SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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BENEDICT P. MORELLI, ARLENE B. MORELLI, and THE MORELLI LAW FIRM, PLLC, f/k/a MORELLI ALTERS RATNER, LLP,

Plaintiffs,

-against- Index No. 153011/16

BENJAMIN WEY, NYG CAPITAL, LLC d/b/a NEW YORK GLOBAL GROUP, and FNL MEDIA LLC,

Defendants. Motion Sequence No. 003

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CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this defamation action, plaintiffs Benedict P. Morelli (Morelli), Arlene B. Morelli (Mrs. Morelli), and The Morelli Law Firm, PLLC f/k/a Morelli Alters Ratner, LLP (Morelli Law Firm) allege that defendants Benjamin Wey (Wey), FNL Media LLC (FNL), and NYG Capital LLC d/b/a New York Global Group (NYGG) have waged a campaign to defame them through the publication of numerous false and defamatory statements in their online magazine, blogs, and social media, in order to injure their professional reputations. Plaintiffs allege that these attacks were prompted by the Morelli Law Firm's representation of a former NYGG employee, Hanna Bouveng (Bouveng), in a federal action asserting sexual harassment, retaliation, and defamation claims against defendants herein (*see Bouveng v NYG Capital LLC*, 175 F Supp 3d 280 [SD NY 2016]). Defendants now move, pursuant to CPLR 3211 (a) (1), (5), and (7), to dismiss the complaint in its entirety.

BACKGROUND

Morelli is the founding partner of the Morelli Law Firm, a New York City law firm specializing in personal injury and employment law (verified complaint, ¶ 4). Mrs. Morelli is Morelli's wife and is an employee of the Morelli Law Firm (*id.*, ¶ 5).

Wey is the chief executive officer of NYGG and the publisher of FNL Media's TheBlot.com (*id.*, ¶ 7). Wey writes, edits, and publishes articles on TheBlot.com by authoring articles under his own name or aliases, and by hiring third-parties to author such articles (*id.*, ¶ 11). In addition, according to plaintiffs, Wey and his agents post comments to many of the articles using pseudonyms, aliases, and false identities to make it appear that such comments were written by unaffiliated third-parties (*id.*). Wey also publishes entries on social media, including Twitter, Facebook, and Pinterest, and on "attack" websites which he allegedly owns or controls, including www.benjaminwey.nyc, www.benjaminwey.net, www.fakelawyers.com, and www.benedictmorelli.com (*id.*, ¶¶ 10, 20).

Beginning in 2015 and continuing through the present, defendants allegedly repeatedly published over 600 separate false and defamatory statements and images about plaintiffs (*id.*, ¶¶ 20, 26-72; appendix A to verified complaint). Specifically, defendants accused plaintiffs of numerous criminal or repugnant acts, including but not limited to, extortion, bank fraud, falsifying evidence, witness intimidation, conspiracy to commit fraud, sexual harassment, and professional misconduct (*id.*). According to plaintiffs, defendants perpetrated these attacks in order to injure plaintiffs in their profession, business, and livelihoods, though defendants were initially motivated to compromise plaintiffs' representation of Bouveng (*id.*, ¶¶ 21, 30, 73). To maximize the damage to plaintiffs' reputations and livelihoods, defendants or their agents

performed internet search engine "optimization" to increase the exposure of their false and defamatory articles to users of Google and other internet search engines (*id.*, ¶ 23).

This action was commenced on April 8, 2016, by the filing of a summons and complaint. The verified complaint asserts three causes of action against all three defendants: (1) defamation *per se* (*id.*, ¶¶ 77-88); (2) civil conspiracy (*id.*, ¶¶ 89-94); and (3) permanent injunction (*id.*, ¶¶ 95-99).

Defendants argue that 42 of the 79 statements pleaded in the complaint are time-barred, since they were published before April 8, 2015. Defendants next contend that 18 of the remaining statements are not "of and concerning" any of the three plaintiffs, given that they only reference (i) David Ratner, (ii) Martha McBrayer, (iii) Zoe Bartholomay, (iv) Jeremy Alters, and (v) the now defunct law firms of Morelli Alters Ratner, LLP and Morelli Ratner, LLP. Additionally, defendants maintain that the following statements do not constitute defamation *per se*: (1) statements that plaintiffs are under FBI investigation or another type of investigation; and (2) statements concerning plaintiffs' Mafia or Ku Klux Klan affiliation.

Furthermore, defendants assert that the complaint must be dismissed inasmuch as it is based on statements protected under Civil Rights Law § 74's absolute privilege. Specifically, defendants assert that: (1) statements concerning bank fraud are substantially accurate reports of the allegations in *City National Bank v Morelli Ratner, P.C.*, Sup Ct, NY County, index No. 158388/14 (the *CNB* action) (Wipper affirmation, exhibit B); (2) statements concerning professional misconduct and sanctions are substantially accurate reports of the proceedings in *Markey v Lapolla Indus., Inc.*, 2015 WL 5027522, 2015 US Dist LEXIS 112915 (ED NY 2015), *report and recommendation adopted* 2016 WL 324968, 2016 US Dist LEXIS 8851 (ED NY

2016) (the *Lapolla* action) (*id.*, exhibit D), *Kremen v Benedict P. Morelli & Assoc., P.C.*, Sup Ct, NY County, Jan 25, 2010, Goodman, J., index No. 101739/06, *revd* 80 AD3d 521 (1st Dept 2011) (*id.*, exhibit E), and *Vitale v Abbott Labs.*, 2007 WL 3307212, 2007 US Dist LEXIS 82332 (ED NY 2007); (3) statements concerning extortion are an accurate description of the publicly-filed papers in *Fox News Network, L.L.C. v Mackris*, Sup Ct, Nassau County, index No. 14087/04, in which Fox News anchor Bill O'Reilly sued Morelli's firm for "extortion" (*id.*, exhibit C) and the *Lapolla* action; and (4) statements concerning sexual harassment are accurate reports of the complaint in *Clark v Morelli Ratner, P.C.*, Sup Ct, NY County, index No. 105237/08 (*id.*, exhibit F). As argued by defendants, many of the statements are protected as pure opinion. However, defendants specifically address only two categories of statements: (1) statements concerning extortion, and (2) images of Morelli and Mrs. Morelli with text such as "Fraud" or "Extortion," asserting that they are obviously satirical and laced with opinion.

