

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
YASSER ABBAS,)	
)	
Plaintiff,)	
)	
v.)	Civ. Action No. 12-1565 (EGS)
)	
FOREIGN POLICY GROUP, LLC,)	
JONATHAN SCHANZER,)	
)	
Defendant.)	
_____)	

MEMORANDUM OPINION

Plaintiff Yasser Abbas brings this defamation action against Foreign Policy Group and Jonathan Schanzer, the author of an article that appeared in Foreign Policy Magazine in June 2012. Pending before the Court are defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and special motion to dismiss pursuant to the District of Columbia Anti-Strategic Lawsuits Against Public Participation Act of 2010 (the "Anti-SLAPP Act"), D.C. Code § 16-5502(a) (2012). Upon consideration of the motions, the responses and replies thereto, the amicus brief filed by the District of Columbia, the applicable law, and the entire record, the Court **GRANTS**

defendants' special motion to dismiss and **DENIES** defendants' motion to dismiss pursuant to rule 12(b)(6) as moot.¹

I. BACKGROUND

A. Yasser Abbas

Yasser Abbas ("Plaintiff" or "Mr. Abbas") is the son of Mahmoud Abbas ("M. Abbas"), the President of the Palestinian Authority (the "PA"). Compl. ¶ 9. He owns and operates many businesses throughout the Middle East: he is the chairman of Falcon Holding Group, which owns Falcon Global Telecommunications Services Company, Falcon General Investment Company, and Falcon Electrical Mechanical Company, an engineering company with offices in Gaza, Jordan, Qatar, the United Arab Emirates, and the West Bank that has done work for USAID in the past, Compl. ¶¶ 21, 28; he is the owner of Falcon Tobacco, Compl. ¶ 16; he is the chairman of the publicly traded Al-Mashreq Insurance Company, Compl. ¶ 31; and he is the managing director of the First Option Project Construction Management Company, which has offices in Amman, Tunis, Cairo, Montenegro, and Ramallah and has been awarded USAID funds. Compl. ¶ 32.

Mr. Abbas also serves as a political emissary for his father's regime, and often travels to other countries and

¹ Because granting the Anti-SLAPP motion disposes of the entire action, the Court need not consider the motion to dismiss pursuant to Rule 12(b)(6) here.

international meetings in this capacity. Anti-SLAPP Mot. at 9-10 (citing Anti-SLAPP Mot., Jones Decl. Ex. 15, 16, 17, 18). He has previously acknowledged that his political involvement in the Palestinian Authority and his business success have engendered controversy. See, e.g. Anti-SLAPP Mot., Jones Decl. Ex. 6, Excerpts from an interview with Yasser Abbas in Ramallah ("Yasser Abbas Interview"), Part 3. Over the last few years, many questions have been raised about whether his business success and political ties are linked, though he has systematically denied any such allegations. Anti-SLAPP Mot. at 11-12; see, e.g., Jones Decl., Ex. 24 (Ike Seamans, *What do Palestinians Do With Humanitarian Aid Money?*, THE MIAMI HERALD, Jan. 25, 2003, at 7B ("Israeli military intelligence charges that Yasser Arafat and his cronies have \$20 billion stashed in Swiss bank accounts and invested in foreign real estate. With PA financial help, Yasser Abbas, the prime minister's son, joined the gravy train. He has gained control of the electronics industry, even though he's a Canadian citizen who lives in Ramallah only a few months a year.)); see also Jones Decl., Ex. 21, 22, 25, 26.

As public scrutiny over his business and political activity has increased, Mr. Abbas has used the threat of defamation litigation to counter bad press. Anti-SLAPP Mot. at 14-15. Between 2008 and 2010, Mr. Abbas and his family have filed

defamation lawsuits or threatened to sue for libel on three separate occasions against an Israeli television channel, Reuters, and Al-Jazeera. *Id.* Mr. Abbas has also threatened to sue Richard Falk, the United Nations Special Rapporteur for the Palestinian Territories. *Id.*

B. Foreign Policy Magazine and Jonathan Schanzer

Foreign Policy is an online and print publication is a "forum for 'international news and opinions' covering topics on global politics and economics." Anti-SLAPP Mot. at 15; Compl. ¶ 5. The magazine contains an "Arguments" section, which is described as: "Polemical, controversial, and powerful, FP arguments provide timely insight on stories making headlines around the world." Anti-SLAPP Mot. at 16. Foreign Policy also publishes FP Arabic on a bimonthly basis in partnership with the Gulf Strategic Studies Center in Qatar, which contains translated pieces from Foreign Policy and is distributed in the Middle East. Compl. ¶ 7.

Jonathan Schanzer is the Vice President for Research at the Foundation for Defense of Democracies ("FDD"), a non-partisan group that focuses on national security and foreign policy. Anti-SLAPP Mot., Declaration of Jonathan Schanzer ("Schanzer Decl.") at ¶ 1. Prior to joining FDD, Mr. Schanzer worked as a terrorism finance analyst at the U.S. Department of the Treasury and at several other U.S. think tanks. He has also published

two books about Hamas and the Middle East and regularly publishes articles in American and international publications, including Foreign Policy. Schanzer Decl. ¶¶ 2-5. Mr. Schanzer has also testified before Congress twice regarding the issue of corruption in the PA.² See Compl. ¶¶ 56-77.

