UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PAN AM SYSTEMS, INC., et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	2:11-cv-00339-GZS
	)	
CHALMERS HARDENBERG, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Defendants Chalmers Hardenbergh, C.M. Hardenbergh, P.A., and Atlantic Northeast Rails & Ports ("ANRP")[1] (collectively, "Defendants"), through undersigned counsel, move to dismiss the Plaintiffs' complaint, pursuant to Fed.R.Civ.P. 12(b)(6). The primary basis for this motion is that the complaint fails to satisfy the *Iqbal/Twombly* pleading standard of Fed.R.Civ.P. 8. The Plaintiffs must do more than merely allege the threadbare elements of their claims. To state claims, they must allege the factual underpinnings necessary to raise a plausible inference that the claims asserted are viable.

In their defamation claim (Count I), the Plaintiffs recite the "actual malice" standard of fault applicable in defamation cases against public figures, but fail to allege any facts sufficient to raise an inference that Defendants acted with the necessary level of fault. Even if the Plaintiffs were not public figures (which flies in the face of the public record and the status of railroads – and their CEOs – as highly visible figures of great importance to the region's transportation system), their claims would fail because they do not allege any facts sufficient to

[1] The complaint misspells Mr. Hardenbergh's name. Defendants have corrected this misspelling throughout this Motion. Moreover, Atlantic Northeast Rails & Ports is a New York Corporation, although the Complaint does not reference its separate corporate status. This motion is brought on behalf of Atlantic Northeast Rails & Ports, Inc. and the two other defendants.

raise a plausible inference of negligence. Plaintiffs also fail to plead facts sufficient to meet *Iqbal/Twombly* standards in connection with the remaining elements of their defamation claim. The Plaintiffs' defamation claim suffers from the further defect that many of the asserted statements are non-actionable opinion under Maine common law. One of the asserted statements – by the Chair of a New Hampshire state agency involved in railroad policy – is protected by the common law fair report privilege. Once again, no facts are alleged sufficient to overcome the privilege.

A claim of defamation per se (Count II) is not a separate cause of action and, in any event, reporting on the functioning of the railroads in the region is a matter of public concern for which presumed damages are unavailable as a matter of law.

The Plaintiffs' false light claim (Count III) suffers from pleading defects similar to those found in their defamation claim. They assert malice in a conclusory fashion, without pleading facts sufficient to plausibly state a claim. As a matter of law, the statements alleged also do not rise to the level of being "highly offensive" as necessary to state a false light claim. In addition, corporate plaintiffs do not have an actionable right of privacy.

Finally, Plaintiffs claim for punitive damages (Count IV) is not an independent cause of action. In addition, Plaintiffs have not adequately pled punitive damages as a remedy because they plead malice in an entirely conclusory and generalized fashion. There is no factual basis for a punitive damages remedy within the four corners of the complaint.

The complaint must be dismissed in its entirety.

INCORPORATED MEMORANDUM OF LAW

In this action, the major railroad holding company in New England (Pan Am Systems), its operating subsidiary (Springfield Terminal Railway) and its former chief executive officer

(David Andrew Fink) (collectively "Plaintiffs") allege that the reporting of a small trade newsletter and its editor defamed them and invaded their privacy. The Plaintiffs have coupled a list of perfectly appropriate journalistic statements with generalized assertions that the statements were made in a way that violates the law. The plethora of legal deficiencies contained in Plaintiffs' complaint reveals Plaintiffs' actual intent here: a constitutionally impermissible attempt to silence a journalistic voice.

FACTUAL BACKGROUND[2]

On September 6, 2011, Plaintiffs filed a four-count complaint against Defendants. Compl. (Docket # 1). The complaint refers to ANRP as "a widely read weekly trade newsletter and e-bulletin covering the Northeastern United States, Eastern Quebec and the Canadian Maritimes regions." *Id.* ¶ 4. ANRP also "maintains a website that contains back issues of its newsletters, maps, and a database about shippers, ports, railroads, and intermodal facilities." *Id.* ¶ 5. Chalmers Hardenbergh is the editor and publisher of ANRP. *Id*. ¶ 6. Hardenbergh and C.M Hardenbergh P.A. are also alleged to be owners and principals of ANRP. *Id*. ¶¶ 7-9.

