UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

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Roush Publications, Inc. ("Roush Publications"), Gerald L. Roush ("Roush"), Cavallino, Inc., and John W. Barnes, Jr. ("Barnes") (together, "Defendants"), by their attorneys, Arkin Kaplan Rice LLP, respectfully submit this memorandum of law in support of their motion to dismiss the complaint ("the Complaint") filed by Paul "Barney" Hallingby ("Hallingby" or "Plaintiff") pursuant to Rules 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.[1]

PRELIMINARY STATEMENT

Hallingby's Complaint fails to adequately allege any of the five elements of his defamation and libel claims, and must be dismissed.

First, the Statements in the advertisements that Defendants allegedly published were not "of and concerning" Hallingby, as the advertisements do not mention or otherwise refer to Hallingby. Moreover, Plaintiff fails to allege facts indicating that readers understood the Statements to refer to Hallingby.

Second, the Statements in the advertisements were not even made by Defendants. Plaintiff misleadingly omits from his Complaint that the advertisements each state: "*For further information please contact: Oliver Weber, Attorney-at-Law . . .*," and then list Mr. Weber's contact information. This language demonstrates that the Statements are attributed to the third party (Swiss Attorney Oliver Weber) who made them. Weber paid for and placed the

[1] *See Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) (Federal Rule of Civil Procedure 12(b)(6) states "that when a motion is made under Rule 12(b)(6) and 'matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56,' giving all parties a reasonable opportunity to present pertinent material under that Rule." (citing Fed. R. Civ. Pro. 12(b)(6))).

advertisements and put his name and contact information in the advertisements, clearly indicating that Weber was making the Statements.

Third, Plaintiff has failed to adequately allege that Defendants acted in a grossly irresponsible manner. Defendants were clearly not grossly irresponsible, as they 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; and (2) Swiss Attorney Oliver Weber – the individual who placed the advertisements.

Fourth, Plaintiff alleges no facts to support his claim that the Statements are false. Plaintiff alleges absolutely no facts to support his conclusory assertion that the Statements "are false in that the Automobile is not and was not 'stolen.'" Plaintiff also alleges that the Statements are false "insofar as they impute to Hallingby the crime of knowingly receiving and/or maintaining possession of stolen property." The Statements, of course, can in no way fairly be said to impute any crimes to Hallingby. Moreover, Plaintiff fails even to plead any facts that support Plaintiff's conclusory assertion that Hallingby did *not* knowingly receive and/or maintain possession of stolen property. In fact, Plaintiff admits that it would be virtually impossible for him not to have known the Automobile was stolen.

Fifth and finally, the Statements are not per se actionable and Plaintiff has failed to adequately plead special damages. The Statements are not per se actionable both because they do not charge Plaintiff with a serious crime and because reference to extrinsic facts is required to understand, among other things, that they allegedly implied that the possessor of the Automobile (1) had knowingly purchased and/or possessed stolen property and (2) was Hallingby. In addition, Hallingby does not even seek *recovery* of any special damages. Hallingby's sole allegation in this regard is that he "has suffered special damages, the precise amount of which

has not been ascertained but which include substantial costs incurred by plaintiff in defending baseless charges brought against him as a result of the defamatory publication." Hallingby does not plead that any particular charges have been filed against him. More importantly, this allegation is woefully insufficient, as this "specious at best" argument has been rejected by the U.S. Supreme Court, as well as the Appellate Division of the New York Supreme Court.

STATEMENT OF FACTS[2]

On March 10, 2009, Hallingby, a resident and citizen of New York, filed his Complaint against Roush Publications, Roush, Cavallino, Inc., and Barnes. Complaint ¶¶ 1-6. Roush edits and publishes the "Ferrari Market Letter" (the "Letter"), and Roush Publications distributes the Letter in New York and elsewhere. *Id.* ¶¶ 2, 3. Barnes publishes "Cavallino" magazine (the "Magazine"), and Cavallino, Inc. distributes the Magazine in New York and elsewhere. *Id.* ¶¶ 4, 5. Both the Letter and the Magazine focus on issues relating to rare Ferrari automobiles. *Id.* ¶¶ 2, 4.

