

No.

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In The

SUPREME COURT OF THE UNITED STATES

HOAI THANH PETITIONER

v.

HIEN THI NGO

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX

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FILED: October 11, 2017
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1110
(8:14-cv-00448-PJM)

HOAI THANH
Plaintiff - Appellant

v.

HIEN T. NGO
Defendant - Appellee

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Agee, Judge Keenan, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1110

HOAI THANH,
Plaintiff - Appellant,

v.

HIEN T. NGO,
Defendant - Appellee.

Appeal from the United States District Court for the
District of Maryland, at Greenbelt. Peter J. Messitte,
Senior District Judge. (8:14-cv-00448-PJM)

Submitted: July 27, 2017 Decided: August 4, 2017

Before AGEE, KEENAN, and HARRIS, Circuit
Judges.

Affirmed by unpublished per curiam opinion.

Laurence A. Elgin, Washington, D.C., for Appellant.

Joseph D. Gallagher, GILL SIPPEL &

GALLAGHER, Rockville, Maryland, for Appellee.

Unpublished opinions are not binding precedent in
this circuit.

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PER CURIAM:

Hoai Thanh appeals from the district court's orders:

(1) denying relief on his second amended complaint
in which he asserted claims for, inter alia,

defamation and false light invasion of privacy, and

(2) denying his post-judgment motions for

reconsideration and to file a third amended

complaint. We have reviewed the record included

on appeal, as well as the parties' briefs, and have found no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Hoai Thanh v. Hie Ngo*, No. 8:14-cv-00448-PJM (D. Md. July 22, 2016; May 8, 2015). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
HOAI THANH ***

*

Plaintiff *

*

v. * Civil No. **PJM 14-448**

*

HIEN T. NGO *

*

Defendant *

*

MEMORANDUM OPINION

The seemingly endless litigation between Plaintiff Hoai Thanh and Defendant Hien T. Ngo has now been whittled down to the present suit ("*Thanh II*") and a single remaining claim: false light/invasion of privacy arising from an article that Ngo purportedly published on the internet on October 2, 2011. The factual and procedural background of the case is

detailed in the Court's Opinion in *Hoai Thanh v. Hien T. Ngo*, Civ. No. 11-PJM-1992 (May 8, 2015) ("*Thanh I*"). Ngo now moves for summary judgment, asserting that Thanh has fatally misstated the date of the publication, which undisputed evidence shows occurred at the latest in October 2007. As a result, says Ngo, Thanh has failed to allege the false light claim with adequate specificity, and in any event, she continues, the claim is barred by the statute of limitations. Thanh asserts that actual publication occurred in October 2011 and, regardless of the date of publication, that his suit is timely because the cause of action did not accrue until he discovered the publication in 2012.

For the following reasons, the Court will **GRANT** Ngo's Motion for Summary Judgment.

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I.

In *Thanh I*, Thanh alleged he was attacked by Ngo on multiple fronts—defaming him, casting him in a false light, intimidating him, filing “baseless” lawsuits against him—all in retaliation after Thanh published accusations against Ngo in his newspaper, *Dai Chung*, to the effect that Ngo was misusing charitable funds. On November 27, 2013, in *Thanh I*, Thanh moved to amend his Complaint to add further claims of defamation and false light. The Court denied the motion as too late to be filed in that suit, but did grant Thanh leave to file a separate lawsuit alleging any cause of action included in the motion to amend that was not already part of *Thanh I*. See

Order of January 14, 2014 at 2, *Thanh I*, ECF No. 105. The case currently pending before the Court, *Thanh II*, is that separate lawsuit.¹

The Complaint in the present case was filed February 14, 2014. ECF No. 1. After the Court twice gave Thanh leave to amend, it granted Ngo's Motion to Dismiss as to all but a single claim: Count I-A of the Second Amended Complaint alleging false light/invasion of privacy arising from an article Ngo purportedly published in Vietnamese on the internet on October 2, 2011. *See* Memo. Op. at 11-15 (May 8, 2015), ECF No. 16.

Thanh alleges in this claim that on October 2, 2011, Ngo "published on Google on the Internet what was a republishing of a document that she had repeatedly used previously in her broadcasts and also on the Internet," which, Thanh says, placed him in a false light. Second Amend. Compl. ¶ 63, ECF No. 9-2. Thanh goes on to explain that "this republishing was not discovered by him despite his diligence until another Vietnamese person called it to his attention just a few days before he was deposed by the defendant's counsel for the first time in [*Thanh I*]

¹ All claims in *Thanh I* went out on Summary Judgment in favor of Ngo by Memorandum Opinion and Order issued on May 8, 2015. *See Thanh I*, ECF Nos. 147, 148.

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on April 6, 2012,² at which time the plaintiff gave a copy of that blast email to the defendant[.]” *Id.*

The Second Amended Complaint cites a number of sections from the publication (translated from

Vietnamese) as examples of false light which purportedly state or imply that Thanh is “a communist or is under the control of the hated communist government in Vietnam, . . . is too stupid to run a newspaper, [and] that [his] newspaper lied and misled the public.” See Second Amended Compl. ¶ 64, ECF No. 9-2 (“Thanh, who is mainly an auto body shop repairer holding screws and painting guns, not a pen holder, but wants to be known as an intellectual; and for this purpose, hired an overseas student from VN today to run his newspaper.”). Other quoted passages state that Thanh is a “cheater,” an “infidel,” and bankrupt. Second Amended Compl. ¶ 66 (“Mr. Hoi Thanh has cheated [a particular business owner] \$10,000. [. . .] But fooled up by Mr. Hoai Thanh the infidel man, [the business owner] sued Mr. Hoai Thanh even though Hoai Thanh’s wife pretended to lose consciousness in the court and Hoai Thanh has filed bankruptcy.”).

The Second Amended Complaint also quotes a passage from the October 2, 2011 publication which Thanh alleges falsely calls him a “crook” in his dealings with a Mrs. Minh, a woman to whom Thanh supposedly owed a debt. The quoted passage states that “Mrs. Minh [. . .] voluntarily phoned me [Ngo] at will to retell me [Ngo] how she had lent Mr. Hoai Thanh money.” Second Amended Compl. ¶ 65. The publication purportedly goes on to say that, when Mrs. Minh went to Thanh’s house to collect her debt, Thanh called the police to have her arrested. Minh was said to have been handcuffed, arrested, and later set free on bond. *Id.* Thanh

² As Ngo points out, the correct date is actually August 2012, as Thanh testified in his August 22, 2012 deposition. Def.'s Reply at 4 n.2, ECF No. 24; Def.'s Ex. 7, Aug. 22, 2012 Thanh Depo. 153:7–12, ECF No. 21-8. The Court will assume Thanh intends to assert the later date of August 2012, since it is more advantageous to him for the purposes of his limitations argument.

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asserts Ngo knew of the falsity of the statements in the article: specifically, he references a deposition of Minh taken in *Thanh I*, in which Minh, contrary to what Ngo was maintaining, stated that no such arrest and no such handcuffing actually took place.

In ruling on Ngo's Motion to Dismiss in the present case, the Court determined that the false light claim, when viewed in the light most favorable to Thanh, sufficiently alleged that Ngo personally published what might be fairly construed as derogatory statements about Thanh on October 2, 2011. Memo. Op. at 11-15, ECF No. 16. While the Court found this allegation of false light plausible, it declined to hold as a matter of law that such statements would be highly offensive to a reasonable person.

In addition, because Maryland's statute of limitations for false light claims is three years, the Court concluded that Thanh's false light claim for the supposed October 2, 2011 publication appeared to be timely, whether calculated from the date Thanh moved to amend his complaint in *Thanh I* (November 27, 2013) or from the date *Thanh II* was filed (February 14, 2014). See Memo. Op. at 6-7. On the other hand, the Court granted Ngo's Motion to

Dismiss as to Thanh's defamation claim with respect to the October 2, 2011 broadcast, because it fell outside of Maryland's one-year statute of limitations for defamation claims.

The Court now considers Ngo's Motion for Summary Judgment on the remaining false light claim. Ngo argues that there can be no genuine dispute that Ngo did not, in fact, publish any article on October 2, 2011. Instead, she says, the undisputed evidence demonstrates that she posted the article to an online discussion group no later than 2007, and thereafter some third party posted the article to the Tin Paris website, a Vietnamese-language online magazine, in October or November 2007. Ngo has presented evidence that Thanh's copy of the article with the date October 2, 2011 is, in fact, a Google cache or "snapshot" of the Tin Paris website, to

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which the article was posted in 2007. Def.'s Mot. Summ. J. at 5-7, ECF No. 21-1. On this basis, Ngo argues that Thanh has failed to present sufficient evidence that she published any statements at all on October 2, 2011, much less false light statements. Further, his claims are barred by the statute of limitations because, as a matter of law, the discovery rule does not apply to false light statements published in mass media. Def.'s Reply Mot. Summ. J. at 6-9, ECF No.24.

Thanh argues in response that he is not an IT expert, and it is a question of fact "whether or not the defendant published this material." Pl.'s Resp. Opp'n Mot. Summ. J. at 1-2, ECF No. 23. Further, Thanh

believes that whether the statute of limitations should render his claim untimely is a question of fact, based on “whether the plaintiff discovered it when he did was reasonable under the circumstances.” *Id.* at 2. Thanh’s sole evidentiary support consists of an affidavit from himself alone, in which he states that Ngo “republished” the article many times “throughout October and November of 2011” but he (Thanh) only became aware of the article “after another person brought it to his attention.” Pl.’s Resp. Opp’n Mot. Summ. J., Ex. 1, Thanh Aff. ¶¶ 9–10, ECF No. 23-1.

II.

A court may grant summary judgment pursuant to Federal Rule of Civil Procedure 56(a) only when there is no genuine dispute as to any material fact, and the moving party is plainly entitled to judgment in its favor as a matter of law. Fed. R. Civ. Pro. 56(a); *see Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). A dispute of material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact is one “that might affect the outcome of the suit under governing law.” *Libertarian Party of Va. v. Judd*, 718 F.3d

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308, 313 (2013) (quoting *Anderson*, 477 U.S. at 248). Thus, “the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could

return a verdict for the [nonmoving party] on the evidence presented.” *Anderson*, 477 U.S. at 252.

This inquiry requires the court to view the record “in the light most favorable to the party opposing the motion” and to draw all reasonable inferences in that party’s favor. *Foster v. Univ. of Maryland-E. Shore*, 787 F.3d 243, 248 (4th Cir. 2015). Nevertheless, “it is ultimately the nonmovant’s burden to persuade [the court] that there is indeed a dispute of material fact.” *CoreTel Va., LLC v. Verizon Va., LLC*, 752 F.3d 364, 370 (4th Cir. 2014) (citation omitted). The burden on the nonmoving party extends to establishing a genuine issue of material fact on each essential element of its case. *Anderson*, 477 U.S. at 248–49; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Thus, a party opposing the motion may not defeat summary judgment by relying on a mere “scintilla of evidence” or by means of mere conclusory allegations or speculation. *Anderson*, 477 U.S. at 251; *see Am. Arms Int’l v. Herbert*, 563 F.3d 78, 82 (4th Cir. 2009). Further, he “‘may not rest upon the mere allegations or denials of [his] pleadings,’ but rather must ‘set forth specific facts showing that there is a genuine issue for trial.’” *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 525 (4th Cir. 2003).

III.

Ngo moves for summary judgment on a narrow ground: while accepting that she was the author of the article in question, she argues that the only time she posted the statements in question was to an online discussion group sometime in 2007. She denies any posting to the Tin Paris website or reposting by her thereafter and Thanh, she submits, has offered no evidence to

the contrary. Thus, says Ngo, there is no genuine dispute that she did not publish the defamatory statements in question on October 2, 2011 and she is entitled to judgment as a matter of law.

A.

In Maryland,³ the elements of a claim of false light/invasion of privacy are as follows: (1) publicity in a false light before the public; (2) which a reasonable person would find highly offensive; and (3) which the actor had knowledge of or as to which he or she acted in reckless disregard of the fact that the publicized matter would place the plaintiff in a false light. *Cambridge Title Co. v. Transamerica Title Ins. Co.*, 817 F. Supp. 1263, 1278 (D. Md. 1992) *aff'd*, 989 F.2d 491 (4th Cir. 1993); *see Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 514, 665 A.2d 297, 318 (Md. Ct. Spec. App. 1995) (citing Restatement (Second) of Torts § 652E (1977)).

An allegation of false light must meet the same legal standards as an allegation of defamation. *Piscatelli v. Van Smith*, 424 Md. 294, 306 (Md. 2012). In order to present a *prima facie* case of defamation in Maryland, a plaintiff must allege specific facts establishing the following four elements: (1) that the defendant made a defamatory statement to a third person,

³ The parties appear to agree that Maryland law applies to the present suit. Maryland follows the principle of *lex loci delicti commissi*, the law of the place of the harm, in the context of tort claims. *See Naughton v. Bankier*, 114 Md. App. 641, 691 A.2d 712, 716 (Md. Ct. Spec. App. 1997). “In defamation actions, the place of the harm has traditionally been considered to be the

place where the defamatory statement was published, i.e., seen or heard by non-parties.” *Wells v. Liddy*, 186 F.3d 505, 521–22 (4th Cir. 1999) (applying Maryland choice-of-law rules to determine that the substantive law of Virginia applied to the defamation claims); see *Fornshill v. Ruddy*, 891 F. Supp. 1062, 1069 (D. Md. 1995), *aff’d*, 89 F.3d 828 (4th Cir. 1996) (“[In] multistate defamation . . . the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state.” (quoting Restatement (Second) of Conflict of Laws (1971 & Supp. 1995))). Thanh is domiciled in Virginia, and could conceivably argue—but does not—that he was harmed when the Vietnamese community residing in his home state first read the statements online. However, were the Court to apply Virginia law, the claim would fail: there is no cognizable cause of action for false light in Virginia. See *WJLA-TV v. Levin*, 264 Va. 140, 160 & 160 n.5, 564 S.E.2d 38 (Va. 2002). Further, any such claim would be barred by the statute of limitations, given that Virginia does not apply the discovery rule to defamation claims. See *Bass v. E.I. Dupont De Nemours & Co.*, 28 F. App’x 201, 206 (4th Cir. 2002) (citing *Jordan v. Shands*, 255 Va. 492, 498, 500 S.E.2d 215 (Va. 1998)).

