**UNITED STATES DISTRICT COURT**
**DISTRICT OF MAINE**

| | | |
|---|---|---|
| PAN AM SYSTEMS, INC., et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | 2:11-cv-00339-NT |
| | ) | |
| CHALMERS HARDENBERGH, et al., | ) | |
| | ) | |
| Defendants. | ) | |

**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

Defendants Chalmers Hardenbergh, C.M. Hardenbergh, P.A., and Atlantic Northeast Rails & Ports ("ANRP") (collectively, "Defendants"), through undersigned counsel, reply to Plaintiffs' Objection to Defendants' Motion to Dismiss. Plaintiffs have conceded that some of their claims are without merit.[1] Their remaining case amounts to an attempt to attack the free speech rights of a small but powerful journalistic voice covering the railroad industry in the northeast.

## I. The Complaint does not meet the Twombly/Iqbal pleading standard.

Under *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), as discussed in Defendants' Motion to Dismiss, Plaintiffs are required by Rule 8(a) to plead facts to support each element of their claim. *Iqbal* says that a pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U. S. at 555. Since *Iqbal*, the First Circuit has held in at least one context that a rote recitation of the fault standard of a cause of action is insufficient. *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009) (allegation that defendants "acted with deliberate indifference

[1] In their Objection to Motion to Dismiss, Plaintiffs admitted that Counts II (*Pls Obj'n* at 2 n.1) and IV (*Pls Obj'n* at 2 n.1), and Count III in so far as it relates to the corporate plaintiffs (*Pls Obj'n* at 16 n.11), lack any basis in law.

and/or reckless disregard" was the type of "parroting" of a legal standard that should be stricken from a complaint).

Plaintiffs cite to *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) to save their complaint, *Pls. Obj'n* 6-7, but *Ocasio,* as Plaintiffs report, explicitly requires that a pleading contain facts.

> To show an "entitlement to relief," a pleader must state enough factual material "to raise a right to relief above the speculative level on the assumption that all allegations in the complaint are true (even if doubtful in fact)." *Id* at 12 (citing *Twombly*, 550 U.S. at 555). "If the factual content, so taken, 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,' the claim has facial plausibility." *Id.* at 12 (quoting *Iqbal*). "A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss." *Id* at 15.

*Pls. Obj'n* at 7 (emphasis added, internal citations omitted)

Plaintiffs supply no facts that the allegedly defamatory statements were "false,"[2] that the Defendants were "negligent," and that they acted in "reckless disregard for the truth." *Compl.* ¶ 15-17. Each paragraph is only "a formulaic recitation of the elements" of defamation. As such, they must be disregarded pursuant to *Iqbal* and *Ocasio*. Once that is done, the complaint amounts to a list of permissible journalistic statements and provides no plausible basis for relief.

The only case offered by the Plaintiffs to rebut this reasoning came down in another district, ***prior*** to the Supreme Court's decision in *Iqbal*. *See Pls. Obj'n* at 8, 10 (citing *Encompass Ins. Co. of MA v. Giampa*, 522 F. Supp. 2d 300, 312, 313-14 (D. Mass. 2007)). In holding that recitation of the element of negligence is sufficient, it relied on the pre-*Iqbal* understanding of averring "state of mind, including motive and intent," generally. *Encompass*,

[2] Plaintiffs assert that falsity is presumed in the absence of a privilege. *Pls. Obj'n* at 8 n. 6 (citing *Ramirez v. Rogers*, 540 A.2d 475, 477 (Me. 1988). Whether that remains the case in Maine is unclear, since the Law Court has since referred to falsity as an element of defamation. *Courtney v. Bassano*, 1999 ME 101, ¶ 16, 733 A.2d 973. The Court need not resolve that ambiguity, because the First Amendment places the burden on the Plaintiffs to prove falsity in this case. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767-77 (1986).

522 F. Supp. 2d at 313-14. *Iqbal* clarified that "'generally' is a relative term" "to be compared to the particularity requirement applicable to fraud or mistake." 129 S. Ct. at 1954. It does not "empower [a plaintiff] to plead the bare elements of a cause of action." 129 S. Ct. at 1954. Furthermore, *Encompass* involved more factually detailed pleadings of falsity than the complaint at issue, *see Encompass*, 522 F. Supp. 2d at 312-13 (quoting allegation that the press release "grossly exaggerated both the nature of [the] case and the amount in controversy"), and was not a media case, *Id.* at 305 (defamation counterclaims brought by businesses providing chiropractic services).

