

Aboutaam v Dow Jones & Co.
2019 NY Slip Op 30747(U)
March 22, 2019
Supreme Court, New York County
Docket Number: 156399/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT D. KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 156399/2017

HICHAM ABOUTAAM

MOTION DATE 10/30/2018

Plaintiff,

MOTION SEQ. NO. 004

- v -

DOW JONES & COMPANY,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 101

were read on this motion to/for DISMISS

Motion by Defendant Dow Jones & Company, pursuant to CPLR 3211 (a)(1) and (7), to dismiss the amended complaint ("the complaint"), alleging causes of action for libel and defamation by implication, is granted for the reasons stated herein.

BACKGROUND

I. The Parties

According to the complaint, Plaintiff Hicham Aboutaam and his brother non-party Ali Aboutaam ("Ali") are internationally prominent art and antiquities dealers. Plaintiff is the owner and president of "Electrum, a Manhattan-based antiquities gallery and brokerage." (Am. Comp. ¶ 9.) Since March 2002 Electrum has served as the exclusive U.S. agent for Phoenix Ancient Art ("Phoenix"), a Geneva, Switzerland-based antiquities gallery wholly owned and operated by Plaintiff's brother Ali Aboutaam ("Ali").

Defendant Dow Jones is the publisher of the Wall Street Journal ("WSJ" or "the Journal").

II. The Subject Article

The instant action for libel and defamation by implication arises from an article published in the Wall Street Journal that first appeared online on May 31, 2017 with the headline stating “Prominent Art Family Entangled in Investigations of Looted Antiquities” and the sub-headline stating “Long-time dealers Ali and Hicham Aboutaam are under scrutiny as authorities in multiple countries look into how Islamic State finances itself by trafficking in ancient objects.” (Am. Compl. ¶ 44.)¹ The authors are listed as Benoit Faucon and Georgi Kantchev. The article contains the following photographs, each separated by several paragraphs, in the following order:

- A photograph of Plaintiff and his brother Ali with two marble statues behind them.
- A photograph of the exterior of “[t]he Aboutaams’ Phoenix Art gallery in Geneva.” (Online Article [caption].)
- A photograph of a “gold ring with a carved gemstone ... believed to be from the Hellenistic/Roman period, dating approximately from 330 B.C. to 400 AD. The photo was seized in a raid on the home of a top Islamic State official in Syria in 2015.” (Id. [caption].)
- A photograph of a “Roman amphitheater in the ancient city of Palmyra in central Syria [that] was badly damaged during ISIS occupation.” (Id. [caption].)
- Photographs depicting both sides of “a gold coin featuring Antoninus Pius, believed to date to approximately 138-161 A.D., ... discovered during a raid on a top Islamic State official’s house in Syria in 2015. The object is one of several subject to a civil-forfeiture proceeding in the U.S.” (Id. [caption].)

According to the complaint, this online headline was later changed to “Prominent Art Family Entangled in ISIS Antiquities-Looting Investigations.” (Am. Compl. ¶ 45.)

The same article then appeared in the WSJ print edition on June 1, 2017 on the front page of the “Life & Arts section with the headline “Antiquities Dealers Probed” and the sub-headline “Ali and Hicham Aboutaam are under scrutiny as

¹ The online article is attached as Exhibit B to the complaint and as Exhibit 2 to Defendant’s Affirmation in Support.

authorities in multiple countries look into looting by Islamic State.”² The same authors are listed and the text of the article appears to be reproduced verbatim from the online article. With the exception of the photograph depicting the exterior of the Phoenix Gallery in Geneva, the same photographs appear in the print edition. However, the photographs of the gold ring and Roman ruins appear on the first page abutting the picture of the Aboutaam brothers—the photograph of the coin appears on the second page.

In sum and substance, the article reports that Plaintiff, his brother non-party Ali Aboutam, and others involved in their family businesses are being investigated by law enforcement in multiple countries for potentially trading in antiquities that may have been looted by ISIS (which stands for Islamic State of Iraq and Syria). The article also discusses—more generally—how law enforcement is seeking to learn more about “one of the art world’s best-kept secrets: how ancient objects plundered in the battle zones of the Middle East end up in posh art collections thousands of miles away.” (Online Article at 1 of 6.) In the context of the latter, no art dealers are identified as being under investigation other than Plaintiff and his brother.

III. The Complaint

The complaint alleges libel as a first cause of action and defamation by implication as a second cause of action. Plaintiff alleges that a reporter from the WSJ contacted Phoenix Ancient Art (“Phoenix”)—Plaintiff’s brother’s Geneva gallery—on January 31, 2017 and stated that he was “writing a news article on trading of artifacts looted by ISIS” and anticipated that the article would mention “scrutiny over your operations and whether artifacts looted under ISIS’s watch could have ended up in your hands.” (Am. Compl. ¶ 13.) The Complaint alleges that Plaintiff, his brother, and others at Phoenix spent months attempting to correct what they believed to be the reporter’s “misconceptions, misunderstandings, and incorrect assumptions.” (Am. Compl. ¶ 5.) Plaintiff alleges that notwithstanding said efforts, Defendant printed an article that—“though it revealed no links between Plaintiff and any antiquities that were bought or sold to support ISIS”—causes the reasonable reader to believe that he is in fact trading ISIS-looted antiquities and thereby funding ISIS. (Id.)

² The print article is attached as Exhibit C to the complaint and as Exhibit 3 to Defendant’s Affirmation in Support.

Plaintiff attaches a survey to his complaint as Exhibit A, which, in sum and substance, purports to show that roughly 400 WSJ subscribers harbor various negative beliefs about Plaintiff and his brother after having read the article, such as that they are: “dishonest,” “less trustworthy,” “running a criminal enterprise,” “helping to finance ISIS through the sale of looted antiquities,” “involved in looting or stealing antiquities in the Middle East,” “have connections with ISIS,” “have done business with ISIS,” and “financing terrorism.”

The complaint alleges various statements in the article that it claims give rise to libel claims and to defamation by implication claims, and this Court will examine each of these specific statements in turn in the “Discussion” section.

The complaint alleges that Plaintiff’s “business and reputation have been severely and immediately damaged” and that customers and “major antiquities institutions have withdrawn from ongoing, immediately profitable and long-standing relationships with Plaintiff.” (Am. Compl. ¶ 7.) At oral argument, Plaintiff’s counsel stated that sales at Plaintiff’s gallery have declined by over 96 percent since the publication of the article. (Oral Arg. Tr. at 26:13-25.)

ARGUMENTS

Defendant Dow Jones & Co. moves to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7). Defendant first argues that Plaintiff’s claim for libel must be dismissed because Plaintiff fails to plead that the subject article’s reporting regarding various investigations into Plaintiff’s family business was “materially false” and therefore does not give rise to a cause of action for libel. Defendant argues that, on this point, Plaintiff does not deny the existence of the Belgian, French and Swiss investigations into his family business. Defendant further argues that the statements about the detentions of Ali’s wife and driver and the statements about Ali’s Egyptian conviction (in absentia) are “substantially” and “concededly” true and that these statements are not “of and concerning” Plaintiff, and, therefore are not actionable.

Defendant further argues that the second cause of action for defamation by implication should be dismissed because Plaintiff fails to make a “rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference.” (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 37-38 [1st Dept 2014].)

Lastly, Defendant argues that Plaintiff is a limited purpose public figure, and as such Plaintiff must allege facts sufficient to show that Defendant acted with actual malice when it published the subject article. Defendant argues that Plaintiff has failed to allege sufficient facts to establish Defendant's actual malice.

In opposition to the instant motion, Plaintiff first argues that the libel claim should not be dismissed. Plaintiff argues that while he does not dispute the existence of some of the investigations, he disputes various details about things that have occurred within the investigations. In addition, Plaintiff alleges that he does in fact plead that the statement that he is being investigated by the U.S. Immigration and Customs Enforcement ("ICE") "in connection with the trade in ISIS-looted antiquities" is false. (*See* Am. Compl. ¶ 108 [c].)

Plaintiff further argues that the statements concerning Ali's Egyptian conviction and the detentions of Ali's wife and driver give rise to claims for libel. Plaintiff argues that while the detentions and conviction did happen, Defendant misstated or omitted various important details about these events that make the statements materially false. Plaintiff further argues that these statements are "of and concerning him."

Plaintiff further argues that the claim for defamation by implication cannot be dismissed. Plaintiff argues that the submission of his survey—showing various negative opinions WJS subscribers have of him after reading the article—demonstrates that there is at least a material issue of fact that the article is defamatory by implication. Plaintiff further argues that the article's headlines and sub-headlines endorse defamatory inferences and are not fair indices of the articles' content. Plaintiff further argues that the articles' layouts—namely the presence of certain pictures in proximity to one another—endorse defamatory inferences. Plaintiff argues that the discussion of law enforcement investigations also creates unfair defamatory inferences. Plaintiff also argues that the description of Plaintiff's business establishment endorses a defamatory inference.

Plaintiff lastly argues that he is not a limited purpose public figure, and that he is a private individual. As such, Plaintiff argues that the standard of gross irresponsibility—as enunciated in *Chapadeau v Utica Observer-Dispatch* (38 NY2d 196 [1975])—should be applied to him. Plaintiff argues that even if he is found to be a limited purpose public figure, he has still alleged sufficient facts to satisfy the pleading standard for actual malice—that Defendant made these statements knowing they were false or with reckless disregard.

In reply, Defendant reiterates the same arguments and argues that Plaintiff inappropriately seeks to point to new statements as giving rise to defamation that were not specified in the complaint.³

DISCUSSION

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, "the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201-02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008].) Thus, "a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)

When considering a CPLR 3211 (a) (1) motion to dismiss, where a defense is founded upon documentary evidence, dismissal "is only appropriate where the documentary evidence presented conclusively establishes a defense to the plaintiff's claims as a matter of law." (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 626-27 [1st Dept 2017] [internal citations omitted].)

"The documents submitted must be explicit and unambiguous. In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences. However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence."

