UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAUL "BARNEY" HALLINGBY Plaintiff, - against - ROUSH PUBLICATIONS, INC., GERALD L. ROUSH, CAVALLINO, INC., and JOHN W. BARNES, JR. Defendants.	:	Index No. 09 Civ 2223 (MGC)

MEMORANDUM OF LAW IN
SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND
MOTION TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT

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Gerald L. Roush and Roush Publications, Inc. ("Roush"), and John W. Barnes, Jr. and Cavallino, Inc. ("Barnes," and together with Roush, "Defendants"), by their attorneys, Arkin Kaplan Rice LLP, respectfully submit this memorandum of law in support of their motion to dismiss and motion to strike the First Amended Complaint ("FAC") filed by Paul "Barney" Hallingby ("Plaintiff") pursuant to Rules 12(b)(6) and 12(f) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

The Court granted Defendants' motion to dismiss Plaintiff's original complaint on November 19, 2009, holding that Plaintiff had failed to plead the essential elements of his libel claims. The Court granted Plaintiff limited permission to amend his complaint to add allegations that would make his libel allegations plausible. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Plaintiff's FAC again fails to adequately allege the elements of his libel claims (and also fails to allege the elements of his new slander of title claims), and must be dismissed.

First, the Statements were not "of and concerning" Plaintiff because the Statements do not mention or otherwise refer to Plaintiff, and Plaintiff fails to allege facts indicating that readers understood the Statements to refer to him.

Second, the Statements are not reasonably susceptible to the defamatory meanings alleged by Plaintiff, and Plaintiff's allegations as to why the Statements are implicitly defamatory are logically flawed and insufficiently pled – indeed, Plaintiff has not identified a single individual who understood the Statements to convey to him or her any of the alleged defamatory meanings.

Third, Plaintiff falls far short of alleging facts that make it plausible that Defendants acted with gross irresponsibility or actual malice. Plaintiff fails even to allege that the source of the advertisements, expressly identified therein, lacks credibility or is unreliable. In addition,

another reliable source confirmed to Defendants the truth of the Statements: Marcel Massini – a recognized worldwide Ferrari expert who keeps detailed records of the history of all early Ferraris.

Fourth, the Statements are not per se libelous and Plaintiff has failed to adequately plead special damages. Plaintiff does not allege that the Statements are per se libelous, and indeed they are not, as reference to at least two extrinsic facts is necessary to understand the Statements' alleged defamatory meanings. Also, Plaintiff's allegation that he incurred special damages in defending "baseless charges" by the Connecticut State Police is insufficient because Plaintiff fails to allege how the Statements directly caused these "baseless charges."

Fifth and finally, Plaintiff's slander of title claims must be dismissed because these claims are beyond the permitted scope of the amended complaint and because Plaintiff has failed to adequately allege actual malice or special damages.

STATEMENT OF FACTS[1]

A. Procedural History

On November 19, 2009, the Court granted Defendants' motion to dismiss Plaintiff's original complaint. The Court allowed Plaintiff to amend his complaint to "make[] it plausible that th[e] statement [at issue] is defamatory." (Oral Argument on November 19, 2009 on

[1] As is required in a motion to dismiss, in describing the facts of this case Defendants have assumed the truth of the factual allegations set forth in Plaintiff's FAC. The facts are supplemented by the full text of documents cited in the FAC, documents that are incorporated by reference in the FAC, documents that Plaintiff relied upon in drafting his FAC and are in his possession or of which he had knowledge, and matters of which judicial notice may be taken, all of which the Court may consider in deciding this motion. *See, e.g., Heller Inc. v. Design Within Reach, Inc.*, No. 09 Civ.1909, 2009 WL 2486054, at *1 (S.D.N.Y. 2009) ("In deciding the defendant's motion to dismiss, the Court may consider documents attached to the Complaint or incorporated in it by reference, matters of which judicial notice may be taken, or documents that the plaintiff relied upon in bringing suit and either are in its possession or of which it had knowledge." (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir.2000); *Jofen v. Epoch Biosciences, Inc.*, No. 01 Civ. 4129, 2002 WL 1461351, at *1 (S.D.N.Y. July 8, 2002)); *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000). Further, "the judicial notice standard under Rule 201 [is] that facts must be 'either (1) generally known . . . or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' Fed.R.Evid. 201(b)." *Kaggen v. I.R.S.*, 71 F.3d 1018, 1023 (2d Cir. 1995).

Defendants' Motion to Dismiss Plaintiff's Original Complaint ("Oral Argument") Transcript ("Tr.") (docket # 35 and attached at Exh. 1) 39:23-40:13.) On January 4, 2010, Plaintiff filed his First Amended Complaint against Defendants.

B. The FAC

Roush edits and publishes the "Ferrari Market Letter" (the "Letter"). (FAC ¶ 3.) Barnes publishes "Cavallino" magazine (the "Magazine"). *Id.* ¶ 8. The FAC alleges that Roush Publications, Inc. and Cavallino, Inc. respectively distribute the Letter and the Magazine in New York and elsewhere. *Id.* ¶¶ 2, 3, 7, 8. Both the Letter and the Magazine focus on issues relating to rare Ferrari automobiles. *Id.* ¶¶ 2, 4.

The FAC alleges that the Letter and the Magazine published advertisements that contain statements (the "Statements") that are defamatory. (FAC ¶¶ 20, 25, 26, 50, 55, 56.) The advertisements read as follows:

STOLEN FERRARI

Ferrari 250 PF, Cabriolet, Silver Colored, Pinin Farina, Series 1, 1957/58, Chassis No. 799 GT

Please be informed that the above-mentioned Ferrari oldtimer car with Chassis No. 0799 GT has been stolen on July 7, 1993 in Marbella, Spain from a Swiss citizen. Please also take notice that this car is on the active list of the police and further legal action will follow. Investigations by Interpol are involved. This Ferrari car has last reported to be in the custody of a Ferrari collector in Sharon 06069, Connecticut, U.S.A.

For further information please contact:
Oliver Weber, Attorney-at-Law
P. O. Box 811
CH-251 Biel
Switzerland
Phone: + 41 77 423 03 20
Fax: + 41 32 323 65 80
Email: stolenferrari@gmail.com[2]

[2] The advertisement placed in the Magazine used the language "on the east coast of the USA" instead of "in Sharon 06069, Connecticut, U.S.A." Also, Plaintiff omits from his FAC all of the italicized language in the

Id. ¶¶ 20, 50. The advertisements were published in the March 22, 2008 and "subsequent editions of the Letter," and in the April/May 2008 issue of the Magazine. *Id.* ¶¶ 20, 33, 37.

Hallingby alleges that he purchased the 1957 Ferrari 250 GT Pinin Farina Cabriolet Series 1, chassis number 0799GT (the "Automobile") in November 2000. (FAC ¶ 14.) The Automobile is one of only 40 cars in the Pinin Farina Series 1, and it is the only Ferrari with the chassis serial number 0799GT. *Id.* Hallingby alleges that the Automobile is well known to serious Ferrari collectors, dealers, and enthusiasts. *Id.* According to Hallingby, among such individuals, the Automobile is sometimes referred to as "0799." *Id.* From the time of purchase onward, Hallingby alleges he maintained the Automobile openly. *Id.* Hallingby entered the Automobile in a number of major vintage auto shows and allowed it to be photographed for Ferrari magazines. *Id.*

Hallingby's new allegations regarding defamatory meaning focus principally on what he claims to be custom in the Ferrari industry. He alleges, among other things, that it is customary for a buyer to conduct a thorough due diligence process before purchasing a rare and valuable vehicle like the Automobile, including researching the title of such a vehicle, investigating clouds on the title, and diligently attempting to resolve any problems or uncertainties. (FAC ¶ 17.)[3] Hallingby also alleges that it is customary for a potential buyer to consult domestic and international records of stolen vehicles to resolve any outstanding claims or charges. *Id.*[4]

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advertisements beginning with "*For further information please contact: Oliver Weber, Attorney-at-Law . . . .*" (FAC ¶¶ 20, 50.)

[3] Plaintiff alleges the facts cited in this paragraph in the process of alleging that members of the "Ferrari Community" know these facts. (*See* FAC ¶ 17.)

[4] Hallingby does not specifically allege that he consulted domestic and international records of stolen vehicles before purchasing the Automobile. However, Plaintiff admitted in his affidavit (submitted in opposition to Defendants' original motion to dismiss) that he *did* learn that the Automobile had been reported stolen during his

According to Hallingby, an experienced buyer who purchases through a reputable broker and who conducts the customary due diligence will have extensive knowledge about the quality of a vehicle's title before the buyer purchases it. *Id.*

Based on this string of conclusory and somewhat vague allegations, Hallingby makes the leap that Members of the "Ferrari Community" (defined by Plaintiff as "Ferrari buyers, sellers, dealers, collectors and enthusiasts") understood that he is an experienced purchaser of rare Ferraris, that he purchased the Automobile through a reputable dealer, and that he bought the Automobile after conducting the customary rigorous provenance investigation, and thus must have believed based on the Statements that Hallingby knowingly purchased a stolen Ferrari. (FAC ¶¶ 2,18.)