The complaint identifies six allegedly false and defamatory statements published in Atlantic Northeast Rails & Ports Newsletters and E-Bulletins. Compl. ¶ 12. The statements all relate to the Plaintiffs' operation of railroads. *Id.* For clarity, Defendants have numbered the bulleted statements of Compl. ¶ 12. Paragraph 12A contains a statement by Peter Burling, chair of the New Hampshire Rail Transit Authority, that Pan Am's dilapidated railroad caused the derailment of a coal train. Paragraph 12B quotes a Pan Am customer that its service is "bad." Paragraph 12C alleges that Pan Am has challenges in safety, employee relations, and locomotive maintenance. Paragraph 12D states that a potential customer of another railroad believes that

[2] For purposes of this Motion, the Defendants recount the facts as alleged in the complaint in accordance with the standard for review for a motion to dismiss. This recitation does not amount to an admission of any facts. Defendants dispute many of the alleged facts.

Pan Am has a lack of service. Paragraph 12E discusses the March 2011 departure of Plaintiff Fink as the head of Pan Am Systems. Paragraph 12F states that Pan Am loses track of railcars.

Based on these statements, the Plaintiffs assert claims of defamation, *id.* ¶¶13-18, defamation *per se*, i*d.* ¶¶ 19-24, false light, *id.* ¶¶ 25-28, and punitive damages, *id.* ¶¶ 29-31.

ARGUMENT

I. STANDARD OF REVIEW ON MOTION TO DISMISS

In ruling on a motion to dismiss under Rule 12(b)(6), a court "must assume the truth of all well-plead facts and give the plaintiffs the benefit of all reasonable inferences therefrom." *Genzyme Corp. v. Fed. Ins. Co.*, 622 F.3d 62, 68 (1st Cir. 2010). To survive a motion to dismiss, "a complaint must establish a plausible entitlement to relief." *Id.* (internal quotations omitted). The plausibility of a claim for relief hinges upon a pleading of sufficient non-conclusory facts. *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). It is not enough to plead "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 129 S. Ct. at 1949-50 (citing *Twombly*, 550 U.S. at 555). Moreover, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.' *Id.* at 1950 (quoting Fed.R.Civ.P. 8(a)(2)).

The First Circuit recently explained *Twombly* and *Iqbal* in *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1 (1st Cir. 2011). The First Circuit adopted *Iqbal*'s instruction that "a court should employ a two-pronged approach" in resolving a motion to dismiss. *Ocasio-Hernandez*, 640 F.3d at 12. First, it should identify and disregard statements in the complaint that merely offer "legal conclusions couched as fact" or "threadbare recitals of the elements of a cause of action." *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949-50 and *Twombly*, 550 U.S. at 555 (internal

punctuation omitted)). After weeding out such conclusory statements, a court should treat "the remaining allegations in the complaint as true." *Id*. If the non-conclusory factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, the claim has facial plausibility." *Id.* (quotation marks omitted).

II. PLAINTIFFS HAVE NOT SUFFICIENTLY PLEADED A CLAIM FOR DEFAMATION.

Under Maine law, the elements of defamation are:

(a) a false and defamatory statement concerning another;

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Morgan v. Kooistra, 2008 ME 26, ¶ 26, 941 A.2d 447, 455. The absence of well-pled facts sufficient to support any single element of defamation requires dismissal.

A. THE COMPLAINT CONTAINS NO FACTS SHOWING ACTUAL MALICE SUFFICIENT TO STATE A CLAIM.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court recognized constitutional free speech implications to defamation claims. In order to effect that constitutional protection, the Court articulated a rule prohibiting a public official "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. 279-80. A subsequent line of cases further refined the constitutional overlay to defamation claims. Notably, the Court extended the actual malice standard to "persons who are not public officials but who are 'public figures' and involved in issues in which the public has a justified and important interest." *Curtis Publishing*

Co. v. Butts, 388 U.S. 130 (1967). To occupy public figure status, one need not be a public figure for all purposes. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). "More commonly, those classified as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* Plaintiffs in this second category are referred to as "limited-purpose public figures," *Pendelton v. City of Haverhill*, 156 F.3d 57, 60 (1st Cir. 1998), and are subject to the same burden of proof as public officials and all-purpose public figures. *See Norris v. Bangor Pub. Co.*, 53 F. Supp. 2d 495, 502-03 (D. Me. 1999).