³ To the extent that Plaintiff seeks to raise new theories of liability in his opposition papers, the Court rejects this attempt and will not consider new theories of liability that have not been alleged in the complaint with sufficient particularity pursuant to CPLR 3016 (a).

(Id.)

Defamation must be pled with sufficient particularity to withstand a motion to dismiss. Pursuant to CPLR 3016 (a), “[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally.” (See also *Three Amigos SJJ Rest., Inc. v CBS News Inc.*, 132 AD3d 82, 92 n 1 [1st Dept 2015].)

“Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance.” (*Aronson v Wiersma*, 65 NY2d 592, 593 [1985].) “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.” (Id.; *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 250 [1991] [“It has long been our standard in defamation actions to read published articles in context to test their effect on the average reader, not to isolate particular phrases but to consider the publication as a whole.”].)

I. Libel

Defamation is “the making of a false statement that ‘tends to expose the plaintiff to public 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.’” (*Manfredonia v Weiss*, 37 AD3d 286, 286 [1st Dept 2007], quoting *Sydney v. MacFadden Newspaper Publ. Corp.*, 242 NY 208, 211–212 [1926].) An action for defamation seeks to compensate the plaintiff for the injury to his or her reputation caused by the defendant’s written expression, which is libel, or by the latter’s oral expression, which is slander. (*Intellect Art Multimedia, Inc. v Milewski*, 24 Misc 3d 1248(A) [Sup Ct, NY County 2009] [Gische, J.]; *Idema v Wager*, 120 F Supp 2d 361, 365 [SDNY 2000], *affd*, 29 Fed Appx 676 [2d Cir 2002].)

To state a claim for defamation, a plaintiff must allege: (1) a false statement that is (2) published to a third party without privilege or authorization (3) constituting fault as judged by, at a minimum, a negligence standard and that (4) causes special harm, unless the statement constitutes defamation per se (in which case damages are presumed). (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]; *Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014]; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999].) There are four

categories of statements that constitute defamation per se: “(1) statements charging the plaintiff with a serious crime; (2) statements that tend to injure the plaintiff in her trade, business or profession; (3) statements that impute to the plaintiff a ‘loathsome disease’; and (4) statements that impute unchastity to a woman.” (*Nolan v State*, 158 AD3d 186, 195 [1st Dept 2018].)

Plaintiff alleges four separate false statements of fact as each giving rise to a claim for libel. The Court will review each of these allegedly false statements of fact in turn.

A. Statements re Ali’s Driver

The complaint states:

“The Article states that Ali’s driver was arrested immediately after a search of his car turned up an oil lamp for which provenance documentation could not be produced. In fact, the driver was not arrested and went home after the vehicle search concluded.”

(Am. Compl. ¶ 106 [a].)

This statement appears to relate to the following opening paragraphs of the article:

“In early March, Swiss law-enforcement officials pulled over a vehicle on a Geneva road and, after a search, discovered an ancient oil lamp, people familiar with the matter say. When the driver failed to provide documentation proving the object’s provenance to the officers’ satisfaction, he was arrested on suspicion of evading value-added taxes, these people say.

The arrest accelerated an investigation that authorities hope can shed light on one of the art world’s best-kept secrets: how ancient objects plundered in the battle zones of the Middle East end up in posh art collections thousands of miles away.

The driver, who hasn’t been identified publicly or charged, works for Ali Aboutaam, the elder brother of one of the most storied families in the international antiquities business, which owns galleries off New York’s Madison Avenue and in Geneva, according to Swiss authorities.

The Swiss say they already had the driver under surveillance when they made the stop, and that it was merely a step in a broader investigation of Mr. Aboutaam and his brother Hicham into whether they have handled Syrian and Iraqi objects looted under the auspices of the extremist group Islamic State, or ISIS.

...

After his arrest in Geneva, the driver told investigators that he had traveled several times to New York's John F. Kennedy International Airport, carrying small antiquities in his hand luggage, and that a person working with the Aboutaams was there to greet him, according to the people familiar with the probe.

'The situation involving Ali Aboutaam's driver ... pertains to the local VAT [value-added tax] and is unrelated to any matters relating to alleged looting,' their lawyer, Mr. [Jeremy H.] Temkin, said."

(Online Article at 1-4 of 6.)

In moving to dismiss, Defendant argues that although Ali's driver was not arrested immediately after the search of the car, he was in fact subsequently arrested and that Plaintiff does not challenge that this subsequent arrest occurred. (Memo in Supp. at 7; Oral Arg. Tr. at 4:13-5:04.) Defendant argues that the article makes no mention of when Ali's driver was arrested but only that he was arrested sometime after his vehicle was searched. As such, Defendant argues that its reporting on the search and arrest of Ali's driver are substantially true and therefore non-actionable.

"To satisfy the falsity element of a defamation claim, plaintiff must allege that the complained of statement is 'substantially false.' If an allegedly defamatory statement is 'substantially true,' a claim of libel is legally insufficient and should be dismissed." (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 94 [1st Dept 2015] [internal quotation marks and emendation omitted].) "A statement is substantially true if the statement would not have a different effect on the mind of the reader from that which the pleaded truth would have produced." (*Id.* [internal quotation marks and emendation omitted].) "[W]hen the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done." (*Greenberg v Spitzer*, 155 AD3d 27, 52 [2d Dept 2017], quoting *Cafferty v S. Tier*

Pub. Co., 226 NY 87, 93 [1919].) As the Second Circuit explains, the substantial truth standard is based on the “underlying purposes of defamation law . . . that the ‘libel law is not a system of technicalities, but reasonable regulations whereby the public may be furnished news and information, but not false stories about any one.’ This system of ‘reasonable regulation’ would be damaged by an overly technical or exacting conception of truth in publication.” (*Tannerite Sports, LLC v NBCUniversal News Group*, 864 F3d 236, 243 [2d Cir 2017], quoting *Cafferty v S. Tier Pub. Co.*, 226 NY 87, 93 [1919].)

The thrust of this portion of the article is that Swiss law-enforcement stopped the driver and found the ancient lamp as part of a larger investigation of Plaintiff’s family business and that the finding of an ancient lamp accelerated said investigation. Notably, the complaint does not allege that the arrest was completely unrelated to the previous search of the driver’s car.

That a driver employed by Plaintiff’s brother may have been released from a brief detention after the search—rather than being arrested immediately—but was thereafter arrested would not by itself change whether the reader draws an evil opinion of Plaintiff after reading the article as a whole. (*See Greenberg v Spitzer*, 155 AD3d 27, 52 [2d Dept 2017] [holding that “statement that the SEC and the DOJ had brought claims against [plaintiff] could not have produced any discernibly different impact on readers than the “pleaded truth” that only the SEC had brought such charges”].) Any imprecision about the timing of the driver’s arrest relates to a minor detail of what is a substantially truthful reporting about the search and arrest of Ali’s driver. (*See Sprecher v Dow Jones and Co., Inc.*, 88 AD2d 550, 551-52 [1st Dept 1982], *affd*, 58 NY2d 862 [1983] [“The omission of relatively minor details in an otherwise basically accurate account is not actionable.”] [internal quotation marks and emendation omitted]; *Udell v NYP Holdings, Inc.*, 169 AD3d 954 [2d Dept 2019] [“A libel action will fail even where a substantially true statement contains minor inaccuracies.”].)⁴

⁴ This Court rejects Plaintiff’s argument that substantial truth is an affirmative defense that cannot be raised on a pre-answer motion. To the extent that *Garcia v Puccio*, (17 AD3d 199, 201 [1st Dept 2005]) stood for such a proposition, as Plaintiff contends, the First Department has overruled *Garcia* in *Franklin*, stating “it is well settled in New York that an alleged libel is not actionable if the published statement could have produced no worse an effect on the mind of a reader than the truth pertinent to the allegation.” (135 AD3d at 94 [internal quotation marks omitted]; *see also Tannerite Sports, LLC*, 864 F3d 236, 246-47 [distinguishing *Garcia*]; *Abbitt v Carrube*, 159 AD3d 408, 409 [1st Dept 2018] [affirming dismissal of libel cause of action, in hybrid Article 78-plenary action, on grounds that alleged libelous statement was substantially true].)

Accordingly, reading this portion of the article in the context of the whole article, the Court finds that the article's allegedly inaccurate reporting that Ali's driver was immediately arrested at the scene does not give rise to a claim for libel.

B. Arrest of Ali's Wife

The complaint states:

"The Article states that Ali's wife was arrested and detained because she failed to 'produce the proper documentation of ownership and origin for some objects' she had removed from a warehouse at the Geneva free ports. In fact, the detention occurred after Ali's wife moved objects from her own storage facility—not located at the Geneva free ports—and declined to respond to questions about where she had relocated it. She was later released and was not charged with any wrongdoing. The Article's false assertion that she was detained for "failing to produce the proper documentation of ownership and origin" for antiquities falsely suggested—in the context of an article about alleged ties between the Aboutaam family and ISIS-looted objects—that the detention was the result of a failure to prove that the objects in question had not been looted by ISIS. In reality, the objects in question had been in the storage unit from which Ali's wife moved them since before the outbreak of the present conflict in Syria."

(Am. Compl. ¶ 108 [b].)

Plaintiff appears to be referring to the following paragraphs in the article:

"In Switzerland, owners of ancient art are required by law to be able to document the legitimate origin of their goods.

Authorities in Switzerland were interested in the Aboutaam family even before the driver's arrest in March, and had already placed Ali Aboutaam's wife under surveillance, people familiar with the matter said. After the March car search, law-enforcement officials secretly watched as the wife, Biliana Voden Aboutaam, moved antiquities out of storage at the Geneva free ports—a maze of armored warehouses in the city's industrial zone where people can legitimately store high-value items without having to pay tax on them, these people said.

Ms. Aboutaam was detained in early March for around two weeks after also failing to produce the proper documentation of ownership and origin for some objects. She was ultimately released without being charged.

...

The situation involving Ali Aboutaam's ... wife pertains to the local VAT and is unrelated to any matters relating to alleged looting,' their lawyer, Mr. Temkin, said."

(Ex. B [Online Article].)

