UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUAN CARLOS NORIEGA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:12-CV-2006 (ESH)
	)	
THE HUFFINGTONPOST.COM, INC.,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION TO DISMISS

Defendant The HuffingtonPost.com, Inc. hereby moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint filed in this matter. For the reasons set forth in the accompanying Memorandum in Support of Defendant's Motion to Dismiss, the Court should dismiss the complaint for failure to state a claim upon which relief can be granted.

REQUEST FOR HEARING

Pursuant to Local Rule 7(f), Defendant respectfully requests that the Court hold a hearing on this motion to dismiss.

Respectfully submitted,

Dated: January 30, 2013

By: /s/ Katherine A. Fallow

Katherine A. Fallow (DC Bar No. 462002)
Michael B. DeSanctis (DC Bar No. 460961)
Maya D. Song (DC Bar No. 989379)

JENNER & BLOCK LLP
1099 New York Ave., N.W., Suite 900
Washington, DC 20001
Phone: 202-639-6000
Fax: 202-639-6066
kfallow@jenner.com
mdesanctis@jenner.com
msong@jenner.com

Counsel for Defendant The Huffington Post

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

JENNER & BLOCK LLP
Katherine A. Fallow (DC Bar No. 462002)
Michael B. DeSanctis (DC Bar No. 460961)
Maya D. Song (DC Bar No. 989379)

1099 New York Ave., N.W., Suite 900
Washington, DC 20001
Phone: 202-639-6000
Fax: 202-639-6066
kfallow@jenner.com
mdesanctis@jenner.com
msong@jenner.com

Counsel for Defendant The Huffington Post

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INTRODUCTION

Plaintiff Juan Carlos Noriega's lawsuit should be dismissed because it seeks to hold Defendant TheHuffingtonPost.com ("The Huffington Post") liable for content posted on its website by an unnamed third party, which Congress has explicitly prohibited in § 230 of the Communications Decency Act, 47 U.S.C. § 230 (2012), and because the blog post at issue is not reasonably capable of defamatory meaning on its face. The blog post, titled "The Primacy of the Rule of Law" (the "Blog Post"), was submitted by a third party to The Huffington Post and published on its website on August 2, 2012. Compl. ¶¶ 8, 30. The Blog Post discusses Pakistan's prosecution of Dr. Shakeel Afridi, a Pakistani doctor who was reported to have run a sham vaccination program for the C.I.A. as part of its effort to locate Osama Bin Laden. *Id.* ¶ 20. Noriega, a lawyer in Panama, is listed as the author of the Blog Post but claims he did not write it. *Id.* ¶ 15. Based solely on this alleged misattribution of authorship, Noriega sued The Huffington Post for defamation *per se* and false light invasion of privacy.

The Complaint fails to state a claim for relief for two fundamental reasons. First, Noriega's claims are barred as a matter of law by § 230. Section 230 immunizes interactive computer service providers like The Huffington Post from tort claims that are based on website content provided by others. *See Parisi v. Sinclair*, 774 F. Supp. 2d 310, 315 (D.D.C. 2011). The Complaint confirms that The Huffington Post is an interactive computer service provider and that the Blog Post was provided by a third person. Although the Complaint vaguely asserts that The Huffington Post approved and published the Blog Post, it is well-established that these kinds of activities do not strip an interactive computer service provider of § 230 immunity.

Second, even if § 230 did not independently bar Noriega's Complaint, his claims for defamation *per se* and false light invasion of privacy fail because the Blog Post on its face is not capable of a defamatory or "highly offensive" meaning. Noriega claims that the opinions

expressed in the Blog Post are so objectionable that his mere association with them defames him. But the Blog Post is not reasonably capable of conveying any defamatory or "highly offensive" meaning, let alone the hyperbolic meaning that Noriega ascribes. Far from expressing odious "anti-U.S." beliefs, the Blog Post encourages the "primacy of the rule of law" in the international reaction to Afridi's arrest and conviction – hardly an infamous or ridiculous opinion to the reasonable reader (especially when attributed to a lawyer).

BACKGROUND

The Complaint alleges the following facts. The Huffington Post operates the website "www.huffingtonpost.com," which features news, links to external news sources, and various news-related blogs. Compl. ¶¶ 4-5.[1] Users of the website may publish content on the site, including comments and blog posts, after creating an account. *Id.* ¶¶ 6-7.