Judge Hornby recently dismissed a defamation claim where the complaint failed " to make a sufficient factual allegation of actual malice . . . ." *Schatz v. Republican State Leadership Comm.*, 777 F. Supp. 2d 181, 187 (D. Me. 2011). In *Schatz*, the plaintiff alleged that each defendant "acted with actual malice, having actual knowledge of the false and defamatory nature of the statements published by defendants . . . or in the alternative, having reckless disregard of and with serious doubt about the truth or falsity of such statements." *Id*. at 188. The Court did not need to decide whether this generalized assertion of malice was enough to survive a motion to dismiss, because plaintiff alleged additional facts as the basis for his claim (and those facts were insufficient). *Id*. at 188-189. However, the Court suggested that a generalized assertion of malice would not have been enough to state a claim. Judge Hornby wrote, "It is doubtful[.]" *Id*. at 189 n. 38.

Those doubts are well justified by ample federal precedent supporting dismissal of defamation claims premised on generalized or conclusory allegations of actual malice. For example, in *Diario El Pais, S.L. v. Nielsen Co., (US)*, No. 07-CV-11295, 2008 U.S. Dist. LEXIS 92987, at *20 (S.D.N.Y. Nov. 6, 2008), the plaintiffs alleged that the defendant media company

knowingly published erroneous estimates of the number of visitors to the plaintiff's website in 2007. *Id*. at *1. The court dismissed plaintiffs' libel claim because they did not "allege facts that render 'plausible' the actual malice element of trade libel, let alone a set [of] facts that satisfy the heightened pleading requirements for actual malice." *Id.* at *22 (citing *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007)); *see also Rutherford v. Katonah-Lewisboro Sch. Dist.*, No. 08-Civ.-10486, 2009 U.S. Dist. LEXIS 105872, at *28 (S.D.N.Y. Nov. 3, 2009) ("Plaintiff asserts that Defendants' conduct was 'malicious.' But that buzzword is, after *Twombly* and *Iqbal*, insufficient; it must be backed up with allegations of fact from which malice can be fairly inferred. Unfortunately for Plaintiff, her pleading contains not a single allegation of *fact* that would support her conclusory allegation of malice.") (internal citations omitted); *Orenstein v. Figel*, 677 F. Supp. 2d 706, 711 (S.D.N.Y. 2009) ("To survive a motion to dismiss, a complaint must do more than recite the elements of a cause of action in conclusory statements; it must contain sufficient factual allegations to 'state a claim to relief that is plausible on its face.' Orenstein's bald allegations that defendants acted with malice – unadulterated by any factual support whatsoever – do not met this burden.") (citation omitted); *Hakky v. Wash. Post Co*., 2010 U.S. Dist. LEXIS 63065 at *17-*18 (M.D. Fla. June 24, 2010) (dismissing complaint; "Although Plaintiff does point to specific statements in the Article that are false or misleading, Plaintiff does not state how Defendants made these statements negligently, or facts supporting that they were made with malice.").

The Plaintiffs seem to recognize that they are at least limited-purpose public figures. They repeatedly allege that the Defendants published their statements "with knowledge of their falsity, or in reckless disregard of the truth or falsity of such statements." Compl. ¶ 17. This

recites, nearly verbatim, the Supreme Court's articulation of the "actual malice" standard in *New York Times v. Sullivan*.

Yet, Plaintiffs do not accompany this recital with any factual allegation supporting the "actual malice" label. Compl. ¶¶ 17, 23, and 27 are merely "legal conclusions couched as fact" and "threadbare recitals of the elements of a cause of action." For example, Compl. ¶ 17 in its entirety reads: "Defendants published the aforedescribed false and defamatory statements with knowledge of their falsity, or in reckless disregard of the truth or falsity of such statements." Neither preceding, nor following, this paragraph do Plaintiffs state any facts which would support this "threadbare recital" of the legal standard. The complaint does not contain a factual theory for actual malice. As such, the Plaintiffs' restatement of the legal standard for "actual malice" is precisely the type of "threadbare recital[] of the elements of a cause of action," that the Supreme Court in *Twombly* cautioned does not satisfy the Rule 8 pleading standard.

Absent a sufficient factual allegation of actual malice, Plaintiffs have failed to state a claim for defamation of public figures.

