IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0512

MICHAEL L. GOGUEN,

Plaintiff and Appellee Cross-Appellant,

v.

NYP HOLDINGS, INC., ISABEL VINCENT, AND DOES 1 through 100,

Defendants and Appellants,

and

WILLIAM DIAL,

Defendant and Cross-Appellee.

RESPONSE BRIEF OF CROSS-APPELLEE WILLIAM DIAL

On Appeal from the Montana Eleventh Judicial District Court, Flathead County, The Honorable Amy Poehling Eddy, Presiding

APPEARANCES:

Matt J. Kelly
Amy C. McNulty
TARLOW & STONECIPHER, PLLC
1705 West College
Bozeman, Montana 59715-4913
(406) 586-9714
mkelly@lawmt.com
amcnulty@lawmt.com

Laura R. Handman (pro hac vice)
Adam L. Rich (pro hac vice)
DAVIS WRIGHT TREMAINE LLP
1251 Ave. of the Americas, 21st Floor
New York, New York 10020-1104
(212) 489-8230
laurahandman@dwt.com
adamrich@dwt.com

ATTORNEYS FOR APPELLANTS

Reid J. Perkins
WORDEN THANE P.C.
321 W. Broadway St., Ste. 300
Missoula, Montana 59802-4142
(406) 721-3400
rperkins@wordenthane.com

Bruce E. Van Dalsem (pro hac vice)
Robert M. Schwartz (pro hac vice)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 S. Figueroa St., 10th Floor
Los Angeles, California 90017-2543
(213) 443-3000
brucevandalsem@quinnemanuel.com
robertschwartz@quinnemanuel.com

Diane M. Doolittle (pro hac vice)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, California 94065-2139
dianedoolittle@quinnemanuel.com

ATTORNEYS FOR APPELLEE AND CROSS- APPELLANT

Peter Michael Meloy
MELOY LAW FIRM
P.O. Box 1241
Helena, Montana 59624
mike@meloylawfirm.com

ATTORNEY FOR CROSS-APPELLEE

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STATEMENT OF ISSUE

Whether the district court correctly determined Dial's comments reported in the *Post* story characterizing Goguen as "a billionaire ala Harvey Weinstein and Epstein," "that he must be stopped," and that "a lot of people in the community who know what he is about and are afraid of him" are opinions and not actionable as defamation under Montana law?

STATEMENT OF THE CASE

On November 20, 2021 the *New York Post* published an article about Goguen captioned: "Tech billionaire allegedly kept spreadsheets of 5000 women he had sex with." The piece generally described the details of several lawsuits involving Goguen. At the end of the article, the reporter, Isabel Vincent, quoted Bill Dial as stating, "he must be stopped," "he is a billionaire ala Harvey Weinstein and Epstein" and "people in the community who know him are afraid of him."

Six days following the publication of the article, Goguen sued the *Post,* Vincent and Dial for defamation, attaching the *Post* article as an exhibit to the Complaint. (D.C. Doc. 1). Dial moved to dismiss on the basis his statements were opinions and not defamatory as a matter of law. After briefing and oral argument, the district court granted Dial's motion to dismiss, but denied a motion to dismiss filed by the *Post*, but certified for a Rule 54(b), M.R.Civ.P., appeal. Goguen then cross-appealed from the district court's order dismissing his claim against Dial.

STATEMENT OF FACTS

Since this appeal involves review of the district's ruling on motions to dismiss, the only relevant facts are those alleged in the Complaint and Dial's words in the *Post* article, as recited above, and attached to the Complaint. (D.C. Doc. 1).

STANDARD OF REVIEW

The Court applies a *de novo* standard to review of a district court's decision on a motion to dismiss for failure to state a claim under Rule 12(b)(6), M.R.Civ.P. *Cooper v. Glaser*, 2010 MT 55, ¶ 6, 355 Mont. 342, 228 P.3d 443 (affirming district court's dismissal of defamation action under Rule 12(b)(6), M.R.Civ.P.); *see also, Barthel v. Barretts Minerals Inc*., 2021 MT 232, ¶ 9, 405 Mont. 345, 496 P.3d 531 (citing *Good Sch. Missoula, Inc. v. Missoula Cty. Pub. Sch. Dist. No. 1*, 2008 MT 231, ¶ 15, 344 Mont. 374, 188 P.3d 1013).

SUMMARY OF ARGUMENT

This Court zealously safeguards Montana citizens' constitutional right of free speech, as guaranteed by both the First Amendment of the U.S. Constitution and Article II, § 7, of the Montana Constitution. Indeed, because these guarantees of free speech are fundamental rights, the test "for defamation is stringent." *McConkey v. Flathead Elec. Coop*., 2005 MT 334, ¶ 45, 330 Mont. 48, 125 P.3d 1121; *see also, Frigon v. Morrison-Maierle, Inc*., 233 Mont. 113, 121, 760 P.2d 57, 62 (1988).

The district court determined correctly that Goguen cannot meet this stringent test because Dial's statements constituted protected opinion, under either a direct or indirect claim. Dial's characterization of Goguen is clearly hyperbolic opinion and his metaphorical comparison of Goguen to other billionaires is not a provable fact. The only statement capable of factual proof is that Goguen is a billionaire, which is true. Dial did not accuse Goguen of a crime.