In addition, defendants argue that plaintiffs' civil conspiracy and permanent injunction claims fall within plaintiffs' defamation claim. With respect to the permanent injunction claim, defendants point out that this also fails, since equity will not enjoin a libel and constitutes a prior restraint on free speech.

In opposition, plaintiffs argue that defendants concede, by their silence, that nearly 570 statements are actionable, and that defendants have not addressed the 69-page appendix A to the complaint. Furthermore, plaintiffs contend that at least 13 of the statements that were originally published before April 8, 2015 were republished within the year prior to the filing of the complaint, given that: (1) the publications containing the statements were modified after April 8, 2015 with "additional defamatory statements and alleged additional information"; (2) the

postings were placed on multiple websites that were modified with "similar statements" after April 8, 2015, reaching a new audience; and (3) defendants had control over the decision to republish. The defamatory statements, plaintiffs argue, are "of and concerning" them since they allege that defendants engaged in a broad campaign to defame plaintiffs, and named plaintiffs directly, or named employees and/or partners of Morelli Law Firm. Plaintiffs also contend that the complaint sufficiently alleges defamation *per se*, since (1) defendants falsely accused that plaintiffs were being investigated for fraud, and (2) defendants falsely claimed that plaintiffs are members of the Ku Klux Klan, a well-known racist organization, and that plaintiffs are members of the Mafia or "a gang" *and* an indictable offense.

Plaintiffs further argue that defendants' statements are not privileged under Civil Rights Law § 74 because they are not substantially accurate reports of the allegations in the judicial proceedings. First, plaintiffs contend that the statements concerning bank fraud are not privileged because defendants' commentary went far beyond the allegations in the *CNB* action. Second, plaintiffs maintain that the statements concerning professional misconduct and sanctions are not privileged because they do not merely report that plaintiffs have been the subject of sanctions, but overtly endorse the false accusations that plaintiffs are subject to (i) "the largest court sanctions in recent history for fraud, fabrication of court evidence," (ii) are guilty of "lying to judges across the country." Third, plaintiffs argue that defendants' statements concerning extortion are not privileged because the allegations and images would not leave the ordinary viewer with the impression that defendants were reporting on judicial proceedings. Fourth, according to plaintiffs, the image and statements of alleged sexual harassment are not privileged because they do not merely report on a judicial proceeding, but falsely state that Morelli and his

partners sexually harassed their employees.

Further, plaintiffs assert that defendants' alleged statements concerning extortion do not constitute opinion, because a reasonable reader would have concluded that the statements were conveying facts and not just opinion. According to plaintiffs, defendants' depictions of plaintiffs as criminals can hardly be defined as satire, and the court should let a jury evaluate the character of the statements.

Finally, defendants contend that since plaintiffs have sufficiently alleged a defamation cause of action, their civil conspiracy and permanent injunction claims should not be dismissed. Furthermore, defendants note that New York courts have entered injunctions as a remedy for defamation where the defamatory statements damage a plaintiff's right to operate its business and earn a livelihood.

In reply, defendants contend that plaintiffs' appendix merely regurgitates the same contents from the complaint, and contains no actionable content. Defendants further note that plaintiffs conceded that at least 29 statements are barred by the statute of limitations. In addition, defendants maintain that the fact that the articles may have been updated and added new, allegedly defamatory statements does not renew the statute of limitations with respect to the old ones no matter how similar they are. Defendants assert that the target audience remained the same: the readers of the Blot.

In addition, according to defendants, plaintiffs' claim that the statements were made as part of a broader campaign to defame plaintiffs fails because: (1) the law in the First Department does not allow a defamation claim by a company or individual for defamation based upon statements that specifically name employees, partners or superiors, but do not name the plaintiff

in the defamation case; and (2) Morelli Law Firm, PLLC does not have standing to sue for Morelli Alters Ratner, LLP (Wipper reply affirmation, exhibit A). As for plaintiffs' arguments with respect to defamation *per se*, the statements that there was a criminal investigation into bank fraud charges do not rise to the level of specificity that would directly address Morelli's ability to practice his profession or disparage his mental capacity and competence as a personal injury lawyer. Similarly, the statements about a criminal investigation into Mrs. Morelli have no bearing on her ability to work as her husband's receptionist or secretary. According to defendants, labeling an attorney as racist does not tend to injure an attorney in his or her profession, such that he or she can recover damages without proving economic injury. As argued by defendants, a reasonable reader would understand the words "mafia" or "gang members" as hyperbole in describing Morelli's conduct, as set forth in the *Lapolla* action and the *CNB* action.

Furthermore, defendants contend that: (1) the statements concerning bank fraud are absolutely privileged under Civil Rights Law § 74, because the plain language of the papers filed in the *CNB* action expressly states that plaintiffs defrauded at least two banks, and the allegations could be fairly characterized as bank fraud under federal law; (2) the statements concerning professional misconduct and sanctions are privileged under Civil Rights Law § 74, because the sanctions imposed in *Lapolla* and *Kremen* amply support the conclusion that Morelli's firm faced sanctions for fraud, fabricating evidence, and lying to judges; and (3) the statements concerning extortion and sexual harassment are protected by Civil Rights Law § 74, because the statements are fair and accurate reports that O'Reilly sued Morelli and his firm seeking to recover for "extortion," Lapolla's allegations against Morelli and his firm are fairly characterized as extortion, and Clark directly sued Morelli seeking to recover for sexual harassment and sexual

and racial discrimination. Finally, the statements concerning extortion are not "mixed opinions," since the articles fully discuss and link extensively to publicly-available court filings and other facts that form the basis for the opinions.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), 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" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 [1st Dept 2009]). However, "bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true and accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000] [internal quotation marks and citation omitted]). Where extrinsic evidence is submitted in connection with the motion, the appropriate standard of review "is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Dollard v WB/Stellar IP Owner, LLC*, 96 AD3d 533, 533 [1st Dept 2012] [internal quotation marks and citation omitted]). In a defamation case, "'[i]f, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action'" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014], quoting *Silsdorf v Levine*, 59 NY2d 8, 12 [1983], *cert denied* 464 US 831 [1983]; *see also O'Loughlin v Patrolmen's Benevolent Assn. of City of N.Y.*, 178 AD2d 117, 117 [1st Dept 1991]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6

[2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

Dismissal is warranted pursuant to CPLR 3211 (a) (1) where the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010], citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:10, at 21-22).