On August 2, 2012, the Blog Post, titled "The Primacy of the Rule of Law," was published on The Huffington Post website. *Id.* ¶ 8. Noriega, a founding partner of a law firm in Panama, was listed as the author. *Id.* ¶¶ 1, 8-9. His photograph and biography were linked to the post. *Id.* ¶¶ 9, 14. Noriega claims that he neither wrote the Blog Post nor submitted it to The Huffington Post. *Id.* ¶¶ 15-16. He alleges that an unidentified third person "wrote and submitted the article to be published" in Noriega's name. *Id.* ¶¶ 30, 38; *see also id.* at 13 ("Prayer for Relief" ¶ 2) (requesting an order "mandating Defendant to conduct an investigation into who created an account in Plaintiff's name and how Defendant allowed it to occur").

The Blog Post discusses international reaction to the arrest, conviction, and sentencing of Afridi, who ran a "sham" vaccination program in Pakistan for the C.I.A. as part of its effort to

[1] The Complaint contains two sets of ¶¶ 1-4. *See* Compl. at 1-2 (¶¶ 1-4, "Jurisdiction and Venue"); *id.* at 2-3 (¶¶ 1-4, "The Parties"). All cites herein to ¶¶ 1-4 of the Complaint refer to the paragraphs in "The Parties" section.

locate Osama bin Laden, and opines that this reaction should be guided by rule of law principles. *Id*. ¶ 20 & Ex. A. The Blog Post notes that after Afridi's cooperation with the C.I.A. was revealed in Pakistan, the Taliban threatened to kill doctors who offer vaccinations, and Pakistani parents became skeptical of vaccinations and began refusing to immunize their children. *Id.* ¶ 20(c); *see also id.* ¶ 20(h). The Blog Post also notes that Afridi was not convicted for his participation in the vaccination scheme, but on the basis of "his links to . . . the leader of a militant organization" that has "consistently launched attacks against the government of Pakistan." *Id.* ¶ 20(d). Citing this fact, the Blog Post states that, "[a]lthough understandable in the emotional framework of Osama bin Laden, the outrage across the United States over" Afridi's arrest "is inconsistent with every nation's basic commitment to the rule of law." *Id.* ¶ 20(a); *see also id.* ¶¶ 20(e), (f). The Blog Post further states that "U.S. efforts to coerce Pakistan into releasing Afridi not only undermine the sovereignty of Pakistan, but endanger the credibility of its democratic principles." *Id.* ¶ 20(e); *see also id.* ¶ 20(b).

LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual assertions, accepted as true, to state a claim for relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible where the complaint "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Yet "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 570); *see Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012).

Although a complaint need not state detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Furthermore, the court "need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint." *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). In resolving a Rule 12(b)(6) motion, a court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits or incorporated by reference, and matters about which the court may take judicial notice. *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007). A court "may take judicial notice of historical, political, or statistical facts, or any other facts that are verifiable with certainty." *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 35 (D.D.C. 2012).

Because § 230 of the Communications Decency Act is a complete bar to recovery, courts routinely dismiss complaints where § 230 applies. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 260 (4th Cir. 2009) (dismissing complaint because it failed to plead facts adequate to defeat defendant's § 230 immunity); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422, 427 (1st Cir. 2007) (same); *Klayman v. Zuckerberg*, No. 11-CV-874, -- F. Supp. 2d --, 2012 WL 6725588, at *6-7 (D.D.C. Dec. 28, 2012) (same); *Parisi*, 774 F. Supp. 2d at 316 (same).[2] Courts are "to resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles.'" *Nemet*,

[2] *See also, e.g., Inman v. Technicolor USA, Inc.*, No. Civ. A. 11-666, 2011 WL 5829024, at *7-8 (W.D. Pa. Nov. 18, 2011); *Black v. Google, Inc.*, No. 10-02381, 2010 WL 3222147, at *3-4 (N.D. Cal. Aug. 13, 2010), *aff'd*, 457 F. App'x 622 (9th Cir. 2011); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1201-02 (N.D. Cal. 2009); *DiMeo v. Max*, 433 F. Supp. 2d 523, 531, 532-33 (E.D. Pa. 2006), *aff'd*, 248 F. App'x 280 (3d Cir. 2007).

591 F.3d at 255 (quoting *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc)).

ARGUMENT

The Complaint should be dismissed because (1) The Huffington Post has immunity from Noriega's claims under § 230; and (2) even if § 230 did not apply, Noriega's claims fail as a matter of law because attributing authorship of the Blog Post to Noriega cannot amount to defamation *per se* or a false light invasion of privacy.

I. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT BARS NORIEGA'S CLAIMS.

