

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Bajardi, et al., v. Pincus, et al.

L-3723-12

Return Date: 9/5/14

Relief Requested: Motion for Summary Judgment Filed by Defendants

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**I. Defendant Nancy Pincus' Motion for Summary Judgment**

Defendant Nancy Pincus (“Pincus”) moves for summary judgment on Plaintiffs Lane Bajardi and Kimberly Cardinal Bajardi’s (“Plaintiffs”) defamation claims, as they are not actionable on the basis that each statement is:

1. Time-barred
2. True
3. Substantially true
4. Opinion
5. Not of and concerning Plaintiffs
6. Non-defamatory
7. Satire
8. Rhetoric, and/or
9. Hyperbole

Additionally, Pincus seeks summary judgment on Plaintiffs’ claims for: (1) intentional infliction of emotional distress, (2) interference with prospective economic advantage, and (3) tortious interference with contract. Defendant Roman Brice joined in the Motions for Summary Judgment filed by Defendants Mark Heyer and Nancy Pincus and Pincus joined in on the other Defendants’ Motions as well.

**Brief Background**

In brief, this matter stems from alleged defamatory statements made by Defendants, via various blog postings, regarding Plaintiffs’ involvement with Hoboken’s political landscape which Defendant Pincus characterizes as “corrupt” Politics. Plaintiffs contend that Defendants posted false and disparaging comments regarding them on various websites including, but not limited to Hoboken.Patch.com, GrafixAvenger.blogspot.com, Galloway.Patch.com and nj.com, among others during the time period June 8, 2011 through July 2012.

Pincus identifies the corrupt political regime in Hoboken as the “Russo Faction”. Pincus is actively involved and supports Hoboken’s reform candidates (“Reform Movement”) who allegedly seek to remove “corrupt” politicians from office. On July 26, 2012, Plaintiffs filed a Lawsuit against Defendants Nancy Pincus, Roman Brice and John Does 1-10 alleging defamation, defamation per se, tortious interference with business relations, intentional infliction of emotional distress and intentional interference with prospective economic relations. John Does 1-10 were ultimately replaced with Defendant Mark Heyer (formerly Jackstop and This Means War).

Plaintiffs allege that Lane Bajardi is a broadcast journalist employed by CBS Radio which is owned and operated by 1010WINS in New York City and that Kimberly Cardinal Bajardi is a free-lance broadcast journalist (see Plaintiffs’ Complaint, Paras 10 and 11).

Facts in the record submitted to the Court also describe the individuals involved in this action as follows:

- **Defendant Nancy Pincus (“Pincus”)** – an architect appointed to the Hoboken Zoning Board of Adjustment (“ZBA”), became involved in politics in 2008 when she began attending Board of Education Meetings. She is actively involved in the Reform Movement. Pincus also started a blog regarding Hoboken political scene, called Grafix Avenger (“GA”).
- **Plaintiff Lane Bajardi (“Bajardi”)** – anchor on 1010 WINS, active participant in Hoboken’s political community; has been linked to Beth Mason’s mayoral campaigns (see below) and to former Hoboken Mayor, Peter Cammarano (sentenced to prison for selling zoning variance). Bajardi had a presence at City Council meetings from 2006-2011. Pincus alleges that he made anonymous posts under the pseudonym names – Prosbu and Vinvan. It is further alleged that Bajardi was once an active supporter of the Reform movement, but then shift his support to the Russo Faction. Additionally, emails produced through discovery, as well as deposition testimony, evidence that Lane Bajardi was actively involved in promoting Beth Mason’s political career.
- **Plaintiff Kim Cardinal Bajardi (“Cardinal”)** – Bajardi’s spouse, who is an active participant in Hoboken’s political community, worked at the highest levels of Councilwoman Mason’s mayoral campaign in 2009, and is alleged to have also posted anonymously under the names of Red Haven and Curious Gal. In 2007 she took an active role in the Hoboken Board of Education election, was a vocal participation in the “Kids

First 2007” committee, and was assigned the task of “cleaning up the list of potential candidates who sent their bios to her for revisions” in hopes of being placed on a ticket for the Board of Education election. Additionally, emails produced through discovery, as well as deposition testimony, point to Cardinal’s involvement in Beth Mason’s political career.

- **Defendant Roman Brice (“Brice”)** – Brice is alleged to be the editor of The Hudson Mile Square View and posts to the internet under pseudonym “hobokenhorse.”
- **Defendant Mark Heyer (“Heyer”)** – Heyer allegedly defamed Plaintiffs over the internet under pseudonyms “JackStop” and “ThisMeansWar.”

Defendant Pincus argues that she reasonably formed the opinion that Bajardi and Cardinal post blogs under the names Curious Gal and Prosbu, which Plaintiffs deny, based on the following:

- Both Plaintiffs Lane Bajardi and Kimberly Cardinal Bajardi are alleged to have been involved in Hoboken politics. It is undisputed that for years Bajardi spoke at City Council Meetings to Promote Councilwoman Mason’s Political Career.
- Bajardi’s appearances at City Council meetings can be briefly summarized as: name calling, yelling, ethnically charged attacks, threats to post his complaint anonymously on the internet, absurd conspiracy theories, and outright lies.
- Internet Commenters Using Pseudonyms “Prosbu” and “Curious Gal” Promoted Beth Mason and Criticized Nancy Pincus in the Same Manner as Plaintiffs Had Done Previously and the Comments Otherwise Appear to be Authored by the Plaintiffs.
- Both Prosbu and Curious Gal repeatedly referred back to the three incidents that Bajardi had used to publicly criticize Pincus: (1) the Pincus article regarding Occhipinti’s potential vote-buying scheme; (2) the dispersing of flyers with the text “Impeach Nancy Pincus;” (3) satirical FBI Letter.
- Prior to this lawsuit, the Plaintiffs have never denied nor deleted the comments alleging them to be the anonymous bloggers under those names.
- These anonymous bloggers are consistently critical of Hoboken Mayor Dawn Zimmer and Pincus, but consistently supportive of Mason.
- Curious Gal has sometimes responded to comments addressing her simply as “Kim.”

- Several references/comments made by the anonymous bloggers were the same references and comments previously made by either Bajardi or Cardinal.
- The fact that Probus wrote that he supports Mason and was troubled by the allegations that Bajardi had defendant former Mayor Cammarano's corruption, suggest that Probus is Lane Bajardi.

### **Findings of Fact**

The Court finds the following facts undisputed, or undisputable:

1. On May 3, 2009, Lane Bajardi authored an email claiming that he and his wife have been "fighting the good fight and covering Beth [Mason]'s flank for years.
2. Lane Bajardi has appeared regularly at City Council and Board of Education meetings "for years."
3. Lane Bajardi's endorsement of Beth Mason was published in the Hudson Reporter.
4. Kim Cardinal has been involved in email communications planning various Hoboken political activities.
5. Lane Bajardi has sent and received various emails tying him to political activity in Hoboken.
6. Some emails obtained in discovery allege political activities of Plaintiffs.
7. Kim Cardinal has been quoted several times in news outlets commenting on Hoboken politics.
8. Lane Bajardi has been generally acknowledged by local press as being an outspoken presence, activist, and political endorser active in Hoboken politics.
9. On April 22, 2010, Lane Bajardi was arrested for allegedly assaulting Defendant Roman Brice.
10. Kim Cardinal has engaged in OPRA requests and requests for Financial Disclosures of various public officials.
11. Jake Stuver, former manager of Beth Mason's campaign, submitted an affidavit certifying that Plaintiffs Lane Bajardi and Kim Cardinal were heavily involved in Beth Mason's political operations.

### Applicable Law

As a general rule, a statement is defamatory if it is false, communicated to a third person, and tends to lower the subject's reputation in the estimation of the community or to deter third persons from associating with him. Lynch v. New Jersey Educ. Ass'n, 161 N.J. 152, 164-65 (1999) (citing *Restatement (Second) of Torts* §§ 558, 559 (1977)).

A *prima facie* case of defamation requires a plaintiff to establish the following: “[I]n addition to damages, the elements of a defamation claim are: (1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher.” DeAngelis v. Hill, 180 N.J. 1, 12–13 (2004).

In deciding whether a statement is defamatory a court must examine three factors: content, verifiability, and context. First, a statement's content must be judged not by its literal meaning but by its objective meaning to a reasonable person of ordinary intelligence. Thus, mere insults and rhetorical hyperbole, while they may be offensive, are not defamatory. McLaughlin v. Rosanio, Bailets & Talamo, Inc., 331 N.J. Super. 303, 312, 751 A.2d 1066, 1071 (App. Div. 2000) (Internal citations omitted).