ARGUMENT

I. STANDARD FOR MOTION TO DISMISS

The Supreme Court has prohibited speculative complaints and required allegations of *facts* to support assertions and conclusory statements. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (To survive a motion to dismiss, a plaintiff "must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)); *Iqbal*, 129 S. Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *id.* ("Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." (internal quotation marks omitted)); *see also Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 183 (2d Cir. 2008) ("bald assertions and conclusions of law will not suffice" (internal quotation marks omitted)).

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investigation of the Automobile's provenance. (Plaintiff's Affidavit dated Oct. 29, 2009 ("Pl. Aff.") ¶ 6 (docket #25 and attached at Exh. 2).)

The Supreme Court requires that a complaint must plead "enough facts to state a claim for relief that is plausible on its face." *Twombly,* 127 S. Ct. 1955, 1974. As the Court has explained, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *See Iqbal*, 129 S. Ct. at 1949 (internal quotation marks omitted).

II. THE COURT SHOULD STRIKE PLAINTIFF'S UNAUTHORIZED AMENDMENTS

The Court granted Plaintiff leave to amend his complaint for a limited purpose:

> THE COURT: But you have offered to amend the complaint to make it more clearly set out facts that establish that this is defamatory.
>
> MS. DROOZ: I repeat the offer.
>
> THE COURT: I will therefore grant the motion to dismiss, and give you leave to file an amended complaint. . . . You may file an amended complaint which makes it plausible that this statement is defamatory, because that is what Twombly and, more importantly, Iqbal, which extended Twombly to other than antitrust cases, requires.
>
> MS. DROOZ: Very well, your Honor.

(Tr. 39:23-40:13.)[5] Plaintiff, however, went far beyond simply adding factual allegations to "make[] it plausible that th[e] statement is defamatory." He seeks to add wholly new causes of action for slander of title, as well as additional libel-related allegations that are unrelated to defamatory meaning.

The Court should strike all of the amendments to the FAC that do not support the defamatory meaning alleged in the original complaint, as the Court did not grant Plaintiff permission to make these amendments. *See, e.g., Lyddy v. Bridgeport Bd. of Educ.*, No. 3:06CV1420, 2008 WL 2397688, at *1-*2 (D. Conn. June 10, 2008) ("[T]he first and second

[5] Plaintiff filed his original complaint on March 10, 2009, less than a month before the statute of limitations expired. *See* NY CPLR § 215 (one year statute of limitations for libel, slander, and false words causing special damages). The statute of limitations on Plaintiff's new unauthorized claims and allegations has expired.

amended complaints go beyond the scope of amendment allowed by the court in its ruling on the defendants' motions to dismiss and were therefore impermissibly filed without leave of court."); *M+J Savitt, Inc. v. Savitt*, No. 08 Civ. 8535, 2009 WL 691278, at *2 (S.D.N.Y. Mar. 17, 2009) ("Plaintiffs' claims . . . are outside the scope of the permitted amendment . . . and will be stricken."); *Elfenbein v. Gulf W. Indus., Inc.*, 590 F.2d 445, 448 n. 1 (2d Cir.1978) (right to amend complaint without permission "terminates upon the granting of the motion to dismiss").

III. THE COURT SHOULD DISMISS HALLINGBY'S CLAIMS FOR LIBEL

A. The Elements of Libel

Under New York law, the elements for libel are (1) a written defamatory statement (2) of fact of and concerning the plaintiff, (3) publication by the defendants to a third party; (4) fault, consisting of at least negligence, (5) falsity of the defamatory statement, and (6) per se actionability or special damages. *E.g., Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 176 (2d Cir. 2000); *Church of Scientology Int'l v. Eli Lilly & Co.*, 778 F. Supp. 661, 666 (S.D.N.Y. 1991). Hallingby has clearly failed to adequately allege at least four of these elements – elements 1, 2, 4, and 6 – and thus his Complaint must be dismissed.

B. The Statements Were Not "Of And Concerning" Hallingby

The Statements were not "of and concerning" Hallingby. The advertisements do not even mention or otherwise refer to Hallingby. *See, e.g., Smith v. Long Island Youth Guidance, Inc.*, 181 A.D.2d 820, 821-22 (2d Dep't 1992) (concluding that a statement that a girl was "'sold to neighborhood men from the time she was 11 . . . sold to support a crack habit'" was not of and concerning her mother). Indeed, part of the *Smith* Court's explicit reasoning for holding that the statement was not "of and concerning" the mother was that "nor was her name mentioned" in it. 181 A.D.2d at 821.

Hallingby thus resorts to extrinsic facts to satisfy the "of and concerning" element, but his allegations here are equally deficient. Where extrinsic facts are relied on to prove reference to the plaintiff, the plaintiff must show that it was reasonable to conclude that the publication on its face relates to him or her and that the extrinsic facts upon which that conclusion is based were known to those who read the publication. *Chicherchia v. Cleary*, 207 A.D.2d 855, 856 (2d Dep't 1994); *see also Berwick v. New World Network Int'l, Ltd.*, No. 06 Civ. 2641, 2007 WL 949767, at *13 & n.10 (S.D.N.Y. 2007) ("[B]ecause the alleged statement does not mention the plaintiffs at all, the pleadings fail to meet the . . . 'of and concerning[' requirement]. . . . While the reference to the plaintiffs may be indirect and may be shown by extrinsic facts, the burden on the plaintiffs is not a light one." (internal quotation marks omitted)).

With respect to the Barnes advertisement, Plaintiff alleges that "Ferrari Community" members "understood that the reference to a 'Ferrari collector on the East Coast of the U.S.A.' was a reference to Hallingby because they knew that Hallingby owned the Automobile and had maintained it openly for over eight years." (FAC ¶ 52.) Plaintiff makes a similar allegation against Roush. *Id.* ¶ 22. These are exactly the kind of factually unsupported conclusory assertions that the Supreme Court has held is insufficient to survive a motion to dismiss. *See Iqbal*, 129 S. Ct. at 1949 ("Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." (internal quotation marks omitted)); *ATSI*, 493 F.3d at 98 (Plaintiff "must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" (quoting *Twombly*, 127 S. Ct. at 1965)).

Hallingby may have "maintained" the Automobile "openly," but there are no facts pled that any "Ferrari Community" member saw the Automobile in Hallingby's possession on the "east coast." Similarly, with respect to the Roush advertisement, who among the Ferrari

Community even saw the Automobile in Sharon, Connecticut? Who knew Hallingby had a residence in Sharon, Connecticut, or that he is the only Ferrari collector to have such a residence? It is particularly implausible that readers of the Magazine would understand that the Statements were referring to Hallingby (who obviously is not the only Ferrari collector on the east coast).[6]

Plaintiff's other alleged facts are similarly insufficient to support his assertion that "Ferrari Community" members "knew that Hallingby owned the Automobile." Plaintiff alleges the facts that (1); the Automobile is one of only 40 cars in the Pinin Farina Series 1, and it is the only Ferrari with the chassis serial number 0799GT and (2) Hallingby entered the Automobile in a number of major vintage auto shows and allowed it to be photographed for Ferrari magazines. (FAC ¶ 14.) But these alleged facts do not support Plaintiff's conclusory assertion that "Ferrari Community" members who read the Statements – even assuming *arguendo* that they knew of the Automobile – knew that the Automobile *was owned by Hallingby*.

C. The Statements Were Not Defamatory

A written statement "may be defamatory if it tends to expose a person to hatred, contempt or aversion, or to induce an evil opinion of him in the minds of a substantial number of the community." *Golub v. Enquirer/Star Group, Inc.*, 681 N.E.2d 1282, 1283 (N.Y 1997) (internal quotation marks omitted). The Court determines as a matter of law whether there is a reasonable basis to allege that the statements communicated an alleged defamatory meaning. *See, e.g., Golub*, 681 N.E.2d at 1283. If statements "are not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." *Id.* at 1283 (internal quotation marks omitted). In other words, *no matter what Plaintiff alleges*

[6] Plaintiff's counsel admitted: "I acknowledge that the ad published by the letter is a better 'of and concerning' case . . . ." (Tr. 41:9-11.)

any particular readers of the Statements understood them to mean, the Court must dismiss the complaint if it would not be reasonable for a substantial number of the community to understand the Statements to convey the alleged defamatory meaning. Here, the Statements do not give rise to the defamatory meaning alleged by Hallingby.

