IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILAN JANKOVIC, also known as PHILIP ZEPTER,	)	
Plaintiff,	)	
v.	)	Civ. No. 1:04 CV 01198 (RW)
INTERNATIONAL CRISIS GROUP, a non-profit organization,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S POST-REMAND RENEWED MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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INTRODUCTION

This litigation seeks to hold defendant International Crisis Group ("ICG") liable for alleged defamation and related torts. This Court twice dismissed the complaints filed in this action, and on all but one, narrow issue, was affirmed by the D.C. Circuit. *Jankovic v. Int'l Crisis Group*, 494 F.3d 1080 (D.C. Cir. 2007). The remaining issue, specifically remanded to this Court to address "in the first instance," is the subject of this motion.

The D.C. Circuit affirmed this Court's dismissal of all but one of the defamation and related claims by Philip Zepter, and all claims against ICG by former plaintiffs Fieldpoint B.V. and United Business Activities Holding, A.G.. Although Zepter and his companies presented myriad theories to this Court and the D.C. Circuit of how two reports and an e-mail published by ICG purportedly defamed them, the D.C. Circuit held only that one three-paragraph passage in "Report 145" (the "Remaining Passage")[1] was capable of a single, narrow defamatory meaning as applied to Zepter personally. 494 F.3d at 1091. Specifically, the D.C. Circuit ruled that a reader of the Remaining Passage could reasonably conclude "that Philip Zepter, personally, was a 'crony' of" or "actively in alliance with [former Serbian dictator Slobodon] Milosevic" and "supported the regime in exchange for favorable treatment." *Id.* The D.C. Circuit concluded that such a "tie" between Zepter and Milosevic was sufficiently odious to be capable of a defamatory meaning. *Id.*

Critically, however, the D.C. Circuit did *not* rule that Zepter's surviving defamation claim was actionable as a matter of law. To the contrary, the D.C. Circuit observed that ICG raised in this Court and again on appeal "various privileges and protections" that were not addressed in this Court's prior opinions and that, if applicable, would defeat Zepter's

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[1] The full text of the Remaining Passage is set forth on pp. 8-9.

surviving defamation claim as a matter of law. 494 F.3d at 1091. Accordingly, the D.C. Circuit remanded the case with instructions that, "in the first instance," this Court should "address the applicability and merits of the Opinion and Fair Comment Protection, the Fair Report Privilege, or the Neutral-Reportage Doctrine" to Zepter's surviving claims. *Id.* at 1091, 1092.

As discussed below, this Court should dismiss Zepter's surviving defamation claim, as well as the related claims for false-light invasion of privacy and tortious interference with business expectancy because the Remaining Passage is protected from such claims as a matter of law. Any conclusion a reader may derive from the Remaining Passage that Zepter was a "crony" of or "actively in alliance with" Milosevic and his regime is non-actionable opinion and also is based on a fair summary of fully disclosed official reports.

Under controlling law, any challenged statement "must be judged with an eye toward readers' expectations and understandings" of the context in which it is published. *Moldea v. New York Times Co.*, 22 F.3d 310, 315 (D.C. Cir. 1994) ("*Moldea II*"). "[O]ne must analyze a statement in its broad context to determine whether it implies the assertion of an objective fact." *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995). Where the context of the publication indicates that it contains subjective evaluations "quintessentially of a type readers expect to find" in the genre, the publication "must be given the constitutional 'breathing space' appropriate to the genre." *Moldea II*, 22 F.3d at 315. Here, the Remaining Passage appears in the context of Report 145, an analytical report that describes controversial and ambiguous events in Serbia of great public importance, interprets and evaluates those events, and makes specific, subjective recommendations for political and social change. In this context, statements or implications in the Remaining Passage about amorphous "ties"

between Zepter and the former Milosevic regime reflect ICG's interpretation of the inherently controversial subject of then-recent Serbian political and social events.

The Remaining Passage further discloses the basis for any conclusion derived by the reader that Zepter was allied with Milosevic. Opinions supported by facts and reasoning disclosed to the reader are not actionable under the First Amendment "'[b]ecause the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts.'" *Moldea II*, 22 F.3d at 317, quoting *Moldea v. New York Times Co.*, 15 F.3d 1137, 1144-1145 (D.C. Cir. 1994) ("*Moldea I*"). To the extent the Remaining Passage connects Zepter to Milosevic, it does so by: 1) revealing that the United States froze the assets of Zepter Banka specifically because of Zepter Banka's support for and alliance with the Milosevic regime, and 2) disclosing ICG's coupling of Zepter personally with Zepter Banka.

The Remaining Passage cites the U.S. Treasury Department website that reveals Zepter Banka's inclusion on the U.S. frozen assets list and incorporates by reference an official Executive Order (carrying the force of law) that directs that the list be comprised of those who were affiliated with or supported the Milosevic regime. The Remaining Passage further makes clear that ICG connected Zepter with those companies that bore his name for purposes of the analysis in the Remaining Passage. Thus, the implication in the Remaining Passage that Zepter was allied with the Milosevic regime is supported by facts and reasoning disclosed to readers and, therefore, is not actionable under the First Amendment. Moreover, because the Remaining Passage fairly summarizes and discloses the official documents supporting any such implication, it is protected from defamation claims by the common law

"fair report" privilege. *See Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985).

In addition to disclosure of its factual sources, the Remaining Passage further lays out ICG's deliberative process. The Passage opines that a "new Serbian oligarchy" of Milosevic-era financial structures formed in the post-Milosevic era. The Remaining Passage makes clear that "some" of the members of that oligarchy are the thirty paired companies and individuals (including "Zepter (Milan Jankovic, aka Filip Zepter)") named in the second paragraph of the Remaining Passage, and that the basis for naming those pairings was because "many" in the pairings had at one time been on one or more of the E.U.'s visa ban list, the E.U.'s frozen assets list or the U.S.'s frozen assets list. The Remaining Passage further clearly explains that the E.U. and U.S. comprised these lists of persons and entities that the E.U. and U.S. determined had "supported" "Milosevic and the parallel structures that characterized his regime." The fact that Zepter Banka (one of the many "Zepter" companies) was on the U.S. frozen assets list is both undisputed in this litigation and confirmable by the reader through the footnote in the Remaining Passage.

The fact that ICG *also* believed that many of the "companies" in the oligarchy had affiliations with the Milosevic regime is made clear in the first paragraph of the Remaining Passage, but in terms that signal to the reader that he or she may disagree with the conclusions – *i.e.* that "some" of the companies were formed as "fronts" by State Security or Army Counterintelligence, while "others" operated at the "direct pleasure" of the ruling couple, and "many" profited from "special informal monopolies and the use of privileged exchange rates." The Remaining Passage also informs the reader in the third paragraph that

"the popular mind" "associated" the paired individuals and companies ("they and their companies") "with the Milosevic regime."

The D.C. Circuit has made clear that commentary is actionable only where the "interpretations are unsupportable by reference to the written work." *Moldea II*, 22 F.3d at 315. Here, the reader of the Remaining Passage can agree or disagree with the weight to be given to the "popular mind." The reader can disagree with ICG's decision to include any individuals in the "new Serbian oligarchy" based on the actions and benefits conferred on "some" or "many" of the "companies." The reader also can disagree with the decision of the U.S. and E.U. to put Zepter Banka (or any named other person or entity) on any official list and can disagree with the determination of the U.S and E.U. that the persons and entities on those official lists were supporters of the Milosevic regime. The information is available on the face of the Remaining Passage for the reader to make his or her own determinations. The Remaining Passage is classic political analysis and any reader's conclusion that Zepter is tied to the Milosevic regime is a supportable interpretation of that political analysis. As such it is fully protected under the First Amendment.

Finally, the Court also should dismiss Zepter's surviving false light privacy and tortious interference claims. Although the tort of false light invasion of privacy is distinct from the tort of defamation, "the same First Amendment protections apply." *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 627 (D.C. Cir. 2001). The law in the District of Columbia, as clarified by the District of Columbia Court of Appeals after the decision of the D.C. Circuit in this case, is that, "where the plaintiff rests both his defamation and false light claims on the same allegations," as Zepter does here, "the claims will be analyzed in the same manner." *Blodgett v. University Club*, 930 A.2d 210, 223 (D.C. 2007). Therefore, Zepter's surviving

false light claim should be dismissed under the same analysis that applies to his surviving defamation claim, and with their dismissal there is no tort that could be the basis for Zepter's tortious interference claim. For that reason, and because Zepter has not alleged that ICG disrupted any specific future business expectations, the Court also should dismiss Zepter's tortious interference claim. *See Sheppard v. Dickstein, Shapiro, Morin & Oshinsky*, 59 F. Supp. 2d 27, 34 (D.D.C. 1999).