"'On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff'" (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011], quoting *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2d Dept 2008]). "To meet its burden, the defendant must establish, inter alia, when the plaintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016] [internal quotation marks and citation omitted]). "If the defendant meets that burden, then the burden shifts to the plaintiff 'to aver evidentiary facts establishing that the cause of action was timely or to raise a question of fact as to whether the cause of action was timely'" (*Lake v New York Hosp. Med. Ctr. of Queens*, 119 AD3d 843, 844 [2d Dept 2014], quoting *Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 611 [2d Dept 2009]). "The plaintiff may do so by averring evidentiary facts establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies" (*CRC*

Litig. Trust v Marcum, LLP, 132 AD3d 938, 938-939 [2d Dept 2015]).

Defamation (First Cause of Action)

Defamation is the "making of a false statement which tends to expose the plaintiff to contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Foster v Churchill*, 87 NY2d 744, 751 [1996] [internal quotation marks and citation omitted]). To state a cause of action for defamation, the plaintiff must allege "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Furthermore, pursuant to CPLR 3016 (a), "the particular words complained of shall be set forth in the complaint."

It is the role of the court to determine, in the first instance, whether the words are reasonably susceptible of defamatory meaning (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 1076 [1997]; *Aronson v Wiersma*, 65 NY2d 592, 593 [1985]; *T.S. Haulers v Kaplan*, 295 AD2d 595, 596 [2d Dept 2002]). In evaluating whether a statement is defamatory,

> "the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction"

(*Dillon*, 261 AD2d at 38). "Courts will not strain to find defamation 'where none exists'" (*id.*, quoting *Cohn v National Broadcasting Co.*, 50 NY2d 885, 887 [1980], *cert denied* 449 US 1022 [1980]).

Plaintiffs' Appendix A to the Verified Complaint

At the outset, the court notes that, in their moving papers, defendants have not addressed plaintiffs' 69-page appendix A to the verified complaint, which contains allegedly defamatory statements. CPLR 3014 states that "[a] copy of any writing which is attached to a pleading is a part thereof for all purposes" (*see also D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 963 [4th Dept 2014]; *Pappalardo v Westchester Rockland Newspapers*, 101 AD2d 830, 830 [2d Dept 1984], *affd* 64 NY2d 862 [1985]; *English v Genovese*, 49 Misc 2d 321, 322 [Sup Ct, Onondaga County 1966] [to be appendable under CPLR 3014, the writing should not be merely evidentiary in nature, but something which can supply a "factual averment necessary to sustain" the pleading]; Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3014:9). While defendants argue in reply that plaintiffs' appendix merely regurgitates the same statements from the verified complaint, and contains no actionable content, "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion" (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Therefore, the court has not considered defendants' reply arguments concerning the appendix to the complaint.

Statute of Limitations

The statute of limitations applicable to defamation claims is one year (CPLR 215 [3]), and generally accrues on the date of the first publication (*Colantonio v Mercy Med Ctr.*, 115 AD3d 902, 903 [2d Dept 2014]; *Hochberg v Nissen*, 180 AD2d 435, 436 [1st Dept 1992], *appeal denied* 80 NY2d 755 [1992]).

"Under the 'single publication rule,' which New York follows, the publication of a

> defamatory statement in a single issue of a newspaper or magazine, although widely circulated and distributed, constitutes one publication that gives rise to one cause of action, and the statute of limitations runs from the date of that publication"

(*Hoesten v Best*, 34 AD3d 143, 150 [1st Dept 2006]).

"An exception to the single publication rule is the concept of 'republication'" (*id.*). "Republication . . . occurs upon a separate aggregate publication from the original, on a different occasion, which is not merely 'a delayed circulation of the original edition'" (*Firth v State of New York*, 98 NY2d 365, 371 [2002], quoting *Rinaldi v Viking Penguin*, 52 NY2d 422, 435 [1981]). "The justification for this exception to the single publication rule is that the subsequent publication is intended to and actually reaches a new audience" (*id.*). As articulated by the First Department, courts have applied the republication exception where the following factors exist: "the subsequent publication is intended to and actually reaches a new audience, the second publication is made on an occasion distinct from the initial one, the republished statement has been modified in form or in content, and the defendant has control over the decision to republish" (*Martin v Daily News L.P.*, 121 AD3d 90, 103 [1st Dept 2014] [internal quotation marks and citation omitted]).

In this case, defendants have met their burden that the time for plaintiffs to sue on 42 of the allegedly defamatory statements has expired. The verified complaint alleges that these statements were published by defendants prior to April 8, 2015, one year before the filing of the instant complaint (verified complaint, ¶¶ 26-27, 31-35, 45-53, 58-61, 65-70, 72 [b, e, i, and m]).

Thus, the burden shifts to plaintiffs "to aver evidentiary facts establishing that the [cause of] action was timely or to raise a question of fact as to whether the [cause of] action was timely" (*Lake*, 119 AD3d at 844 [internal quotation marks and citation omitted]).

Continuous access to an article on a website does not constitute a republication (*see Haefner v New York Media, LLC*, 82 AD3d 481, 482 [1st Dept 2011]; *Young v Suffolk County*, 705 F Supp 2d 183, 212 [ED NY 2010] [story's continuous availability online did not restart the statute of limitations]).