C. The June 5, 2012 Commentary in Foreign Policy Magazine

On June 5, 2012, an article (the "Commentary") written by Mr. Schanzer was published in Foreign Policy magazine. Compl. ¶ 10. The article is entitled "The Brothers Abbas: Are the sons of the Palestinian President growing rich off their father's system?" and appeared in the "Arguments" section of the magazine. It can be accessed by clicking on the "Arguments" link on the FP website. *Id.*; Defs.' MTD, Ex. A. In the introduction of the article, Mr. Schanzer writes:

In the wake of the Arab Spring, U.S. leaders have promised to reverse the United States' long reliance on autocratic, unrepresentative leaders who enrich themselves at the expense of their citizens. There's only one problem: Just as top American officials have been making these lofty promises, new details are emerging of how close family members of Palestinian leader Mahmoud Abbas, a major U.S. partner in the Middle East, have grown wealthy. Have they enriched themselves at the expense of regular Palestinians - and even U.S. taxpayers?

² Mr. Abbas describes Mr. Schanzer's Congressional testimony in the Complaint as evidence of malice on the part of Mr. Schanzer. Because the Court finds that contested portions of the Commentary are not defamatory, see *infra* Section II.C.2, the Court does not reach the question of malice on the part of Defendants.

Defs.' MTD, Ex. A at 2. Mr. Schanzer then discusses Mr. Abbas, his family, and their business and political interests.³

Mr. Schanzer does not paint Mr. Abbas or his family in a particularly flattering light. He writes of allegations of corruption in the PA and the "conspicuous wealth" of Mr. Abbas and his brother, which Mr. Schanzer claims has "become a source of quiet controversy in Palestinian society since at least 2009." Defs.' MTD, Ex. A. He also details allegations made by some in the region against Mr. Abbas and his family, including an allegation by Mohammad Rachid, a former economic advisor to the late PA leader Yasir Arafat who is under investigation for corruption, that President Abbas has "socked away **\$100 million** in ill-gotten gains." Defs.' MTD, Ex. A at 2; Compl. ¶ 14. He also discusses conversations he had with Palestinians during a

³ In his Complaint, Mr. Abbas alleged that a number of statements in the Commentary regarding his business interests and political activity were libelous. See Compl. ¶¶ 14, 16, 21, 22, 28, 30, 32, 35, 37, 39, 41. However, in his Opposition, Mr. Abbas considerably narrowed his libel claim and conceded that "the article's reference to these businesses is not the basis for [his] libel claim." Opp'n to MTD at 10. In their motion to dismiss, Defendants addressed these statements and argued that they were not defamatory. See Defs.' MTD at 15-21. Therefore, the Court will treat any allegations of libel relating to these portions of the Commentary in Plaintiff's complaint as conceded. See *Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) ("It is well disputed in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.") (citing *FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C. Cir. 1997)).

research trip to Ramallah in 2011, who told him that “the Abbas family dynasty is common knowledge” in the region, but that it was rarely discussed “thanks to growing fear of retribution by PA security officers, who have apprehended **journalists and citizens** for openly challenging President Abbas’s authority. Defs.’ MTD, Ex. A at 3; Compl. ¶ 37. The online version of the article contains approximately 31 highlighted words or phrases that are hyperlinks to the underlying source material for statements made in the article, which include articles from other publications and company websites.⁴ Anti-SLAPP Mot. at 17.

Within a week of the publication of Mr. Schanzer’s Commentary in Foreign Policy, Mr. Abbas threatened to sue the magazine in an interview with a Palestinian news agency. Anti-SLAPP Mot. at 17. On July 23, 2012, Mr. Abbas’s London-based counsel sent Foreign Policy a letter asking it to remove the Commentary from its website and retract those portions of the Commentary that he alleged were defamatory or false. *Id.* Foreign Policy responded in a letter dated August 6, 2012, explaining that it did not read Mr. Abbas’s complaints as alleging anything defamatory or materially false in the Commentary, and offering to clarify facts in the article if Mr.

⁴ The bolded words in excerpts of the Commentary in this opinion represent hyperlinks in the on-line version.

Abbas provided the basis to do so. Foreign Policy also offered Mr. Abbas the opportunity to respond in print. *Id.* Through his counsel, Mr. Abbas declined and filed this action on September 20, 2012. *Id.* at 18. On November 5, 2012 defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and a special motion to dismiss pursuant to the District's Anti-SLAPP Act. The District of Columbia moved for leave to file an amicus curiae brief, which the Court granted. The District filed an amicus brief on December 22, 2012 arguing that the Anti-SLAPP Act is applicable in a federal court sitting in diversity. These motions are now ripe for determination by the Court.

II. Discussion

A. The Anti-SLAPP Act

A SLAPP, or strategic lawsuit against public participation, is a civil action that arises out of a defendant's communications to government bodies or the public on an issue of public concern. See Brief of Amicus Curiae District of Columbia ("D.C. Amicus Brief") at 1. The District's Committee on Public Safety and the Judiciary has noted that SLAPPs "are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights." Rep. of the D.C. Comm. on Public Safety and the Judiciary on Bill 18-893 (Nov. 19, 2010) ("Comm. Report") at 4. By imposing

upon defendants the burden of defending against a lawsuit, the Committee concluded that "litigation itself is the plaintiff's weapon of choice," Comm. Report at 4, one that was "wielded to chill the speech of those who would otherwise speak out on a matter of public interest," D.C. Amicus Brief at 1. The Committee also found that the impact of these lawsuits was not limited to defendants against whom a suit had been filed, but also prevented others from voicing concerns regarding issues of public concern. Comm. Report at 4.

To combat this problem, the Council passed the Anti-SLAPP Act in 2010. The protections offered in the Act "follow[] 'the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaged in protected actions'" by enacting similar Anti-SLAPP legislation. *Farah*, 863 F. Supp. 2d at 36 (quoting Comm. Report at 4). The Act aims to address such concerns "by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP." *Id.*

To that end, the Anti-SLAPP Act provides in pertinent part:

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

(b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion

shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code § 16-5502(a)-(b). The Act also provides that “[i]f the special motion to dismiss is granted, dismissal shall be with prejudice.” *Id.* That is, if the defendant meets the burden of showing that the claims at issue arise from the type of activity protected by the Act, the claims must be dismissed with prejudice unless plaintiff can show a likelihood of success on the merits.