FACTS AND BACKGROUND

I. INTERNATIONAL CRISIS GROUP

As the Court is aware from the prior pleadings, ICG is an independent, non-profit, non-governmental organization with some 145 staff members on five continents. ICG works through field-based analysis and high-level advocacy to prevent and resolve deadly conflict. Teams of political analysts are located within or close by countries at risk of outbreak, escalation, or recurrence of violent conflict. Based on information and assessments from the field, ICG produces analytical reports containing practical recommendations targeted at key international decisionmakers. ICG's reports and briefing papers are distributed widely to officials in foreign ministries and international organizations. ICG works closely with governments and those who influence them to highlight ICG's analyses and generate support for its policy prescriptions.

ICG's Board, which includes prominent figures from the fields of politics, diplomacy, business, and the media, is directly involved in helping to bring ICG's reports and recommendations to the attention of senior policymakers around the world. ICG is co-chaired by Christopher Patten, the former European Commissioner for External Relations, and Thomas Pickering, who had a five-decade diplomatic career serving as, among other positions, U.S. Undersecretary of State for Political Affairs, U.S. Ambassador to the United

Nations, and U.S. Ambassador to Russia, India, Israel, Nigeria, Jordan and El Salvador. ICG's President and Chief Executive since January 2000 is former Australian Foreign Minister Gareth Evans.

Recently ICG was listed as one of the "Top 10 Think Tanks in the World" by the Think Tanks and Civil Societies Program at the Philadelphia-based Foreign Policy Research Institute.[2] ICG's groundbreaking and critically important role in disseminating reports that address world crisis situations has been recognized by world leaders who read and depend upon those reports. For example, former President Bill Clinton declared (March 5, 2007):

> In the most troubled corners of the world, Crisis Group has been the eyes, the ears, and the conscience of the global community. Its mix of field-based analysis, well-reasoned policy recommendations, and high-level advocacy is a winning combination.[3]

Former Secretary of State, Colin L. Powell, considers ICG to be "one of the world's premier Non-Governmental Organizations," and he has praised the "ideas" and "insights" in ICG's reports." (Remarks of Colin Powell at ICG Reception (Oct. 10, 2003).) In Powell's words (*id.*):

> ICG tells power what it thinks and advocates with both passion and effectiveness. It is a continuous source of ideas and insights for Governments, Parliaments, International Institutions, the media and fellow NGOs.

Former United Nations Secretary General Kofi Annan[4] has described ICG as a "global voice of conscience, and a genuine force for peace" and commended ICG's

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[2] *Available at* http://www.fpri.org/thinktanksurvey.asp.

[3] *Available at* http://www.crisisgroup.org/home/index.cfm?id=1205&l=1.

[4] Former Secretary General Annan recently was elected to ICG's Board, a position that will be effective July 1, 2008.

"carefully argued" reports (Kofi Annan, United Nations Secretary General (October 5, 2002):[5]

> Your mediation work – and your leadership in early warning and conflict prevention – have been enormously important. So has your intellectual contribution to finding new approaches to long-standing conflicts.

II. REPORT 145

Report 145, entitled "Serbian Reform Stalls Again," was published by ICG on July 17, 2003. (Exhibit B to First Amended Complaint ("FAC"); see also Exhibit 1 to the Declaration of Amy L. Neuhardt dated May 2, 2008 ("Neuhardt Decl.").) In this 28-page report (not including appendices), ICG analyzes social and political events in Serbia following the assassination of Premier Zoran Djindjic on March 12, 2003. The report presents twenty specific recommendations to the Serbian government and the international community to help Serbia make needed political and economic reforms and achieve the goal of integration with wider European institutions. (*Id.* at ii-iii.) Although the report recites numerous facts, its essence is ICG's analysis of those facts and what they portend for the future, consistent with ICG's mission of reducing conflict. Thus, ICG offers its opinion about the steps taken by the Serbian government in the aftermath of the assassination and concludes that the post-Milosevic Serbian government remained excessively dependent on a Milosevic-era financial "oligarchy" that, together with the former state security and army sectors, was obstructing reform.

Within this lengthy report is the Remaining Passage, which contains eleven sentences:

> [1] The unwillingness to continue the crackdown reflects the power of the Milosevic-era financial structures that – with the rigid oversight once

[5] *Available at* http://www.crisisgroup.org/home/index.cfm?id=1205&l=1.

provided by the dictator removed – have transformed themselves into a new Serbian oligarchy that finances many of the leading political parties and has tremendous influence over government decisions. [2] Some of the companies were originally formed as fronts by State Security or Army Counter-intelligence (KOS), while others operated at the direct pleasure of the ruling couple. [3] Under Milosevic, many of these companies profited from special informal monopolies, as well as the use of privileged exchange rates. [4] In return, many of them financed the regime and its parallel structures.

[5] Some of the individuals and companies are well known to average Serbs: Delta Holding (Milorad Miskovic), Karic (Bogoljub Karic), Pink (Zeljko Mitrovic), Zepter (Milan Jankovic, aka Filip Zepter), Kapital Banka (Djordje Nicovic), Toza Markovic (Dmitar Segrt), Progres (Mirko Marjanovic), Simpo (Dragan Tomic), Komercijalna Banka (Ljubomir Mihajlovic), Novokabel (Djordje Siradovic), Stanko Subotic, Dibek (Milan Beko), ABC (Radisav Rodic), Hemofarm (Miodrag Babic), AIK Banka Nis (Ljubisa Jovanovic) and Dijamant (Savo Knezevic) are but some of the most prominent. [6] Because of the support they gave to Milosevic and the parallel structures that characterized his regime, many of these individuals or companies have at one time or another been on E.U. visa ban lists, while others have had their assets frozen in Europe or the U.S.. [Footnote citation to: http://europa.eu.int/index.eu.htm# and http://www.treas.gov/offices/eotffc/ofac/sdn/index.html.]

[7] In the popular mind, they and their companies were associated with the Milosevic regime and benefited from it directly. [8] The DOS campaign platform in September 2000 promised that crony companies and their owners would be forced to answer for past misdeeds. [9] Few of the Milosevic crony companies have been subjected to legal action, however. [10] The enforcement of the "extra-profit" law is often seen as selective, and there have been only a handful of instances in which back taxes, perhaps 65 million Euros worth, have been collected. [11] Most disturbing is the public's perception that – at a time when the economy is worsening – these companies' positions of power, influence and access to public resources seem to have changed very little.

(*Id.* at 17-18 (bracketed numbers added).)

III. ZEPTER'S ALLEGATIONS IN THE FIRST AMENDED COMPLAINT

In the FAC, Zepter alleges that ICG disseminated knowingly false statements about Zepter in three publications, only one of which remains in the litigation. (FAC ¶¶ 2, 45-70, 80-116, attached as Exhibit 2 to Neuhardt Decl.) With respect to the Remaining Passage in

Report 145, Zepter made but four allegations relating to the necessary element of defamatory meaning:

- The Remaining Passage allegedly "falsely describes Mr. Zepter as a member of the 'new Serbian oligarchy,' which includes companies and individuals that have been on E.U. visa ban lists or whose assets were frozen in Europe or the U.S." (FAC ¶ 57.)

- "Mr. Zepter has never been on the visa ban list of the E.U., the U.S., or any other country, and none of Mr. Zepter's assets have ever been frozen in Europe, the U.S., or any other country." (*Id.* ¶ 58; *see also* ¶ 61 ("the false statements ... were understood by the average public to mean ... that Mr. Zepter was black-listed and banned entrance to the countries of the E.U., that Zepter's assets were frozen in Europe or the U.S. ...").)

- "Neither Mr. Zepter nor the Zepter Group have supported the Milosevic regime, nor have they 'benefited from it directly.'" (*Id.* ¶ 58.)

- The allegedly "false statements" "reflected, and were understood by the average public to mean, that Mr. Zepter and the Zepter Group are criminals ... [and] are responsible in some part for the political and social instability of Serbia." (*Id.* ¶ 61.)

Zepter argued each of these theories of defamatory meaning (and still others not supported by the FAC) to this Court and to the D.C. Circuit, but, as discussed below, these theories did not all survive.