Case 8:14-cv-00448-PJM Document 28 Filed 07/22/16 Page 8 of 23 (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered harm. *Id.*; see *Offen v. Brenner*, 402 Md. 191, 198, 935 A.2d 719, 723 (Md. 2007). A defamatory statement is one “which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or from associating or dealing with, that person.” *Batson v. Shiflett*, 325 Md. 684, 722–23, 602 A.2d 1191, 1210 (Md. 1992). The plaintiff bears the burden of proving the falsity of the statement, or that the statement “is not substantially correct.” *Piscatelli*, 424 Md. at 306.

As the Court observed in its May 8, 2015 opinion in *Thanh II*, “the Fourth Circuit has clearly held that

a ‘plaintiff may not baldly allege a broad course of conduct over a lengthy period of time and later sue on any act that occurred during that time period.’” *Gainsburg v. Steben & Co.*, 838 F. Supp. 2d 339, 344 (D. Md. 2011), *aff’d*, 519 F. App’x 199 (4th Cir. 2013) (quoting *English Boiler & Tube, Inc. v. W.C. Rouse & Son, Inc.*, 172 F.3d 862 (table), 1999 WL 89125 at *3 (4th Cir. 1999)). Instead, “[e]very alleged defamatory statement constitutes ‘a separate instance of defamation,’ which ‘a plaintiff must specifically allege.’” *Id.* (quoting *English Boiler & Tube, Inc.*, 1999 WL 89125 at *3 (applying North Carolina law)).

Under what is known as the single publicatrue, “only one action for damages can be maintained as to any single publication” of the defamatory article at issue. *Hickey v. St. Martin's Press, Inc.*, 978 F. Supp. 230, 235 (D. Md. 1997) (determining that the Maryland Court of Appeals would adopt the single publication rule if presented with the issue). As a result, courts that follow the single publication rule reject the proposition that “every sale or delivery of the defamatory article” creates an independent cause of action. *Id.* That said, while “[a]ny one edition of a book or newspaper, or any one radio or television broadcast . . . is a single

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publication,” a second edition of a book or article or a second broadcast by the same defamer is considered a separate publication. Restatement (Second) of Torts § 577A (1977). As explained by this Court in *Hickey*, “[t]he great majority of the states now follow the single publication rule,” 978 F. Supp. at 236, because it “serves to protect defendants from harassment resulting from multiple suits.” *Id.*

(quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 n.8, 104 S. Ct. 1473, 1480 n.8, 79 L.Ed.2d 790 (1984)). Further, the rule better “reflects the facts of modern-day mass publishing and duplicating and gives effect to the policy of repose underlying the statute of limitations.” *Id.* (internal quotation marks and citation omitted).

As a general rule, the original author or publisher of a defamatory statement is not held liable “for a voluntary and unauthorized repetition or republication of the defamatory matter by others who act independently[.]” *Shepard v. Nabb*, 84 Md. App. 687, 698, 581 A.2d 839, 844 (Md. 1990) (internal quotation marks and citations omitted); *accord Jankovic v. Int’l Crisis Grp.*, 494 F.3d 1080, 1087 (D.C. Cir. 2007) (finding no liability for defendant for a third party's posting of the statement elsewhere on the internet). An exception to the rule of non-liability for the author, however, arises where “republication by others is the natural and probable consequences” of the original act of publication, but “the burden is on the plaintiff to show that such exception to the general rule exists.” *Shepard v. Nabb*, 84 Md. App. at 698 (internal quotation marks and citations omitted).

B.

Ngo submits that, because Maryland follows the single publication rule, Thanh is obliged to present sufficient evidence to sustain his burden demonstrating that the article was published, rather than merely available, on October 2, 2011. In fact, says Ngo, the only evidence before the Court demonstrates that the article’s date of the publication occurred no later than November

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2007; there is no evidence that any publication by Ngo of the article occurred on October 2, 2011.

The Second Amended Complaint alleges that “[o]n October 2, 2011, the defendant published on Google on the Internet what was a republishing of a document that she had repeatedly used previously in her broadcasts and also on the Internet.” *Id.* ¶ 63. The parties are in agreement that the offensive article at issue is Thanh’s Exhibit 4 from the August 22, 2012 Deposition in *Thanh I*, which will be referred to as the October 2, 2011 “Google Cache.” Def.’s Mot. Summ. J., Ex. 4, “Google Cache,” ECF No. 21-5; *see also* Def.’s Ex. 1, Pl.’s Answer to Def.’s 2d Interrogs. Nos. 19–20, ECF No. 21-2. The text of the document is in Vietnamese, but the following text at the top of the document appears in English:

This is Google’s cache of
http://www.tinparis.net/thoisu/1107_23_NgothiHien
 ChongCSVN.html. It is a snapshot of the page as
 it appeared on Oct 2, 2011 at
 00:44:37 GMT. The current page could have
 changed in the meantime. Learn
 more.

Text only version.

These search terms are highlighted: ngo thi
 hien

Id.; *see also* Def.’s Ex. 3, Certified Translation of Cached Vietnamese Document, ECF No. 21-4. According to the report of Ngo’s expert, Jason Newman, the co-founder of Advantage Industries—a company specializing in web page design and technical network systems design, implementation, and maintenance—a Google “cache” is made through

Google's practice of "regular[ly] scanning the internet for the purpose of saving images of web pages." Def.'s Mot. Summ. J., Ex. 2, Newman Report at 2, ECF No. 21-3. These saved pages are "cached" or stored web pages, which "serve as a backup in case the current page being sought by an internet user is not available." *Id.* The report states that the date, October 2, 2011, means that the Vietnamese text was "visible on the internet" on that date, when Google saved the image of the web page.

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Id. The date does not indicate that the web page was uploaded, posted, or published on that date.

Id. at 2–3.

Indeed, Ngo avers in an affidavit that she published the article in October 2007 by posting it to Vietnamese language discussion groups or newsgroups on the internet—but not to the "TinParis.net" webpage captured in the Google Cache. Def.'s Mot. Summ. J., Ex. 5, Ngo Aff. ¶¶ 10–13, ECF No. 21-6. Ngo states that she had no control over TinParis.net or the content of the site, and did not post the article there herself. Nor did she publish or republish the article anytime thereafter. *Id.* ¶¶ 12–13.

Ngo's statements are supported by an Affidavit from Christopher Butler, the office manager at an organization called Internet Archive, which maintains a digital library of internet sites. Butler states that he was able to determine that Ngo's article was available on TinParis.net no later than November 28, 2007. Def.'s Mot. Summ. J., Ex. 6, Butler Aff., ECF No. 21-7. Using his organization's "Wayback Machine," which searches billions of pages

that were captured and automatically stored on the organization's archive, he found the internet archive of the TinParis.net article in question. *Id.* ¶¶ 3–6; see Ex. A to Butler Aff., ECF No. 21-7. The page with Ngo's article on the Tin Paris website shows a code in the URL, which is the date of capture:

"20071128013627". Ex. A to Butler Aff., ECF No. 21-7. This refers to a capture date of 11/28/2007 and a time stamp of 01:36:27 a.m. See Ex. 6, Butler Aff. ¶ 5; Ex. 2, Newman Report at 3. The captured webpage in Exhibit A to the Butler Affidavit also shows the actual web address of TinParis.net: [http://www.tinparis.net/thoisu/1107_23_NgothiHienChong CSVN.html](http://www.tinparis.net/thoisu/1107_23_NgothiHienChongCSVN.html), which is identical to the web address cached by Google. See Ex. 2, Newman Report at 3. Ngo's affidavit also avers that the Vietnamese language in the captured version of TinParis.net found

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by Butler is identical to Thanh's Google Cache copy. See Ex. 5, Ngo. Aff. ¶ 4, 11, ECF No. 21-6.

Ngo concludes that this evidence irrefutably demonstrates that she did not post an article on October 2, 2011 but instead that the article was already available on the Tin Paris website at latest in November 2007.

Other record evidence establishes that Thanh actually *knew* the article was published in October 2007, because in the Second Amended Complaint he alleges a "republishing" date of October 2, 2011. Second Amend. Compl. ¶ 63 ("On October 2, 2011 the defendant published to Google on the Internet what was a republishing of a document that she had repeatedly used previously in her broadcasts and

also on the Internet . . . this republishing was not discovered by him despite his diligence. . . .”). This conclusion is further supported by Thanh’s deposition on August 22, 2012 in *Thanh I*, in which Thanh could not have been clearer that he was aware of the publication in 2007:

Q: [Mr. Gallagher]: I show you what we have had marked as Exhibit 4. Can you tell me what that is, please?

A: [Thanh]: This is the articles was written by Ms. Hien [Ngo] addressing to the president of Vietnam and the Prime Minister of Vietnam and she submitted to Google which later was reprinted by Tin Paris, make false accusations of me about many wrongdoings.

...

Q: Okay. How did the lawsuits [filed by Ngo] force you to close Dail Chung Newspaper?

A: She sue me and she bring me with false accusations on the public media that prevent a lot of people to advertise with us. And she also mention specific here that she will sue me until I had to close the Dial Chung Magazine . . .

.

Q: But when you say here, you are talking about Exhibit Number 4 [the article on TinParis.net]?

A: Yes

Q: That was in 2007?

A: Yes, that’s true.

Def.’s Mot. Summ. J. Ex. 7, Thanh Depo. 152:21–153:6, 201:18–202:9, ECF No. 21-8 (emphasis added).

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Finally, even an English-speaking, non-Vietnamese speaking reader can deduce from the Google cache that the date of publication on the Tin Paris website was October 27, 2007, since it says at the very beginning of the article: “Washington ngay 27 thang 10, 2007”; that is, “Washington[,] October 27, 2007.” Def.’s Mot. Summ. J., Ex. 4, “Google Cache” at 1, ECF No. 21-5.

Thanh’s short affidavit provided in response is tepid at best; he does not appear to dispute any of the facts demonstrated by Ngo’s Exhibits related to the Google Cache. *See* Pl.’s Resp. Opp’n Mot. Summ. J., Ex. 1, Thanh Aff., ECF No. 23-1. Thanh says only that he worked diligently to find articles Ngo posted online but nevertheless did not learn about the article in question until “another person brought it to his attention,” as he “set out in his complaint.” *Id.* ¶ 10. Thanh also states in his affidavit that he wrote to the Tin Paris.net and VanTuyen.net⁴ to take the article down. *Id.* ¶¶ 8, 11-14. After merely asserting the article was published “over and over,” *id.* ¶ 3, his only response to Ngo’s evidence is that the date the article was uploaded—whether October 2, 2011 or not—is an issue of fact for the jury. Pl.’s Resp. Opp’n Mot. Summ. J. at 2. His response in opposition concludes that “the plaintiff is not an IT expert; he believes that when something is stated to have been “archived” on a date[,] it was archived on that date.” *Id.* at 1.

Thanh’s arguments simply do not pass muster. As the party opposing the motion for summary judgment, he “may not rest upon the mere allegations or denials of [his] pleadings, but rather must set forth specific facts showing that there is a genuine issue for trial.” *Bouchat*, 346

F.3d at 525 (internal quotation marks and citations omitted). Merely stating that he disagrees with Ngo's evidence does not create a genuine issue of fact; Thanh must present more than a "scintilla of evidence" and more than conclusory allegations to defeat the motion for summary

⁴ Curiously, Thanh did not mention VanTuyen.net in his original or either Amended Complaints.
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judgment. *See Am. Arms Int'l*, 563 F.3d at 82. As to the date of publication, he has failed to do so.

Having reviewed the record evidence presented, the Court has no hesitation in concluding that no genuine dispute exists that the article in question was, in fact, published and available on TinParis.net at the latest in November 2007, and that the Google Cache document merely demonstrated the availability online—rather than the actual republication by Ngo—of the article on October 2, 2011. The Court considers a second publication theory, in that Thanh also appears to allege that Ngo "republished" the article in or around October 2, 2011, by means of sending the article out in a mass email. While Thanh in the Second Amended Complaint he refers to October 2, 2011 as a "republishing" date on which Ngo purportedly posted the article online, he also refers to the October 2, 2011 article as an "email blast." *See* Second Amend. Compl. ¶ 63; *see also* Def.'s Mot. Summ. J. at 11–12 (citing Pl.'s Answer Def.'s Interrog. No. 8 (referring to "the October 2, 2011 blast email")). Thanh appears

to be saying that publication by Ngo occurred not only over the internet but also in emails she sent.

Although Thanh's allegations that Ngo sent out defamatory mass emails appear in separate counts that the Court has already dismissed, he has not clearly made this allegation in Count I-A. *See id.* at ¶ 70 (alleging in Count 1-B, "[o]n April 8, 2011, and, again, on April 18, 2011, the defendant . . . sent out 'blast' emails to tens of thousands of members of the Vietnamese speaking community"). The only reference to "blast emails" in Count I-A is that at Thanh's deposition, purportedly on April 6, 2012, he "gave a copy of the blast email to the defendant . . . by handing it to her counsel." *Id.* ¶ 63. But the parties agree that the document

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Ngo's counsel received at the deposition (which in fact took place on August 22, 2012) was the October 2, 2011 Google Cache. Def.'s Mot. Summ. J. Ex. 1, Interrogs. 19–20, ECF No. 21-2.