Like the statement above about the arrest of Ali's driver, this portion of the article serves to illustrate how certain authorities—here Swiss authorities—have been investigating the Aboutaams in relation to their potentially trading antiquities looted by ISIS.

To be clear, Plaintiff does not challenge the article's factual assertions that his sister-in-law was surveilled and detained—he merely challenges the location of the surveillance and the precise reason for the detention. Whether Plaintiff's sister-in-law moved the items from Geneva free ports or from her own storage facility (as claimed by Plaintiff) is but a minor detail of this portion's substantially truthful reporting that Swiss authorities surveilled her as she moved these objects. Whether Plaintiff's sister-in-law was detained for refusing to answer questions or failing to provide documentation—essentially, failing to provide information—is a minor detail in the article's substantially truthful report about the detention of Plaintiff's sister-in-law by Swiss authorities.

Accordingly, reading this portion of the article in the context of the whole article, this Court finds that the article's allegedly inaccurate reporting concerning the aforesaid details about the location of the surveillance and the precise reason for detention of Plaintiff's sister-in-law by Swiss authorities does not give rise to a claim for libel.

C. ICE Investigation

The complaint alleges:

“The Article falsely states that Plaintiff is being investigated by U.S. Immigration and Customs Enforcement in connection with the trade in ISIS-looted antiquities.”

(Am. Compl. ¶ 108 [c].)

This allegation of libel relates to the following paragraphs of the article that appear immediately after the paragraphs discussing the Swiss investigation (reproduced *supra*):

“In separate investigations, law enforcement in Belgium and security services in France are also looking at the brothers in connection with the ISIS looting, officials in these countries say.

The U.S. Immigration and Customs Enforcement, or ICE, is scrutinizing the Aboutaam brothers as part of an investigation into a number of U.S.-based antiquities dealers to determine whether they trafficked in looted material, according to people familiar with the matter.

Neither of the Aboutaam brothers has been charged with any wrongdoing related to these investigations. A lawyer representing the family company, Phoenix Ancient ArtSA, said it ‘has never knowingly purchased or sold any looted items, let alone items looted by ISIS.’”

(Online Article at 2 of 6 [emphasis added].)

Defendant points out that, unlike the above paragraphs discussing investigations that particularly relate to items being potentially looted by ISIS, the paragraph concerning the U.S. Immigration and Customs Enforcement (“ICE”) investigation makes no mention that the potentially “looted material” was looted by ISIS. Defendant argues that even if Plaintiff and his family business were not a subject of ICE’s investigation, the “‘gist’ or ‘sting’” of the article is “not made worse by a report of a fourth investigation, even if it were erroneous (which it is not).” (Memo in Supp. at 5-6.) Furthermore, Defendant argues that its reporting of the ICE investigation—like all of the other investigations—is absolutely privileged

as “a fair and accurate report” of an official proceeding pursuant to New York State Civil Rights Law § 74.

Plaintiff here argues that the amended complaint does, in fact, challenge the Article’s claim that Plaintiff is under investigation by ICE, regardless of whether the investigation has a connection to ISIS. Plaintiff argues that the article’s reporting on an investigation by ICE into Plaintiff and his brother does have significant defamatory impact on Plaintiff because Plaintiff lives and runs his gallery in New York. Plaintiff further argues that it is inappropriate to dismiss his libel cause of action at the pleading stage, pursuant to the “incremental harm doctrine,” because measuring the defamatory impact of the statement requires development on the record. In addition, Plaintiff argues that the issue of whether there was an investigation into Plaintiff by ICE cannot be determined on a motion to dismiss because this is a factual question and the defense of truth is one that can only be raised in an answer. Furthermore, Plaintiff contends that Civil Rights Law § 74 has been held to be inapplicable “to a statement by an individual police officer concerning an investigation which he was conducting”—precisely the category of statements at issue here.” (Memo in Opp. at 16, quoting *Law Firm of Daniel P. Foster, P.C. v Turner Broad. Sys. Inc.*, 844 F2d 955, 960-61 [2d Cir 1988].) Plaintiff further argues that, even if Civil Rights Law § 74 does apply, the libel claim relating to the ICE investigation must still stand because section 74 “does not allow newspapers to attribute defamatory statements to unnamed official sources, and then assert *ipse dixit* that its own reporting is accurate and therefore privileged.” (Memo in Opp. at 16-17.)

In Reply, Defendant argues that Plaintiff cannot dispute that he was the subject of an ICE investigation because recent court documents show that he was investigated by ICE-HSI Special Agent Jean Paul Labbat in 2016 and 2017 for allegedly facilitating the sale of a looted Lebanese Bull’s Head statue. (Memo in Reply at 4.) Defendant further argues that pursuant to Special Agent Labbat’s investigation and an affidavit he provided, the District Attorney for New York County (“DANY”) obtained a warrant to seize six objects as well as documents from Plaintiff’s New York gallery on belief that they constitute evidence that tends to “demonstrate that the crime of Criminal Possession of Stolen Property in the Second Degree was committed.” (Memo in Reply at 4.) Defendant argues that this seizure “unquestionably resulted from investigations by U.S. authorities into whether Plaintiff traded looted antiquities, just as the Article says.” (Id. at 4-5.)

Here, the article only discusses the ICE investigation about looted items in the context of a larger article about investigations related to the trade of ISIS-

looted items, but the article does not state that the ICE investigation specifically relates to items looted by ISIS—only that the items were potentially looted. In addition, the statement about the ICE investigation is followed by a statement from Plaintiff’s family lawyer that Plaintiff’s family business “has never knowingly purchased or sold any looted items, let alone items looted by ISIS”, further highlighting the distinction between the European investigations for ISIS-looted items and the ICE investigation regarding items that were just plain looted. Accordingly, to the extent that Plaintiff alleges that these paragraphs create the false impression that the items subject to ICE investigation are connected to ISIS, this fails to state a cause of action for libel.

However, Plaintiff is also alleging a libel claim based on the premise that Defendant falsely reported that he and his brother were “scrutinized” in *any* investigation by ICE at the time of the article’s reporting. (*See* Memo in Opp. at 14.) Although Plaintiff does not contest that his family business was investigated by law enforcement in three other countries—Switzerland, Belgium, and France—the reporting of a fourth investigation by ICE has significant defamatory potential for Plaintiff given that Plaintiff lives in and operates a gallery in New York, and because many of the WSJ readers are based in New York and might accord greater weight to an investigation by a US agency.

Assuming on this motion to dismiss that such a statement concerning the existence of an ICE investigation would be defamatory if false, this Court must analyze whether the reporting of this alleged defamatory fact was privileged pursuant to Civil Rights Law § 74.⁵

Section 74 of the Civil Rights Law 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, legislative proceeding or other official proceeding.” (Id.) “For a report to be characterized as ‘fair and true’ within the meaning of the statute, thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate.” (*Holy Spirit Ass’n for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 [1979].) “A fair and true report admits of

⁵ This Court rejects Plaintiff’s argument that Section 74’s privilege may not be raised on a pre-answer motion. (*Greenberg v Spitzer*, 155 AD3d 27, 45 [2d Dept 2017] [holding that documentary evidence, pursuant to CPLR 3211 (a) (1), may be offered for “the specific purpose of determining whether the alleged defamatory statement constitutes a “fair and true” report of such proceeding” pursuant to Section 74]; *GS Plásticos Limitada v Bur. Veritas*, 84 AD3d 518, 518 [1st Dept 2011] [affirming dismissal of counterclaim based upon application of Section 74].)

some liberality; the exact words of every proceeding need not be given if the substance be substantially stated.” (Id. [internal quotation marks and emendation omitted].)

As one federal court explains:

“Section 74 has been held to protect reports of, inter alia, an investigation of the New York State Commission on Quality of Care for the Mentally Disabled regarding the finances of a Brooklyn psychiatric facility, *Easton*, 1991 WL 280688; an investigation by the New York City Department of Consumer Affairs into the practices of air conditioner repair shops, *Freeze Right Refrigeration*, 101 A.D.2d 175, 475 N.Y.S.2d 383; a district attorney's investigation, *Baumann v. Newspaper Enterprises, Inc.*, 270 A.D. 825, 60 N.Y.S.2d 185 (1946); an internal governmental investigation of the Civil Works Administration, *Farrell v. New York Evening Post, Inc.*, 167 Misc. 412, 3 N.Y.S.2d 1018 (N.Y.Sup.Ct.1938); and an FBI investigation into activities of alleged Communists, *Law Firm of Daniel P. Foster, P.C. v. Turner Broadcasting System d/b/a CNN*, 844 F.2d 955 (2d Cir.1988). It has been held inapplicable, on the other hand, to a statement by an individual police officer concerning an investigation which he was conducting. (*Kelley v. Hearst Corp.*, 2 A.D.2d 480, 483-84, 157 N.Y.S.2d 498, 502 (3d Dep't) (citing *Nunnally v. Press Publishing Co.*, 110 A.D. 10, 12-13, 96 N.Y.S. 1042, 1044 (2d Dep't 1905)), amended, 3 A.D.2d 610, 158 N.Y.S.2d 781 (3d Dep't 1956), appeal denied, 3 A.D.2d 963, 163 N.Y.S.2d 937 (3d Dep't 1957).”

(*Test Masters Educ. Services, Inc. v NYP Holdings, Inc.*, 603 F Supp 2d 584, 588 [SDNY 2009].) As this same federal court explained, the investigation itself is the “official proceeding”—not any documents or official press releases emanating from the investigation. (Id.)

With regard to the ICE investigation, Defendant submits a number of documents from the District Attorney's Office for New York County (“DANY”) that concern an investigation that that office undertook that eventually led to the seizure of a statue of a bull's head believed to have been stolen from the Temple of Eshmun in Lebanon in 1981 during the Lebanese civil war (the “Bull's Head”).

The most important document among these from the DANY is a sixty-three (63) page application dated September 22, 2017, by Assistant District Attorney Matthew Bogdanos (“ADA Bogdanos”) made to the New York State Supreme

Court, for an order pursuant to N.Y. Penal Law § 450.10 and N.Y. Criminal Procedure Law §690.55 authorizing the transfer of the Bull's Head back to Lebanon.