The Act applies to claims based on any oral or written statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(ii) In a place open to the public or a public forum in connection with an issue of public interest.

D.C. Code § 16-5501(1)(A). It applies to “[a]ny other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.” *Id.* An “issue of public interest” is defined as one that is “related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the marketplace.” Pursuant to the Act, an “issue of public interest” “shall not be construed to include private

interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance." *Id.* § 16-5501(3).

In construing the Act, the Court cannot rely on guidance from the D.C. Court of Appeals, which has not yet issued a published opinion interpreting the statute. Where, as here, "the substantive law of the forum state is uncertain or ambiguous, the job of federal courts is carefully to predict how the highest court of the forum state would resolve the uncertainty or ambiguity." *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 119 (2d. Cir. 1994). With this in mind, the Court notes that the Committee Report prepared on the Anti-SLAPP Act emphasized that the statute "followed the model set forth in a number of other jurisdictions." Comm. Report at 1. The D.C. Court of Appeals has accorded great weight to such reports in interpreting other D.C. statutes. *See, e.g. Dist. of Columbia v. Place*, 892 A.2d 1008, 1113 (D.C. 2006); *Carter v. State Farm Mut. Auto. Ins. Co.*, 808 A.2d 466, 471 (D.C. 2002). Therefore, where necessary and appropriate, the Court will look to decisions from other jurisdictions (particularly California, which has a well-developed body of case law interpreting a similar California statute) for guidance in predicting how the

D.C. Court of appeals would interpret the District's Anti-SLAPP statute. See *Boley*, 2013 U.S. Dist. LEXIS 88494 at *8-9.

B. Applicability of the Anti-SLAPP Act in Federal Diversity Actions

The parties dispute whether the District's Anti-SLAPP Act applies in a federal court sitting in diversity. Defendants contend that because the Act confers substantive protections under the District's tort law, it is applicable in federal court. Anti-SLAPP Mot. at 21; D.C. Amicus Brief at 5-6. Plaintiff, however, argues that the Anti-SLAPP Act is procedural and thus inapplicable because a federal court must apply federal procedural laws. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); Anti-SLAPP Opp'n at 3-9.

While the applicability of the Anti-SLAPP Act in a federal court sitting in diversity has not been addressed by the D.C. Circuit, other circuits have found that similar state statutes apply in federal court. See *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010); *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164 (5th Cir. 2009) (adopting the reasoning of the 9th Circuit in *Newsham* and ruling that a similar Louisiana statute was substantive and therefore applied in a federal court).

Most recently, the First Circuit confronted the issue of whether a Maine Anti-SLAPP statute applied in federal court in *Godin v. Schencks* on an interlocutory appeal from a denial of a special motion to dismiss pursuant to the Anti-SLAPP statute. 629 F.3d 79. Plaintiff in *Godin*, a former public school principal, brought a defamation action against three school system officials because they had expressed their view that she had acted abusively toward students at her school. 629 F.3d at 80-81. The individual defendants filed a special motion to dismiss under Maine's Anti-SLAPP statute in the district court, which ruled that the statute conflicted with Rules 12 and 56, and therefore did not apply in federal court. *Id.* at 81-82. The First Circuit reversed the decision of the district court, considering whether the "federal rule is 'sufficiently broad to control the issue before the court,'" and finding that it was not. *Id.* at 86-87 (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1451 (2010) (Stevens, J., concurring)). The court held that "neither Fed. R. Civ. P. 12(b)(6) nor Fed. R. Civ. P. 56, on a straightforward reading of its language, was meant to control the particular issues under [the Anti-SLAPP statute] before the district court" and therefore did not reach the question of whether the Rules 12(b)(6) and 56 comply with the Rules Enabling Act. *Id.* at 86. The Court also concluded that the twin aims of *Erie* -

"discouragement of forum-shopping and avoidance of inequitable administration of the laws," *Hanna v. Plumer*, 380 U.S. 460, 468 (1965), would be "best served by enforcement of [the Anti-SLAPP Act] in federal court," *Godin*, 629 F.3d at 87. After distinguishing both Rules 12(b)(6) and 56 from the Maine statute, the Court found that "[b]ecause [the Anti-SLAPP statute] is 'so intertwined with a state right or remedy that it functions to define the scope of the state-created right,' it cannot be displaced by Rule 12(b)(6) or Rule 56." *Id.* at 89 (quoting *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring)).

Two recent decisions by this Court have also followed the reasoning of the First Circuit in *Godin* as well as the other Circuits that have considered the applicability of state Anti-SLAPP legislation in federal courts. See *Boley v. Atlantic Monthly Group*, No. 13-89, 2013 U.S. Dist. LEXIS 88494 (June 25, 2013); *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29 (D.D.C. 2012); see also *Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 85 (D.D.C. 2012) (noting that the District's Anti-SLAPP statute "is substantive - or at the very least, has substantive consequences" that would make it applicable in federal court); but see *3M Co. v. Boulter*, 842 F. Supp. 2d. 85 (D.D.C. 2012) (finding that the D.C. Anti-SLAPP Act cannot apply in federal court because it is procedural, and therefore, conflicts with

Federal Rules of Civil Procedure 12 and 56). And, the D.C. Circuit recently upheld a district court decision denying a special motion to dismiss pursuant to the District's Anti-SLAPP Act because the motion was not filed within the 45-day limit proscribed by the Act. *Sherrod v. Breitbart*, No. 11-7088, 2013 U.S. App. LEXIS 12959 (June 25, 2013). Though the Circuit did not address the applicability of the District statute to a federal court sitting in diversity, implicit in its holding that defendant had failed to file its motion within the statutory time frame is the conclusion that the statute applies in federal court. *Id.* at *12-13. This Court is persuaded by those Circuits that have held that similar statutes do apply in federal court.