Thanh also refers to the October 2, 2011 Google Cache document as a "blast email" in his responses to interrogatories. When Ngo requested through an interrogatory "the facts known to [Thanh] that indicate that the statement was published on October 2, 2011," Thanh responded that: "The blast email states that that [date] was when it was published on the Internet . . . I was told about the October 2, 2011 blast email by others before I myself saw it. . . . When I saw it myself I saw that it said right on it that it was posted on October 2, 2011." ⁵ Def.'s Mot. Summ. J. at 11–12 (quoting Pl.'s Answer Def.'s Interrog. No. 8).

However, there is nothing in the Google Cache itself indicating that it was in some way part of an email. *See* Def.'s Mot. Summ. J., Ex. 4, Google Cache at 1, ECF No. 21-5. Further, when Ngo's counsel asked at Thanh's August 22, 2012 deposition where he got the Google Cache, he failed to mention an email or that he heard about it from another person, explaining, "I accidentally visited Tin Paris.com and found out about it, just recently . . . [in] early August this year." Def.'s Ex. 7, Aug. 22, 2012 Thanh Depo. 153:8–10.

⁵ The relevant interrogatory in full states as follows:
 INTERROGATORY NO. 8: With respect to the October 2, 2011 Publication, state all of the facts known to you that indicate that the statement was published on October 2, 2011.
 PLAINTIFF'S ANSWER: The blast email states that that was when it was published on the Internet and the posting notice says that it was and the man that gave it to me stated that that's when it was published. I was told about the October 2, 2011 blast email by others before I myself saw it. One of those who told me about it was Mr. Sagant Phan of California, who is mentioned in my answer to number 1 above. There were 3 or 4 other Vietnamese from this area who also told me about it before I myself saw it. All of them described it as another copy of the blast email attacking me that the defendant had sent out over and over again. When I saw it myself I saw that it said right on it that it was posted on October 2, 2011. Def.'s Mot. Summ. J. at 11–12 (quoting Pl.'s Answer Def.'s Interrog. No. 8)

But if Thanh does, in fact, intend to assert republication of the internet article in question as an email, he has offered no evidence that Ngo actually sent such an email containing the article—not even an affidavit from the person who purportedly first alerted him to the existence of the email.⁶ During the hearing on the motion for summary judgment, Thanh’s counsel, in response to the Court’s question as to why he did not present evidence refuting that the Google Cache was not a new publication, appeared to argue that it was sent out in an email, but also suggested that he did not need to present evidence of the existence of the alleged email. *See* H’rg Tr. 47:5–8, ECF No. 27 (“You don’t need an expert to say people can put out blast e-mails any time they want Everybody knows how to use e-mails”).⁷

⁶At the hearing on the Motion for Summary Judgment, counsel for Thanh claimed that he was unable to obtain evidence of emails sent by Ngo from Google or AOL, because those companies responded that “when [Ngo] destroyed the e-mails, they were destroyed on the servers.” H’rg Tr. 44:10–11, ECF No. 27. However, until then, Thanh had never previously raised any issue of spoliation as to these alleged mass emails, nor has he at any time produced to the Court a shred of evidence of the emails from any other source.

⁷Ngo’s counsel noted that Thanh’s only request for discovery consisted of untimely interrogatories: “The only . . . discovery requests that we received in this case were interrogatories that came to us outside the deadline for serving interrogatories. And I took a hard position on that and I told Mr. Elgin [Thanh’s counsel] we were not going to answer them . . . And he conceded the point.” H’rg Tr. 50:6–16, ECF No. 27.

If Thanh intends to rely on theory that the article was “republished” by means of an email, he must not only clearly present this argument to the Court, but

also provide *some* evidence to support the proposition. But on the record before the Court, there is no evidence—which is to say no genuine dispute—that any emails were sent containing the article in question.

The question, then, is whether Thanh’s failure to allege the correct date of publication by some four years is fatal as a matter of law to his false light claim under Count I-A. Although Ngo admits writing the purportedly defamatory article in 2007, she argues that she is nonetheless entitled to judgment as a matter of law, because, in effect, Thanh’s false light claim based on an

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alleged October 2, 2011 internet posting has no grounding in fact. Def.’s Mot. Summ. J. at 1–2, 9, 14–15, ECF No. 21.

The Court agrees that, under the single publication rule, the October 2, 2011 Google Cache of the article does not constitute an actionable publication of the article. Thanh’s discovery of the Google cache, as well as his discovery of the article through various search engines, amount to nothing more than another “sale or delivery of the defamatory article” under the single publication rule. *See Hickey*, 978 F. Supp. at 235. Although he argues that “[f]alse light is systematic and ongoing,” he cannot rely on a theory of continuing course of conduct or harm. *See Gainsburg*, 838 F. Supp. 2d at 344 (“[A] plaintiff may not baldly allege a broad course of conduct over a lengthy period of time and later sue on any act that occurred during that time period.” quoting *English Boiler & Tube, Inc.*, 1999 WL 89125 at *3).⁸

⁸Thanh also fails to present evidence that a republication by a third party occurred after 2007, nor does he provide any argument as to why the Court should deviate from the general rule that the original author of the defamatory statement incurs no liability for republications by independent third parties. *See Shepard v. Nabb*, 84 Md. App. 687, 698, 581 A.2d 839, 844 (Md. 1990) (internal quotation marks and citations omitted); *accord Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1087 (D.C. Cir. 2007) (finding no liability for defendant for a third party's posting of the statement elsewhere on the internet).

While Thanh might have cured this fatal defect as to the date of the publication earlier in the litigation, it is well past the time for amendments. The operative complaint is now the Second Amended Complaint since the suit was filed on February 14, 2014. Recall, too, that Thanh first attempted to bring the claims in this suit in *Thanh I*, but the Court deemed Thanh's November 27, 2013 motion to have come far too late in those proceedings to permit him to amend his complaint once again. Further, as there is no dispute from record evidence that Thanh was aware well before this suit was filed that the original publication date of article was October

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2007, there is no reason he could not have alleged the correct publication date in one of his previous opportunities to amend his complaint.⁹

⁹Ngo further asserts that any amended claim based on the 2007 publication would now be barred by the three year statute of limitations, even assuming limitations accrued when Thanh discovered the article in August 2012. Def.'s Reply at 8 n.3, ECF No. 24. Because every publication constitutes a single cause of action under the single publication rule, Ngo argues, the 2007 publication would not relate back to the filing of the original

complaint under Federal Rule of Civil Procedure 15(c). Fed. R. Civ. P. 15(c) (“An amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading[.]”); see *Gainsburg*, 838 F. Supp. 2d at 344 (citing *English Boiler & Tube, Inc.*, 1999 WL 89125 at *3).

Since there is no evidence that any false light statements by Ngo occurred on October 2, 2011, or indeed within several years of that date, the Court finds that Ngo is entitled to summary judgment as a matter of law.

C.

Furthermore, the Court concludes that Thanh’s claim of false light based on the article published in 2007 is barred by the statute of limitation because the discovery rule does not apply.

The Maryland Court of Special Appeals has held that the applicable limitations period for a false light claim is three years. See *Allen v. Bethlehem Steel Corp.*, 76 Md. App. 642, 649, 547 A.2d 1105 (Md. Ct. Spec. App. 1988) (construing Md. Code Ann., Cts. & Jud. Proc. § 5-101).

Limitations ordinarily run from the time the defamatory statement—and by application, the false light statement—is published. See *Interphase Garment Solutions, LLC v. Fox Television Stations, Inc.*, 566 F. Supp. 2d 460, 464 (D. Md. 2008) (“A defamation claim is complete when the allegedly defamatory statement is [made] because the injury to reputation is immediate.”) Maryland, however, generally follows the discovery rule in tort actions, which provides that “a cause of action accrues when the plaintiff ‘knew or reasonably should have known that the defendant committed a wrong act. . . .’” *Id.*

(citing *Sears, Roebuck and Co. v. Ulman*, 287 Md. 397, 401, 412 A.2d 1240 (Md. 1980)); *see also Hecht v. Resolution Trust Corp.*, 333 Md. 324, 334, 635 A.2d 394, 399 (Md. 1994) (“Recognizing the unfairness inherent in charging a plaintiff with slumbering on rights not reasonably possible to ascertain, this Court adopted what is known as the discovery rule, which now applies generally in all civil actions[.]”) The Maryland Court of Appeals has, in some cases, applied the discovery rule to defamation claims. *See Sears, Roebuck and Co. v. Ulman*, 287 Md. 397, 401, 412 A.2d 1240 (Md. 1980) (holding that the discovery rule applied where plaintiff “could not reasonably have been expected to know[] that Sears had filed a false credit report with the credit agency”); *see also McClure v. Lovelace*, 214 Md. App. 716, 741, 78 A.3d 934, 949 (Md. Ct. Spec. App. 2013), *aff’d sub nom. Amalgamated Transit Union v. Lovelace*, 441 Md. 560, 109 A.3d 96 (Md. 2015).

Thanh submits that the discovery rule should apply here, such that his false light action should be deemed not to have accrued until “another Vietnamese person called [the article] to his attention just a few days before he was deposed” on April 6, 2012, Second Amend. Compl. ¶ 63, (although the Court has accepted, per Thanh’s deposition testimony, that the correct date of the purported discover was actually just before his August 22, 2012 deposition). Thanh asserts that whether he was reasonably diligent in discovering the article is an issue for the jury. Pl.’s Resp. Opp’n Mot. Summ. J. at 2, ECF No. 23.

Ngo counters that whether Thanh was “reasonably diligent” is not a material fact in this case. Under Maryland law, the plaintiff is generally charged with

knowledge of a cause of action as of the date of publication, provided that the alleged defamatory publication is made by way of mass media. Def. Reply at 6–7, ECF No. 24.

This Court has previously held that under Maryland law, where “articles were widely available online and could have been discovered immediately, the statute of limitations began to accrue on the date the articles were published.” *Tani v. Washington Post*, No. PJM 08-1130, Case 8:14-cv-00448-PJM Document 28 Filed 07/22/16 Page 20 of 23 2009 WL 8652384, *2 (D. Md. June 18, 2009), *aff’d*, 352 F. App’x 792 (4th Cir. 2009); *see also Shepard v. Nabb*, 84 Md. App. 687, 696, 581 A.2d 839, 843 (Md. 1990) (holding that the action for defamation accrued on the date of publication where there is nothing in the record to indicate that plaintiff reasonably should not have known of the defendant’s remarks to the reporter on the date the article was published). Because a plaintiff always “reasonably should have known” about purportedly defamatory statements made in mass media as of the time of publication, the “prevailing view is that libel claims relating to articles published in widely available sources begin to accrue on the date of publication.” *Tani*, 2009 WL 8652384 at *2; *see Interphase Garment Sols., LLC v. Fox Television Stations, Inc.*, 566 F. Supp. 2d 460, 464 (D. Md. 2008); *accord Mullin v. Washington Free Weekly, Inc.*, 785 A.2d 296, 297 (D.C. 2001) (“[E]very other court squarely faced with this issue [has] reject[ed] application of the discovery rule in mass media defamation claims) (collecting cases); *Shively v. Bozanich*, 31 Cal. 4th 1230, 1250, 7

Cal. Rptr. 3d 576, 80 P.3d 676 (Cal. 2003) (“[C]ourts uniformly have rejected the application of the discovery rule to libels published in books, magazines, and newspapers, pointing out that application of the discovery rule would undermine the protection provided by the single publication rule.”); *cf. Schweih v. Burdick*, 96 F.3d 917, 921 (7th Cir. 1996) (“[C]ourts seem to apply the discovery rule in situations where the defamatory material is published in a manner likely to be concealed from the plaintiff”); *Bradford v. Am. Media Operations, Inc.*, 882 F. Supp. 1508, 1519 (E.D. Pa. 1995).¹⁰

¹⁰ The question of the accrual of the statute of limitation is left to judicial determination, and “may be based solely on law, solely on fact, or on a combination of law and fact, and is reached after careful consideration of the purpose of the statute and the facts to which it is applied.” *Frederick Road Ltd. Partnership v. Brown & Sturm*, 360 Md. 76, 756 A.2d 963, 973 (Md. 2000). In general, it is often a question of fact for the jury whether the plaintiff exercised due diligence despite his failure to discover his cause of action. *See id.* at 974. Nevertheless, the “prevailing view” that the discovery rule does not apply to defamatory statements published in mass media often eliminates this factual dispute.

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The question, then, is whether Ngo’s article, posted on the Tin Paris website, should be considered mass media and “widely available online,” such that Thanh reasonably should have known of its existence at the time it was posted.¹¹

¹¹ Whether the Court should date the statute of limitations from Ngo’s purported original posting in the discussion group or a third party’s posting on TinParis.net is merely academic given that the postings occurred within about a week of each other in

2007—both more than six years prior to the initiation of this suit. *Cf. Bond v. U.S. Dep't of Justice*, 828 F. Supp. 2d 60, 78 (D.D.C. 2011) (noting under the single publication rule that “in the print media world, the copying of an article by the reader—even for wide distribution—does not constitute a new publication’ and . . . ‘the equivalent occurrence should be treated no differently on the Internet.” (quoting *Jankovic v. Int’l Crisis Grp.*, 494 F.3d 1080, 1087 (D.C. Cir. 2007))).

