IN THE SUPERIOR COURT

FOR THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

WILLIE TAN, Plaintiff, v. YOUNIS ART STUDIO, INC., dba MARIANAS VARIETY, Defendant.	CIVIL ACTION NO. 01-0624 **ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR ALTERNATIVELY FOR DISMISSAL**

I. INTRODUCTION

The above matter came on for a hearing on February 20, 2002, at 9:00 a.m. on Defendant's Motion for Judgment on the Pleadings or Alternatively, Dismissal for Failure to State a Claim for Relief. Steven P. Pixley, Esq. appeared on behalf of Plaintiff. G. Anthony Long, Esq. appeared on behalf of Defendant. The Court, having reviewed the briefs, exhibits, affidavits and having heard and considered the arguments of counsel, now renders its written decision.

II. FACTS

On October 19, 2001, Defendant published a political advertisement in its publication the *Marianas Variety*, which consisted of a letter from Representative Stanley T. Torres [hereinafter Torres] to then gubernatorial candidate Benigno R. Fitial [hereinafter Fitial]. In the letter, Torres questioned Fitial in regard to a 1985 cash contribution in excess of $100,000, allegedly received from Plaintiff while Fitial was Vice Speaker of the House of Representatives.

Following publication of the letter, Plaintiff filed this Complaint on November 29, 2001, asserting defamation. On January 24, 2002, Defendant filed this Motion for Judgment on the Pleadings or Alternatively, Dismissal for Failure to State a Claim for Relief. Plaintiff opposes the motion.

III. ISSUES

1. Whether Defendant sufficiently establishes that it is entitled to judgment as a matter of law.

2. Whether Plaintiff sufficiently states a claim for relief.

IV. ANALYSIS

Defendant asserts that the facts alleged in this case are insufficient, as a matter of law, to support a judgment in favor of Plaintiff and thus, Defendant is entitled to judgment on the pleadings, or alternatively to dismissal for failure to state a claim. Pursuant to Commonwealth Rule of Civil Procedure 12(c), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."[1] Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that: (1) no material issue of fact remains to be resolved; and (2) it is entitled to judgment as a matter of law. *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984). A motion for judgment on the pleadings is the same as a motion to dismiss filed after the pleadings are closed and raises only questions of law. The pleadings must be construed liberally and in a light most favorable to the party against whom the motion is made, and every reasonable inference in favor of the party against whom the motion is made should be indulged. *Vaught v. Vaught*, 441 N.E.2d 811, 812 (Ohio Ct. App. 1981); *see also McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988) (stating that in reviewing Rule 12(c) motion, all allegations of fact of the opposing party are accepted as true and are construed in the light most

[1] Generally, the pleadings are closed upon the filing of a complaint and answer. *See* Com. R. Civ. P. 7(a); *see, e.g., Hofschneider v. H.O. Lee, Inc.*, Civ. No. 91-0232 (N.M,I. Super. Ct. Aug. 13, 1992) ([Unpublished] Order Granting Summary Judgment at 2), *aff'd*, App. No. 92-028 (N.M.I. Sup. Ct. July 12, 1993) ([Unpublished] Opinion). Where, however, "a counterclaim, cross-claim, or third-party claim is interposed, then the filing of a reply, cross-claim answer, or third-party answer normally will mark the close of the pleadings." CHARLES A. WRIGHT & ARTHUR R. MILLER, 5A FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1367 (2d ed. 1990); Com. R. Civ. P. 7(a).

favorable to that party).

Similarly, in considering a motion to dismiss for failure to state a claim upon which relief can be granted, "the court must accept the allegations as true and construe them in the light most favorable to the plaintiff." *Govendo v. Micronesian Garment Mfg., Inc*., 2 N.M.I. 270, 283 (1991) (*citing Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir. 1990)). "The defendant must then demonstrate that, even after taking the well pleaded facts as true, the plaintiff still fails to state a claim for relief." *Govendo v. Marianas Pub. Land Corp*., 2 N.M.I. 482, 490 (1992). Dismissal is improper unless the court is absolutely certain that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See Micronesian Garment Mfg., Inc*., 2 N.M.I. at 283.