C. Merits of Defendants' Motion

1. Prima Facie Showing of Protected Activity

In order to prevail on their Anti-SLAPP Act motion, defendants must make a "prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). The Court finds that defendants have made that showing here.

Defendants have shown that the Commentary and Mr. Schanzer's statements are protected under several provisions of the Anti-SLAPP Act. As an initial matter, the Commentary qualifies as a written statement made "[i]n a place open to the

public or a public forum in connection with an issue of public interest." *Id.* § 16-5501(1)(A)(ii). FP's website is a "place open to the public," because anyone with a working internet connection or access to one can view it. See *Boley*, 2013 U.S. Dist. LEXIS 88494, at *10 (finding that the website of The Atlantic was a "place open to the public"); *Farah*, 863 F. Supp. 2d at 38 (holding that statements in an internet blog posting were "made in a 'place open to the public or a public forum'" (quoting § 16-5501(1)(A))).

Mr. Schanzer's statements regarding Mr. Abbas concerned an issue of public interest because, contrary to Plaintiff's assertions, he is a "public figure." See § 16-5501(3). Although the Anti-SLAPP Act does not define the term "public figure," it is a term of art in the context of Plaintiff's defamation action. There are two types of public figures: "general purpose and limited purpose public figures." *Tavoulaareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir. 1987) (en banc). "A person becomes a general purpose public figure only if he or she is a well-known celebrity, his name a household word." *Id.* (internal quotation marks omitted). However, "[f]ew people attain the general notoriety that would make them public figures for all purposes." *Waldbaum v. Fairchild Publ'n's, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980). Instead, "public figures for the more limited purpose of certain issues or situations"

are much more common. *Tavoulaareas*, 817 F.2d at 772. If "an individual voluntarily injects himself or is drawn into a particular public controversy[, he] thereby becomes a public figure for a limited range of issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

Though Mr. Abbas has not achieved the kind of ubiquity or notoriety to be considered a general purpose public figure, he is a limited purpose public figure. The Court is not persuaded by Mr. Abbas's argument that he cannot be considered a limited purpose public figure "by virtue of defending himself from the slanderous claims by the controversy maker." Opp'n to MTD at 13. As defendants explain, Mr. Abbas has "voluntarily thrust himself into a role of prominence in both Palestinian politics and the controversy surrounding his wealth." Defs.' MTD at 24. He explains in his Complaint that he accompanies his father on official trips, and that he travels as a special envoy "for the benefit of the Palestinians and the Palestinian cause." Compl. ¶ 40. In the Complaint, Mr. Abbas also describes his role in the repatriation of the Palestinian National Fund, in "ensuring the resumption of US and Canadian aid to the UN Relief and Works Agency for Palestinian Refugees," and in providing financial assistance to Palestinian students and those Palestinians freed from Israeli jails. *Id.* ¶ 43. In the past, Mr. Abbas has openly discussed his wealth; indeed, he has claimed that 25

percent of his income went to the PA budget. Defs.' MTD, Ex. I at 2. He has also claimed that the PA owes him a great deal of money, but that he could not use his influence and status to collect the debt in order to avoid being accused of exploiting his father's position. *Id.* Under these circumstances, Mr. Abbas cannot reasonably claim that he has no role in the controversy apart from "simply defending himself against the slander." Opp'n to MTD at 13. See *Waldbaum*, 627 F.2d at 1298 ("Those who attempt to affect the result of a particular controversy have assumed the risk that the press, in covering the controversy, will examine the major participants with a critical eye.").

Further, the question of U.S. aid to the Palestinian Authority, and the level of corruption in the PA under both Yasir Arafat and Mahmoud Abbas, is fundamentally a matter of the public, not private, interest.⁵ See Anti-SLAPP Mot. at 5-6. The

⁵ Mr. Abbas has acknowledged as much in the past. During an interview in 2008, Mr. Abbas discussed corruption in the context of the effect of the global financial crisis on the Palestinian economy:

We don't accept any kind of corruption claims to us these days, because the whole economy of the globe, the global economy, has been knocked down by corruption, either in the U.S., or in the Gulf, or in Europe, or in maybe Canada, or just name it [T]his is the only country that's going up, everybody is going down - simply because we have a limited kind of corruption. We don't have it anymore. It's been limited. Everything is mainly under control. I cannot say we have 100 percent control on corruption that

relationship between the United States and the Palestinian Authority, and the way that U.S.-appropriated funds are used by the Palestinian Authority has been debated at length for years. The question of whether the sons of the President of the Palestinian Authority are enriching themselves by virtue of their political ties, and whether some of their wealth can be traced to U.S. tax dollars is part of that issue. As defendants point out, numerous publications in the United States and throughout the world have written extensively about corruption in the Palestinian Authority generally, and the Abbas family's wealth specifically. See Defs.' MTD at 23-24. Indeed, Mr. Abbas does not dispute that "there is a public controversy concerning allegations of corruption within the Palestinian Authority." Opp'n to MTD at 13.

