IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM GILMAN,

Plaintiff/Counterclaim Defendant,

No. 11 Civ 5843 (JPO)
ECF Case

v.

ELIOT SPITZER and THE SLATE GROUP, LLC,

ORAL ARGUMENT REQUESTED

Defendants/Counterclaimants.

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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Defendants respectfully submit this reply in support of their Motion for Judgment on the Pleadings ("Motion").

I. DEFENDANTS' MOTION IS NOT PREMATURE

Plaintiff William Gilman argues that the Motion should be denied because he has not yet filed a responsive pleading to Defendants' Counterclaim and, as a result, the pleadings are not yet "closed" within the meaning of Rule 12(c). *See* Pl.'s Mem. of Law in Opp. to Defs.' Mot. for J. on Pldgs. ("Opp.") at 9-10 (citing Wright & Miller treatise). In a case like this one—*i.e.*, where the counterclaim to which plaintiff has not pleaded is one seeking attorneys' fees under New York's anti-SLAPP statute—this Court's precedent is to the contrary. *Friends of Rockland Shelter Animals, Inc. v. Mullen*, 313 F. Supp. 2d 339, 345 (S.D.N.Y. 2004).[1] Even were the law otherwise, the Court retains ample authority to convert the Motion to one for summary judgment pursuant to Rule 56. And, needless to say, Gilman's premise—*i.e.*, that Defendants may not challenge the threshold viability of his Complaint until his own motion to dismiss their counterclaim has been adjudicated—is difficult to reconcile with his previous insistence on commencing discovery promptly following the filing of *this* reply brief. *See* Joint Letter to Court (Oct. 21, 2011).[2]

[1] *See also, e.g.*, *De Malmanche v. Glenrock Asset Mgmt. Assocs., L.P.*, No. 07 Civ. 10940 (KNF), 2011 WL 990165, at *1 n.1 (S.D.N.Y. Mar. 16, 2011) (observing that court had granted defendant's Rule 12(c) motion filed before pleadings were formally closed because "no useful purpose existed in dismissing the motion without prejudice"); *Provident Life & Cas. Ins. Co. v. Ginther*, No. 96-CV-0315E(H), 1997 WL 9779, at *1 (W.D.N.Y. Jan. 3, 1997) (where defendant filed answer and counterclaim simultaneously with motion to dismiss, court treated motion as one for judgment on pleadings and, despite having been filed prior to reply to counterclaim, decided motion because "neither party will be prejudiced if this Court rules on the merits").

[2] As Defendants have explained, it is to guard against the misuse of defamation litigation to punish protected expression that the First Amendment looks with favor on early, potentially dispositive motions in cases, like this one, involving speech about matters of public concern. Mem. at 11 (citing cases). Gilman's contrary contention notwithstanding, this principle applies as fully to motions brought under Rule 12 as it does to those litigated under Rule 56. *See* R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS § 16:2.1 (2011) ("[C]ourts routinely consider on motions to dismiss issues such as whether the statement at bar is capable of bearing a defamatory meaning, whether it is 'of and concerning' the plaintiff, . . . and whether the suit is barred by privilege and frequently grant motions on these grounds and others.").

II. NEITHER OF THE CHALLENGED STATEMENTS *REASONABLY* CAN BE UNDERSTOOD AS "OF AND CONCERNING" GILMAN

Gilman objects to "analyz[ing] the defamation as two fragmented provisions." Opp. at 10; *see also id.* at 13 (chastising Defendants for "bifurcat[ing] the defamatory statement, a single sentence, into a 'First[]' and a 'Second Challenged Statement'"). This, however, is how *Gilman* pled his own cause of action. *Compare* Compl. ¶¶ 27-28 (identifying First Challenged Statement) *with id.* ¶¶ 29-34 (identifying Second Challenged Statement). That said, Defendants agree that the Court must consider the publication as a whole and review the two challenged statements in context and according to their natural meaning. Mem. in Support of Defs.' Mot. for J. on Pldgs. ("Mem.") at 12-13 (citing cases). So construed, no *reasonable* reader would understand the allegedly defamatory sting of either statement to be "of and concerning" Gilman.