According to ADA Bogdanos' application, the Aboutaams became the exclusive dealers of the Bull's Head—among other items—pursuant to a 2006 agreement with the prior owners Lynda and William Beierwaltes (collectively, “the Beierwaltes”), who were professional antiquities collectors and dealers. (Affirm. in Supp., Ex. 14 [Repatriation Application] ¶¶ 42-44.) ADA Bogdanos states that as the Aboutaams were attempting to sell the Bull's Head, Plaintiff Hicham Aboutaam sought documentation from the Beierwaltes to verify the item's provenance. (Id. ¶¶ 60-61.) According to the application, the Beierwaltes only provided Plaintiff with a single invoice from a disgraced antiquities dealer, which Mr. Bogdanos describes as only stating that the Bull's Head was an “*authentic* antiquity and that it was a *valuable* antiquity” but not stating “whether it was a *lawful* antiquity.” (Id. [emphasis in original].) ADA Bogdanos describes Plaintiff's communications with the Beierwaltes as “reveal[ing] his own skepticism about the provenance being provided by the Beierwaltes.” (Id.)

According to this application, an individual named Michael Steinhardt expressed interest in the Bull's Head in 2008 to the Aboutaams, and the Bull's Head was ultimately sold to Mr. Steinhardt in 2010 through Plaintiff's gallery for \$700,000—with three other pieces for a total sale price of \$1.6 million. (Met Warrant App ¶¶ 54-58.) Mr. Steinhardt then had Plaintiff arrange for the Bull's Head to be loaned to the Metropolitan Museum of Art (“the Met”). (Id.)

Around April 2014, the Curator in Charge of the Met's Greek and Roman Department, noticed that the Bull's Head (C-17) on loan from Mr. Steinhardt appeared to be the same Bull's Head appearing in a picture from a 2005 publication detailing various antiquities stolen from the Temple of Eshmun in Lebanon, during the Lebanese civil war in 1981. (Met Warrant App ¶ 89.) This curator notified the Plaintiff of the “potential problem,” and Plaintiff notified Mr. Steinhardt and the Beierwaltes. As ADA Bogdanos described, “[c]learly recognizing the problem, the three parties (Steinhardt, Aboutaam, and the Beierwaltes) agreed to unwind the original sale, with ‘ownership’ of the Bull's Head (C-17) going back to the Beierwaltes from Mr. Steinhardt.” (Id. 90.) However, according to ADA Bogdanos, neither Steinhardt, Plaintiff, the Beierwaltes, or the Met notified the Republic of Lebanon about the “potential problem”—even though Lebanon was the potential rightful owner of the Bull's Head as cultural property under international law—until two years later when the

Met (who had kept the Bull's Head in its possession) did so over the objection of the Beierwaltes. (Id. ¶¶ 90-94.)

As ADA Bogdanos details, the Republic of Lebanon requested the U.S. Government's assistance in repatriating the Bull's Head, and around February 2017 the U.S. Attorney's Office for the Eastern District of New York referred the matter to the DANY "as part of our larger existing investigation." (Id. ¶ 95.) Pursuant to the DANY's investigation, ADA Bogdanos met with counsel for the Beierwaltes on May 26, 2017, and informed them "that this Office's preliminary investigation revealed, in my view, overwhelming evidence that the Bull's Head (C-17) was stolen property in New York County. Stressing that there were still investigative steps to be taken to be absolutely sure, I informed them that it appeared likely that I would eventually be ethically bound to apply for a judicially authorized warrant to seize the Bull's Head (C-17)." (Id. ¶ 95.)

In making his application for repatriation, ADA Bogdanos was particularly critical of the Beierwaltes, explaining that under this state's Penal Law § 165.55 (2) "a person in the business of buying, selling or otherwise dealing in property is presumed to know that property was stolen if he did not ascertain by reasonable inquiry that the person from whom he obtained it had a legal right to possess it." (Repatriation Application ¶ 114.) ADA Bogdanos made clear that as longtime art dealers, the Beierwaltes were clearly in the business of selling antiquities and, pursuant to the statute, it can be presumed that they knew the Bull's Head was stolen.

Eventually, Hon. Daniel P. Fitzgerald, sitting in this county's Supreme Court – Criminal Term, signed a warrant for the seizure of the Bull's Head from the Met on July 6, 2017. In signing the warrant, Justice Fitzgerald noted that the warrant had been signed based on a showing of "reasonable cause" having been established by "affidavit having been made this day before me by Special Agent John Paul Labbat Shield # 2820, of the Department of Homeland Security-Homeland Security Investigations (DHS-HSI)." (Affirm in Supp., Ex. 14 [Fitzgerald Aff.].) Based on emails submitted as part of the warrant application, Special Agent Labbat appears to have been part of the investigation since March 2017.

The Bull's Head was eventually repatriated to Lebanon later that year. However, in a letter submitted to Justice Fitzgerald, ADA Bogdanos explained that "although the Bull's Head shall be released without the Beierwaltes or any other individuals being the subject of criminal charges, the investigation continues." (Affirm in Supp., Ex. 15 [Letter to Hon. Fitzgerald].) ADA Bogdanos further

explained that another one of the objects sold by the Beierwaltes to Mr. Steinhardt—in 2015—had been subject to seizure by warrant, and that the DANY intended to have this item repatriated to Lebanon. (Id.)

Thereafter, Hon. Jill Konviser, also sitting in this county's Supreme Court – Criminal Term, signed a warrant dated January 3, 2018 for the seizure of six objects and documents from Plaintiff's gallery. The warrant clearly states that it was issued based on “[p]roof by affidavit having been made this day before me by Special Agent John Paul Labbat Shield # 2820, of the Department of Homeland Security-Homeland Security Investigations (DHS-HIS).” (Affirm. in Supp., Ex. 17 [Konviser Warrant].) The warrant further noted “that the above-described property constitutes evidence that tends to demonstrate that the crime of Criminal Possession of Stolen Property in the Second Degree was committed.” (Id.)

Reviewing these court documents, the evidence before this Court clearly shows that, at the time that this article was published, ICE—principally through Special Agent Labbat—was investigating, with ADA Bogdanos, whether the Bull's Head that had been sold through Plaintiff's gallery was stolen property and subject to repatriation to its home country. The record further indicates that based on Special Agent Labbat's work an additional warrant issued for the seizure of other potentially stolen property and related documents from Plaintiff's gallery.

Accordingly, this Court finds that the aforesaid statement that at the time of the article's publication, ICE was “scrutinizing the Aboutaam brothers as part of an investigation into a number of U.S.-based antiquities dealers to determine whether they trafficked in looted material” was a substantially accurate report of a government investigation and therefore protected from defamation liability pursuant to Civil Rights Law § 74.

Lastly, this Court rejects Plaintiff's argument that Section 74 does not apply to statements concerning law enforcement investigations like the instant one. In fact, the case Plaintiff relies on for this argument, *Law Firm of Daniel P. Foster, P.C. v Turner Broad. Sys. Inc.*, (844 F2d 955 [2d Cir 1988]), actually found that Section 74 applied to a news organization's publication of a statement by the head of the FBI's New York office concerning the execution of a warrant. As discussed above, Section 74 has been applied to statements about various types of official investigations—whether by the FBI, a district attorney, or the New York City

Department of Consumer Affairs.⁶ As such, it is clear that the ICE investigation—where Special Agent Labbat was working with the DANY—qualifies as “an official proceeding” within the meaning of Civil Rights Law § 74.

Accordingly, reading this portion of the article in the context of the whole article, the complaint fails to state a claim for libel based on the paragraphs concerning Plaintiff and his brother being investigated by ICE, as this paragraph was a substantially accurate report of an official proceeding protected by Civil Rights Law § 74.

D. Plaintiff's Gallery

The complaint states that there is a cause of action for libel because:

“The Article describes Plaintiffs New York gallery as a ‘discreetly lit’ place ‘where around 24 unlabeled objects are displayed with prices that are in the hundreds of thousands of dollars.’ In reality, the objects displayed at the gallery are always labeled, and many are not priced in the hundreds of thousands of dollars. The gallery always displays more than 24 objects.”

(Am. Comp. ¶ 108 [d].)

This allegation appears to relate to the following paragraphs in the article:

“The Aboutaams’ U.S. gallery is located on a street off Madison Avenue. Visitors are buzzed into a discreetly lit stone-floored room where around 24 unlabeled objects are displayed with prices that are in the hundreds of thousands of dollars.”

(Online Article ¶ at 5 of 6.)

This statement is not defamatory on its face. Although Plaintiff may disagree with these statements regarding his gallery’s lighting and the labeling, pricing and number of artifacts displayed in his gallery, these statements are not

⁶ Although Plaintiff cites *Law Firm of Daniel P. Foster, P.C.*, for the proposition that Section 74 “has been held inapplicable . . . to a statement by an individual police officer concerning an investigation which he was conducting,” that case cites *Kelley v Hearst Corp.*, 2 A.D.2d 480 (3d Dept 1956) for this proposition. Here, the article’s substantial accuracy is proven by court documents and written statements from ADA Bogdanos. (See also *Fine v ESPN, Inc.*, 11 F Supp 3d 209, 215 [NDNY 2014] [casting doubt on *Kelley*].)

the type to cause “an evil opinion” of him in the minds of the readers. They simply provide a description of Plaintiff’s gallery and are but minor details that do not produce a different effect on the mind of the reader than the pleaded truth. (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 94 [1st Dept 2015]; *Sprecher v Dow Jones and Co., Inc.*, 88 AD2d 550, 551-52 [1st Dept 1982], *affd*, 58 NY2d 862 [1983].)

Accordingly, reading this portion of the article in the context of the whole article, the complaint fails to state a claim for libel based on the aforesaid paragraph describing Plaintiff’s gallery.