Nor can Dial's statement be construed as expressing indirect, untrue, facts about Goguen. Rather, a review of the various matters discussed in the *Post's* article reveals that Dial was expressing his disdain for Goguen, who like Epstein and Weinstein, is a billionaire accused of various instances of sexual misconduct with women. Simply comparing an individual's actions to another similarly situated person does not express a fact, direct or indirect, as to their guilt. Indeed, the law is clear that a rhetorical personification or harsh judgment regarding someone accused of sexual misconduct is not defamatory. Restatement (Second) of Torts, § 566, comment d.

Nothing in the substance of Dial's comments, nor the context in which his statements appear in the article, suggests to a reasonable reader that Dial's opinions were based on any undisclosed facts about Goguen's guilt, especially with regard to Dial's knowledge of Goguen from his former status as a law enforcement official. Regardless, "not all statements that could be interpreted in the abstract as

criminal accusations are defamatory." *Knievel v. ESPN*, 393 F.3d 1068, 1075 (9th Cir. 2005). While Dial's statements may be opprobrious and irksome to Goguen, they are not capable of defamatory meaning, entitling Dial to dismissal under Rule 12(b)(6), M.R.Civ.P., as a matter of law.

ARGUMENT

Statements of opinion are not actionable as defamation. There are "two kinds of opinion statements: those based on assumed or expressly stated facts, and those based on implied, undisclosed facts." *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1159 (9th Cir. 2021) (citing *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F.3d 1430, 1438-39 (9th Cir. 1995)). An "opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning." *Id*. As established below, Dial's statements express no false or demeaning facts, but rather express his dislike of Goguen, which is protected opinion.

An indirect implication from a statement can also form the basis of a defamation claim if the speaker expresses an opinion under circumstances that would cause a reasonable listener to understand that the opinion is based on the speaker's knowledge of undisclosed facts. In other words, the "opinion" can be treated as an implied assertion of fact, which if not actually true may covey a defamatory meaning about someone. *Id*.

This is the argument Goguen focuses on in his cross-appeal, and also must be rejected, as established below, because "loose, figurative, or hyperbolic language . . . negate[s] the impression that the contested statement is an assertion of fact." *Id*. at 1160 (quoting *Milkovich v. Lorain J. Co*., 497 U.S. 1, 21(1990); *see also, Underwager v. Channel 9 Austl*., 69 F.3d 361, 367 (9th Cir. 1995) (holding "colorful, figurative rhetoric" nonactionable because "reasonable minds would not take [it] to be factual").

Before turning to Goguen's main contentions, however, several prefatory notes are in order. For the first time in his cross-appeal, Goguen draws a distinction between the communication of Dial's opinion to the reporter and the publication of his comments in the *Post* article. Without having first presented this argument to the lower court, Goguen now faults the court for applying its "undisclosed facts" analysis in the context of the *Post* story. He insists that the actionability of the words must be determined at the time they were first communicated, without consideration of the context of the published article, and that the district court erred by not conducting such a prefatory analysis.

First, this is a new argument and therefore not appropriate for review by this Court. *City of Billings v. Edward*, 2012 MT 186, ¶ 32, 366 Mont. 107, 285 P.3d 523. Regardless, this argument does not assist Goguen as it does not matter whether context is assessed at the time Dial made the comments, or at the time the

Post published them, because his statements express only opinions and do not imply, any "undisclosed" defamatory facts about Goguen.

Moreover, the sole basis for Goguen's "undisclosed facts" argument is that Dial's status as the former Whitefish police chief would cause a reasonable reader to believe his comments were based on undisclosed facts. But this characterization is only meaningful in the context of the published article as it informs the reader of Dial's former position "retired Whitefish police chief." In other words, Goguen's indirect libel claim can only be made in the actual context conferred by the *Post* article. "The context in which the statement appears is paramount" to any "analysis, and in some cases it can be dispositive." *Knievel*, 393 F.3d at 1075. Indeed, Goguen's cross-appeal argues defamatory meaning from "undisclosed facts" perceived by "a reasonable reader." (Goguen's Brief at p. 36). Goguen cannot cherry-pick only those facts from the article providing "context" which suits his position. The entire context of the *Post* article addressing the "allegations" against Goguen must be considered.

A pervasive theme in Goguen's cross-appeal that any determination of whether a statement constitutes protected opinion must be submitted to a jury for resolution is inaccurate. A district court may make a pretrial determination as to whether an allegedly libelous statement is capable of defamatory meaning. The district court here properly did so and its decision should be affirmed.

I. A Court May Determine Defamatory Meaning as a Matter of Law.

A court may make the preliminary determination as to whether the alleged publication is defamatory. *Lee v. Traxler*, 2016 MT 292, ¶¶ 18-19, 385 Mont. 354, 384 P.3d 82 (citing *McConkey*, ¶ 44) (the determination of whether a statement is defamatory is preliminary and within the province of the court). As noted by a leading treatise:

> Over the years one exception to the general rule that the complaint will be construed liberally on a Rule 12(b)(6) motion has been employed by a number of federal courts. When the claim alleged is a traditionally disfavored "cause of action" such as malicious prosecution, libel or slander, courts have tended to construe the complaint by a somewhat stricter standard and have been more inclined to grant a Rule 12(b)(6) motion to dismiss.

Wright and Miller, Federal Practice and Procedure, § 1356, p. 592.

It is well-settled that trial courts can dispose of defamation cases at the pleading stage. *See e.g., Yeagle v. Collegiate Times*, 497 S.E.2d 136, 138 (Va. 1998) (holding trial court properly dismissed complaint because phrase "Director of Butt Licking" while "disgusting, offensive, and in extremely bad taste" was not defamatory as a matter of law, but mere "rhetorical hyperbole"); *Scott v. Moon*, No. 2:19CV00005, 2019 U.S. Dist. LEXIS 11856, at *7 (W.D. Va. Jan. 24, 2019) (holding following "hyperbolic" statements failed to state claim: that plaintiff was "the dumbest person, possibly ever," "really fucking stupid," a "moron," a "slut

whore," that she writes like she uses a "crayola magic marker," and "ha[d] like a dozen husbands by age 30").