First, the Statements do not mention Hallingby's name and, as explained in detail in Part III.B, Plaintiff fails to plead sufficient facts to allege that the Statements refer to him implicitly. *See, e.g., Cohn v. Brecher*, 20 Misc.2d 329, 330 (N.Y. Sup. Ct. 1959) ("defamatory words must refer to some ascertained or some ascertainable person, and that person must be the plaintiff" (internal quotation marks omitted)); 43A N.Y. Jur. 2d Defamation and Privacy § 76 (2009) ("where the words used contain no reflection on any particular individual, no averment or innuendo can make them defamatory"). The Statements thus do not have a defamatory meaning with respect to Hallingby.

Further, Hallingby has failed to allege a reasonable basis for his contention that the Statements "falsely impute immoral and/or criminal conduct to Hallingby, specifically the knowing receipt and/or possession of stolen property"; and "falsely imply to members of the Ferrari Community that Hallingby intentionally refrained from conducting the customary provenance investigation prior to purchase and/or deliberately ignored provenance information indicating that the Automobile was stolen." (FAC ¶¶ 25, 26, 55, 56.)

The Statements, of course, state only that the Automobile is in the "custody" of a Ferrari collector, they do not even mention ownership, due diligence, or even that the Automobile had been purchased. One cannot even conclude from the Statements that the custodian of the Automobile owns it, let alone conducted extensive due diligence on its provenance. Indeed, why would one conclude from these advertisements that something in the chain of title would indicate

that the Automobile was stolen?

Moreover, Hallingby's allegations are extremely vague. Does he allege that the Ferrari Community would understand that Hallingby purchased a vehicle that he knew (through due diligence) had been the subject of a claim that it was stolen, or that he did not do appropriate due diligence? (FAC ¶¶ 25, 26, 55, 56.) In this regard, Hallingby's allegations are inconsistent.

As the Court opined: "I don't read what the complaint says as stating, or implying, that this plaintiff bought a car knowing it was stolen . . . . Even if it's false, I don't see how it's defamatory. . . . The trouble is it is all too vague." (Tr. 30:17-31:1; *see also id.* 36:25-37:3 (The Court explained: "as it now reads it is a very ambiguous statement, and ambiguous statements are not defamatory unless there is some reason for believing that they are understood in a peculiar way for some reason.").) The FAC is no better – the alleged implication of a defamatory meaning is simply too vague as a matter of law. *See, e.g.*, *Casamassima v. Oechsle*, 125 A.D.2d 855, 855-56 (3d Dep't 1986) (holding that statement by defendant – who was contemplating filing a felony complaint against plaintiff for stealing a typewriter – that plaintiff "had no permission to take any typewriter from this court house" to several court personnel "f[e]ll far short of accusing plaintiff of a crime"); *Seymour v. Lakeville Journal Co.*, No. 04 CV 4532, 2004 WL 2848537, at *4-5 (S.D.N.Y Dec. 9, 2004) (holding that article stating that plaintiff had been paying her tax in the wrong (cheaper) town could not be read to say Plaintiff was knowingly evading taxes and explaining that "[a]n innuendo cannot alter or enlarge the plain and obvious meaning of the words so as to convey a meaning that is not otherwise expressed"); *El Meson Espanol v. NYM Corp.*, 521 F.2d 737, 739-40 (2d Cir. 1975) ("The quoted passage, tested by a 'fair' not a broad reading . . . cannot be read to accuse plaintiff corporation of 'knowing' acquiescence or participation in narcotics activity . . . .").

The FAC proposes a convoluted series of allegations to arrive at what is alleged to be a necessary implication: (i) readers of the Statements understood that the reference to the custodian of the Automobile was a reference to Hallingby (*id.* ¶¶ 22, 52), (ii) such readers understand that Hallingby had purchased the Automobile, and that it is unlikely, if not impossible for a buyer who conducts a customary provenance investigation to purchase a stolen rare Ferrari like the Automobile without being aware that it is stolen (*id.* ¶ 17), and (iii) such readers thus would have interpreted the Statements to mean that Hallingby had committed the criminal and/or immoral acts of knowingly receiving and/or maintaining possession of stolen property and intentionally refraining from conducting the customary provenance investigation and/or deliberately ignoring information indicating the Automobile was stolen (*id.* ¶¶ 25, 26, 55, 56).

But Plaintiff's conclusion does not follow from his allegation unless *readers of the Statements would assume that Hallingby was more likely to commit a criminal and/or immoral act than he was to unintentionally fail to discover that the Automobile was stolen during his title check.* Without this, readers of the Statements would have reasoned that, while it is unlikely that Hallingby unintentionally failed to discover that the Automobile was stolen during his title check, it is even *less* likely that Hallingby committed the criminal and/or immoral acts that the Statements allegedly state that Hallingby committed, and thus the most likely conclusion is that Hallingby received and maintained the Automobile *without* knowing that it was stolen (because his title and check was unintentionally not thorough enough, involved mistakes, *etc.*).[7] Thus, as Plaintiff never alleges that the "fact" in italics above is true, his allegations of defamatory

[7] During Oral Argument, Plaintiff's counsel stated: "There are factual allegations to the effect that the members of the rare Ferrari community knew that this was a car that couldn't have been purchased unless there was a providence check or unless Mr. Hallingby was turning a blind eye to evidence of its having been stolen." (Tr. 39:5-10.) The Court responded: "We know that is not accurate. We know that people make mistakes." (Tr. 39:11-12.)

meaning are logically flawed and inadequate as a matter of law. *See, e.g.*, *Iqbal*, 129 S. Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Moore v. Levy*, 191 N.Y.S. 165, 166-67 (N.Y. Sup. Ct. 1921) ("The question is not whether the words *could* have been understood as imputing unchastity, but whether they would be commonly so understood. . . . Without extraneous facts to show the meaning to be as claimed, the complaint does not state a cause of action."). As the Court correctly recognized:

> The real problem is that this is not a clearly defamatory statement, and to make it more likely that it is defamatory than it is not, you need additional facts. You don't always. When something is patently defamatory on its face, you don't need anything else. But because it is not clear to many readers, including the Court, that the statement that the car has been stolen implies that the owner bought it knowing it was stolen, it requires something that would make it plausible that that's what it is.

(Tr. 35:6-15.) Plaintiff has failed to plead sufficient facts to support his great leap from the published words to his assertion that a reasonable reader would read so much more into these words.[8]

In addition, Plaintiff's new allegations of defamatory meaning are wholly conclusory and unsupported by *any* facts. While Plaintiff did not allege this in his original complaint, he has now decided that the Statements have two *additional* defamatory meanings: "The [S]tatements are also defamatory in that they falsely imply to members of the Ferrari Community that Hallingby intentionally refrained from conducting the customary provenance investigation prior to purchase and/or deliberately ignored provenance information indicating that the Automobile was stolen." (FAC ¶¶ 26, 56.) Plaintiff does not allege that *any* person – named or unnamed –

[8] Indeed, all of this proceeds from a faulty premise: that a title search will always and necessarily show whether a Ferrari is stolen. This of course is not alleged, and cannot be true; there are numerous cases when documents are forged or documents are recorded in error.

actually understood the statements to convey these newly alleged meanings. (*See, e.g.*, FAC ¶¶ 36, 62.) Indeed, this is the reasoning on which the Court dismissed Plaintiff's original complaint, and the Court granted Plaintiff an opportunity to replead because Plaintiff represented that he *would* support his alleged defamatory meanings with facts. (*See* Tr. 39:23-40:3 ("you have offered to amend the complaint to make it more clearly set out facts that establish that this is defamatory").) Thus, Plaintiff's new, conclusory, speculative, and wholly unsupported allegations of defamatory meaning must be dismissed.[9]

Finally, in the context of alleging his injuries, Plaintiff makes new allegations ("New Injury Allegations").[10] (*See* FAC ¶¶ 36, 62.) The New Injury Allegations do not support Plaintiff's defamatory meaning allegations, and Plaintiff does not allege otherwise. Most importantly, *Plaintiff has not identified a single individual who understood the Statements to convey to him or her any of the alleged defamatory meanings.*[11] Plaintiff's New Injury Allegations are specifically deficient as follows:

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[9] Additionally, even assuming *arguendo* that the Statements could reasonably be understood to mean that Hallingby "intentionally refraining from conducting the customary provenance investigation prior to purchase," the Statements would not be actionable because this meaning is not defamatory. (FAC ¶¶ 26, 56.) Such a meaning would not be defamatory because it would not "tend[] to expose [Plaintiff] to hatred, contempt or aversion, or to induce an evil opinion of him in the minds of a substantial number of the community." *Golub*, 681 N.E.2d at 1283 (internal quotation marks omitted). Hallingby had no legal, moral, or other obligation to conduct a customary provenance investigation prior to his purchase, and Plaintiff does not allege otherwise. The only reason Hallingby would have had to do a title check is to make sure – for his own sake – that he was not buying a car with a less-than-clear title. If Hallingby concluded that it was worth it to save the time and money to do a less-than-customary provenance investigation in exchange for an increased risk that he was purchasing a car with a less-than-clear title, then he had every right to do a less-than-customary provenance investigation. Simply stating that Hallingby chose such a legitimate course of action is not defamatory.

