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Attorneys for Appellants NYP Holdings, Inc. and Isabel Vincent

IN THE SUPREME COURT OF THE STATE OF MONTANA

NYP HOLDINGS, INC. AND ISABEL VINCENT Appellants, v. MICHAEL L. GOGUEN Appellee.	Supreme Court Case No._____ **NOTICE OF APPEAL**

Notice is given that NYP Holdings, Inc. and Isabel Vincent, the Appellants above-named and named Defendants in the cause of action filed in the Eleventh Judicial District, in and for the County of Flathead, as Cause No. DV-21-1382, hereby appeal to the Supreme Court of the State of Montana from the order entered by the District Court on July 26, 2022 and certified as a final judgment by the District Court on August 30, 2022.

THE APPELLANT FURTHER CERTIFIES:

1. That this appeal is not subject to the mediation process required by M. R. App. P. 7.

2. That this appeal is an appeal from an order certified as final under M. R. Civ. P. 54(b). A true and correct copy of the District Court's August 30, 2022 certification order is attached hereto as **Exhibit A**. The July 26, 2022 Order certified as final is attached hereto as **Exhibit B.**

3. All available transcripts of the pertinent proceedings in this cause relative to this appeal have been ordered.

4. That included herewith is the filing fee prescribed by statute.

DATED this 6th day of September, 2022.

TARLOW STONECIPHER
WEAMER & KELLY, PLLC

/s/ *Amy C. McNulty*
Amy C. McNulty

Amy Eddy
DISTRICT COURT JUDGE
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MONTANA ELEVENTH JUDICIAL DISTRICT COURT
FLATHEAD COUNTY

MICHAEL L. GOGUEN, *Plaintiff*, vs. NYP HOLDINGS, INC.; ISABEL VINCENT; WILLIAM DIAL; and DOES 1 through 100, *Defendants*.	Cause No. DV-21-1382(A) ORDER ENTERING PARTIAL FINAL JUDGMENT AND GRANTING CERTIFICATION PURSUANT TO MONT. R. CIV. P. 54(b)

The Plaintiff filed this *Complaint for Defamation* on November 26, 2021. The Complaint arises out of an article published by the NYP Holdings, written by Isabel Vincent, and which quotes William Dial.

On December 23, 2021, Dial filed a *Motion to Dismiss* generally arguing his statements were not actionable statements of fact.

On January 10, 2022, NYP Holdings and Vincent filed a *Motion to Dismiss* generally arguing under Montana or New York law, which they asserted applied to the matter, the publication was absolutely privileged under the fair report doctrine.

Following oral argument on April 5, 202, on July 26, 2022, the Court issued its *Order Re: Motions to Dismiss*, finding that Montana law applied, whether the *Post* Article was fair, true and published without malice were questions of fact for the jury to decide, after which the Court would determine whether the privilege applied, and Dial's statements were not actionable. On August 5, 2022, the Court issued a *Rule 16 Scheduling Order* setting the matter for a jury trial during the Court's April 1, 2024, civil jury term.

Now pending before the Court is Plaintiff's *Unopposed Motion for Entry of Partial Final Judgment Pursuant to Montana Rule of Civil Procedure 54(b)*, filed 8/19/2022; and NYP Holdings and Vincent's *Unopposed Motion for Certification Pursuant to M. R. C. P. 54(b)*, filed 8/19/2022. Both of these motions arise out of the Court's *Order Re: Motions to Dismiss*. Having reviewed the file and being fully apprised, the Court hereby rules as follows:

EXHIBIT A

ORDER

Plaintiff's *Unopposed Motion for Entry of Partial Final Judgment Pursuant to Montana Rule of Civil Procedure 54(b)* is GRANTED. Partial Final Judgment is hereby entered in favor of Defendant William Dial and against Plaintiff Michael Goguen.

NYP Holdings and Vincent's *Unopposed Motion for Certification Pursuant to M. R. C. P. 54(b)* is hereby GRANTED. The Court's *Order Re: Motions to Dismiss* is hereby certified as final pursuant to Rule 54(b), M.R.Civ.P.

RATIONALE

The factual record of this case is voluminous and will not reiterated herein. The Court's *Order Re: Motions to Dismiss* contains a complete factual background.

"When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Mont. R. Civ. P. 54(b)(1). In making this determination, "the district court must balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final, and the court shall, in accordance with existing case law, articulate in its certification order the factors upon which it relied in granting certification, to facilitate prompt and effective review." Mont. R. App. P. 6(6).

> (1) the burden is on the party seeking final certification to convince the district court that the case is the "infrequent harsh case" meriting a favorable exercise of discretion; (2) the district court must balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final; (3) the district court must marshal and articulate the factors upon which it relied in granting certification so that prompt and effective review can be facilitated.

Roy v. Neibauer, 188 Mont. 81, 87, 610 P.2d 1185, 1189 (1980) (quoting *Allis-Chalmers Corp. v. Phila. Elec. Co*., 521 F.2d 360, 365 (3d Cir. 1975)).

This litigation, and the Court's *Order Re: Motions to Dismiss*, involves multiple parties, and "adjudicates fewer than all claims as to all parties" and "leaves matters in the litigation undetermined." Mont. R. App. P. 6(5). As such, it is not appealable as of right. However, since the *Order* is "an otherwise interlocutory order," this Court is within its discretion to determine that there is no just reason for delay of an immediate appeal pursuant to Mont. R. Civ. P. 54(b). Mont. R. App. P. 6(6). For the reasons set forth below, the Court finds that this is an infrequent harsh case where certification pursuant to Rule 45(b) serves the interests of sound judicial administration and public policy.

In considering Rule 54(b) certification, the Court must consider the following factors:

(1) The relationship between the adjudicated and unadjudicated claims;
(2) The possibility that the need for review might or might not be mooted by future developments in the district court;
(3) The possibility that the reviewing court might not be obliged to consider the same issue a second time;
(4) The presence or absence of a claim or counterclaim which could result in a setoff against the judgment sought to be made final;
(5) Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like.

Roy, 188 Mont. at 87, 610 P.2d at 1189.

The Court will address each factor in turn:

The "relationship between the adjudicated and unadjudicated claims" weighs in favor of certification. While Plaintiff's claims against Dial are adjudicated, and the claims against the Post are not, the claims are related to one another as the Post published Dial's statements. Additionally, the legal issues that would be addressed on appeal are not the same issues that remain to be litigated. *Kohler v. Croonenberghs*, 2003 MT 260, ¶18, 317 Mont. 413, 77 P.3d 531.

The "possibility that the need for review might or might not be mooted by future developments in the district court" weighs in favor of certification. No future developments in this case could conceivably moot the need for the Montana Supreme Court to definitively decide the choice of law and fair report privilege issues raised here. No matter what is learned in fact discovery or decided at trial, the parties, the Court, and the jury need final clarity as to which state's law controls the privilege question (New York or Montana) and whether Goguen's claims are even actionable under Montana law. At the same time, early review could resolve the case in the Post's favor and moot the need for expansive discovery and a weeks-long trial. The second Factor weighs in favor of certification.