IV. THIS COURT'S OPINION OF MAY 1, 2006

This Court granted ICG's motion to dismiss the First Amended Complaint on May 1, 2006. *Jankovic v. Int'l Crisis Group*, 429 F. Supp. 2d 165 (D.D.C. 2006).[6] The Court first held that all claims by Zepter and his former co-plaintiffs regarding one of the reports and the e-mail were barred by the statute of limitations. *Id.* at 171-173. With respect to Report 145, the Court first held that statements within Report 145 concerning Zepter-related corporate

[6] On August 23, 2005, this Court dismissed the Original Complaint on jurisdictional grounds, but granted plaintiffs leave to file the FAC.

entities were not defamatory as to Zepter personally, *id.* at 174-75, and that no portion of Report 145 was defamatory as to Zepter's co-plaintiffs. *Id.* at 175-76.

The Court then held that none of the passages in Report 145 was capable of defamatory meaning as to Zepter personally. *Id.* at 173-179. With respect to the Remaining Passage, the Court found that the excerpt as a whole is "at heart, critical of the power that businesses allegedly have had and continue to have in the present day Serbian government." *Id.* at 178. The Court held that "[t]o accuse a Serbian company of seeking political power does not rise to the 'odious, infamous, or ridiculous' level necessary for claims of defamation, particularly when the plaintiffs are not Serbian companies." *Id.*

Although the Court found that the Remaining Passage as a whole was not capable of defamatory meaning, the Court took the time to separately address the viability of claims arising from the portion of the Remaining Passage that states "many of these individuals or companies have at one time or another ... had their assets frozen in Europe or the U.S." *Jankovic*, 429 F. Supp. 2d at 176. As to this portion of the Remaining Passage, the Court found that "plaintiffs admit that Zepter Banka had its assets frozen in the United States." *Jankovic*, 429 F. Supp. 2d at 177. Because of this admission, the Court held that "no set of facts can show this sentence to be false or imply false facts, and it therefore cannot be the basis for a defamation claim." *Id.*

The Court further observed that the sentence at issue was supported by a citation to an Internet link to the U.S. Department of the Treasury that provides "archived lists of the companies whose assets were frozen for the past twelve years, including Zepter Banka." *Id.* at n. 8. The Court found that "this sentence was based on publicly available government information" accessible to "any reader willing to perform minimal research." *Id.* Thus, the

Court dismissed claims arising from this portion of the Remaining Passage on the ground that it did not have the required element of *falsity* in addition to dismissing it for being incapable of a defamatory meaning.

Finally, this Court held that Zepter's false light invasion of privacy and tortious interference claims were "rooted in the same alleged defamatory conduct" and had to be dismissed for the same reasons. *Id.* at 179.

V. THE D.C. CIRCUIT'S OPINION

On July 24, 2007, the D.C. Circuit affirmed the vast majority of this Court's May 1, 2006 Opinion.[7] The D.C. Circuit affirmed this Court's dismissal on statute of limitations grounds of all claims arising from one of the reports and the e-mail, the dismissal of all claims by Zepter's co-plaintiff companies, the dismissal of claims by Zepter personally arising from mentions of Zepter-related companies, and the dismissal of all defamation and related claims by Zepter personally based on any portion of Report 145 other than those related to the Remaining Passage in Report 145.

As to the Remaining Passage, after considering the myriad theories of defamation presented by Zepter to the Court, the D.C. Circuit accepted one narrow aspect of Zepter's arguments. Specifically, the D.C. Circuit held that it was "unable to say that a reader of this passage could not reasonably conclude that Philip Zepter personally, was a 'crony' of Milosevic who supported the regime in exchange for favorable treatment." *Jankovic*, 494 F.3d at 1091. Citing *Southern Air Transport, Inc. v. ABC, Inc.*, 877 F.2d 1010, 1015 (D.C. Cir. 1989), where the D.C. Circuit previously had acknowledged that "[a]n inference that [a plaintiff company] was engaged in dealings with the [apartheid] government of South Africa

[7] The D.C. Circuit also affirmed this Court's opinion of August 23, 2005 dismissing all claims against former Defendant James Lyon, who is not named in the FAC.

clearly would have a defamatory meaning because of the intense antipathy felt by a great number of Americans toward South Africa," the D.C. Circuit here held narrowly that, despite "numerous qualifiers," the Remaining Passage, *taken as a whole*, "could lead a reasonable reader to conclude that Philip Zepter was actively in alliance with Milosevic and his regime," and that such a conclusion is "sufficiently odious" to satisfy the element of defamatory meaning. *Jankovic*, 494 F.3d at 1091.

Notably, the D.C. Circuit did not disturb this Court's conclusion that, because the U.S. froze Zepter Banka's assets, Zepter could not base a defamation claim on the statement in the Remaining Passage that "many of these individuals or companies have at one time or another ... had their assets frozen in Europe or the U.S." Nor did the D.C. Circuit accept any of Zepter's alternate theories of defamatory meaning presented on appeal or open the door for Zepter to conjure up new theories on remand. In short, although Zepter had ample opportunity to plead theories of defamatory meaning and to argue such theories on appeal, the D.C. Circuit gave credence only to the theory that the Remaining Passage is capable of the defamatory meaning that there was an "alliance" or "tie" between Zepter and the Milosevic regime.

Notwithstanding its holding that the Remaining Passage is capable of that single defamatory meaning, the D.C. Circuit observed that ICG argued on appeal, as it had in this Court, that the Remaining Passage is not actionable as a matter of law because it was protected expression under the First Amendment and common law. *Jankovic*, 494 F.3d at 1091. This Court had not considered those arguments because it dismissed Zepter's claims on other grounds. Rather than considering those "privileges and protections" (*id.*) itself, the D.C. Circuit remanded the case to this Court with instructions that, "in the first instance," this

Court "address the applicability and merits of the Opinion and Fair Comment Protection, the Fair Report Privilege, or the Neutral-Reportage Doctrine" to Zepter's defamation, false light privacy, and tortious interference claims, but only "as applied to Philip Zepter personally." *Id.* at 1091-92.

ARGUMENT

I. THE REMAINING PASSAGE DEEMED "CAPABLE OF DEFAMATORY MEANING" IS NOT ACTIONABLE AS A MATTER OF LAW

Although the D.C. Circuit held that the Remaining Passage is capable of a single, narrow defamatory meaning, it did not hold that the Remaining Passage is actionable as a matter of law. Rather, the law is clear that, even if a statement is capable of defamatory meaning, it nonetheless is not actionable if the statement is protected from defamation claims by the First Amendment or otherwise. *Moldea II*, 22 F.3d 310, 316-19 (holding that, although the publication was "capable of a defamatory meaning insofar as it tends to injure Moldea's reputation as a practitioner of his chosen profession, investigative journalism," it nonetheless was not actionable under the First Amendment because the challenged statements either were true or were supportable interpretations of the publication); *White v. Fraternal Order of Police*, 909 F.2d 512, 523 (D.C. Cir. 1990) ("[a] defendant may escape liability if the defamatory meaning is established as true or as constitutionally protected expression"). *Accord, Partington v. Bugliosi*, 56 F.3d 1147, 1152 (9th Cir. 1995) (holding that statements assumed to be capable of defamatory meaning were not actionable because they were protected by the First Amendment). Accordingly, the D.C. Circuit's holding here that the Remaining Passage is capable of defamatory meaning does not resolve whether it is actionable as a matter of law. As ICG will now demonstrate, the Remaining Passage is not actionable.

A. Milkovich And Its Progeny Establish That The First Amendment Protects A Wide Range Of Expression

The Supreme Court made clear in *Milkovich* that, although the First Amendment does not create "a wholesale defamation exemption for anything that might be labeled 'opinion,'" it does shield a wide range of expressions of opinion from defamation claims. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990). Indeed, the Court concluded that protection of such expression was "adequately secured" by pre-existing First Amendment safeguards that provide the "breathing space" that "[f]reedoms of expression require in order to survive." *Id.* at 19 (citation and quotation marks omitted).

In reaching this conclusion, the *Milkovich* Court reaffirmed its prior decision in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), which "stands for the proposition that a statement on matters of public concern *must be provable as false* before there can be liability under state defamation law." 497 U.S. at 19 (emphasis added). The *Milkovich* Court similarly reaffirmed its prior decisions in *Greenbelt Cooperative Publ'g Ass'n, Inc. v. Bressler*, 398 U.S. 6 (1970), *Letter Carriers v. Austin*, 418 U.S. 264 (1974), and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), which together make clear that, even where a statement can in its most literal sense be proved true or false, the First Amendment nonetheless "provides protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." 497 U.S. at 20.[8] This line of cases "provides

[8] In *Greenbelt*, the Supreme Court held that the First Amendment prohibited imposition of liability for reporting that some persons had characterized a real estate developer's negotiating position as "blackmail," because the word "blackmail" could not reasonably be interpreted to mean that the developer committed the actual crime of blackmail. 398 U.S. at 13. In *Letter Carriers*, the Supreme Court held that the use of the word "traitor" in a literary definition of a union "scab" could not be the basis for a defamation action, because such use was meant in a figurative and rhetorical sense. 418 U.S. at 284-285. In *Hustler Magazine,* the Supreme Court held that the First Amendment precluded recovery for intentional

assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Id.*

Milkovich's reconfirmation of these previous First Amendment doctrines makes clear that the sentiment of the Supreme Court's previous ruling in *Gertz v. Robert Welch, Inc.* remains intact – that "[u]nder the First Amendment, there is no such thing as a false idea." *Id.* at n. 1 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974)). As explained by one leading commentator: "the syllogism implied by *Gertz* stands after *Milkovich*: Defamation is actionable only if false; opinions cannot be false; opinions are not actionable." Hon. Robert D. Sack, *Sack on Defamation* at § 4.2.4.