[10] The Court did not grant Plaintiff permission to amend his complaint to add new allegations of injury, and thus the Court should strike the New Injury Allegations to the extent they are new allegations of injury. *See supra*, Part II.

[11] During Oral Argument, Plaintiff's counsel stated: "Mr. Hallingby's affidavit states that people did come up to him and question his title to the car." (Tr. 36:14-17.) The Court responded: "They came up to him. But none of them said, at least in what you gave me, I see you are a [knowing] receiver of stolen goods. Because that's what it has to imply." (Tr. 36:18-20.)

- Plaintiff does not allege that many of the referenced individuals were even *aware* of the Statements, let alone that the Statements *caused* the alleged suspicion in the "Ferrari Community" (which, if it existed, could have been caused by, for example, the ongoing police and Interpol investigations)
- Many of the allegations are utterly irrelevant to whether readers of the Statements understood them to mean that Plaintiff *knowingly* purchased a stolen car.
- One allegation admits that the Ferrari enthusiasts who read the advertisement could not identify that the "owner" to whom the advertisements referred was Hallingby. (FAC ¶¶ 36, 62 ("The enthusiasts stated, inter alia, that the owner [Hallingby] . . . .").)
- Plaintiff makes conclusory assertions as to what statements "implied" and what the "tone and tenor" of statements indicated the speakers really meant.
- Several allegations are not credible after Plaintiff "fairly summarized" what friends and acquaintances in the Ferrari Community had said to him related to the advertisement as: "Isn't that your car?," "I hope there's no problem," "I was sorry to read about [you/your car]." (Pl. Aff. ¶ 9.)
- Plaintiff repeatedly fails to identify the people he references.

D. Plaintiff Has Failed to Allege that Defendants Were Grossly Irresponsible or Acted With Actual Malice

Plaintiff in this case must adequately allege that Defendants were grossly irresponsible and acted with actual malice. Plaintiff has failed to do so.[12]

1. The Statements "Arguably" Involve a Matter of Legitimate Public Concern

"To state a claim for defamation under New York Law, the plaintiff must allege . . . fault amounting to at least negligence on part of the publisher . . . ." *Gargiulo v. Forster & Garbus Esqs.*, 651 F. Supp. 2d 188, 192 (S.D.N.Y. 2009) (Cedarbaum, J.) (citing *Dillon v. City of New*

[12] The issue of fault can be decided on a motion to dismiss. *See, e.g., Sheridan v. Carter*, 48 A.D.3d 447, 448 (2d Dep't 2008) (affirming grant of motion to dismiss because fault under the *Chapadeau* standard was inadequately alleged); *Love v. William Morrow and Co.*, 193 A.D.2d 586, 588 (2d Dep't 1993) (same); *Hollander v. Cayton*, 145 A.D.2d 605, 606 (N.Y. Sup. Ct. 1988) (granting motion to dismiss because actual malice was inadequately alleged); *Hassan v. Spicer*, No. 05-CV-1526, 2006 U.S. Dist. LEXIS 3571, at *8 (E.D.N.Y. Jan. 31, 2006) (same), *aff'd*, No. 06-0934-cv, 216 Fed. Appx 123, U.S. App. LEXIS 3359; *Amadasu v. Bronx Lebanon Hosp. Ctr.*, No. 03 Civ. 6450, 2005 U.S. Dist. LEXIS 774, at *51 (S.D.N.Y. Jan. 21, 2005) (magistrate rpt. & rec.) (same), *adopted by*, No. 03 Civ. 6450, 2005 U.S. Dist. Lexis 7081.

York, 261 A.D.2d 34, 38 (1st Dep't 1999) (citing Rest.2d Torts § 558)). However, where the content of an allegedly defamatory statement is "arguably" within the "sphere of legitimate public concern," which is "reasonably related to matters warranting public exposition," a plaintiff must adequately allege that the publisher acted in a "grossly irresponsible manner" in publishing the statement. *Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569, 571 (N.Y. 1975).

Here, Defendants published Statements regarding the investigation of and attempt to recover a stolen rare Ferrari. This clearly renders the subject matter of the Statements a matter of public concern. New York courts have explicitly stated that accusations of criminal behavior and the operations of the criminal justice system are matters warranting public exposition. In *Pollnow v. Poughkeepsie Newspapers, Inc.*, the court commented that it is "plain" that "alleged criminal conduct" and the "operation of the criminal justice system" regarding the disposition of the criminal charges are matters of "legitimate public concern." 107 A.D.2d 10, 15 (2d Dep't 1985), *aff'd*, 67 N.Y.2d 778 (1986); *see also Maloney v. Anton Cmty. Newpapers, Inc.*, 16 A.D.3d 465 (2d Dep't 2005) (article describing incident involving plaintiff that resulted in plaintiff being arrested and charged with menacing dealt with matter of legitimate public concern).[13]

Additionally, that multiple news articles were written and published about the seizure of the stolen Automobile by the authorities demonstrates that the investigation of and attempt to recover the Automobile is a matter of legitimate public concern.[14] *See Gaeta v. N. Y. News, Inc.*,

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[13] Indeed, Plaintiff's own allegations of the "Ferrari Community's" interest in the subject matter of the Statements demonstrate that it is a matter of public concern. (*See, e.g.*, FAC ¶¶ 36, 62.)

[14] *See, e.g.*, Bill Sanderson, "Sorry, Your Ferrari," New York Post (Sept. 6, 2008), *available at* http://www.nypost.com/seven/09062008/news/regionalnews/sorry__your_ferrari_127750.htm; Noah Joseph, "Connecticut Police seize rare stolen Ferrari 250 PF Cabrio," Autoblog (Sept. 9, 2008), *available at* http://www.autoblog.com/2008/09/09/connecticut-police-seize-rare-stolen-ferrari-250-pf-cabrio, *article reprinted in*

465 N.E.2d 802, 805 (N.Y. 1984) ("Determining what editorial content is of legitimate public interest and concern *is a function for editors*." (emphasis added)); *Huggins v. Moore*, 726 N.E.2d 456, 460 (N.Y. 1999) ("[T]he *Chapadeau* standard is [thus] deferential to professional journalistic judgments. Absent clear abuse, the courts will not second-guess editorial decisions as to what constitutes matters of genuine public concern.").

Thus, there is little doubt that the investigation of and attempt to recover the Automobile is a matter of legitimate public concern, and there is no doubt that it is "arguably" such a matter. *See Chapadeau*, 341 N.E.2d at 571; Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 6.4 (2008) ("The use of the phrase '*arguably* within the sphere of legitimate public concern' has effectively avoided . . . the apparent necessity for courts to decide in each instance what is and what is not of general or public interest. As soon as a serious issue arises as to whether a publication treats a matter of legitimate public concern, it is automatically resolved because it becomes apparent that the matter is at least 'arguably' of legitimate public concern."); *Albert v. Loksen*, 239 F.3d 256, 269-70 (2d Cir. 2001) ("decisions in which *Chapadeau* was held inapplicable because the subject matter was not a matter of legitimate public concern are extremely rare"); *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 102 n.9 (2nd Cir. 2000) ("the scope of what is 'arguably within the sphere of public concern' has been held to be extraordinarily broad").

Indiacar (Sept. 10, 2008), *available at* http://www.indiacar.net/news/n90335.htm; Robert Farago, "How Could Hallingby NOT Know this Ferrari Was Stolen?," The Truth About Cars (Sept. 6, 2008), *available at* http://www.thetruthaboutcars.com/how-could-hallingby-not-know-this-ferrari-was-stolen; "Ferrari Stolen Decade Ago Found In Sharon," Connecticut Eyewitness News Channel 3 Website, WFSB.com (Sept. 5, 2008), *available at* http://www.wfsb.com/news/17400417/detail.html; Tony Hammer & Michele Hammer, "Ferrari Stolen in Spain Turns Up in Connecticut," About.com Classic Cars Blog (Sept. 9, 2008), *available at* http://classiccars.about.com/b/2008/09/09/ferrari-stolen-in-spain-turns-up-in-connecticut.htm; "Stolen Ferrari Worth $5 Million Found In Conn.," WCBS (September 5, 2008), *available at* http://wcbstv.com/watercooler/stolen.ferrari.ferrari.2.811205.html.

2. Plaintiff Has Failed To Adequately Allege That Defendants Were Grossly Irresponsible

As the Statements "arguably" involved matters of legitimate public concern, Plaintiff must adequately allege that Defendants acted in a grossly irresponsible manner. This standard "is highly protective of defendants; it is almost as difficult as 'actual malice' for plaintiffs to meet in most cases, and more difficult in some." Sack, *supra*, Part III.D.1, § 6.4.