II. Defamation by Implication

“‘Defamation by implication’ is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements.” (*Armstrong v Simon & Schuster, Inc.*, 85 NY2d 373, 380-81 [1995].) Although defamation by implication was first recognized as a cause of action by the Court of Appeals in 1963 in *November v Time Inc.* (13 NY2d 175), the test for such a cause of action to survive a motion to dismiss was not resolved by an appellate court in this state until 2014 when the First Department did so in *Stepanov v Dow Jones & Co., Inc.* (120 AD3d 28, 37-38 [1st Dept 2014]).⁷

The *Stepanov* court held:

“To survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference. We

⁷ The *Armstrong* Court held that “[t]he choice of an appropriate test for claims of defamation by implication must therefore await another day” because it determined that the matter before it was “a case of allegedly false statements of verifiable fact” (*Armstrong v Simon & Schuster, Inc.*, 85 NY2d 373, 381 [1995].)

The *Armstrong* Court, however, stated that the case of *Memphis Publishing Co. v. Nichols* (569 SW2d 412, 420 [Tenn 1978]) was “illustrative” of the tort defamation by implication: “There, the court found an article implicitly defamatory where it truthfully reported that a woman, upon finding her husband at plaintiff’s home, shot the plaintiff, but the article neglected to state that at the time they all were at a social gathering with several other people, including plaintiff’s husband.” (*Armstrong*, 85 NY2d at 381.) The defamatory implication, of course, being that the plaintiff was having an affair with the shooter’s husband. (*Memphis Publ.*, 596 SW2d at 419.)

believe this rule strikes the appropriate balance between a plaintiff's right to recover in tort for statements that defame by implication and a defendant's First Amendment protection for publishing substantially truthful statements.”

(*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 37-38 [1st Dept 2014].)

Here, the complaint lists eight statements in the article that Plaintiff argues created a defamatory inference. In sum and substance, the plaintiff argues that, based on these eight statements, a reasonable reader would infer that Plaintiff and his family business, in fact, traded in ISIS-looted antiquities, thereby funding ISIS. Plaintiff further argues that these statements affirmatively suggest that the authors intended or endorsed such defamatory inference.

With *Stepanov*'s test in mind, this Court now reviews each of the eight statements alleged to give rise to Plaintiff's cause of action for defamation by implication.⁸

A. The Article's Headlines and Sub-Headlines

The complaint first alleges:

“The Article's headline and sub-headline, both in print and online were intended to lead readers to draw the false inference that Plaintiff is being investigated for direct participation in looting by the Islamic State, and would likely cause a reasonable reader to draw such an inference. Indeed, the online comments concerning the Article posted publicly on the Journal's website make clear that many readers have already concluded that Plaintiff supports ISIS, which is utterly false.”

(Am. Comp. ¶ 110 [a].)

The online article originally had the headline “Prominent Art Family Entangled in Investigations of Looted Antiquities” and the sub-headline “Long-time dealers Ali and Hicham Aboutaam are under scrutiny as authorities in multiple countries look into how Islamic State finances itself by trafficking in ancient objects.” (Affirm in Supp. Ex. 2.) According to the complaint, this online

⁸ During oral argument, counsel for each side stated that Plaintiff's claims for defamation by implication are the crux issue on the instant motion. (Oral Arg. Tr. at 12:23-13:11, 25:12-26:26.)

headline was later changed to “Prominent Art Family Entangled in ISIS Antiquities-Looting Investigations.”

The print article has the headline “Antiquities Dealers Probed” and the sub-headline “Ali and Hicham Aboutaam are under scrutiny as authorities in multiple countries look into looting by Islamic State.” (Affirm in Supp., Ex. 3 [Print Article].)

During oral argument, the Court asked Plaintiff’s counsel what specifically was meant by the amended complaint’s assertion that the article caused the reader to infer that Plaintiff is being investigated for “direct participation in looting by the Islamic State.” (Oral Arg. Tr. at 42:13-44:21.) Plaintiff’s counsel stated that he was not arguing that “a reasonable reader would think my client is in ISIS or went to these locations and looted it himself.” (Id.) Rather, Plaintiff’s counsel argued that the article caused a reasonable reader to think “[t]hat [Plaintiff] financed ISIS and all of their crimes by selling antiquities in the Western market.” (Id.)

As the case *Schermerhorn v Rosenberg*, (73 AD2d 276, 286-87 [2d Dept 1980]), quoted by Plaintiff (Memo in Opp. at 5), explains:

“The rule in this State is that defamatory headlines are actionable though the matter following is not, unless they fairly indicate the substance of the matter to which they refer, and unless they are a fair index of the matter contained in a truthful report. To determine whether the headline is a fair index of the article with which it appears, both must be considered together. If the headline is a fair index of an accurate article, it is not actionable. If it is not a fair index, then the headline must be examined independently to determine whether it is actionable under general principles of libel. That the defamatory meaning of the headline may be dispelled by a reading of the entire article is of no avail to the publisher. A headline is often all that is read by the casual reader and therefore separately carries a potential for injury as great as any other false publication.”

(*Schermerhorn v Rosenberg*, 73 AD2d 276, 286-87 [2d Dept 1980].) Of course, newspapers are allowed editorial judgment and discretion in constructing their headlines: “A newspaper need not choose the most delicate word available in constructing its headline; it is permitted some drama in grabbing its reader’s attention, so long as the headline remains a fair index of what is accurately reported below.” (*Test Masters Educ. Services, Inc. v NYP Holdings, Inc.*, 603 F Supp 2d 584, 589 [SDNY 2009].)

As this Court has already noted, the article here is reporting, in sum and substance, that Plaintiff, his brother non-party Ali Aboutam, and others involved in their family businesses are being investigated by law enforcement in multiple countries concerning whether they traded in antiquities that may have been looted by ISIS. Plaintiff does not challenge the substantial truth of this report that such investigations were being conducted by Swiss, Belgian and French authorities at the time of the article's publication.⁹ Although Plaintiff does challenge his being investigated by ICE (for trading in allegedly looted antiquities with no apparent connection to ISIS), this Court has found that the article's report on that investigation is substantially accurate and therefore protected by Civil Rights Law § 74. As such, reading these headlines and sub-headlines against the matter contained in the article, this Court finds that they are fair indices and therefore non-actionable.

The article does not impart any inference of guilt. It only raises the question of whether Plaintiff and his brother have been trading in ISIS-looted antiquities. It does not accuse them of doing such. (*See Akpinar v Moran*, 83 AD3d 458, 459 [1st Dept 2011] [holding that a reasonable reader would understand that the statements in an article about a pending criminal investigation into a mortgage fraud and a civil lawsuit in connection with the fraud in which plaintiff was named as a defendant were "mere allegations to be investigated rather than as facts"].)¹⁰

In addition, although some readers may believe that these investigations into Plaintiff's family business indicate Plaintiff is guilty, that belief is not because of the headlines or because the language of the article as a whole can be reasonably read to impart such an inference. Rather, it is only because some readers may

⁹ To be clear, although Plaintiff's counsel now states that "direct participation in looting by the Islamic State" means only that Plaintiff "financed ISIS and all of their crimes by selling antiquities in the Western market," the article clearly states that Plaintiff's family business is under investigation for potentially trading in ISIS-looted antiquities. Plaintiff has not alleged in the complaint that the article falsely reported that these investigations concerned whether his family business was potentially trading ISIS-looted antiquities—and that the investigations concerned another subject. Because Plaintiff does not specifically allege in the complaint that his family business was not being investigated for potentially trading in ISIS-looted antiquities (in Belgium, France and Switzerland), Plaintiff cannot now seek to hold Defendant liable for allegedly creating the defamatory inference that he was so investigated. To the extent Plaintiff seeks to raise a new theory of liability at oral argument, the Court rejects this attempt. Such a theory should have been plead with particularity in the complaint pursuant to CPLR 3016 (a).

¹⁰ It also bears noting that, in comparison with the instant headlines, the headline at issue in *Schermerhorn* was "SCHERMERHORN SAYS NDDC CAN DO WITHOUT BLACKS" when the defendant-reporter Rosenberg admitted that the plaintiff then-New York State Senator Schermerhorn told him "I want to be able to have qualified Blacks that can serve" among other statements. (73 AD2d at 279.)

believe that one would not be investigated by law enforcement in four different countries if one were not guilty. However, this Court—which must uphold the constitutional protection that one is presumed innocent until proven guilty in a court of law—will not endorse such a reading as reasonable. (*See Jacobus v Trump*, 55 Misc 3d 470, 484 [Sup Ct, NY County 2017] [Jaffe, J.] “[T]hat others may infer a defamatory meaning from the statements does not render the inference reasonable under these circumstances.”), *affd*, 156 AD3d 452 [1st Dept 2017], lv to appeal denied, 31 NY3d 903 [2018]; *Martin v Hearst Corp.*, 777 F3d 546, 553 [2d Cir 2015] [“Reasonable readers understand that some people who are arrested are guilty and that others are not.”].) Comparing this case to the *Memphis Publishing Co. v. Nichols* (569 S.W.2d 412, 420 [Tenn 1978])—which the *Armstrong* court referred to as “illustrative” of the tort of defamation by implication—this article does not leave out or twist any crucial details that would fundamentally change the reader’s perception of Plaintiff and his family business.

Accordingly, reading this portion of the article in the context of the whole article, this Court finds that the headlines and sub-headlines are fair indices of the article and that, on this basis, Plaintiff fails to make a “rigorous showing” that the headlines cause the reasonable reader to infer that “Plaintiff is being investigated for direct participation in looting by the Islamic State,” and that the authors intended to impart such an inference. The Court further finds that Plaintiff fails to make a rigorous showing that this portion of the article, when read together with the other seven statements in the context of the whole article, creates a defamatory inference that Plaintiff and his family business, in fact, traded in ISIS-looted antiquities, and that the authors intended or endorsed such an inference.

B. The Layout of the Article

Plaintiff alleges that he also has a claim for defamation by implication because:

“The layout of the Article, including Defendant’s choice to prominently display a large photograph of Plaintiff next to the damaged ruins of Palmyra and a ring and gold coin linked to ISIS looting—despite the absence of any factual connection between these objects and Plaintiff—was intended to cause readers to draw the false inference that Plaintiff is involved in looting by ISIS.”

(Am. Comp. ¶ 110 [b].)