The Complaint alleges that the Letter and the Magazine published advertisements that contain statements (the "Statements") that are defamatory. Complaint ¶¶ 17, 33. The advertisements read as follows:

STOLEN FERRARI

Ferrari 250 PF, Cabriolet, Silver Colored, Pinin Farina,

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[2] As is required in a motion to dismiss, this statement of facts assumes the truth of the factual allegations set forth in the Complaint. The facts are supplemented by documents that are incorporated by reference in the Complaint, the full text of documents cited in the Complaint, 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).

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[3]

Id. ¶¶ 13, 29; *See* Roush Aff. ¶ 2 & Exh. 2; Barnes Aff. ¶ 2 & Exh. 1. Swiss attorney Oliver Weber – representing Dr. Andreas Gerber, the owner of the Ferrari with the Vehicle Identification Number 0799GT (the "Automobile") – placed and paid for the advertisements in the Letter and the Magazine. *See* Roush Aff. ¶ 2, Barnes Aff. ¶ 2. The advertisements were published in the March 22, April 5, and April 19, 2008 issues of the Letter, and in the April/May 2008 issue of the Magazine. *Id.* ¶¶ 13, 29, 37; Roush Aff. ¶ 2 & Exh. 2.[4]

Hallingby purchased the Automobile in or about 2000. Complaint ¶ 11. The Automobile is unique because, among other things, it is one of only 36 cars in the Pinin Farina Series 1. *Id.* For that reason, the Automobile is well known to serious Ferrari collectors and others. *Id.* The

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[3] 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." *See* Barnes Aff. ¶ 2 & Exh. 1. Plaintiff misquotes this part of the Magazine advertisement and bases his allegations on that misquote. *See* Complaint ¶¶ 13, 15. Moreover, Plaintiff misleadingly omits from his Complaint all of the italicized language in the advertisements beginning with "*For further information please contact: Oliver Weber, Attorney-at-Law . . .*," and then listing Mr. Weber's contact information. *Id.* ¶¶ 13, 29. This language indicates that the Statements are attributed to the third party (Swiss Attorney Oliver Weber) who made them, and that Weber placed and paid for the advertisements.

[4] The Complaint erroneously asserts that the advertisements were published in March, April, and May 2008 issues of the Letter. Complaint ¶¶ 29, 37. In fact, they were published in the March 22, April 5, and April 19, 2008 issues of the Letter. *See* Roush Aff. ¶ 2 & Exh. 2.

Automobile has appeared at a number of major vintage auto shows and has been featured in several automobile magazines. *Id.* From the time of his purchase onward, Hallingby maintained the Automobile on his property in Sharon, Connecticut. *Id.*

It is customary for a buyer to conduct a thorough due diligence process before purchasing a rare and valuable vehicle like the Automobile. Complaint ¶ 12.[5] In that regard, a potential buyer customarily extensively researches the provenance of such a vehicle, carefully checks the vehicle's title, and investigates any clouds on the title. *Id.* Before such a sale is finalized, a potential buyer consults domestic and international records of stolen vehicles and investigates and resolves any outstanding claims or charges. *Id.* Accordingly, it is virtually impossible for a buyer to purchase a stolen rare Ferrari like the Automobile without being aware that it is stolen. *Id.*

Before the advertisements were printed, Roush and Barnes each separately communicated with Marcel Massini, a leading expert in recordkeeping for rare Ferrari automobiles, to investigate the status of the title of the Automobile. *See* Barnes Aff. ¶¶ 3, 4, 5 & Exhs. 3, 4; Roush Aff. ¶ 3.[6] Massini told both men that his records confirmed that the Automobile was stolen. *See* Barnes Aff. ¶¶ 4, 5 & Exhs. 3, 4; Roush Aff. ¶ 3. Massini specifically informed Roush that the Automobile was reported stolen from a warehouse in Spain. *See* Roush Aff. ¶ 3. In addition, both Roush and Barnes were advised by Swiss Attorney Oliver Weber, the individual who placed the advertisements, that the Automobile was stolen. *See* Complaint ¶¶ 13, 29, 37; Roush Aff. ¶¶ 2, 4, 8 & Exhs. 2, 5; Barnes Aff. ¶¶ 2, 6 & Exhs. 1, 6.