Indeed, Montana judges will not hesitate to dismiss a complaint when the allegations do not meet the requisite legal standard to maintain an action for defamation, as this Court recently did a short while ago. *Rusk v. Roseen*, 2022 MT 21N, ¶ 7, 408 Mont. 539, 502 P.3d 176 (affirming district court's Rule 12(b)(6) dismissal of petition alleging defamation, slander and libel);[1] *see also*, *Cooper*, ¶ 6 (affirming district court's Rule 12(b)(6) dismissal of defamation action on the basis of legislative immunity).

And specifically, a Montana trial court is justified in dismissing an action which erroneously alleges as defamatory a statement of opinion. *See e.g. Argenbright v. Page*, Cause No. BDV 97-653, 1998 Mont. Dist. LEXIS 222, *9-10 (Judge Sherlock granted defendant's motion to dismiss, noting the "threshold issue" that statements were opinion "is dispositive of the defamation claim"). While *Argenbright* was not appealed, a Montana district court is well within its authority to make a pretrial determination that a statement is not defamatory as a matter of law. *Lee*, ¶ 27; *Cooper*, ¶ 6.

[1] Dial does not cite this case "as binding precedent," but rather for the fact of its dismissal. Int.Op.Rules, § I, ¶ 3(c).

Thus, contrary to Goguen's criticism that Montana courts will not dismiss a defamation complaint on the basis it alleges nonactionable opinion--they can, and they have. And so too should this Court. As noted by this Court in *Williams v. Pasma*, 202 Mont. 66, 72, 656 P.2d 212, 215 (1982):

> While our Constitution like that of Missouri, Colorado, South Dakota and Wyoming provides that in libel suits 'the jury under the direction of the court, shall determine the law and the facts' yet the decisions clearly show that the function of the court and jury is not greatly different in the trial of libel from what it is in other cases.

Citing *Manley v. Harer*, 73 Mont. 253, 263, 235 P.2d 757, 760 (1925), Goguen maintains that Dial's statement is susceptible to two different meanings and "it is for the jury to determine in what sense it was used." But Dial misrepresents this principle as followed by the Court in *Manley*. This Court in *Manley* determined, as a matter of law, the challenged statements were defamatory *per se*. *Manley*, 73 Mont. at 262, 235 P. at 760. The allegedly libelous statement in *Manley* was an accusation that a Broadwater County road supervisor was submitting claims for work he was not doing. The defendant claimed that his comment was not libel *per se* and could not be made so by innuendo. The lower court agreed and dismissed the claims. This Court reversed, concluding the statement was libelous *per se*, but remanding on the issue of whether it was privileged because it was made against an official regarding a public matter, which required a jury's determination of malice. *Manley*, 73 Mont. at 264, 235 P. at 761.

Even in *Hale v City of Billings*, 1999 MT 213, 295 Mont. 495, 986 P.2d 413, the case most heavily relied upon by Goguen in his brief, this Court made clear that "it is still the province of the court" to determined questions of law, and specifically, "determine whether a communication is capable of bearing a particular meaning," "whether the meaning is defamatory," and whether any privilege exists. *Hale*, ¶¶ 16, 35.

Accordingly, as argued below, a district court may declare a statement unactionable opinion as a matter of law, just as the district court did correctly in this case. Goguen's contrary position should be rejected.

II. The District Court Correctly Determined Dial's Statements Were not Defamatory Because They Expressed no Direct Facts and Constituted Protected Opinion.

Goguen's defamation claim against Dial arises from the following words published in the *Post* article, which is attached to the Complaint and is also attached as Exhibit A in Dial's opening brief on his motion to dismiss:

> "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 ala Harvey Weinstein and (Jeffrey) Epstein. There's a lot of people in this community who know what he's about and they are afraid of him."

It is well-settled libel law in Montana that expressions of opinion are not actionable. *McConkey* , ¶ 44. In order to be defamatory, this Court has held that "the words at issue '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.'" *Lee*, ¶ 20 (citing *Ray v. Connell*, 2016 MT 95, ¶ 11, 383 Mont. 221, 371 P.3d 391). And because the test for defamatory meaning is "stringent . . . claims of defamatory libel may not be based on innuendo or inference,' or 'sarcastic or hyperbolic statements.'" *Lee*, ¶ 20 (citation omitted).

In 1990, the U.S. Supreme Court issued an opinion addressing the extent of constitutional protection for expressions of opinions. In *Milkovich*, the Court resolved a lawsuit involving a high school wrestling coach who sued a sports columnist for reporting that the coach had lied during a hearing regarding his employment suspension. Relying on a myriad of cases construing the extent of the constitutional privilege of expressions of opinion, the lower courts dismissed the case. The Supreme Court, in a 7-2 decision authored by Chief Justice Rehnquist, reversed the lower courts.

The Chief's opinion reaffirmed the well-established principle that "a statement of opinion relating to matters of public concern which does not contain a provable false factual communication will receive full constitutional protection." *Milkovich,* 497 U.S. at 20. At the same time, the Court eschewed any *a priori* classification of the challenged statement as fact or opinion and refocused the

inquiry on the verifiability of the truth of the statement. The linchpin of *Milkovich* is not whether a statement might be labeled as opinion but whether the statement reasonably implied an assertion of objective fact.