B. THE COMPLAINT FAILS TO CONTAIN A FACTUAL ALLEGATION OF NEGLIGENCE SUFFICIENT TO STATE A CLAIM.

Assuming, *arguendo*, that Plaintiffs are not public figures, the complaint must at least contain factual allegations that would support a finding of negligence. In Maine, plaintiffs who are not public figures or public officials must prove negligence to succeed on a claim of defamation.[3] *Courtney v. Bassano*, 1999 ME 101, ¶ 16, 733 A.2d 973 (citing *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

[3] Indeed, the First Amendment prohibits every state from "impos[ing] liability without fault" against "a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

defamation plaintiff to show that the defendant acted at least negligently). A defamation defendant is negligent if he or she does not have a "reasonable basis" for a statement. *Id.*

Under the *Iqbal* standard, Plaintiffs must plead a factual predicate supporting their assertion of negligence. This they have not done. The Plaintiffs' allegations of negligence are purely generalized rote assertions. The complaint contains no facts that show a lack of due care on the part of Defendants in publishing the alleged statements contained in the complaint.

C. THE COMPLAINT FAILS TO CONTAIN A FACTUAL ALLEGATION OF FALSITY SUFFICIENT TO STATE A CLAIM AND ONE OF THE ALLEGED STATEMENTS IS TRUE BASED ON THE FACTS PLED IN THE COMPLAINT ITSELF.

Under Maine law, an essential element of a claim for defamation is the existence of a false statement concerning the plaintiff.[4] *McCullough v. Visiting Nurse Assn. of Southern Maine*, 1997 ME 55, ¶ 10, 691 A.2d 1201; *Courtney v. Bassano*, 1999 ME 101, ¶ 16, 733 A.2d 973; *Withers v. Hackett*, 1998 ME 164, ¶ 9, 714 A.2d 798, 801. Likewise, a statement is not actionable if it is substantially true, i.e., if a more accurate statement would not have been less damaging than the one which was published. *McCullough*, 1997 ME 55, ¶ 10. "It is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." *Id.* (*citing* RESTATEMENT (SECOND) OF TORTS § 581A cmt. f (1977)). For example, the statement that a person was terminated for "several incidents" when in fact that person was terminated for only two incidents is "substantially true even though it may not be technically accurate." *Id.*

[4] Where a private figure plaintiff "seeks damages against a media defendant for speech of public concern," this burden is necessary to protect the defendant's First Amendment rights. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986). Maine chose to give defamation defendants greater protection by extending the plaintiff's burden to prove falsity to all cases. Nevertheless, the Defendants would be entitled to *Philadelphia Newspapers* protection even if Maine law did not apply. The Defendants, as publishers of "a widely read weekly trade newsletter and e-bulletin," *Compl.* ¶ 4, are plainly media defendants.

The complaint contains a broad-brush assertion of falsity, but fails to spell out in any level of detail what specific facts contained in the alleged statements in Paragraph 12 of the complaint are false. Given their burden to prove falsity, Plaintiffs cannot state a claim without indicating how the statements are at odds with the truth. Yet, the complaint provides no information concerning the truth with respect to the subjects addressed in Defendants' allegedly false statements. This difficulty is exacerbated by the number of statements at issue and the conclusory and generalized reference to every alleged statement as "false." For example, in Paragraph 12A the statement emphasized refers to an accident and a slow-moving coal train having derailed. Was there an accident? Did a coal train derail? If the derailment was not an accident, then what in fact transpired? Plaintiffs have not pled facts that, if proven, would establish that all of the emphasized language in Paragraph 12 of the complaint is false.

In addition, the complaint itself contains a factual allegation that makes one of the alleged defamatory statements true. Plaintiffs allege that David Andrew Fink was the president and CEO of Pan Am Systems, Inc. until March of 2011 (Compl. ¶ 3), yet they also broadly assert that it was false for Defendants to publish a story asserting that Pan Am removed Fink from management of the company in a newsletter published on March 21, 2011. Compl. ¶ 12E. The statement contained in Paragraph 12E that "David Andrew Fink, the head of Pan Am Systems, is no longer in charge" is true based on the facts pled in Paragraph 3 of the Complaint. Any claims based on this statement should be dismissed since the complaint itself alleges that the statement is accurate.

Plaintiffs have not adequately pled falsity.