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[5] Plaintiff alleges the facts cited in this paragraph in the process of alleging that members of the "Rare Ferrari Community" know these facts. *See* Complaint ¶ 12.

[6] Roush first heard that the Automobile might be stolen in September 2000 from FBI Special Agent Ken Crook. *See* Roush Aff. ¶ 3.

Roush and Barnes's reasonable basis for printing the advertisements is confirmed by the fact that in 1995 and 2008, Dr. Andreas Gerber filed criminal complaints in Switzerland reporting that the Automobile was stolen in 1993 in Marbella, Spain. *See* Roush Aff. ¶¶ 5, 6 & Exhs. 7, 8. Further, in September 2008, based on, among other things, the fact that the Automobile had been reported stolen, the Connecticut State Police seized the Automobile on Hallingby's property. *See* Roush Aff. ¶ 7 & Exh. 9.

ARGUMENT

I. STANDARD FOR MOTION TO DISMISS

To survive a motion to dismiss brought under Rule 12(b)(6), 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.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly,* 127 S. Ct. 1955, 1965 (2007)). Although a court should construe the pleadings liberally, "bald assertions and conclusions of law will not suffice." *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 183 (2d Cir. 2008) (internal quotation marks omitted). A complaint must plead "enough facts to state a claim for relief that is plausible on its face." *Howard v. Mun. Credit Union*, No. 05 Civ. 7488, 2008 WL 782760, at *6 (S.D.N.Y. Mar. 25, 2008) (quoting *Twombly,* 127 S. Ct. 1955, 1974).

II. THE COURT SHOULD DISMISS HALLINGBY'S CLAIMS FOR DEFAMATION AND LIBEL

A. The Elements of Libel

Under New York law, the elements for libel[7] are (1) a written defamatory statement of fact of and concerning the plaintiff, (2) publication by the defendants to a third party; (3) fault,

[7] Plaintiff describes his claims as for both "defamation" and "libel." As libel is the subset of defamation that covers defamatory written or printed words, and the allegedly defamatory material in this case was transmitted by printed words, Plaintiff's claims are most precisely described as claims for libel. *See* Restatement (Second) of Torts § 568 (1977) (The two types of defamation are libel and slander. Generally, libel consists of the publication of

consisting of at least negligence, (4) falsity of the defamatory statement, and (5) per se actionability or special damages. *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).

Thus, to avoid dismissal of his Complaint, Hallingby must have adequately alleged that: (1) the Statements were of and concerning Hallingby; (2) Defendants published the Statements to a third party; (3) Defendants acted with the requisite amount of fault,[8] (4) the Statements were false, and (5) Hallingby has incurred special damages or the Statements are per se actionable. Hallingby has clearly failed to adequately allege these elements, and thus his Complaint must be dismissed.

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

Hallingby's libel claims must be dismissed because the Statements were not "of and concerning" Hallingby. *Bee Publ'ns v. Cheektowaga Times, Inc.*, 107 A.D.2d 382, 384 (N.Y. App. Div. 1985) (citation omitted); *see also Kirch v. Liberty Media Corp.*, 449 F.3d 388, 399-400 (2d Cir. 2006) (Under New York law, "[t]he 'of and concerning' requirement stands as a significant limitation on the universe of those who may seek a legal remedy for communications they think to be false and defamatory and to have injured them."); Restatement (Second) Torts § 613, cmt. d (1977) (plaintiff must prove the alleged defamatory statement "was published of and concerning him, that is, he must satisfy the court that it was understandable as intended to refer to himself, and must convince the jury that it was so understood"). Though the plaintiff need not be named specifically, *Cuthbert v. Nat'l Org. for Women*, 207 A.D.2d 624 (N.Y. App.

