No. _____

IN THE

Supreme Court of the United States

MILAN JANKOVIC, also known as PHILIP ZEPTER,

Petitioner,

FIELDPOINT B.V.; UNITED BUSINESS ACTIVITIES HOLDING, A.G.,

Respondents,

—v.—

INTERNATIONAL CRISIS GROUP, A Non-profit Organization;
JAMES LYON, Individual; DOES 1 THROUGH 10,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under this Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974), a private person who "voluntarily injects himself or is drawn into a particular public controversy . . . thereby becomes a public figure for a limited range of issues." To prevail on a defamation claim, such a "limited-purpose public figure" must show that the defendant made the defamatory statement with "actual malice"—that is, with knowledge or reckless disregard of its falsity. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The constitutional question presented, on which the Courts of Appeals and state high courts are divided, is:

(1) Whether, for a defamation plaintiff to be deemed a limited-purpose public figure, the defamatory statement must be directly related (or "germane") to the plaintiff's voluntary involvement in the particular public controversy.

If the Court grants *certiorari* on this question, Petitioner also asks this Court to review the D.C. Circuit's decision on the following question:

(2) Whether a court may grant summary judgment in an actual-malice case on the ground that the plaintiff has not proven that the defendant "actually possessed subjective doubt" about the truth of a story, even if, based on the admissible evidence, a reasonable jury could find that the defendant actually possessed subjective doubt.

PARTIES TO THE PROCEEDING

Petitioner is Milan Jankovic, commonly known as Philip Zepter. Petitioner is referred to as Philip Zepter throughout this Petition. Respondent is the International Crisis Group.

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Alexander D. Del Russo, *Freedom of the Press and Defamation: Attacking the Bastion of New York Times Co. v. Sullivan,*
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Frederick Schauer, *Public Figures,*
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Gerald G. Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making,*
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James J. Greenfield, *Comment, Defamation and the First Amendment in the 1978 Term: Diminishing Protection for the Media,*
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Mark D. Walton, *The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations,*
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Mark L. Rosen, *Media Lament-The Rise and Fall of Involuntary Public Figures,*
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PETITION FOR WRIT OF *CERTIORARI*

Philip Zepter ("Zepter") respectfully petitions for a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, *Jankovic v. International Crisis Group*, is reported at 822 F.3d 576 (D.C. Cir. 2016) ("*Jankovic III*"). Pet. App. 5a. The opinion of the United States District Court for the District of Columbia, *Jankovic v. International Crisis Group*, is reported at 72 F. Supp. 3d 284 (D.D.C. 2014), *aff'd*, 822 F.3d 576 (D.C. Cir. 2016). Pet. App. 44a.

JURISDICTION

The D.C. Circuit entered judgment on May 10, 2016, and denied a timely petition for rehearing *en banc* on June 24, 2016. On August 12, 2016, this Court entered an order extending the time to file a petition for *certiorari* to and including November 21, 2016.

This Court has jurisdiction under 28 U.S.C. § 1254(1). Pet. App. 158a.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

Government for a redress of grievances." Pet. App. 170a.

INTRODUCTION

Philip Zepter is a Serbian-born businessman who, while his home country suffered under the notorious dictatorship of Slobodan Milosevic during the 1990s, resided in Western Europe and had no involvement in Serbian public life. In the early 2000s, after Milosevic's fall from power, Zepter provided advice and support to reformist Prime Minister Zoran Djindjic, who extradited Milosevic to face justice in The Hague. (Djindjic was later assassinated by pro-Milosevic criminal groups.) This support for Prime Minister Djindjic was Zepter's only involvement in Serbian political affairs.

In 2003, Respondent International Crisis Group ("ICG"), a U.S.-based non-governmental organization, published a report falsely accusing Zepter of having been a Milosevic "crony" and receiving corrupt benefits in return. That toxic accusation was both personally offensive to Zepter, a supporter of Serbia's reform movement, and damaging to his reputation as an upstanding businessman in Western Europe. More importantly, it was false, as even rudimentary research would have revealed. ICG has presented no evidence to support the claim and eventually removed the offending report from its website altogether.

Zepter sued ICG for defamation in the U.S. District Court for the District of Columbia. *Jankovic*, Pet. App. 44a. In the decision below, the D.C. Circuit held that Mr. Zepter's involvement in post-Milosevic

Serbia made him a "limited-purpose public figure" required to prove "actual malice" in order to prevail on his defamation claim. Pet. App. 22a. That was error—an error that implicates an important division of authority in the Courts of Appeals. As Zepter argued below, and as at least four other Courts of Appeals have held, this Court's decision in *Gertz* requires that the defamatory statement be germane to the plaintiff's voluntary involvement in the "particular controversy giving rise to the defamation." *Gertz*, 418 U.S. at 352. Zepter's limited involvement in public life during the 2000s, after Milosevic left the scene, was not germane to politics in the Milosevic era or to the defamation. Under *Gertz* and the Courts of Appeals that have followed its ruling, Zepter's limited involvement in public life in post-Milosevic, democratic Serbia would not have made him a limited-purpose public figure for purposes of a defamatory statement about the Milosevic era.

The D.C. Circuit's loose approach—mirrored, unfortunately, by several other Courts of Appeals—effectively expands the limited-purpose-public-figure doctrine to those who have *any* involvement in public life, regardless of whether the defamatory statement relates to that public involvement. That contravenes the letter and spirit of this Court's decisions on the limited-purpose-public-figure doctrine, which make clear that it exists precisely to ensure that *some* limited involvement in public life does not make private figures fair game for *all* purposes. This Court's intervention is needed to restore uniformity among the Courts of Appeals and prevent the further erosion of the limited-purpose-public-figure doctrine.

If the Court grants *certiorari* on the first question presented, Zepter respectfully requests that the Court also grant *certiorari* to correct the D.C. Circuit's clearly erroneous statement of the standard for summary judgment in actual malice cases, which resulted in summary judgment being granted against Zepter.

STATEMENT OF THE CASE

A. Philip Zepter and His Limited Involvement in the Reform Movement in Post-Milosevic Serbia

Philip Zepter was born in a small Serbian town and grew up in Bosnia. After college, Zepter moved to Austria where he learned German and earned a living by selling cookware. He eventually started his own company, starting with cookware sales, and expanded into other businesses. Zepter's companies, including a bank, eventually expanded from Western Europe into Serbia, though Zepter's business presence in Serbia remained modest.

During the 1990s, Serbia was ruled by the infamous dictator Slobodan Milosevic. Zepter did not know Milosevic (other than through the media) and was not involved with Serbian politics during this period. In 2000, after NATO intervened to stop genocide in Kosovo, this dark period in Serbian history ended. Zoran Djindjic, a pro-democracy reformer, became Prime Minister of Serbia in 2001 and promptly extradited Milosevic to The Hague to stand trial for war crimes. At this point, Zepter took a limited role in Serbian public life, as a friend and supporter of Prime Minister Djindjic. Tragically,

Djindjic was assassinated in March 2003 by opponents of his reformist agenda.

B. ICG Falsely Accuses Mr. Zepter of Being a Milosevic "Crony"

In July 2003, ICG published Report 145, entitled "Serbian Reform Stalls Again." The report discusses the progress of political and economic reform in Serbia and the integration of Serbia into international institutions following the assassination of Djindjic. In Report 145, ICG defamed Zepter by stating that he was actively in alliance with and a personal crony of Milosevic, the "Butcher of the Balkans," and that he had received corrupt benefits in return. That is false. Far from being a Milosevic "crony," Zepter had no relationship whatsoever with Milosevic and was not involved in Serbian politics until after Milosevic's fall. The charge was particularly offensive and damaging to Zepter as a supporter of the democratic reform movement in Serbia and of Prime Minister Djindjic in particular—the man who extradited Milosevic to face justice and ultimately paid for that act of courage with his life.

C. Proceedings in the District Court and Court of Appeals

In 2004, Zepter sued ICG for defamation in the U.S. District Court for the District of Columbia pursuant to 28 U.S.C. Sections 1332 and 1367(a). Pet. App. 159a, 168a. This case has produced three appeals to the D.C. Circuit; only that court's most recent opinion is at issue here.

Jankovic I. In *Jankovic v. International Crisis Group*, 494 F.3d 1080 (D.C. Cir. 2007), Pet. App.

138a, the D.C. Circuit held that Report 145's conclusion that Zepter was a personal and corrupt Milosevic crony was capable of a defamatory meaning.

Jankovic II. In *Jankovic v. International Crisis Group*, 593 F.3d 22 (D.C. Cir. 2010), Pet. App. 120a, the D.C. Circuit rejected ICG's defenses that its statement was merely an opinion or a fair report or comment on a government document. The D.C. Circuit held that ICG's statement that the defamation was "based on true facts" was "falsely stated." Pet. App. 132a.

Jankovic III. In *Jankovic v. International Crisis Group*, Pet. App. 44a, the District Court granted ICG's motion for summary judgment, holding that Zepter was a limited-purpose public figure and that there was insufficient evidence of actual malice to permit the case to proceed to a jury trial. In the decision at issue here, the D.C. Circuit affirmed. Pet. App. 5a.

The D.C. Circuit first held that Zepter was a limited-purpose public figure. The court reasoned that Zepter was involved in what it described as "the public controversy surrounding political and economic reform in Serbia and integration of Serbia into international institutions during the post-Milosevic era." Pet. App. 7a. The D.C. Circuit held that Zepter had entered this controversy by supporting Djindjic.

Most critically for the purposes of this Petition, the D.C. Circuit then held that Zepter was a limited-purpose public figure for purposes of the defamatory

charge even though the defamation was not about that public controversy. It rejected Zepter's argument that the defamatory statement was not germane to his involvement in public life on the ground that the germaneness "inquiry is not the place to debate whether the statement is true or even well-supported." Pet. App. 22a. In short, it held the defamatory allegation itself—whether true or not—connected Zepter to the Milosevic era.

Because of the D.C. Circuit's holding, Zepter was required to show actual malice. Zepter's admissible evidence included: (1) evidence of attempted extortion against Zepter and another person by James Lyon, the author of Report 145; (2) ICG's purported reliance on sensationalist Serbian press reports, which ICG itself labeled in Report 145 as "notorious for spreading rumors and outright lies"; (3) ICG's reliance on the fact that Zepter Banka (Zepter's bank in Serbia) had appeared on the "OFAC Frozen Asset List," even though during that period *all* Serbian financial institutions were on the list; (4) the lack of evidence that any of Lyon's purported confidential sources said what Lyon claimed they said or even existed; (5) ICG's failure to seriously investigate Zepter, despite Lyon's admissions that he knew Zepter had lived in Monaco for many years and became successful in Western Europe, not in Serbia; (6) ICG's deviation from its normal operating, research and verification procedures; and (7) the fact that anyone familiar with Serbia would know the implausibility of Lyon's, and hence ICG's, claim that Djindjic would accept as a friend and supporter a crony of Milosevic.

Reviewing this evidence, the D.C. Circuit held that Zepter had "fail[ed] to show by clear and convincing evidence that ICG acted with actual malice in publishing the statement." Pet. App. 7a.

REASONS FOR GRANTING THE PETITION

I. This Court's Intervention Is Needed To Resolve A Split Among The Courts Of Appeals And State Supreme Courts Over Whether, For A Defamation Plaintiff To Become A Limited-Purpose Public Figure, The Defamatory Statement Must Be Germane To The Plaintiff's Involvement In The Public Controversy At Issue

This Court should grant the Petition to resolve a live and expanding division of authority among lower courts about the scope of the limited-purpose-public-figure doctrine established by this Court in *Gertz*.

The D.C. Circuit is among several federal Courts of Appeals to have effectively abandoned *Gertz*'s requirement that for the plaintiff to be deemed a limited-purpose public figure, the defamatory statement must be related to the plaintiff's voluntary involvement in the *particular public controversy* to which the statement pertains. In the D.C. Circuit, defamation is deemed "germane" if it is not "wholly unrelated" to the plaintiff's involvement in a public controversy: "'Misstatements *wholly unrelated* to the controversy' are not protected, but statements, including those highlighting a plaintiff's 'talents, education, experience, and motives,' can be germane." Pet. App. 21a. In practice, this "not-wholly-

unrelated" standard dilutes the germaneness requirement to the point of meaninglessness.

Other Courts of Appeals and state high courts require that the defamatory statement be directly related to the plaintiff's voluntary, limited public activities—an approach that accords with *Gertz* and strikes the appropriate balance between upholding free speech on issues of public concern and ensuring that defamation law protects the legitimate interests of private figures who take on some public responsibilities but have not pervasively injected themselves into public life.

This is a question of pressing importance for the First Amendment principles governing defamation. With many Courts of Appeals having abandoned a rigorous germaneness requirement, the limited-purpose-public-figure doctrine in these circuits has already expanded far beyond the balance struck in the seminal decision, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, and further defined in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). If this drift from *Gertz* is left unchecked, the essential distinction between all-purpose and limited-purpose public figures will be lost. Indeed, if this trend in the Courts of Appeals persists, the law will effectively revert back to the view that it is the public *subject* of the defamation, not the public status of the *plaintiff*, that controls—the very position rejected by the Court in *Gertz* when it overruled the "public subject matter" doctrine. *See Gertz*, 418 U.S. at 346 (overruling

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality opinion)).

A. The D.C. Circuit's Overbroad Approach to the Limited-Purpose-Public-Figure Doctrine Conflicts with Several Other Courts of Appeals and State Supreme Court Decisions

1. Conflict With Other Courts of Appeals

At least two other Circuits, the First and Seventh Circuits, have followed the D.C. Circuit's overbroad approach to the limited-purpose-public-figure doctrine in a manner that makes it exceedingly difficult for any defamation plaintiff who has had a minimum of public exposure to be adjudged a private figure.

The Fourth, Sixth, Ninth and Eleventh Circuits, on the other hand, have taken an approach faithful to this Court's holding in *Gertz* that requires a direct relationship between the plaintiff's voluntary participation in the public controversy and the defamation.

Like the D.C. Circuit, the First and Seventh Circuits have expanded the limited-purpose-public-figure doctrine beyond the limits envisioned by *Gertz*, by effectively discarding the requirement that the defamation relate to the "particular controversy" in which the plaintiff was involved. For example, in *Pendleton v. City of Haverhill*, 156 F.3d 57, 61-62 (1st Cir. 1998), the First Circuit held that the plaintiff, a former high-school athlete, was a limited-purpose

public figure with respect to defamatory statements by police that he "should be in rehab" and "had coke all over his face" when he was arrested, even though his sole participation in the public sphere was on the unrelated issue of his and other minorities' inability to land public teaching positions. And in *Harris v. Quadracci*, 48 F.3d 247, 251-52 (7th Cir. 1995), the Seventh Circuit held that plaintiff's status as a limited-purpose public figure because of a tax-evasion scheme extended to defamatory statements about a private romantic feud that occurred years after the tax trial.[1]

On the other side of this division of authority are at least four Courts of Appeals which require a close factual connection between the defamatory statement and the plaintiff's voluntary involvement in public life. In none of these circuits would Zepter (who had no role in Serbian public life during the Milosevic regime) have been deemed a limited-purpose public figure for purposes of the false charge that he was a Milosevic "crony."

The Fourth Circuit has long required a "direct" connection between the defamatory statement and the plaintiff's participation in the controversy. *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 688 (4th Cir. 1989). In *Blue Ridge Bank*, the Fourth Circuit held the plaintiff, a bank, to be a private figure for

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[1] Similarly, in *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265, 1269 (7th Cir. 1996), plaintiff was held to be a public figure because his alleged notoriety "included reports of financial irresponsibility," even though the defamatory statement specifically concerned only his purported non-payment of one individual.

purposes of a false claim about its financial soundness, even though the bank had conducted an extensive promotional campaign to attract customers. The court reasoned that "there is no evidence to suggest that Blue Ridge Bank ever raised the issue of its corporate financial health—the subject of Veribanc's report—as part of its promotional efforts or that Veribanc's consideration of Blue Ridge Bank's financial health was in any way prompted by this advertising." *Id.* at 687-88.[2] The court explained that "a plaintiff should not be considered a limited-purpose public figure absent the existence of a pre-defamation public controversy in which the plaintiff has become *directly involved*," lest "the Court's dual inquiry, prescribed in *Gertz*, regarding the subject matter of the publication (i.e., whether it is a matter of public concern) and the status of the defamed entity" be collapsed "into a single consideration." *Blue Ridge Bank*, 866 F.2d at 688.

Similarly, the Sixth Circuit has refused to find a plaintiff a limited-purpose public figure where the

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[2] *See also Wells v. Liddy*, 186 F.3d 505, 537 (4th Cir. 1999) (plaintiff was not a limited-purpose public figure because even though she spoke to the press about Watergate, she spoke only on her personal observations as a "witness to history," not about the controversial aspects such as why the break-in occurred, who was responsible and so forth); *Mylan Pharm., Inc. v. Am. Cyanamid Co.*, Nos. 94-1502, 94-1472, 1995 WL 86437, at *4 (4th Cir. Mar. 3, 1995) (defendant-counterclaimant was not a limited-purpose public figure where the subject of the defamation (the adequacy of defendant's marketing efforts for a drug) did not relate to the drug's effectiveness which was the subject of defendant's promotional efforts).

defamatory statement did not relate directly to the plaintiff's limited involvement in public life. Most recently, in *Armstrong v. Shirvell*, 596 F. App'x 433, 438, 446 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 403 (2015), the Sixth Circuit correctly held that the former student body president of the University of Michigan was a private figure for purposes of accusations that he was a "radical homosexual activist, racist, elitist, & liar," because those statements did not relate to his role as student-body president, the only "public controversy" in which he was involved. *Id.* at 445-46**;** *see also Wilson v. Scripps-Howard Broad. Co.*, 642 F.2d 371, 374 (6th Cir. 1981) (plaintiff was not a limited-purpose public figure because his promotion of his cattle business was not directly related to the controversy over cattle deaths).[3]

The Eleventh Circuit also requires courts to find that "the alleged defamation was germane to the plaintiff's participation in the controversy." *Bennett v. Hendrix*, 426 F. App'x 864, 866 (11th Cir. 2011) (quoting *Mathis v. Cannon*, 276 Ga. 16, 573 S.E.2d 376, 381 (2002)). Like Zepter, the plaintiff in *Bennett* had, at one point, served as a prominent supporter for a candidate for political office. But that

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[3] *Cf. also Falls v. The Sporting News Publ'g Co.*, 899 F.2d 1221 (6th Cir. 1990) (defamatory statement about plaintiff sportswriter's writing abilities directly related to his public role as magazine columnist); *Street v. Nat'l Broad. Co.*, 645 F.2d 1227,1235 (6th Cir. 1981) (defamatory statement with respect to plaintiff's involvement in trial directly related to plaintiff's decision to "g[i]ve press interviews" about trial and "aggressively promote[] her version of the case outside of her actual courtroom testimony").

involvement, like Zepter's support for the reformist Prime Minister Zoran Djindjic, was separated from the subject matter of the defamatory statement. The court thus held "that the defamation was not germane to the sole public activity in which [the plaintiff] participated, and therefore he was not a limited purpose public figure at the time that defamation occurred." *Id.; see also Long v. Cooper*, 848 F.2d 1202, 1205 (11th Cir. 1988) (plaintiff was not a limited-purpose public figure because plaintiff's role as a discount seller of satellite TV equipment was not directly related to the controversy over the virtues of discount wholesalers versus specialty retailers).

The Ninth Circuit has followed the Fourth, Sixth and Eleventh Circuits in rejecting limited-purpose-public-figure status where the "defamatory comments were not germane to [the] participation," even if the plaintiff "voluntarily injected himself" into "that [public] controversy." *Dawe v. Corr. USA*, 506 F. App'x 657, 659 (9th Cir. 2013) (former executive of private prison company held a private figure for purposes of charges related to his management of company, even though he "injected" himself into a public controversy over prison privatization).[4]

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[4] *Cf. also Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 268 (9th Cir. 2013) (defendant-counterclaimant was a limited-purpose public figure regarding its business practices because claims were directly related to its "aggressive advertising campaign in which it made controversial claims about its products and services").

2. Conflict with State Supreme Courts

The D.C. Circuit's approach also conflicts with at least three state supreme courts' approach to the limited-purpose-public-figure doctrine. In *Cottrell v. National Collegiate Athletic Ass'n*, 975 So. 2d 306 (Ala. 2007), the Alabama Supreme Court held a former assistant football coach to be a private figure with respect to allegedly defamatory statements that he abandoned his family, stole funds from a foundation, and stole videotapes of prospective student-athletes from a university athletic department. *Id.* at 342. The Alabama Court reasoned that such statements were not germane to the underlying public controversy, plaintiff's purported violations of NCAA rules. *Id.* at 343. In doing so, the Alabama Court explicitly refused to stretch the "germaneness" requirement to encompass generally plaintiff's character or fitness to coach, which would have been emblematic of the D.C. Circuit's overbroad approach here. *Id.* By contrast, the Alabama Court held plaintiff to be a limited-purpose public figure for purposes of other statements which did directly relate to his alleged NCAA rules violations. *Id.*

In *Healey v. New England Newspapers, Inc.*, 555 A.2d 321 (R.I. 1989), a doctor and YMCA board president was held to be a private figure with respect to allegedly defamatory statements that he had failed to assist a board member he had asked to leave a meeting and who later died of a heart attack. *Id.* at 325. The Rhode Island Court held that despite plaintiff's role as board president and his

participation in some controversial firings, the defamatory statements did not involve those issues. *Id*. Instead, the defamatory statements related to "plaintiff's role as a physician and his implied inaction in response to the collapse of a person in need." *Id*.

And in *Wayment v. Clear Channel Broadcasting, Inc.*, 116 P.3d 271 (Utah 2005), the Utah Supreme Court held that a TV reporter, who had some "fame in the local community" and had reported on issues related to the defamatory statement, nonetheless did "not qualify as a limited-purpose public figure" because her public activities were not "germane to the alleged defamation." *Id.* at 281, 289. That is diametrically opposed to the D.C. Circuit's approach, under which virtually any public involvement, however attenuated the link to the defamation, suffices.