Interestingly, the Court in *Milkovich* cited with approval *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970), where a real estate developer sued a newspaper for publishing articles stating that some people characterized his negotiations with the local city council as "blackmail." Rejecting a contention that liability could be premised on the notion that the word "blackmail" implied the developer had committed the actual crime of blackmail, the Court held that "the imposition of liability on such a basis was constitutionally impermissible -- that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported." *Greenbelt,* 398 U.S. at 13.

Noting that the published reports "were accurate and full," the Court reasoned that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." *Greenbelt,* 398 U.S. at 13. In other words, even if a challenged phrase is technically capable of a defamatory meaning when viewed in a vacuum, its actual expression must be analyzed in the context it was presented to the reader.

The Ninth Circuit has relied on *Greenbelt* for the proposition that "[b]ecause the reasonable interpretation of a word can change depending on the context in which it appears, not all statements that could be interpreted in the abstract as criminal accusations are defamatory." *Knievel*, 393 F.3d at 1075; *see also, Fasi v. Gannett Co.*, No. 96-15129, 1997 U.S. App. LEXIS 12445, at *3 (9th Cir. May 27, 1997) ("*Greenbelt* makes clear that the words extortion and blackmail must be viewed in the context of the article to determine their meaning"); *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 301-02 (4th Cir. 2008) (concluding that calling someone a "hired killer" was loose and hyperbolic and not actionable").

While *Milkovich* purportedly settled the constitutional dimensions of opinion protection under the First Amendment, the jurisprudence spawned by the case provided little guidance on how lower courts should resolve the task of separating fact from opinion. As Justice Brennan observed in his dissenting opinion, determining whether a statement implies "actual facts about an individual . . . are the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made." *Milkovich*, 495 U.S. at 24.

Justice Brennan also devised a useful summary of the law: "[I]f 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, the statement is not actionable." *Milkovich*, 495 U.S. at 24 (citing *Haynes v. Alfred A. Knopf, Inc.*, 8 F.2d 1222, 1227 (7th Cir. 1993)).

This Court departed somewhat from *Milkovich* in *Hale v. City of Billings*, *supra*, reversing a grant of summary judgment but reaffirming the Montana principle that whether a statement is fact or protected opinion is a matter of law for the court to decide. The main issue in *Hale* was not whether reference during a "most wanted" television program to Hale being a "most wanted suspect" or "fugitive from justice" were capable of defamatory meaning, but rather whether there was overwhelming evidence that such statements were true. The Court concluded a jury would have to decide truthfulness. *Hale*, ¶ 21.

As to the issue of whether the statements were "constitutionally protected opinion," this Court "conclude[d] that this is a matter which a court can and should rightfully determine upon a motion for summary judgment. Such a determination, pursuant to Restatement (Second) of Torts § 617, goes to whether the statement is capable of bearing a defamatory meaning, and whether the meaning is in fact defamatory." *Hale*, ¶ 22. If clear from the context of the statement that the speaker was relying on facts disclosed in either the statement itself or in the

broader communication in which it was contained, the statement is afforded constitutional protection as opinion. *Hale*, ¶ 27. This is the same analysis followed in the Ninth Circuit. *Herring*, *supra*.

Unfortunately, neither *Milkovich* nor *Hale*, provide a handy recipe which affords a lower court criteria to be considered in resolving whether an opinion statement is entitled to protection. The Ninth Circuit examines the "totality of the circumstances in which it was made" and uses the following factors to determine whether a statement can reasonably be interpreted as a factual assertion: 1) first, the statement is assessed "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"; 2) next, "the specific context and content of the statements" are reviewed, " analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation;" and 3) last, the court "inquire[s] whether the statement itself is sufficiently factual to be susceptible of being proved true or false." *Knievel*, 393 F.3d at 1074-75.

Following *Hale*, the Montana Supreme Court decided two separate cases in which it addressed whether a statement was protected opinion. In *McConkey*, *supra*, the libel claim arose after a contentious dispute between the Board of Trustees and the general manager of Flathead Electric Coop (FEC) Warren McConkey. The chair of the Board , James Malone, wrote several letters to the

local newspaper blaming McConkey for the poor financial position of the FEC. Among the statements, Malone wrote:

> Management (the Plaintiff general manager) has led the co-op through direct actions and through bad recommendations to the board over the last five years into one h[ell] of a mess.

Citing *Burr v. Winnett Times Pub. Co.*, 80 Mont. 70, 77, 258 P. 242, 244 (1927), the Court reiterated the proposition that sarcastic and hyperbolic statements are protected and meet the stringent test for defamation: "Statements such as "Management has led the co-op . . . into one h[ell] of a mess[,]" are hyperbolic and not actionable. *McConkey*, ¶ 48.

Goguen cites an obscure Illinois lower appellate court decision, where comparison to a public figure was found actionable, *Hadley v. Doe*, 12 N.E.3d 75, 90-91 (Ill. App. Ct. 2014). In *Hadley*, an anonymous on-line news reader posted a comment that the plaintiff was "a Jerry Sandusky waiting to be exposed." *Hadley*, however, is inapposite. First, the Court did not find the comparison alone actionable. Rather, the additional statement, "[c]heck out the view he has of Empire from his front door" implied that he was a pedophile because it referenced a local elementary school, i.e., Empire, and because "when the statement was posted, the Sandusky sexual abuse scandal had dominated the national news for weeks." *Hadley*, 12 N.E.3d at 85. Additionally, the statement "waiting to be exposed" implied guilt.