The Huffington Post is protected by § 230 immunity against any alleged tort liability arising from the content of the Blog Post. Section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *see* 47 U.S.C. § 230(c)(1) ("No provider . . . of an interactive computer service shall be treated as the publisher . . . of any information provided by another information content provider."); *id.* § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). In enacting § 230, Congress made the decision to treat Internet publishers "differently from corresponding publishers in print, television and radio." *Parisi*, 774 F. Supp. 2d at 315 (quotation marks omitted); *see Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998). Finding that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 U.S.C. § 230(a)(3), Congress sought "to encourage the unfettered and unregulated development of free speech on the Internet." *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003). Congress therefore "granted

most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party." *Carafano v. Metrosplash.com, Inc.* 339 F.3d 1119, 1122 (9th Cir. 2003).

Courts have interpreted § 230 broadly, holding that "an 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue." *Carafano*, 339 F.3d at 1123; *accord Nemet*, 591 F.3d at 254-55; *Lycos*, 478 F.3d at 418-19; *Parisi*, 774 F. Supp. 2d at 316. To resolve whether a defendant is immune under § 230, a court "must determine whether: (1) the defendant is a provider of an interactive computer service; (2) the statements at issue were created by an information content provider; and (3) the plaintiffs seek to hold the defendant liable as 'a publisher or speaker of third party content.'" *Parisi*, 774 F. Supp. 2d at 315-16; *see Lycos*, 478 F.3d at 418. Each of these requirements is met here.

A. The Huffington Post Is an "Interactive Computer Service Provider" Immune to Suit Under § 230.

The Complaint confirms that The Huffington Post is an interactive computer service provider for purposes of § 230. *See* Compl. ¶¶ 6-7 (describing how The Huffington Post enables multiple users to interact with the website via, *e.g.*, posting comments or blog posts). Section 230 defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). Website operators like The Huffington Post "are providers of interactive computer services within the meaning of section 230" because a website "enables computer access by multiple users to a computer server." *Lycos*, 478 F.3d at 419 (internal quotation marks omitted); *accord Zuckerberg*, 2012 WL 6725588, at *3 ("Courts generally

conclude that a website falls within the definition of an interactive computer service." (citation and internal quotation marks omitted)).

The Complaint also makes clear that the Blog Post originated with and was created by an unidentified third party or parties, who then submitted the Blog Post to The Huffington Post in Noriega's name. *See* Compl. ¶¶ 30, 38 (claiming third party "wrote and submitted the [Blog Post] to be published"); *id.* at 13 ("Prayer for Relief" ¶ 2) (requesting an order "mandating Defendant to conduct an investigation into who created an account in Plaintiff's name and how Defendant allowed it to occur"). Under § 230, that third party is the "information content provider" for the Blog Post. *See* 47 U.S.C. § 230(f)(3) ("information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service"). Because Noriega seeks to hold The Huffington Post liable for content provided by a third party, § 230 bars his Complaint.

B. The Huffington Post's Alleged Exercise of Editorial Functions Does Not Remove § 230 Immunity.

While an interactive computer service provider may also be an information content provider – and thereby lose § 230 immunity – as to content that it is "responsible, in whole or in part, for . . . creat[ing] or develop[ing]," 47 U.S.C. § 230(f)(3), this requires "something more substantial than merely editing . . . and selecting material for publication." *Batzel*, 333 F.3d at 1031; *see Lycos*, 478 F.3d at 419. Indeed, § 230 "precludes liability [where defendants] exercise[e] the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message." *Batzel*, 333 F.3d at 1031; *see id.* at 1032; *Drudge*, 992 F. Supp. at 50.

None of the Complaint's allegations support an inference that The Huffington Post is an "information content provider" for purposes of the Blog Post. The various allegations in the

Complaint that The Huffington Post "contributed to the editing and publishing of the article," Compl. ¶¶ 27, 34, do not overcome § 230 immunity. "[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred." *Parisi*, 774 F. Supp. 2d at 315 (quoting *Drudge*, 992 F. Supp. at 50); *see Batzel*, 333 F.3d at 1031; *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). The Complaint's allegations that The Huffington Post "allow[ed], approv[ed], and assist[ed] with the publishing of the article," Compl. ¶ 21; *see also id.* ¶¶ 8, 23, 30, 38, are therefore insufficient to subject The Huffington Post to liability for the Blog Post.