D. FIVE OF THE SIX STATEMENTS ALLEGED IN THE COMPLAINT ARE NON-ACTIONABLE OPINION.

Under Maine common law, a false statement must be "an assertion of fact, either explicit or implied, and not merely an opinion, provided the opinion does not imply the existence of undisclosed defamatory facts." *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991); *see also True v. Ladner*, 513 A.2d 257, 261-62 (Me. 1986). "The crucial difference between statement of fact and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact." *Caron v. Bangor Publ'g Co*., 470 A.2d 782, 785 (Me. 1984). (citations omitted). For example, in *Fortier v. International Brotherhood of Electrical Workers, Local 2327*, 605 A.2d 79, 80 (Me. 1992) the Law Court held that statements that a former union member "has no morals" and "betrayed his fellow workers by crossing the picket line" did not state objective facts but rather to presented an interpretation of the facts. Likewise, a state senator's reference to a proposed homeless shelter as "lackluster" and a statement that he had "grave concerns" over the shelter's pending application were non-actionable statements of opinion. *Lightfoot v. Matthews*, 587 A.2d 462, 462-463 (Me. 1991).

The determination whether an allegedly defamatory statement is a statement of fact or opinion is a question of law, unless the average reader could reasonably understand the statement as either fact or opinion, in which case the question is for the fact-finder. *Caron*, 470 A.2d at 784.

The statement contained in Paragraph 12B that Pan Am service is "consistently bad" is a non-actionable statement of opinion. A personal judgment that service is "bad" is necessarily a subjective assessment of the quality of service.

The statement contained in Paragraph 12C, "I would think they have plenty of other challenges, [such as] safety challenges, employee relations and locomotive maintenance" is not defamatory since every railroad has safety employee and maintenance challenges and the fact of "challenges" is not derogatory. To the extent that the statement suggests that Pan Am is not adequately meeting those challenges – which is not a fair inference since the context was merely questioning why Pan Am was using "home-grown" APUs[5] – is a vague and subjective judgment that "challenges" face Pan Am. *See Guilford Transp. Indus. v. Wilner*, 760 A.2d 580, 597 (D.C. App. 2000) (explaining that a statement is not actionable where "it is plain that a speaker is expressing a subjective view" (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)).[6]

The statement contained in Paragraph 12D by a customer critical of ST's "level of service" and "lack of service" is also opinion. A criticism with regard to the level of service is a judgment which is not provably true or false.

E. THE COMPLAINT IS BASED, IN PART, ON STATEMENTS PROTECTED BY THE FAIR REPORT PRIVILEGE.

The fair report privilege protects the media from liability for reporting on actions and statements made by government officials. "The purpose of the privilege is to ensure that publications may perform the important function of informing the public of actions taken by government agencies and officials." *Yohe v. Nugent*, 321 F.3d 35, 42-43 (1st Cir. 2003).

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[5] "APU" is an acronym for "auxiliary power unit."

[6] In *Guilford Transportation Industries v Wilner,* 760 A.2d 580, 589 (D.C. App. 2000), the plaintiffs were Guilford Transportation Industries (the original name of what is now Pan Am Systems), David Andrew Fink, and Timothy Mellon, the majority owner of what is now Pan Am Systems. The sole defendant was Frank Wilner, the author of an op-ed column in the widely-read *Journal of Commerce*, which discussed, *inter alia,* activities of the railroad, just as Defendants did here. As part of their complaint, Fink and Mellon alleged that Wilner's column labeled them as "antagonistic to labor." The trial judge ruled that "even if the allegation of an anti-labor bias was fairly implied in the column, that charge is not "provably false. It is much more a subjective assessment of a company's attitude and conduct towards labor." The DC Circuit Court of Appeals agreed.

> The fair report privilege recognizes that (1) the public has a right to know of official government actions that affect the public interest, (2) the only practical way many citizens can learn of these actions is through a report by the news media, and (3) the only way news outlets would be willing to make such a report is if they are free from liability, provided that their report was fair and accurate.

Id. at 43 (*quoting ELM Medical Laboratory, Inc. v. RKO General Inc*., 403 Mass. 779, 782, 532 N.E.2d 675 (1989)). "[S]o long as a newspaper's rough and ready summary . . . is substantially correct, the newspaper's report is protected by the privilege." *Id*. (citation and internal quotations omitted).