The "possibility that the reviewing court might not be obligated to consider the same issue a second time" weighs in favor of certification. The choice of law and application of the privilege are threshold questions of law that – once decided by the Montana Supreme Court – will become the law of the case and not be subject to further review.

The "presence or absence of a claim or counterclaim which could result in a setoff against the judgment sought to be made final" weighs in favor of certification. There are no claims or counterclaims that could result in a setoff.

Any "[m]iscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like" weigh in favor of certification. None of the parties would be prejudiced by any delay caused by an early appeal,

and, to the contrary, clarity on the questions at issue would either end this litigation or allow it to proceed more efficiently. Moreover, since both the Post and Goguen are seeking early appeal pursuant to Rule 54(b), this further suggests that neither side perceives appeal at this juncture to be a prejudicial delay. An early appeal would also clearly serve the interest of judicial economy.

"Balanc[ing] the competing factors present in the case," it is clear that "certification serves the interest of public policy and sound judicial administration," *Roy*, 188 Mont. at 87, 610 P.2d at 1189, and there is "no just reason for delay." Mont. R. Civ. P. 54(b). Without guidance from the Montana Supreme Court now, judicial resources may be needlessly strained as the parties expend significant time and money litigating the truth or falsity of *all* of these allegations, as well as malice and damages, only to find out later on appeal that it was all unnecessary. That is precisely the kind of outcome that Rule 54(b) is meant to avoid.

This determination is consistent with the Montana Supreme Court's case law on this issue. See, e.g., *Kaul v. State Farm Mut. Auto. Ins. Co*., 2021 MT 67, ¶ 9, 403 Mont. 387, 482 P.3d 1196 (considering grant of partial summary judgment on single issue after Rule 54(b) judgment despite continued presence of "other claims not relevant to the present proceeding" between the same parties); *Moe v. Butte-Silver Bow* Cty., 2016 MT 103, ¶ 12, 383 Mont. 297, 301, 371 P.3d 415 (considering grant of partial summary judgment on three of four counts in complaint after Rule 54(b) judgment); *Baumgart v. State, Dep't of Commerce*, 2014 MT 194, ¶¶ 10-11, 376 Mont. 1, 332 P.3d 225 (considering grant of summary judgment on all issues to one defendant and on some issues to another after Rule 54(b) judgment despite "issues remaining for trial"); *Blanton v. Dep't of Pub. Health & Human Servs*., 2011 MT 110, ¶¶ 54-55, 360 Mont. 396, 255 P.3d 1229 (considering legal questions of retroactive applicability and "made whole" doctrine on appeal and cross-appeal after Rule 54(b) judgment); *Wamsley v. Nodak Mut. Ins. Co*., 2008 MT 56, ¶ 13, 341 Mont. 467, 472, 178 P.3d 102 (considering legal questions of collatral estoppel, comity, and personal jurisdiction after Rule 54(b) judgment while "[o]ther issues not relevant to the current appeal continued to be raised and argued before the District Court"); *Bowyer v. Loftus*, 2008 MT 332, ¶¶ 1-5, 346 Mont. 182, 183, 194 P.3d 92 (considering issue of employer's vicarious liability after Rule 54(b) judgment without considering not yet presented issue of employee's direct liability); *Crisafulli v. Bass*, 2001 MT 316, ¶ 13, 308 Mont. 40, 43, 38 P.3d 842 (considering legal question of parent's duty to supervise while case proceeded to trial on respondeat superior theory against different defendant); *Infinity Ins. Co. v. Dodson*, 2000 MT 287, ¶¶ 7-10, 302 Mont. 209, 213, 14 P.3d 487 (considering insurance company's maximum liability without considering not-yet-presented issue of insured's direct liability); *Watson & Assocs., Inc. v. Green, MacDonald &* Kirscher, 253 Mont. 291, 293, 833 P.2d 199 (1992) (considering legal question after Rule 54(b) judgment of whether complaint filed by foreign plaintiff tolled statute of limitations).

Since there is no just reason for delay of an appeal, the Court exercises its discretion to certify the *Order Re: Motions to Dismiss* as final pursuant to Rule 54(b), and enter judgment in favor of Dial.

DATED AND ELECTRONICALLY SIGNED AS NOTED BELOW

Electronically Signed By:
Hon. Judge Amy Poehling Eddy
Tue, Aug 30 2022 02:29:44 PM

Amy Eddy
DISTRICT COURT JUDGE
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THE MONTANA ELEVENTH JUDICIAL DISTRICT COURT
FLATHEAD COUNTY

MICHAEL L. GOGUEN, *Plaintiff,* vs. NYP HOLDINGS, INC., ISABEL VINCENT, WILLIAM DIAL, and DOES 1 through 100, *Defendants.*	Cause No. DV-21-1382(A) ORDER RE: MOTIONS TO DISMISS

Pending before the Court is Defendant William Dial's *Motion to Dismiss*, filed December 23, 2021. (Docs. 8–9.) Plaintiff Michael L. Goguen filed his *Opposition* brief on February 3, 2022. (Doc. 31.) Dial filed his *Reply* February 24, 2022. (Doc. 33.)

Also pending before the Court are Defendants NYP Holdings, Inc., and Isabel Vincent's (collectively the "*Post*") *Motion to Dismiss*, filed January 10, 2022. (Docs. 17.0–17.2.) Plaintiff Michael L. Goguen filed his *Opposition* brief on February 3, 2022. (Doc. 32.) The *Post* filed its *Reply* February 24, 2022. (Doc. 34.)

The parties appeared for oral argument April 5, 2022, at 1:30 p.m. All parties were present with counsel. The motion is fully briefed and ripe for decision. The Court, having apprised itself of the file and considered the arguments made by counsel, finds as follows:

ORDER

Defendant William Dial's *Motion to Dismiss* is GRANTED, consistent with the following *Rationale*.

Defendants' Defendants NYP Holdings, Inc., and Isabel Vincent's *Motion to Dismiss* is DENIED, consistent with the following *Rationale*.

EXHIBIT B

RATIONALE

I. Background[1]

Plaintiff Michael Goguen alleges NYP Holding, Inc., (hereinafter "*Post*") defamed him when the *Post* published an article in November 2021 which contained information about a series of lawsuits, involving Amber Baptiste and Matthew Marshall, that Goguen had been involved in ("*Post* Article"). The Court will not recite the lengthy allegations in the *Complaint*, as the document, with exhibits, is almost 300 pages in length. But essentially the effect of the *Post* Article portrays Goguen as a serial philanderer, if not sexual abuser, who leveraged his wealth to cover up and promote his alleged criminal behavior. Goguen maintains the *Post* Article is unfounded in fact and constitutes defamation *per se* because it accuses him of facilitating and participating in criminal activity. (Doc. 1 at ¶¶53–54.) The *Post* Article contains a quote from William Dial, the former Whitefish Chief of Police, which Goguen alleges is also defamatory. In response, the *Post* asserts the article is protected by the fair report privilege as the alleged defamatory statements were taken from either the Amber Baptiste or Matthew Marshall litigation, and Dial asserts his comments are protected opinion.