Furthermore, neither The Huffington Post's alleged display of certain keywords with the Blog Post, *id.* ¶¶ 10, 11, nor its alleged actions to promote the Blog Post, *id.* ¶¶ 12-14, remove its § 230 immunity. As "neutral tools for navigating" the website, the keywords accompanying the Blog Post are fully protected under § 230. *See Carafano*, 339 F.3d at 1125; *GW Equity LLC v. Xcentric Ventures LLC*, No. Civ. A. 07-CV-976-0, 2009 WL 62173, at *5 (N.D. Tex. Jan. 9, 2009); *Goddard*, 640 F. Supp. 2d at 1198 (describing Google's Keyword Tool as a "neutral tool" that "does nothing more than provide options that advertisers may adopt or reject at their discretion"). An interactive computer service provider does not lose § 230 immunity when it decides how to categorize or present third party content, or adds extraneous content that does not materially contribute to the allegedly unlawful content. *See Lycos*, 478 F.3d at 415-16, 420 (holding that Lycos was protected by § 230 even where it linked information posted on its website to related websites); *GW Equity*, 2009 WL 62173, at *5 (finding website's addition of geographical information to allegedly disparaging titles of the reports at issue, as well as its provision of neutral and negative categories for user postings, insufficient to trigger the loss of

§ 230 immunity).[3] Nor does a service provider lose § 230 immunity by taking steps to make third-party content available to more users: § 230 "provid[es] immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others." *Drudge*, 992 F. Supp. at 52; *cf. Asia Economic Institute v. Xcentric Ventures LLC*, No. Civ. 10-01360, 2011 WL 2469822, at *6 (C.D. Cal. May 4, 2011) ("Plaintiffs fail to cite any authority that increasing the prominence of a page in internet searches amounts to 'creation or development of information' that would render Defendants 'information content providers' under the CDA.").

In sum, The Huffington Post's decision to allow publication of certain third-party content amounts to no more than the "exercise of a publisher's traditional editorial functions." *Parisi*, 774 F. Supp. 2d at 315 (quoting *Drudge*, 992 F. Supp. at 50). Courts have routinely held that similar actions do not deprive websites of § 230 immunity, including: the registration of users seeking to post content on its website, *see Lycos*, 478 F.3d at 416, 420; the review and approval of content submitted for publication, *see Batzel*, 333 F.3d at 1031; and the editing and publication of that content, *see* 47 U.S.C. § 230(c)(1), (e)(3); *Zeran*, 129 F.3d at 330; *Drudge*, 992 F. Supp. at 51-52. These functions "facilitate the speech of others on the Internet," and thus fall within the core of § 230 immunity. *Lycos*, 478 F.3d at 415; *see Drudge*, 992 F. Supp. at 50.

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[3] *See also Nemet*, 591 F.3d at 257-58 (holding that consumer review website was protected by § 230 even where defendant structured and designed its website to develop information for class-action lawsuits, and contacted users to inquire about their complaints); *Mitan v. A. Neumann & Assocs., LLC*, No. Civ. 08-6154, 2010 WL 4782771, at *5 (D.N.J. Nov. 17, 2010) (finding defendant entitled to § 230 immunity for allegedly defamatory e-mail he forwarded along with a message unrelated to plaintiff); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, No. 07-956, 2007 WL 2949002, at *3 (D. Ariz. Oct. 10, 2007); *Drudge*, 992 F. Supp. at 51-52 (holding that America Online, Inc. ("AOL") was protected by § 230 even though "AOL ha[d] certain editorial rights with respect to the content . . . disseminated by AOL, including the right to require changes in content and to remove it; and it ha[d] affirmatively promoted [the content provider] as a new source of unverified instant gossip on AOL").

To the extent Noriega seeks to argue that websites *should* be responsible for third-party content based on playing the role of a traditional publisher, Congress expressly decided otherwise in enacting § 230. *See Carafano*, 339 F.3d at 1122, *quoted in Parisi*, 774 F. Supp. 2d at 315 (observing that, in enacting § 230, Congress decided to treat Internet publishers "differently from corresponding publishers in print, television and radio"); *Batzel*, 333 F.3d at 1026-27 (same).

Noriega's defamation and false light invasion of privacy claims necessarily seek to hold The Huffington Post liable as "a publisher" of the Blog Post. *See Barnes*, 570 F.3d at 1101-02 (noting that false light actions are premised on the publication of information and thus within the scope of § 230); *Zeran*, 129 F.3d at 331-32 (explaining that publication of a statement is a necessary element in defamation actions). Where § 230 applies, "[n]o provider . . . of an interactive computer service shall be treated as the publisher . . . of any information provided by another information content provider." 47 U.S.C . § 230(c)(1). The Complaint must therefore be dismissed. *See Nemet*, 591 F.3d at 255; *Lycos*, 478 F.3d at 422, 427; *Parisi*, 774 F. Supp. 2d at 316, 322.

II. NORIEGA FAILS TO STATE A CLAIM FOR DEFAMATION *PER SE* OR FALSE LIGHT INVASION OF PRIVACY.

Even assuming for the sake of argument that Noriega's claims are not barred by § 230, the Complaint should be dismissed because it fails to "state a claim for relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). Noriega cannot prevail on his defamation *per se* claim because attributing authorship of the Blog Post to Noriega does not impute to him the commission of a criminal offense – as required for a libel *per se* claim in the District of Columbia – nor is the Blog Post reasonably capable of defamatory meaning on its face. For the same reason, the Blog Post is not capable of being so "highly offensive" to a reasonable person on its face as to be actionable as a false light invasion of privacy.