In the case at hand, Plaintiff asserts that the letter published in the *Marianas Variety* defamed Plaintiff by implying that Plaintiff bribed a public official, which is a felony in the CNMI,[2] and that Plaintiff is dishonest and corrupt. The statements that Plaintiff complains of read in relevant part:

> 1. you owe the people of the CNMI to tell the TRUTH about the over One Hundred Thousand Dollars you received in CASH that you said you got from your friend, Mr. Tan, the money you smuggled out of the Philippines while you were Vice Speaker of the House in 1985?,
>
> 2. Was the money Mr. Tan paid you for repealing the Foreign Investment Act?,
>
> 3. Was the money you received from Mr. Tan for L&T Garment and Poker machines which flowed into the CNMI?,
>
> 4. Was it that money which let Mr. Tan walk into the Lower Base government buildings and public lands to become the largest garment factory in the CNMI . . .?,
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> 5. Ben, tell the CNMI people the TRUTH that Mr. JERRY TAN, the brother of MR. WILLIE TAN, once said that the people of the CNMI are all crooks, that the Saipanese are accessible to BRIBERY . . . , and
>
> 6. Ben, didn't the Tans pay their way into the CNMI through you receiving that money?

Pl.'s Opp'n at 2-3.

The elements of a defamation claim are: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the

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[2] *See* 6 CMC § 3201.

part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *See Bolalin v. Guam Publications, Inc.*, 4 N.M.I. 176, 183 (1994) (*citing* RESTATEMENT (SECOND) OF TORTS § 558 (1977) [hereinafter RESTATEMENT]). The threshold question is whether the statements made by Defendant are false. In the complaint, Plaintiff alleges that the statements are false. Accepting Plaintiff's allegations as true, as the Court must at this stage of the proceedings, Plaintiff has sufficiently alleged a false statement by Defendant.

In addition to being false, Plaintiff must show that the statements are defamatory. The question of whether the challenged statements are capable of conveying a defamatory meaning is the responsibility of the court. *See Southern Air Transp., Inc. v. Am. Broad. Cos., Inc.*, 877 F.2d 1010, 1013-14 (D.C. Cir. 1989). Pursuant to RESTATEMENT § 614(1), the court must determine the following: "(a) whether a communication is capable of bearing a particular meaning, and (b) whether that meaning is defamatory." If the court determines that a statement is reasonably susceptible to a defamatory interpretation, then it becomes a question for the trier of fact whether the statement was understood in a defamatory sense. *Id.* at § 614(2). A statement is defamatory if it tends to "harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." *Fernandes v. Tenbruggencate*, 649 P.2d 1144, 1147 (Haw. 1982); *Afro-American Publ'g Co. v. Jaffe*, 366 F.2d 649, 654 n.10 (D.C. Cir 1966) (stating that publication may convey defamatory meaning if it "tends to lower plaintiff in the estimation of a substantial, respectable group, though they are a minority of the total community or plaintiff's associates"); RESTATEMENT § 559.

Defendant, however, contends that Plaintiff's claim fails as a matter of law because defamation cannot lie on innuendo and implication. Where there is no express and specific statement charging Plaintiff with bribery of a public official, there can be no defamation. In support of this contention, Defendant cites *Sekisui House, Ltd. v. Superior Ct.*, Orig. Action No. 99-008 (N.M.I. Sup. Ct. Nov. 23, 1999) (Opinion and Order). The Court finds Defendant's reliance on *Sekisui House* misplaced. In *Sekisui House*, the Supreme Court simply stated that "[d]efamation by implication is disfavored in this jurisdiction." *Id.* at 5. The Court then cited *Camacho v. Santos*, 1 CR 281, 286-87 (Dist. Ct. 1982),

in which the defendant made the following statements:

> It is good for only one man, Governor of the Northern Marianas, at the time when the Commonwealth is poor, to send nurses to his house to care for his father (deceased) twenty four (24) hours a day and paid out of your money, public funds. Is that good? Good? What is the difference between his father and your fathers and mothers?
>
> And Carlos, our governor, when his father was ill he ordered nurses to care for his father at his house, at his house! And it's your money that was used. Is it right to do this? You! you, you, you do you have such a right? Okay! That is why we must replace him.