With regard to the photographs, Plaintiff here appears to be specifically complaining about the print edition where the photograph of Plaintiff and his brother abuts a photograph of the ISIS damaged ruins of Palmyra, as well as the photograph of an ancient gold ring with a carved gemstone that was “seized in a raid on the home of a top Islamic State official in Syria in 2015.” Plaintiff also seems to complain that a photograph of a gold coin linked to ISIS is printed on the next page of the print edition.

In contrast, the online edition of the article separates all of the photographs by several paragraphs.

The Court rejects this theory of defamation liability as being wholly without merit. Plaintiff would essentially hold that newspapers can be liable for defamation because they place a picture of a person too closely to a certain photograph which somehow conjures up negative emotions in the reader even though the individual’s picture and the other picture are relevant to the subject matter of the story. Such a rule has absolutely no basis in this state’s law, and such a rule would have a chilling effect on the inclusion of photographs in newspapers articles.¹¹

Again, if anything induces an “evil opinion” of Plaintiff, it is the article’s reporting that the Aboutaams are being investigated in various jurisdictions for potentially trading ISIS-looted antiquities. That readers might not presume Plaintiff innocent is not the fault of Defendant, and the decision to include certain pictures in the article cannot be the basis of finding fault with Defendant.

In addition, in arguing that the layout of the article endorses a defamatory inference, Plaintiff submits several Twitter postings that one of the contributors, Kelly Crow, published concerning the article. These tweets read as follows:

¹¹ The instant case is distinguishable from the layout in *Rejent v Liberation Publications, Inc.*, where the photograph of the plaintiff – a professional model – appeared “surrounded by innumerable other suggestive advertisements of live sex videos, telephone sex talk, erotic devices and sexual literature” without the plaintiff’s consent to the use. (197 AD2d 240, 243 [1st Dept 1994]; compare also *Ward v Klein*, 10 Misc 3d 648, 649 [Sup Ct, NY County 2005] [Richter, J.] [denying dismissal where photos of the plaintiff appeared in a documentary next to the defendant, a famous musician, boasting of his sexual exploits with numerous women and the complaint alleged that the plaintiff had an “exclusive, monogamous romantic relationship” with the defendant].) Both of these cases concern the publication of photographs of individuals who were not significant figures in the subject matter of the respective publications, and the inclusion of their photographs was arguably fortuitous. Here, Plaintiff and ISIS are both central figures in the subject matter of the article: investigations into Plaintiff’s family business potentially trading in ISIS-looted antiquities.

- “Breaking! @WSJ reveals Abouttam family under surveillance because of ties to ISIS looted antiquities. Scary details by @ benoitfaucon”
- “Jaw-dropping @wsj details tracing trail of ISIS art loot to NY by @benoitfaucon @georgikantchev”
- “Fantastic story. Authorities in three countries tracking wealthy Lebanese-Canadian family accused of looting Syrian antiquities.”
- “ISIS Is Selling Syria’s Antiquities to the West.”
- “In a jaw-dropping scoop, @wsj reveals three countries are invest[igat]ing the Aboutaam...”
- “ISIS art loot? @WSJ scoop reveals 3 countries are investigating @PhoenixAncArt for ties to militants looting Syria for art like this ring [photo below].”
- “Catching up? @WSJ scoop shows police in Europe, US following trail of #IslamicState looted-art in Syria to galleries”

(Affirm. in Opp., Ex. C [Crow Tweets].) Plaintiff argues that these above tweets show that one of the article’s contributors understood and intended the article to convey the defamatory inference that Plaintiff was financing ISIS. Defendant argues, in opposition, that these tweets were not referred to in the complaint and Plaintiff is not separately suing for the content of the tweets. Defendant thus argues that the tweets, if examined, must be read in conjunction with the article, and in such context, the tweets do not cause the article to impart a defamatory inference or establish that the author intended or endorsed that inference.

As a preliminary matter, it bears noting that Ms. Crow – the WSJ reporter who posted these tweets – was not listed as an author of the article but rather as a contributor. Nonetheless, even if Ms. Crow were listed as an author, this Court would nonetheless find that these tweets, when read in the context of the article, do not establish a rigorous showing that the language of the article as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference. Although the tweets are not written with the same careful and precise language as the article, the overwhelming message conveyed by the tweets is that the Aboutaam family business is *under investigation* for connections to ISIS-looted antiquities—not that the Aboutaams are guilty of having such connections. In addition, the tweets provide links to the article and are intended to get the reader of the tweets to read the article which provides a more nuanced discussion of the investigation than the tweets themselves.

Lastly, this Court rejects Plaintiff's attempt to sustain his complaint by submitting a survey. As a preliminary matter, there is no affidavit from an appropriately qualified expert or any other evidence to indicate that the survey is scientifically reliable. Notably, right before reading the article and answering questions, those surveyed apparently read the following statements:

"To briefly summarize, the article asserts that brothers Ali and Hicham Aboutaam are under investigation in multiple countries for possibly trafficking and selling historical artifacts that have been stolen by the Islamic State (ISIS).

The suggestion is that, through middlemen, the Aboutaam brothers purchased the stolen or looted artifacts from ISIS and transported the pieces to their art galleries in Geneva, Switzerland and New York City to put them up for sale."

(Ex. A to Complaint [Survey] at 2 [emphasis added].)

"The suggestion" in the second paragraph appears to this Court to be highly prejudicial: the survey participant is being told to interpret the article in the same way that the Plaintiff does in his complaint.

Most critically, however, this Court rejects the idea that a plaintiff should be allowed to keep his defamation lawsuit alive by simply commissioning a survey that indicates that certain people have a negative opinion of him based on the allegedly libelous article. To allow such would effectively end the rule—for such wealthy defamation plaintiffs—that it is the job of the court to determine in the first instance "[w]hether particular words are defamatory." (*Aronson v Wiersma*, 65 NY2d 592, 593 [1985].)

Accordingly, reading this portion of the article in the context of the whole article, this Court finds that Plaintiff has failed to make a "rigorous showing" that the layout of the article was intended to and did in fact cause the reasonable reader to infer that Plaintiff "is involved in looting by ISIS." The Court further finds that Plaintiff fails to make a rigorous showing that this portion of the article, when read together with the other seven statements in the context of the whole article, creates a defamatory inference that Plaintiff and his family business, in fact, traded in ISIS-looted antiquities, and that the authors intended or endorsed such an inference.

C. The Arrest of Ali's Driver and the Ancient Oil Lamp

The complaint further alleges:

“The Article contains an anecdote about the stop and search by Swiss law enforcement of a vehicle, resulting in the discovery of an ‘ancient oil lamp.’ The Article omits that the lamp belonged to a passenger in the car who had nothing to do with Plaintiff and who admitted that the lamp was his. This deliberately incomplete anecdote, appearing directly under a headline connecting Plaintiff with ISIS-looted antiquities and accompanied by a false claim that the driver was immediately arrested, was intended to cause readers to falsely infer that the oil lamp belonged to Plaintiff, Ali, and/or Phoenix and had been looted by ISIS.”

(Am. Comp. ¶ 110 [c].)

This statement appears to relate to the following opening paragraphs of the article:

“In early March, Swiss law-enforcement officials pulled over a vehicle on a Geneva road and, after a search, discovered an ancient oil lamp, people familiar with the matter say. When the driver failed to provide documentation proving the object’s provenance to the officers’ satisfaction, he was arrested on suspicion of evading value-added taxes, these people say.

The arrest accelerated an investigation that authorities hope can shed light on one of the art world’s best-kept secrets: how ancient objects plundered in the battle zones of the Middle East end up in posh art collections thousands of miles away.

The driver, who hasn’t been identified publicly or charged, works for Ali Aboutaam, the elder brother of one of the most storied families in the international antiquities business, which owns galleries off New York’s Madison Avenue and in Geneva, according to Swiss authorities.

The Swiss say they already had the driver under surveillance when they made the stop, and that it was merely a step in a broader investigation of Mr. Aboutaam and his brother Hicham into whether they have handled Syrian

and Iraqi objects looted under the auspices of the extremist group Islamic State, or ISIS.

...

After his arrest in Geneva, the driver told investigators that he had traveled several times to New York's John F. Kennedy International Airport, carrying small antiquities in his hand luggage, and that a person working with the Aboutaams was there to greet him, according to the people familiar with the probe.

'The situation involving Ali Aboutaam's driver ... pertains to the local VAT [value-added tax] and is unrelated to any matters relating to alleged looting,' their lawyer, Mr. [Jeremy H.] Temkin, said."

(Online Article at 1-4 of 6.)

Notably, although the complaint states that the passenger and alleged owner of the lamp had nothing to do *with Plaintiff*, the complaint does not allege that Ali's driver being pulled over with the oil lamp in his car was a sheer coincidence and completely unrelated *to the Aboutaam family business* of trading in antiquities. Indeed, an antiquities broker, by definition, merely facilitates a trade between a buyer and seller and never acquires title to the antiquity himself—as was the case with the sale of the Bull's Head from the Beirwaltes to Mr. Steinhardt that Plaintiff arranged. Assuming *arguendo*, as this Court must on a motion to dismiss, that the passenger was the owner of the lamp, the complaint does not, for example, dispel the idea that perhaps the passenger was being driven to Ali (as opposed to Plaintiff) for the purpose of selling the lamp to Ali, that the passenger had recently purchased the lamp from Ali and was being transported with his purchase as a courtesy, or that the owner was being driven to meet a buyer arranged by Ali. Without pleading that the lamp had absolutely no connection to the Aboutaam family business, this Court finds that the passenger's ownership of the lamp was a minor detail of the story and its omission from the story was a protected exercise of the WSJ's editorial judgment. (*See Sprecher v Dow Jones and Co., Inc.*, 88 AD2d 550, 551-52 [1st Dept 1982], *affd*, 58 NY2d 862 [1983] ["Whether or not a particular article constitutes unbalanced reporting is essentially a matter involving editorial judgment and is not actionable. The omission of relatively minor details in an otherwise basically accurate account is not actionable."] [internal quotation marks and emendation omitted].)