Since *Milkovich,* the federal and state courts, including those in the District of Columbia, have amplified *Milkovich* in at least two significant respects: (a) an emphasis on examination of context in analysis of claims of defamation; and (b) a recognition that, where the basis for an opinion is evident from the content of the allegedly defamatory publication, the work is non-actionable.

1. Context Is Of Critical Importance In Analyzing The Viability Of Claims For Defamation

First, courts repeatedly have emphasized the importance of context in analyzing the viability of claims for defamation. Thus, the D.C. Circuit has emphasized that the cases underlying *Milkovich* "recognize[] that some materials by their very nature require interpretation, and that the First Amendment affords latitude to those engaged in that task." *Moldea II*, 22 F.3d at 316. Where the context of a work includes "evaluations

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infliction of emotional distress arising from an ad parody that could not reasonably be interpreted as stating actual facts about the plaintiff. 485 U.S. at 56-57.

quintessentially of a type readers expect to find in [the] genre," the allegedly defamatory statements "must be judged with an eye toward readers' expectations and understandings of [the genre]." *Id.* at 315 (discussing the genre of book reviews). *See also Partington,* 56 F.3d at 1153 ("The Supreme Court and other courts have emphasized that one must analyze a statement in its broad context to determine whether it implies the assertion of an objective fact."); *Phantom Touring, Inc. v. Affiliated Pubs.*, 953 F.2d 724, 729 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992) ("The sum effect of the format, tone and entire content of the articles [at issue] is to make it unmistakably clear that [the author] was expressing a point of view only. As such, the challenged language is immune from liability.")

2. Where The Basis For An Opinion Is Evident From The Face Of A Publication, It Is Not Actionable

Second, courts also have held under *Milkovich* that, where the basis of an allegedly defamatory statement of opinion is disclosed to the reader, the statement is entitled to full First Amendment protection. The D.C. Circuit explained the rationale for this rule in *Moldea I*, 15 F.3d at 1144-1145, and *Moldea II*, 22 F.3d at 317, affirming in both opinions that:

> [W]hen a writer gives a statement of opinion that is based upon *true* facts that are revealed to readers ... such opinions generally are not actionable so long as the opinion does not otherwise imply unstated defamatory facts. Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation.

As further explained in *Moldea II*, where the basis for the opinion is set forth, it is not necessary to determine whether a conclusion is verifiable if the statements offered in support of the conclusion are supportable interpretations of the work:

> [W]e *need not determine whether "too much sloppy journalism" is verifiable*, as the statements that the *Times* review offers in support of this assessment are supportable interpretations of *Interference*. Thus, even if the review's assertion that the book contains "too much sloppy journalism" is verifiable,

> *that assessment is supported by revealed premises that we cannot hold to be false in the context of a book review.* As we stated in *Moldea (I)*, "Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions, based on those facts, this type of statement is not actionable in defamation.

Moldea II, 22 F.3d at 317 (emphasis added); *see also Int'l Courier, Inc. v. Seagraves,* 1999 WL 1027034 (D.D.C. 1999) (An article in an industry publication for the "mailing business" that reported on a criminal complaint filed against a courier service and observed that "apparently" the courier's criminal co-defendants didn't "believe [the courier] ha[d] a strong case" was not actionable because the basis for the opinion (*i.e.*, that the co-defendants settled quickly with the government) was set forth in the article).

Moreover, where the context of the publication makes clear that it contains subjective analysis, such commentary is actionable "only when the interpretations are *unsupportable by reference to the written work.*" *Moldea II,* 22 F.3d at 315 (emphasis in original). That is, "when a writer is evaluating or giving an account of inherently ambiguous materials or subject matter, the First Amendment requires that the courts allow latitude for interpretation." *Id.* To satisfy this steep burden, a plaintiff seeking to recover for defamation for statements arising from a publication that facially contains subjective assessments of opinion, the "plaintiff must show that the statement was so 'obviously false' that '*no reasonable person* could find' that the statement's characterizations were supportable interpretations of the underlying material." *Washington v. Smith*, 893 F. Supp. 60, 62 (D.D.C. 1995) (emphasis added), *aff'd*, 80 F.3d 555 (Table); 1996 U.S. App. LEXIS 7558 (D.C. Cir. Apr. 12, 1996). *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1094 (4th Cir. 1993) ("Finally, though 'there is no such thing as a true idea,' Greve's opinion was certainly defensible.")

This First Amendment doctrine is widely recognized. *See, e.g., Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997) ("...if a statement of opinion either discloses the facts on which it is based or does not imply the existence of undisclosed facts, the opinion is not actionable."); *Partington,* 56 F.3d at 1156 ("The courts of appeal that have considered defamation claims after *Milkovich* have consistently held that where a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment.") (citing *Moldea II*); *Phantom Touring,* 953 F.3d at 731 ("In this case, the comprehensive nature of the information provided in the articles, aided by the column format and the style and tenor of the writing, lead inevitably to the conclusion that no reasonable reader could interpret Kelly's statements as factual assertions of dishonesty."); *Chapin*, 993 F.2d at 1093 ("Because the bases for the 'hefty-mark up' conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related."); RESTATEMENT (SECOND) OF TORTS §566 cmt. C (an opinion based on disclosed or assumed nondefamatory facts "is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is").[9]

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[9] *See also Fasi v. Gannett Co.*, 114 F.3d 1194 (Table), 1997 WL 285939 (9th Cir. 1997) ("Here, the article outlines Fasi's controversial zoning proposal, comments on the inappropriateness of Fasi's behavior, and opines that Hawaii residents will be harmed. ... Such speech falls clearly within the First Amendment's protection."); *Nicosia v. DeRooy*, 72 F. Supp. 2d 1093, 1103 (N.D. Cal. 1999) ("The court finds that De Rooy adequately disclosed the facts underlying her conclusion that Nicosia embezzled money from Jack Kerouac's heirs. *Accusations of criminal activity, like other statements, are not actionable if the underlying facts are disclosed.*") (emphasis added), *citing In re Yagman*, 796 F.2d 1165, 1174 (9th Cir. 1986); *Gardner v. Martino,* 2005 WL 3465349, at *10 (D. Or., Sep. 19, 2005) ("Given that the statements came after a long recitation of facts disclosed by Feroglia, I conclude, as a matter of law, that they are non-actionable opinion under both the First Amendment and Oregon common law."); *Riley v. Harr*, 292 F.3d 282, 290 (1st Cir. 2002) (citing *Partington* and *Moldea II*).

The doctrine exists to protect not only the most popular or well reasoned of opinions, but *all opinions*, regardless of the strength of the reasoning and analysis that leads to the opinion:

> [T]he facts and premises underlying Cornwell's opinion – *however misleading, incomplete, or erroneous those facts and premises may have been* – were fully disclosed in his letter to Beattie and the attachment thereto. As a result, Cornwell's characterization of the data used in Beattie's appraisal as "present[ing] such a misleading indication of the value of this property as to be considered fraudulent" – *even if amounted to a hyperbolic, unjustified and derogatory opinion* – was not an actionable-defamatory statement.

Beattie v. Fleet National Bank, 746 A.2d 717, 727 (R.I. 2000) citing *Moldea II*, 22 F.2d at 316-17 (emphasis added); *see also Agora v. Axxess, Inc.*, 90 F. Supp.2d 697, 706 (D. Md. 2000) ("Agora mistakenly equates an 'erroneous assessment' of facts with a disagreeable opinion. This reading runs not only contrary to the well-established principle that an opinion based on fully disclosed facts is not subject to defamation actions, but is contrary to ... *Milkovich*.").