Whether the alleged misattribution of authorship is reasonably capable of "defamatory" or "highly offensive" meanings are questions of law for the Court to consider in the first instance. At the dismissal stage for a defamation claim, the court "must determine as a threshold matter whether a challenged statement is capable of a defamatory meaning." *Moldea v. N.Y. Times Co.* ("*Moldea II*"), 22 F.3d 310, 316-17 (D.C. Cir. 1994); *see Klayman v. Segal*, 783 A.2d 607, 612-13 (D.C. 2001). Similarly, when presented with a claim for false light invasion of privacy, "the question the court must resolve is whether a fact-finder could rationally conclude that the aspersion to [plaintiff] is highly offensive." *Lane v. Random House, Inc.*, 985 F. Supp. 141, 148 (D.D.C. 1995); *see also* 1 Robert D. Sack, *Sack on Defamation* § 12:3.4, at 12-28 (4th ed. 2012) (for false light claims, "it is for the court first to determine whether the criticized matter is capable of the meaning assigned to it by the plaintiff, and whether that meaning is highly offensive to a reasonable person" (internal quotation marks omitted)).

Courts in the District of Columbia do not hesitate to dismiss defamation and false light invasion of privacy claims where the contested statements are not reasonably capable of defamatory meaning or a "highly offensive" meaning on their face. *See, e.g.*, *Klayman*, 783 A.2d at 609 (affirming dismissal of defamation and false light claims where contested statement was not "as a matter of law . . . reasonably capable of defamatory meaning" nor "place[d] [plaintiff] in a highly offensive light"); *Clawson v. St. Louis Post-Dispatch, LLC*, 906 A.2d 308, 310 (D.C. 2006) (affirming dismissal of defamation claim where contested statement was not "reasonably capable of a defamatory meaning"); *Lane*, 985 F. Supp. at 149 (dismissing plaintiff's false light allegations because the contested statement "does not objectively cross the 'highly offensive' threshold"). Although defamation and false light claims have distinct elements, the "two torts are so similar," *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 628 (D.C.

Cir. 2001), that when a court dismisses a defamation claim, it frequently dismisses any related false light claim on the same ground. *See, e.g., Klayman*, 783 A.2d at 619 ("[S]imilar to our conclusion that the challenged statement did not make [plaintiff] appear to be 'odious, infamous or ridiculous' [under defamation], and for the same reasons, we are constrained to agree with the trial court that the statement did not place [plaintiff] in a 'highly offensive' false light."). Likewise, although a plaintiff in the District of Columbia may plead both torts, he "may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion." *Id.* (internal quotation marks omitted).

A. Attributing the Blog Post to Noriega Does Not Impute the Commission of a Criminal Offense and Is Therefore Not Libelous "*Per Se*."

Noriega styles his libel claim as one for defamation "*per se*." Compl. ¶ 31. In the District of Columbia, "[t]here are distinct differences between an action in libel and an action in libel *per se*." *Raboya v. Shrybman & Assocs.*, 777 F. Supp. 58, 60 (D.D.C. 1991). "[T]o be actionable as libel *per se*, the contents of a defamatory publication must 'impute . . . the commission of some criminal offense for which [the Plaintiff] may be indicted and punished, if the charge involves moral turpitude and is such as will injuriously affect [the Plaintiff's] social standing,' or, . . . the question is whether, from the language attributed to defendant, there is something from which commission of a crime can be inferred."[4] *Id.* at 59 (quoting *Farnum v. Colbert*, 293 A.2d 279, 281 (D.C. 1972)). Thus, while "[a] defamatory publication need only be injurious to the reputation of another to constitute libel . . . libel *per se* requires an actual imputation of a criminal offense." *Id.* at 60 (citing *Smith v. District of Columbia*, 399 A.2d 213

[4] *Cf. Franklin v. Pepco Holdings, Inc.*, 875 F. Supp. 2d 66, 75 (D.D.C. 2012) ("A statement is defamatory as a matter of law ('defamatory per se') if it is so likely to cause degrading injury to the subject's reputation that proof of that harm is not required to recover compensation.").

(D.C. 1979)); *see also Bannum, Inc. v. Citizens for a Safe Ward Five, Inc*., 383 F. Supp. 2d 32, 41 (D.D.C. 2005) ("Libel *per se* requires the actual imputation of a criminal offense.").