Again, Plaintiff does not plead that his family business was not in the process of potentially buying, selling, or brokering the trade of the subject lamp. Thus, the omission of the lamp's ownership at the time that Ali's driver was stopped does not create a defamatory inference. The omission of the lamp's ownership is not akin to the omitted details in *Memphis Publishing Co. v. Nichols* where the article truthfully reported that a woman, upon finding her husband at plaintiff's home, shot the plaintiff, but the article neglected to state that at the time they all were at a social gathering with several other people, including plaintiff's husband. (569 S.W.2d 412, 420 [Tenn 1978].)

Accordingly, reading this portion of the article in the context of the whole article, the Court finds that Plaintiff fails to make a rigorous showing that the omission of this detail of ownership creates a defamatory inference "that the oil lamp belonged to Plaintiff, Ali, and/or Phoenix and had been looted by ISIS" and that the authors intended to impart such an inference. The Court further finds that Plaintiff fails to make a rigorous showing that this portion of the article, when read together with the other seven statements in the context of the whole article, creates a defamatory inference that Plaintiff and his family business, in fact, traded in ISIS-looted antiquities, and that the authors intended or endorsed such an inference.

D. The Investigations and Plaintiff and Ali's Knowledge of Said Investigations

The complaint alleges:

"The Article refers to investigations of Plaintiff supposedly being conducted by authorities in multiple countries concerning the trade in ISIS-looted antiquities. But the Article omits that Phoenix, Ali, and Plaintiff have never been contacted about any such investigation and had specifically disclaimed any knowledge of such an investigation. This omission is intended to convey to readers the false implication that Plaintiff admits that such investigations exist targeting him."

(Am. Comp. ¶ 110 [d].)

This allegation appears to relate to the paragraphs on the first two pages of the article discussing the Swiss, Belgian, French and U.S. ICE investigations. These paragraphs are followed by the following paragraphs:

“Neither of the Aboutaam brothers has been charged with any wrongdoing related to these investigations. A lawyer representing the family company, Phoenix Ancient ArtSA, said it ‘has never knowingly purchased or sold any looted items, let alone items looted by ISIS.’”

The lawyer, Jeremy H. Temkin, added: ‘Phoenix prides itself on its outstanding research of the provenance of items it buys and sells, its extensive due diligence, and its efforts to enhance transparency in the market.’”

(Online Article at 2-3.)

In the complaint, Plaintiff only contests that his family business is being investigated by ICE, and Plaintiff does not contest the existence of the Swiss, Belgian, and French investigations concerning his family business allegedly trading in antiquities looted by ISIS.¹² As has been discussed exhaustively herein, the reporting on the existence these investigations is what induces the potential “evil opinion” of the reader (if anything does). Plaintiff only complains that Defendant has failed to report that he and his brother have “disclaimed any knowledge” of these investigations—again, he does not allege in the complaint that these investigations never existed. (*See Am. Compl.* ¶¶ 59-63.)¹³

That the article may have omitted that Plaintiff and his brother disclaimed knowledge of the investigations does not create a defamatory inference that Plaintiff traded in ISIS-looted antiquities—it is fairly common, after all, for investigation targets not to know they are being investigated. To the extent that such a detail would have cast Plaintiff in a more favorable light, the omission of said detail was a matter of editorial judgment. (*See Sprecher v Dow Jones and Co., Inc.*, 88 AD2d 550, 551-52 [1st Dept 1982], *affd*, 58 NY2d 862 [1983]; *see also*

¹² At oral argument, Plaintiff’s counsel stated that Plaintiff does not contest the existence of the Swiss, French and Belgian investigations, but contests “the nature” of these investigations being about ISIS. (Oral Arg. Tr. at 44:22-50:21.) However, Plaintiff failed to plead in his amended complaint that the article falsely reports that these three investigations are unrelated to the trading of ISIS-looted antiquities and, say, concern potential VAT evasions or some other subject matter. Accordingly, the Court will not now consider this newly raised theory of liability, having not been pleaded with sufficient particularity pursuant to CPLR 3016 (a).

¹³ Plaintiff also complains that the article fails to report that “one of the objects at issue in the Belgian inquiry” had been traded in Europe long before the outbreak of the Syrian civil war. (*Am. Compl.* ¶ 63.) Assuming the truth of Plaintiff’s assertion, the failure to report on this single “false lead” is merely the omission of a minor detail and does not give rise to liability for defamation by implication. (*See Sprecher v Dow Jones and Co., Inc.*, 88 AD2d 550, 551-52 [1st Dept 1982], *affd*, 58 NY2d 862 [1983].)

Cabello-Rondon v Dow Jones & Co., Inc., 45 Media L Rep 2746 [SDNY Aug. 16, 2017] [“Cabello has failed to adequately plead that those statements are materially false because he has not challenged the ‘gist or substance’ of those statements—that he is, in fact, under investigation for his potential involvement in drug trafficking and money laundering activities.”], *affd* on other grounds, 720 Fed Appx 87 [2d Cir 2018].)

Accordingly, reading this portion of the article in the context of the whole article, this Court finds that Plaintiff fails to make a rigorous showing that the article’s omission “that Phoenix, Ali, and Plaintiff have never been contacted about any such investigation and had specifically disclaimed any knowledge of such an investigation” imparts a defamatory inference “that Plaintiff admits that such investigations exist targeting him” and that the authors intended such an inference. The Court further finds that Plaintiff fails to make a rigorous showing that this portion of the article, when read together with the other seven statements in the context of the whole article, creates a defamatory inference that Plaintiff and his family business, in fact, traded in ISIS-looted antiquities, and that the authors intended or endorsed such an inference.

E. The Mention of the Civil Forfeiture Actions

The complaint states:

“The Article artfully transitions from describing alleged investigations of Plaintiff connected to looted antiquities into a discussion of civil forfeiture actions against objects associated with ISIS. The civil forfeiture actions mentioned in the Article having nothing to do with Plaintiff, Ali, or Phoenix, and concern objects completely unrelated to them and their business. Yet this text, along with a photograph of a gold ring allegedly looted by ISIS (and identified as such in a caption), appears next to a large photograph of Plaintiff. This layout is intended to convey the false inference that a connection exists between the ISIS-looted objects subject to forfeiture proceedings and Plaintiff and Ali.”

(Am. Comp. ¶ 110 [e].)

This complaint appears to relate to the juxtaposition of the paragraphs reproduced in the immediately preceding sub-section of this decision concerning investigations into Plaintiff and the following paragraphs along with a photograph of the gold ring:

“The illegal trade in ancient coins, statues and relics has long been a vital source of funds for Islamic State, security officials say.

In December 2016, the Justice Department for the first time filed a civil complaint seeking the forfeiture of objects associated with ISIS, alleging that the group markets and sells antiquities to finance its terror operations.

The items, which include a gold ring with a gemstone and a carved Neo-Assyrian stone depicting a eunuch, are believed to be worth hundreds of thousands of dollars, the Justice Department said. Photographs of the items were discovered during a raid of a top ISIS official’s home near Deir Ezzour, Syria, in 2015 according to the complaint, filed in Washington federal court. **As is typical of a civil forfeiture case, the lawsuit named the pieces themselves as defendants, and it isn't known who currently possesses them. No dealers have been implicated in the case.”**

(Online Article at 3 of 6 [emphasis added].)

This Court rejects Plaintiff’s argument that the aforesaid statement can give rise to a claim for defamation by implication, when read in the context of the whole article. Here, Plaintiff has the burden of making a “rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference.” (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 37-38 [1st Dept 2014].) Plaintiff is apparently asking the Court to believe that: (1) a reasonable reader would ignore or not read the last line that “[n]o dealers have been implicated” in the civil forfeiture case; and (2) that Defendant intended the reader to ignore the last sentence or still believe that the Aboutaams were implicated in the case notwithstanding the last sentence. The Court finds that a reasonable reader would read the last sentence and deduce that “no dealers” includes Plaintiff and his brother among the dealers who have **not** been implicated in this civil forfeiture case, notwithstanding the proximity of this portion of the article to a photograph of Plaintiff and his brother and the preceding paragraphs discussing the investigations in the Abooutaam family business.

Accordingly, reading this portion of the article in the context of the whole article, this Court finds that Plaintiff fails to make a rigorous showing that this portion created a “false inference that a connection exists between the ISIS-looted objects subject to forfeiture proceedings and Plaintiff and Ali” and that the authors

intended to create this inference. The Court further finds that Plaintiff fails to make a rigorous showing that this portion of the article, when read together with the other seven statements in the context of the whole article, creates a defamatory inference that Plaintiff and his family business, in fact, traded in ISIS-looted antiquities, and that the authors intended or endorsed such an inference.

F. Ali's Driver Bringing Antiquities into the US via JFK

The complaint states:

“The Article states that Ali’s ‘driver told investigators that he had traveled several times to New York’s John F. Kennedy International Airport, carrying small antiquities in his hand luggage, and that a person working with the Aboutaams was there to greet him.’ The paragraph completely omits critical context for this statement that Phoenix had provided in an April 20, 2017 letter, namely that (1) “it is common practice to transport small, high-value objects by hand-carry in order to avoid the risks associated with shipping items via air cargo (mishandling of the crate, theft, loss, delays, etc.)”; (2) all of Phoenix’s hand carry exports and imports were fully documented and processed through Swiss customs and declared at U.S. customs; and (3) the individual who met Phoenix’s employee at the airport in New York was an independent customs broker engaged in the regular business of processing hand-carried imports. The Article thus deliberately avoids disclosing to readers that the importation practice being described is commonplace, that the items in question were all appropriately declared and processed, and that the ‘person working with the Aboutaams’ who processed the paperwork for the items at JFK was an independent customs broker who was not employed by Plaintiff, Ali, or Phoenix. The relevant language was chosen to evoke the Article’s previous discussion of how unnamed ‘dealers use courier services and air cargo to smuggle antiques into U.S. airports and are increasingly stashing objects in passenger luggage.’ The Article’s deliberate omission of important context and careful choice of words to avoid telling readers about the involvement of a legitimate and independent broker, and to instead raise the specter of false similarities between Plaintiff’s activities and those of smugglers, show that the Article’s authors intended to falsely imply that the practice described was part of illegal smuggling of ISIS’s looted objects by Plaintiff, Ali, and Phoenix.”