Neither additional contextual factor is present here. At the time of Dial's comment, the Weinstein and Epstein scandals were no longer dominating the national news. And while it was known that both billionaires were accused of various instances of sexual misconduct by women, there was no additional context in Dial's comments implying that Goguen had committed a crime, that he was guilty of sexual misconduct, or that he would be found guilty and was "waiting to be exposed," such as that found in *Hadley*, 12 N.E.3d at 85.

Additionally, the defendant in *Hadley* persuaded the lower court to apply Illinois' "innocent construction" rule. In Illinois, words cannot be actionable *per se* if they are capable of innocent construction. The innocent construction rule requires courts to consider a statement in context, giving the words their natural and obvious meaning. If so construed, a statement "may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff, it cannot be actionable *per se*." *Chapski v. Copely Press*, 92 Ill.2d 344, 352 (1982); *see also, Kolegas v. Heftel Broad. Corp.* 607 N.E.2d 201, 206 (1992). Under the innocent construction rule, only reasonable innocent constructions will remove an allegedly defamatory statement from the *per se* category. *Id.; see also, Costello v. Capital Cities Commc'ns, Inc.*, 532 N.E.2d 790, 796 (Ill. 1988).

Montana courts have never adopted the "innocent construction" rule and it would be erroneous to apply the *Hadley* rule in this case. Moreover, a careful

reading of the case reveals the Court found the mere comparison to Sandusky was "figurative language akin to name calling" which actually constituted an expression of opinion, but that the additional references to undisclosed facts rendered the opinion "mixed" entitling the plaintiff to discover the identity of the anonymous poster of the comment. *Hadley*, 12 N.E.3d at 90-91.

Indeed, this fact is instructive. The *Hadley* Court stressed that it did not "intend to guide or predict the outcome of the underlying defamation case. We rule only that Hadley has met his discovery burden." *Hadley*, 12 N.E.3d at 92. On this basis, it distinguished *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir. 1999), noting it was "on point in other ways" but "did not involve the presuit disclosure of a potential defendant's identity." *Hadley*, 12 N.E.3d at 91.

In *Gilbrook*, the Ninth Circuit Court of Appeals reversed a jury verdict that the defendant had defamed the plaintiff by calling him a "Jimmy Hoffa," concluding such reference was colorful, figurative rhetoric that reasonable minds would not take to be a factual assertion that the plaintiff had committed a crime. *Gilbrook*, 177 F.3d at 862; *see also, Clifford v. Trump*, 818 F. App'x 746, 749-50 (9th Cir. 2020) ("Stormy Daniels" lost her defamation case against Donald Trump on the basis of his use of "a colorful expression of rhetorical hyperbole" in a tweet which labeled her lawyer as "[a] total con job").

The same holds true here. Dial's comparison to Weinstein and Epstein expresses his opinion in a colorful, rhetorical, and figurative way as to billionaires alleged to have engaged in sexual misconduct and, as the district court concluded, implies no undisclosed facts that he was actually stating Goguen was guilty of raping numerous women. It must be remembered that the article in which Dial's statements were published addressed "allegations" against Goguen. The alleged defamatory statement must be "read in context" and "[t]here is no defamation liability for a statement of opinion when a report sets out the underlying facts in the publication itself, thereby allowing the listener to evaluate the facts and either accept or reject the opinion"). *Clifford*, 818 F. App'x at 750 (citation omitted).

In addition to the Ninth Circuit, other courts have declared that mere comparison to a celebrity or well-known criminal actor or enterprise qualifies as non-defamatory rhetorical opinion, and many have dismissed the case under Rule 12(b)(6) for failing to state a claim. *See e.g. Montefusco v. ESPN Inc*., 47 F. App'x 124, 125 (3d Cir. 2002) (affirming dismissal of defamation action where charges against baseball player were compared to O.J. Simpson); *Clark v. Time Inc*., 242 F. Supp. 3d 1194, 1222-23 (D. Kan. 2017) (determining journalist's reference to former county club manager as "Vlad the Impaler" in comparing his management style was not defamatory under Kansas law and constituted opinion in the form of "rhetorical hyperbole" and "exaggerated expressions of criticism");

Holy Spirit Ass'n. v. Harper & Row Publishers, 420 N.Y.S.2d 56, 59 (N.Y.Sup.Ct. 1979) (comparison of occult church group the "Moonies" to Nazis constituted an expression of opinion and was not actionable as defamation); *Peters v. Saunders*, 50 Cal. App. 4th 1823, 1833 n.5 (1996) (unpublished) ("Saunders' comparison of Peters' organization to the Mafia [is] an expression of opinion or an exercise in hyperbole [and] is not defamatory"); *Rizzo v. Welcomat*, 14 Phila. 557, 562 (1986) (comparison of mayor to Hitler not actionable).

While at the district court level, Goguen attempted to distinguish all of these cases as containing "cartoonish hyperbole" such that no reasonable reader would assume they were true (see Goguen's Response to Dial's Mtn Dismiss, pg. 14), none of these cases made such a distinction. In fact, there is no "cartoonish hyperbole" exception for expressions of opinion in the law. Rather, rhetorical comparison to a public figure constitutes hyperbolic opinion, not actionable as defamation, especially in this case where it is clear by its context that Dial's comparison was to other billionaires facing "allegations" of sexual misconduct.