Libel continues to carry the doctrine of presumed damages; however, presumed damages will only allow a Plaintiff to defeat summary judgment on the issue of damages. W.J.A. v. D.A., 210 N.J. 229, 233 (2012). Compensatory damages require proof of actual damage to reputation. Id.

“Whether the meaning of a statement is susceptible of a defamatory meaning is a question of law for the court.” Ward v. Zelikovsky, 136 N.J. 516, 529 (1994). That determination requires a court to “consider the content, verifiability, and context of the challenged statements.” Ibid. This means the court's analysis must focus upon the “ ‘fair and natural meaning that will be given [to the statements] by reasonable persons of ordinary intelligence.’ ” DeAngelis, *supra*, 180 N.J. at 14 (quoting Ward, *supra*, 136 N.J. at 529, and Romaine v. Kallinger, 109 N.J. 282, 290 (1988)). In that regard, while the “use of epithets, insults, name-calling, profanity and hyperbole may be hurtful to the listener and are to be discouraged, ... such comments are not actionable.” Ibid. (citing Ward, *supra*, 136 N.J. at 529–30). “[I]n cases where the statement is capable of being assigned more than one meaning, one of which is defamatory and another not, the question of whether its

content is defamatory is one that must be resolved by the trier of fact.” Romaine v. Kallinger, 109 N.J. 282, 291 (1988). The Supreme Court of New Jersey has opined as follows with regard to the inquiry as to whether a statement is defamatory:

Courts do not automatically decide a case on “[t]he literal words of the challenged statement.” Smolla, *supra*, § 6.03[8][a], at 6-16.16. Rather, courts must “consider the impression created by the words used as well as the general tenor of the expression,” as experienced by a reasonable person. *Ibid.*; see *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 566 N.Y.S.2d 906, 909-107, 567 N.E.2d 1270, 1273-74, *cert. denied*, 500 U.S. 954, 111 S.Ct. 2261, 114 L.Ed.2d 713 (1991).

16 When considering the statement's “fair and natural” meaning, therefore, courts permit the context in which the statement appears to inform its determination of whether the statement was capable of a defamatory meaning. See *Cibenko v. Worth Publishers, Inc.*, 510 F.Supp. 761, 764 (D.N.J.1981) (applying New Jersey law); *Romaine, supra*, 109 N.J. at 290, 537 A.2d 284.

The listener's reasonable interpretation, which will be based in part on the context in which the statement appears, is the proper measure for whether the statement is actionable. *Restatement (Second) of Torts, supra*, § 566 comment c. If the comment occurred during an argument or is an outburst unrelated to the general topic of discussion, for example, a reasonable listener is less likely to accord to the challenged statement its literal meaning. Indeed, “[t]he ordinary reasonable recipient of a communication naturally discounts to some degree statements made in the heat of vitriolic battle, because the recipient understands and anticipates the human tendency to exaggerate positions during the passions and prejudices of the moment.” Smolla, *supra*, § 6.08[4][b][ii], at 6-35.

Words uttered face to face during an altercation may well be understood merely as abuse or insult, while words written after time for thought or published in a newspaper may be taken to express the defamatory charge and to be intended to be taken seriously. Ward v. Zelikovsky, 136 N.J. 516, 532-33 (1994).

To the extent that statements are “political discourse,” they are not actionable. “[P]olitical discourse depends on the expression of opinion. Lynch v. New Jersey Educ. Ass’n, 161 N.J. 152 (1999). “In an election for public office, that discourse often entails a subjective appraisal of the qualifications of a candidate. Emotion, partisanship, or self-interest, although they may impair the appraisal’s value, do not justify its suppression.” *Id.* at 168.

The Defendants argue that the context of the post eliminates any defamatory interpretation, because it is found among “60 excited posts induced by the article and the imminent election.” Indeed, the Supreme Court of New Jersey has found that speech made in such a context “is at the very core of free-speech protections.” G.D. v. Kenny, supra, at 291-92. Moreover, the Supreme

Court of New Jersey has also recognized that “statements made in the heat of vitriolic battle” may be to some degree discounted by the ordinary reasonable listener, since such a listener understands the human tendency to exaggerate in the heat of passion. Ward v. Zelikovsky, 136 N.J. 516, 532-33 (1994).

In this case, the Court is asked to find that statements written as comment posts in a thread be accorded the same status as words uttered in passionate and vitriolic online commentary to an article about Hoboken politics. The Court finds that this is a reasonable characterization of the context of these statements. Comments on politics indisputably create an atmosphere of the kind. This leaves the Court to decide whether, within such a context, the words still constitute defamation.

The fair comment privilege also provides a defense to a libel or slander action when the words in question are fair comment on a matter of public interest or concern.” Senna v. Florimont, 196 N.J. 469, 486 n.12 (2008) (quoting Leers v. Green, 24 N.J. 239, 253 (1957)) (internal quotation marks omitted)). “This fair comment doctrine extends to virtually all matters of legitimate public interest, and goes beyond matters of opinion to statements of fact.” Vassallo v. Bell, 221 N.J. Super. 347, 373 (App. Div. 1987) (citation omitted). However, the fair comment privilege is a qualified privilege. See Diary Stores, Inc. v. Sentinel Pub. Co., Inc., 104 N.J. 125, 137 (1986); Vassallo, 221 N.J. Super at 372-73. It only applies if the statement: (1) is “based on facts truly stated,” (2) does not contain “imputations of corrupt or dishonorable motives on the person whose conduct or work is criticized,” and (3) is “the honest expression of writer’s real opinion.” Leers, 24 N.J. at 254. Thus a plaintiff may overcome the fair-comment privilege by establishing that “the publisher knew the statement to be false or acted in reckless disregard of its truth or falsity,” (i.e., with actual malice.) See Petersen v. Meggitt, 407 N.J. Super. 63, 78 (App. Div. 2009) (quoting Diary Stores, 104 N.J. at 151). The analysis is fact-intensive, focusing whether the activity concerns public interest, the statement is true, and if it was made with actual malice.

“A statement’s verifiability refers to whether it can be proved true or false. Absent a settled meaning, the truth or falsity of an insult is not susceptible to such proof.” Lynch v. New Jersey Educ. Ass’n, 161 N.J. 152, 167 (1999). The “verifiability” analysis requires a court to determine whether the statement is “one of fact or opinion.” Ibid. Expressions that clearly reflect opinion on

matters of public concern are protected and are not actionable. Kotlikoff v. Cmty. News, 89 *N.J.* 62, 68–69 (1982). On the other hand, “[t]he more fact based the statement, the greater likelihood that it will be actionable.” DeAngelis, *supra*, 180 *N.J.* at 14–15. Conversely, where the statement consists of “[l]oose, figurative or hyperbolic language, [it] will be ... more likely to be deemed non-actionable as rhetorical hyperbole or a vigorous epithet.” *Id.* at 15 (citations omitted).

Although the “use of epithets, insults, name-calling, profanity and hyperbole may be hurtful to the listener and are to be discouraged, ... such comments are not actionable.” DeAngelis v. Hill, 180 *N.J.* 1 (2004). In this vein, the Supreme Court of New Jersey has opined that “although perhaps directly injurious to a person, name-calling does not have a defamatory content such that harm to reputation can be shown.” Ward v. Zelikovsky, 136 *N.J.* 516, 529 (1994). Most courts that have considered whether allegations of racism, ethnic hatred or bigotry are defamatory have concluded for a variety of reasons that they are not based primarily on the chilling effect that such a holding would cast over a person’s freedom of expression. *Id.* at 533. An accusation of bigotry may only be found to be actionable if supported by facts that are “capable of objective proof of truth or falsity.” Ward v. Zelikovsky, 136 *N.J.* 516, 539 (1994). The Ward Court also guides us as follows:

The First Amendment “does not embrace the trite wallflower politeness of the cliché that ‘if you can’t say anything good about a person you should say nothing at all.’ Rodney A. Smolla, *Law of Defamation*, 6.09[2], at 6-37 (1986). Indeed, “name calling, epithets, and abusive language, no matter how vulgar or offensive, are not actionable.” *Id.* at 6.12[9], at 6-54. “No matter how obnoxious, insulting or tasteless such name-calling, it is regarded as a part of life for which the law of defamation affords no remedy.” *Id.* At 4.03, at 4-11.