In fact, Defendants undertook due diligence before publishing the ads, and had a reasonable basis to believe the Statements were true. As Barnes explained in his February 11, 2009 letter to Plaintiff's counsel:

> When we received the enquiry from a Swiss lawyer [Oliver Weber] about placing an ad for the whereabouts of s/n 0799 GT, I contacted Mr. Marcel Massini of Switzerland. He is a recognized worldwide Ferrari authority and keeps detailed records of the history of all the early Ferraris. I asked him if the car was ever reported stolen and he came back to me in writing that yes, it was reported stolen in Spain in 1992. This is also on his detailed history of the car, which Massini also provided me.

(*See* Affidavit of John W. Barnes, Jr. dated Aug. 21, 2009 ("Barnes Aff.") ¶ 7 (docket #14 and attached at Exh. 3)[15]; Barnes Aff. ¶ 4 & Exh. 3 (Massini stated to Barnes in a March 4, 2008 e-

[15] After Plaintiff reviewed the affidavits of Defendants John Barnes, Jr. and Gerald Roush, Plaintiff added certain allegations in his FAC that had not appeared in his original complaint. Specifically, Plaintiff alleges in his FAC that among serious Ferrari Collectors, dealers and enthusiasts, "the Automobile is sometimes referred to as '0799.'" (FAC ¶ 14.) In making this allegation, Plaintiff relied on the Barnes Affidavit. (*See, e.g.*, Plaintiff's Opposition to Defendants' Motion to Dismiss Plaintiff's Original Complaint "Pl. Opp." (docket #27) at 14 ("In his March 8, 2008 email to Marcel Massini, defendant Barnes asks, 'What's up with 0799?' referring to the vehicle by its chassis number. (*See* Defendants' Exhibit 3; Barnes Aff. at ¶ 4.)"). In addition, Plaintiff alleges in his FAC that "Roush and Roush, Inc. examined a computer database that showed Hallingby as the current owner in possession." (FAC ¶ 29.) In making this allegation, Plaintiff relied on the Roush Affidavit. (*See, e.g.*, Affidavit of Gerald L. Roush dated Aug. 24, 2009 ("Roush Aff.") ¶ 3 (docket #15 and attached at Exh. 4) ("For many years, I have entered the information that I have received regarding the Automobile in a database.").) Plaintiff may not cherry-pick parts of documents that Defendants provided to him after he filed his original complaint to rely on in drafting new allegations in his amended complaint without being subject to the settled rule that the Court may then consider the entirety of those documents. Thus, the Court may consider the entirety of the Barnes and Roush Affidavits in deciding this motion to dismiss. *See, e.g.*, *Heller Inc. v. Design Within Reach, Inc.*, No. 09 Civ.1909, 2009 WL 2486054, at *1 (S.D.N.Y. 2009) ("In deciding the defendant's motion to dismiss, the Court may consider . . . documents that the plaintiff relied upon in bringing suit and either are in its possession or of which it had knowledge."); *see also supra*, Note 1.

mail regarding the Automobile: "yes it is stolen!"); Barnes Aff. ¶ 5 & Exh. 4 (Massini's history of the Automobile states that the Automobile was stolen in 1992).)

As for Roush, Massini informed him by e-mail on September 28, 2000 that the Automobile had been stolen. (*See* Roush Aff. ¶ 3.) Roush relied on the information from this September 28, 2000 e-mail from Massini, among other evidence, to support his belief that the Statements in the Letter were true when he published them. *See id.*

In addition, Swiss Attorney Oliver Weber represented to both Roush and Barnes that the vehicle was stolen in the text of the advertisements. (*See* FAC ¶¶ 20, 50; *supra*, Note 2 and associated text, Roush Aff. ¶¶ 2, 4, 8 & Exhs. 2, 5; Barnes Aff. ¶¶ 2, 6 & Exhs. 1, 6.)

Here, Plaintiff does not allege that Defendants could not have reasonably relied on Massini or Weber. In New York, publishers are generally protected when they rely on third party sources. Unless they have substantial reason to doubt the accuracy of such a source, they can rely on that source without fear of a defamation finding. *See, e.g.*, *Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018, 1032 (2d Cir. 1997) ("Absent 'obvious reasons' to doubt the truth of an article, a newspaper does not have the 'intolerable burden of rechecking every reporter's assertions and retracing every source before' publication" (quoting *Karaduman v. Newsday*, 416 N.E.2d 557, 566 (N.Y. 1980)); *Gaeta*, 465 N.E.2d at 804, 806-07 (defendant not grossly irresponsible because "she had no reason to suspect her source" on whom she relied in publishing challenged statements).[16]

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[16] As the court in *Ortiz v. Valdecastilla*, 102 A.D.2d 513, 520 (1st Dep't 1984), stated:

> [T]he *Chapadeau* standard has been broadly interpreted. . . . In both *Robart*[*v. Post-Standard*, 52 N.Y.2d 843 (N.Y. 1981)] and *Carlucci*[*v. Poughkeepsie Newspapers, Inc.*, 88 A.D.2d 608 (2d Dep't 1982)], summary judgment was granted without any evidence of the reliability of the sources involved. In neither case did the reporter know even the name of the alleged police officer with whom he had spoken, and neither reporter verified the erroneous information with a second source.

Thus, as both Roush and Barnes relied on two reliable sources who both confirmed the truth of the Statements: (1) Marcel Massini – a recognized worldwide Ferrari expert who keeps detailed records of the history of all early Ferraris (*see* Barnes Aff. ¶ 3); and (2) Swiss Attorney Oliver Weber – the individual who placed the advertisements, Defendants were not grossly irresponsible. *See, e.g.*, *Wong v. World Journal*, No. 111729/2001, at 10 (N.Y. Sup. Ct. July 12, 2002), *available at* http://decisions.courts.state.ny.us/search/query3.asp, ("A finding of gross irresponsibility on the part of a defendant publisher thus requires proof of, but not limited to, knowledge of the falsity of their source or *a complete failure to confirm source information*." (emphasis added)).

Moreover, Plaintiff alleges insufficient facts to support his fault allegations against Roush. First, Plaintiff alleges that pior to publication, "Roush and Roush, Inc. examined a computer database that showed Hallingby as the current owner in possession." (FAC ¶ 29.) But there are always subsequent possessors of a stolen car. Whether or not such possessors know the car has been stolen in the past, one could reasonably expect them and third-parties to describe them as an owner in possession.

Also, Plaintiff omits that the document Plaintiff relies on in making this allegation states that the database that Roush examined explicitly states that the Automobile had in fact been stolen in Marbella, Spain just as the Statements assert, and that Marcel Massini was the source for this information. (*See* FAC ¶ 29; Roush Aff. ¶ 3.) Thus, far from suggesting the Statements were "probably false," the database that Roush examined prior to publication was a reliable source supporting the *truth* of the Statements. (FAC ¶ 29.)

Plaintiff additionally argues that Scott Rosen, the alleged previous owner of the Automobile, and Nicola Soprano, who brokered the Automobile's sale to Plaintiff, gave Roush

serious reason to doubt the accuracy of the Statements before Roush allegedly republished the statements. (FAC ¶¶ 31-33.) As explained below, the Court need not consider these arguments because they are relevant only to the allegations that Roush republished the Statements, which allegations are insufficient because they do not specifically allege when the Statements were republished. *See supra*, Part III.F.

Additionally, Plaintiff's claim that Soprano could have given Roush reason to doubt the accuracy of the Statements before Roush's republications clearly must fail, as *Soprano did not approach Roush until after Roush had published the Statements for the final time.*[17]

Regardless, Plaintiff admits that Rosen informed Roush that he was the previous owner of the Automobile and that Soprano informed Roush that he brokered the sale to Plaintiff. (FAC ¶¶ 31, 32.) If it were discovered that Rosen bought, possessed, or sold the Automobile knowing it was stolen, or that Soprano brokered the sale of the Automobile knowing it was stolen, they would be exposed to serious criminal and civil liability. Hence, Roush knew that Rosen and Soprano had a huge personal interest in preventing the Statements from being republished and in preventing the public and the authorities from believing that the Automobile was stolen. Thus Rosen and Soprano were inherently biased. More importantly, Plaintiff does not allege that Rosen or Soprano gave Roush any *evidence* that the Automobile was not stolen. Bald assertions supported by no evidence by Rosen or Soprano, who were known to be biased by Roush, should not have given Roush serious reason to doubt the truth of the Statements, especially given that

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[17] Plaintiff does not allege when exactly Soprano approached Roush, when Roush republished the Statements, or directly allege that it was before Roush's re-publications because, as Plaintiff knows, he cannot. (FAC ¶¶ 32, 33.) As Soprano admitted, he does not know when he approached Roush. (*See* Affidavit of Nicola Soprano dated October 28, 2009, (docket # 19 and Exh. 5), at ¶ 13 (Soprano states that he spoke with Roush "[o]n or about April and May of 2008").) In fact, Soprano spoke with Roush on May 18, 2008 – approximately one month *after* Roush last republished the Statements. Thus, anything Soprano allegedly said to Roush is irrelevant to Roush's fault. (*See, e.g.*, Pl. Opp. at 26 ("*Fault is measured at the time of publication* - not afterward. *Dibella v. Hopkins*, 403 F.3d 102 (2d Cir. 2005) (actual malice involves the subjective state of mind of the publisher at the time of publication).").)

two reliable sources had both previously confirmed to Roush the truth of the Statements. *See supra*, this section.