Camacho, 1 CR at 285 n.1. Plaintiffs filed a two count complaint alleging that defendant's slanderous statements caused injury to Carlos S. Camacho, and that defendant's words slandered the remaining plaintiffs. Defendant moved the court for dismissal pursuant to Fed. R. Civ. P. 12(b)(6). With regard to defendant's statements, in reference to plaintiff Carlos S. Camacho, the District Court held that:

> It is well settled that to charge one orally with [sic] crime of larceny, embezzlement or misappropriation is actionable per se and that it is not necessary that the words spoken constitute by themselves a technical charge of crime or that there should be a directly affirmative charge, it being sufficient that the words are naturally and presumably understood by the hearers as charging the crime in question. This Court has analyzed the alleged remark by the defendant contained in paragraph six and concludes that the statement as pleaded is actionable per se.

Camacho, 1 CR at 286 (citations omitted). With regard to defendant's statements in reference to the remaining plaintiffs, the District Court stated that "[t]he alleged defamatory remark . . . , does not by name or by implication mention any of the plaintiffs except Carlos S. Camacho." *Id*. The District Court went on to state that:

> In the absence of ambiguity of the defendant's remarks, it is for the court to determine whether a given remark is slanderous per se. In deciding this issue, the court, considering the statements by defendant in their entirety, is bound to invest the words used with their natural meanings. "The language used may not be extended by the innuendo or conclusions of the pleader; the defamatory character must be certain and apparent from the words themselves."

Camacho, 1 CR at 286-87 (citation omitted). In support of this contention, the District Court relied on *Ryan v. Hearst Publ'ns, Inc.*, 100 P.2d 24 (Wash. 1940). In *Ryan*, defendant caused an article to be published about a Mrs. Lillian A. Ryan who had been convicted of a money swindling scam. The article stated that "Mrs. Lillian A. Ryan . . . had found it such a profitable racket that she was able to raise

sixteen children." *Id.* at 24. Along with the article, defendant published a picture of Mrs. Ryan's husband and the sixteen children. Mr. Ryan, and the Ryan children, brought an action for defamation asserting that the article insinuated that Mr. Ryan failed to meet the needs of his family and that the children owed their existence to their mother's criminal endeavors. The court stated that "[i]n so far as the contents of the publication is concerned, there was no charge or intimation that [plaintiffs] were in any way connected with the fraud perpetrated by Lillian A. Ryan . . . . It cannot reasonably have been inferred that [plaintiff] husband was derelict in his duty to provide for his family." *Id.* at 25-26. The court went on to hold that the publication complained of did not constitute libel per se. *Id.*

The cases relied upon by the Supreme Court disfavored the use of innuendo and implication to impute defamatory meaning to a given statement that otherwise, standing alone, is not susceptible to a defamatory meaning. A review of the case law shows that "[t]he word 'innuendo' has been a source of great confusion in the law of defamation. Frequently, it has been improperly used as the meaning of the inferences which may be properly drawn from the words complained of." *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 182 A.2d 751, 754 (Pa. 1962). "The purpose of an innuendo . . ., is to define the defamatory meaning which the plaintiff attaches to the words; to show how they come to have that meaning and how they relate to the plaintiff: [b]ut it cannot be used to introduce new matter, or to enlarge the natural meaning of the words, and thereby give to the language a construction which it will not bear." *Id*. As explained in *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 499 n.7 (3rd Cir. 1978):

> The term 'innuendo' has two possible meanings in the law of defamation, one of which is technical and the other of which is not. The narrow, technical meaning of the term is associated with the common law system of pleading, under which an 'innuendo' was an explanation of the defamatory meaning of a communication in light of extrinsic circumstances, the existence of which was averred to in a prefatory statement called an 'inducement' . . . . The second . . . meaning of 'innuendo' is that which it has in common language, namely, the insinuation or implication which arises from the literal language used in a statement or set of comments.

(Citations omitted). Today, though many courts have chosen to use the words "innuendo" and "implication" interchangeably, it appears that *Camacho* and *Ryan* did not. In *Ryan* the court stated, and the *Camacho* court cited, "[t]he language used may not be extended by the innuendo or conclusions of the pleader; the defamatory character must be certain and apparent from the words themselves."