The purpose for this doctrine is clear. "Otherwise, authors would hesitate to venture beyond 'dry, colorless descriptions of facts, bereft of analysis or insight,'" and "the threat of defamation lawsuits would discourage 'expressions of opinion by commentators, experts in a field, figures closely involved in a public controversy, or others whose perspectives might be of interest to the public.'" *Riley v. Harr*, 292 F.at 290-91 (quoting *Partington*, 56 F.3d at 1154); *see also Groden v. Random House, Inc.*, 1994 WL 455555 at *9 (S.D.N.Y. Aug. 23, 1994) (addressing an advertisement for a book about the Kennedy assassination: "the public interest in uninhibited, robust and wide open debate on public issues is best served by allowing free competition between proponents of conflicting accounts of the Kennedy assassination, not by stifling it in the name of truth in advertising.") (quotation omitted), *aff'd*, 61 F.3d 1045 (2d Cir. 1995).

B. The Context In Which The Remaining Passage Appears Demonstrates That It Expresses Subjective Opinion Fully Protected By The First Amendment

Here, the context for the Remaining Passage is Report 145. Report 145 addresses a subject that is, by its very nature, a matter of opinion and public debate – the failure of Serbia's efforts to institute reforms after the assassination of Premier Zoran Djindjic. (*See* Report 145 at i.) The report offers its readers a lengthy analysis of the potential causes of Serbia's troubles and summarizes those analyses in a "Conclusion," an "Executive Summary" and a list of "Recommendations." (*Id.*) Moreover, Appendix B to the report makes clear that ICG works "though field-based *analysis* and high-level *advocacy* to prevent and resolve deadly conflict." (*Id.* at 30 (emphasis added).) "Teams of political analysts" provide "assessments" from the field that ICG uses to produce "analytical" reports containing "practical recommendations" regarding their subject matter. (*Id.*) ICG has "advocacy" offices in several international locations." (*Id.*)

Although ICG bases its reports on extensive field research and fact gathering, its reports are repeatedly tempered with signals to the reader that ICG is evaluating and analyzing facts, so that the reader may draw his or her own conclusions from ICG's reports. Throughout Report 145, ICG presents its expert evaluation of leading personalities, corporations, government entities and events in Serbia. The policymakers for whom ICG's reports are written not only anticipate, but depend upon, the authors to express their informed points of view. As former Secretary of State Colin Powell has said: "ICG tells power what it thinks and advocates with both passion and effectiveness. It is a continuous source of ideas and insights for Governments, Parliaments, International Institutions, the media and fellow NGOs."[10]

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[10] Remarks of Colin Powell at ICG Reception (Oct. 10, 2003).

The serious nature of ICG's mission in no way changes the fact that readers of ICG's reports are free to disagree with ICG's interpretations, analyses, and recommendations. To the contrary, courts repeatedly have recognized that academic and political analyses are as much the subject of protected opinion as any book review, op-ed column, or talk-radio program that generates debate and controversy. *See, e.g., Auvil v. 60 Minutes*, 836 F. Supp. 740 (E.D. Wash. 1993) (debate over whether the chemical "alar" causes cancer a matter of protected opinion); *Groden,* 1994 WL 455555, at *9 (analysis of whether there was a gunman on the "grassy knoll" near the Kennedy assassination was a matter protected by the First Amendment); *Ezrailson v. Rohrich*, 65 S.W.3d 373, 382 (Tex. 2001) ("in the area of medical science research, criticism of the create research ideas of other medical scientists should not be restrained by fear of a defamation claim in the event the criticism itself ultimately fails for lack of merit").

The reason for this is apparent: it is not the role of the courts to decide which ideas and opinions are "correct." *See, e.g., Gertz,* 418 U.S. at 339-340 ("[t]here is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction *not on the conscience of judges and juries* but on the competition of other ideas ...") (emphasis added); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.") As the Seventh Circuit explained in *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994):

> Scientific controversies must be settled by the methods of science rather than by the methods of litigation. *More papers, more discussion, better data, and more satisfactory models – not larger awards of damages – mark the path towards superior understanding of the world around us.*

(Emphasis added.) Similarly, the Ninth Circuit in *Partington*, 56 F.3d at 1154, reasoned:

> When, as here, an author writing about a controversial occurrence fairly describes the general events involved and offers his personal perspective about some of its ambiguities and disputed facts, his statements should generally be protected by the First Amendment. *Otherwise, there would be no room for expressions of opinion by commentators, experts in a field, figures closely involved in a public controversy, or others whose perspectives might be of interest to the public.* Instead, authors of every sort would be forced to provide only dry, colorless descriptions of facts, bereft of analysis or insight. There would be little difference between the editorial page and the front page, between commentary and reporting, and the robust debate among people with different viewpoints that is a vital part of our democracy would surely be hampered.

(Emphasis added.)

The assessments by ICG in an analytical study and advocacy piece such as Report 145, no less than the comments of a reviewer in a book review, the analysis of a historian, or a critic of medical research "must be judged with an eye toward readers' expectations and understandings" of such reports. *Moldea II*, 22 F.3d at 315. To ensure that analytical studies and advocacy pieces such as Report 145 survive, its author, ICG, "must be given the constitutional 'breathing space' appropriate to the genre." *Id.*

C. The Remaining Passage Is Not Actionable Because ICG Sets Forth The Basis For Its Opinions

The D.C. Circuit ruled that a reader of the Remaining Passage reasonably could conclude "that Philip Zepter, personally, was a 'crony' of" or "actively in alliance with Milosevic" who "supported the regime in exchange for favorable treatment," and that such a "tie" between Zepter and Milosevic was sufficient to state a cause of action for defamation. *Jankovic,* 494 F.3d at 1091. Zepter's claim must be dismissed because the face of the Remaining Passage discloses the factual basis for and reasoning behind any conclusion regarding Zepter's alleged ties to the Milosevic regime.[11]

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[11] Indeed, even the D.C. Circuit's articulation of the potentially defamatory meaning of the Remaining Passage demonstrates that the conclusion is a matter of opinion. The D.C. Circuit

1. The Source For The One Remaining Potentially Defamatory Inference Is Disclosed In The Remaining Passage

The factual connection between Zepter and the Milosevic regime that the D.C. Circuit held could be gleaned from the Remaining Passage is fully disclosed to the reader. After referring to sixteen named companies and their owners, including "Zepter (Milan Jankovic, aka Filip Zepter)," the Remaining Passage states in the very next sentence: "*Because of the support they gave to Milosevic and the parallel structures that characterized his regime, many of these individuals or companies* have at one time or another been on E.U. visa ban lists, while others have had their assets frozen in Europe or the U.S." (Emphasis added.) Zepter complains that these sentences "were understood by the average public to mean ... that Mr. Zepter was black-listed and ... that Mr. Zepter's assets were frozen in Europe or the U.S." (FAC ¶ 61.)

As this Court pointed out in its opinion of May 1, 2006, the Remaining Passage cites a website maintained by the U.S. Treasury Department's Office of Foreign Assets Control

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described its conclusion several different ways, one of which was that a reader could conclude that Zepter was a "crony" of the Milosevic regime. The fact that a conclusion can be described with any number of variations on vocabulary demonstrates that no particular word defines the conclusion. Moreover, an accusation of "cronyism" is not one that can be proved true or false. *See Salvo v. Salem News Publ'g Co.*, No. R-2237, 4 Media L. Rep. (BNA) 1856 (Mass. Dist. Ct. Oct. 5, 1978) (a newspaper column entitled "Cronyism is Still a Factor in School Politics," which said that school board members who "demonstrated a penchant for cronyism" had apparently "paid off a three year old political debt" by appointing plaintiff as supervisor of attendance, was not actionable in libel, because, *inter alia*, the challenged column constituted opinion and not provable fact) (a copy of the *Salvo* decision is attached as Exhibit 3 to the Neuhardt Decl.); *Thomas v. News World Commc'ns*, 681 F. Supp. 55, 63 (D.D.C. 1988) (dismissing suit against *The Washington Times* and some of its principals and employees based on editorial statements describing plaintiffs' placards as "unAmerican," "trash," and "a continuing insult, mocking the true intent behind the precious right of citizens to petition the government for the redress of grievances," and describing plaintiffs as "bums," "pitiable lunatics," "deluded," and "insane," because the statements "are not 'verifiable.'").

("OFAC") (http://www.treas.gov/offices/eotffc/ofac/sdn/index.html)[12] as the source for the statement that the assets of "many" of the named "individuals and companies," including "Zepter," were frozen by the United States. *Jankovic*, 429 F. Supp. 2d at 177 n. 8. The Court further observed that the "link to the Department of the Treasury has archived lists of the companies whose assets were frozen for the past twelve years, including Zepter Banka." *Id.* Thus, ICG's facial disclosure of this government website "makes clear that this sentence" – that is, the sixth sentence stating that the assets of many of the previously named individuals and companies (including Zepter Banka) were frozen by the U.S. – "was based on *publicly available government information*" and was accessible "to any reader willing to perform minimal research."[13] *Jankovic*, 429 F. Supp. 2d at 177 n. 8 (emphasis added).