## **Analysis**

### **A. Statute of Limitations**

Defendant Pincus argues that several statements within the Complaint are time barred and non-actionable because the Complaint was filed more than one year after the publication of these statements. In New Jersey, the statute of limitations for defamation is one year. N.J.S.A. 2A:14-3. Specifically, Defendant cites to statements in Complaint ¶ 18 (published June 8, 2011), ¶ 22 (published June 16, 2011), and ¶ 25 (published July 11, 2011). The Court previously ruled on

March 22, 2013 that these statements are time-barred pursuant to 2A:14-3 and thus granted Summary Judgment as to them.

## **B. Defamatory Statements**

### **1. Complaint ¶ 28**

Pincus posted a handwritten letter in her blog website addressing the FBI's investigation into the allegations of leaked e-mails from within Hoboken's City Hall. Plaintiffs argue that the letter threatens violence against Plaintiffs and their children and falsely implies Plaintiffs' involvement in criminal activity.

Pincus argues that the article is non-defamatory as it was written as joke and is not of and concerning the Plaintiffs or their children. The Court agrees. In support of its position, Pincus cites to Dijkstra v. Westerink, 168 N.J. Super. 128 (App. Div. 1979), which held that for a comment to be of and concerning a plaintiff, "such reference to him that those who read or hear the libel reasonably understand the plaintiff to be the person intended." Id. at 133.

In analyzing the "fair and natural meaning" of the statements in the letter, the Court finds that a reasonable person of ordinary intelligence would find the overall context of this letter as joke or hyperbolic language. Although not dispositive, but to be considered, is the fact that Pincus subsequently printed a retraction confirming that the letter was a joke. Furthermore, the Court finds that the letter is not of and concerning the Plaintiffs and a reasonable person who reads the letter would not understand it to be directed towards the Plaintiffs. Therefore, the Court finds the statements contained in Paragraph 28 of the Complaint to be inactionable.

### **2. Complaint ¶ 31 and 35**

The allegations in Paragraph 31 complain about a handful of statements within a five-page article discussing the changes that have occurred in Hoboken since the beginning of the FBI investigation concerning the Mayor's stolen e-mails published on September 13, 2011.

Specifically, the comments state that Plaintiff Lane Bajardi is a "Beth Mason operative" who has since been "MIA at public meetings" and "has ditched his known screen names, commenting under a variety of new ones." The article goes on to assert that the most likely motive for using several screen names is "to create the perception that the message is shared by many." The article concludes by stating "FBI, they're at it again . . . Persons-of-Interest, enjoy the time you have left. Unshackled."

Paragraph 35 of the Complaint alleges that Pincus posted the following statement: “Lane Bajardi is back. Still fighting for the corrupt and The Machine for his Beth Mason paycheck. Yawn. Same ole, same ole.”

Plaintiffs argue that the statements are defamatory because Bajardi is not a person of interest in the FBI investigation, is not involved in criminal activity, is not a political operative, is not paid by Mason, and does not anonymously post.

Defendant asserts that the article is based on stated facts concerning the FBI’s raid and investigation and that the statements are clearly opinion based upon the language “GA believes the following” and “GA thinks the motive is . . . .” Further, “person-of-interest” does not have a specific meaning; Bajardi was known to work closely with Mason; the article does not state that Bajardi is involved in criminal activity, but rather truthfully states that shortly after the FBI raid, Bajardi stopped attending City Hall meetings and stopped running advertisements promoting Mason. In addition, Defendant Pincus contends that the allegations that Plaintiffs have written the anonymous comments are “substantially true.” “Minor inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting, of the libelous charge be justified.” G.D. v. Kenny, 205 N.J. 275, 294 (2011). Defendant Pincus justified her reasoning based upon the style of rants and topics discussed in these anonymous posts.

The Court finds that the statement in Paragraph 31 that Lane Bajardi is a “Beth Mason operative” and the statement in Paragraph 35 that Lane Bajardi is “still fighting for the corrupt and The Machine for his Beth Mason paycheck” are defamatory as to Lane Bajardi if proven to be false. It is undisputed that Mr. Bajardi is employed by 1010WINS as a journalist and purportedly has the obligation to remain neutral and uninvolved in politics in order to remain credible to the community that he reports to. In fact, Bajardi states that his supervisor informed him any political activity (using his name or anonymously) would be cause for his immediate termination. To the extent that the statement made by Pincus that he was politically involved and paid by Beth Mason is false, a jury could potentially find that those particular statements lowered his reputation in the community if the appropriate proofs are submitted. The remainder of the statements contained in Paragraphs 31 and 35 are not actionable in that they are opinion that cannot be proven true or false, rhetorical hyperbole and not otherwise defamatory.

### **3. Complaint ¶ 38**

Paragraph 38 involves an article posted on Defendant's blog on November 9, 2011. The subject of the article is the criminal complaint filed against the City Hall IT staffer. Defendant Pincus argues that the article was of Pincus' opinion regarding false statement made to the FBI by the suspected IT staffer. Specifically, the article discusses the role of "blogs" in the Complaint and that "GA believes this points to . . . Lane Bajardi for their handling of leaked emails and other leaked materials."

Plaintiffs argue in the Complaint that Bajardi was not involved in the theft of the e-mails, handling of e-mails or other information leaked in relation to that crime, is not a party to the conspiracy and that the statements imply criminal activity.

Defendant contends that her opinion is based on stated facts and clearly is identified as an opinion. The article was based on text from the criminal complaint and on the fact that Bajardi appeared at City Council meetings supporting Ms. Mason's e-mail investigation. (Plumb Cert. Exh. A – Lane Bajardi stated that the e-mail investigation had been undermined by the Mayor's (Dawn Zimmer) phantom IT team). Furthermore, the statement clearly states that GA believes and there was no implication of criminal activity because distributing leaked e-mails to the press or publishing them is not a crime. In support, Defendant cites to Bartnicki v. Vopper, 532 U.S. 514 (2001) (disclosure of information by an innocent recipient does not impute criminal guilt, despite knowledge that the initial disclosure was unlawful).

The statement made by Pincus in the blog quoted at Paragraph 38 is her opinion with regard to a matter of public importance i.e. the leaking of emails and other leaked documents. In the statement, a reasonable person of ordinary intelligence would conclude the statement that "blogs" are evidence of the political schism in Hoboken and that Pincus "believes" this points to Lane Bajardi is a matter of her opinion. The statement cannot be verified as true or false as it is couched in loose terms of what Pincus "believes." Accordingly, the Court finds that the statements in Paragraph 38 of the Complaint are inactionable.

#### **4. Complaint ¶ 41**

This article was published on December 23, 2011, and addresses comments regarding the Hoboken public schools and the fact that Bajardi never appeared on Mason's Election Law Enforcement Commission ("ELEC") reports which detail political spending, particularly spending on personnel. The article comments on why "Curious Gal (Bajardi's Bridezilla)" is not curious to know why her husband did not appear on those reports and that IRS gives cash to those who

identify/disclose tax cheats. The article goes on to further comment on the fact that “[a] real curious gal might explore what’s really going on in our schools instead of trashing elected Board members and their children.”

Plaintiffs allege that these statements are defamatory because Kim Cardinal does not post as Curious Gal, is not a political operative, is not paid by Mason, does not have unreported income from Mason, and encourages readers to contact the IRS to initiate an unwarranted investigation.

Defendant Pincus argues that the statement does not “state” but rather questions if the revenue stream has indeed been reported and is meant to spur discussion on an issue of public concern and therefore is not actionable. See Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761, 765 (D.N.J. 1981) (court concluded that the text of the caption was not libel, but posed a rhetorical question calculated to provoke the reader’s mind and induce discussion). Moreover, anyone may report anyone else at any time to the IRS for alleged tax fraud and finally, the article did not encourage its readers to contact the IRS, but Kim Cardinal to contact the IRS.

The only potentially “false” fact would be “whether CuriousGal is curious enough to know why her hubby never appeared on a Mason ELEC” which is simply not a verifiable statement. The remainder of the statements are couched in terms of what Plaintiff has “heard” and as to Pincus’ opinion as to what a “CuriousGal” would do. Similarly, whether CuriousGal is Bajardi’s “Bridezilla” is hyperbolic language or an epithet which cannot be verified as true or false is not actionable. Accordingly, the Court finds the statements in Paragraph 41 of the Complaint to be inactionable.

#### **5. Complaint ¶ 47**

On January 18, 2012, Pincus sent an e-mail to 1010 WINS, attaching to it comments posted by Probus that suggested anti-Semitism remarks against Mayor Dawn Zimmer and called Lane Bajardi a “hyper-partisan political operative.” In the e-mail, Pincus stated Bajardi blogs under the screen name “Probus” and that as someone of Jewish faith, she is disgusted and offended by the anti-Semitic inferences made. Pincus goes on to further state that she does not think 1010 WINS advertisers will appreciate a voice on the airwaves actively engaged in spreading bigotry.