Finally, even setting aside whether Mr. Abbas is a "public figure" or whether the corruption in the Palestinian Authority is a "public issue," Mr. Schanzer's statements while testifying

we had before - no - but I can claim it's in the 90's, it's in the high 90's, because it's not easy for anyone to go and really start, you know, having any sort of corruption in any project that comes up. It's not that easy, it's not that easy anymore. Everybody knows that the President is holding the stick on everybody's head, ok? And he always threatens with that stick, so they know. It's not a joke. As a result, we don't accept the corruption slogan anymore. After the past three months, I can't accept it. I personally will attack anyone who talks about the Palestinian corruption[.]

Anti-SLAPP Mot., Jones Decl., Exhibit 6, at Part 3.

before Congress and in the Commentary are "written or oral statement[s]" made "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." D.C. Code § 16-5501(1)(A)(i). Plaintiff concedes that the Commentary at issue was written after Mr. Schanzer testified before Congress regarding "the topic of U.S. Aid to Palestinians" during which he purportedly suggested that it would be a "worthwhile inquiry [to] explore the way in which Abbas' sons, Yasser and Tarek, have accumulated wealth since their father took office in 2005." Compl. ¶¶ 57-61.

2. Likelihood of Success on the Merits

Because defendants have made a prima facie showing that Mr. Abbas's defamation claim "arises from an act in furtherance of the right of advocacy on issues of the public interest," Mr. Abbas must now show that he is likely to succeed on the merits of his defamation claim in order to survive defendants' Anti-SLAPP motion. D.C. Code § 16-5502(b). The Act does not define what it means to succeed on the merits, so the Court looks to relevant case law from California as instructive. There, in order to show a "probability of prevailing on a claim" in opposition to an Anti-SLAPP motion to dismiss, a plaintiff "must satisfy a standard comparable to that used on a motion for judgment as a matter of law." *Price v. Stossel*, 620 F.3d 992,

1000 (9th Cir. 2010); see also *Arenas v. Shed Media US Inc.*, 881 F. Supp. 2d 1181, 1188 (C.D. Ca. 2011). Thus, a plaintiff "must demonstrate that the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Price*, 620 F.3d at 1000 (quoting *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001)). If a "plaintiff fails to present a sufficient legal basis for the claims or if the evidence offered is insufficiently substantial to support a judgment in favor of the plaintiff, then the defendant's anti-SLAPP motion should be granted." *Arenas*, 881 F. Supp. 2d at 1188 (citing *Price*, 620 F.3d at 1000).

To prevail on his defamation claim under District of Columbia law, Mr. Abbas must show:

(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.

Oparaugo v. Watts, 884 A.2d 63, 76 (D.C. 2005) (internal quotation marks omitted)). "Falsity and defamatory meaning 'are distinct elements of . . . defamation and are considered separately.'" *Carpenter v. King*, 792 F. Supp. 2d 29, 34 (D.D.C. 2011) (quoting *White v. Fraternal Order of Police*, 909 F.2d 512,

520 (D.C. Cir. 1990). If the plaintiff is a public figure, he faces a higher burden, and must show, by clear and convincing evidence, that a defendant published the allegedly defamatory statements with "'actual malice'—that is, without knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); see also *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991).

To show falsity, a plaintiff "must demonstrate either that the statement is factual and untrue, or an opinion based implicitly on facts that are untrue." *Carpenter*, 792 F. Supp. 2d at 34 (quoting *Lane v. Random House*, 985 F. Supp. 141, 150 (D.D.C. 1995)). A statement is defamatory "if it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1293-94 (D.C. Cir. 1998) (quoting *Howard Univ. v. Best*, 484 A.2d 958, 988 (D.C. 1984)). The statement "must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous, or ridiculous.'" *Best*, 484 A.2d at 989 (quoting *Johnson v. Johnson Publ'g Co.*, 271 A.2d 696, 697 (D.C. 1970)). "The plaintiff has the burden of proving the defamatory nature of [the challenged] publication, . . . and the publication must be considered as a whole, in the sense in which it would be

understood by the readers to whom it was addressed." *Id.* Words should be given their plain and natural meaning, and "the statements at issue should not be interpreted by extremes, but should be construed as the average or common mind would naturally understand them." *Klayman v. Segal*, 783 A.2d 607, 616 (D.C. 2001). Whether an allegedly defamatory statement is capable of defamatory meaning is a question of law. *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 627 (D.C. Cir. 2001).

As noted in footnote 3 *supra*, Mr. Abbas has considerably narrowed his defamation claim in his Opposition to Defendants' Motion to Dismiss. He now contends that he does not contest portions of the Commentary that relate to his business interests. Mr. Abbas explains that

the principal allegations supporting [his] libel claim are the paragraphs concerning the article's [] libelous questions, the allegations that the article purports to provide 'new details' regarding those libelous questions, and the allegations concerning the information provided by Mr. Schanzer's unidentified sources, which are the only 'new details' used by Mr. Schanzer to support the libelous implication of his libelous questions—namely, that [he] has wrongfully enriched himself at the expense of regular Palestinians and even U.S. taxpayers.

Opp'n to MTD at 12.