First, Gilman argues that (1) readers would understand the statements to refer to him because Spitzer also wrote that "two of the cases against employees of [Marsh] were dismissed after the defendants had been convicted," Opp. at 1-2, 5-7, and (2) since Gilman can therefore be identified as an "individual[] covered by *the communication*, a defamation action is allowed," *id.* at 11-12 (emphasis added). This is not the law: Gilman must show that a reasonable reader would have understood the *allegedly defamatory statements* to be of and concerning him.

In this regard, Gilman mischaracterizes the thrust of the piece as an effort by Defendant Spitzer to justify the criminal case against *Gilman*. The *Wall Street Journal* editorial that prompted Spitzer's rebuttal invoked the decision vacating Gilman's conviction (although it did not name him either) as a point of departure to criticize Spitzer's broader investigation of the insurance industry. In the piece, Spitzer, like the *Journal*, focused on the importance and success of his investigation of another company, AIG, and its chairman Hank Greenberg. In so doing, Spitzer noted that the *Journal* also had been wrong to suggest that his related investigation of

Marsh was a failure, not least because Greenberg's son had been removed from his position as Marsh's CEO in its wake. It was in this context that Spitzer acknowledged, as the *Journal* recognized, that two convictions resulting from his investigation had been set aside. Then, in what Gilman contends is the first false and defamatory statement about him, Spitzer notes that these were not the only cases brought, criticizing the *Journal* for "fail[ing] to note the many employees of Marsh who have been convicted and sentenced to jail terms." Compl. ¶¶ 27-28.

Gilman contends that reasonable readers would have understood this passage as an assertion he was guilty notwithstanding that his conviction had been vacated. *Id.* To support this argument, Gilman rewrites the piece itself, claiming that Spitzer wrote that "Gilman's conviction was overturned on a technicality" and "that the technicality does not mean that Gilman and [his co-defendant] were innocent." Opp. at 12; *see also id.* at 7, 13. The piece, however, says no such thing. And it is well settled that any "impression," *id.* at 20, drawn by a reader to that effect from the statements actually made is not actionable as a matter of law. In *Nekos v. Kraus*, 878 N.Y.S.2d 827 (3d Dep't 2009), for example, the Appellate Division dismissed a defamation action arising from a flyer that described the criminal charges of which plaintiff had been convicted, while simultaneously asserting that the fact an appellate court had thereafter reversed the conviction on procedural grounds "'doesn't mean the underlying facts aren't true.'" *Id.* at 828. The court explained that the prospect a reader might conclude from the flyer that plaintiff had committed a crime did not render it actionable. *Id.* at 829 ("The flyer's words . . . are not literally false. Rather, they accurately state the fact that the reversal of a criminal conviction due to procedural errors does not render judgment upon the substantive merits of the charges.").[3]

[3] *Accord, e.g., White v. Fraternal Order of Police*, 707 F. Supp. 579, 589 n.12 (D.D.C. 1989) ("If a newspaper accurately reported that an individual was arrested and charged with a crime, a reader could reasonably infer, *i.e.*, guess, surmise, or derive as a probability, that the individual actually committed the crime. However, unless the newspaper article, considered as a whole, in context, could be reasonably understood to express that the