Plaintiffs allege that the statement is defamatory because Bajardi is not anti-Semitic, has not posted anything inferring such, is not a political operative, and does not post as Probus.

Defendant argues that whether Bajardi is anti-Semitic is a matter of unverifiable opinion, name calling and thus is not actionable. Defendant Pincus additionally asserts that her opinion

that Bajardi is anti-Semitic is supported by Bajardi's City Council appearance wherein he verbally attacked Mayor Dawn Zimmer before concluding that "they don't have vowels at the end of their names so it's not incompetence." Moreover, the practice of the Russo Faction in using a video van in Hoboken to criticize Ms. Pincus with images of Nazi flags. Defendant Pincus further states that the only response from 1010 WINS asked if Pincus had proof that Bajardi was Probus and nothing further. Pincus argues that this clearly shows that it was understood to be her opinion.

The Court finds that the statements articulated in Paragraph 47 of the Complaint are inactionable since they constitute unverifiable statements of Pincus' opinion as to Plaintiffs' alleged bigotry and his role in the Hoboken political scene. Even assuming that Plaintiffs are able to establish that they are not CuriousGal and Probus, Pincus' statement that they are using those pseudonyms in the context of the exchange of blog posts is not defamatory on its face. A reasonable person reading the blog post would conclude that the statement is Pincus' opinion since it is obvious to the reader that the use of an internet pseudonym cannot be established as true or false unless the author admits to using the name. The statements regarding Pincus' belief as to Bajardi's bigotry simply are not actionable under New Jersey law since they are couched in terms of Pincus' opinion as to Bajardi. Additionally, whether Bajardi is a "hyper-partisan political operative" is hyperbolic name-calling that is not capable of verifiability. Therefore, the statements contained in this Paragraph are not actionable.

#### **6. Complaint ¶ 52**

This article was published on January 16, 2012, and discusses the St. Patrick's Parade Committee's accusations that Dawn Zimmer had cancelled the parade because of ethnic and religious intolerance. In the statements, Defendant again cites Bajardi as Probus and further asserts that "[h]e and his buddies are saying the (Jewish) mayor and her allies are anti-Christian, anti-Irish, anti-Italian, anti-(name your ethnicity)." This post is led by an image of hooded Ku Klux Klan members performing the straight-arm Nazi salute and holding signs denying the holocaust.

Plaintiffs allege the statements are defamatory because Bajardi is not anti-Semitic, does not post any-thing anti-Semitic, is not a political operative, and does not post as Probus.

Defendant relies upon the defenses set forth in the preceding section: Defendant argues that whether Bajardi is anti-Semitic is a matter of unverifiable opinion, name calling and is not actionable. Defendant asserts that her opinion that Bajardi is anti-Semitic is supported by Bajardi's

City Council appearance wherein he verbally attacked Mayor Dawn Zimmer before concluding that “they don’t have vowels at the end of their names so it’s not incompetence.” Additionally, Defendant points to the practice of the alleged “Russo Faction” in using a video van in Hoboken to criticize Ms. Pincus with images of Nazi flags.

Again, Pincus’ statement that Plaintiffs are using pseudonyms in the context of the exchange of blog posts is not defamatory on its face in that a reasonable person would conclude that it is Pincus’ opinion as an internet pseudonym cannot be established as true or false unless the author admits to using the name. Even assuming that Plaintiffs are able to establish that they are not CuriousGal and prosbus, the Court finds that the accusations of anti-Semitism and the like are not actionable in that they are unverifiable statements of Pincus’ perception that Plaintiffs are racist. Accordingly, applying New Jersey law, this Court finds that the statements contained in Paragraph 52 of the Complaint are inactionable.

#### **7. Complaint ¶ 56**

The Article complained of was published on January 25, 2012. Defendant states that most of the article addresses the alleged corruption of Hoboken’s allegedly fired Construction Code Officer, Al Arezzo.

Specifically, the article discuss Curious Gal’s comments regarding Arezzo’s firing by the City. Again, Pincus addresses Curious Gal as being Kim Cardinal. (“I had to laugh at the mournful post of Curious Gal, who does not deny being Kim Cardinal”). Defendant concludes the post by writing, “who luvs ya, Al? Mr. and Mrs. Melanoma, defenders of corruption, haters of the clean, progressive Kids First majority School Board. And that’s about it.”

Plaintiffs argue that the statements are defamatory because they are not political operatives, Kim Cardinal does not post as Curious Gal, Bajardi does not post as Prosbu, describing Plaintiffs as defenders of corruption falsely implies involvement in criminal activity, and referring to them as Mr. and Mrs. Melanoma is highly damaging to their reputation.

Defendant Pincus argues that the statement that Plaintiffs are political operatives is true. Defendant relies upon the Merriam Webster definition of “operative” which is a person who works toward achieving the objectives of a larger interest. Defendant further relies upon the fact that the Plaintiffs have publicly supported and promoted political candidates.

Defendant further asserts that the fact that Plaintiffs post as Curious Gal and Prosbu are substantially true and the statement that Plaintiffs have defended corruption is true based upon

Bajardi's letter to the editor endorsing Peter Cammarano and the statements made at a City Council meeting six days after Mayor Cammarano sold two future zoning variance to an FBI information. At this meeting Bajardi argued against the transfer of the Zoning Board Adjustment authority from the new mayor to the City Council stating that the vote was "sour grapes" and "a needless attempt to remove power from the Mayor's office . . . it's been drafted based on assumptions and innuendo."

Defendant Pincus contends that the article is not even of and concerning them, but rather concerning their comments as under pseudonyms, for which they have yet to directly deny posting under those names. Lastly, Defendant argues that the assertion that Plaintiffs are a cancer to the political scene is an insult and thus not actionable defamation.

Again, Pincus' statement that Cardinal is using a pseudonym in the context of the exchange of blog posts is not defamatory on its face. A reasonable person reading the blog post would conclude that the statement is Pincus' opinion since it is obvious to the reader that the use of an internet pseudonym cannot be established as true or false unless the author admits to using the name. Even assuming that Plaintiffs are able to establish that they are not CuriousGal and probus, the Court finds that the designation of "Mr. and Mrs. Melanoma" is non-actionable name calling and hyperbole, and thus not actionable defamation. The Court finds that the matter of whether Cardinal is a "political operative" is not defamatory as to her since her counsel advised the Court at oral argument that she was not working as a journalist at the time of the allegedly defamatory statements. As stated above, the reference to Lane Bajardi as a "political operative" is potentially capable of a defamatory meaning and should be presented to the trier of fact for a determination as to whether it is defamation. Additionally, allegations that a plaintiff knows or associates, or in this case defends or supports a "criminal" are not defamatory as a matter of law. See Romaine v. Kallinger, 109 N.J. 282, 289 (1988) (The statement that the Plaintiff knew a "junkie" does not attribute any kind of criminality to plaintiff. A reasonable and fair understanding of the statement simply does not yield an interpretation that the plaintiff was or had been in illegal possession of drugs or otherwise engaging in any illegal drug-related activity – at most, the sentence can be read to imply that plaintiff knew a junkie).

Therefore, this Court finds that all of the statements in Paragraph 56 of the Complaint except the statement as to "political operative Lane Bajardi" are not actionable.

**8. Complaint Paragraphs 59, 62, 65, 71 and 74**

The complained of statements are comments to a Hoboken Patch article published on January 26, 2012 and entitled “Dissecting the State of the City Address.” Predominately, the statements made were regarding the Plaintiffs’ alleged association with Hoboken’s corrupt political groups and Plaintiffs’ parenting skills.

**Paragraph 59**

Specifically the comment complained of in Paragraph 59 states that Plaintiffs continue to trash public schools, are protective of Al Arezzo, and questioning their parenting skills (“You could care less about your own kid, future public school student? You 2 suck as parents. Somebody call DYFS.”).

Plaintiffs claim that the statements are defamatory because Plaintiff Cardinal acts to ensure her child’s well-being, suggesting that someone call DYFS damages their reputation and Plaintiff does not post under Curious Gal.

**Paragraph 62**

The complained of comment in Paragraph 62 encourages the readers to use public schools and not to listen to the comments posted by Curious Gal, and again addresses Plaintiffs’ alleged bad parenting skills and support of Arezzo. (“This Curious Cardinal MOTHER hates the mayor more than she looks out for the welfare of her own child . . . . would rather trash the schools . . . they should change their last names to Russo . . . . Their poor kid. Won’t somebody call DYFUS.”).