Statements by public officials at a press conference or in an interview are also within the privilege. *See, e.g., Jones v. Taibbi*, 400 Mass. 786, 797 (1987) (statement made by law enforcement at press conference is privileged); *Friedman v. Israel Labour Party*, 957 F.Supp. 701, 714 (E.D.Pa.1997) (fair report privilege applicable to press release issued by foreign government); *Lotrich v. Life Printing and Pub. Co*., 253 N.E.2d 899, 902 (Ill.App.Ct.1969) ("news reports based on the records and utterances of police and other law enforcement officers are protected by the report privilege"); and *Steer v. Lexleon, Inc*., 472 A.2d 1021, 1026 (Md.App.1984) (fair report privilege for reporting of police press release). In *Jones v. Taibbi*, for example, the Massachusetts Supreme Judicial Court held that reporting on statements made by a police chief at "a press conference" is "privileged." 400 Mass. at 797. Likewise, the First Circuit held in *Yohe v. Nugent* that descriptions by a Police Chief to news reporters of an arrest of a heavily armed and potentially suicidal ex-Green Beret and related circumstances was protected by the fair report privilege. 321 F.3d at 41-42.

Although the Law Court has not yet recognized the fair report privilege, the Court has applied an expansive test for recognition of privileges:

> A conditional privilege against liability for defamation arises in settings where society has an interest in promoting free, but not absolutely unfettered, speech. It may arise in

> any situation in which an important interest of the recipient of a defamatory statement will be advanced by frank communication.

Cole v. Chandler, 2000 ME 104, ¶ 6, 752 A.2d 1189 (citations and internal quotations omitted). The fair report privilege meets this test, and would be recognized by the Law Court in appropriate circumstances. *See Yohe,* 321 F.3d at 43 (discussing basis for the privilege).

A common law privilege may be overcome "only if the person who made the defamatory statements loses the privilege through abusing it." *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991). "Abuse includes making the statement outside normal channels or with malicious intent. For purposes of defamation claims, malice means when the originator of the statement knows [her] statement to be false, recklessly disregards its truth or falsity, or acts with spite or ill will." *Cole*, 2000 ME 104, ¶ 7 (citations and internal quotations omitted). "An inadequate investigation of the truth of the statement by the publisher is not sufficient to show actual malice." *Rice v. Alley*, 2002 ME 43, ¶ 23, 791 A.2d 932.

Plaintiff bears the burden of "producing evidence of abuse" of the privilege. *Rice*, 2002 ME 43, ¶ 26; *see also McCullough v. Visiting Nurse Assn. of Southern Maine,* 1997 ME 55, ¶ 11, 691 A.2d 1201 ("[Plaintiff] bears the burden of creating a factual issue that [defendant] abused the conditional privilege by, among other actions, making the statements outside normal channels or with malicious intent.").

The statement contained in Paragraph 12A is a quotation by Peter Burling, the Chair of the New Hampshire Rail Transit Authority. By legislation enacted in 2007, New Hampshire Governor John Lynch created the NHRTA to oversee the development of commuter rail in New

Hampshire. R.S.A. 238-A:1 – A:19;[7] *see also* http://www.nh.gov/dot/programs/nhrta/ (last visited Oct. 17, 2011). The report of Burling's statement is as follows:

> Peter Burling, chair of the New Hampshire Rail Transit Authority, blamed ST for the accident. 'What has happened here is a perfectly predictable accident – but it's hard to describe it as an accident, since the probabilities were so clear it was going to take place. The only thing we didn't know is when and where . . . . A horrendously dilapidated railroad system has caused a slow –moving coal train to fall of the tracks.'

Compl. ¶ 12. This is a report of a statement by the chair of an official New Hampshire administrative agency charged with significant duties related to the railroad industry. The statement is within the common law fair report privilege. The complaint does not contain well-pled facts sufficient to rebut the privilege.

III. PLAINTIFFS HAVE NOT STATED A CLAIM FOR DEFAMATION PER SE.

Under Maine law "defamation per se" is not a separate cause of action. Rather, proof of per se defamation merely lifts plaintiffs' burden of proving special damages. *Galarneau v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 504 F.3d 189, 198 (1st Cir. 2007). To the extent defamation per se is alleged as a distinct claim it must be dismissed.