Tani, 2009 WL 8652384 at *2 (citing *Shepard v. Nabb*, 84 Md. App. at 696). Since Maryland courts have not addressed the issue, “this Court must apply a rule which it reasonably believes would be adopted by the Maryland Court of Appeals.” *Hickey*, 978 F. Supp. at 236 (citing *Kirby v. Chrysler Corp.*, 554 F. Supp. 743, 749 (D. Md. 1982).

The Court sees no reason to deviate in this case from the usual rule that a plaintiff is charged with knowing about defamatory statements made in mass media at the time of the first broadcast. In general, publications on the Internet—as well as the use of search engines such as Google, which have enabled users to find specific online content with relative ease—have, if anything, reduced the difficulty victims faced in the context of printed newspapers, book, and articles in discovering specific defamatory statements. *Accord Wolk v. Olson*, 730 F. Supp. 2d 376, 378 (E.D. Pa. 2010) (“If the [discovery] rule is intended for hard-to-discern injuries, it would be at odds with a cause of action based upon a defamatory statement disseminated through a mass medium, like a website, and received by tens of thousands of readers.”) (emphasis added); *Phillips v. World Pub. Co.*, 822 F. Supp. 2d 1114, 1122 (W.D. Wash. 2011) (“In the internet context, the statute of limitations

begins to run when the allegedly infringing material is first posted on the internet.”) (citing *Canatella v. Van De Kamp*, 486 F.3d 1128, 1134–36 (9th

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Cir. 2007)); *cf. Henry v. Raycom Media, Inc.*, 210 F. App'x 632, 633 (9th Cir. 2006) (affirming that, under Arizona law, discovery rule should not toll the statute of limitations in a defamation case where “internet postings were accessible by any member of the public for free”).

The Court finds no genuine dispute of fact that the Tin Paris webpage was widely available online. Throughout this case—in fact, even well prior to the present suit between the parties—Thanh himself has emphasized that the defamatory statements have reached a very large audience of Vietnamese readers. In his deposition testimony on August 22, 2012, he described Tinparis.net as follows: “I believe it is an online magazine publishing to worldwide audiences.” Def.’s Mot. Summ. J., Ex. 7, Thanh Depo. 153:14–16, ECF No. 21-8 (emphasis added). Thanh later states, “I read it on the Internet and I realized that Ms. Hien [Ngo] had had this on Google. That means the world had read it.” *Id.* at 153:20–21 (emphasis added). Further, in his deposition, he describes where he got the article, explaining “I accidentally visited Tin Paris.com and found out about it, just recently. . . [in] early August this year.” *Id.* 153:8–10. That he “accidentally” discovered the article not only casts doubt on his story that it came from a friend, but also highlights the relative ease with which he was apparently able to find it online. To this point, his affidavit opposing the present Motion concedes that he eventually found the Ngo’s article “on many

Internet sites over and over again” including Google, Yahoo, and AOL. Thanh. Aff. ¶¶ 3, 7, ECF No. 23-1. All of these “Internet sites,” are, of course, search engines—which further demonstrates that Thanh had little difficulty finding the article in question via a number of online search engines once he became aware of its existence.

While certain online content may be difficult to find under specific circumstances, such as where defamatory statements are posted on a private account with limited or no public access, this is hardly such a case. There is no dispute that the Tin Paris website was an online magazine
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 that was widely accessible. Further, this is not case in which purportedly defamatory statements online should have come as a surprise: Thanh and Ngo have been embroiled in defamation litigation—essentially at war—for well over a decade. Thanh had every reason to be on the constant lookout for additional defamatory statements by Ngo since well before the disputed article was first published by her in 2007. Because the Tin Paris website was widely available online, the discovery rule does not apply to postpone accrual of the limitations period. That means Thanh’s claim of false light, which was not filed until February 2014, is barred by Maryland’s three-year statute of limitations.

IV.

For the foregoing reasons, the Court will **GRANT** Ngo’s Motion for Summary Judgment on Thanh’s final claim of false light under Count I-A, and **ENTER FINAL JUDGMENT** in her favor.

A separate Order will **ISSUE**.

/s/

PETER J. MESSITTE
UNITED STATES DISTRICT

JUDGE
JULY 22, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
HOAI THANH *

*

Plaintiff *

*

v. * Civil No. **PJM 14-448**

*

HIEN T. NGO *

*

Defendant *

*

FINAL ORDER OF JUDGMENT

Upon consideration of Ngo's Motion for Summary Judgment, ECF No. 21, and Thanh's Opposition thereto, oral argument having been held thereon, it is, for the reasons set forth in the accompanying Opinion, this 22nd day of July, 2016

ORDERED

1. Ngo's Motion for Summary Judgment, ECF No. 21, is **GRANTED**;
2. Final Judgment is **ENTERED** in favor of Ngo and against Thanh; and
3. The Clerk of the Court is directed to **CLOSE** the case.

/s/

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

Case Name: Thanh v. Ngo

Case Number: [8:14-cv-00448-PJM](#)

Filer:

**WARNING: CASE
CLOSED on 07/22/2016**

Document Number: 36(No document
attached)

Docket Text:

**PAPERLESS ORDER DENYING [30] Plaintiffs'
Motion to Amend/Correct; AND PAPERLESS
ORDER DENYING [31] Plaintiff's Motion to
Amend/Correct. Signed by Judge Peter J.
Messitte on 12/29/2016. (rass, Chambers)**

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
HOAI THANH ***

Plaintiff *

v. * Civil No. PJM 14-448

HIEN T. NGO *

*

Defendant *

*

MEMORANDUM OPINION

This case (“*Thanh II*”) represents another chapter in the seemingly endless litigation between Hoai Thanh and Hien T. Ngo. The factual and procedural background of the case may be found in the Court’s Opinion in *Hoai Thanh v. Hien T. Ngo*, Civ. No. 11-PJM-1992 (May 8, 2015) (“*Thanh I*”), the last battleground between these disputants before the present case.

A.

The Court has before it in the present case Defendant Ngo’s Motion to Dismiss. ECF No. 7. Consideration of this motion requires the Court to revisit *Thanh I*.

In *Thanh I*, on November 27, 2013, Thanh filed a Motion to Amend his Complaint, which would have added further defamation and false light claims to that case. The Court held that the motion came too late in that proceeding since, as early as September 17, 2012, Thanh had represented to the Court that he planned “to file a motion to amend the Complaint to include what [Thanh] contends are specific additional instances of defamation and false light invasion of privacy.” *Thanh I*, ECF No. 49, at 2. As a result, the Court denied Thanh’s Motion to Amend, but did grant him leave to file a separate lawsuit alleging any cause of action included in the

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Motion to Amend that was not already part of *Thanh I*. See Order of January 14, 2014, *Thanh I*, ECF No. 105, at 2. This is that separate lawsuit.

Thanh filed his Complaint in the present case (*Thanh II*) on February 14, 2014. ECF No. 1. He filed his First Motion to Amend the Complaint in this case on June 13, 2014. ECF No. 6. Pursuant to Federal Rule of Civil Procedure 15(a)(1), Thanh was entitled to amend the Complaint as a matter of course within 21 days of serving the initial Complaint and, since Ngo was served on June 7, 2014, ECF No. 5, *i.e.*, within 21 days, Thanh was entitled to amend. The Court therefore granted the First Motion to Amend the Complaint by marginal order dated March 30, 2015. ECF No. 13. Ngo filed a Motion to Dismiss the First Amended Complaint on June 30, 2014. ECF No. 7. Before the Court could rule on the Motion to Dismiss, Thanh filed a Second Motion to Amend the Complaint on July 24, 2014, ECF No. 9, in which he sought to make one simple amendment to the First Amended Complaint. In the First Amended Complaint, Thanh had alleged that he was “a resident of Virginia” and Ngo was “a resident of Maryland.” ECF No. 6-2. In the Second Amended Complaint, Thanh changed “resident” to “citizen,” such that Thanh now alleged he was “a citizen of Virginia and the defendant [was] a citizen of Maryland.” Ngo did not oppose this change, but otherwise stated her opposition to the Second Motion to Amend on the grounds that it failed to cure the other deficiencies outlined in her Motion to Dismiss, and that any amendment was therefore futile. Def.’s Resp. Br., ECF No. 10. Since Rule 15(a)(2) provides that a court should freely grant leave to amend when justice so requires, the Court granted Thanh’s First Motion to

Amend the Complaint by marginal order on March 30, 2015. ECF No. 12.

Although the Motion to Dismiss is now moot on jurisdictional grounds, the Court holds that its grant of leave to Thanh to file the Second Amended Complaint did not moot Ngo's Motion to Dismiss on non-jurisdictional grounds.¹

¹ Rather than re-filing her Motion to Dismiss after the Court granted Thanh leave to file the Second Amended Complaint, Ngo instead filed an Answer to the Second Amended Complaint. ECF No. 14. In the interest of judicial economy, the Court considers Ngo's Motion to Dismiss insofar as it applies to the Second Amended Complaint, which, as noted, is identical to the First Amended Complaint except for substituting the word "resident" for the word "citizen" in the jurisdictional allegations. The Court need not tarry over whether the filing of the Second Amended Complaint moots the Motion to Dismiss. The Court believes it does not. In any event, under Rule 12(c), a court may act *sua sponte* when, as here, it determines after the pleadings are closed that there is no material issue of fact presented and that one party is clearly entitled to judgment. *See Flora v. Home Fed. Sav. & Loan Ass'n*, 685 F.2d 209, 211 (7th Cir. 1982); *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011) (no error for district court to dismiss *sua sponte* under Rule 12(c)).

Having granted summary judgment in favor of Ngo on all claims in *Thanh I*, *see* Opinion, *Thanh I*, ECF No. 147, the Court turns to the Motion to Dismiss in *Thanh II*.

B.

Ngo argues that Thanh's claims for malicious prosecution in the present suit should be dismissed, because this Court already entered summary judgment against Thanh on exactly the same allegations in *Thanh I*. Ngo is correct. The malicious prosecution claims (more accurately

styled as “malicious use of process” claims) in the Second Amended Complaint are virtually identical to the malicious prosecution claims as to which the Court granted summary judgment in favor of Ngo in *Thanh I*. See Order, *Thanh I*, ECF No. 121; *compare* Second Amended Compl. ¶¶ 108-132, *Thanh II*, ECF No. 9-2 with Compl. ¶¶ 92-116, *Thanh I*, ECF No. 10. Thanh’s malicious prosecution claims in *Thanh II* are therefore barred by reason of *res judicata* and Ngo’s Motion to Dismiss the malicious prosecution claims herein is **GRANTED**.

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Ngo next submits that all but one of Thanh’s defamation and false light claims in the present case are barred by applicable statutes of limitations. The Court reviews the various claims.

First, the legal framework:

Every alleged defamatory statement constitutes a separate instance of defamation, which a plaintiff must specifically allege. *Gainsburg v. Steben & Co.*, 838 F. Supp. 2d 339, 344 (D. Md. 2011) (citing *English Boiler & Tube, Inc. v. W.C. Rouse & Son, Inc.*, 172 F.3d 862 (4th Cir.1999)), *aff’d*, 519 F. App’x 199 (4th Cir. 2013). The applicable limitations period for a defamation claim is one year. Md. Code, Cts. & Jud. Proc. Art., § 5-105. The Maryland Court of Special Appeals has held that the applicable limitations period for a false light claim is three years. See *Allen v. Bethlehem Steel Corp.*, 76 Md. App. 642, 649 (1988) (construing Md. Code Ann., Cts. & Jud. Proc. § 5-101). Accordingly, Thanh must have filed a complaint specifically alleging each allegedly defamatory or falsely lighting broadcast within one

year of the broadcast (for defamation claims) or within three years of the broadcast (for false light claims),² unless the statute of limitations was otherwise tolled.

² ordinarily the limitations period runs from the time the defamatory statement is published, Maryland follows the discovery rule, which provides that a cause of action accrues at the time the plaintiff knows or reasonably should know of the wrong. *Gainsburg*, 838 F. Supp. 2d at 342 (citing *Interphase Garment Solutions, LLC v. Fox Television Stations, Inc.*, 566 F.Supp.2d 460, 464 (D. Md. 2008)). Thanh alleges that he learned of one particular broadcast (the internet broadcast of October 2, 2011) some six months after it was broadcast. See Compl. ¶ 61, ECF No. 1. Thanh does not allege that he discovered any other particular broadcast at any time after it was broadcast, and, indeed, Thanh maintained throughout *Thanh I* that Ngo repeatedly made defamatory/false light statements about him over a period extending over several years. Thanh therefore was on notice and cannot fairly claim that he became aware of a given broadcast at any time other than when it was actually broadcast. Accordingly, with the exception of the October 2, 2011 publication, the Court finds that Thanh knew or reasonably should have known of each of the broadcasts as of the date that they were broadcast.

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C.

Claims Asserted in *Thanh II* Complaint

Scattered throughout Thanh's sixty-five page Complaint in *Thanh II* are eleven different broadcast dates, each of which the Court will assume without deciding is a well-pleaded claim. Thanh's Complaint in *Thanh II* was filed on February 14, 2014. Nine of the claims in *Thanh II* Thanh sought to raise by his Motion to Amend the Complaint in *Thanh I*, which was filed on November 27, 2013. For purposes of calculating the limitations period in the present case, *Thanh II*, the Court will assume without deciding that the nine claims Thanh attempted to raise when he sought to amend his complaint in *Thanh I* were asserted as of November 27, 2013, the date that the Motion to Amend the Complaint in *Thanh I* was filed.³ The Court will consider the two claims not raised in the Amended Complaint in *Thanh I* as having been asserted on February 14, 2014, when the Complaint in *Thanh II* was filed.