Nevertheless, courts have suggested and one court has held that posting a modified version of an original posting on the internet can constitute a republication for statute of limitations purposes. In *Firth*, an allegedly defamatory report was posted on the State of New York's website (*Firth*, 98 NY2d at 367). The State subsequently added an unrelated report to its website (*id.* at 368). The claimant filed a defamation claim more than one year after the report was first released and posted on the internet (*id.*). In response to the State motion to dismiss the claimant's defamation claim, the claimant argued that the State republished the report within one year of the filing of the claim when it added the unrelated report to the website (*id.* at 371). In holding that the single publication rule applied to postings on the internet, the Court of Appeals noted that "[c]ommunications posted on Web sites may be viewed by thousands, if not millions over an expansive geographic area for an indefinite period of time" (*id.* at 370).

The Court rejected the claimant's argument, reasoning as follows:

> "The mere addition of unrelated information to a Web site cannot be equated with the repetition of defamatory matter in a separately published edition of a book or newspaper as the justification for the republication exception has no application at all to the addition of unrelated material on a Web site, for it is not reasonably inferable that the addition was made either with the intent or the result of communicating the earlier and separate information to a new audience.
>
> "We observe that many Web sites are in a constant state of change, with information posted sequentially on a frequent basis. For example, this Court has a Web site which includes its decisions, to which it continually adds its slip opinions as they are handed down. Similarly, Web sites are used by news organizations to provide readily

> accessible records of newsworthy events as they occur and are reported. Those unrelated additions are indistinguishable from the asserted DMV report modification of the State's Web site here. A rule applying the republication exception under the circumstances here would either discourage the placement of information on the Internet or slow the exchange of such information, reducing the Internet's unique advantages. In order not to retrigger the statute of limitations, a publisher would be forced either to avoid posting on a Web site or use a separate site for each new piece of information (see Note, *Cyber–Defamation and the Single Publication Rule*, 81 B.U. L. Rev. at 915). These policy concerns militate against a holding that any modification to a Web site constitutes a republication of the defamatory communication itself"

(*id.* at 370-371).

In *Martin*, the First Department held that re-posting of a newspaper column on a newspaper's website, which was inadvertently deleted during a changeover to a new computer content-management system, did not constitute republication (*Martin*, 121 AD3d at 104). The plaintiff argued that the restored columns included new hyperlinks to social media and social networking sites (*id.*). However, in concluding that the column was not republished, the Court wrote that:

> "Had the columns remained on the Daily News website as was intended, their presence three years later would not have justified any additional action. Their inadvertent deletion during a changeover to a new computer content-management system, and their restoration once that inadvertent deletion was discovered, was not geared toward reaching a new audience. The columns were not modified in any substantial way, and their restoration was, as characterized by the motion court, akin to a delayed circulation of the original"

(*id.*). In contrast, in *Giuffre v DiLeo* (90 AD3d 602, 603-604 [2d Dept 2001]), the Court held that "plaintiff raised a triable issue of fact as to whether a reposting of the original post was either through a posting of a modified version of the post or through posting of the post an another Web site."

Moreover, if the allegedly defamatory statement is relocated to a new website, the

relocation to the new website constitutes a republication, sufficient to restart the statute of limitations (*see Firth v State of New York*, 306 AD2d 666, 667 [3d Dept 2003]; *Rare 1 Corp. v Moshe Zwiebel Diamond Corp.*, 13 Misc 3d 279, 281 [Sup Ct, NY County 2006]). Courts have held that the relocation to a new website is "akin to the repackaging of a book from hard cover to paperback" (*Firth*, 306 AD2d at 667).

In this case, plaintiffs have averred evidentiary facts that the republication exception applies to the allegedly defamatory statements contained in paragraphs 31 (a), (b), (c), and (d), 49 (a), 50 (a) and (b), 51 (a), 61 (a), 66 (a), 68 (a), 69 (a), and 70 (a) of the verified complaint. Plaintiffs allege that these statements appeared on TheBlot.com, and that the articles were substantially modified on June 4, 2015 and February 22, 2016 to include additional defamatory statements (verified complaint, ¶¶ 31 [a]-[d], 50 [a]-[b], 66 [a], appendix at entry 19; ¶¶ 49 [a], 51 [a], appendix at entry 10, ¶ 61 [a], appendix at entry 8). Plaintiffs also allege that articles that originally appeared on www.fakelawyers.com, www.marthamcbrayer.com, and www.benedictmorelli.com were moved to TheBlot.com, added similar statements, and were last updated on June 4, 2015 (*id.*, ¶¶ 68 [a], 70 [a], appendix at entry 19; ¶ 69 [a], appendix at entry 8). It cannot be concluded, as a matter of law, that defendants did not make these modifications with the intent or result of communicating the earlier defamatory statements (*see Firth*, 98 NY2d at 371).

Nevertheless, with respect to the remaining statements that were published before April 8, 2015, plaintiffs have failed to raise an issue of fact. The fact that readers had continuous access to the postings is insufficient to restart the statute of limitations (*see Haefner*, 82 AD3d at 482).

In view of the above, the branch of defendants' motion to dismiss on statute of limitations

grounds is granted to the extent that the allegedly defamatory statements published before April 8, 2015 are dismissed, except as to: (1) those contained in paragraphs 31 (a), (b), (c), and (d), 49 (a), 50 (a) and (b), 51 (a), 61 (a), 66 (a), 68 (a), 69 (a), and 70 (a) of the verified complaint; and (2) the statements contained in appendix A to the complaint (which defendants did not address in their moving papers).

"Of and Concerning" Requirement

To establish a *prima facie* case of defamation, the plaintiff must show that the publication is "of and concerning" the plaintiff (*Three Amigos SJL Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86 [2016]). This burden is "not a light one" (*Lihong Dong v Ming Hai*, 108 AD3d 599, 600 [2d Dept 2013] [internal quotation marks and citations omitted]). "The party alleging defamation need not be named in the publication but, if, . . . he or she is not, that party must sustain the burden of pleading and proving that the defamatory statement referred to him or her" (*Chicherchia v Cleary*, 207 AD2d 855, 855 [2d Dept 1994]; *see also De Blasio v North Shore Univ. Hosp.*, 213 AD2d 584, 584 [2d Dept 1995] ["where the person defamed is not named in a defamation publication, it is necessary, if it is to be held actionable as to him, that the language used be such that persons reading it will, in light of the surrounding circumstances, be able to understand that it refers to the person complaining"] [internal quotation marks and citation omitted]).