B. The D.C. Circuit's Approach is Inconsistent with this Court's Precedent

The D.C. Circuit's approach cannot be reconciled with the divide between public and private figures, and the narrow confines of the limited-purpose-public-figure doctrine established by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, *Time, Inc.*, *v. Firestone*, 424 U.S. 448, *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, and *Hutchinson v. Proxmire*, 443 U.S. 111.

Nothing tells the story more dramatically than a comparison of the cases of Elmer Gertz, the plaintiff in *Gertz*, and Philip Zepter, the plaintiff here. Both

were defamed based on guilt by association. Lyon, the author of the false report about Zepter, based his defamation on the assumption that "it was impossible during the Milosevic era to have amassed significant wealth without the sponsorship of, or direct assistance from, the regime or its security services." Pet. App. 28a. (The irony, of course, is that Zepter earned virtually all of his money outside of Serbia). In Gertz's case, the defamer, a company associated with the John Birch Society, assumed that anyone who came to the aid of the victim of police abuse must be a communist sympathizer. *Gertz*, 418 U.S. at 325.

Both plaintiffs also had nontrivial, but limited, involvement in public life. Elmer Gertz was no recluse. The Seventh Circuit noted his "considerable stature as a lawyer, author, lecturer, and participant in matters of public import . . . ." *Gertz v. Robert Welch, Inc.,* 471 F.2d 801, 805 (7th Cir. 1972) (per John Paul Stevens, J.), *rev'd*, 418 U.S. 323. Even so, this Court held that Gertz was a private figure because the defamatory attacks, which focused on his representation of a victim of alleged police brutality, were not germane to "the particular controversy giving rise to the defamation." *Gertz*, 418 U.S. at 352.

Zepter, similarly, undertook some limited public activities in the early 2000s in support of the Serbian reformer Zoran Djindjic. Yet as in *Gertz*, the defamatory statements were related to an entirely different period in Serbia and of Zepter's life—the Milosevic period—during which Zepter had not "voluntarily inject[ed]" himself into public affairs. *Id.*

at 351. Under a correct application of *Gertz* (and in the Fourth, Sixth, Ninth and Eleventh Circuits), Zepter would have been deemed a private figure for purposes of ICG's defamatory statements.

Perhaps most importantly, the D.C. Circuit's approach disserves the core purpose of the Court's distinctions between all-purpose public, limited-purpose public, and private figures—balancing the need to protect free speech with the rights of those who have not injected themselves into a given public controversy. *Gertz* distinguished between "all-purpose" public figures (those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes," *id.* at 345), and the more common limited-purpose public figures who "have thrust themselves to the forefront of *particular public controversies* in order to influence the resolution of the issues involved." *Id.* (emphasis added). Zepter, like Gertz, had entered arenas of public and professional life. Yet Zepter, like Gertz, had achieved no general fame or notoriety in the community. Indeed, the record shows that most officials, and ICG's executives who were Balkans experts, had never heard of Zepter prior to the publication of ICG's defamatory report. Pet. App. 87a-88a.

Precisely to avoid discouraging talented, public-spirited private citizens from taking on public responsibilities and participating in civic life, *Gertz* emphasized that "[w]e would not lightly assume that a citizen's *participation in community and professional affairs rendered him a public figure for all purposes*." *Gertz*, 418 U.S. at 352 (emphasis

added). "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Id.* In short, *Gertz* clearly requires a nexus between the plaintiff's voluntary public activities *and the defamatory statements giving rise to the case.* Indeed, without this nexus, the limited-purpose-public-figure doctrine would bleed into the all-purpose-public-figure doctrine—any involvement in public life would render a person a public figure for all purposes. Critically, that means that whether a plaintiff is a limited-purpose public figure turns on "the nature and extent of an individual's participation *in the particular controversy giving rise to the defamation*." *Id.* (emphasis added).

Here, the "particular controversy" was the rule of Slobodan Milosevic. Zepter was never involved in any way with Slobodan Milosevic. Nor was he involved in public life during the Milosevic regime. Zepter's later public activities do not make him a limited-purpose public figure for that earlier period, any more than Gertz's earlier prominence made him a limited-purpose public figure for a later representation.

This excessively generous pro-defendant "not wholly unrelated" doctrine has produced excessively generous pro-defendant results. It should come as no surprise that in *every* case in the D.C. Circuit applying the Circuit's limited-purpose-public-figure test first announced in its *Waldbaum* decision in 1980, the Circuit has found the plaintiff to be a public

figure. *See Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.3d 1287 (D.C. Cir. 1980); *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985); *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1985) (en banc); *Clyburn v. New World Commc'ns*, 903 F.2d 29, 33 (D.C. Cir. 1990); *Lohrenz v. Donnelly*, 350 F.3d 1272, 1279 (D.C. Cir. 2003); Pet. App. 5a. This remarkable pro-defendant box score stands in stark contrast to the four cases decided by this Court adjudicating the private figure standard (*Gertz, Firestone, Wolston*, and *Hutchinson*) all of which found the plaintiff to be a private figure. Something is amiss. The culprit is the lack of any disciplined nexus between the defamation and the plaintiff's involvement in a public controversy.

The D.C. Circuit eluded this problem by insisting that the "germaneness . . . inquiry is not the place to debate whether the statement is true or even well-supported. Those questions are relevant to the actual malice inquiry." Pet. App. 22a. It reasoned that the defamatory allegation itself connected Zepter to the Milosevic era. This answer, however, threatens to eviscerate the limitations of the limited-purpose-public-figure doctrine, for it means that a false claim that a person has some dark past connection—whether to communists in Gertz's case or to corrupt dictators in Zepter's case—may *in itself* elevate a plaintiff to public figure status despite the lack of any evidence in the record establishing such a connection.

This Court has already held that defendants cannot bootstrap themselves into the protections of the actual-malice standard by claiming that the defamatory attention they have given to the plaintiff

itself elevates the plaintiff to public-figure status. "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson*, 443 U.S. at 135. That thin reed, squarely foreclosed by this Court's precedent, cannot save the D.C. Circuit's holding here.

C. The Question Presented is Important and Likely to Recur

The question presented carries profound theoretical and practical importance for the future of the First Amendment principles governing the law of defamation. In the real world of defamation practice, virtually everything turns on whether a plaintiff is a public or private figure, yet lower courts are now largely at sea with no clear compass as to how to apply the distinction. Rodney A. Smolla, 1 *Law of Defamation* § 2:20 (2d ed. 2016). The values of *Gertz* are not advanced by a jurisprudence of inconsistency. *See* Mark D. Walton, *The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations*, 16 N. Ill. U. L. Rev. 141, 169 (1995) ("Unfortunately, the Court's inability or unwillingness to articulate clear guidelines for identifying public figures, particularly the limited-purpose public figure from *Gertz*, has led to unpredictable and inconsistent determinations of the status of defamation plaintiffs who are not public officials."); Alexander D. Del Russo, *Freedom of the Press and Defamation: Attacking the Bastion of New York Times Co. v. Sullivan,* 25 St. Louis U. L.J. 501, 518-25 (1981) (noting the inconsistency with which courts have

applied the *Gertz* distinction between public figures and private individuals, leading to "a maze of seemingly irreconcilable cases"); James J. Greenfield, Comment, *Defamation and the First Amendment in the 1978 Term: Diminishing Protection for the Media*, 48 U. Cin. L. Rev. 1027, 1037-38 (1979) (arguing that application of the "malleable" rules of *Gertz* "has evolved into an ad hoc balancing test").

D. Loosening the Limited-Purpose-Public-Figure Category Will Discourage Private Citizens from Taking on Civic Responsibilities

As the scope of the limited-purpose-public-figure doctrine expands, the set of citizens willing to participate publicly in civic life contracts. *Gertz* drew a fine balance between encouraging civic life and public service and robust freedom of expression. But that balance is fragile. If redress for defamation becomes unavailable to those who make *any* entry into public life, ordinary citizens will effectively become fair game. This would deter talented persons in the private sector from entering any segment of the public arena. *See* Frederick Schauer, *Public Figures*, 25 Wm. & Mary L. Rev. 905, 935 (1984) ("Important factual and theoretical differences exist between commentary about public figures and commentary about public officials. If we ignore this distinction in designing the constitutional rules that constrain actions for defamation, we may discover only too late that we have overprotected the less important, and underprotected the more important."). Here, Zepter's public role was limited to providing support for someone a—public official—

something countless private citizens do every day. This cannot mean that these citizens are now fair game for any accusation, whether or not it is connected to those public responsibilities. *See* Gerald G. Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 Minn. L. Rev. 645, 681 n.175 (1977) (Supreme Court "eliminated the possibility that a person may become an involuntary public figure"); Mark L. Rosen, *Media Lament-The Rise and Fall of Involuntary Public Figures*, 54 St. John's L. Rev. 487, 502 (1980) (stating that involuntary public figure classification is "all but extinct").

Gertz was decided before the Internet and the age of social media. Sadly, defamation is now a growth industry, making the limited-purpose-public-figure category much more important. "When a defamatory message is posted on the Internet, one can view and track and permanently document the echo boom of comments, posts, tweets, and repetitions of the defamatory story as the falsehood spreads like a virulent virus across digital space." Smolla, *supra* § 1:27.50. This Court's intervention is needed to restore the thoughtful balance established in *Gertz*, which safeguards the health of the democratic process and the integrity of our public discourse.

E. This Case is an Ideal Vehicle to Resolve this Question

This case presents an ideal vehicle for resolving another critical and recurring question in modern First Amendment defamation practice. The question was outcome-determinative here. Because the D.C. Circuit deemed Zepter a limited-purpose public

figure, he was required to show actual malice—which it found he could not (albeit by applying an incorrect legal standard, *see infra* Part II).[5]

This case also is a strong vehicle for this Court to restore the boundaries of the limited-purpose-public-figure doctrine because Zepter's case has so many striking parallels to *Gertz*. Both Zepter and Gertz were successful private citizens who voluntarily injected themselves into public controversies at different points in their careers—*but not the controversies to which the defamatory statement pertained.* That is the decisive principle, which should have resolved this case in Zepter's favor.

F. This Case Will Not Affect First Amendment Protections Applicable to Defamatory Speech About Public Figures

It bears noting that this case will not affect the First Amendment principles applicable to defamatory speech concerning public figures. Those who have become public figures "by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention," *Gertz*, 418 U.S. at 342, will remain covered by the *New York*

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[5] The D.C. Circuit's opinion states that certain evidence was not admitted due to "procedural defaults." Pet. App. 10a-11a. That statement does not present any problem here, for two reasons. First, it referred to certain evidence probative of actual malice, but actual malice would be irrelevant had the D.C. Circuit not erroneously deemed Zepter a limited-purpose public figure. Second, even on the question of actual malice, the evidence that *was* admitted should have been sufficient to survive summary judgment under the correct legal standard. *See infra* Part II.

Times Co. v. Sullivan standard no matter what the Court holds here. Germaneness is not a factor for general-purpose public figures precisely because as to them, everything is deemed germane, and anything goes, absent actual malice. The whole point of the limited-purpose-public-figure construct, in contrast, is to limit the *New York Times*' lowered protection for reputation to a plaintiff's entry into a specific public controversy.

This case thus only affects those who have *not* pervasively sought the spotlight, but rather have undertaken some limited involvement in civic life. Private citizens who do not seek fame but simply wish to lend their talents and resources to some specific public purpose should not be discouraged by the prospect that doing so will open every aspect of their life up to scurrilous attacks.

The careful balance contemplated by *Gertz* serves the profoundly important purpose of encouraging participation in the democratic process, a purpose *Gertz* sought to shelter and protect. Zepter's coming forth to support the pro-democracy reformer Djindjic was a *good* thing, an action to be applauded. The First Amendment is inappropriately pressed to a perverse end if it is construed to penalize and discourage such action, exposing Zepter and other public-spirit citizens to defamation unrelated to their public activities. This is not what *Gertz* intended, and this Court should make clear that it is not the law.

II. This Court Should Correct The D.C. Circuit's Misstatement Of The Standard For Summary Judgment In Actual Malice Cases, Which Is Clearly Erroneous Under This Court's Settled Precedent

If the Court grants *certiorari* on the first question presented, Petitioner respectfully requests that the Court also correct the D.C. Circuit's facially erroneous statement of the standard for summary judgment in actual malice cases, which resulted in summary judgment being granted against Zepter.

A. Resolving this Question Would Promote Efficiency and Provide Useful Guidance to the Lower Courts

Having been deemed a limited-purpose public figure, Zepter was required to prove that ICG acted with actual malice in making the defamatory statement. Because this additional question is closely "connected to the ultimate disposition of the case," resolving it together with the first would promote "the efficient administration of justice." *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1779 (2015) (Scalia, J., concurring in part and dissenting in part); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 484 (1971) (resolving a "second substantial question" where doing so would promote "the efficient administration of justice").

B. The Merits of the Question Are Straightforward

The D.C. Circuit misapplied this Court's long-settled precedent governing the nonmoving party's burden on summary judgment in an actual-malice case. First, it held that it was Zepter's burden to "show by clear and convincing evidence that ICG acted with actual malice." Pet. App. 7a. It then went on to hold he had "failed to establish that 'the defendant actually possessed subjective doubt' about the statement." Pet. App. 39a; *see also* Pet. App. 40a ("each of Zepter's factual theories fails to show clear and convincing evidence of actual malice"); Pet. App. 41a ("we hold that Zepter has failed to establish clear and convincing evidence of actual malice").[6]

Of course, deciding whether Zepter had carried his burden of persuasion was not the court's task on summary judgment, but the jury's, as this Court's decision in *Anderson*, 477 U.S. 242, makes pellucidly clear. On summary judgment in an actual-malice case, the question for the court is not whether the plaintiff has proved his case by clear and convincing evidence, but "whether the evidence in the record

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[6] At certain points the D.C. Circuit makes reference to the correct governing standard. *E.g.,* Pet. App. 40a ("Even taking these flawed evidentiary assertions together, no reasonable jury could find by clear and convincing evidence that ICG acted with actual malice."). But its own analysis and breakdown of Zepter's evidence and repeated statement that Zepter had "failed to establish clear and convincing evidence of actual malice" leave no doubt that it usurped for itself the judgment that *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986), reserves for the jury.

could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Id.* at 255-56 (emphasis added). It was not for the court to decide whether Zepter's evidence made the requisite showing; its task on summary judgment was merely to decide *whether a reasonable jury could find that he had*, given all the evidence in the record.

CONCLUSION

This Court should grant the Petition for *Certiorari*.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7171

September Term, 2015

1:04-cv-01198-RBW

Filed On: June 24, 2016

MILAN JANKOVIC, also known as PHILIP ZEPTER,

Appellant

FIELDPOINT B.V. and UNITED BUSINESS ACTIVITIES HOLDING, A.G.,

Appellees

—v.—

INTERNATIONAL CRISIS GROUP, A NON-PROFIT ORGANIZATION, et al.,

Appellees

Consolidated with 14-7178

BEFORE: Garland,* Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges

* Chief Judge Garland did not participate in this matter.

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7171

September Term, 2015

1:04-cv-01198-RBW

Filed On: May 10, 2016 [1612397]

MILAN JANKOVIC, also known as PHILIP ZEPTER,

Appellant

FIELDPOINT B.V. and UNITED BUSINESS ACTIVITIES HOLDING, A.G.,

Appellees

—v.—

INTERNATIONAL CRISIS GROUP, A NON-PROFIT ORGANIZATION, et al.,

Appellees

Consolidated with 14-7178

O R D E R

It is ORDERED, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en

banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 10, 2016

Decided May 10, 2016

No. 14-7171

MILAN JANKOVIC, also known as PHILIP ZEPTER,

Appellant

FIELDPOINT B.V. and UNITED BUSINESS ACTIVITIES HOLDING, A.G.,

Appellees

—v.—

INTERNATIONAL CRISIS GROUP, A NON-PROFIT ORGANIZATION, et al.,

Appellees

Consolidated with 14-7178

Appeals from the United States District Court
for the District of Columbia
(No. 1:04-cv-01198)

Rodney A. Smolla argued the cause for appellant. With him on the briefs were *William T. O'Brien*, *Lisa Norbett Himes*, *John W. Lomas Jr.*, and *Malcolm I. Lewin*.

Michael D. Sullivan argued the cause for appellees. With him on the brief were *Thomas Curley*, *Mara J. Gassmann*, *Neil H. Koslowe*, and *Jonathan Greenblatt*.

Hashim M. Mooppan was on the brief for *amici curiae* The Brookings Institution, et al. in support of defendants-appellees.

Before: HENDERSON, ROGERS and SRINIVASAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: Milan Jankovic, also known as Philip Zepter, sued the International Crisis Group ("ICG") for defamation based on a statement in one of its reports that linked him to the Slobodan Milosevic regime. This is the third time this case is before the court. We twice previously reversed the dismissal of the complaint and remanded the case. *Jankovic v. Int'l Crisis Grp.* (*Jankovic I*), 494 F.3d 1080 (D.C. Cir. 2007); *Jankovic v. Int'l Crisis Grp.* (*Jankovic II*), 593 F.3d 22 (D.C. Cir. 2010). In the first appeal, the court held that one statement in an ICG report was capable of defamatory meaning, and, in the second appeal, the court rejected ICG's defenses that the statement was merely an opinion or a fair report or comment on a government document. Zepter now appeals the grant of summary judgment to ICG. *Jankovic v. Int'l Crisis Grp.*

(*Jankovic III*), 72 F. Supp. 3d 284 (D.D.C. 2014). He contends that the district court erred in ruling that he was a limited-purpose public figure, and alternatively that, to the extent he was, the district court erred in finding that he failed to proffer evidence from which a reasonable jury could find by clear and convincing evidence that ICG published the defamatory statement with actual malice.

Upon *de novo* review, we hold that summary judgment was appropriately granted. On the evidence before the district court, Zepter was a limited-purpose public figure with respect to the public controversy surrounding political and economic reform in Serbia and integration of Serbia into international institutions during the post-Milosevic era. Contrary to his suggestion, he was not a mere bystander engaged in civic duties but was an advisor to and financial supporter of Prime Minister Zoran Djindjic, who came into power following Milosevic's ouster. Further, Zepter's mustering of evidence, deficient in part due to his procedural defaults, fails to show by clear and convincing evidence that ICG acted with actual malice in publishing the statement. Accordingly, we affirm.

I.

This appeal arises out of publication by the International Crisis Group of *Serbian Reform Stalls Again* ("Report 145"), a report about reforms in the wake of the assassination of Prime Minister Zoran Djindjic. This report followed closely after ICG's publication of *Serbia After*

Djindjic ("Report 141"). ICG, a non-profit, multinational organization with over 90 staff members on five continents published reports like these as part of its mission to influence policymakers and to prevent and resolve deadly conflict. *Jankovic I*, 494 F.3d at 1084–85. These two reports were primarily authored and researched by James Lyon, who was ICG's project director for Serbia from 2000 through 2005.

Briefly: In 1999, Serbia was marred by violence as its President, Slobodan Milosevic, carried out a pattern of ethnic violence in the Serbian province of Kosovo. These actions resulted in military intervention by the North Atlantic Treaty Organization ("NATO") and imposition of sanctions by the United States and European countries. Milosevic lost the presidency in a democratic election in 2000, but his successor, President Vojislac Kostunica, faced a politically powerful parliament led by Prime Minister Zoran Djindjic, who favored sweeping changes of Milosevic's policies. In 2001, Prime Minister Djindjic extradited Milosevic to The Hague, Netherlands, to stand trial for war crimes. Prime Minister Djindjic was assassinated in 2003. *See Jankovic III*, 72 F. Supp. 3d at 292.

Report 145, as described by its principal author, addressed, among other things, the inability of the post-Milosevic Serbian government to achieve political and economic reform and to assert civilian control over the Milosevic-era police, military, and intelligence structures. It also analyzed continuing concerns about the influence of wealthy businessmen, some of whom were considered to have been closely connected to these power structures, on Serbia's fledgling democracy.

ICG's concern was that without meaningful political and economic reform the prospect of further ethnic violence and national conflict in Serbia and the Balkans was likely.

As a successful businessman, Zepter was concerned about some of the negative statements ICG made about him in their reports. Born and raised in Serbia, Zepter established a successful cookware company after college and that business achieved success throughout Europe. *Jankovic III*, 72 F. Supp. 3d at 292. Over time, Zepter expanded his business into other areas, including banking, and he had banking interests in Serbia while Milosevic was in power. He filed suit, alleging that statements in the two ICG reports and an e-mail sent by the principal author of the reports were defamatory, but this court held that only claims related to a three-paragraph statement in Report 145 could proceed. *Jankovic I*, 494 F.3d at 1084. That statement described Zepter as a member of the "New Serbian Oligarchy" and stated, for example, that he was "associated with the Milosevic regime and benefitted from it directly." Report 145, at 17. It also stated that individuals like Zepter continued to be in positions of power and to enjoy access to resources, and that few of the "crony companies" had been subject to legal action despite promises by reformers. *Id.* at 17–18. The court concluded that a reasonable reader could construe the statement as asserting "that Philip Zepter, personally, was a 'crony' of Milosevic who supported the regime in exchange for favorable treatment" and "that Philip Zepter was actively in alliance with Milosevic and his regime." *Jankovic I*, 494 F.3d at 1091.

Having determined that the statement in Report 145 was capable of defamatory meaning, the court subsequently rejected ICG's defenses of fair report, fair comment, and opinion. *Jankovic II*, 593 F.3d at 26–28. ICG had supported portions of the statement with a list of frozen assets that was prepared by the U.S. Office of Foreign Assets Control ("OFAC"), and an accompanying Executive Order. *See id.* at 26–27. Although the list included the assets of a bank established by Zepter, the court held neither the fair report nor comment privileges applied because the list included the assets of all Serbian financial institutions, whether or not operated by Milosevic cronies. *See id.* at 26–27, 29. The court also rejected ICG's position that the statement was merely an opinion, concluding it was "sufficiently factual to be susceptible of being proved true or false." *Id.* at 27–28 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990)). To the extent it might have been an opinion, the court concluded it was not privileged because the opinion's factual basis was not fully disclosed in the report. *See id.* at 28.