Perhaps realizing the futility of these challenges, Goguen relies heavily on the second part of the challenged statement: "There's a lot of people in this community who know what he's about and they are afraid of him." Goguen believes this is not opinion because it is susceptible to being proven true or false. According to Goguen, "[t]here either are or are not "a lot of people" in Whitefish

who are afraid of Goguen, so a "determination of whether [Dial] lied in this instance can be made on a core of objective evidence." (Goguen's Opening Brief on Cross-appeal, p. 37.) Apart from whether the statement is provable, the better question is whether it is even defamatory.

Under Montana law, libel is "a false and unprivileged publication…which exposes any person to hatred, contempt, ridicule or obloquy or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation." Section 27-1-802, MCA. Even under this statutory definition, Dial's comment is not capable of defamatory meaning as the courts have construed the meaning of "defamatory per se."

"Words are defamatory *per se* which upon their face and without the aid of extrinsic proof are injurious to the person concerning whom they are spoken. *Anderson v. City of Troy*, 2003 MT 128, ¶ 14, 316 Mont. 39, 68 P.3d 805. In *Keller v. Safeway Stores*, 111 Mont. 28, 31, 108 P.2d 605 (1940), this Court insisted that if the words were at all ambiguous, that is, if they lack a single, unmistakable (and opprobrious) meaning they are not defamatory. "It will not be sufficient to prove words which only amount to an accusation of fraudulent, dishonest, vicious or immoral, but not criminal, conduct." *Keller*, 111 Mont. at 33, 108 P.2d at 609.

In *Anderson*, ¶ 17, the Court concluded that "gang-banger" was too vague to impute any particular opprobrious characteristic to the plaintiff and was not defamatory: "[t]erms which basically convey only a vague message that someone is a "bad" person are not" defamatory. Words like "crook, creep, gangster or hoodlum," which "leave the listener guessing as to the actions or characteristics of the person being described" are not defamatory. *Id.*

In *Wainman v, Bowler*, 176 Mont. 91, 576 P.2d 268 (1978), the Court found that *Daniels County Leader* articles accusing the police department of dereliction of duties, bullying of people, deliberate concealing of public records and abysmal record keeping were not defamatory *per se* as to the plaintiff police chief. The Court affirmed a motion to dismiss where the district court noted: "[t]he important pleading in this case is the complaint and a reading of the complaint reveals that all of the references are to a general class of people, and although the plaintiff was within that class, the language was insufficient to constitute libel per se." *Wainman*, 176 Mont. at 93.

In *Chapman v. Maxwell*, 2014 MT 35, 374 Mont. 12, 322 P.3d 1029, this Court reviewed a grant of summary judgment in a libel claim arising from a document contained in the plaintiff's medical records that the defendant nurse was concerned that the plaintiff may have been malingering or seeking narcotics. The plaintiff, Allison Chapman, appearing in the case *pro se*, claimed that the

statements in her records were false and defamatory. LaDonna Maxwell, her nurse, contended among other things that the statements were opinion and not actionable. Citing the general jurisprudence governing libel claims (as well as *McConkey*), this Court concluded:

> We conclude that Maxwell's statements in her medical records did not carry a defamatory meaning; therefore, it is unnecessary to determine whether they were false. 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." *McConkey v. Flathead Elec. Coop.*,2005 MT 334, ¶ 44, 330 Mont. 48, 125 P.3d 1121.

Chapman, ¶ 14.

Comparing the statement made in this case to Montana cases in which the Court concluded that certain words ***were*** defamatory per se is instructive. In nearly all of the cases, the statement deemed libelous per se is an explicit accusation of criminal conduct. In *Keller, supra*, a Safeway store manager accused the plaintiff of trying to pass a worthless check, which is a codified criminal offense. The Court concluded that because the alleged statement charged the plaintiff "of doing just that, we fail to see how it can seriously be contended that she was not charged with crime. It follows that the language used constituted slander per se." *Keller*, 111 Mont. at 34, 108 P.2d at 609; *see also*, *Roots v. Montana Human Rights*

Network, 275 Mont. 408, 913 P.2d 638 (1996) (naming plaintiff as a Ku Klux Klan (KKK) organizer capable of defamatory meaning).

Certainly, within the context of this jurisprudence, stating that people are afraid or fearful of Goguen is simply not defamatory. "Defamation requires a purported factual assertion and the statement that someone 'fears for their life,' in this context, is a clear expression of opinion not fact." *Osei v. Coastal Int'l Sec*., Civil Action No. 1:13-cv-1204, 2014 U.S. Dist. LEXIS 202884, at *4 (E.D. Va. Mar. 6, 2014). Dial's statement does not accuse Goguen of committing a crime. It cannot be made libelous even by innuendo. (Goguen argued, below, that his claim is libel *per quod*, despite having never pled the theory).

Goguen does rely on this Court's decision in *Roots, supra*. There, the plaintiff, Roger Roots, sued the Montana Human Rights Network for defamation arising out of a publication authored by the group asserting that Roots was an organizer for the Ku Klux Klan. The trial court granted summary judgment ruling that Roots was a limited purpose public figure and the assertion he was a KKK organizer was protected opinion. This Court reversed on grounds that there were material disputes of fact concerning Roots limited purpose public figure status rendering summary judgment inappropriate. The Court also found that the allegedly defamatory statement that Roots was an organizer for the KKK was a factual assertion and not entitled to protection.

Although the Court cited *Milkovich* in resolving the second issue, MHRN neither argued, nor did the Court consider whether the challenged statement was unprotected because it was based on undisclosed fact. Both parties offered evidence at the summary judgment stage. MRHN offered evidence of Roots connections to the KKK and Roots submitted affidavits from actual members of the Klan stating he was not an organizer. The Court determined that since the challenged statement was susceptible to proof of truth or falsity, it was not protected speech.