In addition, if an alleged defamatory statement involves a matter of public concern, the First Amendment prohibits the award of presumed damages unless the plaintiffs can prove actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350 (1974); *Levinsky's, Inc. v. Wal-Mart Stores*, 127 F.3d 122, 132 (1st Cir. Me. 1997) ("[T]he Constitution forbids an award of presumed or punitive damages for words spoken without actual malice on matters of public concern."). The First Circuit explained:

> The Supreme Court has roughly bisected the sphere of social commentary between matters of public concern, which are those that can be "fairly considered as relating to any matter of political, social, or other concern to the community," and matters of private concern, which are those that address "matters only of personal interest." A court must

[7] According to R.S.A. 238-A:2, the NHRTA was established "for the general purpose of developing and providing commuter rail or other similar forms of passenger rail service." *Id.*

> determine whether a statement comes within the public concern hemisphere of this formulation by reference to its "content, form and context." In order to do so, the relevant community need not be very large and the relevant concern need not be of paramount importance or national scope. Rather, "it is sufficient that the speech concern matters in which even a relatively small segment of the general public might be interested."

Levinsky's, Inc., 127 F.3d at 132 (citations omitted).

Defendants, as publishers of "a widely read weekly trade newsletter and e-bulletin," Compl. ¶ 4, are media defendants covering the railroad industry in Maine, New England, and the Canadian maritime provinces. Statements regarding the operation of railroads are matters of public concern given the importance of the region's rail transportation network. W. Page Keeton, PROSSER AND KEETON ON TORTS at 832 (5th ed. 1984); *Crane v. Waters*, 10 F. 619 (C.C.Mass. 1882); *Guilford Transp. Industries v. Wilner*, 760 A.2d 580, 589 (D.C. App. 2000). Hence, Plaintiffs cannot recover presumed damages absent well-pled facts supporting a claim of malice. Having failed to do so, they cannot sustain a per se defamation theory.

IV. PLAINTIFFS HAVE NOT STATED A CLAIM FOR FALSE LIGHT INVASION OF PRIVACY.

Under Maine law, a false light invasion of privacy is defined as:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Cole v. Chandler, 2000 ME 104, ¶ 17, 752 A.2d 1189 (quoting RESTATEMENT (SECOND) OF TORTS § 652E (1977)).

It is appropriate at the motion to dismiss stage to review whether alleged statements are sufficient to state a false light claim. *Dempsey v. National Enquirer, Inc.*, 687 F. Supp. 692, 694 (D.Me. 1988) (finding that First Circuit precedent supports a "threshold determination" as to the

adequacy of a false light claim) (mot. for reconsideration denied, 702 F.Supp. 927, 932-933 (D.Me. 1988); *see also Machleder v. Diaz*, 801 F.2d 46, 58 (2d Cir. 1986) (court may determine "as a matter of law that a publication is not reasonably capable of conveying the offensive meaning or the innuendo ascribed by plaintiff as the basis for his invasion of privacy claim"). A review of a false light claim at the pleadings stage is only more appropriate in light of *Iqbal/Twombly*.

The Plaintiffs' false light claim fails for at least three reasons. First, there are no "highly offensive" statements alleged in the complaint. Comment c to the Restatement (Second) § 652E, which explains the "highly offensive" standard, provides, "It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy." In addition, "[i]n order to avoid a head-on collision with First Amendment rights, courts have narrowly construed the highly offensive standard." *Machleder*, 801 F.2d at 58.

In *Fudge v. Penthouse International, Ltd*., 840 F.2d 1012, 1019 (1st Cir. 1988), the First Circuit held that an article in a pornography magazine implying that four schoolgirls aged 8-12 were masculine in nature and wished to dominate their male schoolmates was not "highly offensive" as a matter of law. Likewise, Judge Carter in *Dempsey*, 687 F. Supp. at 694, ruled that a fabricated report in a tabloid concerning "physical sensations, thoughts and fears supposedly experienced by the plaintiff during the time he was clinging to the door rails of the plane, and during the emergency landing" were not "highly offensive" as a matter of law. In *Machleder*, the Second Circuit reviewed decisions concerning the "highly offensive" standard and concluded that a portrayal of plaintiff as "as intemperate and evasive" was not "highly

offensive" as a matter of law. *Id*., 801, F.2d at 58. These decisions demonstrate the high threshold of offensiveness that must be met to state a false light claim.

The complaint refers to garden-variety customer service types of issues. Compl. ¶ 12. It is part of being in business to have customers that are (and are not) satisfied. It is not "highly offensive" to complain about customer service offered by a large railroad responsible for Maine and much of the region's transportation network. With respect to the reporting on Fink's separation from the railroad, the reporting is true (Comp. ¶ 3), and, in any event, the reporting as alleged does not meet the "highly offensive" standard. There is nothing alleged in the complaint that rises to the level of being "highly offensive," and, therefore, actionable as a false light claim.