**Paragraph 65**

The complained of comment in Paragraph 65 responds to a comment posted by Curious Gal stated that “maybe Nancy Pincus can post the lawsuit (High School Principal was suing the Bd. of Ed and a Peter Carter for harassment and sexual discrimination charges) on her trash blog[.]”

The comment posted by the Defendant Pincus again questioned Curious Gal’s ability as a parent specifically stating that, “You are a lousy parent” and that Plaintiffs’ son would be better off being raised by wolves. The blog comment also directly responded to Curious Gal’s statement that Pincus should post the harassment lawsuit, by stating that Plaintiff should have one of her pimps write a check because it would cost \$1/word.

Plaintiffs argue that Cardinal acts to ensure her child’s well-being, does not post comments as Curious Gal, is not paid by Hoboken politicians or criminals, implies that Plaintiffs’ child should be taken from their custody and implies that Cardinal is associated with criminals and prostitution.

**Paragraph 71**

The complained of comment in Paragraph 71 again asserts that the Plaintiffs are associated with corrupt officials, that they lack normal parental instincts, and that hating the mayor is more important to them than supporting the public school system for their own son.

Plaintiffs allege the statements are defamatory because they work to ensure their child's well-being, it implies Plaintiffs' child should be taken from their custody, Cardinal does not hate Mayor Zimmer, and Plaintiffs are not associated with Al Arezzo.

**Paragraph 74**

The complained of comment in Paragraph 74 also asserts that they are associated with corrupt politics ("Turning tricks for politicians may satisfy your ego, but you ain't helping your kid") and are bad parents ("You're a miserable mother . . . The kid would be better raised by wolves").

Plaintiffs allege that the statements are defamatory because Plaintiffs work to ensure their child's well-being, Kim Cardinal does not attack Hoboken public schools, is not paid by Hoboken politicians, falsely imply Plaintiffs' child should be taken from their custody, and that the statements associated Cardinal with prostitution and criminality.

In response to Plaintiffs' claim with respect to the above comments, Defendant Pincus argues that whether the Plaintiffs care deeply about their child and act to ensure his well-being is unverifiable. Furthermore, stating that the Plaintiffs are terrible parents, is Defendant's opinion, an insult and, again, unverifiable. Moreover, no reasonable reader would call DYFS upon learning that Plaintiffs support a different slate of Board of Education candidates, nor would a reader conclude that Plaintiffs' child should be taken from their custody.

Additionally, Defendant argues that Plaintiff's attack on public schools is true based upon her belief that Plaintiffs are Prosbu and Curious Gal, their decision to withhold support from the Kid First campaign (group of reform candidates attempting to be elected on to the Bd. of Ed), and Kim Cardinal's interview of a reform candidate for the Board of Education, wherein Cardinal verbally attacked her.

In this case, Pincus' innuendo that they are using those pseudonyms in the context of the exchange of blog posts is not defamatory on its face. A reasonable person reading the blog post would conclude that the statement is Pincus' opinion since it is obvious to the reader that the use of an internet pseudonym cannot be established as true or false unless the author admits to using the name. Even assuming that Plaintiffs are able to establish that they are not CuriousGal and prosbu, this Court finds that Plaintiffs' literal "sex worker" interpretation of the following

comments, “have your pimps write a check,” and “turning tricks for politicians may satisfy your ego” simply does not make sense in context and would not be so interpreted by a reasonable reader. Also, with regard to Plaintiffs’ assertion that they are defamed by statements associating them with Al Arezzo, Plaintiffs have promoted the Russo Faction since at least 2009, and they are truthfully associated with the Russo Faction’s appointees. Finally, allegations that a plaintiff knows or associates with a criminal are not defamatory as a matter of law. See Romaine v. Kallinger, supra. Insofar as the Defendant’s alleged statements malign Plaintiffs’ parenting skills, the Court finds the statements non-actionable. No reasonable jury would believe that Defendant has ever been in a position to judge Plaintiffs’ skills as parents, nor that any reasonable reader would act upon her opinions, and therefore any statements proffered by Defendant in this regard should be considered unverifiable opinion and insults, not susceptible to a defamation claim. Similarly, the comments about CuriousGal Kim Cardinal trashing the public school system 24/7 for political patrons is posed in the context of opinion on CuriousGal’s mothering skills which is legally inactionable “name calling.”

Accordingly, this Court finds that the statements contained in Paragraphs 59, 62, 65, 71 and 74 of the Complaint are not actionable.

#### **9. Complaint ¶ 77**

This article, which was published on January 30, 2012, was written in response to a letter received from a reader querying whether the vent atop of Plaintiffs’ home was properly installed. (The reader was asking if the position of the vent was legal). Photos were taken of Plaintiffs’ roof.

Defendant Pincus’ published article reposted three comments of a Hoboken Patch article. Defendant’s post again stated that “Curious Gal is believed to be Kim Cardinal (Has never denied it) the wife of ‘probus’ – believed to be Lane Bajardi (has never denied it). Defendant cites to comments posted by Curious Gal and Probus wherein they express their support for Al Arezzo and disagree with the way Al Arezzo has been treated by the City Council and CuriousGal is an “anti-Zimmer operative.”

The blog goes on to state that the reader should contact the Construction Office and cites to the New Jersey State Mechanical Code – “Chimneys and Vents.” Specifically, the blog states “Does that smokestack look like it’s 4 feet below the window? Really, one can’t tell from a photograph. Maybe probus or Curious Gal can measure it for us?”

Plaintiffs allege that the statements are defamatory because they do not post under those screen names, they are not political operatives, they do not support Al Arezzo, the statements imply improper involvement with the installation of a vent and the statement encourages readers to contact state officials, which harms their reputation.

Defendant Pincus argues that Plaintiffs' post as Curious Gal and Probus is substantially true. Moreover, Defendant states their identities as her personal opinion ("believed to be"). To the extent that Plaintiffs' have spent years promoting the Russo Faction politicians, Defendant argues that they are truthfully associated with the Russo Faction's corrupt appointees, including Al Arezzo. Defendant further argues that the natural and fair meaning of the statements regarding the alleged vent code violation is not actionable defamation, nor does the existence of a building code violation harm reputations. Lastly, the statement encouraging a single reader to contact the "construction office" to ask whether the vent is legal is not susceptible to a defamatory meaning. Plaintiffs do not explain how or why this statement might harm their reputation.

This Court finds that the statements contained in Paragraph 77 are primarily unverifiable opinion in that they specifically state that they are Defendant's opinion as to what she believes to be Plaintiffs' blogging pseudonyms based upon their failure to deny same. Regarding the question of whether the vent was properly installed, the Court finds no possible grounds for defamation in the statement in that the reader is merely suggested to contact the Construction Office. Again, with regard to Plaintiffs' assertion that they are defamed by statements associating them with Al Arezzo, Plaintiffs have promoted the Russo Faction since at least 2009, and they are truthfully associated with the Russo Faction's appointees. Finally, allegations that a plaintiff knows or associates, or in this case is supportive of, a criminal are not defamatory as a matter of law. Accordingly, the Court finds that the statements in Paragraph 77 of the Complaint are not actionable.

#### **10. Complaint ¶¶ 84 and 87**

The complained of comments stems from an article published in the Galloway Patch wherein it addressed the naming of a former Hoboken Business Administrator, Arch Liston, as Interim Acting Township Manager in Galloway. Curious Gal and Vinvan (another screen name believed to be used by Bajardi) criticizing Liston and Mayor Zimmer.

Defendant posted on the Galloway Patch website the following comments: "We have a sickness living amongst us – his name is Lane Bajardi and his wife is Kim Cardinal;" identifying

Bajardi as a 1010 WINS anchor, stating that they both post under different screen names; that Bajardi was arrested for assaulting a local blogger; that they run smear campaigns on anyone affiliated with Mayor Dawn Zimmer; and again calling them Mr. and Mrs. Melanoma.

Plaintiffs allege that the statements are defamatory as they do not post under the identified screen names, calling them “sickness” damages their reputations; identifying 1010 WINS as Bajardi’s employer endangers his job.

Defendant further posted that Bajardi had worked for years on the campaigns of Beth Mason, yet had never appeared on Mason’s ELEC report; blogs as Vinvan, has been questioned by the FBI, and is believed to be part of a criminal conspiracy; and that Bajardi’s friend Patrick Ricciardi (City Hall IT Staffer who was arrested) had been arrested and more arrest will follow.

With respect to those comments, Plaintiffs allege that the statements are defamatory because they do not post under those screen names, are not political operatives, are not paid by Ms. Mason, do not have undeclared income, Bajardi has never been questioned by the FBI, is not involved in a criminal conspiracy, is not friends with the IT staffer and that the statements imply Plaintiff’s involvement in criminal activity.