Second, Gilman all but concedes that, had Spitzer instead written that "the editorial fails to note the many *other* employees of Marsh who have been convicted and sentenced," he would have no claim, because readers would in that event have understood him as referring to Marsh employees other than Gilman. *See* Opp. at 14. But, reasonably construed, the paragraph as published communicates the same meaning. It logically must be read to refer to different Marsh employees other than the "two" who had just been described in the previous sentence as having had *their* convictions dismissed—otherwise, the *Journal*, which itself had referenced the decision to vacate Gilman's conviction, could not have been said by Spitzer to have "failed" to note these other employees' convictions. This observation applies equally to the second passage: its reference to "Marsh and its employees" necessarily must refer to employees other than the "two" against whom charges had been dismissed, since Spitzer expressly criticizes the *Journal* (which *had* mentioned the vacated Gilman conviction) for *failing* to reference the successful proceedings against Marsh and others of its employees.[4]

Third, Gilman devotes the lion's share of his argument to the proposition that he may pursue his claim over the second challenged statement because the group of "employees" to which it could possibly refer is so small as to afford each member of it a cause of action. Opp. at 15-18. Once again, Gilman has misstated applicable law.

(a) Gilman relies almost exclusively on cases decided between 1840 and 1963 for the proposition that a defamatory statement regarding a group of limited size provides a viable basis

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individual in fact committed the crime, the newspaper report would not be actionable[.]"), *aff'd in relevant part*, 909 F.2d 512 (D.C. Cir. 1990)

[4] Gilman asserts repeatedly that the piece's reference to "jail terms" is false. Opp. at 5, 12, 14. This contention is irrelevant to the issue presented by the Motion, which is whether the reference is of and concerning Gilman and, for the reasons just stated, it plainly is not. Moreover, the contention is premised on a sleight of hand: Gilman maintains that it was false for Spitzer to have stated that Marsh employees "served jail time," *id.* at 7, but what Spitzer actually wrote was that some Marsh employees had been "*sentenced* to jail time." And whether anyone "was *ultimately* sentenced to jail," as Gilman elsewhere hedges his allegation of falsity, *id.* at 5 (emphasis added), is for the same reason also beside the point—it is not what the piece says.

at common law for a defamation action by each member of that group. *Id.* In 1964, however, the Supreme Court held that the First Amendment imposes substantive limitations on the common law of defamation where the speech at issue addresses a matter of public concern, including a requirement that there be a much closer nexus between a defamatory statement and the defamation plaintiff. Specifically, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 258, 291 (1964), the Court held that the First Amendment protected a newspaper advertisement that accused Montgomery, Alabama police "of answering Dr. [Martin Luther] King's protests with 'intimidation and violence'" because it was not, as a matter of *constitutional* law, "of and concerning" plaintiff, the supervisor of the city's police department (who was not otherwise named in the publication). The Court so held despite the fact that, at Alabama common law, testimony by witnesses who understood the advertisement to refer to plaintiff was sufficient to sustain a jury verdict in his favor. *Id. See Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379 (1977) ("More recent decisions make clear the great extent to which [*Sullivan*] and its progeny have altered traditional rules governing libel actions."). The Second Circuit has repeatedly invoked *Sullivan* in support of the proposition that "an individual plaintiff must be *clearly* identifiable" in an allegedly defamatory statement about a matter of public concern "to support a claim for defamation." *Algarin v. Wallkill*, 421 F.3d 137, 139 (2d Cir. 2005) (emphasis added) (citations omitted); *accord Abramson v. Pataki*, 278 F.3d 93, 102 (2d Cir. 2002).[5]

(b) Even in cases governed solely by the common law, Gilman's tactic of redefining the group to which the piece refers in an effort to make it small enough to be said plausibly to focus

[5] *See also Diaz v. NBC Universal, Inc.*, 337 Fed. App'x 94, 96 (2d Cir. 2009) ("As a threshold, and constitutional, matter, a plaintiff alleging defamation must demonstrate that the allegedly defamatory statement was 'of and concerning' him or her."); *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 400 n.2 (2d Cir. 2006) ("of and concerning" requirement serves to protect "freedom of speech and of the press"); RESTATEMENT (SECOND) OF TORTS § 564 cmt. f (1977) ("The common law position was that if the recipient reasonably understood the communication to be made concerning the plaintiff, the defamer was subject to liability . . . . This position is now held to be in violation of the First Amendment[.]").