³ As it turns out, it makes no difference whether the Court considers the date of filing for limitations purposes to be the date of the filing of the Amended Complaint in *Thanh I*, November 27, 2013, or the date of the filing of the Complaint in *Thanh II*, February 14, 2014. Except for the October 2, 2011 claim, which is timely under either filing date, all other claims are untimely or otherwise barred under either filing date.

Three of the allegedly defamatory broadcasts asserted in the present case—on October 6, 2001, Compl. ¶ 27, ECF No. 1, September 2, 2004, Compl. ¶ 29, ECF No. 1, and December 23, 2004, Compl. ¶ 29, ECF No. 1—were asserted as claims in *Thanh I*. The Court granted summary judgment in favor of Ngo as to all three of these claims in that case. Order, *Thanh I*, ECF No. 105; Final Order of Judgment, *Thanh I*, ECF No. 148. Accordingly,

Thanh's claims as to the October 6, 2001, September 2, 2004, and December 23, 2004 broadcasts asserted in the present case are barred by reason of *res judicata*, and are dismissed with prejudice.

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Claims related to seven broadcast dates pleaded in the present case are barred by reason of the statutes of limitations for both defamation (1 year) and false light (3 years), as the following chart demonstrates:

Date of Broadcast	Thanh I Amended Compl. (filed 11/27 13)	Thanh II Compl. Filed 2/ 14/14)	Years Elapsed between Broadcast and filing of Thanh I Amended Compl.	Years Elapsed between Broadcast and filing of Thanh II Compl.
10/21/2007		ECF No. 1 ¶ 30	n/a	12.3
9/7/2004	ECF No. 96-1 ¶ 33	ECF No. 1 ¶ 26	9.2	9.4
12/6/2005		ECF No. 1 ¶ 29 n/a	n/a	8.2
12/11/2005	ECF No. 96-1 ¶ 33	ECF No. 1 ¶ 26	8.0	8.2
4/6/2006	ECF No. 96-1 ¶ 26	ECF No. 1 ¶ 26	7.6	7.9
12/6/2006	ECF No. 96-1 ¶ 33	ECF No. 1 ¶ 26	7.0	7.2
12/10/2006	ECF No.	ECF No. 1	7.0	7.2

Because claims as to these seven broadcast dates were not raised in *Dai Chung News Media Inc., et al. v. Ngo, et al.*, 04-RWT-4033 (D. Md. Dec. 27, 2004) (“*Dai Chung I*”), *Dai Chung News Media, Inc., et al v. Ngo, et al.*, 05-AW-3420 (D. Md. Dec. 22, 2005) (“*Dai Chung II*”), or in *Thanh I*, no tolling is applicable. Since all the claims, as shown by the chart, fall well outside limitations for both defamation and false light claims, Thanh’s claims as to these seven broadcasts are dismissed in the present case with prejudice.

That leaves one and one only of the broadcast dates alleged in the original Complaint in this case: a purported October 2, 2011 posting of a document on the Internet. *See* Compl. ¶¶ 60-66, ECF No. 1. Thanh alleges that he only learned of this broadcast on April 6, 2012, some six months after it was broadcast. *See* Compl. ¶ 61, ECF No. 1. As of November 27, 2013, the base filing date for broadcast, some two years and one month had passed since it was published, and one year and seven months had passed after Thanh claims to have discovered it. Thanh filed his Complaint in in this case, *Thanh II*, alleging claims related to this broadcast some two years and

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four months after it was published, and one year and ten months after he alleges that he discovered it. As such, the October 2, 2011 broadcast falls outside the one year statute of limitations for defamation claims, but falls within the three year statute of limitations for false light claims. Accordingly, Thanh’s defamation claim as to the October 2, 2011 broadcast is dismissed with prejudice; his false light claim as to

the October 2, 2011 broadcast remains in the case—for now.

D.

Claims Asserted in *Thanh II* First Amended Complaint

Thanh's First Amended Complaint in this case alleged four new broadcast dates as defamation and false light causes of action: specifically, March 21, 2006, March 31, 2006, April 8, 2011, and April 18, 2011. That is, these broadcast dates were not asserted in any prior complaint in *Dai Chung I*, *Dai Chung II*, *Thanh I*, or *Thanh II*, which means no tolling of limitations applies. The Court therefore considers the claims as to these four dates as having been raised as of June 13, 2014, when the First Amended Complaint in *Thanh II* was filed, unless the claims are deemed to relate back to February 14, 2014, the date the original Complaint in this case was filed.

Federal Rule of Civil Procedure 15(c) provides that an amendment to a pleading relates back to the date of the original pleading when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading. *See Gainsburg*, 838 F. Supp. 2d at 342 (D. Md. 2011). The Fourth Circuit has identified two requirements for a claim to relate back under Rule 15(c): (1) there must be a factual nexus between the amendment and the original complaint, and (2) the defendant must

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have notice of the claim and must not be prejudiced by the amendment. *Id.* (citing *Grattan v. Burnett*, 710 F.2d 160, 163 (4th Cir. 1983)). Two of

the four new broadcast dates asserted in the First Amended Complaint in the present case (March 21, 2006 and March 31, 2006) concern alleged rebroadcasts of the September 2, 2004 broadcast at issue in *Thanh I*. See First Amended Compl. ¶¶ 27, 84, ECF No. 6-2. They were not asserted in any complaint in *Dai Chung I*, *Dai Chung II*, or *Thanh I*. As such, limitations has never been tolled as to these two dates. As a result, the Court need not address whether these two claims relate back to the filing of the Complaint in *Thanh II* because, even assuming they did, they still would have been asserted over seven years after the broadcasts took place—far outside the statute of limitations for both defamation and false light. Thanh’s false light and defamation claims as to March 21, 2006 and March 31, 2006 are thus dismissed with prejudice.

The remaining two new broadcast dates asserted in the First Amended Complaint in this case (April 8, 2011 and April 18, 2011) relate to mass emails allegedly sent by Ngo to thousands of members of the Vietnamese American community. See First Amended Compl. ¶¶ 69-75, ECF No. 6-2. These broadcasts were not asserted in any prior complaint in *Dai Chung I*, *Dai Chung II*, or *Thanh I*, such that limitations has never been tolled as to these two claims. Nor were these claims specifically alleged in the original Complaint in *Thanh II*. Again, the Court need not address whether or not the defamation claims as to these two broadcasts relate back to the filing of the original Complaint in *Thanh II* because, even assuming they did, they still would have been asserted more than two years after the events took place, far outside the statute of limitations for defamation. Thanh’s defamation claims as to April 8,

2011 and April 18, 2011 are accordingly dismissed with prejudice.

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If, however, the false light claims as to the April 8, 2011 and April 18, 2011 broadcasts are deemed to relate back to the filing of the original Complaint in *Thanh II* on February 14, 2014, they would fall within the three year statute of limitations for false light. If the claims do not relate back to the Complaint in *Thanh II*, they would fall outside the statute of limitations for false light.

The question, then, is whether there is a factual nexus between the claims in the First Amended Complaint and those in the original Complaint, and whether Ngo has received fair notice of the claim and would not be prejudiced by the relating back. The Court finds no relation back.

These two mass email broadcasts of April 8, 2011 and April 18, 2011 do involve the same basic allegations at issue in *Thanh I* and elsewhere in the Complaint in *Thanh II*; i.e., that in radio broadcasts and re-broadcasts Ngo committed false light invasion of privacy by describing Thanh as dishonest in business dealings. However, the present claims refer to mass electronic mailings on April 8, 2011 and April 18, 2011, not radio broadcasts. The only reference to a mass email in the original Complaint in this case was in connection with the October 2, 2011 claim, which concerned the publication of a document to the internet. *See* Compl ¶ 93 (referring to a “blast email posted at Google on the Internet on October 2, 2011”); *see also id.* ¶ 61. There is no indication that the mass email or document that Ngo allegedly posted to the internet on October 2, 2011 is

the same mass email that Ngo allegedly sent on April 8, 2011 and April 18, 2011; indeed, the First Amended Complaint does not state that they are the same email, and offers differing descriptions of their contents. *Compare, e.g.*, First Amended Compl. ¶¶ 62-68 (alleging that October 2, 2011 broadcast falsely accuses Thanh of being a communist, an infidel, and a perjurer) *with* First Amended Compl. ¶¶ 69-75 (alleging that April 8, 2011 and April 18, 2011 broadcasts falsely accuse Thanh of being illiterate and in bankruptcy). Moreover, the false light claims as to the April 8, 2011 and April 18, 2011 emails in the First Amended Complaint are clearly distinct from and could not have provided notice of a false light claim based on the October 2, 2011 email/internet publication in the *Thanh II* Complaint. *See Gainsburg*, 838 F. Supp. 2d at 344.

Thanh cannot avoid the effect of limitations on these separate instances of false light invasion of privacy, each of which would support an independent recovery, by simply alleging that they were part of a pattern of false statements made for the purpose of bringing Thanh into disrepute. In rejecting a similar argument, this Court noted that the Fourth Circuit has clearly held that a “plaintiff may not baldly allege a broad course of conduct over a lengthy period of time and later sue on any act that occurred during that time period.” *See id.* (citing *English Boiler & Tube, Inc.*, 172 F.3d 862, at *3). The Court finds that the April 8, 2011 and April 18, 2011 broadcasts do not relate back to the filing of the Complaint in *Thanh II*. Accordingly, for purposes of calculating the limitations period in *Thanh II*, the Court will consider these two claims as having been asserted on June 13, 2014, the date of the filing of the First Amended Complaint.

This means that Thanh filed the First Amended Complaint in the present case more than three years after the April 8, 2011 and April 18, 2011 broadcasts. Both claims are therefore barred by limitations for both defamation and false light claims, and are dismissed with prejudice.

Summarizing to this point, the Court **GRANTS** Ngo's Motion to Dismiss with prejudice as to all defamation claims in this case. The Court **GRANTS** Ngo's Motion to Dismiss with

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prejudice as to all false light claims except for the October 2, 2011 claim, which the Court finds was filed within three years of February 14, 2014.

E.

But does Thanh's false light claim as to October 2, 2011, *see* Second Amended Compl. ¶¶ 62-68, ECF No. 7-1, state a claim upon which relief can be granted, another ground on which Ngo seeks dismissal?

To survive a motion to dismiss, a plaintiff must plead facts sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This requires "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 668 (2009). Although a court will accept factual allegations as true, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." *Id.*

The elements of a claim of false light invasion of privacy are: (1) publicity in a false light before the public; (2) which a reasonable person would find highly offensive; and (3) that the actor had knowledge of or acted in reckless disregard of the

publicized matter placing plaintiff in a false light. *Cambridge Title Co. v. Transamerica Title Ins. Co.*, 817 F. Supp. 1263, 1278 (D. Md. 1992) *aff'd*, 989 F.2d 491 (4th Cir. 1993). An allegation of false light must meet the same legal standards as an allegation of defamation. *Piscatelli v. Van Smith*, 424 Md. 294, 306 (2012). In order to plead properly a defamation claim under Maryland law, a plaintiff must allege specific facts establishing four elements to the satisfaction of the fact-finder: (1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered harm. *Id.* For purposes of the first element, a defamatory statement is one that tends to

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expose a person to public scorn, hatred, contempt, or ridicule, which, as a consequence, discourages others in the community from having a good opinion of, or associating with, that person. Under the second element, a false statement is one that is not substantially correct. The plaintiff carries the burden to prove falsity. *Id.*

Ngo argues that Thanh's false light allegation as to the October 2, 2011 email fails to state a claim for two reasons.

First, she argues that the allegations are not even plausibly defamatory. Thanh, she says, quotes passages from the alleged actionable publication and draws his own conclusions about what the passages say or mean, but in fact Thanh's conclusions are not supported by the passages themselves. Second, Ngo

argues that none of the statements rise to the level of being “highly offensive to a reasonable person.”

The Court agrees with Ngo that it is not entirely clear that the passage quoted at paragraph 64 of Thanh’s Second Amended Complaint “plainly indicates that [Thanh] is a communist or under control of the hated communist government in Vietnam,”⁴ and agrees that

⁴ 64. One passage from this publication placing the plaintiff in a false light read as follows:

Note 5 on the said article: In reference to the sentence “the *popular newspaper* printed accusations,” I wonder if You Two (alluding to (VN communist president) Chairman Nguyen Minh Triet & Premier Nguyen Tan Dung – Translator’s Note) meant not to capitalize it as Dai Chung *Popular Newspaper*). I fear you did because it is the very publication of Mr. Hoai Thanh, who is mainly an auto body shop repairer holding screws and painting guns, not a pen-holder, but wants to be known as an intellectual; and, for this purpose, hired an overseas student from VN today to run his newspaper. I wonder if You Two incited this student or another unknown collaborator of his when either party wrote an article to accuse me of collecting about \$100,000 but sharing only \$5,000 with Rev. Nguyen Van Ly so that Mr. Hoai Thanh might be proud when readers assumed that he was the article’s author under the pen name Van Nam. I have sued Mr. Hoai Thanh for this wrongdoing. Additionally I proved my sending money by means of wire

transfer records, receipts by quick money-transferring agencies, and the receipts from spiritual leaders inside of Vietnam such as Rev. Nguyen Van Ly and Rev. Nguyen Huu Giai, as well as Ven. Thich Khong Thanh, and Thich Thai Hoa,

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the passage quoted at paragraph 65 does not literally call Thanh a “crook.”⁵ But for present purposes the Court allows that a trier of fact might reasonably infer that the passages could be read the way that Thanh reads them. Moreover, at least one of the quoted passages if proven and, viewed in the light most favorable to Thanh, does plausibly imply that he is “too stupid to run a newspaper,” as Thanh alleges. *See* Second Amended Compl. ¶ 64, ECF No. 7-1 (“Thanh, who is mainly an auto body shop repairer holding screws and painting guns, not a pen holder, but wants to be known as an intellectual; and for this purpose, hired an overseas student from VN today to run his newspaper.”). Other quoted passages explicitly state that Thanh is a cheater, an infidel,

v.v...since then, Popular Newspaper (Dai Chung) has lost ads and profits, and then has ceased publication itself. Also ever since, Hoai Thanh the auto body shop owner-turned editor has been disappearing from the Vietnamese Community of Greater Washington. Upon request, I’m faxing copies of wire money transfer from the account of CRFV at First Union Bank to Rev. Ly’s account at VietCom Bank, as well as quick money transfer records. You Two also can listen to Rev. Ly’s acknowledging receipt of more

than one hundred thousand U. S. dollars for flood relief in the special interview restored at website www.tudotongiao.org].