(A) Amber Baptiste Litigation

On May 23, 2014, Amber Baptiste and Michael Goguen entered in a *Release and Personal Injury Settlement Agreement* ("*Release*"). (Doc. 17.2, Ex. 1) The *Release* outlines that Baptiste "had prepared and contemplated filing a lawsuit against [Goguen] seeking monetary damages for personal injury and other claims arising from their prior relationship." *Release*, p. 1. Goguen sought to keep the details of their prior relationship confidential. *Release*, p. 1. Without any admission of liability, and in exchange for Baptiste maintaining confidentiality about their prior relationship, destroying all documents related to the contemplated litigation, and releasing all claims, Goguen agreed to pay Baptiste $40,000,000 in four installment payments. *Release*, pp. 1-2.

On March 8, 2016, in the Superior Court of the State of California for the County of San Mateo, Baptiste filed a *Verified Complaint for Breach of Contract* against Goguen. (Doc. 17.2, Ex. 1) Baptiste generally alleged that while Goguen had made the first payment of $10,000,000, he had refused to make subsequent payments and attempted to rescind the *Release* arguing it was

[1] As this is a motion to dismiss for failing to state claim, all background material is taken as true directly from Goguen's *Complaint*, the documents attached to Goguen's *Complaint*, or referred to therein and subsequently attached to the briefing. *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶8, 390 Mont. 12, 407 P.3d 692; (*See* Doc. 1.) Attached to Goguen's *Complaint* was a print copy of the Post Article (Doc. 1, Ex. A), online copy of the Post Article (Ex. B), legal correspondence between counsel for Goguen and the New York Post (Ex. C), Civil Harassment Restraining Order After Hearing (Doc. 1, Ex. C—Ex. A), Baptiste v. Goguen, Final Statement of Decision (Doc. 1, Ex. C—Ex. B), Baptiste v. Goguen, Final Judgment (Doc. 1, Ex. C—Ex. C), Matthew Marshall Change of Plea Hearing Transcript (Doc. 1, Ex. D), POST correspondence to William Dial (Doc. 1, Ex. E).

entered into under duress. *Verified Complaint*, PP6-7. This *Verified Complaint* will not be detailed herein except to the extent the allegations were published in the *Post* Article at issue in this matter. Goguen countersued against Baptiste in response.

On January 24, 2020, following a three-day bench trial beginning October 28, 2019, at which Baptiste failed to appear, the California judge issued a *Final Statement of Decision*. All of Baptiste's claims were dismissed with prejudice after the Judge found she had committed fraud., extortion, and enjoined her from repeating false and defamatory statements. The Judge ruled in favor of Goguen on all of his counterclaims and ordered Baptiste to return the $10,000,000, as well as other damages. (Doc. 1, Ex. C). Goguen was also granted a *Civil Harassment Restraining Order After Hearing against Baptiste*. (Doc. 1, Ex. C). The *Civil Harassment Restraining Order* prohibited Baptiste from repeating the following statements which, the Judge had found to be false and defamatory:

> (1) Goguen purchased Baptiste when she was a young girl from an organized crime syndicate; (2) Goguen raped, sodomized, or abused Baptiste or any other women; (3) Goguen infected Baptiste or any other women with a sexually transmitted disease, including HPV; (4) Goguen kept Baptiste as a sex slave; (5) Goguen tore, ruptured, or perforated Baptiste's anal canal during sex, or that he left her bleeding and unable to evacuate her bowels; (6) Goguen stalked or harassed Baptiste or any other persons. (7) Goguen engaged in human trafficking, sex trafficking. sex slavery, or child sex tourism; (8) Goguen is a pedophile, psychopath, pervert, or sexual deviant; (9) Goguen forced numerous women to have abortions; (10) Goguen committed or solicited murder; (11) Goguen bribed the Court, attorneys, or law enforcement; (12) Goguen tampered with evidence to hide his crimes; (13) Goguen married multiple prostitutes; (14) Goguen committed tax evasion or tax fraud; (15) Goguen silenced victims through nondisclosure agreements or any other means; (16) Jamie Goguen is a prostitute; (17) Jamie Goguen cyberbullies Baptiste or any other rape or trafficking victim; and (18) Jamie Goguen instructs her friends to make false social media posts about Baptiste.

(Doc. 1, Ex. C).

In summary, ten months before the *Post* Article was published, the California judge dismissed Baptiste's claims with prejudice and enjoined her from repeating false and defamatory statements—many of which were republished in the *Post* Article. (Doc. 1, Ex. C at ¶7.)

(B) Matthew Marshall Litigation

In 2019, Matthew Marshall, a former associate of Goguen's, was indicted in U.S. District Court for the District of Montana for 11 federal crimes stemming from his apparent victimization of Goguen over a five-year period of time. (Doc. 1, P30).

On September 1, 2021, in the U.S. District Court for the District of Montana, Matthew Marshall and others filed a *Verified First Amended and First Supplemental Complaint* against Goguen (and related entities) alleging violations of the Racketeer Influenced Corrupt

Organizations Act ("RICO") generally arising from a "Sexual Scheme". This *Verified Complaint* is 236 pages and will not be detailed herein except to the extent the allegations were published in the *Post* Article at issue in this matter.[2]

On November 10, 2021, ten days before the *Post* Article was published, Marshall pled guilty in the criminal proceedings to wire fraud for defrauding Goguen in the amount of $225,000, money laundering for then loaning a portion of that money to another individual, and tax evasion in the amount of $356,756. (Doc. 1, Ex. D).[3]

On May 24, 2022, six months after the *Post* Article was published, Marshall's *Verified First Supplemental and First Amended Complaint* was dismissed with prejudice after the Judge took judicial notice of Marshall's guilty plea in the federal criminal proceeding. See *Marshall v. Goguen*, Case 9:21-cv-00019-DWM, Doc. 99, filed 3/31/2022 and Doc. 106, filed 5/24/2022.

(C) William Dial

Defendant William Dial is the former Police Chief for the Whitefish, Montana Police Department. *Compl*., p. 7, ¶18. According to Goguen's *Complaint*:

> Dial resigned abruptly on August 5, 2021, and less than three weeks later, the Montana Public Safety Officer Standards and Training ("POST") Bureau, issued formal allegations against him for unethical and criminal misconduct for conspiring with Marshall and providing false information to the City of Whitefish, the Montana Division of Criminal Investigation, and the FBI. Among other things, the POST Bureau found that "Chief Dial willfully falsified information in conjunction with official duties … by providing false information in separate inquiries to the City of Whitefish, the Public Safety Officers Standards and Training Council (POST), the FBI, the Montana Department of Justice Division of Criminal Investigations (DCI), and the FBI Criminal Justice Information Network (managers of the nationwide Criminal Justice Information Services) during each agency's legally authorized investigation of Chief Dial's conduct" and that "Chief Dial lied to CJIN [Montana's Criminal Justice Information Network] when he denied that Matt Marshall, a civilian with no POST Bureau certification or Montana law enforcement credentials, had an access card and/or unescorted access to the Whitefish Police Department."