Accordingly, *Roots* is not helpful to resolution of this case. None of the comments made by Dial contain provable facts. A metaphorical comparison to a famous person cannot be proven true or false. The only part of the challenged statement that can be considered an assertion of fact (that people in Whitefish who know him are afraid of hm) is not, by itself, capable of a defamatory meaning. Indeed, given the contextual relationship of this latter statement to the remainder of Dial's comments it falls within the opinion privilege.

In addition to the claim that Dial's comments are not "opinion" because they are susceptible to proof that they are true or false, Goguen also contends that even if the words are opinion, a reasonable reader would conclude they were based on undisclosed facts and are not covered by the opinion privilege. As argued below, this "indirect" or "mixed" position must also be rejected.

III. The District Court Correctly Determined Dial's Statements Were Not Defamatory Because They Expressed no Indirect Facts and Were Therefore Protected Opinion.

Goguen's fallback argument--that even if not directly defamatory, the words implied an indirect untrue statement of fact--necessarily concedes that Dial's statement in the first instance expressed his "opinion" as the legal exception for "undisclosed defamatory facts" applies only to statements of opinion. *Hale*, ¶ 27. Regardless, while Goguen attempts to paint Dial with background knowledge based on his status as the former Chief of Police, the article contains no such reference or implication, and makes clear that Dial was retired when he was interviewed and was not affiliated with any law enforcement entity.

Revisiting *McConkey, supra* is instructive. In *McConkey*, the plaintiff contended that under *Hale*, the statements were not protected opinion because they were made in the context of undisclosed facts. This Court rejected this argument concluding:

> However, McConkey has failed to suggest what inferred facts are undisclosed in this case. To the contrary, the publicly disclosed facts concerning FEC's financial problems and rate increases are obvious and disclosed. It is not defamatory to express the opinion that FEC's publicly known financial problems were the result of mismanagement, and that the general manager may have been partially responsible. Therefore, in this case there was no reasonable inference that Malone's opinions were based on undisclosed defamatory facts.

McConkey, ¶ 50.

Goguen's primary claim that the comments are not entitled to protection as opinion because a reasonable reader would assume they were based on undisclosed facts known to Dial in his former occupation as a police chief. Notwithstanding that Goguen's argument regarding the timing of Dial's statement is new and precluded from appellate review, it matters not because such an "undisclosed fact" allegation can only be assessed in the context of the published story. Moreover, any undisclosed implication must be a "defamatory fact" *Hale,* ¶¶ 27-29, which Goguen cannot establish.

While technically, Goguen may have a slander (not libel) claim against Dial arising from his initial interview with Vincent, his arguments raised before the district court were grounded in the publication Dial's comments in the *Post* story. It would make no sense to evaluate Goguen's "reasonable reader/undisclosed facts" theory only in the context of the interview between Dial and Vincent. Regardless, Dial's statements did not convey or imply any indirect defamatory facts regarding Goguen. Goguen's argument must be rejected on both procedural and substantive grounds, and the district court's decision, affirmed.

Because Goguen advanced his "reasonable reader" argument to the district court, the court resolved Goguen's contention by considering the article as a whole and the context in which Dial's comments appeared in the story concluding that there was no basis for a "reasonable reader" to assume they were made on some

secret facts. The court "first considered the broad context in which the statements were published." (Dist. Ct.'s Opinion, p. 16). The court found that the comments were at the end of the article which discussed allegations in a number of lawsuits "that would support his assertion, including Goguen's wealth and sexual conduct." *Id*. "While being compared to Weinstein and Epstein is understandably disturbing, it also fits within the overall tone and hyperbole of the *Post* Article." *Id*. Dial's statements are not sufficiently factual to imply there are underlying undisclosed facts beyond those contained in the *Post* article.

Insisting that Dial's statements were "suffused with factual content" does not make it so. (Goguen's Opening Brief on Cross-Appeal at p. 36). Indeed, there is no indication in the article's context that Dial possessed some unrevealed defamatory facts about Goguen's guilt due to his former status as a law enforcement officer. Dial's comments were pure non-actionable opinion that he disliked, disfavored, and was perhaps even fearful of Goguen, a very wealthy man with resources to fight allegations of sexual misconduct, similar to billionaires like Weinstein and Epstein. Dial made no implication of guilt, and stated only that Goguen, like Weinstein and Epstein, was a billionaire facing lawsuits involving allegations of sexual misconduct.

The context is essential. Dial's statements were included at the end of a detailed examination by the Post of the numerous "allegations" of sexual

improprieties by Goguen in several high-profile lawsuits. Dial's opinion of Goguen as reported in the piece was clearly related to and based on the rest of the story. There is nothing beyond describing Dial as the former Whitefish police chief contained in the entire article suggesting that his comments were based on undisclosed facts. Indeed, Goguen's only basis for his "undisclosed defamatory facts" argument is Dial's status as a former police chief. Such status, without more, does not equate to an implication of criminal conduct.

This Court should conclude that a review of Dial's statements in context does not imply the existence of any undisclosed facts supporting his opinions and no defamatory meaning can reasonably be inferred from them. "If all that the communication does is to express a harsh judgment upon known or assumed facts, there is no more than an expression of opinion of the pure type, and an action of defamation cannot be maintained. For maintaining the action it is required that the expression of ridicule imply the assertion of a factual charge that would be defamatory if made expressly." Restatement (Second) of Torts, § 566, comment d.