Defendants argue that these challenged portions of the Commentary are not actionable because: (1) the purportedly "libelous questions" are unanswered questions, not statements of fact, and to the extent that the questions imply anything, they

imply a non-actionable opinion; and (2) the purported "new details" that Plaintiff objects to are not capable of defamatory meaning because they are not of and concerning him. Defs.' Reply to MTD at 3. In response, Mr. Abbas argues that the Commentary is a "reporting piece, not a mere opinion piece." Plaintiff's Opp'n to MTD at 9 (emphasis in original).

a. "Libelous Questions"

i. The Two Questions are Rhetorical, and Are Not Assertions of Fact

Mr. Abbas contends that the Commentary poses two "libelous questions:" (1) "Are the sons of the Palestinian president growing rich off their father's system?; and (2) "Have they enriched themselves at the expense of regular Palestinians—and even U.S. taxpayers?" Plaintiff's Opp'n to MTD at 6; Compl. ¶¶ 10, 13; Defs.' MTD, Ex. A, at 3. Mr. Abbas alleges that these questions "may be read as assertions of false fact that [he] is wrongfully and possibly criminally getting rich off his 'father's system.'" Plaintiff's Opp'n at 6-7. Purportedly, these questions ask "those he works with and all the world to wonder if plaintiff has 'enriched' himself 'at the expense of regular Palestinians - and even U.S. taxpayers.'" Compl. ¶ 49. Defendants argue that "the Commentary merely posed questions, without stating or implying as factual matter that Plaintiff was guilty of criminal or corrupt conduct, and Plaintiff has wholly

mischaracterized the Commentary in an effort to suggest otherwise." Defs.' Reply to MTD at 1.

A statement challenged as defamatory, regardless of whether it is posed as a question, cannot be libelous unless it can reasonably be read as a false assertion of fact. See *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1094 (4th Cir. 1993).

"[I]nquiry itself, however embarrassing or unpleasant to the subject, is not accusation." *Id.* In *Chapin*, the court considered an article published in the *Philadelphia Inquirer* that questioned the finances of a charity program run by plaintiff through which people could send gift packages to soldiers stationed in Saudi Arabia. *Id.* at 1091. In one purportedly defamatory section of the article, the author posed a question regarding plaintiff's involvement in the charity: "Who will benefit more from the project - GIs or veteran charity entrepreneur Roger Chapin of San Diego and Falls Church, Va., the organizer of the campaign?" *Id.* at 1093-94. While acknowledging that the question was "pointed, and could certainly arouse a reader's suspicion," the court ruled that it could not "reasonably be read to imply the assertion of the false and defamatory fact - pocket-lining - of which plaintiffs complain." *Id.* at 1094. Instead, the court held that the "question simply provokes public scrutiny of the plaintiffs' activities." *Id.* Plaintiff also challenged another portion of

the article in which the author wrote, "it is not clear where the rest of the money goes." *Id.* at 1095. The court held that the author was not making a false assertion, but rather was "invit[ing] the public to ask." *Id.* at 1096. That one of the possible answers to that question was that "Chapin is a dishonest man who pockets the difference" did not make the statement defamatory, and according to the court, was "precisely why we need and must permit a free press to ask the question." *Id.*

Other courts that have considered whether a question can support a defamation claim have reached a similar conclusion. In *Partington v. Bugliosi*, the court considered whether a rhetorical question regarding an attorney's trial strategy was capable of defamatory meaning. 56 F.3d 1147, 1155 (9th Cir. 1995). In the passage at issue, the author, an attorney for a co-defendant in the same trial, asked: "Had Walker's lawyer not read the theft-trial transcripts? Our copy had ended up in a warehouse; perhaps theirs had too." *Id.* (emphasis in original). The court held that the statement did not imply that plaintiff had not read the transcripts and therefore did not adequately represent his client. *Id.* at 1156. In rejecting plaintiff's assertion that the statement was defamatory, the court explained that "the rhetorical device used by [the defendant] negates the impression that his statement implied a false assertion of

fact." *Id.* at 1157. Instead, the author's use of a question made clear his lack of definitive knowledge and invited the reader to consider various possibilities. *Id.* See also *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 730 (1st Cir. 1992) (holding that statements in a series of articles published in the *Boston Globe*, including a rhetorical question regarding whether plaintiff was "trying to score off the success of Andrew Lloyd Webber's 'Phantom,'" were not defamatory because they "reasonably could be understood only as [the author's] personal conclusion about the information presented, not as a statement of fact")⁶.

Similarly, the two questions posed in the Commentary cannot reasonably be read to imply the meaning that Mr. Abbas alleges - that he "is wrongfully and possibly criminally getting rich off of his 'father's system'" or that he is enriching himself "at the expense of regular Palestinians and even U.S. taxpayers" - nor can they be read to imply the assertion of objective facts. Opp'n to MTD at 6-7, 12. Though the conclusions Mr. Abbas draws

⁶ The Court is not persuaded by Mr. Abbas' attempts to distinguish *Phantom Touring* on the ground that the entirety of the Commentary "conveys the impression that the author is reporting a fact-based news item." Opp'n to MTD at 7-8. The *Phantom* court concluded that the challenged statements, including that the production was "fake" and "phony," were not defamatory because "[t]he sum effect of the format, tone and entire content of the articles is to make it unmistakably clear that [the author] was expressing a point of view only." 953 F.2d at 729. For the reasons explained in Section II.C.2.b *infra*, the same is true here.

are possible answers to the questions posed by Mr. Schanzer, the questions invite the reader to form her own judgments regarding the relationship between Mr. Abbas's family ties and his admittedly great wealth. The reader could arrive at a number of different conclusions, a fact that Mr. Abbas acknowledges in his own complaint. See Compl. ¶ 49 (alleging that the Commentary asks "those he works with and all the world to wonder if plaintiff has 'enriched' himself at the expense of 'regular Palestinians - and even U.S. taxpayers'"). That Mr. Abbas would prefer that readers do not answer the questions in the affirmative is not sufficient to support his defamation claim. Indeed, the invitation in the Commentary for the reader to form her own opinion is not libel, rather it "is the paradigm of a properly functioning press." *Chapin*, 993 F.2d at 1096.

ii. The Questions Imply an Opinion, Not a Fact

Even if the two questions posed by Mr. Schanzer were capable of defamatory meaning, they are statements of opinion protected by the First Amendment because they do not contain a provably false connotation. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). Where the factual basis for a conclusion is outlined in the article, or, as is the case here, for the questions, those statements are protected by the First Amendment. See *Moldea v. New York Times Co.*, 22 F.3d 310, 318

(D.C. Cir. 1994) (holding that where "the readers understand that [] supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon the facts, this type of statement is not actionable in defamation"). In distinguishing opinions from assertions of fact, the court can consider the language used, the context of the language, and the extent to which the language can be verified. *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc).