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[2] This matter, including Marshall's RICO claims, were dismissed with prejudice on May 24, 2022, after the Judge took judicial notice of Marshall's guilty plea in the federal criminal proceeding and refused to exercise supplemental jurisdiction over the state law claims. See *Marshall v. Goguen*, Case 9:21-cv-00019-DWM, Doc. 99, filed 3/31/2022 and Doc. 106, filed 5/24/2022.

[3] Marshall is currently serving a six-year prison term, followed by three years of supervised release, having been sentenced on March 3, 2022. He is also required to pay more than $2.35 million in restitution to Goguen.

Compl., p. 5, ¶11.

While it is unknown when Dial made the comments to the Post, when the article was published he was no longer the Chief of Police.

(D) *Post* Article

On November 20, 2021, at 7:59 a.m., the *Post* published an online article written by Isabel Vincent entitled *Tech billionaire allegedly kept spreadsheet of 5,000 woman he had sex with*. *Complaint*, Ex. B. While started by Benjamin Franklin and one of the longest running newspapers in the United States, the *Post* has morphed into a tabloid-like publication.[4] This particular article was published with bright flashy colors and a photo of Goguen imposed over the background of one-hundred-dollar bills, provocative photos of Amber Baptiste, the silhouette of a woman who appears to be dancing on a pole, and imbedded videos. Certain quotes are pulled out in bold font over a bright yellow background, and other quotes were blown up in big bubble letters. Published alongside the article were other "Trending Now" articles ranging from *Mike Pompeo: How I lost nearly 100 pounds in 6 months* to *Antonio Brown escalates Buccaneers drama with leaked texts* to *Kylie Jenner shares more pregnancy photos amid speculation she gave birth*. (Doc. 1, Exs. A and B, Doc. 17.2, Ex. 7). On the *Post's* website the article was filed under Blackmail, Sex Scandals and Silicon Valley. *Id*.

The *Post* Article contained hyperlinks[5] to a number of other articles, including:

(1) *Ex-stripper describes 13-year nightmare as tech titan's sex slave*, NYP, posted 3/14/2016, at 11:43 pm;[6]
(2) *The Trump Administration Is Mulling A Pitch For A Private "Rendition" And Spy Network*, posted 11/30/2017, at 2:01 p.m. ET;[7]
(3) *Whitefish Security CEO Pleads Guilty to Federal Crimes in Scheme to Defraud Billionaire Goguen*, posted 11/10/2021.[8]

The *Post* Article prompted a flurry of online comments from Goguen responding to the allegations. Doc. 17.2, Ex. 4.

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[4] "The Post has the fourth highest circulation of any paper in America. Its online edition reaches everywhere. The Post was known in the 1980s for its salacious stories and tabloid headlines, ("Headless Body In Topless Bar"), and in 2004 as the "least credible" news source in New York." (Doc. 1, P4) (internal citations omitted).

[5] These hyperlinks are taken from Doc. 1, Ex. B., where the hyperlinks are in red.

[6] https://web.archive.org/web/20211120133412/https://nypost.com/2016/03/14/ex-sequoia-capital-partner-countersues-in-sex-abuse-case/ (last accessed 5/26/2022)

[7] https://web.archive.org/web/20211120133412/https://www.buzzfeednews.com/article/aramroston/trump-administration-mulls-private-rendition (last accessed 5/26/2022)

[8] https://web.archive.org/web/20211120133413/https://flatheadbeacon.com/2021/11/10/whitefish-security-ceo-pleads-guilty-to-federal-crimes-in-scheme-to-defraud-billionaire-goguen/ (last accessed 5/26/2022)

Later, on November 21, 2021, at 1:34 p.m., the *Post* published another online article written by Jorge Fitz-Gibbon entitled *Tech billionaire Michael Goguen fires back at bombshell allegations*. (Doc. 17.2, Ex. 5). The article was published in a similar form and with similar context of the original article, with exception the article was filed under Montana, Sexual Abuse and Silicon Valley, and included some on Goguen's responses. *Id*. On November 22, 2021, the *Post* published the same article, but in print and entitled *Goguen: I'm no Montana menace*. Doc. 17.2, Ex. 5.

On November 24, 2021, counsel for the *Post* wrote a letter to Goguen's counsel responding to the initial letter from Goguen demanding a correction and apology. Doc. 17.2, Ex. 6. The *Post* denied the article was defamatory because each statement that was objected to was "either privileged as a fair and accurate report or judicial proceedings or protected opinion." *Id*.

(E) Current Litigation

With this history as a backdrop, on November 26, 2021, Goguen filed the present *Complaint for Defamation* against NYP Holdings, Inc., Isabel Vincent and William Dial, and requested a jury trial. (Doc. 1) The *Complaint* specifically alleges

> [t]he following statements in the Post article are false, defamatory, and unprotected by any privilege:
>
> a. Plaintiff "transformed" Whitefish, Montana "into his private fiefdom" and "a dark banana republic."
> b. Plaintiff "controls local law enforcement."
> c. Plaintiff maintains a "spreadsheet documenting his sexual encounters," with "5,000 women."
> d. Plaintiff "outfitted a local bar he owns with a basement 'boom boom' room, which features a stripper pole" and used the room "to maintain women for the purpose of committing illicit sexual activity."
> e. Plaintiff "could not obtain a security clearance with the US government because of the allegations of sexual abuse."
> f. "Women" "tried to complain to police about [Plaintiff]'s alleged sexual assaults."
> g. Members of the Flathead County Sheriff's Department were "on [Plaintiff]'s payroll."
> h. One woman "told a local police officer that [Plaintiff] had allegedly sexually assaulted her."
> i. "Pam Doe told Whitefish police that [Plaintiff] had sexually assaulted her" and "later recanted her story with police after signing a non-disparagement agreement with [Plaintiff]."
> j. "Threats to publicize unsubstantiated incidents of sexual impropriety unnerved former Sequoia Capital partner [Plaintiff] Michael Goguen and other Valley luminaries, according to a federal indictment" (emphasis added).

k. The article states that Amber Baptiste accused Plaintiff of "constant sexual abuse," "countless hours of forced sodomy," and demands that Baptiste refer to Plaintiff as "king" and "emperor."
l. The article states that Baptiste "underwent surgery for a ruptured anal canal after [Plaintiff] 'forcibly sodomized her and left her bleeding and alone on the floor of a hotel room in a foreign country.'"
m. The article states that Baptiste is restrained "from filing any similar suits against" Plaintiff.
n. The article states that Plaintiff "filed a counter-claim" against Baptiste.
o. The article reports that Plaintiff "falsely told the FBI that Marshall did not have the requisite experience [and] had stolen and then laundered funds from [Plaintiff]."
p. The article states that "according to the civil complaint, Marshall spent the cash on [Plaintiff]'s orders and was not reimbursed by [Plaintiff]."

Complaint, pp. 13-17, P33.

The *Complaint* then alleges the following statement made by Dial, and published by the *Post*, were defamatory:

> The Post's article identifies Defendant Dial as the former Whitefish Police Chief. It quotes Defendant Dial as stating that Plaintiff is "a billionaire a la Harvey Weinstein and [Jeffrey] Epstien [sic]. There's a lot of people in this community who know what he's about and they're afraid of him" and that "he has to be stopped."