on him—here, by claiming the piece would be understood as referring only to those Marsh employees who had been indicted—has been repeatedly rejected, for good reason. Indeed, in *Brady v. Ottoway Newspapers, Inc.*, 445 N.Y.S.2d 786 (2d Dep't 1981), one of the cases on which Gilman relies in explicating the common law, the court explained that "the group to which the allegedly defamatory comment refers must be isolated by the standards set forth or implied in the comment. . . . Imputation to the plaintiff will be evaluated in relation to the group as defined by the comment and not by the plaintiff's relationship to a smaller subset of the group defined." *Id.* at 793. Similarly, in *Diaz v. NBC Universal, Inc.*, 337 Fed. App'x 94 (2d Cir. 2009), the plaintiff police officers objected to the portrayal in a film of their 400-person department as corrupt. To avoid dismissal, they argued that the statement should be understood to refer only to a nine-member team, of which they were members, that was involved in some of the events portrayed. The Second Circuit rejected this argument, concluding that, "[b]y seeking to limit the group referenced in [the film] to the nine-member search team, [plaintiffs] arguably seek to do just what *Brady* prohibits, *i.e.*, they seek to define the group by standards outside the comment." *Id.* at 95.

Gilman's efforts to limit the group actually referenced in the second statement to those Marsh employees who had been indicted cannot reasonably be squared with the passage's plain language, which references only "*Marsh's* behavior" and wrongdoing by "Marsh and its employees" and does so in only the most general terms. Moreover, it cannot be reconciled with the sentence that immediately follows it, in which Spitzer makes explicit that he is broadly referring to wrongdoing by "Marsh as a company," not singling out individual employees. All of these references are part of the context in which the statement must be construed, and their presence in the piece underscores that it cannot reasonably be read to single out Gilman or any

other reasonably identifiable subset of Marsh employees. Indeed, as Gilman recently has conceded in the related case he has filed against Marsh in this Court, the State alleged "improper conduct by several divisions of Marsh," conduct which, by his own admission, "implicated *dozens* of employees." Opp. to Marsh Mot. to Dismiss at 5 (emphasis added).

III. GILMAN IS UNABLE TO DIVEST DEFENDANTS OF THE PRIVILEGE PROTECTING FAIR AND TRUE REPORTS OF JUDICIAL PROCEEDINGS

Under New York law, a report describing judicial proceedings is absolutely privileged against a defamation claim if it accurately conveys the gist of a litigant's allegations, and this is so even if those allegations ultimately prove to be false. Mem. at 19-20. A court properly evaluates an assertion of the privilege by comparing the published report to the record in the proceedings, being mindful that an article is not a legal brief and need not convey the issues with the same precision expected in a pleading. *Id.* at 20-21. For his part, Gilman does not take issue with any of the cases on which Defendants rely, arguing instead that the "facts" do not support application of the privilege in this case for various reasons. Opp. at 18-23.

First, Gilman contends that the piece does not qualify as a report about judicial proceedings. *Id.* at 18-19. This contention cannot be squared with the piece's plain language, which *expressly* presents Spitzer's defense of the propriety and social utility of a set of judicial proceedings initiated by his office. The statements sued upon are introduced as relating to "the cases my office brought against Marsh & McLennan," and he thereafter refers expressly to both the criminal and civil proceedings involving Marsh and its employees. No reasonable reader confronted with the piece's actual language could fail to grasp that it concerned these specifically referenced judicial proceedings. As the court explained in *Gonzalez v. Gray*, 69 F. Supp. 2d 561 (S.D.N.Y. 1999), *aff'd*, 216 F.3d 1072 (2d Cir. 2000), the relevant question is simply whether "a reasonable viewer would understand the [challenged s]tatements to be reports of a judicial

proceeding." *Id.* at 570. That an author may choose to "situate [such a report] within a broader context," as Spitzer did here, does not vitiate the privilege as a matter of law. *Id.*