Moreover the official rationale of the U.S. government for placing Zepter Banka on the frozen assets list also is readily available through reference to the Executive Orders that authorized the creation and maintenance of the list. The OFAC webpage identified in the Remaining Passage and previously discussed by the Court contains a link to the archived lists since 1994. (*See* screen shot of OFAC website, attached as Exhibit 4 to the Neuhardt Decl. (with link to "Archive of changes to the SDN list"), and screen shot of website page entitled "Archive of Changes to the SDN List," attached as Exhibit 5 to the Neuhardt Decl.) The archived list entitled "SDN Changes 1998" reveals that on June 18, 1998, Zepter Banka (and all but four other companies named in the Remaining Passage) was added to the U.S. frozen assets list in 1998 pursuant to "*an Executive Order issued by President Clinton blocking*

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[12] This URL, as published in Report 145, automatically transfers the viewer to the now-current OFAC webpage regarding the Specially Designated Nationals List ("SDN") at http://www.treas.gov/offices/enforcement/ofac/sdn/index.html.

[13] Zepter also has admitted in this litigation that the assets of Zepter Banka were frozen by OFAC. *Jankovic*, 429 F. Supp. 2d at 177.

property of the Governments of the Federal Republic of Yugoslavia(Serbia and Montenegro), the Republic of Serbia, and the Republic of Montenegro, and Prohibiting new investment in the Republic of Serbia in response to the situation in Kosovo." (Screen shot of "SDN Changes 1998," attached as Exhibit 6 to the Neuhardt Decl., at 9; *see also id.* at 40 (listing of Zepter Banka).) That is, Zepter Banka was placed on a frozen assets list intended for "property of the Governments of [Serbia and Montenegro],"[14] and therefore clearly had been tied to Milosevic by the United States Government itself.

If the reader of the Remaining Passage wanted further clarification of why Zepter Banka was included on a list intended for "property of the Governments of [Serbia and Montenegro], the reader could look at the relevant Executive Order – which has the force of law in the United States. OFAC republished the SDN list in the *Federal Register* and identified the Executive Order that directed the freezing of the assets of those on the list as Executive Order 13088, issued by President Clinton on June 9, 1998. *See* 64 F.R. 60660-01 (Nov. 8, 1999).[15] This information also was reprinted in the Treasury Department's regulations. 31 C.F.R. § 586.201(c).

In Executive Order 13088, a publicly available government document (and attached as Exhibit 8 to the Neuhardt Decl.), then-President Clinton ordered that:

> [Because of] the actions and policies of the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Republic of Serbia with respect to Kosovo, by promoting ethnic conflict and human suffering, threatening to destabilize countries of the region and to disrupt progress in Bosnia and Herzegovina in implementing the Dayton peace agreement, [it is

[14] Milosevic was President of the Federal Republic of Yugoslavia (Serbia and Montenegro) at that time and through 2000.

[15] ICG provided the Court with a copy of this *Federal Register* notice when it initially moved to dismiss the FAC in 2005. (*See* Docket Entry #33, Oct. 24, 2005, Exh. 19 to Declaration of Amy L. Neuhardt of the same date. ICG has attached another copy of the *Federal Register* notice as Exhibit 7 to the Neuhardt Decl.)

> necessary to freeze the assets of those governments and their] *agencies, instrumentalities, and controlled entities, including all financial institutions and state-owned and socially-owned entities* [organized or located in those countries] *and any persons acting or purporting to act for or on behalf of any of the foregoing.*

Exec. Order No. 13088, 64 C.F.R. 60660-01 (Nov. 8, 1999) (emphasis added).

Executive Order 13088 and the resulting list cited in the footnote to the Remaining Passage therefore established in official public records (disclosed to the reader of the Remaining Passage) the official determination of the U.S. government that the assets of Zepter Banka should be frozen because Zepter Banka was an "instrumentalit[y]" of, "controlled" by, or "purporting to act for or on behalf of," the Milosevic regime. The OFAC website, which incorporated Executive Order 13088 by reference, therefore fully disclosed facts supporting any reader's conclusion that Zepter Banka was allied with the Milosevic regime.[16]

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[16] Moreover, any party wishing to determine whether Zepter Banka remained on the U.S. frozen assets list could do so either by looking at each year's archive SDN list on the OFAC website, or more simply, by searching for "Zepter" on that website. Such a search directs the user to the SDN archive list for 2001. (*See* screen shot entitled "Treasury Search," attached as Exhibit 9 to the Neuhardt Decl.) That search alone reveals the existence of additional official actions relevant to Zepter Banka. (*See* SDN List 2001, attached as Exhibit 10 to the Neuhardt Decl. at 1 (citing Executive Order 13192) and 57 (explaining the removal of certain entities from the SDN list, but maintenance of the continuing order to freeze assets).)

First, according to the 2001 SDN list, Executive Order 13192 lifts *future* economic sanctions against certain entities affiliated with the Federal Republic of Yugoslavia, but orders that the previously frozen assets of those entities that had been designated as "FRYK" "*remain*[] *blocked* except as authorized, in general license or otherwise, by [OFAC]." (SDN List 2001 at 1 (emphasis added); Executive Order 13192 (January 17, 2001) (available at 66 F.R. 7379, attached as Exhibit 11 to Neuhardt Decl.).) Zepter Banka was designated as "FRYK," and the U.S. therefore continued to freeze Zepter Banka assets from all past transactions. (SDN List 2001 at 35; 1998 SDN List at 40.)

Second, and also as revealed in the 2001 SDN list, in August 2001, OFAC made clear that, although it was removing those persons and entities with "FRYK" designations from the SDN list as a means of "dramatically shrinking the file sizes of OFAC's SDN list and making it easier to down load" (2001 SDN List at 57), all property of persons and entities on those

ICG's decision to connect Zepter Banka and Zepter personally further is facially evident from the Remaining Passage, which makes clear that: (a) ICG associated certain named individuals with particular identified companies; and (b) not every one of the named persons and companies necessarily appeared on the government lists. The Remaining Passage thus clearly identifies thirty "individuals and companies" in couplings: the name of a well-known company, followed by a parenthetical with the name of an individual associated with that company. In addition, the passage plainly states that "many" (*i.e.*, not all) of the "individuals and companies" were on these lists. The clear import of these facial qualifications is that just because *either* an individual or company was on *any of* the E.U. visa ban list, the E.U. frozen assets list or the U.S. frozen assets list, the corresponding member of the coupling was not necessarily also on one or all of the lists. A reader may disagree with ICG's decision to couple companies and individuals, but the fact that it does so is evident from the face of the document.[17] A reader further may disagree with the U.S. government's conclusion (indeed, the conclusion of two U.S. Presidents) that the persons and entities on its

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lists that was blocked before January 19, 2001 was to "*remain blocked*," and a separate list of those entries would remain available by request from OFAC. (*Id.* (emphasis added).)

Basic legal research of Presidential Executive Orders further reveals that President George W. Bush twice extended the orders relating to Zepter Banka. *See* Notice by President George W. Bush, published at 66 F.R. 29007 (May 24, 2001) (continuing for one year the effect of Executive Orders 13088 and 13192), attached as Exhibit 12 to Neuhardt Decl.; Notice by President George W. Bush, published at 67 F.R. 37661 (May 27, 2002) (same), attached as Exhibit 13 to Neuhardt Decl. Only on May 28, 2003 was the frozen assets list that contained Zepter Banka terminated. *See* Executive Order 13304, published at 68 F.R. 13304 (May 28, 2003), attached as Exhibit 14 to Neuhardt Decl.

[17] Zepter also openly acknowledges the direct association between himself and the "Zepter Group" of companies, including Zepter Banka. (*See* FAC ¶¶ 14, 16, 18-19, 24.) Indeed, Zepter, who was born Milan Jankovic, alleges that "after customers and the public in general started referring to him as 'Mr. Zepter,' he officially changed his name to identify with the trademark synonymous with his companies and the products and services they offer." (*Id.* ¶ 18.)

frozen assets list necessarily supported the Milosevic regime, but ICG's reliance on that determination is clearly disclosed.

