

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SARAH PALIN, an individual,

Plaintiff,

– against –

THE NEW YORK TIMES COMPANY,
a New York corporation,

Defendant.

No. 17 Civ. 4853

Hon. Jed S. Rakoff

ECF Case

**PLAINTIFF'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL MEMORANDUM
IN FURTHER SUPPORT OF ITS MOTION TO DISMISS COMPLAINT**

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The Times cites a series of cases for the proposition that knowledge of “probable falsity” cannot exist “if the author did not intend the alleged defamatory meaning and was not aware it would be conveyed by his statement at the time of publication.”¹ However, the cases cited by *The Times* in support of this proposition involve claims based on defamation by implication – not claims like Mrs. Palin’s which are based on statements that are “expressly false.”²

The Times never argued (even in its Supplement) that Mrs. Palin did not allege “ordinary defamation,”³ nor that this is a defamation by implication case.⁴ Thus, *The Times* waived any defamation by implication arguments at the dismissal stage. If such arguments had been raised, Mrs. Palin would have been able to address them and to have sought leave to amend accordingly.⁵

Although actual malice must be proven in both types of cases, the “actual malice standard [has] different elements of proof in ordinary defamation cases than in defamation-by-implication cases.”⁶ Contrary to *The Times*’ argument, ***in ordinary defamation cases an intent to defame is inherently established by the defamatory statement itself;***⁷ whereas implication cases involve an additional “communicative intent” element that is established by demonstrating that “the defendants either intended the defamatory meaning or knew of the defamatory meaning and were

¹ See Supplemental Memorandum [Doc. 42] pp. 6-7 and N.5.

² See *Biro v. Condé Nast*, 883 F.Supp.2d 441, 463-68 (S.D.N.Y. 2012).

³ Ordinary defamation involves statements in which the alleged defamatory statement has *only* a defamatory meaning. *Kendall v. Daily News Publ’g Co.*, 716 F.3d 82 (3d Cir. 2013).

⁴ Defamation by implication under New York law “is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements.” *Stepanov v. Dow Jones & Co., Inc.*, 987 N.Y.S.2d 37, 43 (2014); *Starace v. Chicago Tribune Co.*, 1990 WL 71504, *3 (S.D.N.Y. May 24, 1990).

⁵ If the Court agrees that statements at issue are defamation by implication and not “expressly false,” Mrs. Palin respectfully requests that she be permitted to seek leave to amend to allege the elements of defamation by implication and the supporting context and elements in detail.

⁶ *Kendall*, 716 F.3d at 90.

⁷ *Kendall*, 716 F.3d at 90 (HN[6]).

reckless in regard to it.”⁸ If necessary and permitted, Mrs. Palin can plausibly allege this element too.

The aforementioned cases cited by *The Times* all survived dismissal and were decided on summary judgment⁹ or at trial.¹⁰ The one case that was not, *Manzari*, involved the reversal of an order granting an anti-SLAPP motion under California law (even under a heightened “high probability” standard) because the facts demonstrated that “willful blindness cannot immunize publishers where they act with reckless disregard for the truth or falsity of the implications they are making.”¹¹ That same willful blindness (evidence of awareness of falsity and the implication)¹² is present here. Among other evidence cited in Mrs. Palin’s Memorandum, Mr. Bennet knew the meaning of the word “incitement” and chose to assert a “clear [and] direct link”¹³ between Mrs. Palin and the Loughner shooting, bolstered by the false charge that the Palin Map put stylized cross-hairs on Mrs. Giffords; and all while ignoring readily available facts that refuted these assertions (or implications).¹⁴ *DiLorenzo v. New York News, Inc.* found sufficient evidence of actual malice under very similar circumstances.¹⁵

⁸ *Id.* at 92-93.

⁹ *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309 (7th Cir. 1988); *Compuware Corp. v. Moody's Inv'rs Servs., Inc.*, 499 F.3d 520 (6th Cir. 2007); *Corporate Training Unlimited, Inc. v. NBC*, 981 F. Supp. 112 (E.D.N.Y. 1997); *Masson v. New Yorker Magazine, Inc.*, 832 F. Supp. 1350 (N.D. Cal. 1993), *aff'd*, 85 F.3d 1394 (9th Cir. 1996).

¹⁰ *Kendall v. Daily News Publ'g Co.*, 716 F.3d 82 (3d Cir. 2013); *Howard v. Antilla*, 294 F.3d 244, 252 (1st Cir. 2002).

¹¹ *Manzari v. Assoc. Newspapers Ltd.*, 830 F.3d 881, 889 & 892-93 (9th Cir. 2016) (“If all a publisher needed to do was to deny the allegation, all implied defamation suits would be dead on arrival.”)

¹² *Corp. Training Unlimited*, 981 F. Supp. at 121.

¹³ Mr. Bennet knew the defamatory connotation of the word “link” as it relates to these specific charges. Palin Memorandum [Doc. 40] at N. 23.

¹⁴ Palin Memorandum [Doc. 40] pp. 4-6, 9-10.

¹⁵ 81 A.D.2d 844 (2nd Dept. 1980) analyzes the seriousness of accusations, prior knowledge of facts, case with which facts could be checked, presence of hostility, and impact of insufficient recall)(cited in *Zeevi v. Un. Bk. of Switzerland*, 1993 WL 148871, *10 (S.D.N.Y. Apr. 30, 1993).

Dated: August 22, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum of Law was filed electronically on the 22nd day of August 2017. This Memorandum of Law will be sent by operation of the Court's electronic filing system to counsel of record for all parties as indicated on the electronic filing receipt. Parties and their counsel may access this filing through the Court's system.

/s/ Shane B. Vogt

Attorney