Because "the law draws distinctions between libel and libel *per se* actions . . . the Court should not liberally permit a Plaintiff to assert a libel *per se* claim." *Raboya*, 777 F. Supp. at 60 (dismissing libel *per se* claim). Although Noriega styles his defamation claim as a *per se* tort, he does not allege – let alone attempt to show – that the attribution of the Blog Post to him imputes the commission of a criminal offense. Noriega cannot make this showing under any reasonable reading of the Blog Post. Noriega's defamation *per se* claim should therefore be dismissed.

B. The Blog Post Is Not Reasonably Capable of Defamatory Meaning on Its Face.

To the extent that Noriega alleges a defamation *per se* claim outside the traditional common law category of imputing the commission of a criminal offense, his Complaint still fails to state a claim because he cannot satisfy the required element that (incorrectly) listing him as the author of the Blog Post is reasonably capable of defamatory meaning. Even accepting Noriega's allegation that he was not the author, the Blog Post on its face is not reasonably capable of defaming Noriega.

To be defamatory, a "remark must be more than unpleasant or offensive; the language must make the plaintiff[] appear 'odious, infamous, or ridiculous.'" *Klayman*, 783 A.2d at 613 (quoting *Howard Univ. v. Best*, 484 A.2d 958, 989 (D.C. 1984)). In this context, "odious" means "arousing or deserving hatred or loathing"; "infamous" means "notorious or in disgrace or dishonor"; and "ridiculous" means "deserving ridicule," which is "the act of making someone or something the object of scornful laughter by joking, mocking, etc." *Id.* at 618 (quoting Webster's New World Dictionary 720, 986, 1224 (2d coll. ed. 1982)). "[F]acially innocuous statements" that "do not, on their face, suggest anything untoward about [plaintiff]" are not

defamatory. *Weyrich*, 235 F.3d at 627. When determining whether a statement is capable of defamatory meaning, the challenged statements "must be considered as a whole, in the sense in which it would be understood by the readers to whom it was addressed." *Klayman*, 783 A.2d at 614 (internal quotation marks omitted).

The contested statements in the Blog Post are not reasonably capable of conveying a defamatory meaning on their face. Noriega contends that the Blog Post attributes to him views that are "anti-U.S. government and anti-CIA." Compl. ¶ 28. Not only are the contested statements incapable of bearing these particular meanings, but in no event do they make Noriega appear "odious, infamous, and ridiculous" as a matter of law.

To begin, nothing in the Blog Post states that Noriega has "anti-U.S. government and anti-CIA" views. Most of the statements in the Blog Post are not views or opinions attributable to the author, but instead report facts that are well documented about Afridi's conviction and the impact of his vaccination program on Pakistan's health care and legal system.[5] All of these facts, which are about Afridi, not Noriega, are verified in the press.[6]

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[5] *See, e.g.*, Compl. ¶ 20(c) (stating that polio cases are dramatically climbing in Pakistan; Pakistani parents are now more skeptical of vaccinations and are refusing to immunize their children; the Taliban have threatened to kill doctors who disburse vaccinations); *id.* ¶ 20(d) (stating that Afridi was convicted under Pakistan's tribal justice system for his links to a local warlord); *id.* ¶ 20(h) (stating that thousands of children in Pakistan no longer have access to vaccinations as a result of the C.I.A. scheme; Congress has threatened to cut-off assistance to Pakistan over Afridi).

[6] *See, e.g.*, Salman Masood, *Drone Strikes Continue in Pakistan as Tension Increases and Senate Panel Cuts Aid*, N.Y. Times, May 25, 2012, at A11, *available at* http://www.nytimes.com/2012/05/25/world/asia/pakistan-says-us-drone-strike-kills-suspected-militants.html; Declan Walsh & Ismail Khan, *New Details Emerge on Conviction of Pakistani Who Aided Bin Laden Search*, N.Y. Times, May 31, 2012 at A12, *available at* http://www.nytimes.com/2012/05/31/world/asia/new-details-on-conviction-of-shakil-afridi-pakistani-doctor-who-aided-cia-in-tracking-osama-bin-laden.html; Declan Walsh, *Taliban Block Vaccinations in Pakistan*, N.Y. Times, June 18, 2012, at A4, *available at* http://www.nytimes.com/2012/06/19/world/asia/taliban-block-vaccinations-in-pakistan.html; Donald G. McNeil, Jr., *C.I.A. Vaccine Ruse May Have Harmed the War on Polio*, N.Y. Times, July 10, 2012, at D1, *available at* http://www.nytimes.com