Therefore, the OFAC website cited in the Remaining Passage and Executive Order 13088 incorporated by reference in that website disclosed to any reader "willing to perform minimal research," *Jankovic*, 429 F. Supp. 2d at 177 n. 8, the facts supporting the potentially defamatory meaning that Zepter was "actively in alliance with the Milosevic regime." *Id.* Zepter and other readers of the Remaining Passage may not agree that the freezing of Zepter Banka's assets because of its affiliation with the Milosevic regime and the acknowledged association between Zepter and Zepter Banka give rise to the conclusion that Zepter was "actively in alliance with" the Milosevic regime. The very purpose of the First Amendment doctrine that opinions supported by facts disclosed to the reader are not actionable, however, is to provide authors leeway to express their opinions about those facts, even if their opinions are controversial. Because the reader understands that "such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation." *Moldea II*, 22 F.3d at 317 (quoting *Moldea I*).[18]

2. ICG's Deliberative Process Further Is Disclosed On The Face Of The Remaining Passage

As demonstrated above, sufficient factual basis for any inference that Zepter was tied to the Milosevic regime is disclosed in the second paragraph of the Remaining Passage and its footnote. Zepter's remaining claim for defamation must be dismissed for this reason

[18] Because the Remaining Passage is based on a fair summary of a disclosed official report, the Remaining Passage also is not actionable under the "fair report privilege," which protects "fair and accurate report[s] of ... official government proceeding[s]." *Prins v. Int'l Tel. & Tel. Corp.*, 757 F. Supp. 87, 93 (D.D.C. 1991), citing *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985).

alone. This conclusion is further reinforced, however, by examination of the Remaining Passage as a whole, which further demonstrates ICG's deliberative process – a process with which the reader may or may not concur.

The Remaining Passage opens as follows:

> The unwillingness to continue the crackdown reflects the power of the Milosevic-era financial structures that – with the rigid oversight once provided by the dictator removed – have transformed themselves into a new Serbian oligarchy that finances many of the leading political parties and has tremendous influence over government decisions.

This sentence signals to the reader that ICG is offering a *subjective* opinion. It opines that a "new" "oligarchy" has formed in Serbia comprised of members of the "Milosevic-era financial structures" and that the oligarchy has "tremendous influence" over government decisions. "Oligarchy" is of course an inherently subjective concept.[19] Reasonable minds may differ as to what constitutes an oligarchy: they may disagree about what type of conduct constitutes "governing" by a few; about how many people or entities can comprise the "few" that govern; or about what conduct makes a particular person or entity eligible to be included within an oligarchy.[20] Similarly, what constitutes "influence" over government decisions, much less "tremendous influence" over such matters, is a matter that is incapable of definition. The reader of this passage thus is immediately aware that he or she is reading a subjective opinion about the existence and influence of a "new Serbian oligarchy."

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[19] Indeed, the very definition of "oligarchy" is subjective. *Webster's Third New International Dictionary* defines it as "government *by the few*" (emphasis added), an intrinsically amorphous phrase.

[20] For these reasons, the fact that the Remaining Passage names an "oligarchy" is itself non-actionable, as the determination of whether someone is part of an "oligarchy," or indeed whether an "oligarchy" exists, is purely subjective. *See, e.g., Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) (reversing a judgment of libel entered in favor of the late William F. Buckley on the basis of passages in a book describing Buckley as a "fascist," "fellow traveler," and a member of the "radical right.").

The basis for ICG's identification of "many" of those in the oligarchy, including Zepter, is clear from the passage at issue: "Many of these individuals or companies have at one time or another been on E.U. visa ban lists, while others have had their assets frozen in Europe or the U.S." (Report 145 at 17.)[21] Those lists were compiled of persons and entities who, in the opinion of the E.U. and/or U.S., had given "support" to "Milosevic and the parallel structures that characterized his regime." Thus, it is immediately apparent to a reasonable reader that ICG named the thirty companies and related individuals as members of the "oligarchy" based on: (1) the content of E.U. visa ban lists and the E.U. and U.S. frozen assets lists; and (2) the reason stated by the E.U. and U.S. for creating those lists. Moreover, as discussed above, it also is clear from the passage that not every one of the named persons and companies necessarily appeared on the government lists.

Again, a reader may disagree with ICG's decision to couple companies and individuals, but the fact that it does so is evident from the face of the document. A reader further may disagree with ICG's reliance on the government lists as the criteria to be identified as one of the named members of the "new Serbian oligarchy," but ICG's decision to do so is clearly disclosed.

Similarly, the logical basis for any connection between members of the "oligarchy" and Milosevic is disclosed:

1. "Some of the companies [in the oligarchy] were originally formed as fronts by State Security or Army Counterintelligence (KOS)";

2. "[O]thers operated at the direct pleasure of the ruling couple";

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[21] Zepter admits this logical connection in his own complaint: "Report 145 falsely describes Mr. Zepter as a member of the 'new Serbian oligarchy' that includes companies and individuals which have been on E.U. visa ban lists or whose assets were frozen in Europe or the U.S." (FAC ¶ 57.)

3. "Under Milosevic, many of these companies profited from special informal monopolies, as well as the use of privileged exchange rates";

4. "In return, many of them financed the regime and its parallel structures";

5. "In the popular mind, they and their companies were associated with the Milosevic regime and benefited from it directly";

6. "Because of the support they gave to Milosevic ... many of these individuals have at one time or another been on E.U. visa ban lists, while others have had their assets frozen in Europe and the U.S."

Each of these statements is non-actionable, either because they are based on fully disclosed government reports (the accuracy of which this Court already has determined),[22] do not concern Zepter,[23] do not state facts that can be proved true or false[24] (such as descriptions

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[22] *See* Section C.1., above.

[23] For example, the first four statements on their face refer only to "companies" and cannot be the subject of a defamation claim by Zepter. The D.C. Circuit clearly affirmed this Court's dismissal of the claims of Zepter's co-plaintiff companies and remanded for consideration of the claims based on this passage *only* "as applied to Philip Zepter personally." *Jankovic*, 494 F.3d at 1092.

[24] For example, ICG's assessment of "the popular mind" is inherently incapable of being proved true or false. A case in point is *Riley*, 292 F.3d at 289, in which the First Circuit affirmed the dismissal of defamation claims by the owner of a tannery against the author of the book based on allegedly false statements that the owner repeatedly lied before and during a civil trial. The First Circuit determined that the statements in question represented the author's view of the *trial attorney's* assessment of the owner's testimony, not the author's personal assessment of that testimony, and it held that they were not actionable because ""it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts.'" 292 F.3d at 289. *See also Ollman v. Evans*, 750 F.2d 970, 994, 1006-1007 (D.C. Cir. 1984) (Bork, J., concurring) ("a statement that others hold a particular opinion . . . is inherently incapable of being adjudicated with any expectation of accuracy . . . I do not think the results of a trial on issues like these could be anything but random and, whatever we might be willing of necessity to allow in a different kind of trial, I would be utterly unwilling to let first amendment freedoms ride upon an outcome determined by chance").

of public opinion), or do not state facts that are challenged by Zepter as being false (such as descriptions of activities by "some" of the "companies").[25]

Zepter cannot point to a single statement in the Remaining Passage that is both provably false and claimed to be false within the FAC. These failures defeat his claim. *See Dodds v. American Broadcasting Company, Inc.*, 145 F.3d 1053, 1067 (9th Cir. 1998) ("Given that we have held that the alleged implication that Judge Dodd's conduct was the same as a felon's did not arise and that the set of comments regarding the crystal ball was not made with actual malice, Dodds *cannot convert these two non-actionable items into an implied actionable statement by asserting that they compel a defamatory conclusion.*") (emphasis added).

Zepter may vehemently disagree with ICG's decision to include him within the Remaining Passage or to name an "oligarchy" at all, but the grounds for doing so are set forth in the passage. A reader may disagree about whether an oligarchy exists, whether any particular member of the oligarchy in fact was tied to the Milosevic regime prior to the collapse of its "rigid oversight," whether any particular member should have been included within the oligarchy, or whether public perceptions in Serbia are justified. Zepter cannot, however, demonstrate that "no reasonable person" would agree with ICG's conclusions.[26] *Washington*, 893 F. Supp. at 62.

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[25] Thus, although Zepter claims that *he personally* was never a "front" for State Security, never "operated at the direct pleasure of the ruling couple," never "profited from special informal monopolies" or "privileged exchange rates," never "financed the regime and its parallel structures" and never was subjected to legal action, he has not (and could not) claim the same for "some" or even "many" of the named "companies." (*See* generally FAC.)