Second, no Maine court has ever recognized that a corporation enjoys a protected right to privacy actionable on a false light theory. The RESTATEMENT (SECOND) OF TORTS § 652I cmt. c (1977) states, "A corporation, partnership or unincorporated association has no personal right of privacy. It has therefore no cause of action for any of the four forms of invasion covered by §§ 652B to 652E." Because the Law Court has relied heavily on the Restatement, it is likely that the Court would adopt the position taken by the Restatement.

In addition, the overwhelming weight of authority supports the Restatement position. *Auto-Owners Ins. Co. v. Websolv Computing, Inc*., 580 F.3d 543, 549 n.4 (7th Cir. 2009) ("a corporation . . . does not have any common-law seclusion rights"); *AIDS Counseling & Testing Centers v. Group W Television, Inc*., 903 F.2d 1000, 1004 n.1 (4th Cir. 1990) ("it seems very unlikely that a corporation can ever state a cognizable claim for false-light invasion of privacy"); *Oberweis Dairy, Inc. v. Democratic Cong. Campaign Comm., Inc*., 2009 U.S. Dist. LEXIS 18514, *4-*5 (N.D. Ill. Mar. 11, 2009) ("Several jurisdictions beyond Illinois also rely on the Restatement's privacy tort formulations and hold that corporations lack standing to sue for such

torts. Even in jurisdictions not relying on the Restatement, courts have found that corporations lack standing to sue for privacy torts, including false light."); *Susko v. Cox Enters*., 2008 U.S. Dist. LEXIS 69901, *14-15, 37 Media L.Rep. 1119 (N.D. W. Va. Sept. 16, 2008) (a limited liability company "cannot assert a claim for false light invasion of privacy."); *Intercity Maint. Co. v. Local 254 SEIU*, 62 F. Supp. 2d 483, 506 (D.R.I. 1999) ("a corporation does not enjoy privacy rights"); *So. Air Transp., Inc. v. Am. Broad. Cos., Inc.*, 670 F. Supp. 38, 42 (D.D.C. 1987) ("A corporation cannot be offended. Thus, the Restatement recognizes that a corporation cannot bring suit for being placed in a false light."). The Plaintiff corporations, therefore, have no false light claim.

Third, the "knowledge" or "reckless disregard as to falsity" standard to plead a false light claim is similar to the "actual malice" standard in public figure defamation cases. Plaintiffs have not stated a false light claim for the same reasons that their claim of defamation based on actual malice fails. The Plaintiffs offer no factual allegations beyond a naked recitation of the elements of their claim. *See* Compl. ¶ 27. Their claim is insufficient to satisfy Rule 8, as articulated in *Iqbal/Twombly*.

V. PLAINTIFFS HAVE NOT STATED A CLAIM FOR PUNITIVE DAMAGES.

Plaintiffs' claim for punitive damages is deficient for at least three reasons. First, "[u]nder Maine law, punitive damages are not a separate and distinct cause of action. Rather, it is a type of remedy." *Fiacco v. Sigma Alpha Epsilon Fraternity*, 484 F. Supp. 2d 158, 177 (D. Me. 2007). To the extent punitive damages is pled as a separate cause of action, the claim should be dismissed.

Second, to the extent punitive damages is pled solely as a theory of damages, plaintiff bears the "burden of proving by clear and convincing evidence that the defendant was motivated

by ill will toward the plaintiff or acted so outrageously that malice could be implied." *Sebra v. Wentworth*, 2010 ME 21, ¶ 14, 990 A.2d 538. The complaint utterly fails to allege any facts that would support a claim of ill will or outrageous action.

Third, the same rule that prohibits an award of presumed damages absent a showing of actual malice in connection with speech involving a matter of public concern applies to an award of punitive damages. *Gertz*, 418 U.S. at 345. For the reasons explained *supra* in the Defendants' discussion of defamation per se, the statements alleged in the complaint involved matters of public concern. Punitive damages is not, therefore, an available remedy.

CONCLUSION

WHEREFORE, Defendants respectfully request that the Court:

A. dismiss the Plaintiffs' complaint in its entirety; and

B. grant such other and further relief as is just and proper.

DATED at Portland, Maine this 21st day of October, 2011.

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

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CERTIFICATE OF SERVICE

I, Sigmund D. Schutz, attorney for the Defendants hereby certify that on the above date, I electronically filed the Defendants' Motion to Dismiss the Complaint 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:

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