To the extent Noriega alleges that the article is impliedly defamatory, his claim fails because the contested statements cannot reasonably sustain on their face the allegedly defamatory meaning he imputes. "Defamation by implication . . . requires careful exegesis to ensure that imagined slights do not become the basis for costly litigation." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 596 (D.C. 2000). "Nothing in law or common sense supports saddling a libel defendant with civil liability for a defamatory implication nowhere to be found in the published article itself." *Id.* at 601. In his Complaint, Noriega contends that as a result of the Blog Post, "[a] false implication attached to him that he is not able to objectively analyze the laws in the United States, or elsewhere, without pushing a political agenda or without criticizing the policies of the United States." Compl. ¶ 31(d). But no reasonable reading of the Blog Post on its face would support Noriega's hyperbolic description or his claim that the Blog Post implies he is "anti-U.S. government and anti-CIA."

In this case, the plain and fair meaning of the statements in the Blog Post would lead the average reader to conclude that the focus of the article, as reflected in its title, is simply the "Primacy of the Rule of Law" – namely, that rule of law principles should trump emotion in the international response to Afridi's conviction and sentence. This opinion is reflected in the very first sentence of the Blog Post, which states: "the outrage across the United States" over Afridi's arrest – while "understandable in the emotional framework of Osama bin Laden" – is

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/2012/07/10/ health/cia-vaccine-ruse-in-pakistan-may-have-harmed-polio-fight.html; Declan Walsh, *Gunmen Attack U.N. Vehicle in Pakistan, Wounding Polio Doctor*, N.Y. Times, July 17, 2012, at A13, *available at* http://www.nytimes.com/2012/07/18/world/asia /gunmen-attack-un-polio-doctor-in-pakistan.html; Declan Walsh & Donald G. McNeil, Jr., *Gunmen in Pakistan Kill Women Who Were Giving Children Polio Vaccines*, N.Y. Times, Dec. 18, 2012, at A15, *available at* http://www.nytimes.com/2012/12/19/world/asia/attackers-in-pakistan-kill-anti-polio-workers.html; Declan Walsh & Donald G. McNeil, Jr., *Female Vaccination Workers, Essential in Pakistan, Become Prey*, N.Y. Times, Dec. 20, 2012, at A6, *available at* http://www.nytimes.com /2012/12/21/world/asia/un-halts-vaccine-work-in-pakistan-after-more-killings.html.

"inconsistent with every nation's basis commitment to the rule of law." Compl. ¶ 20(a).[7] The Blog Post continues with this theme, stating: "Emotion is an indefensible ground for the United States government or the U.S. Congress to demand that Pakistan release a man who may or may not be guilty of criminal activity in Pakistan before the legal process is complete." *Id.* ¶ 20(e). At most, the Blog Post opines that the United States should refrain from interfering in Afridi's legal proceedings out of respect for Pakistan's "sovereignty" and concern for "the credibility of [Pakistan's] democratic principles." *Id.* ¶ 20(e); *see also id.* ¶ 20(b). The court should reject Noriega's exaggerated characterization of the Blog Post, which is not supported by its actual content. *See Guilford*, 760 A.2d at 594 ("The court should not, however, indulge far-fetched interpretations of the challenged publication.").

Under any plain and fair reading, the Blog Post presents a thoughtful discussion on a serious issue of public interest on which reasonable people of good conscience could disagree. It simply cannot be that attribution of these views to a person is defamatory on its face. *Cf. Guilford*, 760 A.2d at 598 (observing that a defamatory statement must disparage the plaintiff's character and noting that calling a person a "Republican" "cannot be found in itself to be defamatory, since no reasonable person could consider that it reflects upon his character"). The serious beliefs discussed in the Blog Post are not the sort of views that "would invoke hatred or

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[7] That the United States government reacted with outrage over Afridi's arrest is beyond dispute. *See, e.g.*, Masood, *Drone Strikes Continue in Pakistan as Tension Increases and Senate Panel Cuts Aid*, N.Y. Times, May 25, 2012, at A11:

> In Washington, administration officials and members of Congress reacted with fury over [Afridi's] sentencing. The Senate, which had already slashed foreign aid to Pakistan, moved on Thursday to cut an additional $33 million in military assistance, $1 million for each year Dr. Afridi was sentenced. Senator John McCain of Arizona, ranking Republican on the Armed Services Committee, said, "All of us are outraged at the imprisonment and sentence of some 33 years, virtually a death sentence, to the doctor in Pakistan who was instrumental – not on purpose, but was instrumental and completely innocent of any wrongdoing" in the raid that killed Bin Laden.

loathing for [plaintiff], or that would hold him in disgrace or dishonor, or that would subject him to scornful laughter," as required for defamation. *Klayman*, 783 A.2d at 618.