[26] It is here that the legal difference between the defamatory meaning analysis conducted by the D.C. Circuit in this case and the opinion analysis that is the subject of this motion is perhaps its most profound. Thus, to prove that a statement is "capable of a defamatory meaning," a plaintiff in D.C. must prove only that "*a*" reasonable reader could interpret the

The Remaining Passage is quintessential political analysis and is fully protected by the First Amendment.[27]

II. THE COURT SHOULD DISMISS ZEPTER'S FALSE LIGHT PRIVACY AND TORTIOUS INTERFERENCE CLAIMS FOR THE SAME REASONS IT SHOULD DISMISS HIS SURVIVING PERSONAL DEFAMATION CLAIM

The Court should dismiss Zepter's false light invasion of privacy and tortious interference claims regarding the Remaining Passage for the same reasons it should dismiss Zepter's defamation claims. As the D.C. Circuit has held, "[t]hough invasion of privacy false light is distinct from the tort of defamation, the same First Amendment protections apply." *Weyrich*, 235 F.3d at 627; *cf. Hustler Magazine*, 485 U.S. at 56-57 (First Amendment principles apply to protect expression even if plaintiff sues for intentional infliction of emotional distress rather than defamation). Because, as shown above, ICG's statements in the Remaining Passage are protected against defamation claims by the First Amendment, they are equally protected by the First Amendment against false light privacy claims and claims of tortious interference with business expectancy.

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statement as defamatory. *See, e.g., Jankovic*, 494 F.3d at 1091 ("In that light, the passage could lead a reasonable reader to conclude that Philip Zepter was actively in alliance with Milosevic and his regime..."). The D.C. Circuit found that the Remaining Passage met this standard. In contrast, for an opinion to be unprotected by the First Amendment, Zepter must prove that "*no*" reasonable reader could agree with the opinion based on the statements in the passage. *Moldea II*, 22 F.3d at 314; *Washington,* 893 F. Supp. at 62.

[27] In addition, in *Milkovich*, the Supreme Court observed that, "due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of 'fair comment' was incorporated into the common law as an affirmative defense to an action for defamation." 497 U.S. at 13. The fair comment privilege '"afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.'" *Id.* Thus, because the opinion inferred by the D.C. Circuit from the Remaining Passage that Zepter was "actively in alliance with" the Milosevic regime is "based upon a true or privileged statement of fact" appearing in the OFAC website and the incorporated Executive Order, it also is protected from defamation claims by the "fair comment" privilege. *See Lane v. Random House, Inc.*, 985 F. Supp. 141, 150 (D.D.C. 1995).

In its opinion in this case, the D.C. Circuit addressed the viability of Zepter's non-defamation causes of action. Affirming the action of this Court, the D.C. Circuit first determined that, as to all but the Remaining Passage, Zepter and his co-plaintiffs had no cause of action for false light invasion of privacy or tortious interference with business expectancy. *Jankovic*, 494 F.3d at 1092 ("As to the first and third excerpts in Report 145 ... statements not concerning a plaintiff do not affront privacy rights or business expectancies.") As for the Remaining Passage, which the D.C. Circuit had already determined would be remanded for consideration of Zepter's defamation claims, the D.C. Circuit advised, however, that "the standards for standards for defamation and false light privacy are not identical" under D.C. law, and that before dismissing a false light claim based on the Remaining Passage, this Court would have to "satisfy itself that the statement does not arguably place appellant in a 'highly offensive' false light." *Id.* The D.C. Circuit made no similar suggestion that claims of tortious interference with business expectancy should be subject to an additional inquiry, but merely remanded the case for this Court to consider all three causes of action as they relate to the Remaining Passage. *Id.*

A. The D.C. Court of Appeals Has Clarified D.C. Law On The Standard To Be Applied To False Light Claims

The D.C. Circuit's holding that Zepter's false light claims should be examined under a different standard than Zepter's defamation claims was based on its interpretation of then-existing D.C. law. Thus, the D.C. Circuit observed that D.C. courts generally follow the *Restatement (Second) of Torts*, and then interpreted the Restatement as requiring a separate inquiry into whether the statement at issue puts the plaintiff in a "highly offensive false light." 494 F.3d at 1092. Two weeks after the D.C. Circuit issued its opinion, however, the D.C. Court of Appeals made clear in *Blodgett v. University Club*, 930 A.2d 210, 223 (D.C.

2007), that, *as a matter of D.C. law*, "where the plaintiff rests both his defamation claim and false light claims on the same allegations ... the claims will be analyzed in the same manner." This ruling is now binding on the D.C. Circuit and this Court as an interpretation of D.C. law and is the standard this Court must apply to this motion.

Because Zepter rests his false light claims on the same allegations as his defamation claims, the Court should analyze and dismiss his false light claims using the same analysis applicable to the dismissal of his defamation claims.

B. Zepter's Tortious Interference Claims Also Must Be Dismissed

The D.C. Circuit did not hold that a different standard applies to claims for tortious interference with business expectancy than to claims for defamation, but merely remanded the tortious interference claims arising from the Remaining Passage without further instruction. 494 F.3d at 1092. Accordingly, Zepter's tortious interference claims are subject to the same standards as Zepter's defamation claims, and should be dismissed because they seek to impose liability based on the same constitutionally protected conduct. *See Falwell, supra.*

Zepter's tortious interference claims also should be dismissed because the FAC fails to allege facts sufficient to state a claim for tortious interference arising from ICG's publication of the Remaining Passage. Although the District of Columbia does not recognize a cause of action for tortious interference with business expectancy, it recognizes an analogous claim of intentional interference with prospective economic advantage. "To survive a motion to dismiss for intentional interference with prospective economic advantage, 'a plaintiff must allege "business expectancies, not grounded in present contractual relationship, but which are commercially reasonable to expect."'" *Sheppard v.*

Dickstein, Shapiro, Morin & Oshinsky, 59 F.Supp.2d 27, 34 (D.D.C. 1999), quoting *Democratic State Comm. v. Bebchick*, 706 A.2d 569, 572 (D.C. 1998). The FAC does not support this standard because Zepter does not allege interference with a valid business expectancy.

"A valid business expectancy requires a *probability* of future contractual or economic relationship and not a *mere possibility*." *Washington Metro. Area Transit Auth. v. Quik Serve Foods, Inc.*, Civ. Nos. 04-838, 04-687, 2006 WL 1147933, at *6 (D.D.C. April 28, 2006) (emphasis added). Plaintiff must also allege "intent to disrupt ongoing business relationships." *Sheppard*, 59 F. Supp. at 34. Here, the FAC does not allege that ICG's conduct interfered with any specific future business relationships, but only that "[s]ome such individuals and entities have indicated a reluctance to enter into business transactions with Plaintiffs in response to Defendants' false statements, which is devastating to the continued operations and growth of Plaintiffs' business endeavors" (FAC ¶ 76).[28] This generalized reluctance of unidentified individuals and entities to enter into unspecified business transactions with "Plaintiffs" (which may or may not include Zepter personally[29]) simply

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[28] The FAC does allege that, "[o]n several occasions, representatives of the Zepter Group and Mr. Zepter personally were advised by potential business partners throughout the world, including in the U.S., that in the course of their due diligence, they had read certain reports about Plaintiffs' alleged involvement in money laundering and weapons smuggling which caused these potential business partners to refuse to enter into business relationships." (FAC ¶ 78). But the Remaining Passage does not discuss "money laundering and weapons smuggling" (those statements are included in Report 141), and this allegation therefore cannot support a cause of action arising from the Remaining Passage.

[29] Zepter also cannot rely on allegations that *corporate* bank accounts in Monaco were closed due to Report 145. (*See* FAC ¶ 77 ("By way of example ... all of the bank accounts held at *Credit Fancier de Monaco* ("CFM") by the Zepter Group, its related companies and those companies privately held by Mr. Zepter, were closed by CFM without notice or explanation. As an initial matter, a claim for intentional interference with prospective economic advantage may "not be founded in *present* contractual relationships.").) *See also Sheppard*, 59 F. Supp. 2d at 34 (emphasis added). In addition, none of these accounts are alleged to have been

does not satisfy the requirements of D.C. law that Zepter allege interference with "business relationships that are commercially reasonable to expect." *Sheppard*, 59 F. Supp. 2d at 34.

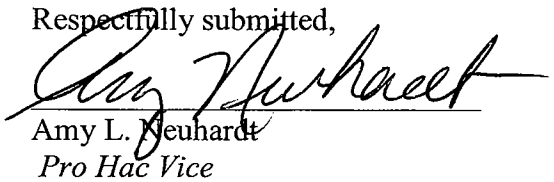
Zepter has failed to allege facts adequate to constitute intentional interference with prospective economic advantage. Accordingly, Zepter's tortious interference claims based on the Remaining Passage should be dismissed.

Zepter's personal business relationships, but at best, the accounts of "companies privately held by Mr. Zepter."

CONCLUSION

For the foregoing reasons the Court should dismiss all claims remaining in the First Amended Complaint.

Respectfully submitted,



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