Second, Gilman persists in claiming that the piece, published in August 2010, is not a "fair" description of the proceeding against him given Justice Yates' July 2, 2010 opinion vacating his conviction. Opp. at 2 n.1; *see id.* at 21. There are multiple problems with this assertion. For one thing, Gilman mischaracterizes the substance of even the publicly available portions of Justice Yates' opinion. *See, e.g.*, Compl. ¶ 18, Opp. at 1, 4.[6] Specifically, he has *omitted* from each of his multiple quotations of the portion of that opinion addressing the "probability" of a "different result" Justice Yates' express disclaimer, which immediately precedes the language Gilman quotes, that he "has not and will not attempt to ask whether, in the Court's mind, the verdict would have been different if the new disclosures had been presented." *People v. Gilman*, 28 Misc. 3d 1217(A), 2010 WL 3036983, at *19-21 (N.Y. Sup. Ct. N.Y. Cty. July 2, 2010). For another, at the time Spitzer authored the piece, the State had appealed from Justice Yates' July 2, 2010 order and it could, all apart from that appeal, have retried Gilman at any time. Mem. at 5-6. When the piece was published, therefore, the criminal charge on which Gilman had been convicted remained pending.

It is for this reason that Gilman is simply wrong when he argues that the piece produced "a different effect on the mind of the reader than if the reader" had both attended his trial and read Justice Yates' opinion. Opp. at 20. Anyone who attended Gilman's trial would have heard

[6] The publicly available version of Justice Yates' opinion is heavily redacted in material respects, omitting those portions of it in which he describes the evidence that prosecutors had withheld. *See People v. Gilman*, 28 Misc. 3d 1217(A), 2010 WL 3036983, at *4, 7-11, 18-19 (N.Y. Sup. Ct. N.Y. Cty. July 2, 2010). Although Gilman is in possession of an unredacted version, and has in fact submitted it to this Court under seal in his related case against Marsh, *see* Opp. to Marsh Mot. to Dismiss at 8 n.3, he has declined to make a copy available to Defendants, *see* Decl. of Katharine Larsen ¶¶ 1-2 & Exs. A-B (correspondence between counsel). Because the cases were tried long after Spitzer had completed his tenure as Attorney General, and he therefore has no knowledge of the contents of the documents prosecutors subsequently failed to produce, Defendants have no access to either the documents or their substance as apparently reflected in the unredacted version of Justice Yates' opinion.

and seen detailed evidence of his personal involvement as "enforcer" of a bid-rigging scheme. Mem. at 4-6 (citing trial record). And, anyone who read Justice Yates' opinion would have learned that, because of prosecutors' failure to provide to the defense potentially material documents, the conviction (but not the indictment) had been set aside. For the privilege to apply, it is sufficient that, at the time of publication, the criminal charge against Gilman remained unresolved and that the piece accurately described both the gist of the pending charge and the then-current status of the proceeding. The record in the criminal case confirms it did.[7]

Third, Gilman argues that the piece accuses him of more serious wrongdoing than was alleged in the criminal indictment because of its specific reference to "'Marsh and its employees pocket[ing] the increased fees and kickbacks.'" Opp. at 21-22. The judicial record, however, confirms that Gilman was charged with felony bid-rigging, the motive for which was the payment to Marsh of greatly increased "contingent commissions"—a type of payment that, while not by itself illegal, was described by the Second Circuit with reference to *this very scheme* as "a euphemism for kickbacks." *Staehr v. Hartford Fin. Servs. Grp.*, 547 F.3d 406, 408 (2d Cir. 2008); *see also* Ans. Ex. 2 (State's appeal brief in *People v. Gilman* outlines scheme and motive). It cannot be disputed that Marsh "pocketed" the increased fees, or "kickbacks," paid to it, and it is likewise true, albeit hyperbolically so, that its employees "pocketed" benefits as a result, in the form of higher compensation resulting from Marsh's increased profits. Gilman's contention that reasonable readers would understand this phrase to be an allegation that Gilman personally had accepted bribes from insurance companies for *his private* benefit simply stretches