Upon remand, the parties filed motions for summary judgment. Zepter moved for partial summary judgment, seeking to establish that he was a private figure and that the defamatory passage was false. ICG moved for summary judgment on the grounds that Zepter was a limited-purpose public figure and he had failed to proffer sufficient evidence of actual malice. The district court agreed with ICG. *Jankovic III*, 72 F. Supp. 3d at 301, 316–17. In granting summary judgment to ICG, the district court took note of various procedural defaults that hindered Zepter's ability

to meet his burden, including failing to seek timely discovery of Lyon's sources, *see id.* at 314 n.32, and to dispute some of ICG's material facts, *id.* at 290.

Zepter appeals the grant of summary judgment, and our review is *de novo*, *Lohrenz v. Donnelly*, 350 F.3d 1272, 1274 (D.C. Cir. 2003), while examining evidentiary and discovery rulings for abuse of discretion, *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 9 (D.C. Cir. 2001).

II.

The Supreme Court has long enshrined "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (internal citation omitted). An action for defamation can be maintained only to the extent it does not interfere with First Amendment rights of free expression. Thus, "a public official" may not "recover[] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice,' that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279–80. Since *New York Times*, the Court has explained that a similar rule applies to public figures, and, accordingly, speech relating to public officials and public figures, as distinct from private persons, enjoys greater protection under the First Amendment. *Gertz v. Robert Welch, Inc.*,

418 U.S. 323, 345 (1974); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154 (1967).

The Court has laid down broad rules about when a private individual becomes a public figure. Some individuals are public figures because they "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes," but more commonly, private individuals become more limited-purpose public figures because they "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345. The Court set the "dividing line between public and private figures based on those who assumed the risk of publicity and had access to channels of communication to defend themselves, and those who did not." *Lohrenz*, 350 F.3d at 1279 (citing *Gertz*, 418 U.S. at 344). Indeed, "[t]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them," whereas a private individual "has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Gertz*, 418 U.S. at 345. In setting these guidelines, the Court accommodated the competing concerns between a free press and a private person's need to redress wrongful injury, but has "been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Id.* at 342 (citation omitted).

A.

Whether Zepter is a limited-purpose public figure or is a private figure is a "matter of law for the court to decide." *Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir. 1987); *see Rosenblatt v. Baer*, 383 U.S. 75, 88 n.15 (1966). Although *Gertz* ultimately controls the resolution of this question of law, this court employs a three-part inquiry first articulated in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296–98 (D.C. 1980). *See Tavoulareas*, 817 F.2d at 772–73. First, the court must identify the relevant controversy and determine whether it is a public controversy. *Waldbaum*, 627 F.2d at 1296. Second, the plaintiff must have played a significant role in that controversy. *Id.* at 1297. Third, the defamatory statement must be germane to the plaintiff's participation in the controversy. *Id.* at 1298. In conducting this analysis, a court must be mindful that "the touchstone" of the limited-purpose public figure analysis remains determining "whether an individual has assumed [a] role[] of especial prominence in the affairs of society . . . [that] invite[s] attention and comment." *See Lohrenz*, 350 F.3d at 1279 (alterations in original) (quoting *Tavoulareas*, 817 F.2d at 773). Zepter contends that the district court erred at each step of the inquiry, and, in so doing, misunderstood the teachings of *Gertz*.

1. <u>*Scope of Public Controversy*</u>. A controversy is not a public controversy solely because the public is interested in it. *See Waldbaum*, 627 F.2d at 1296–97; *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976). To determine whether there is a public controversy, the court "must examine whether

persons actually were discussing some specific question," looking to "see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment." *See Waldbaum*, 627 F.2d at 1297. A controversy is a public one when a "reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution." *Id.*

The district court identified the public controversy as "the progress of political and economic reform in Serbia and the integration of Serbia into international institutions" in the post-Milosevic Serbian government, including the Prime Minister Djindjic regime. *Jankovic III*, 72 F. Supp. 3d at 301–03. Zepter does not dispute that this is a public controversy, but maintains that there was a more specific controversy on which the district court needed to focus. In Zepter's view, the period when Djinjdic was in power was not relevant, and the public controversy should have been focused on "the progress of Serbian political and economic reform *after* the March 2003 assassination of Zoran Djindjic." Appellant's Br. 17. Zepter maintains this controversy is more appropriate because it is narrower, more directly tied to the report which contains the defamation, and compelled by law of the case and judicial estoppel.

When defining the relevant controversy, a court may find that there are multiple potential controversies, and it is often true that "a narrow controversy may be a phase of another, broader one." *See Waldbaum*, 627 F.2d at 1297 n.27. Indeed, courts often define the public controversy in expansive terms. *See Tavoulareas*, 817 F.2d at 773; *Waldbaum*,

627 F.2d at 1299. Although, as Zepter suggests, a broader public controversy may involve many more individuals, defining a public controversy broadly does not necessarily mean that too many individuals will be treated as public figures because the broader the controversy, the less likely it is for any individual to have had "the necessary impact" on that controversy. *See Waldbaum*, 627 F.2d at 1297 n.27. And whether an individual has a sufficient impact on the controversy is the second part of the *Waldbaum* inquiry and is not relevant to the threshold question of defining the public controversy.

Zepter's view that narrowing the definition of the controversy is required in order to relate it to the publication containing the defamation is not well taken. The court has defined controversies as being broader than the narrower discussion contained in the defamatory document, *see Tavoulareas*, 817 F.2d at 778–79; *Waldbaum*, 627 F.2d at 1290 & n.5, 1299, and Zepter offers no reason a different approach is required here. Although Report 145 focuses on the reform effort *after* Prime Minister Djindjic's assassination in 2003, its discussion concerns the broader public debate about the reform effort after Milosevic was ousted from power in 2000. *See, e.g.*, Report 145, at i, 17–18. A report about the prospect of post-2003 reforms in Serbia contributes to both the narrow post-assassination issue and the broader discussion of post-2000 reforms.

Zepter's judicial estoppel and law-of-the-case arguments fare no better. Zepter fails to show ICG's positions regarding the scope of the controversy are inconsistent. ICG never argued in this

court or the district court that the only relevant public controversy was related to the post-Djindjic assassination period, and its prior explanation in 2009 that Report 145 focused on the post-assassination period is consistent with its position now that the relevant public controversy was much broader. Judicial estoppel is therefore inapplicable. *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Also, in *Jankovic II*, the court did not address whether Zepter was a public figure and concluded only that "[t]he language at issue in this case appears in ICG's *Report 145*, which addresses the deceleration of Serbian reforms" after Prime Minister Djindjic's assassination. 593 F.3d at 24. There is no reason to think the court "affirmatively decided the issue" of the relevant public controversy. *See Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995).

2. *Role in Controversy*. For Zepter to be a limited-purpose public figure, he must have "thrust" himself to the "forefront" of the public controversy at issue. *Waldbaum*, 627 F.2d at 1297 (quoting *Gertz*, 418 U.S. at 345). Zepter maintains that the breadth of the controversy ensures that someone such as himself—a mere businessman interested in civic affairs—could not have been expected to have the requisite impact. Appellant's Br. 22–30. After all, a broad controversy "will have more participants" such that it is unlikely any one individual "can have the necessary impact." *Waldbaum*, 627 F.2d at 1297 n.27. In *Gertz*, the Supreme Court cautioned against concluding that an individual was a public figure for all purposes solely because of activity in

"community and professional affairs" and declined to treat that individual as a public figure for a limited controversy in the absence of evidence that he had "thrust himself into the vortex of" any relevant public issue or "engage[d] the public's attention in an attempt to influence its outcome." *Gertz*, 418 U.S. at 351–52; *see Hutchinson v. Proxmire*, 443 U.S. 111, 134–35 (1979).

The evidence eliminates the risk that Zepter was merely an ordinary civic participant and private person who has been mischaracterized as a limited-purpose public figure. It shows that he was was an outspoken supporter, financial backer, and advisor of Prime Minister Djindjic. Zepter now steps back from his statement to the press regarding his advisory role, but he does not deny that he paid over $100,000 to a lobbyist to support Prime Minister Djindjic's effort to improve relations between the United States and Serbia. Returning from a trip to the United States in late November 2001, Djindjic announced that the United States had promised assistance in writing off two-thirds of Yugoslavia's 12.2 billion dollar external debt and rescheduling the remainder. In an open letter of December 30, 2001, to the Serbian people, entitled "My Answer to Them," which was published on the front page of two Serbian newspapers, Zepter emphasized that he had long been a supporter of Djindjic and of reform in Serbia and announced: "When, in a few years, I enter [the] political arena, I will enter to win." In various interviews with members of the Balkan press, Zepter repeated these views, including acknowledging in an article published in the fall 2003 in *Nacional (Croatia)* that he had given advice to

Prime Minister Djindjic and paid for a lobbyist to improve relations between the United States and Serbia.

Thus, Zepter was "purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution." *Waldbaum*, 627 F.2d at 1297; *see Gertz*, 418 U.S. at 345. The evidence shows that Zepter had voluntarily thrust himself into ensuring that Serbia underwent reforms in the post-Milosevic era. He attained "a position in the limelight" through "purposeful action[s] of his own." *See Lohrenz*, 350 F.3d at 1280 (quoting *Gertz*, 418 U.S. at 345). His actions ensured that he would play a central role in the reform, and he "engaged in conduct that he knew markedly raised the chances that he would become embroiled in a public controversy." *Clyburn v. New World Commc'ns, Inc.*, 903 F.2d 29, 33 (D.C. Cir. 1990); *Lohrenz*, 350 F.3d at 1280. His close political relationship with Prime Minister Djindjic carried a risk of public scrutiny. *See Clyburn*, 903 F.2d at 33; *Waldbaum*, 627 F.2d at 1292, 1298; *Thompson v. Evening Star Newspaper Co.*, 394 F.2d 774, 776 (D.C. Cir. 1968); *Rebozo v. Wash. Post Co.*, 637 F.2d 375, 379–80 (5th Cir. 1981). His public actions invited press scrutiny in view of the public discussion regarding the impact that businessmen of his stature would have on reform during and after the Djindjic regime. It is little wonder that a prominent businessman's close ties to Prime Minister Djindjic achieved "special prominence" in the debate about reform in Serbia. *See Waldbaum*, 627 F.2d at 1297.

The three sworn statements proffered by Zepter from prominent individuals with knowledge of Serbia—a former U.S. Ambassador to Yugoslavia, a Djindjic-appointed Assistant Minister of Foreign Affairs, and a former ICG employee—are unhelpful to him. The former ICG employee had no knowledge of Zepter whatsoever, and the other two had no knowledge of Zepter being involved in the political or economic affairs of Prime Minister Djindjic. One understood Zepter simply to be a personal friend of the Prime Minister. But such close personal friendships can carry with them the risk of being swept up into a public controversy. *See Clyburn*, 903 F.2d at 32–33; *Rebozo*, 637 F.2d at 379. Further, these individuals do not contradict the evidence that Zepter was more than just a close personal friend, even paying for a lobbyist to advance Serbia's interests, as defined by Prime Minister Djindjic, in the United States.

The evidence already described disposes of Zepter's view that the only evidence offered in support of his status as a limited-purpose public figure are unreliable Serbian press articles and his purely defensive statements to the press. In suggesting that relying on Serbian news sources for their truth was error in view of their unreliability and potential hearsay problems, Zepter ignores that he failed to offer evidence that the particular articles on which the district court relied were untrue. Under the local rules, uncontested facts may be taken as true for purposes of summary judgment. *See Jankovic III*, 72 F. Supp. 3d at 290 & n.3 (citing Local Civ. R. 7(h) and *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 153 (D.C. Cir. 1996)).

Although there was evidence that the reliability of the Serbian press, generally, was subject to question, the evidence did not indicate it was categorically unreliable; rather, articles could be evaluated on a case-by-case basis and, according to Lyon, could be a "useful barometer of public sentiment, or some portion of it, as well as at times convey accurate information," Lyon Decl. ¶ 51 (Mar. 29, 2013). News sources can play a central non-hearsay role in this part of the inquiry. *See Waldbaum*, 627 F.2d at 1297, 1290 n.3; *see also Tavoulareas*, 817 F.2d at 773–74. In any event, relevant content in the news stories is supported by evidence that Zepter could hardly dispute or label as hearsay, including the lobbyist's deposition testimony on the intended effect of his lobbying and Zepter's own view of his role as contributing to the transition of the Serbian government. *See* Denton Dep. Tr. 13–19, 95–97 (Dec. 14, 2011); Milan Jankovic, "My Answer to Them," *Glas Jovnosti*, Dec. 30, 2001, at 4 (Eng. translation).

On the other hand, it is true that "responding to press inquiries or attempting to reply to comments on oneself through the media does not necessarily mean that [one] is attempting to play a significant role in resolving a controversy." *Waldbaum*, 627 F.2d at 1298 n.31; *see also Clyburn*, 903 F.2d at 32–33. So, the court does not give great weight to a plaintiff's press statements when the statements "merely answer the alleged libel itself" or consist of "purely defensive, truthful statements made when an individual finds himself at the center of a public controversy but before any libel occurs." *See Clyburn*, 903 F.2d at 32. Zepter, however, used the

public controversy to do more than provide a "short simple statement of his view of the story," and instead drew "attention to himself" and used "his position in the controversy 'as a fulcrum to create public discussion.'" *See id.* (quoting *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 168 (1979)); *Tavoulareas*, 817 F.2d at 773–74; *Time*, 424 U.S. at 454 n.3. His open letter to the Serbian People was more than a mere defensive statement as it expressed his continued support for the political regime headed by Prime Minister Djindjic and explained his own future political ambitions. This goes "beyond an ordinary citizen's response to the eruption of a public fray around him." *Clyburn*, 903 F.2d at 33. Moreover, the conduct that Zepter acknowledged to the press—acting as an advisor and financier of the Serbian reform effort—makes him a limited-purpose public figure, and it was that conduct, and not the negative stories, that involved him in the public controversy. *See id.* at 33. Zepter's choosing to involve himself in reform—through his supportive public statements and the payment of a lobbyist—is what gave him "special prominence" in the public controversy.

3. *Germaneness*. For Zepter to have been a limited-purpose public figure, the defamatory statement must be "germane to the plaintiff's participation in the controversy." *Waldbaum*, 627 F.2d at 1298. "Misstatements *wholly unrelated* to the controversy" are not protected, but statements, including those highlighting a plaintiff's "talents, education, experience, and motives," can be germane. *Id.* (emphasis added).

To Zepter, the defamation regarding his possible relationship to Milosevic could not relate to his

role in a public controversy focused on the period *after* Milosevic was no longer in power. Yet even if Zepter was an important figure in the Serbian reform effort mainly due to his relationship with Prime Minister Djindjic, his relationship to Milosevic is relevant to Zepter's role in the controversy. Linking Zepter to Milosevic would be relevant to understanding Zepter's role and why he wanted to be involved in the reform effort led by Prime Minister Djindjic. The germaneness test is met because the defamatory statement relates to the individual's role in the public controversy.

Also according to Zepter, ICG has not offered sufficient evidence of a relationship between Zepter and Milosevic for the defamatory statement to be germane. But the germaneness part of the *Waldbaum* inquiry is not the place to debate whether the statement is true or even well-supported. Those questions are relevant to the actual malice inquiry. The purpose of the germaneness inquiry is to ensure that the allegedly defamatory statement—whether true or not—is related to the plaintiff's role in the relevant public controversy. This ensures that publishers cannot use an individual's prominence in one area of public life to justify publishing negligent falsehoods about an unrelated aspect of the plaintiff's life. *See Waldbaum*, 627 F.3d at 1298.

B.

As a limited-purpose public figure, Zepter can prevail on his defamation claim only if he "proves that the statement was made with 'actual malice' —that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

See New York Times, 376 U.S. at 279–80. A defendant has acted recklessly if "the defendant in fact entertained *serious doubts* as to the truth of his publication" or acted "'with a high degree of awareness of . . . probable falsity.'" *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). The plaintiff can "prove the defendant's subjective state of mind through the cumulation of circumstantial evidence, as well as through direct evidence." *Tavoulareas*, 817 F.2d at 789. But it is not enough to show that defendant should have known better; instead, the plaintiff must offer evidence that the defendant in fact harbored subjective doubt. *See McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1508 (D.C. Cir. 1996). The plaintiff can make this showing, for example, by offering evidence that "it was highly probable that the story was '(1) fabricated; (2) so inherently improbable that only a reckless person would have put [it] in circulation; or (3) based wholly on an unverified anonymous telephone call or some other source that [defendant] had obvious reason to doubt.'" *Lohrenz*, 350 F.3d at 1283 (quoting *Tavoulareas*, 817 F.2d at 790); *see also St. Amant*, 390 U.S. at 732; *Clyburn*, 903 F.2d at 33. In view of the important values enshrined in the First Amendment, the Constitution further protects publishers by requiring that plaintiffs prove actual malice by clear and convincing evidence. *See Gertz*, 418 U.S. at 342; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986).

1. To prevail on summary judgment, and now on appeal, Zepter must show that "the evidence in

the record could support a reasonable jury finding . . . that [he] has shown actual malice by clear and convincing evidence." *Anderson*, 477 U.S. 255–56. As the non-moving party, he is entitled to the benefit of all "justifiable inferences" in his favor and "need only present evidence from which a jury might return a verdict in his favor." *See id.* at 254–55, 257. He is also entitled to the benefit of the aggregate of the evidence. *See Lohrenz*, 350 F.3d at 1283; *Tavoulereas*, 817 F.2d at 794 n.43. Nonetheless, because of the heightened burden imposed by the clear and convincing standard and the challenges associated with offering evidence about state of mind, this standard is not easily met, even at summary judgment. *See Lohrenz*, 350 F.3d at 1283. The "standard of actual malice is a daunting one," *McFarlane*, 91 F.3d at 1515 (quoting *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1308 (D.C. Cir. 1996)), and "[f]ew public figures have been able clearly and convincingly to prove that the scurrilous things said about them were published by someone with 'serious doubts as to the truth of his publication.'" *Id.* (quoting *St. Amant*, 390 U.S. at 731).

Although the serious doubt inquiry "is too fact-bound to be resolved on the basis of any single factor or mechanical test," *see Tavoulereas*, 817 F.2d at 788, several principles guide the analysis. For example, "actual malice does not automatically become a question for the jury whenever the plaintiff introduces pieces of circumstantial evidence tending to show that the defendant published in bad faith." *Id.* at 789. Nor is it enough for the plaintiff to offer evidence of "highly unreasonable conduct constituting an extreme departure

from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 664–65 (1989) (citation omitted); *Clyburn*, 903 F.2d at 33. Nor, further, does it suffice for a plaintiff merely to proffer "purportedly credible evidence that contradicts a publisher's story." *Lohrenz*, 350 F.3d at 1284. Rather, it is only when a plaintiff offers evidence that "a defendant has reason to doubt the veracity of its source" does "its utter failure to examine evidence within easy reach or to make obvious contacts in an effort to confirm a story" demonstrate reckless disregard. *McFarlane*, 91 F.3d at 1509. Absent such concerns, the defendant has no duty to corroborate the defamatory allegation. *See id*. Even "ill will toward the plaintiff or bad motives are not elements of actual malice," and "such evidence is insufficient by itself to support a finding of actual malice." *Tavoulareas*, 817 F.2d at 795. That is, "a newspaper's motive in publishing a story—whether to promote an opponent's candidacy or to increase its circulation—cannot provide a sufficient basis for finding actual malice." *Harte-Hanks Commc'ns*, 491 U.S. at 665. Only when the evidence of ill will or bad motive is also probative of a "willingness to publish *unsupported allegations*" is it suggestive of actual malice. *See Tavoulareas*, 817 F.2d at 796.

2. Zepter contends that a reasonable jury could find that ICG published the defamatory statement in Report 145 with actual malice. He points to a series of circumstances that individually or collectively, he maintains, would permit a reasonable jury to find that ICG's statement was based on a mere assumption that there was continuing

influence of the Milosevic oligarchy during and after the Djindjic regime, and that ICG's lack of evidence that Zepter was a Milosevic crony demonstrates that it published the statement with actual malice. *See Jankovic I*, 494 F.3d at 1091. As he puts it, the principal author of Report 145, Lyon, "self servingly claims to have *assumed* that any financially successful person from Serbia must have been a Milosevic crony," and his "claim is all the more unwarranted in light of evidence showing that Lyon pursued a scheme to extort Zepter." Appellant's Br. 9. The view that Report 145's defamatory statement was based on a mere assumption ignores key portions of Lyon's declaration, which explains his research process and that his conclusion was not a mere assumption but based on information gathered from various sources. ICG's other conduct on which Zepter relies, including Lyon's attempted extortion, does not rise to the level of clear and convincing evidence of actual malice.

Because Lyon was the principal author of Report 145 and Zepter maintains that nothing that ICG points to supports the defamatory statement, it bears setting out the particulars of Lyon's declaration. ICG maintains that it had and continues to have a good faith belief that the defamatory statement is true, explaining the process for gathering information for Report 145 and the basis for concluding that Zepter was aligned with the Milosevic regime. ICG—including ICG's Vice President in charge of research with over 30 years at the U.S. State Department and another former ICG employee with thirty years' experience in foreign affairs—considered Lyon to be an expert

on the area and to be one of ICG's best analysts. Lyon had devoted his professional life to the study of the Balkans, had a Ph.D in Balkan history from the University of California, Los Angeles, and had extensive experience from living and working in, and conducting research on, the Balkans. He spent approximately two months researching, interviewing, and drafting Report 145, which underwent further editing upon his supervisor's review and upon subsequent review by the director of research, and the report was ultimately approved by ICG's president. In view of Lyon's extensive reporting and research, ICG was confident in the truthfulness of its report.