In response, Defendant argues that identifying Plaintiffs as the individuals who post under the identified screen names is substantially true. Moreover, the statement that Plaintiffs are political operatives is true. The assertion that Plaintiffs are paid by Ms. Mason is not defamatory. Referring to Plaintiffs as a “sickness” is name-calling and not actionable defamation. Identifying 1010 WINS as Bajardi’s place of employment is true. Statements regarding Mason’s ELEC reports is Defendant’s opinion based upon the fact that the reports do not list anyone being paid to write her stuff, despite having many e-mails that demonstrate that Plaintiffs did write for Mason. In addition, whether Mr. Bajardi has been questioned by the FBI is likely unverifiable as the investigation is on-going. Lastly, whether Bajardi is friends with another potentially corrupt Russo Faction is unverifiable and not defamatory as a matter of law.

In this case, again the reference to Pincus’ statement that Plaintiffs are using pseudonyms in the context of the exchange of blog posts is not defamatory on its face. A reasonable person reading the blog post would conclude that the statement is Pincus’ opinion since it is obvious to the reader that the use of an internet pseudonym cannot be established as true or false unless the author admits to using the name. The Court also finds that referring to Plaintiffs as a “sickness” is non-actionable name calling. 1010WINS is indeed Plaintiff Lane Bajardi’s place of work, and

naming that fact is not actionable. Likewise, stating that Lane Bajardi does not appear on Mason's ELEC report is fact which has not been denied by Plaintiffs. Again, stating that Plaintiff Kim Cardinal Bajardi is a "hideous political operative" is non-actionable name calling nor is stating that Plaintiffs are associated with someone involved in criminal conduct.

However, the statements that Plaintiff-journalist Lane Bajardi has worked for years on the campaigns of a wealthy local Councilwoman named Beth Mason is defamatory to this Plaintiff should he prove that the statement is false. The statement that Mr. Bajardi has been questioned by the FBI, thus implying criminal conduct, and that he is believed to be part of the criminal conspiracy to steal our mayor's email and trafficking [sic] confidential city information are defamatory to the extent they are not true and require that Pincus' defenses as to these comments be presented to a jury at the time of trial. The statement suggesting "perhaps lots of undeclared income to the IRS. Oops!" is not subject to verification as truth or falsity since it is couched in terms of speculative rhetoric. Therefore, the Court finds that Plaintiff Kimberly Cardinal Bajardi has no claim for defamation based upon the statements contained in Paragraphs 84 and 87 and finds that the statements identified above as to Plaintiff Lane Bajardi are actionable.

#### **11. Complaint ¶¶ 99 and 100**

The comments are from a blog article published March 12, 2012, entitled "Silence of the Lenz." Mike Lenz (former Hoboken Councilman) sent a letter, via certified mail, to the owner of Hoboken411, as well as to Beth Mason and Lane Bajardi, to retract some of the comments in the article. Only Mason accepted the certified mail delivery and some changes were made to the article, but Lenz demanded further changes. In addition, several comments were posted by other bloggers suggesting that Lenz sends the letter to Bajardi's employer, 1010 WINS.

Defendant posted the Mike Lenz letter and commented that Bajardi works for 1010 WINS as an on-air news reader and as such is prohibited from engaging in local partisan politics. Defendant goes on to state that Bajardi's silence regarding Mike Lenz's letter is an admission that he had ghostwritten "Deconstructing Michael Lenz." Furthermore, Defendant states that he cannot deny it because there may be sworn deposition in the near future.

Plaintiffs allege that by indicating where Bajardi is employed encourages readers to contact his employer, thereby endangering his job.

Defendant argues that by stating that Bajardi is an on-air anchor at 1010 WINS does not endanger his job, nor did Defendant's comments encourage readers to contact his employer.

Furthermore, Defendant contends that stating an opinion of agreement with a reader's suggestion to take action is not capable of being proved true or false because it does not state a fact. Defendant asserts that the overall context of the article was addressing the fact that Bajardi would not accept certified letters, which is a statement of fact.

The Court finds that naming Plaintiff's place of work is not defamatory. To the extent that Plaintiff Lane Bajardi believes that a threat was implied or that the reader was encouraged to contact his employer through colloquy, such a threat may be otherwise actionable, but not as defamation. Accordingly, the Court finds that the statements in Paragraphs 99 and 100 of the Complaint are not actionable.

## **12. Complaint ¶ 103**

The blog was published on March 16, 2012. The blog comments on the fact that Probus defended Bajardi's relationship with Peter Cammarano, reposting a comment directly from Probus who suggested that the Cammarano-Bajardi disclosure was undocumented hearsay. Defendant's blog goes on to further question whether Bajardi was Cammarano's pitch man in the corruption and that Bajardi and his wife are now associated with Al Arezzo.

Defendant also included a timeline of when Peter Cammarano sold the variance, when Bajardi publicly spoke in favor of Cammarano and finally, Cammarano's arrest.

Plaintiffs allege that the statements are false and defamatory because Bajardi does not post as Probus; Bajardi never aided or abetted corruption; Bajardi is not working for or with former Mayor Cammarano; the statements imply involvement in criminal activity; and the identification of Bajardi's workplace endangers his job.

Defendant Pincus argues that the statement regarding Bajardi's involvement was posed as a question, it was meant to spur discussion and, therefore, is not-defamatory. Moreover, Defendant provided a factual basis for her question/opinion and, therefore, is also not defamation. Furthermore, the comments do not suggest that Bajardi is still working for Cammarano, was rather referring to Bajardi's former work with Peter Camarano when he publicly lobbied for Cammarano's retention of authority over the Zoning Board. Lastly, identifying Bajardi's work as 1010 WINS is true and therefore not actionable defamation.

The Court finds that the statement which could be read as alleging that Lane Bajardi (by way of being probus) has violated the rules of his employer 1010WINS by supporting former

Mayor Peter Cammarano is capable of a defamatory meaning as to Mr. Bajardi considering his position as a journalist with his employer.

### **13. Complaint ¶ 118**

The complained of statement is a comment to a Hoboken Patch Article published on May 21, 2012. This article resulted in 717 posts, with many of those posts commenting on a hearing concerning Board of Education member Theresa Minutillo's criminal harassment complaint against Matt Calicchio, an employee of Beth Mason's civic league. In response to Defendant's post regarding the hearing, Curious Gal attacked Defendant as being a bully.

In response, Defendant commented on how she "hit a nerve with Curious Gal / Kim Cardinal" about how her husband, Bajardi, never appeared on the ELEC report and about all of the unpaid tax-income they owe the IRS. Defendant further states that Mason's non-profit, tax-exempt corporation was a political operative employment agency and questioned whether Curious Gal and Prosbu were also part of it as well.

Plaintiffs allege that they do not post anonymously as Curious Gal and Prosbu, are not paid political operatives, are not paid by Mason's non-profit organization and are not being investigated by the IRS, or have committed tax evasion.

Defendant again asserts that the statements alleging that the Plaintiffs post as Curious Gal and Prosbu are substantially true, the statements do not state Plaintiffs are paid by Mason or any non-profit organization affiliated with Mason, nor does it state that the Plaintiffs are being invested or that they have committed tax evasion. Rather, Defendant argues, the statement, "all of that unpaid tax-income you 2 may owe the IRS" and "are CG and prosbu on the 501(c)(3) dole too," are questions meant to inspire discussion and based on facts because Bajardi did steady political work for Mason and a court found that Calicchio was being paid through Mason's non-profit organization to do political work, but never appeared on any of Mason's ELEC reports. Moreover, Defendant argues that the comments posted were regarding Hoboken Politics and that reasonable readers of the 117 page comment thread would take these comments as opinions.

The Court finds that the statements in Paragraph 118 of the Complaint are not actionable since they are posed in the form of a question and are rhetorical hyperbole.

### **14. Complaint ¶ 121**

In essence, the comments were pertaining to the Board of Education decision not to re-appoint the public school's track coach. In response, Curious Gal indicated that she had inside

information from board meetings. Defendant asserts that by the end of the comment string, essentially all of the commenters had identified Curious Gal as Kim Cardinal.

Thereafter, comments were published on the blog entitled “Data Smuggling at the BoE: Whodunit?” The article proposed a conspiracy theory, written in a detective novel style, on the question concerning how information flows from closed session board of education meetings to the internet. Defendant furthers this conspiracy theory alleging that Curious Gal and Probus are the Plaintiffs and that “Curious Kim” had relayed information of close-session meetings to the Patch, that she is the current or former wife of Bajardi and moved out to a waterside development in Edgewater. Defendant further states that “all disturbing, and in this case, her victim is an African American,” thereby suggesting that she had a “dark motive.”