As for Barnes, Plaintiff alleges only one fact that could possibly suggest fault – that in 2001 Hallingby entered the Automobile in a rare Ferrari show that Barnes sponsored and that Barnes "identified the Automobile to visitors at the show by affixing to it a sign that stated: *'Serial No. 0799,' 'Owner Paul Hallingby.*"[18] (FAC ¶ 58.) From this one fact, Plaintiff jumps to the conclusion that "Defendants Barnes and Cavallino, Inc. were fully aware that Hallingby owned the Automobile" when they published the Statements *seven years later*. *Id.* But Plaintiff alleges no facts to show why such gross speculation is justified. *See, e.g.*, *ATSI*, 493 F.3d at 98 (Plaintiff "must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" (quoting *Twombly*, 127 S. Ct. at 1965)). Presumably, Barnes or one of his employees asked Hallingby or one of his associates for the serial number and owner of the Automobile and then wrote the answer down on a sign in the process of creating such signs for every car in the show. Barnes may never have seen the sign, and even if he did, or created it himself, he likely forgot its contents soon after, *let alone seven years later*. In addition, the Automobile still of course could have been stolen (with or without the "owner's" knowledge). All stolen cars will have subsequent possessors who, whether they know the car is stolen or not, will claim to be the owner of the car. Thus, even had Plaintiff adequately pled that Barnes knew that in 2001 the current possessor of the Automobile represented that he was the owner, it should not have given Barnes serious reason to doubt the truth of the Statements, especially given that two reliable sources had both previously confirmed to Barnes the truth of the Statements. *See supra*, this section.

[18] The Court did not grant Plaintiff permission to add this allegation to his amended complaint – which is relevant to fault, not defamatory meaning – and thus the Court should strike it. *See supra*, Part II.

3. Plaintiff's Admissions Demonstrate That He is a Public Figure in the Community in Which Defendants Published the Statements

Plaintiff's admissions (discussed below), clearly show that he is a public figure within the "Ferrari Community" – which Plaintiff alleges is the relevant public for this litigation and the audience for the alleged defamation. (*See e.g.*, FAC ¶¶ 2, 7, 21, 22, 51, 52.)[19]

Plaintiff must be considered a public figure for the purposes of this case because he is a public figure in the community in which Defendants published the Statements.

> A person may be widely known or engaged in a public controversy in a specific place or among specific people and therefore a public figure in relation to some and not to others. A plaintiff may thus be, for example, a public figure for purposes of suit against a defendant who publishes in a small discrete community in which the plaintiff is known . . . .

Sack, *supra* Part III.D.1, § 5.3.9. While Plaintiff is not a general purpose public figure, the law has been established for decades that an individual can be a public figure within a more delimited community. *See, e.g.*, *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1089-95 (D. Haw. 2007) (Plaintiff held to be "a public figure within the surfing community."); *Chandok v. Kessig*, No. 5:05-1076, 2009 WL 2762167 (N.D.N.Y. Aug. 27, 2009) (holding that plaintiff was a limited interest public figure in plant biology community and noting that she had co-authored articles and was known within the community); *Coliniatis v. Dimas*, 965 F. Supp. 511, 517 (S.D.N.Y. 1997) (holding that plaintiff was a public figure in Greek-American community); *Celle*, 209 F.3d 163, 177 (holding that plaintiff was a public figure in "Metropolitan Filipino-

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[19] Plaintiff admitted in his original complaint and his opposition to Defendants' motion to dismiss Plaintiff's original complaint that the "*Rare* Ferrari Community" is the relevant community to be analyzed for the purposes of this case. (*See, e.g.*, Original Complaint (docket #1) ¶¶ 11, 12, 14, 15, 18, 30, 31, 34; Pl. Opp. at 11, 13, 14, 19 (emphasis added).) The Court did not grant Plaintiff permission to amend his complaint to make the relevant community the "Ferrari Community" instead, and thus the Court should strike this amendment. *See supra*, Part II. Indeed Plaintiff's amendment cuts *against* the purpose for which leave to amend was granted – a larger, less expert, less specialized community that deals in "regular" non-rare Ferraris would be *less* likely to be aware of the alleged background facts necessary to understand the alleged defamatory meanings (*e.g.*, the fact, nature, and implications of the provenance checks). *See id.*

American community"). Especially relevant for this case is *Mackay v. CSK Publishing Co.*, which held that plaintiff was a "limited use public figure" within the community of Corvette enthusiasts. 693 A.2d 546, 554 (N.J. Super. Ct. App. Div. 1997).

Here, there can be no doubt that Plaintiff is a public figure within the "Ferrari Community." Plaintiff's admissions demonstrate that he is known in, and thus is a public figure in, the Ferrari Community. For example, Plaintiff alleges in his FAC that:

- The Automobile "is well know to serious Ferrari collectors, dealers and enthusiasts. . . . From the time of purchase onward, Hallingby maintained the Automobile openly. He entered it in a number of major vintage auto shows and allowed it to be photographed for Ferrari magazines." (FAC ¶ 14.)

- "Prior to the publication of the statements complained of herein, members of the Ferrari Community accurately believed that Hallingby was the Automobile's rightful owner." (FAC ¶ 16.)

- "[T]he individuals listed above and other members of the Ferrari Community accurately understood that Hallingby is an experienced purchaser of rare Ferraris . . . ." (FAC ¶ 18.)

- "Members of the Ferrari Community, including those listed hereinabove, read the above-quoted statements in the Magazine and understood that the reference to a 'Ferrari collector on the East Coast of the U.S.A.' was a reference to Hallingby because they knew that Hallingby owned the Automobile and had maintained it openly for over eight years." (FAC ¶ 52; *see also id.* ¶ 22.)

Moreover, Plaintiff has admitted that: "Hallingby has collected rare Ferraris for 15 years. During that time he has been actively involved in the rare Ferrari community, attending car shows, [and] cultivating friendships among Ferrari dealers and collectors . . . ." (Pl. Opp. at 2); Hallingby seeks "to maintain his good reputation in the Ferrari community." (*id.*); and Hallingby "made the car available for photographs that were published in a Ferrari enthusiasts' magazine with 'Paul "Barney" Hallingby' listed as the owner. He also entered the car in Ferrari shows." (*id.* at 4 (citations omitted)). Thus, plaintiff deliberately, and well before the alleged defamatory

statements were published, put himself forward in the Ferrari Community, was well known there, and identified himself with the Automobile in question. This exactly meets the standard for public figure set forth in *Chandok* and elsewhere.

Indeed, the Court can easily determine that Plaintiff is a public figure on this motion to dismiss, as Plaintiff *must necessarily* allege facts that classify Plaintiff as a public figure in the community to which the Statements were published because Plaintiff must necessarily allege that members of that community knew who Hallingby was in order for Plaintiff's claim to be viable. Specifically, because the Statements do not name Hallingby, Plaintiff must allege that readers knew who Hallingby was such that they knew the Statements referred to Hallingby, which Plaintiff is required to allege to satisfy both the of and concerning and defamatory meaning elements. *See supra*, Parts III.B & C. Plaintiff cannot have it both ways – he cannot argue (1) that Plaintiff *was so well known* to those in the community in which the Statements were published that those who read them would have known the Statements referred to Hallingby, even though they do not identify him, and (2) that Plaintiff *was not well known* to those in the community in which the Statements were published, and thus Plaintiff should not be considered a public figure in that limited community.

4. Plaintiff Has Failed To Adequately Allege That Defendants Acted with Actual Malice

Because Plaintiff is a public figure, he must make "a showing of 'actual malice'—that is, [that Defendants made the Statements] with knowledge that [they were] false or with reckless disregard of whether [they were] false or not. A plaintiff must prove actual malice by clear and convincing evidence." *DiBella v. Hopkins*, 403 F.3d 102, 110 (2d Cir. 2005) (citations omitted). To allege a defendant acted with "reckless disregard" of the truth, a plaintiff must allege that the defendant acted with "a high degree of awareness that the advertisement was false." *Dally v.*

Orange County Publ'ns, 117 A.D.2d 577, 579 (2d Dep't 1986). As discussed above, Plaintiff has not adequately pled gross irresponsibility. *See supra*, Part III.D.2. Thus Plaintiff has failed, *ipso facto*, to plead the higher standard of actual malice. *See, e.g.*, *Dally*, 117 A.D.2d at 577-79 (holding no actual malice even where plaintiff had previously directly informed defendant and provided undisputed evidence that the statements were false and defendant relied on an "unreliable source").