Although the precise source for the defamatory statement was not made clear in Report 145, Lyon explained that his conclusion that Zepter was a Milosevic crony was based on prior ICG reports, interviews he had conducted, Balkan press reports, a report purporting to be from the Office of the High Representative ("OHR") formed to implement the Dayton Peace Agreement, and the OFAC frozen assets list. Lyon Decl. ¶¶ 27–67. Through reviewing or researching ICG's prior reports (Reports 115, 118, 126, and 141), Lyon had become familiar with Zepter and had come to believe that Zepter's banks were in league with the Milosevic regime in view of the role such banks might have played in aiding the regime by controlling cash flows in Serbia and neighboring Republika Srpska ("RS"). *Id.* ¶¶ 27–39. Additionally, he conducted many interviews with officials associated with Balkan governments and the embassies of the NATO powers that intervened in the region as well as businessmen in the area. *Id.* ¶¶ 40–41. Although

the precise identities of these sources remain confidential, Lyon stated each had previously proven to be reliable and that he had confidence in the information they were providing. *Id.* ¶¶ 48–50. From these interviews with confidential sources, Lyon concluded that "it was impossible during the Milosevic era to have amassed significant wealth without the sponsorship of, or direct assistance from, the regime or its security services." *Id.* ¶ 42. He had been told by a local government source that Zepter had access to privileged currency rates and "was among those who had profited handsomely under the [Milosevic] regime." *Id.* ¶ 45. He had also been told by many intelligence and diplomatic sources that Zepter and his businesses were believed to be engaged in money laundering and arms dealing, that he had ties to "Milosevic's state security apparatus[,] and that Zepter's company had been formed with capital from a state-owned company controlled by Milosevic." *Id.* ¶¶ 48–49. Lyon acknowledged being encouraged in his conclusion by the fact that questions were being raised by the Balkan press about the source of Zepter's wealth and his ties to the Milosevic regime. *Id.* ¶ 52. Lyon also received from a NATO intelligence source a report purporting to be from the OHR that supported his conclusion Zepter was engaged in criminal wrongdoing and was associated with Milosevic. *Id.* ¶¶ 52, 57, 60–61. Finally, Lyon also relied on the fact that the OFAC had included Zepter Bank on a list of entities whose assets should be frozen. *Id.* ¶¶ 64–65. This bolstered Lyon's conclusion that the bank had close ties to the Milosevic regime. *Id.* ¶¶ 65–67. Because his research revealed that it was not "possible that any significant commercial entity, particularly a

bank, could operate independently of [the Milosevic] regime," Lyon believed that the bank's assets were frozen due to its relationship with the Milosevic government. *Id.* ¶ 67.

Zepter maintains, Lyon's declaration aside, that the record supports an inference that ICG did not rely on any sources outside of the OFAC frozen assets list. Because ICG previously represented to this court in 2009 that the defamatory statement was either purely an opinion, or at least an opinion fully supported by the frozen assets list, a jury could infer that ICG did not actually rely on the other sources referenced in Lyon's declaration, which was not prepared until 2013. Given the court's conclusion that the factual basis for the defamatory statement had not been disclosed to the reader as a result of "ICG falsely stat[ing] the basis for the frozen assets lists," *see Jankovic II*, 593 F.3d at 28, Zepter maintains the court must hold that Lyon had no other basis for the defamatory statement and that therefore the defamatory statement was merely an unsubstantiated opinion based on a mere assumption.

Zepter overreads *Jankovic II*. ICG's defense that the defamatory statement was an opinion does not necessarily mean it had no other factual basis for the statement. Nor did this court hold that ICG's only basis for the defamatory statement was the frozen asset list. Rather, the court concluded that the statement did not deserve protection "under the doctrine that 'a statement of opinion that is based upon true facts that are revealed to readers'" is not actionable. *See id.* (citation omitted). Nothing revealed to the readers of Report 145—including the OFAC list—sufficed to fully support

the defamatory statement. *See id.* ICG had not, however, argued that its only factual support for the statement was the frozen assets list but that the frozen assets list supplied a fully disclosed basis for supporting the statement. This left open the possibility that ICG had other sources undisclosed in the Report to support the defamatory statement.

Zepter is correct that the court cannot consider one source on which Lyon purports to rely—the OHR Report. The district court ruled ICG was judicially estopped from relying on this evidence. *Jankovic III*, 72 F. Supp. 3d at 317 n.37. On appeal, ICG has failed to present more than cursory argument, in a footnote and without case citations, that this was error, Appellee's Br. 46–47 n.10. The court does not consider the merits of such underdeveloped arguments, thereby leaving that ruling in place. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001).

Zepter maintains further, however, that even if a jury could believe that Lyon relied on each of the sources he mentioned in his declaration, there were "obvious reasons to doubt" their accuracy or reliability. *See, e.g.*, *McFarlane*, 91 F.3d at 1513 (citation omitted); *Lohrenz*, 350 F.3d at 1284–85. He focuses on why the OFAC listing and Serbian press are unreliable, but he nowhere suggests there was any reason for Lyon to doubt ICG's prior reports or his confidential sources, each of which support the defamatory statement. Zepter's counsel emphasized during oral argument that, unlike the precedents on which ICG relies, ICG

has never revealed the identity of its confidential sources or otherwise provided the specific basis for the defamatory statement. True, but this gets Zepter only so far. Zepter's failure to learn the identity of the confidential sources was due, at least in part, to his untimely discovery request. *See Jankovic III*, 72 F. Supp. 3d at 315 n.32. The only record evidence is that Lyon had confidence in what these sources told him based on their past reliability. Lyon Decl. ¶¶ 48–50.

And there is no merit to Zepter's argument that ICG could not rely on confidential sources because ICG had failed to disclose their identity to him. *See* Appellant's Br. 51–52. Where, as here, "the primary source of evidence is the reporter's own (naturally self-interested) testimony of what a confidential source told him, the combination of the burden of proof and the reporter's privilege to withhold the source's identity confront a defamation plaintiff with unusual difficulties." *Clyburn*, 903 F.2d at 35. But the court also recognized that "the reporter's privilege is a qualified one," because a plaintiff may be able to compel a reporter to divulge his sources if the plaintiff "exhausts all reasonable alternative means of identifying the source." *Id.* (citing *Zerilli v. Smith*, 656 F.2d 705, 713–14 (D.C. Cir. 1981), and *Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir. 1974)). In the cases on which Zepter relies, the defendant was precluded from relying on the confidential sources after a court had determined that the reporter's privilege gave way and that precluding the defendant from relying on such sources was an attractive alternative remedy to requiring the reporter to reveal a source's identity. *See, e.g.*, *Dowd v. Calabrese*, 577

F. Supp. 238, 244 (D.D.C. 1983). Zepter is not at that point, for his motion to compel disclosure was denied because he filed it after the time for discovery had closed. *Jankovic III*, 72 F. Supp. 3d at 315 n.32; *see also Jankovic v. Int'l Crisis Grp.*, No. 04-1198, slip op. at 4 (D.D.C. Sept. 4, 2014). On appeal, Zepter makes only a cursory argument this was error, in a footnote to his brief. The court does not consider such arguments, *see Am. Wildlands*, 530 F.3d at 1001; *Cement Kiln*, 255 F.3d at 869, as Zepter does not attempt to explain why the district court abused its discretion in refusing to permit untimely discovery when he could have sought production during the discovery period. As in *Clyburn*, Zepter's "failure to offer evidence of actual malice" with respect to the confidential sources "must be charged squarely to him." *See* 903 F.2d at 35.

Zepter's failure to offer evidence casting doubt on ICG's good faith reliance on these confidential sources leaves no basis for a reasonable inference that Lyon had not supported the defamatory statement with such sources. This may well prevent Zepter from proving actual malice, *see, e.g.*, *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1297–98 (D.C. Cir. 1988); *McFarlane*, 91 F.3d at 1513; *Tavoulareas*, 817 F.2d at 790. *See also St. Amant*, 390 U.S. at 731–32. But Zepter is entitled to the benefit of the aggregate effect of evidence relevant to showing ICG acted with actual malice. *See Lohrenz*, 350 F.3d at 1283; *Tavouloreas*, 817 F.2d at 794 n.43. He maintains that other circumstances relating to Report 145 could still convince a jury that Lyon did not rely on these confidential sources. Zepter

focuses on Lyon's other sources where there is evidence of unreliability as well as a series of editorial missteps by ICG, and Lyon's attempted extortion.

First, Zepter maintains that a jury could find that it was reckless for ICG to rely on the Serbian press because ICG recognized that some Serbian press outfits were "sensationalist bordering on libel" and others were "notorious for spreading rumours and outright lies," Report 145, at 9–10. Zepter, however, exaggerates the role the Balkan press played in Lyon's reporting, as his declaration's greater reliance on confidential sources demonstrates. As in *McFarlane*, 91 F.3d at 1513, even though Lyon had reason to be "wary" of the press reports, "he also had some reason to believe the story, based upon his own research and his conversations with journalists and experts" on Balkan affairs. *See also Tavoulareas*, 817 F.2d at 790. Any potential bias associated with the news reports, "does not detract from the reliability" of the confidential sources. *See Clyburn*, 903 F.2d at 34. And disclosure in Report 145 of the potential unreliability of the press reports would tend to dispel any claim of actual malice. *See McFarlane*, 74 F.3d at 1304.

Second, Zepter maintains that a reasonable jury could find actual malice based on ICG's negligence in overreading the OFAC frozen asset list to support the defamatory statement. This court concluded that ICG's reliance was misplaced because the listing did not mean that "Zepter Banka gave 'support' to Milosevic, and that its U.S. assets were frozen because of that support." *Jankovic II*, 593 F.3d at 27. But that is not the same as

showing that ICG knowingly published a false statement or subjectively doubted that the list justified the conclusion at the time Report 145 was issued. What is relevant to malice is the information "that was available to and considered by [ICG] prior to publication." *McFarlane*, 91 F.3d at 1508. Even if the Executive Order accompanying the OFAC list did not reflect ICG's understanding of the list, the inferences in Zepter's favor end with a showing that ICG honestly, if mistakenly believed that the OFAC listing was evidence of Zepter's support for the Milosevic regime. An honest misinterpretation does not amount to actual malice even if the publisher was negligent in failing to read the document carefully. *Cf. Time, Inc. v. Pape*, 401 U.S. 279, 289–92 (1971); *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984).

Third, Zepter's reliance on insufficient investigation by ICG is a non-starter. Only if "a defendant has reason to doubt the veracity of its source" is its "failure to examine evidence within easy reach or to make obvious contacts" evidence of its reckless disregard. *See McFarlane*, 91 F.3d at 1510. Lyon had not discovered anything that caused him to doubt his conclusion about Zepter, and therefore was under no obligation to investigate further. *See Lohrenz*, 350 F.3d at 1284–85; *McFarlane*, 91 F.3d at 1510; *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 901 (9th Cir. 1992); *see also St. Amant*, 390 U.S. at 732–33. "Even where doubt-inducing evidence could be discovered, a publisher may still opt not to seek out such evidence and may rely on an informed source, so long as there is no 'obvious reason to doubt' that

source." *Lohrenz*, 350 F.3d at 1285. Zepter has not identified any such evidence that ICG might have easily discovered, other than possibly from speaking with Zepter himself. That Lyon did not contact Zepter, who might reasonably be expected to deny that he was a Milosevic crony, is neither surprising nor required. *See McFarlane*, 91 F.3d at 1510–11; *Lohrenz*, 350 F.3d at 1286.

Fourth, ICG's purported deviations from its normal operating procedures are no more suggestive of actual malice. Zepter highlights ICG's use of an intern to fact check, which is unremarkable, and this, along with ICG's departures from its style and procedures guidelines, does not amount to "purposeful avoidance of the truth." *See Harte-Hanks Commc'ns*, 491 U.S. at 692. Whether these procedures were regularly followed is up for debate, but departures from the normal procedure would, at most, constitute evidence of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Even less does mere sloppy journalism constitute clear and convincing evidence that ICG acted with actual malice. *See Lohrenz*, 350 F.3d at 1284 (quoting *Harte-Hanks Commc'ns*, 491 U.S. at 666).

Fifth, Zepter emphasizes that anyone familiar with Serbia would recognize the inherent improbability of an outspoken supporter of Prime Minister Djindjic having previously been a Milosevic supporter. This posits a false dichotomy. *See Jankovic III*, 72 F. Supp. 3d at 313. The evidence shows that it was neither unheard of for a former

Milosevic supporter to shift alliances, such that Lyon and ICG would have been breaking new ground in concluding that Zepter had done exactly that, nor that anyone at ICG thought this possibility particularly unlikely. Shifting alliances were thought to be common, as illustrated by the example of a Milosevic security chief joining the post-Milosevic government. And according to the President of ICG, there was nothing inconsistent about "someone having been close to the Milosevic regime but nonetheless at the same time being close to people who were, with varying degrees of capacity and intent, trying to forge a new regime for Serbia." Evan Garth Dep. Tr. 346 (Oct. 26, 2011). Maybe Zepter should not have been considered by ICG to be among those who switched allegiances, but he has pointed to no evidence that ICG staff would have been subjectively aware that it was inherently improbable that he had done so.

Sixth, Zepter points to the evidence that Lyon attempted to extort money from him, something he waited some nine years after its alleged occurrence to mention. During a meeting with Lyon, either before or after Report 145 was issued, Zepter claimed that Lyon said Zepter could get him to stop writing negative stories about him if he paid Lyon one to two million dollars. Zepter Dep. Tr. 308–09 (Mar. 15, 2012). On summary judgment, the court must assume that the extortion attempt occurred. *See* Fed. R. Civ. P. 56(c); *Anderson*, 477 U.S. at 255; *cf. Robinson v. Pezzat*, No. 15-7040, 2016 WL 1274044, at *6–7 (D.C. Cir. Apr. 1, 2016). Zepter suggests a reasonable jury could find that Lyon's motive to extort undermined the credibility of Lyon's work

and offered an incentive for him to write untrue reports.

Keeping in mind that "speech 'honestly believed,' whatever the speaker's motivation, 'contribute[s] to the free interchange of ideas and the ascertainment of truth,'" *Tavoulareas*, 817 F.2d at 795 (alteration in original) (quoting *Garrison*, 379 U.S. at 73), Zepter is nonetheless correct that in some circumstances motive-based evidence can be probative of actual malice, *see id.* But the mere presence of some ulterior motive—whether a profit motive, a motive to produce the most interesting stories, or a personal desire to harm the subject of a story—is not enough to support a finding of actual malice. *See Harte-Hanks Commc'ns*, 491 U.S. at 666–68; *Tavoulareas*, 817 F.2d at 795–97, *accord Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991). This is so even though such motives may naturally provide publishers with an incentive to achieve an end without regard to the truth of what they publish. *See Tavoulareas*, 817 F.2d at 797. Absent evidence that the publisher's alleged motive shows an "intent to inflict harm through falsehood," a "willingness to publish *unsupported allegations*," or a desire to publish "*with little or no regard for* [the report's] *accuracy*," the plaintiff has not produced motive-based evidence probative of actual malice. *See id.* at 795–97 (citation omitted); *see also Harte-Hanks Commc'ns*, 491 U.S. at 667. This is true even where the plaintiff introduces evidence that the publisher engaged in "contemptible" conduct in reporting the story, for example, by asking someone to steal documents in support of a story. *See Tavoulareas*, 817 F.2d at 796.

For the attempted extortion to be clear and convincing evidence from which a reasonable jury could find actual malice, Zepter must proffer evidence not only that Lyon prepared Report 145 with an extortion motive in mind, but also that the extortion motive caused ICG or Lyon to risk publishing an *untrue* statement about him. Zepter's evidence fails to establish the latter, at least by clear and convincing evidence. All Zepter has shown is that Lyon hoped to capitalize on working on reports about the Balkans. That evidence, without more, does not amount to evidence that Lyon was willing to publish untruths in order to make an extra buck. *See Tavoulareas*, 817 F.2d at 796–97. Such evidence is not inevitably clear and convincing evidence of actual malice. A reporter might be equally, if not more, successful in blackmailing someone with true information, so the fact of extortion does not categorically allow the inference that Lyon intended to extort Zepter with falsehoods. In fact, Zepter's own recounting of the extortion attempt significantly downplays the plausibility of such an inference. The only evidence shows that Lyon's motive to extort was consistent with blackmailing individuals with reports he believed to be true. When Zepter asked Lyon to stop publishing "lies," Lyon responded that he believed what he wrote was true and that he had reliable sources to prove it. Zepter Dep. Tr. 308. In view of all of the other evidence supporting Lyon's conclusion about Zepter and the evidence that ICG had a strong motive to publish truthful, carefully prepared reports that were even better than many embassy reports, *see* Jon Greenwald Dep. Tr. at 163–64 (Jun. 10, 2011), no reasonable jury could find that Lyon's extortion attempt indicated he

published a falsehood either willingly or recklessly, much less that there was such clear and convincing evidence.

The district court declined to consider Zepter's proffered declarations providing hearsay accounts of Lyon's attempts to extort others who were the subject of ICG reports. *Jankovic III*, 72 F. Supp. 3d at 318 (citing Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 403, 404(a)(1)). Zepter offered these declarations only to "show reputation concerning character" generally, and so even were these declarations in evidence, they would do no more to establish that Lyon was willing to publish without regard to truth or falsity in order to extort. There is no need, then, to consider whether it was an abuse of discretion to exclude these declarations.

Seventh, for a similar reason, Zepter's related argument that Lyon had concocted a pre-conceived storyline by which all wealthy Serbian citizens were Milosevic cronies also fails to establish actual malice. Lyon may have adopted an adversarial stance toward these wealthy citizens he had come to believe were deserving of suspicion, but this attitude is not "antithetical to the truthful presentation of facts." *See Tavoulareas*, 817 F.2d at 795.

For these reasons, we conclude that, despite weaknesses in some sources on which ICG relied and viewing the evidence in his favor, Zepter has failed to establish that "the defendant actually possessed subjective doubt" about the statement published in Report 145. *See McFarl*ane, 91 F.3d at 1508. Owing in part to his procedural failings during discovery and at summary judgment, Zepter

has not pointed to evidence that there were obvious reasons to doubt the confidential sources or that ICG or Lyon had discovered evidence causing them to doubt the conclusion that Zepter was allied with the Milosevic regime. Absent such evidence from Zepter, the record evidence of Lyon's extensive background research and reporting on the Balkans, his understanding of the Serbian press, and his good faith belief that the frozen assets list implied more than it actually did, belies actual malice. This is particularly so in view of evidence showing that ICG's report underwent multiple internal reviews by knowledgeable staff. Evidence of ICG's missteps and preconceived notions about Zepter's Milosevic years does little to show actual malice. And although Zepter's evidence of Lyon's attempted extortion shows poor judgment and is hardly admirable conduct for a reporter, *see Tavoulareas*, 817 F.2d at 796, even that evidence fails to show that Lyon risked writing "lies" or was motivated to do so. Separately, then, each of Zepter's factual theories fails to show clear and convincing evidence of actual malice.

Zepter's theories fare no better when viewed in the aggregate. Even taking these flawed evidentiary assertions together, no reasonable jury could find by clear and convincing evidence that ICG acted with actual malice. *See McFarlane*, 91 F.3d at 1516. What is still missing is evidence that ICG had "serious doubts" about the truth of the defamatory statement or that it published the statement with a high degree of awareness of its probable falsity, such that ICG acted with reckless disregard for the statement's truth. *See St. Amant*, 390 U.S. at 730.

Accordingly, we hold that Zepter has failed to establish clear and convincing evidence of actual malice, and we affirm the grant of summary judgment to ICG.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-1198 (RBW)

MILAN JANKOVIC,

Plaintiff,

—v.—

INTERNATIONAL CRISIS GROUP,

Defendant.

ORDER

For the reasons set forth in the Memorandum Opinion issued contemporaneously with this Order, it is

ORDERED that Plaintiff Philip Zepter's Motion for Partial Summary Judgment Affirming His Status as a Private Figure is **DENIED**. It is further

ORDERED that Plaintiff Philip Zepter's Motion for Partial Summary Judgment Affirming the Falsity of [International Crisis Group]'s Defamatory Statements is **DENIED AS MOOT**. It is further

ORDERED that the Motion for Summary Judgment of Defendant International Crisis Group is **GRANTED**. It is further

ORDERED that Defendant International Crisis Group's Motion to Strike [the] Plaintiff's Hearsay Declarations is **GRANTED**. It is further

ORDERED that Plaintiff Philip Zepter's Motion to Strike the 2003 Expense Receipts of James Lyon is **DENIED AS MOOT**.

SO ORDERED on this 4th day of November, 2014.

REGGIE B. WALTON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-1198 (RBW)

MILAN JANKOVIC,

Plaintiff,

—v.—

INTERNATIONAL CRISIS GROUP,

Defendant.

MEMORANDUM OPINION

The plaintiff, Milan Jankovic, also known as Philip Zepter, brings this action to recover damages for injuries allegedly caused by a defamatory publication circulated by the defendant, the International Crisis Group. There are several motions currently pending before the Court: (1) Plaintiff Philip Zepter's Motion for Partial Summary Judgment Affirming His Status as a Private Figure ("Pl.'s Private Figure Mot."); (2) Plaintiff Philip Zepter's Motion for Partial Summary Judgment Affirming the Falsity of [International Crisis Group]'s Defamatory Statements ("Pl.'s Falsity Mot."); (3) Motion for Summary Judgment of Defendant International Crisis Group ("Def.'s Summ. J. Mot."); (4)

Defendant International Crisis Group's Motion to Strike [the] Plaintiff's Hearsay Declarations ("Def.'s Strike Mot."); and (5) Plaintiff Philip Zepter's Motion to Strike the 2003 Expense Receipts of James Lyon ("Pl.'s Strike Mot."). Upon careful consideration of the parties' submissions,[1] the Court will deny the plaintiff's motion for partial summary judgment affirming his status as

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[1] In addition to the filings already mentioned, the Court considered: (1) the Opposition of Defendant International Crisis Group to [the] Plaintiff's Motion for Partial Summary Judgment Affirming His Status as a Private Figure ("Private Figure Opp'n"); (2) Plaintiff Philip Zepter's Reply Memorandum in Support of His Motion for Partial Summary Judgment Affirming His Status as a Private Figure ("Private Figure Reply"); (3) the Opposition of Defendant International Crisis Group to [the] Plaintiff's Motion for Partial Summary Judgment on the Element of Material Falsity ("Falsity Opp'n"); (4) Plaintiff Philip Zepter's Reply Memorandum in Support of His Motion for Partial Summary Judgment Affirming the Falsity of [International Crisis Group]'s Defamatory Statements ("Falsity Reply"); (5) Plaintiff Philip Zepter's Memorandum of Points and Authorities in Opposition to [International Crisis Group]'s Motion for Summary Judgment ("Summ. J. Opp'n"); (6) the Reply of Defendant International Crisis Group in Support of Its Motion for Summary Judgment ("Summ. J. Reply"); (7) Plaintiff Philip Zepter's Memorandum in Opposition to Defendant International Crisis Group's Motion to Strike [the] Plaintiff's [Hearsay] Declarations ("Opp'n to Def.'s Strike Mot."); (8) Defendant International Crisis Group's Reply in Support of Its Motion to Strike [the] Plaintiff's Hearsay Declarations ("Def.'s Strike Mot. Reply"); (9) Defendant International Crisis Group's Opposition to [the] Plaintiff's Motion to Strike Expense Receipts ("Opp'n to Pl.'s Strike Mot."); and (10) Plaintiff Philip Zepter's Reply Memorandum in Support of His Motion to Strike the 2003 Expense Receipts of James Lyon ("Pl.'s Strike Mot. Reply").

a private figure, deny the plaintiff's motion for partial summary judgment affirming the falsity of International Crisis Group's defamatory statements as moot, grant summary judgment for the defendant, grant the defendant's motion to strike the plaintiff's hearsay declarations, and deny the plaintiff's motion to strike the expense receipts as moot.