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defamatory matter by written or printed words, and slander consists of the publication of defamatory matter by spoken words.).

[8] When an allegedly defamatory statement arguably involves a matter of "legitimate public concern," a plaintiff must adequately allege that in publishing the statement the publisher acted in a "grossly irresponsible manner." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569, 571 (N.Y. 1975).

Div. 1994), the burden of proof is "not a light one." *Chicherchia v. Cleary*, 207 A.D.2d 855, 855 (N.Y. App. Div. 1994) (citation omitted). 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 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*, 207 A.D.2d at 856.

Here, the advertisements do not mention or otherwise refer to Hallingby. *See, e.g., Smith v. Long Island Youth Guidance, Inc.*, 181 A.D.2d 820, 821-22 (N.Y. App. Div. 1992) (concluding that 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). Plaintiff makes the conclusory assertion that readers of the Statements "understood that the reference to a 'Ferrari collector in Sharon 06069, Connecticut' was a reference to Hallingby." Complaint ¶¶ 15, 31.[9] This conclusory allegation, however, is not supported by any *facts*. Plaintiff merely alleges that (1) the Automobile "is unique because, *inter alia*, it is one of only 36 cars in the Pinin Farina Series 1 [and thus] is well known to serious Ferrari Collectors and others"; (2) the Automobile "appeared at a number of major vintage auto shows and has been featured in several automobile magazines"; and (3) "[f]rom the time of purchase onward, Hallingby maintained the Automobile in . . . Sharon, Connecticut." *See* Complaint ¶ 11. These allegations do not establish that readers of the Letter and Magazine know that Hallingby lived in Sharon Connecticut or that he owned

[9] 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." *See* Barnes Aff. ¶ 2 & Exh. 1. Plaintiff misquotes this part of the Magazine advertisement and bases his allegations against Cavallino, Inc. and Barnes on that misquote. *See* Complaint ¶¶ 13, 15 (readers of the Statements in the Magazine "understood that the reference to a 'Ferrari collector in Sharon 06069, Connecticut' was a reference to Hallingby."). Plaintiff makes no allegation that readers of the Statements in the Magazine understood that the reference to a "Ferrari collector on the east coast of the USA" was a reference to Hallingby. Thus Plaintiff has failed to allege the "of and concerning" element against Barnes and Cavallino, Inc., and Plaintiff's claims against these Defendants must be dismissed for this reason alone.

the Automobile.[10] *See ATSI Commc'ns*, 493 F.3d at 98 (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.*'" (emphases added) (quoting *Twombly,* 127 S. Ct. at 1965 (2007))); *Spool*, 520 F.3d at 183 (in pleadings, "bald assertions . . . will not suffice" (internal quotation marks omitted)).

C. Defendants Did Not Make the Statements in Question

The Statements in the advertisements were not even made by Defendants. Plaintiff misleadingly omits from his Complaint all of the italicized language in the advertisements beginning with: "*For further information please contact: Oliver Weber, Attorney-at-Law . . .*," and then listing Mr. Weber's contact information. *See id.* ¶¶ 13, 29; Roush Aff. ¶ 2 & Exh 2; Barnes Aff. ¶ 2 & Exh. 1. This language demonstrates that the Statements are attributed to the third party (Swiss Attorney Oliver Weber) who made them. Weber paid for and placed the advertisements and put his name and contact information in the advertisements, clearly indicating that Weber was making the Statements. *See* Roush Aff. ¶ 2 & Exh. 2; Barnes Aff. ¶ 2 & Exh. 1; *see also, e.g.*, 43A N.Y. Jur. 2d Defamation and Privacy § 91 (2009) ("In order to impose liability for the publication of a defamatory statement, the defamatory statement must ordinarily have been made by the defendant, either directly or through the agency of some other person authorized to act for him or her." (*citing* Am. Jur. 2d, Libel and Slander § 225)); Restatement (Second) Torts § 613 (1977) (regarding the alleged defamatory statement, plaintiff has the burden of proving "its publication by the defendant").