In determining whether the "of and concerning" requirement has been sufficiently pleaded, the court must consider whether those who know the plaintiff, upon reading the statements, would understand that the plaintiff was the target of the allegedly libelous statement (*see Dalbec v Gentleman's Companion, Inc.*, 828 F2d 921, 925 [2d Cir 1987] ["It is not

necessary that all the world should understand the libel"]). "The reference to the party alleging defamation may be indirect and may be shown by extrinsic facts" (*Chicherchia*, 207 AD2d at 855).

Here, when considering the statements as a whole (*see Alf v Buffalo News, Inc.*, 100 AD3d 1487, 1488 [4th Dept 2012], *affd* 21 NY3d 988 [2013] [allegedly defamatory articles about corporation were not "of and concerning" sole shareholder; "the articles read as a whole, including all of the allegedly defamatory statements, would lead the average reader to conclude that [the corporation], not plaintiff himself, had cheated the government"]), the complaint alleges facts that defendants made defamatory statements "of and concerning" each of the plaintiffs. Indeed, the statements contain numerous direct references to Morelli (*see* verified complaint, ¶¶ 28 [b], 29 [a], 31 [b], [c], [d], 32 [a], 33 [a], [b], [c], 34 [a], 35 [a], 36 [a], 39 [b], 40 [a], 43 [a], [c], 45 [a], 52 [a], 55 [a], 58 [a], 59 [a], 61 [a], 63 [a], 65 [a], 66 [a], 67 [a], 68 [a], 69 [a], 72 [a], [c], [d], [f], [g], [h], [k]), Mrs. Morelli (*id.*, ¶¶ 35 [a], 65 [a], 66 [a], 67 [a], 68 [a], 69 [a], 70 [a], 71 [a], 72 [h]), and the Morelli Law Firm or Morelli Alters Ratner (*id.*, ¶¶ 26 [a], 28 [b], 29 [a], 31 [b], [c], 33 [c], 34 [a], 37 [b], 38 [a], [b], 40 [a], 41 [a], 43 [d], 48 [a], 55 [a], 56 [a], 58 [a], 59 [c], 61 [a], 65 [a], 72 [a], [c], [d], [g]). As noted above, the court's inquiry on a motion to dismiss is whether "plaintiff would be entitled to recovery for defamation" "upon any reasonable view of the stated facts" (*Davis*, 24 NY3d at 268 [internal quotation marks and citation omitted]). Further, the verified complaint alleges that The Morelli Law Firm, PLLC was formerly known as Morelli Alters Ratner, LLP (verified complaint, ¶ 4). The court has not considered defendants' evidence, presented for the first time in reply, purportedly indicating that The Morelli Law Firm, PLLC and Morelli Alters Ratner, LLP are distinct entities (Wipper reply affirmation, exhibit A).

Defamation Per Se

"A false statement constitutes defamation per se when it charges another with a serious crime or tends to injure another in his or her trade, business or profession" (*Geraci v Probst*, 61 AD3d 717, 718 [2d Dept 2009], *mod on other grounds* 15 NY3d 336 [2010]). This exception is "limited to defamation of a kind incompatible with the proper conduct of the business, trade, profession or office itself. The statement must be made with reference to a matter of significance and importance for that purpose, rather than a more general reflection upon the plaintiff's character or qualities" (*Liberman v Gelstein*, 80 NY2d 429, 436 [1992] [internal quotation marks and citation omitted]). "Defamation per se in reference to a plaintiff-attorney generally 'includes those [statements] which show lack of character or a total disregard of professional ethics, [for example], statements that indicate an attorney has been disloyal to the best interest of his client or statements that accuse an attorney of unprofessional conduct'" (*Wilson v Tarricone*, 2013 WL 12084504, *4 [SD NY 2013], *affd* 563 Fed Appx 864 [2d Cir 2014], quoting *Held v Pokomy*, 583 F Supp 1038, 1041 [SD NY 1984]). "A corporation may maintain an action for libel without proof of special damages where . . . the charge is defamatory and it injuriously affects its business or credit" (*Vocational Guidance Manuals, Inc. v United Newspaper Mag. Corp.*, 280 App Div 593, 595 [1st Dept 1952], *affd* 305 NY 380 [1953]).

Here, contrary to defendants' contention, as alleged by plaintiffs, defendants did not merely make "a statement that there is an investigation." Rather, the complaint alleges that defendants published an article entitled "The FBI investigation targets BENEDICT MORELLI [and] ARLENE MORELLI" (verified complaint, ¶ 39 [b]), stated that plaintiffs committed "bank fraud" and "massive bank fraud" (*id.*, ¶¶ 40, 42, 43 [a]), and made statements indicating that

plaintiffs are "law violators" with a "long history of committing fraud" (appendix A to verified complaint).[1]

In addition, in light of plaintiffs' allegations that defendants stated that Morelli, a partner of the law firm, was a member of the Ku Klux Klan (verified complaint, ¶¶ 4, 72 [c], [d]), plaintiffs have sufficiently stated a cause of action for defamation *per se* (*see Sheridan v Carter*, 48 AD3d 444, 446-447 [2d Dept 2008] [domestic worker's published statements which depicted couple that formerly employer her as racists were defamatory per se]; *Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 261 [1st Dept 1995] [complaint stated cause of action for slander per se where it stated that volunteers made statements that former coordinator was anti-Semitic and was biased in her treatment of Jewish volunteers]).