Camacho, 1 CR at 286-87. Therefore, the interpretation of the alleged defamatory language "can not, by innuendo, be extended beyond its ordinary and common acceptation," nor can the innuendo "extend the meaning of words used, or make that certain which is in fact uncertain." *Carwile v. Richmond Newspapers, Inc.*, 82 S.E.2d 588, 592 (Va. 1954). Thus, in the case at hand, it is not necessary that the statements complained of expressly and specifically state that Plaintiff bribed a public official. Rather, "the language used must, as a matter of law, be reasonably capable of a defamatory interpretation." *Woodrnont Corp. v. Rockwood Ctr. P'ship*, 811 F. Supp.1478, 1481 (D. Kan. 1993); *see also Tavoulareas v. Washinton Post Co.*, 817 F.2d 762, 780 (D.C. Cir. 1987) (stating that defamation by implication stems not from what is literally stated, but from what is implied). "Courts must be vigilant not to allow an implied defamatory meaning to be manufactured from words not reasonably capable of sustaining such meaning." *See White v. Fraternal Order of Police*, 909 F.2d 512, 519 (D.C. Cir. 1990).

> The usual test applied to determine the meaning of a defamatory utterance is whether it was reasonably understood by the recipient of the communication *to have been intended* in the defamatory sense . . . . When one uses language, one is held to the construction placed on it by those who hear or read, *if that construction is a reasonable one.*

Id.

In the case at hand, the mere fact that Plaintiff may have made a sizeable contribution to Fitial is not susceptible to a defamatory meaning. Upon reading the publication in its entirety, however, one might conclude, from the words themselves, that Plaintiff made a contribution to Fitial as a bribe to exact favors and beneficial legislation. The Court cannot say at this point that the statements are not reasonably capable of a defamatory meaning. Thus, Defendants are not entitled to judgment on the pleadings as a matter of law.[3]

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[3] The Court notes that at the hearing, the parties raised the issue of whether Plaintiff is a public figure. "If the party defamed is either a public official or public figure, the plaintiff must prove actual malice to recover on a defamation claim." *Gilbert v. WNIR 100 FM*, 756 N.E.2d 1263, 1270 (Ohio Ct. App. 2001). Whether a plaintiff is a public official or a public figure, is a question of law for the trial judge. *Id*. Plaintiff has alleged malice on the part of Defendant in the Complaint. The Court, however, finds that it is not prudent to address this issue at this stage, as there has not been discovery or evidence presented to prove or disprove the allegation.

Defendants next assert that Plaintiff fails to plead special damages and thus does not state a claim upon which relief can be granted. Under the common law, libel is divided into libel per se and libel per quod. A statement is libelous per se when the words complained of are "defamatory in themselves and [] intrinsically, by their very use, without innuendo and the aid of extrinsic proof, import injury and damage to the person concerning whom they were written." *Karrigan v. Valentine*, 339 P.2d 52, 55 (Kan. 1959). A writing is libelous per se, and is actionable without proof of special damages, if it contains a false statement imputing to the plaintiff, among other things, criminal conduct. *See Moore v. Univ. of Notre Dame*, 968 F. Supp. 1330, 1334 (N.D. Ind. 1997); *Heerey v. Berke*, 544 N.E.2d 1037, 1040 (Ill. App. Ct. 1989).

On the other hand, a statement is libelous per quod "if: (1) the defamatory character of the statement is not apparent on its face, and extrinsic facts are required to explain its defamatory meaning; or (2) the defamatory character of the statement is apparent on its face, but the statement does not fit within any of the recognized defamation per se categories." *Darovec Marketing Group, Inc. v. Bio-Genics, Inc.*, 42 F. Supp. 2d 810, 817 (N.D. Ill. 1999); *Agriss v. Roadway Exp., Inc.*, 483 A.2d 456, 470 (Pa. Super. Ct. 1984) (a showing of facts and circumstances imparting a defamatory meaning to otherwise innocent or neutral words is required). To state a defamation per quod claim, plaintiffs must adequately plead and prove special damages. *Darovec*, 42 F. Supp. 2d at 817.

As discussed above, the Supreme Court disfavored the use of extrinsic facts to explain the defamatory meaning of a statement not apparently defamatory. Regardless, in the case at hand, the Court finds the publication to be libelous per se. Not only is the defamatory meaning apparent on the face of the statements, the statements impute criminal conduct on the part of Plaintiff. Thus, viewing the allegations in the light most favorable to Plaintiff, Defendant's motion to dismiss for failure to state a claim upon which relief can be granted is denied.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion for Judgment on the Pleadings or Alternatively for Dismissal is DENIED.

SO ORDERED this 10th day of May 2002.

/s/ Edward Manibusan
EDWARD MANIBUSAN, Presiding Judge