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[10] Plaintiff makes the conclusory assertion that "[o]ver the years, rare Ferrari buyers, sellers, collectors and enthusiasts (collectively, the 'Rare Ferrari Community') came to know that Hallingby owned the Automobile and maintained it in Sharon, Connecticut." Complaint ¶ 11. In pleadings, without allegations of supporting *facts*, such "bald assertions . . . will not suffice." *Spool*, 520 F.3d at 183; *ATSI Commc'ns*, 493 F.3d at 98.

D. Plaintiff Has Failed to Allege that Defendants Were Grossly Irresponsible

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

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). Generally, a media report is considered a matter of public concern. Indeed, New York's highest court has concluded that "[d]etermining what editorial content is of legitimate public interest and concern *is a function for editors*." *Gaeta v. New York News, Inc.*, 465 N.E.2d 802, 805 (N.Y. 1984) (emphasis added). The court continued, "[w]hile not conclusive, a commercial enterprise's allocation of its resources to specific matters and its editorial determination of what is 'newsworthy,' may be powerful evidence of the hold that subjects have on the public's attention." *Id.* (some internal quotation marks omitted). Finally, the court declared that "the press['s] . . . editorial judgments as to news content will not be second-guessed so long as they are sustainable." *Id.* As such, courts will only intervene to prevent "clear abuses." *Id.*; *see also 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."). Accordingly, the mere fact that something has been published by the media gives rise to a strong presumption that it involves a matter of public concern.

Moreover, New York courts have explicitly stated that accusations of criminal behavior against a private individual are matters warranting public exposition. In *Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D.2d 10 (N.Y. App. Div. 1985), *aff'd*, 67 N.Y.2d 778

(1986), the court commented that it is "plain" that a person's "alleged criminal conduct" and the "operation of the criminal justice system" regarding the disposition of the charges against such an individual are matters of "legitimate public concern." *Id.* at 15. Accordingly, the court applied the *Chapadeau* standard and measured the newspaper's liability based on "gross irresponsibility." *Id.* at 15-16; *see also Maloney v. Anton Cmty. Newpapers, Inc.*, 16 A.D.3d 465 (N.Y. App. Div. 2005) (article describing incident involving plaintiff that resulted in plaintiff being arrested and charged with menacing dealt with matter of legitimate public concern).

Applying the foregoing principles to the Statements, it is evident that the investigation of and attempt to recover the stolen Automobile is a matter of public concern. The Statements directly concern the possession of a stolen item, and even mention that police are actively investigating the whereabouts of the Automobile. *See* Complaint ¶¶ 13, 29. Thus, this ongoing police investigation fits squarely within the language of *Pollnow* as warranting "legitimate public concern." Moreover, the mere fact that multiple news articles were written about the seizure of the stolen Automobile by the authorities demonstrates that the investigation of and attempt to recover the stolen Automobile is a matter of legitimate public concern, as contemplated by the *Gaeta* court. *See* Roush Aff. ¶ 9; Barnes Aff. ¶ 8; Reisen Decl. ¶¶ 3-9 & Exhs. 10-16. The allocation of editorial resources to coverage of the Automobile powerfully demonstrates that the story behind it is a newsworthy one. 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").

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

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." Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 6.4 (2008).