Moreover, plaintiffs' allegations that defendants stated that plaintiffs were members of the Mafia or a "gang" and were guilty of a serious crime are sufficient to state a cause of action for defamation *per se* (*see Harris v Queens County Dist. Atty's Office*, 2012 WL 832837, *9 [ED NY 2012] [statement that attorney was security threat to the courthouse was defamatory per se]). For example, defendants allegedly stated that "[t]he court accuses the Morelli mafia of fabricating evidence that resulted in extortion of a Texas based chemical company," "City National Bank charges the Morelli 'gang' members with orchestrating a multi-year money laundering scheme and massive loan frauds," "Benedict Morelli and his fellow 'gang members at Morelli Alters Ratner conspired with Morelli's wife, Arlene B. Morelli and David Ratner to

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[1]The court disregards defendants' contention, made for the first time in reply, that statements of a criminal investigation by Mrs. Morelli have absolutely no bearing on her ability to work as her husband's receptionist or secretary. Defendants did not make separate arguments as to her in their moving papers.

swindle City National Bank, BankUnited and the Esquire Bank," "Benedict Morelli and the con man's wife Arlene were sued for money laundering, bank fraud and suspected mafia affiliation," "[t]he gang at Morelli Alters Ratner is wantonly defrauding City National out of millions of dollars," "shady lawyers Benedict Morelli, David Ratner, Martha McBrayer extortion 'mob' members were finally captured" (verified complaint, ¶¶ 28 [b], 31 [a], 33 [c], 35 [a], 37 [b], 43[c]).

Therefore, plaintiffs' allegations are sufficient to state a cause of action for defamation *per se*.

Civil Rights Law § 74 Absolute Privilege

Civil Rights Law § 74 provides, in relevant part, that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding." To be "fair and true," the account need only be "substantially accurate" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 [1979]). Moreover, "a fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated" (*Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publs.*, 260 NY 106, 118 [1932], *rearg denied* 261 NY 537 [1933]).

"Before addressing the issue of whether the defendants published a 'fair and true report,' it is also incumbent on the party asserting the privilege to establish that the statements at issue reported on a 'judicial proceeding'" (*Cholowsky v Civiletti*, 69 AD3d 110, 114 [2d Dept 2009], quoting *Wenz v Becker*, 948 F Supp 319, 323 [1996]). "If the publication does not purport to comment on a judicial proceeding, Civil Rights Law 74 is inapplicable" (*id.*). "If the context in which the statements are made make it 'impossible for the ordinary viewer [listener or reader] to

determine whether defendant was reporting'" on a judicial proceeding, the absolute privilege does not apply" (*id.* at 114-115 [citation omitted]). "Comments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that fall within section 74's privilege" (*Lacher v Engel*, 33 AD3d 10, 17 [1st Dept 2006]).

(a) Statements Concerning Bank Fraud

Defendants argue that paragraphs 36 and 43 (d) and the images contained in paragraphs 72 (h) and (j) of the verified complaint are privileged as fair and true reports of the *CNB* action.

Paragraphs 36 and 43 (d) provide as follows:

"36. April 29, 2015:

> a. Posing as 'David Ratner,' defendant Wey commented on TheBlot.com's April 28. 2015 article entitled 'In Red Bull Lawsuit, Judge Katherine Polk Failla Misled By Morelli Alters Ratner Fraud,' through various postings, including: (i) "This is also a false article: Benedict Morelli is the crook that committed bank fraud, not me. I just spent the bank's money . . . ," (ii) "I am just trying to squeeze Red Bull for some money," (iii) My boss Benedict Morelli committed bank fraud. I was told to spend the money as fast as I could"

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"43. February 22, 2016

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> d. "It's true that the obscure Morelli Law Firm is riddled with nasty charges of Bank Fraud and is facing record court sanctions against their desperate, financially stressed blood sucker lawyers." Published in an update to an article entitled "The Top 5 Warning Signs You've Got a Terrible Lawyer,' originally posted October 22, 2014, on TheBlot.com by Darren Eldridge, an alias of Wey"

(verified complaint, ¶¶ 36, 43 [d]).

In the images contained within paragraphs 72 (h) of the verified complaint, there is an

image of Morelli and Mrs. Morelli, along with the words "Fraud LOVE BIRDS" and "Sued for Massive Bank Fraud" (*id.*, ¶ 72 [h]). Paragraph 72 (j) contains images of Morelli, David Ratner, and Bernie Madoff, along with the words "Bank Fraud" under Morelli and Ratner's names, and "Bernie Madoff: Morelli Ratner, *MAKE PAPPA PROUD!!*" (*id.*, ¶ 72 [j]).

Here, defendants have failed to demonstrate that these statements are substantially accurate reports of the *CNB* action (*see Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010] [defendants failed to submit documentary evidence conclusively establishing as a matter of law that the allegedly defamatory statements constituted a "fair and true" report of judicial proceedings within the meaning of Civil Rights Law § 74]). The statements at issue do not refer to the *CNB* action.

Additionally, "[t]he test is whether the published account of the proceeding would have a different effect on the reader's mind than the actual truth, if published" (*Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434, 436 [1st Dept 1995]). "If the published account . . . suggests more serious conduct than that actually suggested in the official proceeding, then the privilege does not attach, as a matter of law" (*id.*; *see also Ocean State Seafood v Capital Newspaper, Div. of Hearst Corp.*, 112 AD2d 662, 666 [3d Dept 1985] ["privilege does not apply when the news account of the judicial proceeding is combined with other facts or opinions to imply wrongdoing"). While defendants rely on CNB's memorandum of law in the *CNB* action indicating that Morelli, Mrs. Morelli, and his former firm "took deliberate and intentional steps to hinder City National Bank's attempt to collect on its debt by fraudulently conveying assets to an entity controlled by Mr. Morelli and by transferring assets out of the state" and that Morelli's firms had "pledged assets that were pledged as security to [CNB]" (Wipper affirmation, exhibit B

at 1, 13), the statements at issue appear to suggest more serious conduct (*see Daniel Goldreyer, Ltd.*, 217 AD2d at 436 [in painting restorer's defamation action, article suggested more serious conduct than that suggested in official proceeding, where it described paint as inappropriate and spoke of use of "house paint" and "roller brushes"]; *Dibble v WROC TV Channel 8*, 142 AD2d 966, 967 [4th Dept 1988] [report was not "substantially true" where there was no justification for defendants' published statement that plaintiff was indicted for embezzlement and securities violations, and that plaintiff was accused of misuse of client escrow accounts and stock fraud]). Indeed, Wey, commenting as "David Ratner," allegedly stated that "I just spent the bank's money," "I am just trying to squeeze Red Bull for some money," and that "I was told to spend the money as fast as I could" (verified complaint, ¶ 36). In addition, defendants allegedly stated that Morelli Law Firm is "facing record sanctions" (*id.*, ¶ 43). To the extent that defendants rely on the document entitled "A History of Frivolous Claims and Contentions at the Morelli Alters Ratner Law Firm" (Wipper affirmation, exhibit I), the court finds that this document does not constitute documentary evidence.