This passage plainly indicates that the plaintiff is a communist or is under the control of the hated communist government in Vietnam[.]” ECF No. 9-2, at 30-31.

⁵ 65. In the same false lighting publishing another passage states as follows:

Rebuttal 8:

Mrs. Minh, owner of a hair cuttery, voluntarily phoned me at will to retell me how she had lent Mr. Hoai Thanh money. (I’m still keeping the tape recording of the call as a souvenir.) When she wanted him to pay back, he reportedly asked her to come to his home and pick up all pieces of property that are equal in total value to his debt. Upon her arrival at his home, however, Mr. Hoai Thanh called the police to arrest her by reason of her illegal trespassing. And then how her hands were cuffed. But thanks to the bond by a close friend who formerly was an officer in the U.S. Army, she was set free. It’s memorable that this money loan happened between the end of 1970’s and the start of 1980’s when Vietnamese priests or Buddhist monks had not come to serve their congregations in the Washington area. Needless to say, on the other hand, the loan had never been recounted in *Popular Dai Chung Newspaper* for “nobody wants to tell the public that he or she is to blame as long as he or she not yet exposed to the public.” (This fact may be proved by *Popular Newspaper*’s readers, too.)

This calling of the plaintiff a crook placed him in a false light[.]” ECF No. 9-2, at 31-32.

and bankrupt. Second Amended Compl. ¶ 66, ECF No. 7-1 (“Mr. Hoi Thanh has cheated [a particular business owner] \$10,000. [. . .] But fooled up by Mr. Hoai Thanh the infidel man, [the business owner] sued Mr. Hoai Thanh even though Hoai Thanh’s wife pretended to lose consciousness in the court and Hoai Thanh has filed bankruptcy.”).

Finally, and most significantly, the Second Amended Complaint quotes a passage from the October 2, 2011 publication that purports to describe Thanh's dealings with a Mrs. Minh, to whom Thanh supposedly owed a debt. The quoted passage states that "Mrs. Minh [. . .] voluntarily phoned me [Ngo] at will to retell me [Ngo] how she had lent Mr. Hoai Thanh money," and when Mrs. Minh arrived at Thanh's house to collect her debt, Thanh called the police to arrest Minh, and she was handcuffed, arrested, and set free on bond. Second Amended Compl. ¶ 65, ECF No. 7-1. But Thanh's Second Amended Complaint references a deposition of Mrs. Minh taken in *Thanh I*, in which Mrs. Minh, contrary to what Ngo was maintaining, stated that no such arrest and no such handcuffing actually took place. Thanh asserts that this deposition demonstrates that Ngo knew of the falsity of Ngo's email broadcast on October 2, 2011. *Id.*

The Court finds that, viewed in the light most favorable to Thanh, the Second Amended Complaint sufficiently alleges that Ngo personally published what might be fairly construed as derogatory statements about Thanh on October 2, 2011. Assuming that these statements were in fact published, the Court finds it plausible that specific accusations of cheating business owners and/or of arbitrarily causing individuals to be arrested when in fact they were not arrested would expose a person so accused to public scorn, and would discourage others in the community from or associating with that person. At this stage, therefore, the Court declines to hold as a matter of law that such statements, if proven, would not be highly offensive to a reasonable person. The

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Court also finds it plausible that such statements, if proven, were not substantially correct, and that Ngo might even be found to have acted in reckless disregard of that falsity.

Accordingly, the Court **DENIES** Ngo's Motion to Dismiss Thanh's false light claim as to the October 2, 2011 broadcast.

F.

In her Motion for a More Definite Statement, Ngo argues that the Second Amended Complaint is so confusing and so saturated with argument and recitation of extraneous matters that it is impossible for her to file a meaningful answer in accordance with Federal Rule of Civil Procedure 8(b). The Court shares Ngo's concerns; the Second Amended Complaint is hard to follow. However, in light of the very substantial narrowing of the claims in this case which the Court has just accomplished, *i.e.* it is limited solely to the October 2, 2011 event, which in turn concerns one mass email apparently already in Ngo's possession, the Court finds that a more definite statement of the claim is not necessary. Accordingly, Ngo's Motion for a More Definite Statement is **DENIED**.

G.

A final word—for now. The Court has had considerable difficulty wading through the records in *Dai Chung I*, *Dai Chung II*, *Thanh I*, and *Thanh II*. Henceforth, this case must proceed differently. Counsel are **DIRECTED** to adhere to the following guidelines in all future filings in this case.

When making any reference to any document in the record, counsel **SHALL** cite the title of the

document at issue, as well as the relevant electronic case filing number (or, if the document has not yet been assigned an electronic case filing number, the exhibit number), as well as the relevant page number, as well as the relevant paragraph number (if applicable).

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Characterizations of documents in the record, without accompanying pinpoint citations, will not be entertained. If referencing a document contained in the record of another case (such as *Thanh D*), counsel **SHALL** so indicate. Any reference to a transcript of a hearing or deposition **SHALL** cite the date of the deposition and the page and line numbers of the relevant excerpt. Any citation to case authority **SHALL** quote the relevant language and specify the page number that contains the cited proposition. General references to a case, without an accompanying pinpoint citation, are unacceptable. For further guidance, counsel are directed to consult Rules B4.1.2 and B7.1.2-4 of *The Bluebook: A Uniform System of Legal Citation*.

A separate Order will **ISSUE**.

/s/

PETER J. MESSITTE

UNITED STATES DISTRICT JUDGE

May 8, 2015

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

HOAI THANH *

*

Plaintiff *

*

v. * Civil No. **PJM 14-448**

*

HIEN T. NGO *

*

Defendant *

*

ORDER

Upon consideration of Ngo's Motion to Dismiss, ECF No. 7, it is, for the reasons set forth in the accompanying Memorandum Opinion, this 8th of May, 2015

ORDERED

1. Ngo's Motion to Dismiss is **DENIED** as to the October 2, 2011 false light invasion of privacy claim;

2. Ngo's Motion to Dismiss is **GRANTED WITH PREJUDICE** as to all other claims;

3. Ngo's Motion for a More Definite Statement, ECF No. 7, is **DENIED**; and

4. Counsel are **DIRECTED** to adhere to the following guidelines in all future filings in this case:

- a. When making any reference to any document in the record, counsel **SHALL** cite the title of the document at issue, as well as the relevant electronic case filing number (or, if the

document has not yet been assigned an electronic case filing number, the exhibit number), as well as the relevant page number, as well as the relevant paragraph number, if applicable. Characterizations of

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documents in the record, without accompanying pinpoint citations, will not be entertained.

- b. If referencing a document contained in the record of another case (such as *Thanh I*, counsel **SHALL** so indicate.
- c. Any reference to a transcript of a hearing or deposition **SHALL** cite the date of the deposition page and the line numbers of the relevant excerpt.
- d. Any citation to case authority **SHALL** quote the relevant language and specify the page number that contains the cited proposition. General references to a case, without an accompanying pinpoint citation, are unacceptable.
- e. For further guidance, counsel are **DIRECTED** to consult Rules B4.1.2 and B7.1.2-4 of The Bluebook: A uniform system of citation.

_____/s/_____
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT
COURT

FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

HOAI THANH,))

Plaintiff,) Case No. 11-cv-01992 (PJM)

)

vs.))

(Bankruptcy Chapter 7

HIEN THI NGO,) Case No. 09-16698 WIL

) Adverse Case No. 11-00232 WIL)

Defendant.)

AMENDED COMPLAINT

1. The creditor, Hoai Thanh (“Hoai”), acting by
and through his undersigned counsel,

* * * * *

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5. For years, and continuing well into 2006 (for example, on April 6, 2006) after Hoai filed suit on these matters for the second time in federal court, Hien, along with co-defendants, engaged in a sustained campaign against Hoai of defamation, of casting Hoai in a false light and of intimidating him, stirring up threats of violence against him within the Vietnamese-American community in 22 states and the District of Columbia.

* * * * *

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9. Hien and her co-defendants attacked particularly any persons such as Hoai, who owned or ran, however small by comparison, any Vietnamese-

language medium such as Hoai's small newspaper, Dai Chung. Hoai and others like him and their small media became the target of further deceptions of the Vietnamese community and extensive campaigns by Hien and her co-defendants to cast Hoai and the other small Vietnamese newspaper owners and operators, but particularly Hoai, in a false light because they asked questions about what was going on with the finances of Hien and Hung and their corporations that they operated.

* * * * *

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This was after the defendant had filed for bankruptcy so that, with regard to the plaintiff, no statute of limitations under Maryland law has been running since. A copy of this email as posted on Google on October 2, 2011 is attached hereto as Exhibit 1 to this complaint and is incorporated herein by reference.

* * * * *

PLAINTIFF DEMANDS A TRIAL BY JURY ON
ALL ISSUES SO TRIABLE UNDER
THE CONSTITUTION AND LAWS OF THE
UNITED STATES.

Respectfully submitted,

/s/

Laurence A. Elgin Bar No 13609

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* * * * *

**This was after the defendant had filed for
bankruptcy so that, with regard to**

the plaintiff, no statute of limitations under Maryland law has been running since.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Greenbelt Division)

HOAI THANH)

2820 Poag Street)

Alexandria VA 22303 ,))

Plaintiff,) Case No. _____

)

vs.))

(Bankruptcy Chapter 7

HIEN THI NGO) Case No. 09-16698 WIL

8001 Bradley Blvd)

Bethesda, MD 20817,) Adverse Case No. 11-00232

WIL)

)

Defendant.)

COMPLAINT

* * * * *

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10. This Court is in a position to proceed in this matter because of the operation of two tolling statutes as they apply to the facts of the case. One is the effect of the Federal Tolling Statute which is found at 28 U.S.C. § 1367(d) upon the pendant counts that were in the plaintiff's original filings of his case in this court. The second is the effect of the Maryland statute, found in the Maryland Code in the

Courts and Judicial Proceedings Article at § 5-202 where it says that when a “debtor files a petition in insolvency which is later dismissed, the time between the filing and and the dismissal is not included in determining whether a claim against the debtor is barred by the statute of limitations.” Here the defendant filed her petition in bankruptcy after she was sued in the Montgomery County Circuit Court and that filing of her petition was on April 16, 2009. Since she has not been discharged from her debt to the plaintiff, no statute of limitations has been running since that date.

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This was after the defendant had filed for bankruptcy so that, with regard to the plaintiff, no statute of limitations under Maryland law was running.

* * * * *

Respectfully submitted,
/s/

Laurence A. Elgin Bar No 13609
Counsel for Plaintiff

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* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)
HOAI THANH,)
2820 Poag Street)

Alexandria VA 22303,)
)
 Plaintiff,) Case No. 8:14-cv-00448-PJM
)
 vs.)
) (Bankruptcy Chapter 7
 HIEN THI NGO,) Case No. 09-16698 WIL
) Adverse Case No. 11-00232 WIL)
 Defendant.)
FIRST AMENDED COMPLAINT
 * * * * *

2. In fact in a prior iteration of this same litigation, (not a different and distinct case due to tolling statute) in the Circuit Court for Montgomery County, Maryland, at a hearing at which the defendant herein attended, took the stand and contested the amount, the damages from acts complained of herein were determined to be one million dollars (\$1,000,000). This was at a time when the defendant herein had petitioned for bankruptcy and the action there against her (as opposed to co-defendants in the state proceeding) was automatically stayed as to the defendant.

* * * * *

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* * * * *

10. This Court is in a position to proceed in this matter because of the operation of two tolling statutes as they apply to the facts of the case. One is the effect of the Federal Tolling Statute which is found at 28 U.S.C. § 1367(d) upon the pendant counts that were in the plaintiff's original filings of his case in this court. The second is the effect of the

Maryland statute, found in the Maryland Code in the Courts and Judicial Proceedings Article at § 5-202 where it says that when a “debtor files a petition in insolvency which is later dismissed, the time between the filing and the dismissal is not included in determining whether a claim against the debtor is barred by the statute of limitations.” Here the defendant filed her petition in bankruptcy after she was sued in the Montgomery County Circuit Court and that filing of her petition was on April 16, 2009. Since she has not been discharged from her debt to the plaintiff, no statute of limitations has been running since that date with regard to her. The parallel case against her in the Montgomery County Circuit Court is still pending there as against her because of the litigations in this court in which she is a defendant because of her bankruptcy although there the case there against her brother and their two corporate entities has been decided there in favor of the plaintiff in the amount of one million dollars (\$1,000,000).

* * * * *

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63. ...This was after the defendant had filed for bankruptcy so that, with regard to the plaintiff, no statute of limitations under Maryland law was running.

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This was at a time when the defendant herein had petitioned for bankruptcy and the action there

against her (as opposed to co-defendants in the state proceeding) was automatically stayed as to the defendant.