I. STANDARD OF REVIEW

A motion for summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," based upon the depositions, affidavits, and other factual materials in the record. Fed. R. Civ. P. 56(a), (c). A fact is "material" if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). And "a dispute over a material fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Arrington v. United States, 473 F.3d 329, 333 (D.C. Cir. 2006) (quoting Anderson, 477 U.S. at 247). The moving party bears the initial burden of showing the absence of a disputed material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If this burden is satisfied by the moving party, the burden then shifts to the opposing party to "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 248. "Although summary judgment is not the occasion for the court to weigh credibility or evidence, summary judgment is appropriate 'if the nonmoving party fails to make a showing sufficient to

establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Talavera v. Shah, 638 F.3d 303, 308 (D.C. Cir. 2011) (citations omitted) (quoting Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006)). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a [reasonable] jury to return a verdict for that party." Anderson, 477 U.S. at 249. In making this assessment, "[t]he evidence is to be viewed in the light most favorable to the nonmoving party and the court must draw all reasonable inferences in favor of the nonmoving party." Talavera, 638 F.3d at 308 (citing Anderson, 477 U.S. at 255). These inferences, however, must be "justifiable." Anderson, 477 U.S. at 255.

II. BACKGROUND

At the outset, the Court notes that the plaintiff has made it difficult to discern which purported material facts are in dispute.[2] See generally ECF No. 158-2, Plaintiff Philip Zepter's Statement of Genuine Issues of Material Facts in Opposition to Defendant [International Crisis Group]'s Motion for Summary Judgment ("Material Facts I") (disputing the defendant's proffered undisputed material facts). In response to many of the allegedly undisputed facts proffered by the defendant, the plaintiff raises a garden variety of objections that

[2] The Court will primarily cite to the parties' submissions in connection with the defendant's motion for summary judgment, as that motion is dispositive and encompasses the relevant arguments made in the other motions before the Court.

do not genuinely dispute the truth of the undisputed facts asserted by the defendant. For example, the plaintiff merely cites case law, therefore making only legal arguments in many of its responses to the defendant's undisputed facts. But legal arguments alone are insufficient to create a factual dispute to defeat a motion for summary judgment. See Glass v. Lahood, 786 F. Supp. 2d 189, 199 (D.D.C. 2011) ("legal memoranda are not evidence and cannot themselves create a factual dispute sufficient to defeat a motion for summary judgment"), aff'd, 11-5144, 2011 WL 6759550 (D.C. Cir. Dec. 8, 2011); see also Conservation Force v. Salazar, 715 F. Supp. 2d 99, 106 n.9 (D.D.C. 2010) ("arguments of counsel . . . are not evidence" (internal quotations and citations omitted)).

The plaintiff also repeatedly uses qualifiers that do not genuinely dispute the truth of the allegedly undisputed facts set forth by the defendant. Thus, when the defendant cites Serbian press articles from the record as the evidentiary basis for its undisputed facts, the plaintiff merely disputes those facts "to the extent they rely on an article from the Serbian press which [the defendant] described as 'sensationalist bordering on libel' and 'notorious for spreading [rumors] and outright lies.'" E.g., ECF No. 158-2, Material Facts I ¶ 145 (quoting Pl.'s Private Figure Mot., ECF No. 145-4, Exhibit ("Ex.") 12 (July 2003 International Crisis Group Report Entitled "Serbian Reform Stalls Again" ("Report 145")) at 9-10). However, Report 145 does not reasonably suggest that these characterizations are attributable to all publications of the Serbian press in the relevant timeframe. See

Pl.'s Private Figure Mot., ECF No. 145-4, Ex. 12 (Report 145) at 9-10. Indeed, the primary researcher and author of Report 145 recognized that the accuracy of the Serbian press articles had to be assessed on a "case-by-case basis." Def.'s Summ. J. Mot., ECF No. 150-1, Ex. 16 (Deposition of James Lyon, Ph.D. ("Lyon Dep.")) at 22:6-15. Thus, where the plaintiff does not specifically dispute the facts from a particular Serbian press article by citing to evidence from the record, these facts remain uncontroverted.[3] See Local Civ. R. 7(h); see also Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner, 101 F.3d 145, 153 (D.C. Cir. 1996) (placing "burden on the parties to focus the court's attention on the salient factual issues in what otherwise may amount to a mountain of exhibits and other materials").

Alternatively, when the defendant cites Serbian press articles as the evidentiary basis for its undisputed facts, the plaintiff sometimes merely disputes those facts "to the extent they rely on a news article which is hearsay."[4] E.g., ECF No. 158-2,

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[3] Some of the Serbian press articles contain interviews with or quotes from the plaintiff. E.g., Def.'s Summ. J. Mot., ECF No. 151-3, Ex. 25; Def.'s Summ. J. Mot., ECF No. 151-5, Ex. 27. The plaintiff does not specifically contend that the Serbian press articles inaccurately reported what he publicly stated. In any event, as the Court will soon explain, the Serbian press articles cited by the defendant in support of its undisputed facts are not necessarily being used for the truth of the matters asserted.

[4] Because some of these Serbian press articles contain interviews with or quotes from the plaintiff, it is unclear to the Court why these are not at least party admissions that are not excluded under the hearsay rule. See Fed. R. Evid. 801(d)(2).

Material Facts I ¶ 145. This objection is without merit under controlling precedent, as the defendant cites these articles for purposes other than the truth of the matter asserted. See Def.'s Summ. J. Reply, ECF No. 163-21, Response of Defendant [International Crisis Group] to Plaintiff Philip Zepter's Statement of Genuine Issues of Material Fact and His Response to [International Crisis Group]'s Statement of Undisputed Material Facts ("Resp. to Material Facts I") at 6-8. First, the articles assist the Court in identifying a public controversy, Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1297 (D.C. Cir. 1980) ("The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment. It should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy." (internal footnotes omitted)). And second, they aid the Court in determining the plaintiff's role, if any, in that public controversy. Id. ("The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution. In undertaking this analysis, a court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements.").[5]

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[5] Nowhere does the plaintiff contest that these articles were actually published by the Serbian press.

The plaintiff also objects to the defendant's proffered undisputed facts that rely on reports from the defendant's experts on hearsay grounds.[6] E.g., ECF No. 158-2, Material Facts I ¶ 24. But expert reports are an exception to the rule against hearsay in the summary judgment context. See Fed. R. Evid. 802 advisory committee's note (listing "Rule 56: affidavits in summary judgment proceedings" as an exception to prohibition against hearsay). The Court, therefore, can and will consider expert reports in resolving the parties' summary judgment motions, provided that the expert has "personal knowledge," "set[s] out facts that would be admissible in evidence," and "show[s] that [he or she] is competent to testify on the matters stated."[7] Fed. R. Civ. P. 56(c)(4)); see also Lohrenz v. Donnelly, 223 F. Supp. 2d 25, 37 (D.D.C. 2002), aff'd, 350 F.3d 1272 (D.C. Cir. 2003) (considering expert report in defamation case on summary judgment).

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[6] The plaintiff repeatedly cites A-J Marine, Inc. v. Corfu Contractors, Inc., 810 F. Supp. 2d 168, 178 n.6 (D.D.C. 2011) and Mahnke v. Washington Metropolitan Area Transit Auth., 821 F. Supp. 2d 125 (D.D.C. 2011) in support of his argument that expert reports are hearsay. But neither case is helpful on that point. The Court in A-J Marine dealt with an "unsworn" report, 810 F. Supp. 2d at 178 n.6 (emphasis added), an issue that the plaintiff has not raised here. And in Mahnke, the Court discussed expert reports as hearsay in the context of their use at trial. 821 F. Supp. 2d at 154.

[7] To the extent the plaintiff disputes the competency of the defendant's experts to testify about certain subject matter, e.g., ECF No. 158-2, Material Facts I ¶ 99 ("Mr. Bieber also admitted having no knowledge of Zepter Banka, and is not qualified to testify as an expert on economic activity in Serbia."), the Court will not rely on those portions of the expert reports discussing those subjects.

Finally, in those instances where the plaintiff deems many of the defendant's purported undisputed facts as "immaterial," the Court will treat those facts as conceded, as this response does not raise a genuine issue of material fact.[8] See Herrion v. Children's Hosp. Nat'l Med. Ctr., 786 F. Supp. 2d 359, 362 (D.D.C. 2011) ("irrelevant and immaterial" challenges are "patently insufficient to controvert the truth of the matters identified"), aff'd, 448 F. App'x 71 (D.C. Cir. 2011). In sum, because the aforementioned challenges do not controvert the truth of the defendant's proffered undisputed facts, the Court will treat those undisputed facts as admitted. See Local Civ. R. 7(h) ("In determining a motion for summary judgment, the [C]ourt may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion."). Against this backdrop, the Court finds that the following facts are undisputed.

A. Factual Background

1. The Parties

The plaintiff "was born in a small Serbian town and grew up in Bosnia." ECF No. 157-1, Defendant International Crisis Group's Response to [the] Plaintiff's Statement of Undisputed Material Facts ("Material Facts II") ¶ 1. After college, he

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[8] The defendant has similarly done the same in response to purported undisputed material facts advanced by the plaintiff in his partial motions for summary judgment. The Court will likewise treat those facts as conceded.

"established the Zepter Company, . . . a cookware company[.]" Id. ¶ 2. After the formation of his company, the plaintiff "achieved business success throughout Europe." Id. ¶ 4. The plaintiff's products can be found in more than forty countries. See id. ¶ 5.

The defendant "is a non-profit organization founded in 1995 to help anticipate, prevent, and resolve deadly conflicts around the world." ECF No. 158-2, Material Facts I ¶ 4. In the early-to-mid 2000s, it "focused significant efforts" on the Balkans. Id. ¶ 6. In that regard, the defendant regularly publishes analytical reports intended to influence policymakers around the world. Id. ¶ 9.

2. The Serbian Government During the Relevant Timeframe

In 1999, Serbia was marred by civil conflict as its President, Slobodan Milosevic, carried out violence in Kosovo—a province in Serbia. See id. ¶ 31. Milosevic's actions in Kosovo resulted in military intervention by the North Atlantic Treaty Organization ("NATO"), as well as economic sanctions by the United States and European countries. See id. In 2000, Milosevic lost a democratic election to Vojislav Kostunica, see id. ¶ 32, and following Milosevic's ouster from power in Serbia, "there was a public discussion in Serbia about the direction and extent of political, economic, and social reforms," id. ¶ 161. "The topic was a mainstay of public debate and discussion in the media, on television, in diverse social and political circles, and on the streets of Serbia." Id. (internal quotations omitted); see also id. ¶ 37 ("When Milosevic fell at the end of 2000 for a

number of years, there was a constant policy debate in the wider international community, and . . . within the [International] Crisis Group, about what was really going on in Serbia, [including whether Serbia] . . . was . . . really reforming [and] moving away from the Milosevic period" (internal quotations and alterations omitted)). Despite Kostunica's victory over Milosevic, "political power was vested in the newly elected Serbian parliament and its [P]rime [M]inister, Zoran Djindjic." Id. ¶ 33. Kostunica and Djindjic would eventually become political rivals, with Djindjic "taking charge of the crucial levers of government in Serbia." Id. ¶ 34; see also id. ¶ 164 ("The future of Serbian reforms was of international concern, and prominent news publications regularly covered the issue."). "Djindjic was a reformist who favored sweeping change from the policies implemented by . . . Milosevic," but "Djindjic's political rivals, such as . . . Kostunica, advocated a policy of continuity." Id. ¶ 162. In 2001, Djindjic extradited Milosevic to The Hague, Netherlands, to stand trial for war crimes. Id. ¶ 35. Djindjic was assassinated in 2003. Id.

3. Press Coverage of Post-Milosevic Serbia[9]

a. Press Reports About Djindjic

After Milosevic was removed from power, "[t]here was intense interest in the international

[9] Many of the Serbian press articles have been translated into English. Any alterations made by the Court do not change the substance of the articles. For example, some alterations were made to correct grammatical errors.

community and in the region as to whether Djindjic was committed to democratic reform and at what pace." Id. ¶ 34. Specifically, Western nations viewed Serbia as the "key to regional stability" in the Balkans. Id. The international community harbored some doubt as to whether Djindjic could reform Serbia and govern it differently than Milosevic. See Def.'s Summ. J. Mot., ECF No. 151-9, Ex. 31 (January 2001 Economist Article Entitled "Zoran Djindjic, Serbia's [O]ther [B]ig [M]an" ("January 2001 Economist Article") at 2 ("One of Serbia's leading columnists, by no means a fan of Mr[.] Milosevic, calls Mr[.] Djindjic 'Little Slobo[,'] implying that he has the same dictatorial tendencies."); id. ("Years of sanctions and decades of communism have stunted the economy, and corruption is rife. If foreigners are to invest, the judiciary must be cleaned up, and the criminals who ran the show under Mr[.] Milosevic must be dealt with. Many well-wishers fear that Mr[.] Djindjic, who is far from monkish himself, may not be inclined to take them on."); id. at 3 ("Moreover, skeptics in Belgrade think [Djindjic] has already been too cosy with Mr[.] Milosevic's old crime-connected security-service types. . . . Mr[.] Djindjic has to be tough and shrewd. He also needs conciliatory skills—and integrity. He has the first two qualities in abundance. Whether he has the other two is worryingly less certain.").

For example, the Serbian press reported that the changes that Djindjic was "trying to introduce" in Serbia were "purely cosmetic and aimed at allowing the financial elite created during the Milosevic regime—representatives of whom are

allegedly his close friends—to keep its positions and power . . . ." See Def.'s Summ. J. Mot., ECF No. 151-10, Ex. 32 (January 2001 Reporter Article Entitled "You Just Watch Him" ("January 2001 Reporter Article")) at 2. In particular, Djindjic's association with "business people" drew skepticism from the public. Def.'s Summ. J. Mot., ECF No. 152-4, Ex. 41 (August 2001 Financial Times Article Entitled "The Belgrade Connection" ("August 2001 Financial Times Article")) at 1 ("Today, Djindjic is Prime Minister—an international star. He has long been considered in the [W]est to be a guarantor of democracy in the Balkans. But behind this facade lurks a different, scarcely perceived side: Contradictions in which the Serbian government head has entangled himself, as well as contacts with business[]people that are classed as part of organized crime, cast dark shadows over the purported shining light. . . . [T]his top politician has become involved with people who undermine his credibility."); see also id. at 2-3 (calling into question Djindjic's association with a "cigarette smuggler"). The public viewed Djindjic as a politician with "many complicated business interests . . . and many Serbs saw him as an elegant kingpin turned politician." Def.'s Summ. J. Mot., ECF No. 153-21, Ex. 89 (March 2003 Article Entitled "The World: Murder in Belgrade; Did Serbia's Leader Do the West's Bidding Too Well" ("March 2003 Article") at 1; see also Def.'s Summ. J. Mot., ECF No. 152-5, Ex. 42 (August 2001 Vreme Article Entitled "Murder, Corruption and Political Games" ("August 2001 Vreme Article")) at 3 ("It is understandable that . . . Djindjic's government with a European and reformist reputation does

not like its standing being called into question."); id. at 6 ("Kostunica's mention of corruption in the media is usually interpreted as an attack of Djindjic . . . ." (internal quotations omitted)); Def.'s Summ. J. Mot., ECF No. 152-8, Ex. 45 (August 2001 www.nzz.ch Article Entitled "Europe [W]ill [N]ot [W]ait [F]or [U]s" ("August 2001 www.nzz.ch Article")) at 1 ("President Kostunica accuses the reformers of Serbian chief executive Djindjic of being interlinked with organized crime."); Def.'s Summ. J. Mot., ECF No. 153-13, Ex. 81 (Article From www.milovanbrkic.com Entitled "Birth of the Serbian Godfather" ("www.milovanbrkic.com Article")) at 4 ("The Serbian Prime Minister does not hide his strong ties to the underground. Asked if it is true that he has ties to criminals, Prime Minister Djindjic in his interview for Sunday Telegraph . . . confirms that is correct that he comes from that milieu.").

b. Press Reports About the Plaintiff

During the time period discussed above, the press also wrote articles about the plaintiff. See ECF No. 158-2, Material Facts I ¶ 77. His political views, as well as his political activities, were reported by the press. See Def.'s Summ. J. Mot., ECF No. 154-10, Ex. 113 (September 2003 Article Entitled "I am [B]eing [A]ttacked in Serbia for [H]elping Djindjic" ("September 2003 Article")) at 1 ("Several sources in Belgrade confirmed for 'Nacional' that [the plaintiff] came under fire of . . . favorites of the past regime who cannot forgive him for helping the opposition in overthrowing Slobodan Milosevic . . . ."); Def.'s Summ. J. Mot.,

ECF No. 148-3, Ex. A (2001 Article Entitled "Bosnian Serb [P]arty [S]ays Serb [E]ntity [R]uled [B]y [P]rivate [B]usinessman" ("2001 Businessman Article")) at 1 ("The chairman of the executive committee of the Serbian Radical Party SRS in the Bosnian Serb Republic,[10] Mirko Blagojevic, said today that [the plaintiff] was 'at the helm of the Serb Republic' because 'he donated a large amount of money to Prime Minister Mladen Ivanic's election campaign, and in return asked that his aide, Milenko Vracar, be appointed finance minister[.']"); Def.'s Summ. J. Mot., ECF No. 151-3, Ex. 25 (1998 Article Interviewing Zepter Entitled "The Time of Wisdom Has Come" ("1998 Interview")) at 2 ("[T]he Serbian Republic have a sincere friend in [the plaintiff] . . . . The time has come when this country must finally be led by wisdom rather than by feelings. It must act in a calculated manner, wisely, and with selected allies in every respect, i.e., political, national and economic. . . . I am convinced that the Serbian Republic is facing an economic transformation. I feel that the way of thinking which has become deeply rooted in most of the government is changing. To put it simply, you must get used to fostering the principles that have created civilization and its greatest achievement are democracy and the market economy. . . . In conclusion, politics is always responsible or should be for what happens to us."); Def.'s Summ. J. Mot., ECF No. 151-5, Ex. 27 (Article Entitled "How Milan Jankovic Became Philip Zepter" ("How

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[10] The Serbian Republic, also known as "Republika Srpska," refers to a "Serbian-majority enclave . . . in Bosnia." ECF No. 158-2, Material Facts I ¶ 52.

Jankovic Became Zepter")) at 18 (recognizing that the plaintiff "became politically engaged" two years before article was published).

Through the press, the plaintiff publicly expressed his desire to "enter [the] political arena" in Serbia. Def.'s Summ. J. Mot., ECF No. 152-27, Ex. 64 (December 2001 Glas Javnosti Article) at 4 ("I want to help Serbia. . . . When in a few years, I enter political arena, I will enter to win."); see also Def.'s Summ. J. Mot., ECF No. 152-28, Ex. 65 (December Ekonomija 2001) at 1 ("According to his own words, [the plaintiff] is not a shadow ruler of Serbia[,] but a man who wishes to contribute to the victory of democracy, law, and action, over inaction and anarchy.").

The plaintiff used the press to voice his approval of Djindjic's political agenda for the future of Serbia. E.g., Def.'s Summ. J. Mot., ECF No. 152-27, Ex. 64 (December 2001 Glas Javnosti Article) at 2 ("I have helped, in many ways, . . . opposition activists and activities in Serbia. That is why I was not favored by the former regime (the fact for which I am, of course, proud) . . . .); id. at 3 ("The fact that at the time of Milosevic's reign of terror, Mr. Djindjic was the fiercest and most consistent defendant of the honor and dignity of the Serbian people in the Western media has been consistently hidden from our country's public eye . . . The people with good (political) taste should be impressed by this. . . . That is why, at the time of the darkest Milosevic's dictatorship, I publicly stated in an interview for the magazine 'Profil' that I am most impressed by Djindjic among all the politicians on the Serbian political scene, and I can repeat that today as well . . . . I will support,

to the horror of my 'critics[,'] not only the current Prime Minister, but also all those for whom I believe that they can bring prosperity to my country and my people."); Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (June 2001 Blic News Article Entitled "[Djindjic]'s Promotion in USA is Financed by Zepter" ("June 2001 Blic News Article")) at 44 (quoting the plaintiff as stating: "In the polluted political life in Serbia everyone is striving to become the new Milosevic and to rule as he did . . . . However, I do see a glimpse of bright light in the general hopelessness. Zoran [Djindjic] is certainly one of them.").