## II. Plaintiffs fail to meet their burden of pleading falsity and fault.

A second barrier to defamation claims against media defendants is provided by the "constitutional requirement that the plaintiff bear the burden of showing falsity, *as well as* fault,[3] before recovering damages." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767-77 (1986) (emphasis added). Plaintiffs correctly argue that the Complaint need not prove falsity and fault, *Pls.' Obj'n* at 8, but *Iqbal* and *Twombly* require that their Complaint do more than baldly allege that Defendants made false statements and were at fault. By requiring that Plaintiffs state facts to back up allegations – here allegations of both falsity and fault – the *Twombly/Iqbal* standard protects the First Amendment and the freedom of the press. Plaintiffs may not merely speculate as to falsity and negligence and then engage in a fishing expedition via discovery, ostensibly to seek facts to prove their case. That would chill media comment. Defendants and others would think, "If I publish this damaging fact about Pan Am, they will slap me with a lawsuit saying it is

[3] In Maine, Plaintiffs would bear this burden regardless of whether the Defendants were members of the media or possessed any other privilege. *Courtney v. Bassano*, 1999 ME 101, ¶ 16, 733 A.2d 973 (quoting *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 128 (1st Cir. 1997) ("Simply put, Maine defamation law does not recognize liability without fault; rather, as a predicate to recovery, Maine requires a defamation plaintiff to show that the defendant acted at least negligently.")

'false' and I acted 'negligently.' Then I will go through months of discovery while Pan Am attempts to find facts to back up the allegations. I better not publish it."

In light of these First Amendment interests the Court should carefully police the applicable pleading standard. Plaintiffs correctly state, "All that is required are factual allegations that allow the court to make reasonable inferences that the alleged statements are false..." *Pls.' Obj'n* at 8 (emphasis added). But they allege no facts about falsity, so the Court has nothing to infer. Likewise, Plaintiffs claim that the element of fault "is reasonably implied by [Defendants'] publication of false defamatory statements," *Pls.' Obj'n* at 10, blithely doing away with black letter defamation law which makes fault a separate element of defamation.

## III. Plaintiffs mistake First Amendment protections as affirmative defenses.

Plaintiffs argue that "Rule 8(a)(2)...does not require a plaintiff in a defamation claim to predict any and all conditional privileges a defendant may later raise as affirmative defenses after the commencement of an action." *Pls. Obj'n* at 3. The First Circuit has made clear, however, that affirmative defenses may be considered at the motion to dismiss stage. "In an appropriate case, an affirmative defense may be adjudicated on a motion to dismiss for failure to state a claim." *In re Colonial Mast.*, 324 F.3d 12, 16 (1st Cir. 2003).

Even if Plaintiffs were correct that the court could not consider affirmative defenses at the pleading stage, Defendants' arguments, with one exception,[4] are not based on affirmative defenses. Defendants' argument is based on Plaintiffs' failure to plead the elements of their defamation claim. That the complaint lacks the requisite factual substance to state a claim is not raising an affirmative defense; it is only pointing out that, lacking any facts, the complaint does not meet the pleading standards of *Twombly/Iqbal*.

[4] Statement 12A, which is within the fair report privilege.

## IV. Plaintiffs are public figures.

Plaintiffs argue that they are not public figures. *Pls. Obj'n* at 12. The ongoing public controversies in which Plaintiffs are embroiled include the adequacy and the quality of the rail transportation services afforded to the public by the primary rail operator in New England. The Complaint itself shows the public nature of the issues in this case. Plaintiffs allege that Defendants newsletter devoted to the railroad and related industries is "widely read." Compl. ¶ 4. The Complaint involves a set of thirteen[5] comments about Plaintiffs' operation over a period of fifteen months (from December 2, 2009 to March 17, 2011). These comments, from customers of the railroad, would-be customers, railroad officials, and a supplier of auxiliary power units to railroads, all familiar with Plaintiffs' operations, Compl ¶ 12, show that Plaintiffs' operations are of intense public interest.

The public nature of the controversy and Plaintiffs' involvement is reflected in the myriad news articles of which they are subject.[6] The Court may take judicial notice of these

[5] Allegation 12A is one, 12B has four comments, 12C one, 12D two, 12E four, and 12F one.

[6] Defendants provide just a small sample of some local articles. *See* Matt Wickenheiser, *Baldacci Tours Rail Improvements, Says Trains Key to Maine Industries*, Bangor Daily News, Oct. 23, 2010, *available at* 2010 WLNR 21336927 (in which David Fink discussed Maine industries' reliance on Pan Am lines); Tom Bell, Portland Press Herald, *Legislators' Plan: Force Sale of Rail*, Mar. 6, 2008, *available at* 2008 WLNR 4448787 (discussing proposal in Maine legislature to force sale of Pan Am railways to the state due to the railroad's failure "to provide timely and consistent service to many of its manufacturing customers"); The Associated Press, Maine, *State Lawmakers Want to Give Pan Am Railways the Boot*, Sun Journal, Mar. 6, 2008, *available at* http://www.sunjournal.com/node/235626 ("Some Maine lawmakers want to give Pan Am Railways the boot because of complaints that it's failing to provide timely and consistent service to many of its manufacturing customers."); The Associated Press, *Logo of Once Storied Airline Will Ride the Rails*, Mar. 31, 2005 (discussing Guilford Rails Systems' ownership of the Pan Am "name, colors, and logo"); Edward D. Murphy, *Combative Image Vexes New Hampshire-Based Rail Firm Guilford Transportation*, Portland Press Herald, May 5, 2002, *available at* 2002 WLNR 11977803 (discussing the "very public fights" and "public spats" related to David Fink's railroad operations); *Guilford Head Announces Proposal to Take Over Canadian Railroad Line*, Bangor Daily News, Nov. 3, 1993, *available at* 1993 WLNR 530619 (in which David Fink stated that the plan would save 1,000 jobs); U.S. State News, *Pan Am Railways, Subsidiaries Indicted on Charges of Failing to Report Environmental Contamination*, Apr. 3, 2008, *available at* 2008 WLNR 6359093; Dawn Gagnon, *Derailment Blamed on Broken Shaft*, Bangor Daily News, May 18, 1999, *available at* 1999 WLNR 884150 (in which David Fink commented on derailment of train owned by Springfield Terminal