(b) Statements Concerning Professional Misconduct and Sanctions

Defendants have failed to show that defendants' allegedly defamatory statements concerning professional misconduct and sanctions are privileged (verified complaint, ¶¶ 43 [d] ["It's true that the obscure Morelli Law Firm . . . is facing record court sanctions"]; 55 ["In May 2015, court papers show that David Ratner, Benedict Morelli, Morelli Alters Ratner face the largest court sanctions in recent history for fraud, fabrication of court evidence"]; 56 ["Morelli Alters Ratner law firm has a lengthy history of fabricating court evidence and lying to judges

across the country"]).[2] None of the decisions or documents on which defendants rely indicate that plaintiffs were "facing record court sanctions," subject to "the largest court sanctions in recent history for fraud, fabrication of court evidence," or that they have a "lengthy history of fabricating court evidence and lying to judges across the country" (*id.*).

(c) Statements Concerning Extortion

In the image contained in paragraphs 72 (f) and (l), the Blot allegedly posted Morelli's image alongside the words "EXTORTION," and an image of David Ratner with the words "Extortionist" next to an image of Bill O'Reilly, with what appears to be City National Bank's logo (verified complaint, ¶ 72 [f], [l]). There is no mention of any judicial proceeding. Defendants, therefore, have failed to demonstrate, as a matter of law, that an ordinary viewer would understand that these statements and images were purporting to comment on a judicial proceeding (*see Cholowsky*, 69 AD3d at 114).

(d) Statements Concerning Sexual Harassment

In the image contained in paragraph 72 (k), the Blot allegedly posted images of Morelli

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[2]Defendants rely on *Markey v Lapolla Indus., Inc.*, 2015 WL 5027522, 2015 US Dist LEXIS 112915 (ED NY 2015), *report and recommendation adopted* 2016 WL 324968, 2016 US Dist LEXIS 8851 (ED NY 2016), in which U.S. District Judge Joanna Seybert sanctioned the Morelli Law Firm for failure to produce a report and e-mails in discovery. Defendants also point out that Morelli's firm was sanctioned by Justice Emily Jane Goodman in *Kremen v Benedict P. Morelli & Assoc.*, index No. 101739/06 (Sup Ct, NY County), *revd* 80 AD3d 521 (1st Dept 2011) for engaging in frivolous motion practice. In *Kremen*, Morelli's firm sought to recover for disbursements after a legal malpractice claim against it had been dismissed, but did not submit its retainer agreement on its original motion (*id.*). On appeal, the First Department held that "although defendant's failure to submit its retainer agreement on the initial motion is certainly not commendable, we do not see anything in the record to suggest that defendant intentionally concealed the agreement" (*Kremen*, 80 AD3d at 523). In *Vitale v Abbott Labs.*, 2007 WL 3307212, 2007 US Dist LEXIS 82332 (ED NY 2007), Magistrate Judge Joan M. Azrack sanctioned the Morelli's firm for failure to turn over a file.

and David Ratner appearing to smile at the silhouette of a woman bending over, with the text "Ambulance Chasers David Ratner, Benedict Morelli Sued for Sexual Harassment" (verified complaint, ¶ 72 [k]).[3] As with the other categories, defendants have failed to establish that the statements are substantially accurate reports of the *Clark* action. In the *Clark* action, Celia Clark, a former paralegal, sued Morelli for, inter alia, sexual harassment and racial discrimination (Wipper affirmation, exhibit F). Martha McBrayer, a former partner of the firm, was not a defendant in that lawsuit (*id.*). However, in this case, viewed as a whole, the statements and images appear to suggest that Morelli and his partners sexually harassed their employees (verified complaint, ¶¶ 59 [a], [c], [d], 60, 62 [b]). The statements also go well beyond summarizing the allegations in the *Clark* action: defendants allegedly stated that Ratner "loves to fondle women, anywhere he can find them," and that McBrayer was a "defendant in a lawsuit against her for inappropriately touching a female paralegal" (verified complaint, ¶¶ 59 [d], 63 [b]). In sum, defendants have failed submit documentary evidence conclusively establishing that the allegedly defamatory statements concerning sexual harassment are privileged under Civil Rights Law § 74 (*see Sokol*, 74 AD3d at 1182).

Opinion

"Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]). Whether a statement is one of fact or opinion is a question of law for the court, and depends upon "'whether a reasonable reader or listener

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[3]Defendants also argue that the statements in paragraphs 58, 59 (a), (c), and (d), 60, 61, and 62 (a), (b) are privileged.

would understand the complained-of assertions as opinion or statements of fact'" (*Millus v Newsday, Inc.*, 89 NY2d 840, 842 [1996], *cert denied* 520 US 1144 [1997], quoting *Brian v Richardson*, 87 NY2d 46, 52 [1995]; *see also Silverman v Clark*, 35 AD3d 1, 14 [1st Dept 2006]). In determining whether a statement constitutes a fact or opinion, the following three factors are to be examined:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact"

(*Mann*, 10 NY3d at 276 [internal quotation marks and citation omitted]; *see also Caplan v Winslett*, 218 AD2d 148, 151 [1st Dept 1996]).

With respect to the third factor, the court must consider the content of the communication as a whole, as well as its tone and apparent purpose (*Brian*, 87 NY2d at 51). "Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff'" (*id.* [citation omitted]; *see also Guerrero v Carva*, 10 AD3d 105, 112 [1st Dept 2004]).