Plaintiff makes the conclusory assertion that Defendants were "grossly negligent" in publishing the Statements and that they published them "with knowledge of their falsity or reckless disregard for the truth." Complaint ¶¶ 21, 22, 38, 39. However, Plaintiff fails to allege any facts in support of his conclusory assertion, but rather merely offers additional conclusory assertions. *See* Complaint ¶¶ 19, 35 (Defendants "had no reliable or credible source for the defamatory statements and/or they knew, prior to publication, that said statements were unreliable."); *id.* ¶¶ 20, 36 (Defendants "knew they had no true facts in support of the defamatory statements, and indeed knew that they were no more than unsubstantiated and unverified gossip."); *id.* ¶ 37 ("Following the March, 2008 publication, [Roush and the Letter] acquired information that gave them serious reason to doubt the truth of the defamatory statements. Nevertheless, they republished said statements in the April and May, 2008 editions of the Letter."). Thus, Plaintiff has failed to allege any facts to support an inference that Defendants acted with the requisite amount of fault. *See ATSI Commc'ns*, 493 F.3d at 98 (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.'" (emphasis added) (quoting *Twombly,* 127 S. Ct. at 1965)); *Spool*, 520 F.3d at 183 (in pleadings, "bald assertions . . . will not suffice" (internal quotation marks omitted)).

In any event, Hallingby's allegations are false. 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 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 Barnes Aff. ¶ 7; Barnes Aff. ¶ 4 & Exh. 3 (Massini stated to Barnes in a March 4, 2008 e-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, he first heard that the Automobile might be stolen in September 2000 from FBI Special Agent Ken Crook. *See* Roush Aff. ¶ 3. Roush then made further inquiries and on September 28, 2000 Massini informed him by e-mail that the Automobile had indeed been stolen. *Id.* Roush relied on the information from this September 28, 2000 e-mail from Mr. Massini, among other evidence, to support his belief that the Statements in the Letter were true when he published them. *Id.*

In addition, Swiss Attorney Oliver Weber represented to both Roush and Barnes that the vehicle was stolen in the text of the advertisements and in subsequent correspondence. *See* Complaint ¶¶ 13, 29, 37; Roush Aff. ¶¶ 2, 4, 8 & Exhs. 2, 5; Barnes Aff. ¶¶ 2, 6 & Exhs. 1, 6.

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 lawsuit. *See, e.g.*, *Gaeta*, 465 N.E.2d 802, 804, 806-07 (N.Y. 1984) (defendant not grossly irresponsible because "she had no reason to suspect her source" on whom she relied in publishing challenged statements); *Cottom v. Meredith Corp.*, 65 A.D.2d 165, 167, 169 (N.Y. App. Div. 1978) (reporter not grossly irresponsible in publishing story on landlord's failure to provide heat and repairs to couple where reporter had interviewed couple); *Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018 (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))); *Weiner v. Doubleday & Co.*, 549 N.E.2d 453, 74 N.Y.2d 586, 595 (N.Y. 1989) ("without substantial reasons to doubt the accuracy of the material or the trustworthiness of its author, a publisher is entitled to rely on the research of an established writer" (internal quotation marks omitted)).[11] 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

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[11] As the court in *Ortiz v. Valdecastilla*, 102 A.D.2d 513 (N.Y. App. Div. 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 (N.Y. App. Div. 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.

Id. at 520.

Ferraris[12]; and (2) Swiss Attorney Oliver Weber – the individual who placed the advertisements, Defendants were not grossly irresponsible.

E. The Statements Were Not False

Plaintiff's Complaint must also be dismissed because Hallingby has failed to adequately allege that the Statements were false. *See Prozeralik v. Capital Cities Commc'ns, Inc.*, 626 N.E.2d 34, 37-38 (N.Y. 1993) ("Under well-established principles of law, a plaintiff in a defamation action has the burden of showing the falsity of factual assertions." (internal quotation marks and citations omitted)).[13]

1. Plaintiff Alleges No Facts To Support His Claim That The Statements Are False

Fatal to his claim, Plaintiff alleges absolutely no facts to support his conclusory assertion that the Statements "are false in that the Automobile is not and was not 'stolen.'" Complaint ¶¶ 16, 32. *See ATSI Commc'ns*, 493 F.3d at 98 (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.'" (emphasis added) (quoting *Twombly,* 127 S. Ct. at 1965)); *Spool*, 520 F.3d at 183 (in pleadings, "bald assertions . . . will not suffice" (internal quotation marks omitted)).