And as reported by the press, the plaintiff's approval translated into political and financial support for Djindjic. See, e.g., Def.'s Summ. J. Mot., ECF No. 154-10, Ex. 113 (September 2003 Article) at 4 (interview of the plaintiff wherein he acknowledged that he "made many enemies by helping Zoran [Djindjic] come to power, for being his close friend"); Def.'s Summ. J. Mot., ECF No. 152-30, Ex. 67 (January 2002 Article Entitled "Seller of Empty Pots" ("January 2002 Article")) at 2 (characterizing the plaintiff as someone who "declares himself a supporter of the Prime Minister's politics"); Def.'s Summ. J. Mot., ECF 151-12, Ex. 34 (June 2001 Article From www.spo.org Archives ("June 2001 SPO Article")) at 1 (referring to "[the plaintiff] . . . []as the financier of the Democratic Party"); Def.'s Summ. J. Mot., ECF No. 153-13, Ex. 81 (www.milovanbrkic.com Article) at 15 ("[The plaintiff], also invested more than ten million dollars in the Democratic Party and Mr. Djindjic personally."); Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (June

2001 Politika Article), at 31 ("[The plaintiff] has been talked about for years as one of the main financiers of the former Serbian opposition, primarily of Zoran Djindjic and the Democratic Party.").

Specifically, the plaintiff's financial support of Djindjic included helping Djindjic retain the services of a United States lobbyist named James Denton to represent Serbian interests in this country. See, e.g., ECF No. 158-2, Material Facts I ¶ 81 ("[The plaintiff] agreed to pay for the services of James Denton."); see also Def.'s Summ. J. Mot., ECF No. 154-10, Ex. 113 (September 2003 Article) at 4 ("I was helping [Djindjic] . . . by mostly giving advice, but in other ways too, primarily by paying a company that was lobbying for the opposition in the USA at the time. That way I wanted to present a new Serbia in the USA, so Washington can recognize the new democratic alternative, to show that Serbia is not what Milosevic had created it to be . . . ."); Def.'s Summ. J. Mot., ECF No. 153-24, Ex. 92 (July 2003 Article Entitled "Zepter was Paying the Serbian Government's Lobbyists" ("July 2003 Article")) at 1 (reporting that the plaintiff was paying "$120,000 dollars a year, as well as traveling expenses," for James Denton to "perform[] public relations work for the Serbian [g]overnment in the United States aimed at establishing a friendly and constructive relationship between the two countries" (internal quotations omitted)); Def.'s Summ. J. Mot., ECF No. 153-16, Ex. 84 (February 2002 Article Entitled "Who [A]re the [R]ich [B]usinessmen [W]ho [F]inance Serbian [P]arties?" ("February 2002 Article") at 10 (reporting that the plaintiff "has

been mentioned" as the individual who would "pa[y] for" the $120,000 service fee in the agreement "between the president of the Serbian government Zoran [Djindjic] and an independent American consultant James Denton"); Def.'s Summ. J. Mot., ECF No. 152- 30, Ex. 67 (January 2002 Article) at 2-3 ("'News' was the first (and the only one at that time) publication that published fax copies of documents which unambiguously confirmed that . . . [the plaintiff] was paying Jim Danton [sic] a lobbying fee on behalf of Zoran Djindjic. In his statement for 'News,' Jim Danton [sic] personally confirmed that, as well. There was nothing in dispute about that, except for the general question of whether Zoran Djindjic had some obligations toward [the plaintiff] because of that, and the fact that the deputies of the Serbian Assembly were not informed, as they should have been, about that arrangement."); Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (December 2001 Article Entitled "And This is Serbia" ("December 2001 Article")) at 84 ("They signed an agreement whereby the company 'Zepter' will pay two hundred thousand dollars per year for the promotion of the Prime Minister in the US. A fax copy of this agreement was published in the weekly magazine 'Blic News,' but none of the other media had the courage to transmit this article."); Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (June 2001 Politika Article), at 31 ("For years he denied it and, even now after 'Blic News' revealed that [the plaintiff] will pay James Denton, an independent U.S. consultant, to lobby on behalf of Serbia in the United States, no one in Zepter International wanted to say a word about it."); Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A

(June 2001 Blic News Article), at 41 (reporting on contract between Djindjic and lobbyist James Denton, where Denton was to "be engaged in public relations in the USA on behalf of the Serbian [g]overnment" and present Serbia as "a stable, forward-looking country, suitable for investment"); id. ("Denton will work under the supervision of the Prime Minister [Djindjic] or his representative on renewing friendly relationships between the two countries, especially with the Administration of President Bush and the US Congress, identifying and coordinating American programs of technical and conomic assistance." (internal quotations omitted)). Further, the plaintiff also acknowledged to the press that he was an "adviser for international economic business affairs" for Prime Minister Djindjic. Def.'s Summ. J. Mot., ECF No. 154-10, Ex. 113 (September 2003 Article) at 4 (interview of the plaintiff wherein he recognized that "when [Djindjic] became Prime Minister, [the plaintiff became] his adviser for international economic business affairs").

And during Djindjic's tenure as prime minister, the press reported on the friendship between the plaintiff and Djindjic. See ECF No. 158-2, Material Facts I ¶ 137; Def.'s Summ. J. Mot., ECF No. 152-28, Ex. 65 (December 2001 Ekonomija Article Entitled "I Have Never Traded in Arms" ("December Ekonomija 2001") at 1 ("As far as his connections with Serbia's Prime Minister Zoran Djindjic are concerned, [the plaintiff] states that the two have known each other for a long time and that they are friends."); Def.'s Summ. J. Mot., ECF No. 152-27, Ex. 64 (December 2001 Glas Javnosti

Article Entitled "My Answer to Them" ("December 2001 Glas Javnosti Article")) at 2 (the plaintiff stating that "I have known mister Djindjic for many years, and I still proudly say that we are friends. I believe in friendship."); Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (December 2001 Article) at 84 ("[The plaintiff] is a close friend of Zoran Djindic's.")

Not only did their friendship "attract public attention," but the press also began to question whether the plaintiff was receiving preferential treatment from Djindjic's government. See Def.'s Summ. J. Mot., ECF No. 153-14, Ex. 82 (June 2002 Article Entitled "In Search of Money Origins" ("June 2002 Article") at 2 (inquiring about the allegation that "companies such as Zepter, . . . that are allegedly close to the regime, have been exempted from taxes, and it has attracted public attention"); see also Material Facts I ¶ 172; Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (September 2001 Article 3 From www.spo.org Archives ("September 2001 SPO Article")) at 13 ("Instead of subjecting [the plaintiff's] wealth and monopoly on all state affairs to investigation, the Mafia don Zoran Djindjic is giving him support for the suppression of opposition activity and critical thought in Serbia. . . . [The] Serbian Renewal Movement will . . . illuminate[] the character and deeds of [the plaintiff], organizer and patron of smuggling and crime in Serbia."); Def.'s Summ. J. Mot., ECF 151-12, Ex. 34 (June 2001 SPO Article) at 1 (reporting that Djindjic "flew abroad free of charge by planes owned by [the plaintiff]"); Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (December 2001 Article) at

84 ("In July of this year, Zoran Djindjic spent part of his vacation as [the plaintiff]'s guest in Monte Carlo."). The public had come to believe that the plaintiff was "the most important financier of the Serbian Government" and that he was "the most important and most influential businessman in Serbia." Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (August 2001 Article Entitled "The Zepter State" ("August 2001 Article")) at 51 ("[The plaintiff] has decided to conquer Serbia . . . in his own way. Namely, [the plaintiff] has become the most important financier of the Serbian Government: out of his own pocket, he is financing Jim Denton, an American lobbyist for Zoran Djindjic; he is paying the bills incurred by the Government abroad, [and] investing in the fallen Serbian economy. . . . Well-informed people even claim that [the plaintiff] has become the most important and most influential businessman in Serbia, and that his words count.").

4. The Alleged Defamatory Passage

"In July 2003, [the International Crisis Group] published Report 145, entitled '<u>Serbian Reform Stalls Again</u>' . . . in which [the International Crisis Group] offered its policy recommendations concerning the progress of political and economic reform in Serbia and the integration of Serbia into international institutions following the March 2003 assassination of Serbian Prime Minister Zoran Djindjic." ECF No. 157-1, Material Facts II ¶ 12. "The report was intended to address several subjects related to advancing peace and regional stability." ECF No. 158-2, Material Facts I ¶ 40. In particular, Report 145 addressed "the inability of

the Serbian government to assert civilian control over Milosevic-era police, military and intelligence agencies," as well as continuing Serbian "concerns regarding the influence of wealthy businessmen on Serbia's fledgling democracy, businessmen commonly referred to as oligarchs or tycoons." Id. (internal quotations omitted)); see also ECF No. 157-1, Material Facts II ¶¶ 22, 24.

"James Lyon was the [International Crisis Group] employee who primarily researched and wrote [Report 145]." ECF No. 158-2, Material Facts I ¶ 18. Lyon "ha[d] studied and [wa]s familiar with the Balkans region," id. ¶ 20, "ha[ving] traveled, studied, and worked in the Balkans, including Serbia, for many years," id. ¶ 21. "He was the [International Crisis Group] project director for Serbia between 2000 through 2005, based in Belgrade." Id. "Lyon began working on [Report 145] in the [S]pring of 2003." Id. ¶ 40.

To gather information for Report 145, "Lyon conducted many interviews on the subject of the businessmen oligarchs."[11] Id. ¶ 64. He "communi-

[11] The defendant's proffered undisputed facts nos. 64, 65, and 66, are not genuinely in dispute by the plaintiff. In response to these proffered facts, the plaintiff argues that the "evidence does not support" these facts "because Lyon has refused to identify his sources." ECF No. 158-2, Material Facts I ¶¶ 64-66. The plaintiff does not contest, however, that Lyon has testified that he did in fact rely on confidential sources. And reliance on confidential sources for publications is entirely permissible in the context of a defamation case. Cf. McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1508 (D.C. Cir. 1996) ("'[T]he plaintiff must establish that even in relying upon an otherwise questionable source the defendant actually possessed subjective doubt.'" (quoting Secord v. Cockburn, 747 F. Supp.

cated with officials in the Serbian . . . government, as well as with officials associated with the embassies and intelligence services of the NATO powers which had intervened militarily in Serbia." Id.¶ 65. These "sources of information with respect to Report No. 145 . . . requested that their identities be kept confidential . . . ." Def.'s Summ. J. Mot., ECF No. 148-2, Declaration of Dr. James Lyon ("Lyon Decl.")) ¶ 49. Based on the interviews he conducted, Lyon concluded that "it was impossible during the Milosevic era to have amassed significant wealth without the sponsorship of, or direct assistance from, the regime or its security services." ECF No. 158-2, Material Facts I ¶ 66. And the plaintiff was allegedly one of these individuals. Def.'s Summ. J. Mot., ECF No. 148-2, Lyon Decl. ¶¶ 42-48; see also Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (September 2001 SPO Article) at 13 ("Financier of the Democratic Party, [the plaintiff], according to the writing of many domestic and foreign media a famous arms dealer, who is called to account by the Israeli government, a businessman who acquired enormous wealth in Serbia from unknown sources during Slobodan Milosevic's rule . . . .").

In addition to interviews with confidential sources, Lyon "also knew that [the plaintiff] had been the subject of various media reports because

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779, 794 (D.D.C. 1990))); Clyburn v. News World Commc'ns, 705 F. Supp. 635, 642 (D.D.C. 1989) ("defendants reliance on the confidential sources, who, in turn, relied on informants, does not indicate actual malice"), aff'd, 903 F.2d 29 (D.C. Cir. 1990).

[he] had closely monitored the Balkan media for many years in the context of [his] work for [the International Crisis Group]." Def.'s Summ. J. Mot., ECF No. 148-2, Lyon Decl. ¶ 51; see also id. ¶¶ 53, 54 (explaining that he was aware of "publications charg[ing] that [the plaintiff]'s business improperly benefitted in various ways from his relationships with leading politicians").

Based on Lyon's knowledge and his research, the following excerpt from Report 145 ("challenged passage") was published:

> The unwillingness to continue the crackdown reflects the power of the Milosevic-era financial structures that-with the rigid oversight once provided by the dictator removed-have transformed themselves into a new Serbian oligarchy that finances many of the leading political parties and has tremendous influence over government decisions. Some of the companies were originally formed as fronts by State Security or Army Counterintelligence (KOS), while others operated at the direct pleasure of the ruling couple. Under Milosevic, many of these companies profited from special informal monopolies, as well as the use of privileged exchange rates. In return, many of them financed the regime and its parallel structures.
>
> Some of the individuals and companies are well known to average Serbs: Delta Holding (Milorad Miskovic), Karic (Bogoljub Karic), Pink (Zeljko Mitrovic),

Zepter (Milan Jankovic, aka Filip Zepter), Kapital Banka (Djordje Nicovic), Toza Markovic (Dmitar Segrt), Progres (Mirko Marjanovic), Simpo (Dragan Tomic), Komercijalna Banka (Ljubomir Mihajlovic), Novokabel (Djordje Siradovic), Stanko Subotic, Dibek (Milan Beko), ABC (Radisav Rodic), Hemofarm (Miodrag Babic), AIK Banka Nis (Ljubisa Jovanovic) and Dijamant (Savo Knezevic) are but some of the most prominent. Because of the support they gave to Milosevic and the parallel structures that characterised his regime, many of these individuals or companies have at one time or another been on EU visa ban lists, while others have had their assets frozen in Europe or the US.[80]

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

> influence and access to public resources seem to have changed very little.

Jankovic v. Int'l Crisis Grp., 593 F.3d 22, 24 (D.C. Cir. 2010) (internal alterations and footnote omitted). Footnote 80 cites to two websites, which were non-functional. See id. at 26. Lyon believed that Report 145 was accurate when it was published. Material Facts I ¶ 101.[12]

The plaintiff was just "a small part" of Report 145. See ECF No. 158-2, Material Facts I ¶ 41. The defendant "never contacted [the plaintiff] for comment concerning the allegations or anything else in Report 145 before publishing Report 145." ECF No. 157-1, Material Facts II ¶ 20.

B. Procedural History

This Court granted the defendant's initial motion to dismiss all of the plaintiff's defamation, false light invasion of privacy, and tortious interference claims, concluding, inter alia, that the challenged passage was not capable of a defamatory meaning. Jankovic v. Int'l Crisis Grp., 429 F. Supp. 2d 165, 178 (D.D.C. 2006) aff'd in part, rev'd in part and remanded, 494 F.3d 1080 (D.C. Cir. 2007). On appeal, the District of Columbia Circuit partially reversed this Court's ruling, finding that the challenged passage in

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[12] The plaintiff disputes this fact asserting that "Lyon (and ICG) should have known that the allegations against [the plaintiff] in Report 145 were false, or at least doubted their veracity." ECF No. 158-2, Material Facts I ¶ 101 (emphasis added). But this response does not controvert what Lyon believed when the defendant published Report 145.

Report 145 was susceptible of a defamatory meaning and that the plaintiff's claims should not have been dismissed. Jankovic v. Int'l Crisis Grp., 494 F.3d 1080, 1091, 1092 (D.C. Cir. 2007). Following the Circuit's remand, the defendant filed another motion to dismiss, arguing that the challenged passage was shielded by the fair report and fair comment privileges, as well as protected as an opinion, and that the tortious interference claim was inadequately pleaded. See Jankovic, 593 F.3d at 25. The District of Columbia Circuit affirmed this Court's dismissal of the tortious interference claim, but reversed this Court's dismissal of the plaintiff's defamation and false light invasion of privacy claims, concluding that "none of the privileges or protections raised" by the defendant applied to the assertion that the plaintiff supported and received benefits from the Milosevic regime. Id. at 26. In support of the Circuit's conclusion, it found that footnote 80 in the challenged passage of Report 145, which purportedly led readers of the report to an Office of Foreign Assets Control ("OFAC") website containing a 1998 frozen assets list and a 1998 Executive Order, id., did "[n]ot . . . suggest[] that . . . [the plaintiff], supported the Milosevic regime or received advantages in exchange," id. at 27 (emphasis in original).[13] The Circuit, therefore, again remanded the case to this Court for further "proceedings consistent with [its] opinion." Id. at 30.

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[13] On appeal, the defendant represented that footnote 80 provided the "factual basis for the connection between [the plaintiff] and the Milosevic regime." Jankovic, 593 F.3d at 28.

The defendant now seeks summary judgment on the grounds that it is not liable for either the defamation or the false light invasion of privacy claims because the plaintiff is a public figure as a matter of law, and the plaintiff cannot show by clear and convincing evidence that the defendant acted with actual malice when it published the challenged passage of Report 145.[14]

III. Legal Analysis

A. Public Figure Analysis

First Amendment protection is afforded to defendants when the object of an alleged defamatory statement is about a public figure. New York Times v. Sullivan, 376 U.S. 254, 270 (1964). The issue of whether a plaintiff is a public figure is a question of law for the courts to determine. See Waldbaum, 627 F.2d at 1294 n.12. There are two types of public figures: (1) general public figures who maintain such status for all purposes and (2) limited-purpose public figures "'(who) voluntarily inject[] [themselves] or [are] drawn into a particular public controversy and therefore become[] . . . public figure[s] for a limited range of issues.'" Id. at 1292 (quoting

[14] The only claims remaining in this case are the plaintiff's defamation and false light invasion of privacy claims against the defendant. As explained herein, because the plaintiff's defamation claim cannot survive summary judgment, the false light invasion of privacy claim also cannot survive. Parsi v. Daioleslam, 890 F. Supp. 2d 77, 92 (D.D.C. 2012); Shipkovitz v. The Wash. Post Co., 571 F. Supp. 2d 178, 183 (D.D.C. 2008), aff'd sub nom. 408 F. App'x 376 (D.C. Cir. 2010).

Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974)). "A person becomes a general purpose public figure only if he or she is 'a well-known celebrity,' his name a 'household word.'" Tavoulareas v. Piro, 817 F.2d 762, 772 (D.C. Cir. 1987) (en banc) (citation omitted). "Few people," however, "attain the general notoriety that would make them public figures for all purposes." Waldbaum, 627 F.2d at 1296. Much more common are "public figures for the more limited purpose of certain issues or situations." Tavoulareas, 817 F.2d at 772. The defendant agrees that the plaintiff is not a general public figure. E.g., Private Figure Opp'n at 1. But the parties dispute whether the plaintiff is a limited-purpose public figure for a limited range of issues.

The District of Columbia Circuit has formulated a three-prong test to determine whether an individual is a limited-purpose public figure. Lohrenz v. Donnelly, 350 F.3d 1272, 1279 (D.C. Cir. 2003) (citing Waldbaum, 627 F.2d at 1294). First, the Court must determine whether a public controversy existed. See Waldbaum, 627 F.2d at 1296. This assessment requires the Court to determine whether there was "a dispute that in fact ha[d] received public attention because its ramifications w[ould] be felt by persons who [we]re not direct participants." Id. at 1296. Second, the Court must analyze the plaintiff's role in the controversy. Id. at 1297. "Trivial or tangential participation is not enough. . . . [To be considered a limited[-]purpose public figure, a plaintiff] must have achieved a 'special prominence' in the debate." Id. To satisfy the "special prominence" requirement, "[t]he plaintiff

either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution." Id. Finally, the Court must assess whether the "alleged defamation [was] germane to the plaintiff's participation in the controversy." Id. at 1298. As applied here, the defendant has established that the plaintiff is a limited-purpose public figure as determined by Waldbaum's three-prong test.[15]

1. The Scope of the Public Controversy

The parties do not dispute the existence of a public controversy "concerning the progress of political and economic reform in Serbia and the integration of Serbia into international institutions." Pl.'s Private Figure Mot. at 5; Private Figure Opp'n at 4. Instead, they disagree as to the temporal scope of the public controversy. See Private Figure Reply at 5. According to the plaintiff, the scope of the public controversy is addressed by Report 145—"the post-Djindjic Serbian government's lack of progress in implementing political and economic reform and what that meant for Serbia's integration into the international community." Pl.'s Private Figure Mot. at 17 (emphasis in original); see also Summ.

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[15] In reaching its conclusion that the plaintiff is a limited-purpose public figure, the Court did not rely on the plaintiff's business activities or philanthropic work, which the plaintiff contends are irrelevant to the limited-purpose-public-figure inquiry. See Summ. J. Opp'n at 18-22. Therefore, the Court need not address the propriety of those factors in conducting its analysis.

J. Opp'n at 8-9. But the defendant argues that the temporal scope of the public controversy is not so limited. See Private Figure Opp'n at 4-12; Def.'s Summ. J. Mot. at 16-24. The defendant concedes that Report 145 is relevant to the Court's task of identifying the proper temporal scope of the public controversy inquiry, but also argues that the Court must "look[] beyond the content" of Report 145 and evaluate the context in which Report 145 was published. Private Figure Opp'n at 4-5. Thus, the defendant contends that the proper temporal scope of the controversy is Serbian political and economic reform, and integration into international institutions, in the post-Milosevic Serbian government. Id. at 12.

The Court agrees with the defendant. In Waldbaum, the District of Columbia Circuit explained:

> To determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some specific question. . . . The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment. It should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.

Waldbaum, 627 F.2d at 1297 (internal citations and footnotes omitted)).[16]

Here, a reasonable reading of Report 145 reveals that while it did emphasize economic and political reforms after the assassination of Djindjic, or the lack thereof, such reform was part of the "larger debate" concerning economic and political reforms in Serbia after the ouster of Milosevic from power in 2000. See Hatfill v. The New York Times Co., 532 F.3d 312, 322-23 (4th Cir. 2008); see also Tavoulareas, 817 F.2d at 767, 773 (identifying public controversy concerning how the United States' private oil industry "should respond to the rise of OPEC and the ensuing energy crisis" in the 1970s); OAO Alfa Bank v. Ctr. for Pub. Integrity, 387 F. Supp. 2d 20, 43 (D.D.C. 2005) (isolating the public controversy as "[t]he rise of the oligarchs and the decline of the Russian economy into what one observer described as a 'criminal-syndicalist state' was one of the defining foreign policy controversies of the 1990s, and the topic of intense discussion in the media, classrooms, think tanks,

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[16] The plaintiff suggests that press clippings that "post-date the public of Report 145" should be entitled to no weight. Private Figure Reply at 24; see also Summ. J. Opp'n at 14, 22-23. The plaintiff cites no case on point for the wholesale rejection of press articles that post-date the publication at issue in a libel case even if those articles discuss events that occurred on or before the challenged publication was published. To the extent that the articles are dated after Report 145's publication date of July 2003, the Court will only rely on the retrospective aspects of those articles. This is consistent with the Court's obligation in determining the plaintiff's private or public status when the allegedly defamatory statements were made.

and the government of the United States, as well as through the rest of the world"). As the defendant correctly observes, Report 145 is replete with references to the political and economic climate in Serbia prior to Djindjic's assassination. See Private Figure Opp'n at 10-12. Indeed, it would be extremely difficult to understand "the post-Djindjic Serbian government's lack of progress in implementing political and economic reform and what that meant for Serbia's integration into the international community" discussed in Report 145, Pl.'s Private Figure Mot. at 17 (second emphasis added), if Report 145 did not compare the degree of progress to the status quo before Djindjic's assassination. Thus, the plaintiff's reading of Report 145 is too narrow.