The Court of Appeals has made a distinction between (1) a "mixed opinion," which means a purported statement of opinion that implies a basis in facts which are not disclosed to the reader or listener, and (2) a "pure opinion," or a purported statement of opinion that is accompanied by a recitation of facts on which it is based or one that does not imply the existence

of undisclosed underlying facts (*see Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]; *Brown v Albany Citizens Council on Alcoholism*, 199 AD2d 904, 905 [3d Dept 1993]). As noted by the Court,

> "[t]he former are actionable not because they convey 'false opinions' but rather because a reasonable listener or reader would infer that 'the speaker [or writer] knows certain facts, unknown to [the] audience, which support [the] opinion and are detrimental to the person [toward] whom [the communication is directed].' In contrast, the latter are not actionable because . . . a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture. Indeed, this class of statements provides a clear illustration of situations in which the full context of the communication 'signal[s] . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.'"

(*Gross v New York Times Co.*, 82 NY2d 146, 153-154 [1993] [citations omitted]).

The statements concerning "extortion" concerning the merits of the Morelli Law Firm's law suits and litigation tactics (verified complaint, ¶¶ 26-29)[4], without more, would appear to be non-actionable opinion (*see Pecile v Titan Capital Group, LLC*, 96 AD3d 543, 544 [1st Dept 2012], *lv denied* 20 NY3d 856 [2013] [use of the term "shakedown" did not convey the specificity that would suggest that defendants were seriously accusing the plaintiffs of the crime of extortion"]; *Melius v Glacken*, 94 AD3d 959, 960 [2d Dept 2012] [a reasonable listener would have believed that calling plaintiff an "extortionist" who is seeking "to extort money" was conveying the defendant's opinion as to the merits of the plaintiff's lawsuit and was not a factual

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[4]The statements are as follows: "Morelli Alters Ratner, another failed extortion attempt on an American financier," "Morelli Firm demand is blackmail, pure and simple," "Martha McBrayer, Lesbian Lawyer Kicked in the Butt . . . Failed to Extort Saudi Prince . . ." and Lesbian, transgender Martha McBrayer Lost a Case AGAIN, kicked in the fat butt by a Saudi Prince, Failed Extortion," "The court accuses the Morelli mafia of fabricating evidence that resulted in extortion of a Texas based chemical company," and "The fraudulent Red Bull settlement enriches extortion . . ." (verified complaint, ¶¶ 26-29).

accusation of criminal conduct]).

However, the court finds that plaintiffs' images, along with statements such as "Bank Fraud Lawyers Got Caught Morelli Alters Ratner Law Firm," "Gallery of Fraud," "Bank Fraud," "Fraud Alert," "Caught, Largest Court Sanctions in America . . .," "Fraud Love Birds," "Sued for Massive Bank Fraud" (verified complaint, ¶ 72), are reasonably susceptible of defamatory connotation. A reasonable viewer of these images could conclude that these statements and images were conveying facts that plaintiffs had committed "fraud," "bank fraud," or "massive bank fraud" (*see Morsette v The "Final Call"*, 309 AD2d 249, 253 [1st Dept 2003] [newspaper that removed a woman's picture from its files and altered it without its permission, to show her wearing prison attire, was sufficient to support a jury's finding in a libel action]).

Civil Conspiracy (Second Cause of Action)

New York does not recognize civil conspiracy to commit a tort as an independent cause of action; rather, the claim stands or falls with the underlying tort (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). "[T]o establish [a] claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury" (*id.*, quoting *World Wide Wrestling Fedn. Entertainment, Inc. v Bozell*, 142 F Supp 2d 514, 532 [SD NY 2001] [internal quotation marks omitted]). Defendants only seek to dismiss this cause of action on the ground that the defamation cause of action fails. Since the complaint states a cause of action for defamation, the branch of defendants' motion seeking dismissal of the second cause of action is denied.

Permanent Injunction (Third Cause of Action)

It is well settled that a "prior restraint on expression comes ... with a heavy presumption against its constitutional validity" (*Organization for a Better Austin v Keefe*, 402 US 415, 419 [1971] [internal quotation marks and citation omitted]). Prior restraints are not permissible where they are sought merely to enjoin the publication of libel (*see Rosenberg Diamond Dev. Corp. v Appel*, 290 AD2d 239, 239 [1st Dept 2002]). An injunction will lie where "the objectionable speech as set forth in the complaint is 'part and parcel of a course of conduct deliberately carried on to further a fraudulent or unlawful purpose'" (*id.*, quoting *Trojan Elec. & Mach. Co. v Heusinger*, 162 AD2d 859, 860 [3d Dept 1990]). Where there is no evidence of a sustained campaign to interfere with the plaintiff's business, a claim for injunctive relief does not lie (*see LoPresti v Florio*, 71 AD3d 574, 575 [1st Dept 2010]). In this case, plaintiffs allege that defendants have waged a campaign to smear their reputations and damage their livelihoods. Given the early stage of this action, the court declines to dismiss the third cause of action.

CONCLUSION

Accordingly, it is

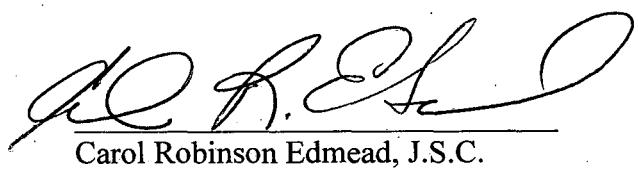
ORDERED that the motion (sequence # 003) of defendants to dismiss the complaint is granted to the extent that the allegedly defamatory statements published before April 8, 2015 are dismissed, except as to (1) those contained in paragraphs 31 (a), (b), (c), and (d), 49 (a), 50 (a) and (b), 51 (a), 61 (a), 66 (a), 68 (a), 69 (a), and 70 (a) of the verified complaint, and (2) the

statements contained in appendix A to the verified complaint, and is otherwise denied. **And it is further**

ORDERED that counsel for defendants shall serve a copy of the Order with Notice of Entry within twenty (20) days of entry on all counsel,

Dated: December 16, 2016

ENTER:



Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.