Complaint, p. 17, P34.

Focusing on the alleged false and defamatory statements, the following outlines the statements that were published by the *Post*, and the sources of the statements:

(1) Plaintiff "transformed" Whitefish, Montana "into his private fiefdom" and "a dark banana republic."

The *Post* Article states, "Whitefish, Mont., is known for fly fishing and hiking trails studded with yellow Aspen trees. But after Silicon Valley billionaire Michael Goguen took up residence in the Rocky Mountain town several years ago, he transformed it into his private fiefdom: a dark banana republic . . ." (Doc 1., Ex. B at 1.)

While not directly quoted from the Marshall *Complaint*, the *Post* asserts the characterization of what was generally alleged in the Marshall *Complaint* is a fair report that is simply "colorful hyperbole."

(2) Plaintiff "controls local law enforcement."

The *Post* Article states, "Whitefish, Mont., is known for fly fishing and hiking trails studded with yellow Aspen trees. But after Silicon Valley billionaire Michael Goguen took up residence in the Rocky Mountain town several years ago, he transformed it into his private fiefdom: a dark banana republic where he allegedly controls local law enforcement." (Doc 1., Ex. B at 1.) The *Post* asserts the statement is a fair report of what was alleged in the Marshall *Complaint*:

> "Mr. Erickson was forced to resign from his position as a Police Detective with the Whitefish Police Department for failing to investigate the alleged conduct by Goguen and improperly accepting gifts and other compensation from Defendant Goguen while employed with the Whitefish Police Department." (Doc. 17.2, Ex. B. at ¶38.)
>
> "Goguen threatened to kill Nash if he 'said anything to anybody' about his 'character flaw,' later telling Nash that he 'owns Montana' and 'supplies law enforcement. (*Id.* ¶328.)
>
> "The conduct and acts described above and elsewhere herein constitute racketeering activities under 18 U.S.C. § 1961(1)(A) in furtherance of the Goguen Sexual Scheme and which are chargeable under state law and punishable by imprisonment for more than one year.
>
> > a. Specifically, Defendants Goguen and the Trustee of the Michael L. Goguen Trust violated § 45-7-101, MCA by knowingly offering or conferring upon then Det. Shane Erickson and Shane Erickson knowingly accepting a pecuniary benefit in the form of an all-expense paid $20,000 hunting trip via private jet travel to Colorado and other financial benefits as consideration for Det. Erickson's failure to perform his duty to investigate the alleged sexual assault of PAM DOE by Defendants Goguen and Eric Payne, as part of a pattern of racketeering activity to conceal Goguen's sexual misconduct and the Goguen Sexual Scheme." (*Id.* ¶413.)

(3) Plaintiff maintains a "spreadsheet documenting his sexual encounters," with "5,000 women."

The *Post* Article states, "Tech billionaire allegedly kept spreadsheet of 5,000 women he had sex with." (Doc 1., Ex. B (headline). "Billionaire Michael Goguen allegedly kept spreadsheet of 5,000 sex partners" Doc 1., Ex. B (header). "He has a spreadsheet documenting his sexual encounters with 5,000 women . . ." (Doc 1., Ex. B.) The *Post* asserts these statements are a fair report of what was alleged in the Marshall *Complaint*:

> "Goguen admitted and showed to Marshall, which Marshall also previously learned from Huntley Ritter, that Goguen had a spreadsheet with some 5,000 women with

whom he had sexual relations across multiple States for two decades or longer." (Doc. 17.2, Ex. B. at ¶254.)

(4) Plaintiff "outfitted a local bar he owns with a basement 'boom boom' room, which features a stripper pole" and used the room "to maintain women for the purpose of committing illicit sexual activity."

The *Post* Article states, "The bombshell allegations . . . are contained in a civil complaint filed in United States District Court for the District of Montana. According to the court papers, Goguen . . . outfitted a local bar he owns with a basement "boom boom" room — allegedly used "to maintain women for the purpose of committing illicit sexual activity." (Doc 1., Ex. A at 1.) The *Post* asserts these statements are a fair report of what was alleged in the Marshall *Complaint*:

> "Casey's Bar . . . of which Goguen is believed to be the sole member, was used to lure women to participate in the sexual conduct with Goguen . . . by providing the "boom boom" room as a space that could be used to maintain women for the purpose of committing illicit sexual activity . . ." (Doc. 17.2, Ex. B. at ¶73.)

> "Goguen gave Payne an "office" in the basement of Casey's Bar that was passcode protected, had a built-in full size stripper pole, and was commonly referred to as the "boom boom" room where Goguen and Payne could procure young women to engage in sexual acts with them for money, drugs or other items of value as part of the Goguen Sexual Scheme." (Doc. 17.2, Ex. B. at ¶417.)

(5) Plaintiff "could not obtain a security clearance with the US government because of the allegations of sexual abuse."

The *Post* Article states, "[Goguen] started Amyntor Group LLC, a private defense contractor that, at one point, was in line to create a private spy network for the Trump administration, according to BuzzFeed. Negotiations were stalled because Goguen could not obtain a security clearance with the US government because of the allegations of sexual abuse, court papers allege." (Doc 1., Ex. A at 1.) The *Post* asserts these statements are a fair report of what was alleged in the Marshall *Complaint*:

> "The Goguen Sexual Scheme further injured Amyntor by disqualifying Goguen from being eligible for a personal U.S. government security clearance, which prevented Amyntor from being able to receive a U.S. government facility security clearance to advance its legitimate and foreseeable business objectives." (Doc. 17.2, Ex. B. at ¶795.)

(6) "Women" "tried to complain to police about [Plaintiff]'s alleged sexual assaults."

The *Post* Article states, "Women who tried to complain to police about Goguen's alleged sexual assaults were met with unsympathetic law enforcement in Whitefish, some of whom were on Goguen's payroll, according to court papers—which also allege that Goguen had set up a

mechanism to listen in on police communications." (Doc. 1, Ex. A at 2.) The *Post* asserts these statements are a fair report of what was alleged in the Marshall *Complaint*:

> "During Marshall's conversation with Goguen after his call with Payne, Goguen also informed Marshall that PAM DOE had made a couple of attempts to report the sexual assault to the Flathead County Sheriff's Office, but the reports were not pursued by the former Sheriff, Chuck Curry." (Doc. 17.2, Ex. B. at ¶430.)

(7) Members of the Flathead County Sheriff's Department were "on [Plaintiff]'s payroll."

The *Post* Article states, "Women who tried to complain to police about Goguen's alleged sexual assaults were met with unsympathetic law enforcement in Whitefish, some of whom were on Goguen's payroll, according to court papers—which also allege that Goguen had set up a mechanism to listen in on police communications." (Doc. 1, Ex. A at 2.) The *Post* asserts these statements are a fair report of what was alleged in the Marshall *Complaint*:

> "On information and belief, Goguen repaid former Sheriff Curry for this act of loyalty and others by giving Curry, when he retired from the Sheriff's Office, his current job working for Goguen at Two Bear Air Rescue." (Doc. 17.2, Ex. B. at ¶430.)