Beyond Report 145, there was "regular[]" press attention given to the "specific question," Waldbaum, 627 F.2d at 1297, of whether Serbian political and economic reform could take place once Milosevic's reign ended, ECF No. 158-2, Material Facts I ¶ 164 ("The future of Serbian reforms was of international concern, and prominent news publications regularly covered the issue."); ECF No. 151-9, Ex. 31 (January 2001 Economist Article) at 2 ("One of Serbia's leading columnists, by no means a fan of Mr[.] Milosevic, calls Mr[.] Djindjic 'Little Slobo[,'] implying that he has the same dictatorial tendencies."); id. at 3 ("If foreigners are to invest, the judiciary must be cleaned up, and the criminals who ran the show under Mr[.] Milosevic must be dealt with. Many well-wishers fear that Mr[.] Djindjic, who is far from monkish himself, may not be inclined to take them on."). And one aspect of that public debate included Djindjic's

ability to institute meaningful reforms in the Serbian government, notwithstanding his questionable associations with "the financial elite." Def.'s Summ. J. Mot., ECF No. 151-10, Ex. 32 (January 2001 Reporter Article) at 2 ("[T]here's a wave of attacks against Djindjic as well: statements that the changes he's trying to introduce are purely cosmetic and aimed at following the financial elite created during the Milosevic regime—representatives of whom are allegedly his close friends—to keep its positions and power[.]"). "The public plainly ha[d] a vital interest . . . in . . . the groups or factions supporting" Djindjic, as well as the "the quality of [his] . . . backers" because they do "play an influential role in ordering [Serbian] society." Thompson v. Evening Star Newspaper Co., 394 F.2d 774, 776 (D.C. Cir. 1968); see also Def.'s Summ. J. Mot., ECF No. 153-21, Ex. 89 (March 2003 Article) at 1 ("Mr. Djindjic himself had many complicated business interests . . . and many Serbs saw him as an elegant kingpin turned politician."); Def.'s Summ. J. Mot., ECF No. 152-4, Ex. 41 (August 2001 Financial Times Article) at 1 ("Today, Djindjic is Prime Minister—an international star. He has long been considered in the [W]est to be a guarantor of democracy in the Balkans. But behind this facade lurks a different, scarcely perceived side: Contradictions in which the Serbian government head has entangled himself, as well as contacts with businesspeople that are classed as part of organized crime, cast dark shadows over the purported shining light. . . . [T]his top politician has become involved with people who undermine his credibility."). Accordingly, the Court finds that there was a public

controversy about Serbian economic and political reform, as well as its integration into international institutions, after Milosevic lost power, when Report 145 was published.

2. The Plaintiff's Role in the Public Controversy

The plaintiff's participation in the public debate concerning economic and political reform in Serbia, and its integration into international institutions after Milosevic's downfall, was neither trivial nor tangential. The plaintiff reportedly assisted in the "overthrow[] of Slobodan Milosevic," Def.'s Summ. J. Mot., ECF No. 154-10, Ex. 113 (September 2003 Article) at 1 ("Several sources in Belgrade confirmed for 'Nacional' that [the plaintiff] came under fire of . . . favorites of the past regime who cannot forgive him for helping the opposition in overthrowing Slobodan Milosevic . . ."), which was the impetus for the public controversy the Court identified above, ECF No. 158-2, Material Facts I ¶ 164 ("The future of Serbian reforms was of international concern, and prominent news publications regularly covered the issue."). During the relevant timeframe, the plaintiff publicly expressed his desire to enter the Serbian "political arena"[17]

[17] The plaintiff's access to the press further bolsters this Court's conclusion that the plaintiff is a limited purpose public figure. See Gertz, 418 U.S. at 344 ("[P]ublic figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements th[a]n private individuals normally enjoy."). And indeed, the plaintiff had such access during the relevant time period. See, e.g., Def.'s Summ. J. Mot., ECF No. 152-27, Ex. 64.

Def.'s Summ. J. Mot., ECF No. 152-27, Ex. 64 (December 2001 Glas Javnosti Article) at 4 ("I want to help Serbia. . . . When in a few years, I enter political arena, I will enter to win."), so that he could "contribute to the victory of democracy," id. ("I do not govern Serbia, but I want to contribute to the victory of democracy, justice, and work over the lack of work and anarchy. It is true that, for a number of years, on a daily basis I have lobbied for prosperity and wellbeing of my country and my people."); Def.'s Summ. J. Mot., ECF No. 152-28, Ex. 65 (December Ekonomija 2001) at 1 (same). And the plaintiff was a public and ardent supporter of Djindjic both politically and financially, see Def.'s Summ. J. Mot., ECF No. 152-27, Ex. 64 (December 2001 Glas Javnosti Article) at 3 (according to the article, the plaintiff stated: "The fact that at the time of Milosevic's reign of terror, Mr. Djindjic was the fiercest and most consistent defendant of the honor and dignity of the Serbian people in the Western media has been consistently hidden from our country's public eye . . . . The people with good (political) taste should be impressed by this. . . . That is why, at the time of the darkest Milosevic's dictatorship, I publicly stated in an interview for the magazine 'Profil' that I am most impressed by Djindjic among all the politicians on the Serbian political scene, and I can repeat that today as well . . . . I will support, to the horror of my 'critics[,'] not only the current Prime Minister, but also all those for whom I believe that they can bring prosperity to my country and my people."); Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (June 2001 Politika Article) at 31 ("[The plaintiff] has been talked about for years as one of the main

financiers of the former Serbian opposition, primarily of Zoran Djindjic and the Democratic Party."), so much so that he "made many enemies," Def.'s Summ. J. Mot., ECF No. 154-10, Ex. 113 (September 2003 Article) at 4 (interview of the plaintiff wherein he acknowledged that he "made many enemies by helping Zoran [Djindjic] come to power, [and] for being his close friend").

At a minimum, the plaintiff attempted to influence or shape Serbia's political and economic direction while Djindjic was the Prime Minister of Serbia. Waldbaum, 627 F.2d at 1298 n.2 ("If in fact [the plaintiff] is shaping or trying to shape the outcome of a specific public controversy, he is a public figure for that controversy . . . ."). He, along with Djindjic, sought to improve diplomatic relations between the United States and Serbia by financing Serbian lobbying efforts in the United States.[18] ECF No. 158-2, Material Facts I ¶ 81 (the

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[18] The plaintiff understandably attempts to downplay his payment to Denton for Serbian lobbying efforts in the United States. See Summ. J. Opp'n at 13 ("[The plaintiff] simply agreed to pay for Denton's efforts."). This oversimplifies the nature of the transaction. First, the sum of money was not insignificant, as it was reportedly over $100,000. See, e.g., Def.'s Summ. J. Mot., ECF No. 153-24, Ex. 92 (July 2003 Article) at 1 (reporting that the plaintiff was paying "$120,000 dollars a year, as well as traveling expenses," for James Denton to "perform[] public relations work for the Serbian government in the United States aimed at establishing a friendly and constructive relationship between the two countries" (internal quotations omitted)). Second, the lobbying efforts that the plaintiff paid for were intended to affect Serbia politically and economically. See, e.g., Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (June 2001 Blic News Article), at 41 (reporting that Denton was to "be engaged in public relations in the USA on behalf of the

plaintiff "agreed to pay for the services of James Denton"); Def.'s Summ. J. Mot., ECF No. 154-10, Ex. 113 (September 2003 Article) at 4 (article reporting that the plaintiff stated: "I was helping Djindjic by giving advice, but in other ways too, primarily by paying a company that was lobbying for the opposition in the USA at the time. That way I wanted to present a new Serbia in the USA, so Washington can recognize the new democratic alternative, to show that Serbia is not what Milosevic had created it to be . . . ."); Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (June 2001 Blic News Article), at 41 (reporting on contract between Djindjic and lobbyist James Denton, where Denton was to "be engaged in public relations in the USA on behalf of the Serbian [g]overnment" and present Serbia as "a stable, forward-looking country, suitable for investment"); id. ("Denton will work under the supervision of the Prime Minister [Djindjic] or his representative on renewing friendly relationships between the two countries, especially with the Administration of President Bush and the US Congress, identifying and coordinating American programs of technical and economic assistance" (internal quotations omitted)). Additionally, the plaintiff served as an "adviser" to Djindjic on

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Serbian [g]overnment" and to present Serbia as "a stable, forward-looking country, suitable for investment"); id. ("Denton will work under the supervision of the Prime Minister [Djindjic] or his representative on renewing friendly relationships between the two countries, especially with the Administration of President Bush and the US Congress, identifying and coordinating American programs of technical and economic assistance." (emphasis added) (internal quotations omitted)).

"international economic business affairs." Def.'s Summ. J. Mot., ECF No. 154-10, Ex. 113 (September 2003 Article) at 4 (interview of the plaintiff wherein he acknowledged that "when [Djindjic] became Prime Minister, [he became] his adviser for international economic business affairs"). In light of this conduct, the plaintiff "realistically [could have been] expected to have a major impact," Waldbaum, 627 F.2d at 1292, on political and economic reforms in Serbia, as well as the integration of Serbia into international institutions, after Milosevic's removal from power.

Regardless of whether the plaintiff intended to keep his friendship with Djindjic "private," Pl.'s Private Figure Mot. at 20, the record demonstrates that the plaintiff entered into a friendship with Djindjic that carried the "risk" of political scrutiny, see Clyburn, 903 F.2d at 33 ("One may hobnob with high officials without becoming a public figure, but one who does so runs the risk that personal tragedies that for less well-connected people would pass unnoticed may place him at the heart of a public controversy."); Waldbaum, 627 F.2d at 1292 ("Th[e] limited-purpose public figure is an individual (who) voluntarily injects himself or is drawn into a particular public controversy and therefore becomes a public figure for a limited range of issues." (internal quotations omitted)); id. at 1298 ("Occasionally, someone is caught up in the controversy involuntarily and, against his will, assumes a prominent position in its outcome."), and the press got wind of it and swept him into the public discussion regarding political and economic reform in the post-Milosevic regime in

Serbia,[19] Def.'s Summ. J. Mot., ECF No. 153-14, Ex. 82 (June 2002 Article) at 2 (inquiring about the allegation that "companies such as Zepter, . . . that are allegedly close to the regime, have been exempted from taxes and it has attracted public attention"), including Djindjic's tie to the "financial elite," see Def.'s Summ. J. Mot., ECF No. 151-10, Ex. 32 (January 2001 Reporter Article) at 2 ("[T]here's a wave of attacks against Djindjic as well: statements that the changes he's trying to introduce are purely cosmetic and aimed at following the financial elite created during the Milosevic regime—representatives of whom are

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[19] For example, the press reported on potential political or economic wrongdoing by the plaintiff. Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (September 2001 SPO Article) at 13 ("Financier of the Democratic Party, [the plaintiff], according to the writing of many domestic and foreign media a famous arms dealer, who is called to account by the Israeli government, a businessman who acquired enormous wealth in Serbia from unknown sources during Slobodan Milosevic's rule . . . ."); Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (January 2002 Article Blic Entitled "The [M]urder a [C]riminal, the [P]erson [O]rdering the [M]urder [U]nknown" ("January 2002 Blic Article")) at 100 ("[T]he investigative committees could not confirm the previous allegation from the initial report that the main organizer and financier of the murder of the Minister of Defense was [the plaintiff], but we came across two more pieces of cross-referenced information concerning him."); Def.'s Summ. J. Mot., ECF No. 152-28, Ex. 65 (December Ekonomija 2001) at 1 (reporting that the plaintiff wrote "a letter to the public" denying allegations regarding an assassination plot and arms trading); see also OAO Alfa Bank, 387 F. Supp. 2d at 44 (using the fact that the plaintiffs had "been the repeated target[s] of allegations of collusion and illegality" to support its finding that the plaintiffs played a non-trivial and non-tangential role in the public controversy).

allegedly his close friends—to keep its positions and power[.]"); see also Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (September 2001 SPO Article) at 13 ("Instead of subjecting [the plaintiff's] wealth and monopoly on all state affairs to investigation, the Mafia don Zoran Djindjic is giving him support for the suppression of opposition activity and critical thought in Serbia. . . . [The] Serbian Renewal Movement will . . . illuminate[] the character and deeds of [the plaintiff], organizer and patron of smuggling and crime in Serbia.").[20]

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[20] The defendant's reliance on Bennett v. Hendrix, 426 F. App'x 864 (11th Cir. 2011) is unavailing, as it does not stand for the proposition the plaintiff advances. Summ. J. Opp'n at 13. There, the Court found that the plaintiff was not a limited purpose public figure only because the alleged "defamation was not germane to the sole public activity in which [the plaintiff] participated," and therefore, the third prong of the Waldbaum analysis was lacking. See id. at 866. The Bennett court was silent as to the other prongs of the Waldbaum analysis. See id. And in any event, the plaintiff in Bennett "played no role other than contributing money to a campaign." Id. Here, the plaintiff's activities far exceed those of the plaintiff in Bennett.

Further, neither Wells v. Liddy, 186 F.3d 505, 534-35 (4th Cir. 1999), nor Gertz, 418 U.S. at 351- 52, is helpful to the plaintiff. Summ. J. Opp'n at 14-16. In both cases, the plaintiffs played a less active role in their respective public controversies, see Wells, 186 F.3d at 534-35; Gertz, 418 U.S. at 352, than the plaintiff here played in the public controversy concerning Serbian political and economic reform during Djindjic's term as prime minister in Serbia, as he, among other things, voluntarily financed lobbying efforts in the United States on behalf of the Serbian government, e.g., Def.'s Summ. J. Mot., ECF No. 154-10, Ex. 113 (September 2003 Article) at 4 ("I was helping [Djindjic] . . . by mostly giving advice, but in other ways too, primarily by paying a company that was lobbying for the opposition in the

The plaintiff's public political and financial support of Djindjic "markedly raised the chances that he would become embroiled in [the] public controversy." Clyburn, 903 F.2d at 33, see also Thompson, 394 F.2d at 776 (finding plaintiff was a public figure who "did not confine himself to private discussion of the issues in [a] primary [political campaign]" and who "took a prominent role in a group appealing for public support" to be a public figure). His support led the press to even anoint him the "most important financier of the Serbian Government." Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (August 2001 Article) at 51 ("[The plaintiff] has decided to conquer Serbia . . . in his own way. Namely, [the plaintiff] has become the most important financier of the Serbian Government: out of his own pocket, he is financing Jim Denton, an American lobbyist for Zoran Djindjic; he is paying the bills incurred by the Government abroad, investing in the fallen Serbian economy . . . . Well-informed people even claim that [the plaintiff] has become the most important and most influential businessman in Serbia, and that his words count."). The plaintiff, therefore, had a "sufficiently central role in the controversy." Clyburn, 903 F.2d at 31.

USA at the time. That way I wanted to present a new Serbia in the USA, so Washington can recognize the new democratic alternative, to show that Serbia is not what Milosevic had created it to be . . . ."), and was an international business affairs adviser for Djindjic, id. (recognizing he "made many enemies by helping Zoran Djindjic come to power, [and] for being his close friend," and then "when [Djindjic] became Prime Minister, [the plaintiff became] his adviser for international economic business affairs").

Accordingly, the Court rejects the plaintiff's proposition that he played no role in any public controversy.[21] See Summ. J. Opp'n at 8-10. The fact that the plaintiff did not appear frequently in the defendant's reporting of the Balkans is not dispositive.[22] See id. at 10-11. Rather, the Court

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[21] The plaintiff attempts to invoke the prohibition against elevating a plaintiff from a private figure to a public figure as a result of the plaintiff's response to the defamation at issue in a particular case. See Summ. J. Opp'n at 14-15. Although that is an accurate understanding of the law, it has no application here. To the extent that the plaintiff is responding to defamatory attacks in the Serbian press articles identified by the defendant, the plaintiff is not responding to the alleged defamatory content in Report 145. Therefore, no impermissible bootstrapping has occurred in the Court's analysis.

The plaintiff also cites a series of Supreme Court cases in an attempt to transform himself from a limited-purpose public figure to a private figure in regards to this case. See Summ. J. Opp'n at 23-24. These cases are inapposite as they hinge in large part on the fact that the plaintiffs in those cases played a trivial role in whatever public controversy existed—if a public controversy even existed at all. See Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 167 (1979) (finding that the plaintiff "played only a minor role in whatever public controversy there may have been"); Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (finding that there was no particular public controversy identified and that the plaintiff "did not thrust himself or his views into public controversy to influence others"); Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (finding that the "[d]issolution of a marriage through judicial proceedings is not" a public controversy, and that the plaintiff did not "freely choose to publicize issues as to the propriety of her married life").

[22] Nor is it persuasive that many of the defendant's employees are not familiar with either the plaintiff or his

also "can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements." Waldbaum, 627 F.2d at 1297; see also id. at 1292 (" [Th[e] limited-purpose public figure is an individual (who) voluntarily injects himself or is drawn into a particular public controversy and therefore becomes a public figure for a limited range of issues." (internal quotations omitted)). And in so doing, the Court is persuaded that the plaintiff was an outspoken political and financial supporter of Djindjic, who "could realistically have been expected . . . to have an impact" on Serbian political and financial reform, as well as Serbia's integration into international institutions, during

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role in political and financial reforms after Milosevic's removal from power in Serbia. See Gray v. St. Martin's Press, Inc., No. 95-285-M, 1999 WL 813909, at *2 (D.N.H. May 19, 1999), aff'd, 221 F.3d 243 (1st Cir. 2000) (finding the plaintiff a limited-purpose public figure, despite the fact that "several editors and other employees" at the defendant publisher "had never heard of" the plaintiff).

The plaintiff's reliance on three declarations from individuals who were familiar with Serbian politics in the relevant timeframe, but were unaware of the plaintiff's role in Serbian political and economic reforms at the time, does not convince the Court that its conclusion about his public-figure status is incorrect. See Summ. J. Opp'n at 11, 13, 23 n.8; see also Summ. J. Opp'n, ECF No. 158-4 (Declaration of James Denton) ¶ 10; Summ. J. Opp'n, ECF No. 158-3 (Declaration of William Montgomery); ¶¶ 10, 16; Summ. J. Opp'n, ECF No. 158-7 (Declaration of Aleksandra Joksimovic) ¶¶ 14, 16. They do not dispute that the Serbian press published the articles the defendant has cited, which demonstrate that the plaintiff was a part of the public controversy.

the relevant timeframe.[23] See, e.g., Def.'s Summ. J. Mot., ECF No. 154-10, Ex. 113 (September 2003 Article) at 4 ("I was helping [Djindjic] . . . by mostly giving advice, but in other ways too, primarily by paying a company that was lobbying for the opposition in the USA at the time. That way I wanted to present a new Serbia in the USA, so Washington can recognize the new democratic alternative, to show that Serbia is not what Milosevic had created it to be . . ."); id. ("[W]hen [Djindjic] became Prime Minister, [the plaintiff became] his adviser for international economic business affairs."); Def.'s Summ. J. Mot., ECF No.

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[23] The plaintiff does not appear to be a stranger to political controversy. See Def.'s Summ. J. Mot., ECF No. 152-28, Ex. 65 (December Ekonomija 2001) at 1 (reporting that the plaintiff wrote "a letter to the public" denying allegations regarding an assassination plot and arms trading); Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (January 2002 Blic Article) at 100 ("[T]he investigative committees could not confirm the previous allegation from the initial report that the main organizer and financier of the murder of the Minister of Defense was [the plaintiff], but we came across two more pieces of cross-referenced information concerning him. Some senior military and police officials were not able to hide their fear at the mention of [the plaintiff]'s name, while the former Minister of Interor of Serbia said that in the past charges had been filed against 'Zepter Bank' for large illegal acquisitions of foreign currency on the streets, which resulted in inflation . . . ."); Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (February 2003 Article Entitled "Law Against the Tobacco Mafia" ("February 2003 Article")) at 113 ("[The plaintiff] was mentioned in passing [during Parliament], and according to the claim of the Radical Party leader, he has earned around 25 billion dollars here in about ten years in sales of cookware, but also weapons, with no taxes paid.").

153-13, Ex. 81 (www.milovanbrkic.com Article) at 15 ("[The plaintiff], also invested more than ten million dollars in the Democratic Party and Mr. Djindjic personally."); Def.'s Summ. J. Mot., ECF No. 153-14, Ex. 82 (June 2002 Article) at 2 (inquiring about the allegation that "companies such as Zepter, . . . that are allegedly close to the regime, have been exempted from taxes and it has attracted public attention").

3. The Relevance of the Challenged Passage in Report 145 to the Plaintiff's Role in the Public Controversy

The plaintiff contends that there is no nexus between the alleged defamatory association between him and the Milosevic regime in the challenged passage of Report 145 and the public controversy regarding political and economic reform, and Serbia's integration into international institutions, after Milosevic's removal from the government. See Summ. J. Opp'n at 17-18. The plaintiff argues with that the challenged passage in Report 145 does not concern his relationship with Djindjic, which he contends is the extent of his involvement with Serbian political and economic reform in post-Milosevic Serbia. See Summ. J. Opp'n at 17-18. But the plaintiff's position fails to acknowledge that the regime replacing Milosevic, which included Djindjic, ran its political campaign on the "promise[]" that those with ties to the Milosevic regime "would be forced to answer for past misdeeds." Pl.'s Private Figure Mot., ECF No. 145-4, Ex. 12 (Report 145) at 17. And while Djindjic may have been perceived

as the "anti-Milosevic," Private Figure Reply at 12 (emphasis in original), there was also a simultaneous public debate as to whether that was the indeed the case. See Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (September 2001 SPO Article) at 13 ("Financier of the Democratic Party, [the plaintiff], according to the writing of many domestic and foreign media a famous arms dealer, who is called to account by the Israeli government, a businessman who acquired enormous wealth in Serbia from unknown sources during Slobodan Milosevic's rule . . . ."); Def.'s Summ. J. Mot., ECF No. 151-10, Ex. 32 (January 2001 Reporter Article) at 2 ("[T]here's a wave of attacks against Djindjic as well: statements that the changes he's trying to introduce are purely cosmetic and aimed at following the financial elite created during the Milosevic regime—representatives of whom are allegedly his close friends—to keep its positions and power[.]"); ECF No. 151-9, Ex. 31 (January 2001 Economist Article) at 2 ("One of Serbia's leading columnists, by no means a fan of Mr[.] Milosevic, calls Mr[.] Djindjic 'Little Slobo[,'] implying that he has the same dictatorial tendencies.").