This Court's decision in *Hale* does not compel a contrary conclusion. Unlike in *Hale*, here there is no factual connotation to be proven false. *Hale*, ¶ 30. The focus in *Hale* was that the tv show's statement that Hale was "armed and dangerous" was capable of being proven false because Hale had never been accused of committing a crime with a weapon and the Billings police had no

knowledge that even owned a firearm. *Hale*, ¶ 29. The same rationale applied to the terms "most wanted" as it could be proven false. *Hale*, ¶ 30.

In contrast to the specific defamatory words at issue in *Hale*, which were found to imply assertions of provable and verifiable fact, none of Dial's statements about Goguen conveyed any provable defamatory fact. *Hale*, ¶¶ 29, 31 (the subject defamatory language implied Hale was "armed" in the absence of any evidence or suspicion or that he was a "fugitive" when the record showed the police knew where he was and were not making efforts to apprehend him).

Goguen's "undisclosed fact" theory of defamation requires implication upon implication before a defamatory fact can be reached and compels consideration of only the select facts chosen by Goguen, to the exclusion of the entire context of the article in which they appear. An implied defamatory fact must result from the statement itself, not one which is based upon an indirect inference from the implied or unstated fact. In other words, the statement itself must imply an undisclosed defamatory fact, *Milkovich*, 497 U.S. at 19, not imply an innocuous fact from which a defamatory factual assumption can be made.

Simply because Dial was the former Whitefish chief of police does not imply that he possessed any unspoken knowledge of Goguen's guilt, when the statements themselves appear in an article addressing "allegations" of sexual misconduct. The Ninth Circuit rejected a similar argument made by "Stormy

Daniels" (Stephanie Clifford) that Donald Trump's tweet could be construed by a reasonable reader "that Mr. Trump had personal knowledge about whether there had in fact been a relationship, such that the tweet would be understood as a statement, based on undisclosed facts, that [she] had fabricated her account of the relationship." *Clifford*, 818 F. App'x at 750.

Notably, in *Clifford*, the Ninth Circuit affirmed the trial court's dismissal of Ms. Clifford's complaint on the basis her allegations were legally insufficient to state a cause of action for defamation. *Clifford*, 818 F. App'x at 751. This Court should similarly reject Goguen's "undisclosed facts" argument and affirm Dial's dismissal from Goguen's lawsuit.

In summary, an informed review of the jurisprudence applicable to Dial's statements, and the context in which they were published, compels the conclusion that he did not defame Goguen, directly or indirectly, entitling Dial to dismissal. This Court should affirm.

CONCLUSION

Under well-settled defamation jurisprudence, libel insists upon a false statement of *fact*. An opinion does not constitute an expression of fact and is not actionable. The only portion of the statement capable of proof is that Goguen is a billionaire. He is. However, obviously he is not actually Weinstein or Epstein and Dial's statement of comparison is merely an expression of opinion. Indeed, a

reasonable reader would take the comments as Dial's hyperbolic opinion expressing his extreme distaste for Goguen. One of the other two parts of the challenged statement "he must be stopped" is also pure opinion and a reasonable reader would consider it so.

Accordingly, this Court should conclude that because Dial's statements regarding Goguen constitute his pure expressions of opinion, they are not actionable as defamation, as a matter of law, and therefore affirm the district court's dismissal.

DATED this 16th day of March, 2023, and RESUBMITTED as corrected and requested by the Court, this 17th day of March, 2023.

Peter Michael Meloy
MELOY LAW FIRM
P.O. Box 1241
Helena MT 59624

/s/ Peter Michael Meloy
PETER MICHAEL MELOY
Attorney for Cross-Appellee William Dial

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Answer brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,527 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance.

/s/ Peter Michael Meloy

CERTIFICATE OF SERVICE

I, Peter M. Meloy, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-20-2023:

Reid J. Perkins (Attorney)
321 W. Broadway St., Ste. 300
Missoula MT 59802
Representing: Michael L. Goguen
Service Method: eService

Matt J. Kelly (Attorney)
1705 West College
Bozeman MT 59715
Representing: NYP Holdings, Inc., Isabel Vincent
Service Method: eService

Amy Claire McNulty (Attorney)
1705 West College Street
Bozeman MT 59715
Representing: NYP Holdings, Inc., Isabel Vincent
Service Method: eService

Elizabeth L. Griffing (Attorney)
PO Box 157
Helena MT 59624
Representing: Michael L. Goguen, Reporters Committee for Freedom of the Press
Service Method: eService

Bruce Van Dalsem (Attorney)
865 S. Figueroa St., 10th Floor
Los Angeles CA 90017
Representing: Michael L. Goguen
Service Method: E-mail Delivery

Robert M. Schwartz (Attorney)
865 S. Figueroa St., 10th Floor
Los Angeles CA 90017
Representing: Michael L. Goguen
Service Method: E-mail Delivery

Laura R. Handman (Attorney)
1301 K Street NW, Suite 500 East
Washington DC 20005
Representing: NYP Holdings, Inc., Isabel Vincent
Service Method: E-mail Delivery

Adam I. Rich (Attorney)
1251 Avenue of the Americas, 21st Floor
New York NY 10020
Representing: NYP Holdings, Inc., Isabel Vincent
Service Method: E-mail Delivery

Diane M. Doolittle (Attorney)
Quinn Emanuel Urquhart & Sullivan, LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores CA 94065
Representing: Michael L. Goguen
Service Method: E-mail Delivery

Electronically Signed By: Peter M. Meloy
Dated: 03-20-2023