(8) One woman "told a local police officer that [Plaintiff] had allegedly sexually assaulted her."

The *Post* Article states, "When one of those women told a local police officer that Goguen had allegedly sexually assaulted her, Marshall urged the officer to go to the FBI. But the investigation was quashed after Goguen wined and dined the cop, promising him luxury elk hunts in his private jet, court papers say." (Doc. 1, Ex. A at 2.) The *Post* asserts these statements are a fair report of what was alleged in the Marshall *Complaint*:

> "During Marshall's conversation with Goguen after his call with Payne, Goguen also informed Marshall that PAM DOE had made a couple of attempts to report the sexual assault to the Flathead County Sheriff's Office, but the reports were not pursued by the former Sheriff, Chuck Curry." (Doc. 17.2, Ex. B. at ¶430.)

(9) "Pam Doe told Whitefish police that [Plaintiff] had sexually assaulted her" and "later recanted her story with police after signing a non-disparagement agreement with [Plaintiff]." In reality, Pam Doe never filed a police report or signed any such agreement with Plaintiff. She has denied under oath that Plaintiff sexually assaulted her, plied her with drugs, or paid her for sex. Indeed, in the federal criminal indictment of Nash, the United States Attorney's office confirmed that "the FBI interviewed the Ms. Doe, who NASH claimed was drugged and raped while she was underage. The woman told the FBI no such crime was committed, but stated she has been repeatedly contacted by

NASH regarding the alleged crime." United States v. Bryan Gregg Waterfield Nash, D. Montana Case No. MJ 19-38, June 18, 2019 Complaint (Dkt. No. 3) at ¶ 30.

The *Post* Article states, "In 2018, a woman identified in court papers as Pam Doe told Whitefish police that Goguen had sexually assaulted her after giving her cocaine and alcohol. . . . Pam Doe later recanted her story with police after signing a non-disparagement agreement with Goguen." (Doc. 1, Ex. A at 2.) The *Post* asserts these statements are a fair report of what was alleged in the Marshall *Complaint*:

> "Defendant SHANE ERICKSON ("Erickson") was a City of Whitefish, Montana Police Detective who was tasked with investigating the alleged criminal aggravated sexual assault of PAM DOE[] by Goguen." (Doc. 17.2, Ex. B. at ¶37.) (capitalization in original).
>
> "On April 24, 2018, Detective Shane Erickson ("Defendant Erickson") of the Whitefish Police Department ("WFPD") informed Marshall that he was investigating allegations that Goguen had participated in the sexual assault of a teenage female, (referred to herein as "PAM DOE"), who had been provided alcohol, cocaine, and money by Goguen, Eric Payne, and a third individual. (Doc. 17.2, Ex. B at ¶392.) (capitalization in original).
>
> "On information and belief, PAM DOE recanted her story through the execution of a sworn declaration after being threatened by an attorney of Goguen, was forced to sign a non-disclosure and non-disparagement agreement and was paid indirectly by Goguen for the purpose of maintaining PAM DOE's silence or complicity. (Doc. 17.2, Ex. B at ¶407) (capitalization in original).
>
> "On information and belief, PAM DOE's signing of the sworn declaration was secured by Bruce Van Dalsem of Quinn Emanuel Urquhart & Sullivan, LLP, who personally flew to Montana, met with PAM DOE, and had her sign a pre-prepared declaration recanting her allegations. (Doc. 17.2, Ex. B at ¶408) (capitalization in original).

(10) "Threats to publicize unsubstantiated incidents of sexual impropriety unnerved former Sequoia Capital partner [Plaintiff] Michael Goguen and other Valley luminaries, according to a federal indictment" (emphasis added).

The *Post* Article states, "Threats to publicize unsubstantiated incidents of sexual impropriety unnerved former Sequoia Capital partner Michael Goguen and other Valley luminaries, according to a federal indictment." (Doc. 1, Ex. B.) (photo caption).

There is no reference to this allegation in either of the judicial proceedings.

(11) The article states that Amber Baptiste accused Plaintiff of "constant sexual abuse," "countless hours of forced sodomy," and demands that Baptiste refer to Plaintiff as "king" and "emperor."

The *Post* Article states, "But things came to a crashing halt in 2016 when his former mistress Amber Baptiste, an exotic dancer from Canada, accused him of "constant sexual abuse," including "countless hours of forced sodomy," court papers say. He also demanded that she refer to him as "king" and "emperor," according to the filings." (Doc. 1, Ex. A at 1.) The *Post* asserts these statements are a fair report of what was alleged in the Baptiste *Complaint*:

> "Ms. Baptiste submitted to Mr. Goguen's constant sexual abuse . . . Ms. Baptiste has suffered countless hours of forced sodomy." (Doc. 17.2, Ex. 1 at ¶3.)
>
> "Mr. Goguen would require Ms. Baptiste to grovel, refer to him as a king and an emperor . . ." (*Id.* at ¶23.)

(12) The article states that Baptiste "underwent surgery for a ruptured anal canal after [Plaintiff] 'forcibly sodomized her and left her bleeding and alone on the floor of a hotel room in a foreign country.'"

The *Post* Article states, "In 2012 Baptiste said, she underwent surgery after Goguen "forcibly sodomized her and left her bleeding and alone on the floor of a hotel room in a foreign country," court papers claimed." (Doc. 1, Ex. A at 1.) The *Post* asserts these statements are a fair report of what was alleged in the Baptiste *Complaint*:

> "In 2012, Ms. Baptiste underwent emergency surgery for a ruptured anal canal after Mr. Goguen forcibly sodomized her and left her bleeding and alone on the floor of a hotel room in a foreign country." (Doc. 17.2, Ex. 1 at ¶3.)

(13) The article states that Baptiste is restrained "from filing any similar suits against" Plaintiff.

The *Post* Article states, "Goguen won a countersuit in the three-year legal battle, securing a restraining order against Baptiste from filing any similar suits against him." (Doc. 1, Ex. A at 1.) In fact, in conjunction with dismissing Baptiste's *Verified Complaint*, the California judge ruled: "The Court grants a civil harassment restraining order . . . The restraining order shall also prohibit Baptiste, under her name or any pseudonym, from repeating the following false and defamatory statements that she has previously made in her social media posts . . ." (Doc. 1, Ex. B.)

The *Post* apparently revised the online article to reflect this statement.

(14) The article states that Plaintiff "filed a counter-claim" against Baptiste.

The *Post* Article states, "Goguen won a countersuit in the three-year legal battle, securing a restraining order against Baptiste from filing any similar suits against him." (Doc. 1, Ex. A, at 1.) The Court sees no reference in the *Post* Article to "counter-claim" as quoted in this matter.

The *Post* apparently revised the online article address Goguen's concerns.

(15) The article reports that Plaintiff "falsely told the FBI that Marshall did not have the requisite experience [and] had stolen and then laundered funds from [Plaintiff]." The article omits that Marshall admitted that he stole and laundered funds, rendering false the article's statement that Plaintiff had "falsely" reported this information to the FBI.