In fact, Roush and Barnes had a reasonable basis for printing the advertisements, and this was confirmed by documents provided by attorney Oliver Weber and Ferrari expert Marcel Massini. In 1995 and 2008, Dr. Andreas Gerber filed criminal complaints in Switzerland

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[12] *See* Barnes Aff. ¶ 3.

[13] *See also Von Gerichten v. Long Island Advance*, 202 A.D.2d 495, 496 (N.Y. App. Div. 1994) (burden of adequately pleading and proving falsity is on private plaintiffs suing media defendants in cases involving matters of public concern); *Love v. William Morrow & Co.*, 193 A.D.2d 586, 588 (N.Y. App. Div. 1993) (same); *McGill v. Parker*, 179 A.D.2d 98, 108-09 (N.Y. App. Div. 1992) (burden of adequately pleading and proving falsity is on private plaintiffs suing non-media defendants in cases involving matters of public concern); *see also Am. Preferred Prescription, Inc. v. Health Mgmt., Inc.*, 252 A.D.2d 414 (N.Y. App. Div. 1998) (same). As previously explained, the Statements involve a matter of public concern. *See supra*, Part II.D.1.

reporting that the Automobile was stolen in 1993 in Marbella, Spain. *See* Roush Aff. ¶¶ 5, 6 & Exhs. 7, 8. Further, based on, among other things, the fact that the Automobile had been reported stolen, a search and seizure warrant for the Automobile from Hallingby's property was issued to and executed by the Connecticut state police in September 2008. *See* Roush Aff. ¶ 7 & Exh. 9. In the course of the execution of this warrant, police seized the Automobile from Hallingby's property. *Id.* Moreover, Interpol has confirmed that the Automobile was stolen in Spain in 1993 and remained listed by Interpol as stolen during 2008. *See, e.g., id.* (Search and Seizure Warrant ¶ 6).[14]

Plaintiff also alleges that the Statements are false "insofar as they impute to Hallingby the crime of knowingly receiving and/or maintaining possession of stolen property." Complaint ¶¶ 16, 32. The Statements, of course, can in no way fairly be said to impute any crimes to Hallingby. All the Statements say is that the Automobile was last reported to be in the custody of a Ferrari collector located "on the east coast of the USA" (the Magazine) or "in Sharon 06069, Connecticut" (the Letter). These statements are true. Moreover, Plaintiff fails even to plead any facts that support Plaintiff's conclusory assertion that Hallingby did *not* knowingly receive and/or maintain possession of stolen property. In fact, Plaintiff admits that it would be virtually impossible for him not to have known the Automobile was stolen. *See* Complaint ¶ 12 ("it is

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[14] As a Connecticut Department of Public Safety posting stated:

> [O]n Thursday, 09/04/2008, the Connecticut State Police Motor Vehicle Task Force and the Connecticut State Police Auto Theft Task Force conducted a joint investigation to attempt to recover a stolen 1958 Ferrari 250 PF. . . . The criminal investigation revealed that the car was reported stolen in Spain in 1993. The original Police report identified the victim from Switzerland. Interpol assisted in this investigation, as well as the original owner/victim. State Police investigators obtained copies of all Spanish and Swiss documents relating to the stolen Ferrari and they were all translated into English. The theft was confirmed and the true ownership was established to be a subject from Switzerland.

Reisen Decl. ¶ 3 & Exh. 10.

virtually impossible for a buyer to purchase a stolen rare Ferrari like the Automobile without being aware that it is stolen").

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

To adequately plead his libel claim, the Statements must be per se actionable or Plaintiff must have plead special damages. *See, e.g., Celle*, 209 F.3d at 176.