articles, *Flynn v. Hubbard*, 782 F.2d 1084, 1087 n. 1 (1st Cir. 1986); *United States v. Perez-Casillas*, 593 F.Supp. 794, 796-797 (D.P.R. 1984), and may take them into consideration in determining whether to dismiss the complaint, *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 16 (1st Cir. 2003). The Court need not address the truth or substance of each article, but the fact of substantial ongoing news coverage of Plaintiffs' rail operations is beyond dispute.[7] *See Condit v. Dunne*, 317 F. Supp. 2d 344, 357-58 (S.D.N.Y. 2004) (In motion to dismiss defamation claim, court took judicial notice of the publication of articles as evidence of a "media frenzy," not as evidence of the substance of the articles). Plaintiffs and their officers—including Plaintiff Fink—have repeatedly inserted themselves into public controversies. Consistent with the allegedly defamatory statements, these controversies relate to issues of service and safety and how those issues impact businesses and the public.

A reading of the case *Guilford Transportation Industries v. Wilner*, 760 A.2d 580 (D.C. App. 2000), shows that Plaintiffs have been public figures within the railroad industry. As early as 1997 Pan Am was "spark[ing] debate throughout the transportation industry." *Wilner*, 760 A.2d at 584.

Plaintiffs are public figures by the weight of their own pleadings and by their indisputable status as highly public entities and figures involved in the region's transportation network. As a result, they must plead facts – which they have not done – sufficient to state a plausible claim that Defendants acted in reckless disregard of the truth.

---

Railway); Lisa Redmond, *Pan Am, Three Others Fined in 2006 Ayer Oil Spill*, The Sun, Lowell, Mass, Apr. 1, 2009, *available at* 2009 WLNR 612108.

[7] Plaintiffs point to *Snead v Redland Aggregates*, 998 F.2nd 1325, 1329-30 (5th Cir. 1993), in vain. The case did not involve media defendants; it centered on one corporate entity's comments about another corporate entity.

## V. Plaintiffs' Objection manipulates the statements.

References to the statements in Plaintiffs' Objection differ from the statements as they appear in the Complaint. For example, the statement "challenges, [such as] safety challenges, employee relations and locomotive maintenance," Compl. ¶ 12, is referenced in the Objection as "a poor job with safety, employee, and locomotive maintenance," *Pls. Obj'n* at 9. Similarly, information from four sources as to the nature of Mr. Fink's "removal" from management of Pan Am, Compl. ¶ 12, became "asserting as fact that Mr. Fink was fired from his position at Pan Am by owner Tim Mellon," *Pls. Opp'n* at 9. Plaintiffs' memorandum takes unjustified liberties with the statements actually published by Defendants.

WHEREFORE, Defendants respectfully request that this Court, for the reasons in this Reply and in their Motion to Dismiss, dismiss the entire Complaint.

DATED at Portland, Maine this 28th day of November, 2011.

Respectfully submitted,
Chalmers Hardenbergh, C.M. Hardenbergh, P.A., and Atlantic Northeast Rails & Ports

by their attorneys,
PRETI FLAHERTY BELIVEAU & PACHIOS, LLP

*/s/ Sigmund D. Schutz*

Sigmund D. Schutz
Benjamin S. Piper
P. O. Box 9546
Portland, ME 04112-9546
Telephone: (207) 791-3000
Facsimile: (207) 791-3111
E-Mail: sschutz@preti.com

**CERTIFICATE OF SERVICE**

I, Sigmund D. Schutz, attorney for the Defendants hereby certify that on the above date, I electronically filed the Defendants' Reply to Plaintiffs' Objection to Defendants' Motion to Dismiss and Incorporated Memorandum of Law in this matter with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) electronically to the registered participants:

Thad B. Zmistowski, Esq., Bar No. 6960
Eaton Peabody
P.O. Box 1210
Bangor, Maine 04402-1210
(207) 947-0111
tzmistowski@eatonpeabody.com

*/s/ Sigmund D. Schutz*
Sigmund D. Schutz
Attorney for Defendants

PRETI FLAHERTY BELIVEAU &
PACHIOS, LLP
One City Center
P.O. Box 9546
Portland, ME 04112-9546
(207) 791-3000
sschutz@preti.com