Thus, even accepting Noriega's allegation that a third party falsely listed him as the Blog Post's author, misattributing the statements in the Blog Post is not reasonably capable of defamatory meaning under D.C. law. *See Klayman*, 783 A.2d at 618 (holding that article's attribution of statements to plaintiff, an international lawyer, though perhaps "unpleasant and offensive" to plaintiff personally, were not "reasonably capable of defamatory meaning" on their face).[8]

C. The Blog Post Is Not Capable of Being "Highly Offensive" Within the Meaning of the False Light Invasion of Privacy Doctrine.

Plaintiff's false light invasion of privacy claim likewise fails as a matter of law. In the District of Columbia, "[a]n invasion of privacy-false light claim requires a showing of: 1) publicity 2) about a false statement, representation or imputation 3) understood to be of and concerning the plaintiff, and 4) which places the plaintiff in a false light that would be [highly] offensive to a reasonable person." *Klayman*, 783 A.2d at 613-14 (quoting *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 859 (D.C. 1999) (alteration in original)). "It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense

[8] Noriega's defamation claim also fails because he has not alleged a sufficient link between the contested statements and reputational injury. He contends, for instance, that the Blog Post "caused injury to [his] professional reputation and credibility as an objective and serious international lawyer." Compl. ¶ 31. But under any fair reading, the Blog Post expresses views that are wholly consistent with the legal profession and might be expected from a lawyer – that legal principles should govern emotionally fraught cases. The attribution of these views to Noriega cannot reasonably be construed to imply a lack of professional integrity or "credibility."

may reasonably be expected to be taken by a reasonable man in [plaintiff's] position . . . ." *Lane*, 985 F. Supp. at 149 (quoting Restatement (Second) of Torts § 652E cmt. c).[9]

Here, for the same reasons that the contested statements in the Blog Post are not capable of defamatory meaning, they too fall short of placing Noriega in a "highly offensive" false light. *See, e.g.*, *Clawson*, 906 A.2d at 317 (holding that "since the underlying assumption" of plaintiff's defamation and false light claims were the same, "and we have determined, as a matter of law, that these words are not defamatory, the trial court did not err in dismissing all of the counts of [plaintiff's] complaint"); *see also Klayman*, 783 A.2d at 611-12 ("For the [same] reasons [that the challenged statement is not defamatory], the Court does not find that the challenged statement, in context, reasonably can support the plaintiff's false light claim." (second bracket added)); *Moldea II*, 22 F.3d at 319. The Blog Post can reasonably and fairly be read as articulating an approach to foreign policy and interaction with foreign justice systems that advocates for the "primacy of the rule of law" over emotion, particularly in the context of Afridi's arrest and conviction. The attribution of these statements to Noriega is "hardly the repugnant conduct necessary to sustain a false light claim." *Lane*, 985 F. Supp. 148 (holding that defendant's characterization of plaintiff as "guilty of misleading the American public" did not rise to the level of highly offensive conduct). Even if the topic discussed in the Blog Post could be construed as controversial, attributing authorship of the Blog Post to Noriega is not "highly offensive" to a reasonable person.

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[9] While the standards for defamation and false light are not identical, they are closely related, and the same defenses and privileges apply to both. *See Lane*, 985 F. Supp. at 148 ("Random House has colorable defenses against defamation. By law, these defenses are valid against false light as well."). For this reason, in the District of Columbia, plaintiffs may plead both torts in the alternative, but "may only recover on one of the two theories based on a single publication." *Moldea v. N.Y. Times Co.* ("*Moldea I*"), 15 F.3d 1137, 1151 (D.C. Cir.), *opinion modified by*, 22 F.3d 310 (D.C. Cir. 1994).

CONCLUSION

For the reasons stated above, the Court should dismiss Plaintiff's Complaint with prejudice.

Respectfully submitted,

Dated: January 30, 2013

By: /s/ Katherine A. Fallow

Katherine A. Fallow (DC Bar No. 462002)
Michael B. DeSanctis (DC Bar No. 460961)
Maya D. Song (DC Bar No. 989379)

JENNER & BLOCK LLP
1099 New York Ave., N.W., Suite 900
Washington, DC 20001
Phone: 202-639-6000
Fax: 202-639-6066
kfallow@jenner.com
mdesanctis@jenner.com
msong@jenner.com

Counsel for Defendant The Huffington Post

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Motion To Dismiss, and the accompanying Memorandum in Support of Defendant's Motion to Dismiss and Proposed Order, were served via operation of the Court's CM/ECF system on January 30, 2013, upon:

Benjamin G. Chew
PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037
bchew@pattonboggs.com

Counsel for Plaintiff

/s/ Katherine A. Fallow