1. The Statements Are Not Per Se Actionable Both Because They Do Not Charge Plaintiff With A Serious Crime And Because They Require Reference To Extrinsic Facts

A statement is per se actionable if, among other things, it charges a person with a serious crime. *See, e.g., Penn Warranty Corp. v. DiGiovanni*, 10 Misc.3d 998, 1002 (N.Y. Sup. Ct. 2005). Plaintiff alleges that the Statements "are defamatory per se in that they falsely impute immoral and/or criminal conduct to Hallingby, specifically the knowing receipt and/or possession of stolen property." Complaint ¶¶ 17, 33. The Statements, of course, can in no way fairly be said to impute these crimes to Hallingby. *See, e.g., supra*, Part II.E.1. Moreover, a defamatory statement is not per se actionable if it requires reference to extrinsic facts. *See Newsday, Inc. v. C.L. Peck Contractor, Inc.*, 87 A.D.2d 326, 327 (N.Y. App. Div. 1982) (granting motion to dismiss where claimed defamatory allegations of larceny could not be slander per se because: "The mere assertion that the defendants are withholding moneys was not facially defamatory. It is clear that they could not be slanderous per se in that a reference to extrinsic facts is needed to understand the nature of the allegations."); *Frawley Chem. Corp. v. A. P. Larson Co.*, 274 A.D. 643, 644 (N.Y. App. Div. 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)). Thus, the Statements are not per se actionable because reference to extrinsic facts is required to understand, among other things, that they allegedly implied that the possessor of the Automobile (1) had knowingly purchased and/or possessed stolen property and (2) was Hallingby. *See* Complaint ¶¶ 11, 12 (admitting that to understand the alleged meaning of the Statements, third parties would have had to know several extrinsic facts, including: (1) that it is virtually impossible for a buyer to purchase a stolen rare Ferrari like the Automobile without being aware that it is stolen; and (2) that Hallingby owned the Automobile and maintained it in Sharon, Connecticut.).

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. Hallingby's sole allegation that he suffered special damages is that he "has suffered special damages, the precise amount of which has not been ascertained but which include substantial costs incurred by plaintiff in defending baseless charges brought against him as a result of the defamatory publication." *See* Complaint ¶¶ 25, 42.[15] This allegation is woefully insufficient, as "[t]he argument that actual damages cannot be ascertained at the pleading stage is specious at best. This precise principle was rejected by the Supreme Court in *Gertz* [*v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974)], and this court in *Salomone*[*v. MacMillan Pub. Co.*, 77 A.D.2d 501 (N.Y. App. Div. 1980)]." *Newsday*, 87 A.D.2d at 328 (internal quotation marks omitted); *id.* ("Defendants have pleaded no special damages. The arbitrary figure of $8,000,000 in compensatory damages is not related to any specific injury."). Moreover, Hallingby does not even seek recovery of *any* special damages.

[15] Hallingby does not plead that any particular charges have been filed against him. Defendants are aware of no such charges brought against Hallingby.

See Complaint at 8 (requesting general and punitive and/or exemplary damages, but no special or actual damages); Fed. R. Civ. P. 9(g) ("If an item of special damage is claimed, it must be specifically stated.").

G. Plaintiff's Request For Punitive and/or Exemplary Damages Must Be Dismissed

Punitive or exemplary damages may only be assessed under New York libel law if the plaintiff has established common law malice, which requires plaintiff to establish that the libelous statements were made out of hatred, ill will, or spite toward the plaintiff. *Celle*, 209 F.3d at 184; *Prozeralik*, 626 N.E.2d at 41-42; *Morsette v. "The Final Call"*, 309 A.D.2d 249, 254-55 (N.Y. App. Div. 2003); 44 N.Y. Jur. 2d Defamation and Privacy § 225 (2009). As Hallingby has not alleged that Defendants made the Statements out of hatred, ill will, or spite towards Hallingby, his request for punitive and/or exemplary damages must be dismissed.

CONCLUSION

For the reasons set forth above, Roush Publications, Roush, Cavallino, Inc., and Barnes respectfully request that the Court dismiss Hallingby's Complaint in its entirety.

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Respectfully submitted,

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