First, the rhetorical questions in the Commentary are supported by facts provided in article as well as hyperlinked source material in the form of articles in other publications, company websites, and interviews given by the plaintiff. All of this serves to put the reader on notice that the piece is one of opinion. *Ollman*, 750 F.2d at 987-88. Second, like the op-ed piece at issue in *Ollman*, the Commentary appeared in the "Arguments" section of the FP website. That page is described as "[p]olemical, controversial, and powerful," and aims to provide "timely insight on stories making headlines around the world." MTD at 10. It is reasonable to assume that the "Arguments" section of FP is one in which readers expect to find analytical and opinionated pieces that reflect a particular viewpoint. See, e.g. *Moldea*, 22 F.3d at 313 (noting that a book review is a "forum in which readers expect to find such

evaluations" of a literary work). Moreover, writing like that in the Commentary is "[a]t the heart of the First Amendment," which recognizes the "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988). This recognition has been vigorously upheld in the District of Columbia:

If the First Amendment's guarantees of freedom of speech and of the press are to ensure that these rights are meaningful not simply on paper, but also in the practical context of their exercise, then a[n] Op-Ed column discussing a subject of public interest must surely be accorded a high level of protection, lest the expression of critical opinions be chilled. This is so because "[t]he reasonable reader who peruses [a] column on the editorial or Op-Ed page is fully aware that the statements found there are not 'hard' news like those printed on the front page or elsewhere [in the magazine]. Readers expect that columnists will make strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere in the [magazine]."

Guilford Transp. Industries, Inc. v. Wilner, 760 A.2d 580, 582-83 (D.C. 2000) (quoting *Ollman*, 750 F.2d at 986).

In in an attempt to demonstrate that the two questions posed by Mr. Schanzer are defamatory and not merely statements of opinion, Mr. Abbas argues that "[t]hey do, in fact, contain provably false factual connotations" because "whether he is growing rich from alleged corruption in the Palestinian Authority is certainly a provable fact by investigating Plaintiff's relevant financial records." Opp'n to MTD at 9.

However, Mr. Abbas seeks to reframe his defamation claim, and indeed the subject matter of the article, in trying to defend his point. The questions the Commentary purportedly answers is whether Mr. Abbas and his brother are growing rich off their father's political power and connections, not whether they are growing rich as a result of generalized corruption in the Palestinian Authority. *See generally*, Defs.' MTD, Ex. A; *see also* Opp'n to MTD at 10. Nevertheless, even the relationship between Mr. Abbas's business success and corruption in the PA were at issue in the Commentary, as defendants argue, "[g]iven the myriad of factors that may have contributed to Plaintiff's wealth—his education, his experience, his skill, and indeed, his connections and opportunities—it would be impossible to prove that Plaintiff grew wealthy solely because of his father" or solely by virtue of corruption in the Palestinian Authority. Defs.' MTD at 10; *see also* *Volm v. Legacy Health Sys., Inc.*, 237 F. Supp. 2d 1166, 1178 (D. Or. 2002) (finding that the question "[w]ould you want to go to a hospital where they did not thoroughly check out the people who would be administering medical care to you?," which was posed to a patient of the practice, was not an assertion of objective fact because it was a rhetorical question not "capable of being proven true or false").

While there is no "wholesale exemption from liability in defamation for statements of 'opinion,'" the purportedly libelous questions at issue do not "imply a provably false fact, or rely upon stated facts that are provably false." Therefore, for this additional reason, Mr. Abbas's defamation claim based on these questions in the Commentary must fail.⁷ *Moldea*, 22 F.3d at 313.

⁷ As Defendants briefly discuss in their motion to dismiss, Mr. Abbas' libel claim arising from the rhetorical questions posed in the Commentary also fails on the basis of the District's Fair Comment Privilege. See Defs.' MTD at 11. "The District of Columbia has long recognized and accorded the media the privilege of fair comment on matters of public interest" as long as the opinions are based on true facts. *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88 (D.C. 1980); see *Jankovic v. Int'l Crisis Group*, 593 F.3d 22, 29 (D.C. Cir. 2010). The privilege affords "legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Milkovich*, 497 U.S. at 13 (internal citations omitted). In the District of Columbia, the fair comment privilege is applicable "even if the facts upon which [the opinion] is based are not included along with the opinion." *Fisher v. Washington Post Co.*, 212 A.2d 335, 338 (D.C. 1965) (internal citations omitted).

Here, it is undisputed that the issue of corruption in the Palestinian Authority is one of public interest. See Opp'n to MTD at 13 ("Plaintiff acknowledges that there is a public controversy concerning allegations of corruption within the Palestinian Authority."). The allegedly "libelous questions" are posed by Mr. Schanzer in the context of an article that generally discusses that issue in the context of an article about whether the sons of President Abbas are benefiting from their family connections. Hyperlinks to the underlying information upon which Mr. Schanzer is reporting are provided in the online version of the article. Mr. Schanzer's questions, which he does not conclusively answer, are his interpretation of those underlying facts, an action which is protected by the Fair Comment Privilege.

b. "New Details"

In the Commentary, Mr. Schanzer writes that "new details are emerging of how close family members of Palestinian leader Mahmoud Abbas, a major U.S. partner in the Middle East, have grown wealthy." Compl. ¶ 13; Defs.' MTD, Ex. A, at 2. Mr. Abbas alleges that these "new details" support the conclusion that he is "enriching himself at the expense of regular Palestinians—and even U.S. taxpayers." Opp'n to MTD at 10-11. He asserts that these new details consist of two things: (1) allegations by Mohammad Rachid that Mahmoud Abbas has "socked away \$100 million in ill-gotten gains; and (2) a statement that during a research trip to Ramallah in 2011 "several Palestinians" told the author that the issue of the Abbas family dynasty was common knowledge in the PA, but that it was rarely discussed because of a "growing fear of retribution by PA security officers, who have apprehended **journalists and citizens** for openly challenging President Abbas's authority."⁸ Opp'n to MTD at 6. The Court addresses these in turn.