E. The Statements Are Not Libelous Per Se And Plaintiff Has Failed To Adequately Plead Special Damages

To adequately plead a libel claim, the Statements must be libelous per se or Plaintiff must have pled special damages. *See, e.g.*, *Drug Research Corp. v. Curtis Publ'g Co.*, 166 N.E.2d 319, 322 (N.Y. 1960); *Meehan v. Newsday, Inc.*, 54 A.D.2d 560, 560 (2d Dep't 1976); *Celle*, 209 F.3d at 176.

1. The Statements Are Not Libelous Per Se Because They Require Reference To Extrinsic Facts

A statement is not per se libelous if it requires reference to extrinsic facts to understand its alleged defamatory meaning. *See, e.g.*, *Frawley Chem. Corp. v. A. P. Larson Co.*, 274 A.D. 643, 644 (1st Dep't 1949) ("[I]t is necessary to plead and prove special damages arising from injury to a plaintiff's business as a result of the publication of words, however falsely or maliciously spoken or written if they were not defamatory upon their face, but require to be shown to have been so by extrinsic evidence." (citing ten New York cases)); Sack, *supra* Part Part III.D.1, §§ 2.8.1, 2.8.3; Pl. Opp. at 15.[20] Here, the Statements are not per se libelous, and Plaintiff does not allege otherwise. Indeed, Plaintiff has withdrawn in his amended complaint

[20] Whether a statement is libelous per se is a question of law for the court to determine. Sack, *supra* Part III.D.1, § 2.8.4.

the allegations in his original complaint that the Statements were per se libelous. (*Compare* Original Complaint ¶¶ 17, 33 *with* FAC ¶¶ 25, 26, 55, 56.)

Here, reference to at least the following extrinsic facts are necessary to understand the alleged defamatory meaning of the Statements: (1) that it is unlikely, if not impossible, for a buyer to purchase a stolen rare Ferrari like the Automobile without being aware that it is stolen; and (2) that Hallingby[21] owned the Automobile. The Statements neither explicitly nor implicitly communicate these facts. Without reference to these extrinsic facts, the Statements' alleged defamatory meaning – that Hallingby had knowingly purchased and/or possessed a stolen Ferrari and intentionally refrained from conducting the customary provenance investigation and/or deliberately ignored information indicating the Automobile was stolen – cannot be established. Without reference to these extrinsic facts, the Statements' apparent meaning is simply that a stolen Ferrari was last reported to be in the custody of a Ferrari collector in Sharon, Connecticut (the Letter) or the east coast of the USA (the Magazine).

2. Plaintiff Has Failed To Plead Special Damages

Under New York defamation law, "special damages" consist of "the loss of something having economic or pecuniary value that must flow directly from the injury to reputation caused by the defamation." *Celle*, 209 F.3d at 179 (internal quotation marks omitted); *Matherson v. Marchello*, 100 A.D.2d 233, 235 (2d Dep't 1984) ("Special damages . . . must flow directly from the injury to reputation caused by the defamation . . . they must be fully and accurately identified with sufficient particularity to identify actual losses." (citations and internal quotation marks omitted)). *See also, e.g.*, Sack, *supra* Part III.D.1, § 2.8.7.1 ("Special damages refers only to

[21] Indeed, the Statements neither accuse Hallingby of a crime nor even mention or refer to him, and thus they are not per se libelous. *See Barry Harlem Corp. v. Kraff*, 652 N.E.2d 1077, 1080 (Ill. App. Ct. 1995) ("A statement which does not mention the plaintiff by name cannot be injurious to him or her on its face [per se]."); *Lind v. O'Reilly*, 636 P.2d 1319, 1320 (Colo. Ct. App. 1981) (news report not libelous per se where it did not refer to plaintiff).

pecuniary damages such as out-of-pocket loss." (citations omitted)). Plaintiff alleges special damages only for "defending baseless charges." This allegation is insufficient because Plaintiff fails to allege how these alleged "baseless charges" were directly caused by the Statements.[22]

Plaintiff alleges that a confidential source reported to the Connecticut Police that the Automobile was stolen, and showed them the Statements. (FAC ¶¶ 38, 64.) Plaintiff also alleges that the Connecticut Police seized the Automobile. *Id.* But the Seizure of the Automobile and the associated criminal investigation (much less any associated legal fees) did not "flow directly from the injury to reputation caused by the defamation." *Celle*, 209 F.3d at 179 (internal quotation marks omitted). In other words, the advertisements were not the direct cause of the seizure and the associated investigation. This is made clear in the full relevant text of the seizure warrant,[23] which states:

> [The Confidential Source] stated to Affiant Van Tine that he/she was aware of a 1958 Ferrari 250PF, with Vehicle Identification Number 0799GT that was stolen in Spain in the early 1990's that he/she believes is now being stored in Connecticut. . . . The Confidential Source stated that a Paul "Barney" Hallingby of [redacted] is currently holding the vehicle. The Confidential Source provided Affiant Van Tine with a history of the vehicle that he/she obtained from the internet. The history shows that the vehicle was reported as "disappeared, stolen" prior to 1993 and, after having changed hands several times, is currently owned by "Paul Hallingby, CT, US." The Confidential Source showed Affiant Van Tine an advertisement in "Cavallino," a magazine that caters to high-end vehicle collector, stating that the 1958 Ferrari 250PF, with Vehicle Identification Number 0799GT, is stolen. . . . Affiant confirmed through Interpol that the 1958 Ferrari 250PF, with Vehicle Identification Number 0799GT was stolen in Marbella, Spain between the dates of May 1st, 1993 and September 30th, 1993 and was reported as such to Interpol by the Swiss Police. It remains listed in Interpol as "stolen." . . . . On July 21st, 2008, Affiant Van Tine received numerous documents from Oliver Weber, the Swiss Attorney who represents the victim in

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[22] Moreover, Plaintiff admits that no "charges" were brought against him to defend. (Pl. Opp. at 32.)

[23] The Court may consider the contents of the seizure warrant both because Plaintiff (1) referred to it in, and (2) had knowledge of it and relied on it in, drafting his amended complaint. *See, e.g.*, *Heller*, 2009 WL 2486054, at *1 ("In deciding the defendant's motion to dismiss, the Court may consider documents incorporated in [the complaint] by reference . . . or documents that the plaintiff relied upon in bringing suit and . . . of which it had knowledge."); FAC ¶¶ 38, 64; Pl. Opp. at 1, 6, 7, 17 n.10. Also, the Court may consider the seizure warrant because it is part of the Roush Affidavit. *See supra*, Note 15; Roush Aff. ¶ 7, Exh. 9.

> this case. The documents highlight the investigation conducted by him on behalf of his client. There are three "Requests for Seizure and Recovery." . . . These "Requests" provide a detailed summary of the events surrounding the theft of the vehicle . . . . Mr. Weber also provided three "Directories of Evidence Documents," two of which have attachments. The primary "Directory" has original notarized statements and signatures and the other having attachments contains copies of those notarized statements and signatures. The attachments are various articles, statements, and other documents that support the accusations made in the aforementioned "Requests for Seizure and Recovery."

(Exh. 6 at 3.1-3.3, ¶¶ 4, 6, 12; Roush Aff. ¶ 7, Exh. 9.) Much more significant information than the Magazine advertisement was presented to the judge who granted the warrant. This information included that Interpol confirmed that the Automobile was stolen, that the Swiss Police reported the Automobile as stolen, and an attorney's detailed summary of the events surrounding the theft of the Automobile with supporting evidence. Therefore, it is not plausible that that advertisement, rather than this other more probative information, was the direct cause of the issuance of the warrant. *See Iqbal*, 129 S. Ct. at 1949 ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. . . . Determining whether a complaint states a plausible claim [will] be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." (internal quotation marks omitted)); *Twombly*, 127 S. Ct. at 1974 (A complaint must plead "enough facts to state a claim for relief that is plausible on its face.").

Moreover, the advertisements could not have caused the warrant to be issued for the Automobile's seizure because the issuance of the warrant required probable cause, and the Magazine Advertisement could not, as a matter of law, have constituted probable cause. *See, e.g.*, *Connecticut v. Buddhu*, 825 A.2d 48, 55-56 (Conn. 2003) ("Probable cause, broadly defined, comprises such facts as would reasonably persuade an impartial and reasonable mind

not merely to suspect or conjecture, but to believe that criminal activity has occurred." (internal quotation marks omitted and emphasis added)); (Exh. 6 at 1, 3.1 ¶ 17; Roush Aff. ¶ 7, Exh. 9.)

Plaintiff also alleges that "[a]s a further direct and proximate result of the publication of the statements, the value of the Automobile fell by in excess of one million dollars and it became unsalable. The Automobile remains substantially below its pre-publication value." (FAC ¶¶ 39, 46, 65, 72.) As an initial matter, this is not an allegation of special damages because Plaintiff does not allege that it is an allegation of special damages. *See, e.g.*, *Matherson*, 100 A.D.2d at 235; Fed. R. Civ. P. 9(g).