(Am. Comp. ¶ 110 [f].)

This portion of the complaint appears to relate to the following paragraphs of the article:

“The U.S., and particularly New York, is a major destination for stolen antiquities, American and European investigators say. More than 40% of the world's art is traded in the U.S., according to Arts Economics, a leading consultancy on art markets.

‘It's still surprisingly easy to smuggle stolen objects here,’ said Domenic DiGiovanni who handled more than 60 antiquities seizures as a customs officer in New York before retiring in 2014. Mr. DiGiovanni said that dealers use courier services and air cargo to smuggle antiques into U.S. airports and are increasingly stashing objects in passenger luggage.

A 1970 United Nations convention banned all trade in antiquities taken without proper disclosure to the country in which they were found. In 2015, amid reports of widespread looting by Islamic State, the UN Security Council banned all trade in Syria antiquities and reaffirmed a 1990s ban on sales of Iraqi artifacts.

...

After his arrest in Geneva, the driver told investigators that he had traveled several times to New York's John F. Kennedy International Airport, carrying small antiquities in his hand luggage, and that a person working with the Aboutaams was there to greet him, according to the people familiar with the probe.

‘The situation involving Ali Aboutaam's driver ... pertains to the local VAT and is unrelated to any matters relating to alleged looting,’ their lawyer, Mr. Temkin, said.”

(Online Article at 4 of 6.)

The complaint does not assert that the above statements by Ali's driver were false. Rather, the complaint asserts that the omission of the aforesaid three details causes the reasonable reader to believe that Plaintiff and his brother were smuggling ISIS-looted antiquities through JFK.

Including such details would not change whether a reasonable reader takes away an evil opinion of Plaintiff, which, again, is potentially induced by the article reporting on him being investigated—not on insinuating that he is guilty. Furthermore, Defendant includes a defense of Plaintiff and his brother immediately after the statement about the driver’s trips to JFK. That Defendant chose not to include the alleged explanation that Phoenix submitted to Defendant by letter was an exercise of its editorial judgment and cannot be the basis for liability. (*See Biro v Conde Nast*, 883 F Supp 2d 441, 465 [SDNY 2012]; *Sprecher v Dow Jones and Co., Inc.*, 88 AD2d 550, 551-52 [1st Dept 1982], *affd.*, 58 NY2d 862 [1983]; *Cholowsky v Civiletti*, 69 AD3d 110, 115 [2d Dept 2009].) Given that the article concerns ongoing investigations into Plaintiff and his family business, the reasonable reader would understand this portion of the article as potentially illustrating a reason for the investigations—not as insinuation of guilt.

Accordingly, reading this portion of the article in the context of the whole article, the Court finds that Plaintiff has failed to make a rigorous showing that this portion of the article imparts the defamatory inference that the driver’s trips through JFK were part of an illegal smuggling operation of ISIS’s looted objects by Plaintiff, Ali, and Phoenix. The Court further finds that Plaintiff fails to make a rigorous showing that this portion of the article, when read together with the other seven statements in the context of the whole article, creates a defamatory inference that Plaintiff and his family business, in fact, traded in ISIS-looted antiquities, and that the authors intended or endorsed such an inference.

G. Ali’s Egyptian Conviction

The complaint alleges:

“The Article states that Ali was sentenced by an Egyptian court ‘in absentia to 15 years in prison after he was accused of smuggling artifacts from Egypt to Switzerland.’ The Article notes that ‘the Egyptian conviction led to his arrest in Sofia, Bulgaria, under an international warrant in 2008.’ Prior to publication of the Article, Phoenix and its representatives had confirmed the arrest and explained to the reporters that Ali had been exonerated by the Bulgarian courts. But the Article stated only: ‘A spokesman for Phoenix said a ruling that year in the Sofia High Court had exonerated Ali Aboutaam and deemed the Egyptian accusations as ‘false.’” The reporters’ choice to attribute this information to Phoenix’s spokesman, rather than to the Bulgarian court records from the case—which, upon information and belief, the reporters never bothered to obtain or review—intentionally created the

false impression that the outcome of the Bulgarian proceedings was somehow a matter of opinion or dispute.”

(Am. Comp. ¶ 110 [g].)

This allegation appears to relate to the following paragraphs in the online article:

“In 2004, an Egyptian court sentenced Ali Aboutaam in absentia to 15 years in prison after he was accused of smuggling artifacts from Egypt to Switzerland. In a news release, Phoenix said Mr. Aboutaam was never invited to participate in the proceedings and learned about his conviction from the press.

According to written statements by Bulgarian authorities, the Egyptian conviction led to his arrest in Sofia, Bulgaria, under an international warrant in 2008. A spokesman for Phoenix said a ruling that year in the Sofia High Court had exonerated Ali Aboutaam and deemed the Egyptian accusations as ‘false.’

Egypt’s antiquities authority didn’t respond to a request for comment.”

(Online Article at 5 of 6.)

As a general matter of law, courts in one jurisdiction cannot exonerate defendants for crimes committed in other jurisdictions—although they may occasionally refuse to extradite. There is also no claim by Plaintiff that if Ali traveled to Egypt he would not be subject to incarceration. That Defendant chose to publish the statement of Phoenix’s spokesman that the Bulgarian court “exonerated” Ali for crimes he was purportedly convicted of in another jurisdiction, as opposed to referring to Bulgarian court records was an exercise of Defendant’s editorial judgment, and this editorial choice could not have produced any discernibly different impact on the reasonable reader.

Accordingly, reading this portion of the article in the context of the whole article, Plaintiff fails to meet his burden of making a “rigorous showing” that attributing the statement concerning a Bulgarian court’s “exoneration” of Ali for an Egyptian conviction to Phoenix’s spokesman “intentionally created the false impression that the outcome of the Bulgarian proceedings was somehow a matter of opinion or dispute.” The Court further finds that Plaintiff fails to make a

rigorous showing that this portion of the article, when read together with the other seven statements in the context of the whole article, creates a defamatory inference that Plaintiff and his family business, in fact, traded in ISIS-looted antiquities, and that the authors intended or endorsed such an inference.

H. The New York Gallery as a Den of Iniquity

The complaint alleges:

“The Article describes Plaintiff’s public New York gallery—which is open to anyone from 9:30 a.m. to 5:30 p.m.— as a ‘discreetly-lit’ den of iniquity where unlabeled, astronomically expensive items are sold to visitors who must be buzzed in. This language was intentionally used to convey the false impression, bolstered by the Article as a whole, that illegal activity, including dealing in ISIS-looted objects, is occurring at Plaintiff’s gallery.”

(Am. Comp. ¶ 110 [h].)

This allegation appears to relate to the following paragraphs:

“The Aboutaams’ U.S. gallery is located on a street off Madison Avenue. Visitors are buzzed into a discreetly lit stone-floored room where around 24 unlabeled objects are displayed with prices that are in the hundreds of thousands of dollars.”

(Online Article at 5 of 6.)

As this Court discussed in the libel section, what Plaintiff complains of here is simply the author’s description of his gallery. Although Plaintiff may disagree with the description, the description does not cause the reasonable reader to believe that Plaintiff is in fact trading in ISIS-looted antiquities.

As the Court discussed previously, reading the article as whole, if anything causes a reader to draw an evil opinion of Plaintiff, it is the article’s reporting that Plaintiff is being investigated in four different countries for potentially trading in looted antiquities, with three of those investigations relating to antiquities allegedly looted by ISIS. However, a *reasonable* reader would understand that these investigations concern “mere allegations to be investigated” rather than factual proof that Plaintiff is guilty of trading ISIS-looted antiquities. (*Akpinar v Moran*, 83 AD3d 458, 459 [1st Dept 2011]; *see also Martin v Hearst Corp.*, 777 F3d 546,

553 [2d Cir 2015] [“Reasonable readers understand that some people who are arrested are guilty and that others are not.”].)

As such, reading this portion of the article in the context of the whole article, this Court finds that Plaintiff has failed to meet its burden of making a rigorous showing that Defendant’s description of his gallery causes the reasonable reader to infer “that illegal activity, including dealing in ISIS-looted objects, is occurring at Plaintiff’s gallery,” and that the authors intended to create this inference.¹⁴ The Court further finds that Plaintiff fails to make a rigorous showing that this portion of the article, when read together with the other seven statements in the context of the whole article, creates a defamatory inference that Plaintiff and his family business, in fact, traded in ISIS-looted antiquities, and that the authors intended or endorsed such an inference.

III. In Closing

The Court finds that the thrust of the article is that Plaintiff’s family— “one of the most storied families in the international antiquities business”—is being investigated and scrutinized about the selling of looted antiquities and whether the family business is dealing in items looted by ISIS and then sold through dealers like Plaintiff and his brother Ali. Nowhere in the article is there an accusation or a suggestion that Plaintiff’s family has actually done what they are being investigated for. The article only discusses that the family is being investigated.

It may be that being subject to an investigation by law enforcement carries a stigma. Here, Plaintiff alleges that this stigma has caused a 96% drop in sales at his gallery. By no means does this Court’s decision seek to undermine the serious consequences that sometimes follow a news organization’s decision to publish details of an ongoing investigation by law enforcement. However, the decision to truthfully report on an ongoing law enforcement investigation is ultimately a question of journalistic judgment. Unless the reporting on such an investigation is materially false or affirmatively creates false suggestions, it is not for the courts to question an editorial judgment to report on an ongoing investigation.

¹⁴ As this Court has dismissed plaintiff’s causes of action for libel and defamation by implication for the reasons stated, this Court need not address Defendant’s argument that Plaintiff has failed to plead actual malice with regard to both causes of action.

CONCLUSION

Accordingly, it is herby

ORDERED that the motion of Defendant Dow Jones & Company to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that said Defendant is directed to serve a copy of this order upon the Clerk of the Court with notice of entry within twenty (20) days of the date of this order; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

The foregoing constitutes the decision and order of the Court.

3/22/2019
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

Robert D. Kalish
HON. ROBERT D. KALISH
J.S.C.