[7] Gilman argues that his Indictment and the record of the judicial proceedings against him and Marsh contain hearsay and "should not be considered as evidence at any state of the proceeding." Opp. at 8 n.8. To the contrary, statements in such documents are not hearsay where, as here, they are not offered as proof of the truth of the matters asserted in them. Fed. R. Evid. 801(a) & (c). Defendants cite to and quote from the record in the underlying judicial proceedings to prove, for purposes of invoking the privilege, that the statements therein *were made*, and *when* they were made. Such statements are not hearsay in the first instance.

the actual language beyond its natural breaking point.[8] But even if a reasonable reader could construe the phrase as an allegation that Gilman personally made money from the criminal scheme, it still would not divest Defendants of the privilege because such a construction accurately reflects the allegation *actually made* against him in the criminal proceeding. Larsen Decl. ¶ 4 and Ex. C, 8-16 (State presented evidence showing that Gilman's compensation was linked to level of "contingent commissions" his department generated, that these commissions provided motive for his criminal conduct, and that his conduct "brought millions of dollars to Marsh at the expense of its clients" while Gilman personally prospered as result).[9]

In the final analysis, the piece tracks closely the allegations made in the multiple proceedings instituted against Marsh and its employees, including in the indictment of and evidence presented against Gilman. Accordingly, if the challenged statements can be understood to be about Gilman at all, the piece "was 'merely restating [the State's] position' in the action" against him, which remained pending at the time of publication, and such a restatement is privileged as a matter of law. *Gristede's Foods, Inc. v. Poospatuck (Unkechauge) Nation*, No. 06-cv-1260 (KAM), 2009 WL 4547792, at *17 (E.D.N.Y. Dec. 1, 2009) (citation omitted).[10]

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[8] *See, e.g., Becher v. Troy Publ'g Co.*, 589 N.Y.S.2d 644, 647 (3d Dep't 1992) ("[n]ewspapers cannot be held to a standard of strict accountability for use of legal terms of art in a way that is not precisely or technically correct by every possible definition. Were it otherwise, the narrow and confining application of the libel laws would entirely defeat the purposes of [the fair report privilege] . . . . Hence, in areas of doubt and conflicting considerations, it is almost always preferable to err on the side of free expression[.]" (citations omitted))

[9] Gilman further contends that it was false for Spitzer to have written that Marsh stood accused of having "harmed" its customers. But even Gilman concedes, as he must, that Marsh publicly apologized for wrongdoing by its employees and agreed to pay nearly $1 billion in what Justice Yates described as "restitution to its customers" to make them whole for the inflated premiums they had been obliged to pay. Opp. at 3 & n.2; *People v. Gilman*, 28 Misc. 3d 1217(A), at *1 n.4.

[10] Gilman's citation to *Ocean State Seafood, Inc. v. Capital Newspaper*, 492 N.Y.S.2d 175 (3d Dep't 1985), is particularly inapt. There, a news article allegedly contained multiple false statements about a food distributor, including that it had purchased clams illegally on the black market, that the clams had poisoned large numbers of people, and that it had violated state labeling laws. *Id.* at 177. The court held that the fair report privilege did not apply because the report falsely asserted that that the distributor had been fined for *all* of the alleged wrongdoing when, in fact, the fine was imposed in a proceeding that had addressed *only* the labeling violation. *Id.* at 178-79.

Dated: January 6, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum in Support of Defendants' Motion for Judgment on the Pleadings was served via the Court's CM/ECF system this 6th day of January 2012 upon the following:

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