But even had Plaintiff alleged this was special damages, the allegation that "the value of the Automobile fell by in excess of one million dollars and it became unsalable" would clearly be an inadequate special damages allegation for three independent reasons: (1) allegations of round number loss amounts are insufficient; (2) potential buyers must be identified for claims of lost customers or sales; and (3) an allegation of a decline in market value is insufficient. *See, e.g.*, *Drug Research Corp. v. Curtis Pub. Co.*, 166 N.E.2d 319, 322 (N.Y. 1960) ("[S]pecial damage must be fully and accurately stated; if the special damage was a loss of customers, . . . the persons who ceased to be customers, or who refused to purchase, must be named . . . . The damage claimed is $5,000,000. Such round figures, with no attempt at itemization, must be deemed to be a representation of general damages." (citations and internal quotation marks omitted)); *Camarda v. Vanderbilt*, 147 A.D.2d 607, 609-10 (2d Dep't 1989) ("The plaintiffs make a general claim that the value of the property surrounding the race tracks has diminished by approximately $5,000 because of the flea markets. Such round figures, with no attempt at itemization, must be deemed to be a representation of general damages. Nor does the affidavit of the real estate broker establish that the plaintiffs have sustained any present injury.") (citation

and internal quotation marks omitted); *Steinberg v. Erie R. Co.*, 103 Misc. 573, 576 (1st Dep't App. Term 1918) ("the amount of the market decline [is] properly general and not special damage").

F. Plaintiff's Allegations that Roush Republished the Statements In "Subsequent Editions of the Letter" Are Insufficient

Additionally, Plaintiff's allegations that Roush *republished* the Statements – and specifically the allegations that Scott Rosen and Nicola Soprano gave Roush reason to doubt the Statements' accuracy before Roush republished them, *see infra*, Part III.D.2 – are facially deficient. Plaintiff alleges that after Roush published the Statements in the March 22, 2008 edition of the Letter, Roush republished the Statements in "subsequent editions of the Letter." (FAC ¶ 33.) But Plaintiff fails to allege the specific time the Statements were republished. *See, e.g.*, *Arsenault v. Forquer*, 197 A.D.2d 554, 556 (2d Dep't 1993) ("Regarding the second letter, which may have been published some time between August 11, 1988, and August 30, 1988, the plaintiff fares no better, as he has failed to lay bare his proof as to the publication date of that letter. The aforementioned cases require that the specifics of all three component parts of the publication, *i.e.*, its time, manner, and audience, must be alleged in order for a cause of action sounding in libel to succeed." (citation omitted)).[24]

[24] Finally, as Plaintiff has not alleged common law malice – *i.e.*, that Defendants made the Statements out of hatred, ill will, or spite towards Plaintiff – his request for punitive and/or exemplary damages must be dismissed. *See, e.g.*, *Prozeralik Capital Cities Commc'ns, Inc.*, 626 N.E.2d 34, 41-42 (N.Y. 1993); *Morsette v. "The Final Call"*, 309 A.D.2d 249, 254-55 (1st Dep't 2003). Moreover, Plaintiff has waived his claim for such damages, as he did not address Defendants' arguments on this issue in his Opposition to Defendant's motion to dismiss Plaintiff's original complaint. (Defendants' Brief in support of their Motion to Dismiss Plaintiff's Original Complaint (docket #13) at 19).

IV. THE COURT SHOULD DISMISS HALLINGBY'S CLAIMS FOR SLANDER OF TITLE

A. The Elements of Slander of Title[25]

Under New York Law, the elements of a slander of title cause of action are "(1) a communication falsely casting doubt on the validity of complainants title, (2) reasonably calculated to cause harm, and (3) resulting in special damages." *Brown v. Bethlehem Terrace Assocs.*, 136 A.D.2d 222, 525 N.Y.S.2d 978, 979 (3d Dep't 1998); *39 College Point Corp. v. Transpac Capital Corp.*, 27 A.D.3d 454, 455 (2d Dep't 2006). Plaintiff has failed to adequately allege the second and third elements of slander of title.[26]

B. Plaintiff Has Failed to Adequately Allege That the Statements Were Reasonably Calculated to Cause Harm

1. "Reasonably Calculated to Cause Harm" Means Actual Malice

Slander of title's second element, that the statements at issue must have been "reasonably calculated to cause harm," means that those statements must have been made with actual malice:

> In New York, courts have applied the "actual malice" standard [to claims of slander of title], and have regularly dismissed claims where the plaintiff has failed to show that the defendant acted with knowledge that the statements were false or with a "reckless disregard" for the truth or falsity of the statements. *See, e.g.*, Fink [v. Shawangunk Conservancy Inc., 15 A.D.3d 754], 790 N.Y.S.2d [249,] 251 [(3d Dep't 2005)] ("We find no evidence of the malicious intent necessary to support a cause of action for slander of title . . . these public assertions cannot be said to have been made 'with a reckless disregard for their truth or falsity.'"); *see also Terrace Hotel Co. v. State*, . . . 227 N.E.2d 846, 849-50 . . . (N.Y. 1967) (holding slander of title to require proof of "malice or spite" . . .); *John W. Lovell Co. v. Houghton*, . . . 22 N.E. 1066, 1067 (N.Y. 1889) (stating that slander of title action will fail unless defendant has "knowledge" that statements were false).

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[25] As Plaintiff indicates in his Amended Complaint, another name for "slander of title" is "product disparagement." *See* FAC at 1, 18; Committee on Pattern Jury Instructions Association of Justices of the Supreme Court of the State of New York, New York Pattern Jury Instructions – Civil, vol. 2, § 3:55, p. 500 (2008 2d. Ed.) ("The tort which the common law referred to as 'slander of title' or 'trade libel,' . . . is sometimes also denominated 'disparagement' . . . .").

[26] As previously discussed, the Court did not grant Plaintiff permission to add his new slander of title claims to his amended complaint, and thus the Court should strike them. *See supra*, Part II.

Chamilia, LLC v. Pandora Jewelry, LLC, No. 04-cv-6017 (KMK), 2007 U.S. Dist. LEXIS 71246, at *35-36 (S.D.N.Y. Sept. 24, 2007).

2. Plaintiff Has Failed To Adequately Plead Actual Malice

In connection with Plaintiff's slander of title claims, Plaintiff has failed to plead facts that make it plausible that Defendants made the Statements with actual malice for the same reasons that Defendants set forth in detail above in Parts III.D.4 and III.D.2.

C. Plaintiff Has Failed to Allege Special Damages

In connection with Plaintiff's slander of title claims, Plaintiff has failed to allege special damages for the same reasons that Defendants set forth in detail above in Part III.E.2. In fact, Plaintiff does not explicitly allege that he incurred any special damages in connection with his slander of title claims, which must thus fail. (*See* FAC ¶¶ 44-48, 70-74.)[27]

[27] Finally, Plaintiff's claim for punitive damages for his slander of title claim is abjectly baseless. He fails to even make conclusory allegations of the required elements of such punitive damages, let alone allege any facts to suggest that the existence of those elements is plausible, as he is required to do. New York's "Court of Appeals has made clear that punitive damages are available only where liability is based upon proof of misconduct that, beyond being merely tortious, bespeaks 'such wanton dishonesty as to imply a criminal indifference to civil obligations'" *Ross v. Louise Wise Servs., Inc.*, 28 A.D.3d 272, 300 (1st Dep't 2006) (quoting *Rocanova v. Equitable Life Assur. Socy. of the United States*, 634 N.E.2d 940, 943-44 (N.Y. 1994)); *see also Prozeralik.*, 626 N.E.2d at 41-42 ("Punitive damages are awarded in tort actions where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime"). Nowhere does – nor, of course, could – Plaintiff allege that Defendants' conduct "implied a criminal indifference to civil obligations" or had "the character of outrage frequently associated with crime." Indeed, Plaintiff alleges absolutely no facts that suggests that Defendants alleged "wrongdoing" was "intentional and deliberate." Moreover, Plaintiff alleges no facts that suggest that any of Defendants alleged actions were done to cause harm, out of spite, or with evil motive. *See, e.g.*, *Wilson v. City of New York*, 7 A.D.3d 266, 267 (N.Y. 2004) (claims for punitive damages were not cognizable where there was no indication that the alleged misconduct had "the character of spite, malice or evil motive"); *Ross v. Louise Wise Services, Inc.*, 28 A.D.3d 272, 300 (1st Dep't 2006) ("a demand for punitive damages should be dismissed where there is no evidence that the tortfeasor was seeking to maliciously hurt the injured parties or to wantonly inflict pain with the intent of injuring [them]" (internal quotation marks omitted).

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court strike the amendments to the First Amended Complaint that the Court did not grant Plaintiff permission to make and dismiss with prejudice Plaintiff's First Amended Complaint in its entirety.

Dated: New York, New York
March 24, 2010

Respectfully submitted,

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