* * * * *

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10. This Court is in a position to proceed in this matter because of the operation of two tolling statutes as they apply to the facts of the case. One is the effect of the Federal Tolling Statute which is found at 28 U.S.C. § 1367(d) upon the pendant counts that were in the plaintiff's original filings of his case in this court. The second is the effect of the Maryland statute, found in the Maryland Code in the Courts and Judicial Proceedings Article at § 5-202 where it says that when a "debtor files a petition in insolvency which is later dismissed, the time between the filing and and the dismissal is not included in determining whether a claim against the debtor is barred by the statute of limitations."

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* * * * *

This was after the defendant had filed for bankruptcy so that, with regard to the plaintiff, no statute of limitations under Maryland law was running.

* * * * *

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07/24/14 Page 1 of 68

This was at a time when the defendant herein had petitioned for bankruptcy and the action there against her (as opposed to co-defendants in the state

proceeding) was automatically stayed as to the defendant.

* * * * *

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* * * * *

10. This Court is in a position to proceed in this matter because of the operation of two tolling statutes as they apply to the facts of the case. One is the effect of the Federal Tolling Statute which is found at 28 U.S.C. § 1367(d) upon the pendant counts that were in the plaintiff's original filings of his case in this court. The second is the effect of the Maryland statute, found in the Maryland Code in the Courts and Judicial Proceedings Article at § 5-202 where it says that when a "debtor files a petition in insolvency which is later dismissed, the time between the filing and the dismissal is not included in determining whether a claim against the debtor is barred by the statute of limitations."

* * * * *

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* * * * *

This was after the defendant had filed for bankruptcy so that, with regard to the plaintiff, no statute of limitations under Maryland law was running.

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07/17/14 Page 13 of 23

VII. MORE OF THE SAME PLUS AN INVALID S/L ARGUMENT

Another of the repetitions of the invalid arguments advanced in the defendant's Rule 12(b)(1) arguments

is contained in the paragraph of her Motion for Dismissal which begins at the bottom of page 5 and continues on to page 6. ...Once again it is an argument advanced by the defendant in prior filings and is one whose fallacious nature we have pointed out. We speak of the statute of limitations argument. Statutes of limitations for torts, of course, are set by state law. As we have pointed out before and is here being ignored, Maryland has a specific statute of limitations statute which applies to the present situation. It is found in the Courts and Judicial Proceedings Article of the Maryland Code at § 5-202. It is entitled: **“Time between petition in insolvency by debtor and dismissal of petition does not defeat claim.”** Its text reads as follows:

If a debtor files a petition in insolvency which is later dismissed, the time between the filing and the dismissal is not included in determining whether a claim against the debtor is barred by the statute of limitations. (An.Code 1957, art. 57, § 9; 1973, 1st Sp. Sess., ch. 2, § 1.)

A Maryland appellate court has made it clear that the “petition in insolvency” referred to in this section of the Code includes a federal bankruptcy filing. *Ali v. CIT Tech. Fin. Servs*, 188 Md. App. 269, 981 A.2d 789 (2009).¹ The term “dismissal” is not defined in the statutes. Therefore, it has its plain meaning. As we have pointed out, the defendant’s bankruptcy has not been discharged, and, therefore, has not been “dismissed” within the plain meaning of that term vis-à-vis the plaintiff. Therefore, no statute of limitations has been running on any tort cause of action of the plaintiff against the defendant since she filed bankruptcy. The causes of action arising in

2011, therefore, are ones in which the statute of limitations has not run for a single day at this point. This argument is invalid.

¹Oddly enough the defendant submitted this case as one of her cases in her exhibit book for the May 28, 2014 hearing before the Court at case no. 2. Perhaps closer attention would prevent the repeating of invalid arguments.

* * * * *

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08/19/16 Page 1 of 19

**PLAINTIFF'S MEMORANDUM OF LAW AND
FACT IN SUPPORT OF HIS RULE 59(e)
MOTION FOR CORRECTION OR
AMENDMENT OR, IN THE ALTERNATIVE,
FOR RECONSIDERATION PURSUANT TO
RULE 60(b)(1) AND/OR (3)**

**I. THE MARYLAND TOLLING STATUTE
APPLIES TO FEDERAL BANKRUPTCY**

The Courts & Judicial Proceedings Article of the Code of Maryland, at §5-202, states:

§5-202 If a debtor files a petition in insolvency which is later dismissed, the time between the filing and the dismissal is not included in determining whether a claim against the debtor is barred by the statute of limitations.

An exhaustive history of this statute in litigation involving its application to one who has filed for federal bankruptcy protection was given by the Court of Special Appeals of Maryland in *Ali v. CIT Financial Services Corp., Inc.*, 188 Md. App. 269, 981 A.2d 759 (2009). That opinion of the Maryland Court

of Special Appeals was then affirmed by the Court of Appeals of Maryland, also delving into the history of the statute and the legislative intent behind it over its history, which, in the opinion of the Court of Appeals, confirmed its plain language, and, thus, made clear and inescapable its application to federal bankruptcy proceedings. *Ali v. CIT Financial Services Corp., Inc.*, 416 Md. 249, 6 A.3d 890 (2010).
* * * * *

The defendant filed her petition in federal bankruptcy on April 6, 2009 in the United States Bankruptcy Court for the District of Maryland, Greenbelt Division. See Bankruptcy Case No. 09-16698 WIL. The Petition of the defendant for bankruptcy under Chapter 7 is found at **Dkt#1** in that case. The defendant filed a copy of the first 3 pages of the Petition as Exhibit 8 to her Motion for Summary Judgment at issue (**Dkt#21-9**). The defendant filed as Exhibit 9 to her Motion for Summary Judgment at issue a copy of the Order Granting Discharge in the main bankruptcy case, (**Dkt#21-10**) which was filed on 8/13/2012 in Bankruptcy Case No. 09-16698-WIL as **Dkt#305** in the general bankruptcy case. Defendant did so, however, without noting that under **Debts That are Not Discharged** on that order, on p. 2 of that Order, paragraph h. applies to this case. The said ¶ h states: “h. Debts that the bankruptcy court has specifically decided or will decide in this bankruptcy case are not discharged.” That exception applied here. The defendant’s bankruptcy case was not dismissed as to the plaintiff because of that exception until the plaintiff’s Adversary Case in the bankruptcy court was closed. That did not occur until after the hearing held by this Court in Case No. 11-cv-01992 PJM. The

Court has termed this original case before it as “Thanh I.” This hearing was held on May 8, 2015 and in it this Court rendered judgment against the plaintiff in “Thanh I.” However, the clerk entered the Order of Judgment three days later, on May 11, 2015. As a result, the Adversary Case of the plaintiff against the defendant as it had existed in the bankruptcy court was not dismissed and closed there until May 14, 2015 (**Dkt#308** in Bankruptcy Adversary Case No. 11-00232 WIL, **FINAL DECREE**).

* * * * *

Plaintiff requests that this Court take judicial notice that no fewer than three of the defendants other creditors filed accusations of fraud against the defendant in her original bankruptcy case.

To continue the history of this litigation: upon a Motion for Withdrawal of Reference, which this Court granted, (**Dkt##1**, in Thanh I, Motion to Withdraw Reference as to the Adversary Case Pursuant to 28 USC 157(d), and **8**, Order Granting Motion to Withdraw Reference) the bankruptcy adversary case led to Case No. 11-cv-01992 PJM before this court. Again in turn, Thanh I led to this case when the plaintiff filed a Motion to Amend in Thanh I (See **Dkt#96**, Motion to Amend/Correct Complaint, which this Court denied, (**Dkt#105**, Order, p. 2), giving the plaintiff, instead, permission to file this case, Case No. 8:14-cv-00448-PJM, which the Court has termed as Thanh II. It was when the plaintiff filed **Dkt#96** in Thanh I on November 27, 2013, as **Dkt#96-1** that plaintiff filed his Proposed Amended Complaint in which he set out, in ¶ 66, the allegation of the publication on the Internet of the defamatory and falsely lighting blast email on the

Internet on Google. The Court has noted this date. This was more than seventeen and one half months before the **FINAL DECREE** dismissing the defendant from the bankruptcy as regards the plaintiff's adversary cases against her.

* * * * *

/s/

* * * * *

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08/22/16 Page 1 of 5

**PLAINTIFF'S MEMORANDUM OF LAW AND
FACT IN SUPPORT OF HIS MOTION
FOR ALLOWANCE OF LEAVE TO
AMEND/CORRECT COMPLAINT**

I. INTRODUCTION: CORRECTIONS SOUGHT

Plaintiff seeks to correct his Complaint in that he seeks to 1) eliminate language referring to parallel and predecessor cases being pending when they no longer are; 2) he seeks to add a specific reference to the date of October 27, 2007, which is the date upon which, according to the Court at **Dkt#28**, p. 13, the publication of the defamatory and falsely lighting material at issue occurred. This is the material which the plaintiff found archived on Google as of October 2, 2011 according to his affidavits and testimony and interrogatory answers.

On the last point: it is clear that this correction adds the October 27, 2007 date as relating back to date of October 2, 2011 date alleged by the plaintiff in his complaints. After all, the now-established date of publication of October 27, 2007, admitted and acknowledged by the defendant clearly relates back to allegation of the plaintiff that the material was found archived on Google on the October 2, 2011 date. This is so because it is the very same material

which defendant admits she published on the Internet on October 27, 2007 which, as a person familiar with the Internet and being one who published on the Internet a good bit she would have reasonably anticipated would be archived on Google. So this correction does not add any new legal theory. Nor does it change the issue of timely filing in light of the Maryland tolling statute which the Court erroneously ignored in its Memorandum Opinion granting summary judgment to the defendant. Further, regardless of the date specified. The incidents complained of remain the same, namely, the publishing on the Internet of the same allegedly defamatory and falsely lighting material.

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Page 1 of 15

I. INTRODUCTION: DEFENDANT'S PRINCIPAL OPPOSITION ARGUMENT

The defendant's Opposition to which this Reply is addressed exhibits a good deal of factual and legal confusion which needs to be addressed in order to elucidate the invalidity of the arguments which it advances. There is also misrepresentation by omission. In order to clarify the arguments in this Reply, plaintiff addresses these misrepresentations and confusions.

As set out on p. 3 of **Dkt#32**, the essence of the defendant's Opposition argument is that the Second Amended Complaint in this case (**Dkt#9-3**) alleged a publication date in its Count IA of October, 2011, of an article defaming and falsely lighting the plaintiff and that the defendant herself did not publish the article alleged on or near that date. In support of her argument the defendant introduces a new principal argument not heretofore seen. It consists of an

assertion that the timeliness of the plaintiff's complaint is governed, not by the applicable statute of limitations set out by the Maryland legislature, but rather by provisions of the federal bankruptcy code. The defendant hinges this argument upon words used by the Maryland legislature in enacting Md. Code, Cts. & Jud. Proc. Art. § 5-202.¹ The particular words are the noun "dismissal," and its related verb, "dismissed." The defendant argues that in enacting the tolling statute, the Maryland legislature was using these words so as to cause the matter here to be not subject to the tolling statute, but rather to a section of Title 11 of the United States Code, namely §108(c) of that title.²

¹The MD Code section is on P.1 of **Dkt #30-1**.

²A copy of this provision of the U.S. Code is on P.6 of **Dkt #32**.

This argument is not valid and does not cohere. The argument depends upon an unsupported assumption that the Maryland legislature, in choosing the words "dismissal" and "dismissed," brought bankruptcy petitions to fall under preemptive federal law regarding the automatic stay in bankruptcy, so as to render the Maryland tolling statute at issue null and void, unenforceable, with the result that the overlooking of the Maryland tolling statute is not a "clear error of law, and/or," for that matter, does not "prevent manifest injustice." In fact, according to the Maryland Court of Appeals, the state legislature, in enacting the tolling statute, was purposefully passing a statute that was apart from and supplemental to the federal bankruptcy statute in

question as the Maryland Court of Appeals made clear the legislature was entitled to do under federal case law.

II. A FAILURE TO READ THE MARYLAND CASE AUTHORITY CAREFULLY

In **Dkt#32**, p. 5, the defendant cites, as did the plaintiff in bringing his Rule 59(e) Motion at issue, the Maryland Court of Appeals and Court of Special Appeals opinions about the Maryland tolling statute and its over 200 years of history in delving extensively into the intent of the Maryland legislature both as to the plain meaning of the words it chose to use in enacting the tolling statute over and over again and to its intent in choosing the words it chose. *Ali v. CIT Tech. Fin. Servs.*, 416 Md. 249, 268; 6 A. 3d 890, 901 (2010) *quoting Ali v. CIT Tech. Fin. Servs.*, 188 Md. App. 269 at 283-84, 981 A.2d 759 at 767(2009). Looking at these Maryland opinions in relation to the issue here the defendant fails to note that the Maryland Court of Appeals in its cited decision, at p. 59, addressed the issue of the U.S. Code § 108, the section which defendant argues is pre-emptive, and said concerning it:

...in 1978 Congress passed what is codified now as 11 U.S.C. § 108, which states,in pertinent part: [I]f applicable nonbankruptcy law ... fixes a period of continuing or commencing a civil action in a court other than in bankruptcy court on a claim against the debtor, ... and such period has not expired before the date of the filing of the petition, then such period does not expire until the latter of —(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the

termination or expiration of the stay....That is, “[f]ederal law assured the plaintiffs 30 days in which to pick up the baton; if states want to give plaintiffs additional time, that is their business.” *Pettibone Corp. v. Easley*, 935 F.2d 120, 121 (7th Cir.1991). It is at this point that the Md. Code (1974 Repl. Vol.), Courts & Judicial Proceedings Art., § 5-202 becomes relevant, **as the Maryland legislature has made it its business to give plaintiffs additional time.** (bold emphasis added).