Plaintiffs allege that the complaint of statement is defamatory because Plaintiff is not a racist; has never posted racist comments; has not pursued any investigation against an African-American out of racists motivation; does not post as Curious Gal; does not live in Edgewater; that Plaintiffs are not divorced; do not maintain separate residences and implies that they are involved in criminal activity.

Defendant Pincus contends that stating that Plaintiffs post under the identified screen names is substantially true; whether Cardinal is racist is not verifiable and non-defamatory. Moreover, assertions that Cardinal lives in Edgewater, maintains a separate residence, or is divorced is not susceptible to a defamatory meaning. Lastly, the fact that Plaintiffs allege that the complaint of statements implies criminal activity is incorrect because receiving and disseminating leaked information, even information that was leaked illegally, is not criminal. New York Times Co. v. U.S., 403 U.S. 713 (1971).

This Court finds that the statements contained in this Paragraph are not actionable. As stated previously, Pincus’ statement that Plaintiffs are using those pseudonyms in the context of the exchange of blog posts is not defamatory on its face. Even if Pincus is falsely accusing Plaintiffs of using the pseudonyms Curious Gal and probus, the racist statements attributed to them are unverifiable statements that are not actionable under New Jersey law. The assertions that Cardinal lives in Edgewater, maintains a separate residence, or is divorced is not susceptible to a defamatory meaning. Lastly, the fact that Plaintiffs allege that the complaint of statements implies criminal activity is incorrect because receiving and disseminating information leaked from closed session, even information that was leaked illegally, has not been established as criminal.

### **C. Limited Public Figure**

Based upon the above, the only statements that are potentially defamatory as contained in Paragraphs 31, 35, 56, 84, 87 and 113 are with regard to Plaintiff Lane Bajardi. Accordingly, this Court must determine whether Mr. Bajardi must establish actual malice in order to prevail on his claims for defamation and defamation per se with respect to the identified statements. Actual malice is required to be proven if either 1) Plaintiff Lane Bajardi is a limited public figure; or 2) whether the alleged defamation involves a public controversy. It is established law that the Court, rather than a jury, must make this determination. Barasch v. Soho Weekly News, Inc., 208 N.J. Super. 163, 173 (App. Div. 1986).

“Once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of that controversy.” Berkery v. Kinney, 397 N.J. Super. 222, 228 (App. Div. 2007). “The court must consider (1) whether the alleged defamation involves a public controversy, and (2) the nature and extent of plaintiff’s involvement in that controversy.” Berkery v. Kinney, 397 N.J. Super. 222, 227 (App. Div. 2007). A “public controversy” is defined as “a real dispute, the outcome of which affects the general public or some segment of it” and the “content, form, and context ... as revealed by the whole record” must be considered. Berkery v. Kinney, 397 N.J. Super. 222, 227 (App. Div. 2007).

New Jersey has particularly high regard for the protection of speech, as our State’s Supreme Court has found that New Jersey’s Constitution offers protections “more sweeping in scope than the language of the First Amendment, has supported broader free speech rights than its federal counterpart.” Sisler v. Gannett Co., 104 N.J. 256, 271 (1986). Indeed, our Supreme Court, through rulings, and our Legislature, through lawmaking, “have stressed the vigor with which New Jersey fosters and nurtures speech on matters of public concern. Id. Furthermore, political speech “lies at the core of our constitutional free speech protections.” Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 499 (2012)(internal citation and quotation omitted). It is with this high regard for the value of free speech in public discourse that the Court finds the Plaintiff Lane Bajardi to be a limited public figure, and the issue at hand to be a matter of public concern, such that Plaintiff must prove by clear and convincing evidence that Defendants made the alleged defamatory comments with actual malice. Durando v. Nutley Sun, 209 N.J. 235, 250 (2012). By

“actual malice,” the Court means that it must be proven that the Defendants knew that their statements were false or acted recklessly with regard to whether they were false.

In this case, the Court finds that the contentious factionalism present in Hoboken politics constitute a sufficiently “particular controversy” to which an individual may have a connection, making the individual a limited purpose public figure. Berkery v. Kinney, 397 N.J. Super. 222, 227 (App. Div. 2007). The Court finds as well that Plaintiff Lane Bajardi has been heavily involved in the factional discord; that he has made efforts to inject his talents into the furtherance of one side over the other, has presented himself at various public gatherings in connection with one of the factions, has communicated with public officials on matters involving Hoboken politics and can generally be considered deeply involved in that particular controversy. Id. As a result, even though Plaintiff claims to have withdrawn from civic involvement as of this date, he “remain[] public figure[s] thereafter for purposes of later commentary or treatment of that controversy.” Id., at 228.

Furthermore, aside from this Court’s finding that the Plaintiff is a limited public figure, this Court finds that the issue of Hoboken political factionalism is one of “public concern” that is clearly offered the highest possible Constitutional protection. W.J.A. v. D.A., 210 N.J. 229, 244 (2012); G.D. v. Kenny, 205 N.J. 275, 312 (2011); Rocci v. Ecole Secondaire Macdonald-Cartier, 165 N.J. 149, 156 (2000). It is a “real dispute,” in that the outcome of every election and political adversarial process has the real potential to lead to some change in direction for the City of Hoboken, and thus, the ongoing battles between these factions has a profound effect on the community of Hoboken in general. Berkery, supra, at 227. The Court finds that to impose penalties without a clear showing of actual malice would offend the principles of free speech and active political discourse that stand at the cornerstone of American foundational freedom. The Court will not sanction the Defendants for exercising their right to engage in the political process absent a clear and convincing showing that they knew what they posted was false, or that they posted those things with reckless disregard of whether they were false. Durando, supra, at 458.

#### **D. Actual Malice**

Finding the Plaintiff a limited public figure, and the matter one of public concern, the actual malice standard is the appropriate standard to use in this defamation case. To prove publication with reckless disregard for the truth, a plaintiff must show that the publisher made the statement with a “high degree of awareness of [its] probable falsity,” Garrison v. Louisiana, 379 *U.S.* 64, 74

(1964), or with “serious doubts” as to the truth of the publication, St. Amant v. Thompson, 390 U.S. 727, 731 (1968). To be actionable, “the recklessness in publishing material of obviously doubtful veracity must approach the level of publishing a ‘knowing, calculated falsehood.’ ” Lawrence v. Bauer Publ'g & Printing Ltd., 89 N.J. 451, 466, 446 A.2d 469 (1982) (citation omitted). Negligent publishing does not satisfy the actual-malice test. Lynch v. New Jersey Educ. Ass'n, 161 N.J. 152, 165 (1999). See New York Times Co. v. Sullivan, 376 U.S. 254, 279–80, 84 S.Ct. 710, 726, 11 L. Ed.2d 686, 706–07 (1964); DeAngelis, *supra*, 180 N.J. at 13; Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 165 (1999). “To satisfy the actual malice standard, [a] plaintiff must establish by clear and convincing evidence ... that [the] defendant published the statement with ‘knowledge that it was false or with reckless disregard of whether it was false.’ ” DeAngelis, *supra*, 180 N.J. at 13 (quoting Sullivan, *supra*, 376 U.S. at 279–80, 285–86, 84 S.Ct. 726, 729, 11 L. Ed.2d at 706–07, 710) (citation omitted); Gulrajaney v. Petricha, 381 N.J.Super. 241, 255 (App.Div.2005). “A publisher's hostility or ill will is not dispositive of malice.” DeAngelis, *supra*, 180 N.J. at 14.

Here, there is insufficient evidence in the record upon which the Court can make a finding as to whether Defendant Pincus made the potentially defamatory statements identified by this Court as to Plaintiff Lane Bajardi with actual malice.

Plaintiff submitted evidence establishing that Defendant Pincus made no effort to investigate 1) whether Plaintiff was a person of interest to the FBI; 2) whether Plaintiff handled leaked emails or other materials from Hoboken City Hall or whether he was part of a conspiracy; 3) whether he was questioned by the FBI; 4) whether Plaintiff was part of a criminal conspiracy to steal the mayor of Hoboken’s email. This evidence is sufficient to create a triable issue as to whether the remaining statements were made with actual malice at this juncture in the sense of having knowledge that they were false or acted in reckless disregard of the truth or falsity.