The *Post* Article states, "Goguen ... falsely told the FBI that Marshall did not have the requisite experience, had stolen and then laundered funds from Goguen . . ." (Doc. 1, Ex. A at 1.) The *Post* asserts these statements are a fair report of what was alleged in the Marshall *Complaint*:

> "Goguen and Hegger falsely told the FBI that Marshall did not have the requisite experience, had stolen and then laundered funds from Goguen . . ." (Doc. 17.2, Ex. B. at ¶533.)

(16) The article states that "according to the civil complaint, Marshall spent the cash on [Plaintiff]'s orders and was not reimbursed by [Plaintiff]." The article omits that, in November 2021 and before the article's publication, Marshall admitted to the criminal conduct of which he claimed, months earlier, to have been "falsely" accused.

The *Post* Article states, "Marshall said that he did not use money that Goguen had forwarded to him for paramilitary missions to Mexico 'or anywhere else. Instead, he spent the money on personal expenses and loans and gifts to friends and family members, among other expenditures,' the plea states. But according to the civil complaint, Marshall spent the cash on Goguen's orders and was not reimbursed by Goguen." (Doc. 1., Ex. A at 1.) The *Post* asserts these statements are a fair report of what was alleged in the Marshall *Complaint*:

> "Plaintiff Marshall was damaged by: a. Incurring significant costs to personally fund Amyntor expenses, including rent, utilities, employee payroll, employee medical insurance, and other overhead expenses in order to keep Amyntor afloat, costs for which Marshall was not reimbursed by Defendant Goguen or Amyntor." (Doc. 17.2, Ex. B. at ¶588(a); *see also* ¶¶727, 751, 770.)

(17) Alleged Defamatory Statements by William Dial as contained in the *Post* Article

William Dial is the former chief of police of the City of Whitefish, Montana. Dial is quoted at the end of the *Post* Article saying in regard to Goguen:

> "This man has to be stopped," said Bill Dial. The retired Whitefish police chief sued Goguen in December 2019 for alleged interference in his own investigation. "He's a billionaire a la Harvey Weinstein and Epstien [sic]. There's a lot of people in this community who know what he's about and they're afraid of him."[9]

(Doc. 1, Ex. B at 13.)

Goguen asserts in his *Complaint* "[Dial] had no basis to assert such an equivalence." (Doc. 1 at ¶9.)

In its *Motion to Dismiss*, the *Post* asserts all statements contained in the *Post* Article that Goguen alleges are defamatory are absolutely protected by the fair report privilege, regardless of whether the statements could carry a defamatory meaning. In a departure from the argument made in its briefing, the *Post* agreed at oral argument that Montana law should apply to this analysis, as there was not an actual conflict between Montana and New York law. In relation to the fair report privilege, New York requires the report to be "substantially accurate", while Montana requires the reporting to be fair, true and done without malice. To the extent the choice of law question needs to be addressed, the Court adopts Goguen's analysis such that Montana law applies to all aspects of this case.

In his *Motion to Dismiss*, Dial asserts the quote contained in the *Post* Article is a statement of opinion and cannot be reasonable understood to imply the assertion of undisclosed fact such that it could carry a defamatory meaning.

II. Legal Standard

A claim is subject to dismissal if, as pled, it is insufficient to state a cognizable claim entitling the claimant to relief. M.R.Civ.P. 12(b)(6). A court "must take all well-pled factual assertions as true and view them in the light most favorable to the claimant." *Anderson*, ¶8.[10] A claim is only subject to dismissal if it "either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim." *Id*. When analyzing a motion to dismiss, the only pertinent documents a court may consider are the complaint and any documents incorporated by reference in the complaint. *Abraham v. O'Brien*, 2020 MT 254N, ¶10, 402 Mont. 425, 472 P.3d 1204 (citing *Cowan v. Cowan*, 2004 MT 97, ¶11, 321 Mont. 13, 89 P.3d 6). The Montana

[9] This quoted from Goguen's Exhibit A to his *Complaint*, which is the print version of the Article.

[10] All internal citations and quotations are omitted unless otherwise noted.

Supreme Court reviews denials of a motion to dismiss for failing to dismiss a claim de novo. *Id.* ¶7.

III. Legal Analysis

"In enforcing laws that impose liability for mere speech, a right explicitly guaranteed to the people in the United States Constitution, states tread perilously close to the limits of their authority. Courts have acknowledged the tension between defamation claims and the First Amendment's protection of speech . . ." *Knievel v. ESPN*, 393 F.3d 1068, 1073 (9th Cir. (Mont.) 2005) (internal citations omitted). In Montana, and relevant to these proceedings, "[d]efamation is effected by . . . libel . . ." Mont. Code Ann. §27-1-801. "Libel is a false and unprivileged publication by writing . . . that exposes any person to hatred, contempt, ridicule, or obloquy or causes a person to be shunned or avoided or that has a tendency to injure a person in the person's occupation." Mont. Code Ann. §27-1-802. Relevant to this matter:

> A privileged publication is one made:
> (1) in the proper discharge of an official duty;
> * * *
> (4) by a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.

Mont. Code Ann. §27-1-804.

When read in conjunction, the above statutes create a three-part test for actions involving defamatory libel:

> (1) the publication must be false;
> (2) the publication must not be privileged; and
> (3) the publication must be defamatory, in that it exposes the person to "hatred, contempt, ridicule, or obloquy," or causes "a person to be shunned or avoided," or has a tendency to injure the person in his or her occupation.

Lee v. Traxler, 2016 MT 292, ¶14, 385 Mont. 354, 384 P.3d 82.

This statutory scheme must be interpreted in light of Article II, Section 7, of the Montana Constitution, which provides, in relevant part, "[i]n all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts." Mont. Const. art. II, § 7. This provision places the heart of any determination regarding defamatory libel directly within the province of the jury, subject only to determinations envisioned by the phrase "under the direction of the court." *Lee*, ¶15. "[T]ruth or falsity of the publication is a determination for the jury alone to make." *Lee*, ¶22.

(A) Were the publications defamatory?

The Montana Supreme Court applies the three-part test for defamatory libel in reverse order, first considering whether the publication is defamatory. *McConkey v. Flathead Elec.*

Coop., 2005 MT 334, ¶44, 330 Mont. 48, 125 P.3d 1121 (stating that the determination of whether a statement is defamatory is preliminary and within the province of the court). "The threshold test for a court is whether the statements, even if false, are capable of bearing a defamatory meaning. If the alleged statements are not defamatory, it is unnecessary for a jury to decide if they are false." *Chapman v. Maxwell*, 2014 MT 35, ¶14, 374 Mont. 12, 322 P.3d 1029. "When evaluating the threshold question of whether a statement is reasonably capable of sustaining a defamatory meaning, [courts] must interpret that statement from the standpoint of the average reader, judging the statement not in isolation, but within the context in which it is made." *Knievel v. ESPN*, 393 F.3d 1068, 1074 (2005) (internal citations omitted). "The test for defamation is stringent." *McConkey*, ¶45 (internal citations omitted).