This exposes the invalidity of the defendant’s argument that the Maryland legislature intended to have had the tolling statute in question inapplicable here because of its choice to use the words “dismissal” and “dismissed.” Further, it puts forward, had the opinion by the Maryland Court of Appeals been actually read, federal Court of Appeals authority that Title 11, §108 of the U.S. Code does not have the controlling, preemptive effect argued by the defendant. The defendant has not put forth any contravening authority. Rather, she has misrepresented the authority which she herself cites and relies upon.

* * * * *

**Activity in Case 8:14-cv-00448-PJM Thanh v.
Ngo Order on Motion to Amend/Correct**

**MDD_CM-
ECF_Filing@mdd.uscourts.gov**

10:12 AM (4
hours ago)

to MDDdb_ECF

U.S. District Court**District of Maryland****Notice of Electronic Filing**

The following transaction was entered on 1/3/2017 at
10:12 AM EST and filed on 1/3/2017

Case Name: Thanh v. Ngo

Case Number: 8:14-cv-00448-PJM

Filer:

WARNING: CASE CLOSED on 07/22/2016

Document Number: 36(No document attached)

Docket Text:

**PAPERLESS ORDER DENYING [30] Plaintiffs'
Motion to Amend/Correct; AND PAPERLESS
ORDER DENYING [31] Plaintiff's Motion to
Amend/Correct. Signed by Judge Peter J.
Messitte on 12/29/2016. (rass, Chambers)**

Appeal: 17-1110 Doc: 10 Filed: 03/01/2017 Pg: 1 of 18

In The

United States Court of Appeals

For The Fourth Circuit

ON APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF

MARYLAND AT GREENBELT

HOAI THANH,

Plaintiff-Appellant

v.

HIEN THI NGO,

Defendant-Appellee

BRIEF OF APPELLANT HOAI THANH

II. STATEMENT OF ISSUES

A) Did the court err in deciding as it did in its Orders and Opinions in that, in making the decisions, it completely ignored the Maryland tolling statute found at Maryland Code, Article Courts & Judicial Proceedings, §3-202 which tolls any statute of limitations and prevents it from running with regard to a person who has filed for bankruptcy from the time of the filing of the bankruptcy petition until the bankruptcy is terminated? B) Did the court err in ignoring the said statute where Thanh mentioned the statute in his Complaint as first filed in a preceding case in a Motion to Amend, and then, when that Motion to Amend was denied and he was ordered instead to open a new case, this case, and file his proposed amended complaint which became the opening complaint in this case and, subsequently, through several amendments in this case continued to allege the tolling statute as well as in a brief filed in this case and, then, after summary judgment was rendered against him, mentioned it again in a post-judgment Rule 59(e) Motion? C) Did the Court erroneously ignore the first filing of the relevant claim invoking the statute in the predecessor case in making its decisions? D) Did the court err in completely failing in any way to take into account the actual date of the filing of the bankruptcy petition by Ngo and the date upon which that bankruptcy was finally discharged with regard to Thanh, particularly in regard to the date of the first filing of Thanh's Complaint involving the charges in question in the

predecessor case? E) Did the court err in declining to find that defamatory and falsely lighting allegations by Ngo would be offensive to an ordinary member of the Vietnamese language community? F) Did the court err in failing to consider archiving on Google as a reasonably anticipated republishing or natural and probable consequence of defamatory and falsely lighting material? G) Did the court err in failing to consider republishing on a popular Vietnamese language website reaching into multiple countries as something to be reasonably anticipated as a reasonable and probable consequence when Ngo blasted out an email to tens of thousands of Vietnamese language readers? H) Can a defendant negate the effect of the Maryland tolling statute by simply denying it in answer to an allegation of it in a complaint? I) When a discharge in bankruptcy is stayed as to a particular creditor who has sued and only operates with regard to other creditor-claimants pending a discharge of that particular creditor's claim, does that terminate the operation of the Maryland tolling statute as to that creditor excepted from the discharge? J) Did the court err in denying Thanh's post-judgment motions?

* * * * *

In her answer, in response to the allegation in the Second Amended Complaint of the Maryland Tolling Statute, Ngo simply denied the statute as if a litigant can deny in an Answer a controlling statute affecting the statute of limitations. (JA 008-009 ¶ 10, JA 287 ¶ 10).

* * * * *

Appeal: 17-1110 Doc: 25 Filed: 08/15/2017 Pg: 1 of 21

APPELLANT THANH'S PETITION FOR PANEL

REHEARING OR CONSIDERATION EN BANC

* * * * *

The lower court opinion is in conflict with opinions of the Supreme Court and, to a significant extent, rulings concerning statute of limitations issues in this and other circuits, in particular a case in this circuit in which the opinion was authored by its former chief judge.

* * * * *

In particular there is a significant amount of case law, particularly Supreme Court opinions which firmly established that federal courts are to take into consideration both the substance and procedural effect of state law on the statute of limitations question, which the lower court, as pointed out in the briefing, completely failed to do here and was then, in turn, affirmed by this Court without taking cognizance of or delving into the issue, much less analyzing and reasoning about it. The purpose of this Petition is to delve into that failure and illustrate that both the lower court and, correspondingly, this Court, because of its affirmance of the lower court without analysis or reasoning, overlooked and misapprehended essential points of law and fact in this case.

* * * * *

The Supreme Court, over a period of years, in several cases, developed the requirements that federal courts are obliged to follow in considering the statutes of limitations of the several states when they are at issue in a case. This development was well described in an article in the Duke Law Journal in 1971 under NOTES, entitled: "STATE STATUTES OF LIMITATIONS IN FEDERAL COURTS: BY WHOM IS THE STATUTE TOLLED?"

* * * * *

That confusion was greatly cleared up in 1842 in the landmark case of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). In *Swift* the Supreme Court held that when federal courts decide diversity cases they are required to apply state statutory law, although not state decisional law. In this case that means, per the Supreme Court, that the lower court and this court are required to apply the Maryland tolling statute which was pled in this case. Maryland Code, Article Courts & Judicial Proceedings, §5-202 is the relevant state statute of limitations. It tolls any statute of limitations and prevents it from running with regard to a person who has filed for bankruptcy from the time of the filing of the bankruptcy petition until the bankruptcy is terminated.

In this case both the lower court and this court have paid no attention to this statute although since 1842 every federal court has been required to do so.

* * * * *

After the Supreme Court's 1842 decision in *Swift*, *supra*, a great deal of confusion and disorganization ensued in the federal court system. Because *Swift* mandated that only state statutes about statutes of limitations had to be noticed and obeyed in federal courts, a body of law grew up in federal courts wherein some federal courts noticed state decisional law and some did not, with which way each federal court went on the point being decided on a case by case basis with no clear guidance. This was ended in 1938 in the landmark decision of *Erie Railroad Co. v. Tompkins*, 304 U.S. 68 (1938), opinion by Mr. Justice Brandeis. In *Erie* the Supreme Court announced that the 1787 Federal Judiciary Act phrase "the laws of the ...states" had been erroneously limited to state

statutory law. Henceforth it would be interpreted to include state decisional law as well as state statutory law.

* * * * *

The law as thus established by statute and decision was persistently ignored in the lower court, and that failure to examine this applicable and controlling law has continued in this Court, in the face of persistent attempts by Thanh to bring it up and have it applied. In *Guaranty Trust Co. v. York*, (326 U. S. 99 (1945), it announced a new rule, the “outcome determinative” test requiring a federal court hearing a diversity case to apply the forum state’s statute of limitations, where the failure to do so would “significantly affect the result of the litigation....” as the failure to apply the state statute did here. Further, in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 531-34 (1949) the high court held that for the purpose of tolling, a state statute of limitations law is sufficiently “substantive” to prevail over federal law where the Federal Rules and state procedure law differ as to the point which an action is deemed to have commenced.

* * * * *

/s/

* * * * *

Case 8:15-cv-03441-PJM Document 30-1 Filed
07/01/16 Page 1 of 4

**PLAINTIFF’S MEMORANDUM IN SUPPORT
OF HIS RULE 60(b)(3) MOTION FOR
FRAUD BY THE DEFENDANT, (AND TO
INCLUDE RULE 60(d) FRAUD AS WELL,
OR, IN THE ALTERNATIVE, FOR
ALTERATION OR AMENDMENT OF
JUDGMENT UNDER RULE 59(e)**

The proof the plaintiff puts before the Court in this motion consists of excerpts from the defendant's depositions in which she concedes that the letters at issue here in the allegations of defamation and false lighting of the plaintiff in the underlying case, Case No. 8:11-cv-01992-PJM (termed by the "Court Thanh 1") were read on her show. As the Court will recall, there came a point in the underlying litigation, after it had gone on for years, when the defendant suddenly asserted that the letters defaming and falsely lighting the plaintiff were not from her show at all, but rather were from some entirely different show which she and her brother attested was broadcast on the radio operation run by her brother. As the Court will also recall, the plaintiff contested with numerous affidavits this newly contrived, different, show as a fabrication, affidavits which the Court chose to find not credible at the summary judgment phase. The Court will further recall that it, at that late point in the litigation, characterized the litigation as having come to the point where the pivotal issue was whether or not it was the defendant's show upon which the defamatory and falsely lighting material was broadcast.

Since the plaintiff now shows in this motion that the defendant herself, when deposed under oath, conceded that the very letters material at issue was from her show, this illustrates that in the Opposition now addressed, the statement above was fraudulent. Further, since counsel for defendant was present, representing the defendant, at her deposition, he is responsible for the above false statement as much as the defendant is.

Exhibit 1 to this Support Memorandum is an excerpt from the deposition of the defendant which was taken by the undersigned with the plaintiff present as well as defendant's counsel. It consists of the pages from the deposition transcript from 51 through 62. In this excerpt, the defendant admits that the material in the Complaint from the underlying case, which is set out in Vietnamese in the Complaint in Thanh 1 at paragraph 69, and then in English at paragraph 71, is from her show. The Complaint in Thanh 1 is at **Dkt#10** in that case.

It is inescapable that in this excerpt the defendant admits to the very material as being from her show that she and her brother then committed perjury about when they fabricated a story about there being a show of the man Le Thi who was a reader, it was shown in Thanh 1, on the radio show of the defendant. The Court will recall that it let the defendant off the hook by positing, in the face of numerous affidavits to the contrary, that Le Thi could have been a reader on the defendant's show and also have had a show of his own, an unwarranted inference in defendant's favor.

Exhibit 1, in inescapably exposing the fraud engaged in by the defendant with the cooperation of her counsel, relates to the following paragraphs in the Complaint in the present case: 48, 55, 58, 65 and 66.

* * * * *

Case 8:11-cv-01992-PJM Document 129 Filed

06/28/14 Page 1 of 22

STATEMENT UNDER PENALTY OF PERJURY

IN THE UNITED STATES DISTRICT
COURT

FOR THE DISTRICT OF MARYLAND
 (Greenbelt Division)
 HOAI THANH,))
 Plaintiff,) Case No. 11-cv-01992 (PJM)
)
 vs.))
 (Bankruptcy Chapter 7
 HIEN THI NGO,) Case No. 09-16698 WIL
) Adverse Case No. 11-00232 WIL)
 Defendant.)

STATEMENT UNDER PENALTY OF PERJURY
STATEMENT OF LAC TRAN UNDER PENALTY
OF PERJURY

* * * * *

2) That she is a native speaker of the Vietnamese language who has come to learn and speak American English.

3) That she has been a listener continually to the Vietnamese language broadcasting of what was before 2002 up through 2006 called Vietnamese Public Radio or VPR which in Vietnamese was always announced in the broadcasts as **Dài Phát Thanh Việt Nam Hải Ngoại** and still does listen to such VPR broadcasts, which are always announced in Vietnamese with the same Vietnamese name just set out.

4) That she learned through listening to VPR a lot that VPR and its broadcasting operation were dominated and controlled by Hung Ngoc Ngo who was heard on its broadcasts at times and who also had her own regular show on VPR. Her show was known by the name of an organization that she controlled which was called, as translated into

English, the Committee for Religious Freedom in Vietnam, or CRFV.

5) That she, from hours of listening to VPR and the shows on it, including the CRFV show on it of Hien Thi Ngo, became familiar with the programming of VPR, which, during the years before 2002 up through 2006, was on a weekly schedule, a copy of which is attached to this statement and the programs set out on it as the schedule of programs that were on VPR in those years and does so from her familiarity with the programming on VPR as she listened for many hours to the programming on VPR as she listened for many hours to the programming on VPR at that time during different hours of the day and different days of the week.

6) That she listened often to the CRFV show of Hien Thi Ngo that was broadcast on VPR. As can be seen from the attached schedule, it was broadcast three times a week on Sundays 11 December 2005 at 9:30 PM to 10:30 PM and Sundays 10 December 2006 at 9 PM to 10 PM, on Thursdays 02 September 2004 at **1:30 AM to 2:30 AM**, and on **Thursday 06 April 2005 at 9:30 AM to 10:30 AM on schedule Trà Lòi Th□ Tin (answer letters)**. Usually these CRFV shows of Hien Thi Ngo were re-broadcasts of earlier shows that clearly had been recorded but...

11) That there was no other show at those times that had a name like Trà ... and was about answering letters.

12) In particular the man Le Thi was only a reader on the show of Hien Thi Ngo; he never had a show on VPR that was his show and Le Thi did not have a role reading on any show other than the show of Hien Thi Ngo.

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She states the above from her own personal knowledge under penalty of perjury this 20 day of June, 2014.

/s/

Lac Tran