## **E. Intentional Torts**

### **a. Intentional Infliction of Emotional Distress**

Plaintiffs’ also assert a claim for intentional infliction of emotional distress (“IIED”). To prevail on such a claim, the plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe. Initially, a plaintiff must prove that the defendant acted intentionally or recklessly. For an intentional act to result in liability, the defendant must intend both to do the act and to produce emotional distress. Liability will also attach when

the defendant acts recklessly in deliberate disregard of a high degree of probability that emotional distress will follow. Second, the defendant's conduct must be extreme and outrageous. The conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Third, the defendant's actions must have been the proximate cause of the plaintiff's emotional distress. Fourth, the emotional distress suffered by the plaintiff must be “so severe that no reasonable man could be expected to endure it.” By circumscribing the cause of action with an elevated threshold for liability and damages, courts have authorized legitimate claims while eliminating those that should not be compensable. Griffin v. Tops Appliance City, Inc., 337 N.J. Super. 15, 22-23 (App. Div. 2001).

Defendant Pincus contends that conduct which does not constitute actionable defamation may not be relied on to sustain a different cause of action solely on the consequences of that alleged defamation. See G.D. v. Kenny, 205 N.J. 275, 307 (2011) (Because the Court found that there was no defamation, it held that the intentional and negligence infliction of emotional distress claims also fail because those torts are predicated on the same conduct alleged in the defamation claim). Moreover, Defendant argues that even where complained statements constitute actionable defamation against a public figure or address a matter of public concern, a plaintiff must establish actual malice to prevail in an action for intentional torts based on the same conduct. See Decker v. Princeton Packet, Inc., 116 N.J. 418, 432 (1989).

Defendant further argues that Plaintiffs cannot sustain a cause of action for a claim of IIED. Defendant Pincus argues that Plaintiffs have not bothered to identify the “extreme or outrageous” conduct that is applicable. Defendant relies upon Ingraham v. Ortho-McNeil Pharmaceutical, 422 N.J. Super. 12, 21 (2011), wherein the Court discussed matters where the elevated threshold of proof of outrageous conduct was met – (1) officer using a racial slur towards an African-American; (2) a report created by a defendant stating that a teacher had threatened to kill her students because teacher refused defendant’s sexual advances; (3) surrounding a plaintiff and making comments and gestures to suggest that she was to perform a sexual act in front of others; (4) a landlord intentionally shutting off heat, water, and security in order to have tenants vacate; and (5) a doctor telling parents that their child was suffering from a rare cancerous disease, when in fact the doctor knew the child had a mildly infected appendix.

By contrast, the Appellate Division highlighted cases where courts had declined to find sufficient extreme and outrageous conduct, including where a plaintiff's co-worker treated her rudely and unprofessionally, called her names, and gestured in a physically intimidating manner and where derogatory gender-based comments were made to the plaintiff. Ingraham, 422 N.J. Super. at 22.

In addition, Defendant argues that the Plaintiffs do not sufficiently allege injury to sustain a cause of action as the distress must result in either "physical illness" or "serious psychological sequelae." Turner v. Wong, 363 N.J. Super. 186, 200 (App. Div. 2003).

Here the Court finds that there has been no evidence submitted by Plaintiffs to surmount the very high bar set for outrageousness. Nor has there been any evidence submitted with regard to physical illness or serious psychological sequelae. Therefore, the Court grants summary judgment as to the IIED claim.

b. Tortious Interference with Business Relations and Prospective Economic Relations

Additionally, Plaintiffs has alleged claims of tortious interference with business relations and intentional interference with prospective economic relations. Defendant Pincus argues that the Plaintiffs have not alleged an economic loss. Plaintiffs assert that Bajardi received reprimands and warnings from his employer. Moreover, Defendant Pincus asserts that Bajardi's meteoric rise as a radio personality indicates that he has not suffered an economic damage.

An action for tortious interference with a prospective business relation protects the right "to pursue one's business, calling or occupation free from undue influence or molestation." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 750 (1989) (citations omitted). To prove such a claim, a plaintiff must establish: (1) a reasonable expectation of economic advantage; (2) that the defendant intentionally interfered with that interest; and (3) the interference caused the loss of the prospective gain. Id.

The Court finds that the Plaintiffs have offered no evidence that either Plaintiff suffered a loss of prospective gain. Therefore, the Court grants summary judgment as to Plaintiffs' claim for tortious interference with business relations and intentional interference with prospective economic relations and dismisses those causes of action in their entirety.

**II. Motion for Summary Judgment filed on behalf of Defendant Mark Heyer (formerly Jackstop and This Means War)**

- a. The Court incorporates the Findings of Fact and Conclusions at Law from the above opinions insofar as they pertain to Defendant Mark Heyer.
- b. The Court shall address each statement upon which Plaintiffs base claims of defamation as to Defendant Heyer.
  - i. **Complaint ¶ 44**: “Has it occurred to Lane Bajardi that he may be looking at hefty prison time? He has NEVER appeared in an ELEC report for Beth Mason or Tim Occhipinti. He appears in this midnight video for Occhipinti’s campaign leaders. . . . Is he credited in Beth Mason’s IRS filings? Does he credit her in his tax forms? <http://www.fbi.gov/news/videos/inside-the-fbis-internet-tip-line>.”

The Court finds that the language in this Paragraph poses rhetorical questions in the context of political discourse rather than statements of fact. Accordingly, they cannot be found to be defamatory.

**ii. Complaint ¶ 81**

Insofar as the statement alleges that Lane Bajardi is a “paid political operative,” the Court has found that such a statement could be defamatory towards Mr. Bajardi. As described above, the statement is not actionable as to Plaintiff Kimberly Cardinal Bajardi.

Further, as discussed in Part I-D with respect to the Pincus Motion, Plaintiff must show actual malice. The Court finds that the evidence submitted by Plaintiff showing that Mr. Heyer conducted no investigation as to the truth of the statements set forth in ¶ 81 of the Complaint establishes an issue of material fact sufficient to withstand summary judgment on the issue of actual malice.

**ii. Complaint ¶106**: “Future felons” and “remoras”

The Court finds these statements not actionable. “Remora” is non-actionable name-calling, and “future felons” is an unverifiable claim and reflective of Defendant’s opinions. Further, the Plaintiffs’ claims of intentional infliction of emotional distress and tortious interference with business relations and prospective economic relations are dismissed on summary judgment for the reasons set forth in Part I-E as to Ms. Pincus’s motion for summary judgment.

**III. Motion for Summary Judgment filed on behalf of Defendant Roman Brice**

- a. The Court incorporates the Findings of Fact and Conclusions at Law from the above opinions insofar as they pertain to Defendant Roman Brice.
- b. The Court shall address each statement upon which Plaintiffs base claims of defamation.
  - i. **Complaint ¶ 35**: “Lane Bajardi is back. Still fighting for the corrupt and The Machine for his Beth Mason paycheck. Yawn. Same ole, same ole.”

For the same reasons as described above, the Court finds this statement potentially defamatory as to Plaintiff Lane Bajardi only.

- ii. **Complaint ¶ 110**: “The Judge described the testimony of Matt Calicchio as “garbage.” No matter what Beth Mason’s other paid political operative Lane (probus/Madison Monroe/et al) Bajardi has to say about his fellow Mason paid political operative Matt Calicchio, the Judge’s comments speak for themselves even if the prosecutor lacked the evidence for a conviction.”

Again, to the extent that the statement regarding Lane Bajardi is that he is a paid political operative, this could have defamatory meaning and must be submitted to a jury.

Further, as discussed in Part I-D with respect to the Pincus Motion, Plaintiff must show actual malice. The Court finds that the evidence submitted by Plaintiff showing that Mr. Brice conducted no investigation as to the truth of the statements set forth in ¶ 35 and 110 of the Complaint establishes an issue of material fact sufficient to withstand summary judgment on the issue of actual malice.

Finally, Plaintiffs’ claims of intentional infliction of emotional distress and tortious interference with business relations and prospective economic relations are dismissed on summary judgment for the reasons set forth in Part I-E as to Ms. Pincus’s motion for summary judgment.

In conclusion, this Court grants the summary judgment motions by all Defendants except as to the following:

- 1) Plaintiff Lane Bajardi’s claim for defamation/defamation per se based on the statements in paragraphs 84, 87 and 103 of the Complaint as against Defendant Nancy Pincus;
- 2) Plaintiff Lane Bajardi’s claim for defamation/defamation per se based on the statements in paragraph 81 as to Defendant Mark Heyer; and

3) Plaintiff Lane Bajardi's claim for defamation/defamation per se based on the statements in paragraphs 35 and 110 as to Defendant Roman Brice.

This Court grants summary judgment as to all other claims made by Plaintiff Lane Bajardi.  
The Court grants summary judgment as to all claims made by Plaintiff Kim Cardinal Bajardi.

The remaining claims shall proceed to trial on September 22, 2014.