⁸ It is not clear to the Court that these two things are the "new details" Mr. Schanzer is referencing in the Commentary, which relate to "how close family members of Palestinian leader Mahmoud Abbas . . . have grown wealthy." Defs.' MTD, Ex. A at 2. This sentence is followed by a lengthy discussion of Mr. Abbas's business interests in the Middle East. *Id.* at 2-3. For the reasons set forth in footnote 3 *supra*, Mr. Abbas has conceded that the portions of the Commentary detailing his business interests are not defamatory. Accordingly, the Court

Regarding Mohammad Rachid, Mr. Schanzer writes:

[President] Abbas's wealth recently became a source of controversy during the investigation of Mohammad Rachid, an economic advisor to the late Palestinian leader Yasir Arafat, in a high-profile corruption probe. Last month, Palestinian officials charged Rachid with siphoning off millions of dollars in public funds

According to a former Palestinian advisor, [President] Abbas holds a grudge against Rachid dating back to the peace talks during the waning days of the Clinton era. . . . "There was a huge amount of jealousy," the former advisor said.

With his back up against a wall, Rachid has now fired back at the Palestinian president with claims that Abbas himself has socked away \$100 million in ill-gotten gains.

Defs.' MTD, Ex. A at 1. Mr. Abbas alleges that Mr. Rachid's allegations are untrue, and that Mr. Schanzer uses the allegations to "link Plaintiff to this lie by his implication that: 'The conspicuous wealth of Abbas's own sons, Yasser and Tarek, has become a source of quiet controversy in Palestinian society since at least 2009.'" Compl. ¶ 15.

Plaintiff's argument fails. As the context of the statement makes clear, the discussion of Mr. Rachid in the Commentary, and his allegations of "ill-gotten gains," relate to President Mahmoud Abbas, not Plaintiff. As such, these statements cannot be the basis of any libel claim brought by Mr. Abbas, because they are not of and concerning him. See *N.Y.*

does not address them here and for the purposes of resolving the pending motions, the Court accepts Plaintiff's characterization of the "new details" in the Commentary.

Times Co., 376 U.S. at 288); *Croixland Props. Ltd. P'ship v. Corcoran*, 174 F.3d 213, 216 (D.C. Cir. 1999) ("To satisfy the 'of and concerning' element, it suffices that the statements at issue lead the listener to conclude that the speaker is referring to plaintiff by description, even if the plaintiff is never named or misnamed."). Even if the statement was about Plaintiff, or if his father brought a libel claim, the statement is not defamatory because Mr. Rachid's allegation is not reported as fact, and is instead put in context, "making it clear to the reader that Rachid's statement is merely the latest in an ongoing exchange of charge and countercharge." Defs.' MTD at 14 n. 7.

Similarly, the second alleged "new detail" is not defamatory. Mr. Schanzer writes:

On a research trip to Ramallah last year, several Palestinians told me that the Abbas family dynasty is common knowledge. However, discussion of the issue rarely rises above a whisper - thanks to fear of retribution by PA security officers, who have apprehended **journalists and citizens** for openly challenging President Abbas's authority.

Defs.' MTD, Ex. A at 3. Mr. Abbas alleges that "[r]eferences to what 'several Palestinians told me' by defendant Schanzer in the FP article is no evidence to support the allegation that Palestinian Authority security officers are being used to protect plaintiff's reputation." Compl. ¶ 38.

First, the account of what "several Palestinians" told the author is support for the statement the Abbas family dynasty is common knowledge in the PA. It is not defamatory because it is not an assertion of false fact, or indeed, of any fact. Mr. Schanzer is reporting on what people in the region have said to him, and does not otherwise take any position on what he has heard.

Second, the Commentary does not state, nor does it imply, that PA security officers are protecting Plaintiff's reputation; rather, it suggests that PA security officers are protecting *his father's* authority. There is nothing in the Commentary to suggest that Plaintiff has any involvement with PA security officers, or that PA security officers are acting at his direction. Therefore, the statement is not defamatory because it is not of and concerning Plaintiff.

III. Conclusion

For the foregoing reasons, the Court concludes that the defendants have made a prima facie showing that Mr. Abbas's defamation claim arises from an act in furtherance of the right of advocacy on issues of the public interest, and that Mr. Abbas has failed to demonstrate a likelihood of success on the merits of his defamation claim because the contested statements are either not capable of defamatory meaning or are protected statements of opinion. Accordingly, the Defendants' special

motion to dismiss pursuant to the District's Anti-SLAPP Act is **GRANTED**, Defendants' motion to dismiss pursuant to rule 12(b)(6) is **DENIED** as moot, and Plaintiff's complaint is **DISMISSED WITH PREJUDICE** pursuant to the Anti-SLAPP Act. An appropriate Order accompanies this Memorandum Opinion.

SIGNED: Emmet G. Sullivan
United States District Judge
September 27, 2013