> Defamation words to be actionable . . . must be of such nature that the court can presume as a matter of law that they will tend to disgrace and degrade [the plaintiff] or cause him to be shunned and avoided. It is not sufficient, standing alone, that the language is unpleasant and annoys or irks him, and subjects him to jests or banter, so as to affect his feelings.

McConkey, ¶45 (quoting *Wainman v. Bowler*, 176 Mont. 91, 96, 576 P.2d 268, 271 (1978).

> The First Amendment protects "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 20, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990) (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988)). Courts have extended First Amendment protection to such statements in recognition of "the reality that exaggeration and non-literal commentary have become an integral part of social discourse." *Levinsky's, Inc. v. Wal-Mart Stores, Inc*., 127 F.3d 122, 128 (1st Cir. 1997). By protecting speakers whose statements cannot reasonably be interpreted as allegations of fact, courts "provide[] 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." *Milkovich*, 497 U.S. at 20 (quoting *Falwell*, 485 U.S. at 53-55).

Knievel, 393 F.3d at 1074-1075.

"When determining whether a statement can reasonably be interpreted as a factual assertion, we must examine the totality of the circumstances in which it was made:"

> First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

Knievel, 393 F.3d at 1074-1075 (internal citations omitted).

"[A] basic principle in the law of defamation is that an expression of opinion generally does not carry a defamatory meaning and is thus not actionable." *McConkey*, ¶49. However, as the Montana Supreme Court has articulated, "it is error for a court to create an artificial dichotomy by distinguishing statements of opinion from statements of fact, and thereby granting unqualified immunity to the former." *Hale v. City of Billings*, 1999 MT 213, ¶27, 295 Mont. 495, 986 P.2d 413 (internal citations omitted). Instead, "if an opinion is not based on disclosed facts, and as a result creates the reasonable inference that the opinion is based on undisclosed defamatory facts, such an opinion is not afforded constitutional protection." *Hale*, ¶27 (citing Restatement (Second) of Torts § 566 and cmt. c. (1977)).

> It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether that meaning was attributed to it by the recipient of the communication.

Restatement (Second) of Torts § 566, cmt. c. (1977).

(1) *Post* Article Statements

The Court agrees with Goguen that the 16 identified allegations, as outlined above, are capable of maintaining a defamatory meaning, such that the Court may "presume as a matter of law that they will tend to disgrace and degrade [the plaintiff] or cause him to be shunned and avoided." *McConkey*, ¶45. The question then becomes whether the statements are nonetheless protected under the fair report privilege. "A privileged publication is one made . . . by a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof." Mont. Code Ann. §27-1-804(4). The Court finds the Baptiste and Marshall *Complaints* and ensuing litigation falls within the definition of a judicial proceeding. *Cox v. Lee Enterprises*, 222 Mont. 527, 530, 723 P.2d 238, 240 (1986).

Anchored in the public's constitutional right to know, right to inspect public documents, including complaints filed in court, and right to the public sittings of courts, *Cox* held "a qualified privilege is available as a defense for a newspaper publisher in a defamation case when the alleged defamation consists of facts taken from preliminary judicial pleadings which have been filed in court but which have not been judicially acted upon." *Id*.

The Court finds the following statements made in the *Post* Article, and as identified by Goguen in his Complaint and described above, are based on either the Baptiste or Marshall *Complaints*: Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 15 and 16. No. 10 is not contained in any judicial proceeding and is not protected by the fair report privilege. Nos. 13 and 14 were apparently corrected by the *Post* as not originally a fair and accurate report.

As such, the *Post* is ***preliminarily*** entitled to a qualified privilege as to those allegations that were taken from either the Baptiste or Marshall *Complaints*. However, the *Post* is ***ultimately*** only entitled to protection of that privilege if it was a "***fair*** and ***true*** report ***without***

malice." Mont. Code Ann. §27-1-804(4) (emphasis added). Goguen specifically alleged the Defendants acted with "malicious intent". *Compl*., p. 19, ¶40. As defined under Montana law:

> A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:
> (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or
> (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

Mont. Code Ann. §27-1-221(2).

In *Sible v. Lee Enters*., 224 Mont. 163, 167-168, 729 P.2d 1271, 1274 (1986), the Montana Supreme Court considered whether the jury had been properly instructed in determining whether a local paper had published an article with actual malice. *Sible* found the jury had not been properly instructed as to "reckless regard for the truth" as contained in Instruction No. 12:

> The effect of Instruction No. 12 is to shield a newspaper where it knows that the source of its information is highly suspect but fails to investigate. The newspaper is shielded because it failed to investigate and find out that certain information was false, choosing rather to close its eyes and publish with no actual serious doubts about the falsity of the material. Such a rule encourages irresponsible journalism. When a newspaper has facts that indicate material is highly suspect, it should, and it does, have a duty to investigate before publishing.

Sible, 224 Mont. at 167-168, 729 P.2d at 1274.

Whether the *Post* Article was fair, true and published without malice are questions of fact for the jury to decide. *Sible*, 224 Mont. at 167-168, 729 P.2d at 1274; *Cox*, 222 Mont. at 530, 723 P.2d at 240. Accordingly, Defendants NYP Holdings, Inc., and Isabel Vincent's *Motion to Dismiss* is DENIED. Based on the jury's verdict following trial, the Court will then make the legal determination as to whether the fair report privilege applies.

(2) Dial's Statements

The following statements by Dial, as contained in the *Post* Article and objected to by Goguen, are generally opinion statements:

> "This man has to be stopped," said Bill Dial. The retired Whitefish police chief sued Goguen in December 2019 for alleged interference in his own investigation. "He's a billionaire a la Harvey Weinstein and Epstien [sic]. There's a lot of people in this community who know what he's about and they're afraid of him."

However, the question is whether the opinions are "capable of bearing a defamatory meaning because [they] may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct." Restatement (Second) of Torts § 566, cmt. c. (1977).

The Court first considers the broad context in which the statements were published. The statements appear at the end of the *Post* Article, which relies on allegations made in a number of legal proceedings and is formatted more as a news article than an opinion piece. *Knievel*, 223 F.Supp.2d at 1179. The *Post* Article discloses numerous facts that would support Dial's assertion, including Goguen's wealth and sexual conduct, allegations of people in the community being intimidated, etc. While being compared to Weinstein and Epstein is understandably disturbing, it also fits within the overall tone and hyperbole of the *Post* Article. The Court then considers the specific context and contents of the statements. The statements were made by the longtime Chief of Police who was well-known in the community, known to previously be involved in investigations about Goguen and others—as described in the *Post* Article, and known to be retired under murky circumstances. Finally, the Court must consider whether the statements are sufficiently factual to be susceptible to being proven true or false. Dial's statements are not sufficiently factual to imply there are underlying undisclosed facts beyond those contained in the *Post* Article.

Dial's *Motion to Dismiss* is GRANTED as, in the context of the *Post* Article, they are not capable of a defamatory meaning.

DATED AND ELECTRONICALLY SIGNED AS NOTED BELOW.

CERTIFICATE OF SERVICE

I, Amy Claire McNulty, hereby certify that I have served true and accurate copies of the foregoing Notice - Notice of Appeal to the following on 09-06-2022:

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