"[A]nswering for past misdeeds," Pl.'s Private Figure Mot., ECF No. 145-4, Ex. 12 (Report 145) at 17, committed under Milosevic's rule is, therefore, not "wholly unrelated" to the debate concerning Serbian political and economic reforms after he was ousted from power in Serbia, see OAO Alfa Bank, 387 F. Supp. 2d at 44 (finding alleged defamatory statements concerning corruption and illegal conduct of Russian oligarchs, a "component of" and not "'wholly unrelated'" to "the debate over

the consequences of Russia's economic reforms" (quoting Tavoulareas, 817 F.2d at 774)). Accordingly, the Court finds that the challenged passage in Report 145 is germane to the plaintiff's participation in the public controversy.

B. Malice

Reflecting this country's "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," the First Amendment sets a high bar for "public figures" to prevail on a defamation claim. New York Times, 376 U.S. at 270. Specifically, a public figure may prevail in a defamation suit only if the public figure can produce "clear and convincing evidence" that the challenged publication was made with "actual malice"—i.e., with "knowledge that it was false or with reckless disregard of whether it was false or not." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991). As the Supreme Court has explained, "[t]he question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984). "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice." Id. (internal quotations omitted).

"The standard of actual malice is a daunting one." McFarlane v. Esquire Magazine, 74 F.3d

1296, 1308 (D.C. Cir. 1996). To meet this burden, the plaintiff can "come forward with any direct evidence of actual malice." OAO Alfa Bank, 387 F. Supp. 2d at 49. Otherwise, "[p]roof of actual malice may take the form of circumstantial evidence." Id. at 50 (citing Clyburn, 903 F.2d at 33). Moreover, the plaintiff is "entitled" to "the benefit of the aggregate of [the] evidence" concerning actual malice. Lohrenz, 350 F.3d at 1283 (citing MacFarlane, 74 F.3d at 1304, and Tavoulareas, 817 F.2d at 794 n.43). However, "courts have identified only three scenarios in which the circumstantial evidence of subjective intent could be so powerful that it could provide clear and convincing proof of actual malice." Id. "These scenarios are where there is evidence that the story: (i) was 'fabricated' or the product of defendants' imagination; (ii) is 'so inherently improbable that only a reckless man would have put [it] in circulation'; or (iii) is 'based wholly on a source that the defendant had obvious reasons to doubt, such as an unverified anonymous telephone call.'" Id. (quoting McFarlane, 91 F.3d at 1512-13). "[A]ctual malice[, however,] does not automatically become a question for the jury whenever the plaintiff introduces pieces of circumstantial evidence tending to show that the defendant published in bad faith." Tavoulareas, 817 F.2d at 789. "Such an approach would be inadequate to ensure correct application of both the actual malice standard and the requirement of clear and convincing evidence." Id.

Here, because the plaintiff is a limited-purpose public figure, the burden of demonstrating actual malice proves too much for the plaintiff to

overcome on summary judgment, as he merely introduces "pieces of circumstantial evidence tending to show that the defendant published in bad faith," which are individually and collectively insufficient as a matter of law to demonstrate actual malice on the part of the defendant.[24] Id. This burden is compounded by the plaintiff's seemingly erroneous understanding of the evidentiary standard for malice at the summary judgment stage for a limited public figure such as himself. See Summ. J. Opp'n at 26-27. The plaintiff asserts that it is unnecessary for him to come forward with clear and convincing evidence for a reasonable jury to conclude that the defendant acted with actual malice in publishing the challenged passage. See id. Not so.

In a Supreme Court case cited by the plaintiff himself, the summary judgment standard is clearly explained:

> When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual

[24] The failure to prove malice renders the plaintiff's motion for partial summary judgment on the element of material falsity moot. Clyburn v. News World Comm'cns, Inc., 705 F. Supp. 635, 643 (D.D.C. 1989) aff'd, 903 F.2d 29 (D.C. Cir. 1990) ("The Court concludes that [the] plaintiff is a limited[-]purpose public figure, and that he has failed to present sufficient evidence to allow a reasonable jury to find actual malice by clear and convincing evidence. Therefore, summary judgment for [the] defendant[] is warranted on the libel claim and the intentional infliction of emotional distress claim. [The] [p]laintiff's motion for partial summary judgment on the issue of falsity is denied as moot.").

> quantum and quality of proof necessary to support liability under [New York Times Co. v. Sullivan, 376 U.S. 254 (1964)]. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Anderson, 477 U.S. at 254 (emphasis added). Consequently, "[a]s a limited-purpose public figure, [the plaintiff] c[an] successfully resist a summary judgment motion only if [he] c[an] point to record evidence from which a reasonable jury could find (by the 'clear and convincing' standard) that the [defendant] published the articles in question with actual malice." Clyburn, 903 F.2d at 33 (quoting Anderson, 477 U.S. at 254)); see also Lohrenz, 350 F.3d at 1283.

Not once does the plaintiff contend that he has come forth with "clear and convincing" evidence of actual malice in this libel suit that creates a genuine issue of material fact for trial. The plaintiff merely argues that there is "sufficient" evidence to raise a genuine issue as to whether the defendant acted maliciously in publishing the alleged defamatory remarks about the plaintiff in Report 145. See, e.g., Summ. J. Opp'n at 26, 45. But based on the plaintiff's opposition to the defendant's motion for summary judgment, the plaintiff's understanding of what is "sufficient" to survive summary judgment on the issue of malice, is not "clear and convincing" evidence—it is some lesser standard. As a result of the plaintiff's failure to contend that there is "clear and convincing"

evidence demonstrating malice on the part of the defendant in publishing the challenged passage in Report 145,[25] the Court grants summary judgment to the defendant.

Alternatively, even construing the plaintiff's opposition as having argued that "clear and convincing" evidence of malice exists in the evidentiary record, the Court would still grant the defendant's motion for summary judgment because the plaintiff's purported circumstantial evidence of the defendant's malicious intent in publishing the challenged passage in Report 145 are legally insufficient to clearly and convincingly demonstrate malice.[26] See Tucker v. Fischbein,

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[25] Because the defendant argued that the plaintiff has not put forth "clear and convincing" evidence of actual malice, and the plaintiff has not responded otherwise, the Court could treat that argument as conceded. See Lewis v. District of Columbia, No. 10-5275, 2011 WL 321711, at *1 (D.C. Cir. Feb. 2, 2011) (per curiam) ("'It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.'" (quoting Hopkins v. Women's Div., Gen. Bd. of Global Ministries, 284 F.Supp.2d 15, 25 (D.D.C. 2003), aff'd, 98 Fed. App'x 8 (D.C. Cir. 2004))).

[26] The Court notes that the plaintiff must resort to circumstantial evidence of actual malice in the absence of direct evidence of actual malice because Lyon, who primarily researched and wrote Report 145, has testified that he believes the challenged passage in Report 145 was accurate, see OAO Alfa Bank, 387 F. Supp. 2d at 49; ECF No. 158-2, Material Facts ¶ 101, and the plaintiff has offered nothing to the contrary. And to the extent any other employees of the defendant was involved with the production of Report 145, the plaintiff does not assert that any such employee

237 F.3d 275, 286 (3d Cir. 2001) (explaining that theories of actual malice "grounded on allegations of poor journalistic practices" such as "a preconceived story-line," "not follow[ing] . . . editorial guidelines," and "fail[ing] to conduct a thorough investigation . . . are without support in the case law").

First, the plaintiff accuses the defendant of disregarding its own operating procedures in publishing Report 145. See Summ. J. Opp'n at 33-35 (enumerating several internal publication standards that International Crisis Group did not follow). But as the Supreme Court and this Circuit has explained, the evidence of malice "must show more than 'highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.'" Lohrenz, 350 F.3d at 1284 (quoting Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 666 (1989)); see also Parsi v. Daioleslam, 890 F. Supp. 2d 77, 83 (D.D.C. 2012) ("[S]loppiness is not evidence of actual malice.").[27]

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subjectively doubted the accuracy of the challenged passage in Report 145, only that "they should have known" of its inaccuracy. ECF No. 158-2, Material Facts I ¶ 101 ("Lyon (and ICG) should have known that the allegations against [the plaintiff] in Report 145 were false, or at least doubted their veracity." (emphasis added)); see also id. ¶¶ 102-03 (failing to show that any other employees of the defendant subjectively believed Report 145 was inaccurate).

[27] The plaintiff argues that the defendant "showed reckless disregard for [the plaintiff] and his reputation." Summ. J. Opp'n at 36. This appears to be another permutation of the plaintiff's argument concerning the defendants failure to investigate the challenged passage of

The plaintiff's reliance on Masson v. New Yorker Magazine, Inc., 960 F.2d 896 (9th Cir. 1992) is misplaced. There, "during a fact-checking process initiated" by the defendant, the plaintiff spoke to the defendant's fact checker, raised objections about the defamatory article, and suggested changes to the article. Id. at 900. The plaintiff's allegations there also suggested that the fact checker looked into the merits of the objections, the fact checker then removed some inaccuracies in the draft article, and that the changes were not incorporated into the final publication. See id. at 901. As a result of this conduct, the Ninth Circuit concluded that a jury could infer that the defendant had serious doubt about the accuracy of what was written about the plaintiff. See id. at 902. But no analogous series of events occurred here. Nor could it, as the plaintiff concedes that the defendant "consciously chose to not contact [the plaintiff] to discuss its allegations" before Report 145 was published. Summ. J. Opp'n. at 32.

Second, the plaintiff suggests that Report 145 was the product of a pre-conceived story line that all wealthy Serbian citizens were Milosevic cronies.[28] See Summ. J. Opp'n at 31-32. Again,

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Report 145 thoroughly. Id. ("[International Crisis Group] left attacks on [the plaintiff]'s name in Report 145 and did nothing to ensure that its claims were accurate or properly supported."). As the Court just explained, this is a legally deficient basis for the Court to deny summary judgment with respect to the issue of actual malice on the part of the defendant.

[28] As the defendant correctly notes, it is inconsistent to insist that on the one hand the defendant was out to "get" him, while on the other hand highlighting the fact that the plaintiff was a "small part" of Report 145. Summ. J. Reply at 27.

allegedly having a pre-conceived story line is not sufficient to demonstrate actual malice.[29] Tucker, 237 F.3d at 286 (explaining that theories of actual malice "grounded on allegations of poor journalistic practices" such as "a preconceived story-line . . . are without support in the case law"). And the defendant's decision to not contact the plaintiff confirming this story line, Summ. J. Opp'n at 32, is also not supportive of a finding of actual malice, see McFarlane, 91 F.3d at 1510-11 (reasoning that contacting the subject of allegedly defamatory allegations could reasonably result in denial of those allegations, but "'hardly alert the conscientious reporter to the likelihood of error'" (quoting Edwards v. Nat'l Audubon Soc'y, Inc., 556 F.2d 113, 121 (2d Cir. 1977)); see also Secord, 747 F. Supp. at 789 ("Accordingly, the plaintiff cannot rely on the defendant's failure to consult with him prior to the publication of [the allegedly defamatory material] as evidence of actual malice.").[30]

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[29] Some of the assertions related to the defendant's alleged pre-conceived story line are without any record support. See Summ. J. Opp'n at 32 (lacking citations to the record).

[30] To the extent any contact was made between the plaintiff and Lyon, on behalf of the defendant, before Report 145 was published, see Summ. J. Reply, ECF No. 163-12, Ex. 8 (Deposition of Philip Zepter ("Zepter Dep. I")) at 301:9-20 (testifying that he potentially met with Lyon "shortly before" Report 145 was published), the meeting was "very short," id. at 307:21-308:1, and the plaintiff never suggested any corrections or provided any sources that called into doubt the reliability of Lyon's confidential sources that he relied upon for the challenged passage in Report 145, see id. at 311:20-22. The plaintiff's alleged representations during the purported meeting that the passages are inaccurate do not, as a matter of law, raise serious doubt about the veracity of the article. See McFarlane, 91 F.3d at 1510-11.

Third, the plaintiff avers that the defendant must have known that the plaintiff never supported Milosevic because he was close friends with Djindjic, who the defendant knew "vigorously opposed Milosevic and sought to overthrow the Milosevic regime." Summ. J. Opp'n at 32-33. But the defendant correctly notes that this "advances a false dichotomy." Summ. J. Reply at 24. Nothing in the record suggests that the defendant had obvious doubts that the plaintiff could not have had friendly relations with both Milosevic and Djindic.[31] Def.'s Summ. J. Mot., ECF No. 148-3, Ex. A (September 2001 SPO Article) at 13 ("Financier of the Democratic Party, [the plaintiff], according to the writing of many domestic and foreign media a famous arms dealer, who is called to account by the Israeli government, a business-

[31] For example, it is reasonable that the plaintiff could have supported Milosevic for his benefit, but then aligned himself with Djindjic after Milosevic's downfall. Cf. Summ. J. Reply, ECF No. 163-16, Ex. 12 (Inst. For War & Peace Reporting, Serbia: Karic Affair Rocks Belgrade ("War & Peace Report")) at 1 ("The Karics generously supported Milosevic's political projects, at the same time sponsoring several opposition parties. After his downfall, they turned their backs on him, hoping to preserve their fortune by cosying [sic] up to the new government."); Def.'s Summ. J. Mot., ECF No. 153-21, Ex. 89 (March 2003 Article) at 1 ("Mr. Djindjic, no saint, made deals with various Serbian devils, both war criminals and ordinary criminals, in organizing the overthrow of Slobodan Milosevic in October 2000. The Serbian popular revolt against Mr. Milosevic that year probably would not have succeeded without Mr. Djindjic and his shadowy relationship with an officer of Mr. Milosevic's paramilitary police, Milorad Lukovic, known as Legija. And it was Legija, the next [S]pring, who carried out Mr. Djindjic's orders to arrest Mr. Milosevic.").

man who acquired enormous wealth in Serbia from unknown sources during Slobodan Milosevic's rule . . . ." (emphasis added)); id. ("Instead of subjecting his wealth and monopoly on all state affairs to investigation, the Mafia don Zoran Djindjic is giving him support for the suppression of opposition activity and critical thought in Serbia. . . . [The] Serbian Renewal Movement will . . . illuminate[] the character and deeds of [the plaintiff], organizer and patron of smuggling and crime in Serbia."). In fact, the record even contains deposition testimony from a former Serbian security chief, who was loyal to both Milosevic and Djindjic. See Summ. J. Reply, ECF No. 163-10, Ex. 6 (Deposition of Vojin Petrovic ("Petrovic Dep.")) at 9:20-12:15, 17:6-18:20 (explaining that he worked for Serbian state security during the Milosevic and Djindjic regimes).

Fourth, the plaintiff asserts that the defendant's mistaken reliance on a United States frozen assets list from OFAC demonstrates actual malice. Summ. J. Opp'n at 36-38. The law does not support the plaintiff's assertion, as it amounts to nothing more than a failure to investigate, which alone does not prove actual malice. Lohrenz, 350 F.3d at 1284 ("failure to investigate does not in itself establish bad faith" (citing St. Amant, 390 U.S. at 733)); Parsi, 890 F. Supp. 2d at 83 ("[S]loppiness is not evidence of actual malice."). A failure to investigate only arises to the level of malice where the defendant also has "obvious reasons to doubt the accuracy of a story." Lohrenz, 350 F.3d at 1284. Here, however, the defendant understood and interpreted the OFAC list in a manner consistent with OFAC. Summ. J. Reply at 26

(comparing International Crisis Group's interpretation of the OFAC list with then-Director of OFAC's interpretation of the OFAC list). And in any event, the defendant's employees testified that they did not doubt the accuracy of the challenged passage in Report 145. ECF No. 158-2, Material Facts I ¶¶ 101-03.

Fifth, the plaintiff criticizes the defendant for relying on the Serbian press, which the defendant described in Report 145 as "sensationalist bordering on libel" and "notorious for spreading [rumors] and outright lies." Summ. J. Opp'n at 39 (quoting Pl.'s Private Figure Mot., ECF No. 145-4, Ex. 12 (Report 145) at 9, 10). But, as explained earlier, the plaintiff has taken these characterizations out of context. A reasonable reading of Report 145 neither leads to the conclusion nor even implies that all Serbian press articles cannot be trusted. See Pl.'s Private Figure Mot., ECF No. 145-4, Ex. 12 (Report 145) at 9-10. Similarly, the sources in the record cited by the plaintiff do not demonstrate that the defendant should have ignored the information published by the Serbian press entirely. See Summ. J. Opp'n at 39-40. In fact, Lyon, who was one of the Balkan experts at the International Crisis Group and the primary researcher and author of Report 145, recognized that the accuracy of the press had to be assessed on a "case-by-case basis," as some press articles relied on "detailed information from certain government media files." Def.'s Summ. J. Mot., ECF No. 150-1, Ex. 16 (Lyon Dep.) at 22:6-22. To the extent that the Serbian press lacked some degree of credibility, reliance on "some" of its articles is insufficient for a finding of actual

malice. See McFarlane, 91 F.3d at 1508 ("'[T]he plaintiff must establish that even in relying upon an otherwise questionable source the defendant actually possessed subjective doubt.'" quoting Secord, 747 F. Supp. at 794); Lohrenz, 350 F.3d at 1286 ("'reliance upon some biased sources . . . do[es] not amount to reckless disregard of the truth'" (quoting Loeb v. New Times Commc'ns Corp., 497 F. Supp. 85, 93 (S.D.N.Y. 1980))). In fact, the defendant's recognition that some unreliability exists, rebuts the plaintiff's contention that the defendant acted with actual malice. See McFarlane, 74 F.3d at 1304 ("full (or pretty full) publication of the grounds for doubting a source tends to rebut a claim of malice, not to establish one" (citing Tavoulareas, 817 F.2d at 788 n.35)).

Sixth, the plaintiff objects to the defendant's reliance on confidential sources to dispel any notion that it did not act maliciously in publishing the allegedly defamatory publication.[32] Summ. J. Opp'n at 44-45. But reliance on confidential sources to rebut any insinuation of malice is proper. Clyburn, 705 F. Supp. at 642 ("[D]efendants['] reliance on the confidential sources, who, in turn, relied on informants, does not indicate actual malice."). And contrary to the plaintiff's

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[32] The plaintiff complains that the defendant should not be permitted to rely on confidential sources to defend against his claim of malice, while simultaneously preventing the disclosure of their identities. Summ. J. Opp'n at 44. But if the plaintiff believed that Lyon was obstructing his discovery efforts by shielding the identities of Lyon's confidential sources, he could have filed a motion to compel while discovery was being conducted. That was not done.

position, Summ. J. Opp'n at 44-45, the defendant did not have an obligation to verify the reliability or existence of the confidential sources unless "the defendant actually possessed subjective doubt," as to their veracity. McFarlane, 91 F.3d at 1508 (quoting Secord, 747 F. Supp. at 794). The plaintiff has not presented clear and convincing evidence as to why Lyon should have doubted, let alone that he did doubt, the reliability of his confidential sources. The plaintiff, without proof, merely calls them "shadowy," Summ. J. Opp'n at 44, which is insufficient to show that Lyon should have doubted the information he received from his confidential sources, see McFarlane, 91 F.3d at 1508 (allowing the defendant to rely on a questionable source so long as there is no subjective doubt on the part of the defendant).

Finally, the plaintiff's charge that Lyon "targeted Zepter . . . for extortion" is an appealing basis for finding actual malice at first blush.[33]

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[33] As additional circumstantial evidence of actual malice, the plaintiff calls into question Lyon's credibility, Summ. J. Opp'n at 31, and alludes to an electronic exchange of correspondence between Lyon and a "Serbian government employee," wherein Lyon alleged that the plaintiff "operated a front company that smuggled weapons to Al-Qaeda and was engaged in money laundering" and was told that the allegation was not true, id. The plaintiff's reliance on this collateral electronic correspondence is misplaced. The substance of the electronic correspondence does not concern the challenged passage of Report 145, so it is not evidence that Lyon subjectively doubted the accuracy of the challenged passage in Report 145. And there is no indication from the record that Lyon was informed by anyone, aside from the plaintiff, that the association drawn between Milosevic and the plaintiff in Report 145 was unfounded.

Summ. J. Opp'n at 29-31. According to the plaintiff, Lyon met with the plaintiff "in an airport in Geneva[, Switzerland] and solicited money in exchange for ceasing . . . further publication of negative allegations about [the plaintiff]." Id. Even accepting this allegation as true, it does not amount to "clear and convincing" evidence of malice.[34] As the District of Columbia Circuit has explained:

> It is settled that ill will toward the plaintiff or bad motives are not elements of actual malice and that such evidence is insufficient by itself to support a finding of actual malice. The rationale for this rule is that speech honestly believed, whatever the speaker's motivation, contributes to the free interchange of ideas and the ascertainment of truth. To recover, plaintiffs cannot ground their claim on a showing of intent to inflict harm, but must, instead, show an intent to inflict harm through falsehood. . . . The appropriateness of such evidence must be determined on a case-by-case basis, bearing in mind that evidence of ill will or bad motives will support a finding of actual malice only when combined with other, more substantial evidence of a defendant's bad faith.

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[34] The plaintiff attempts to corroborate this alleged extortion scheme through declarations of third parties. E.g., Opp'n to Def.'s Strike Mot. at 6. But for reasons explained later, these declarations constitute inadmissible evidence that the Court cannot consider in its summary judgment analysis.

Tavoulareas, 817 F.2d at 795 (internal citations, quotations, and alterations omitted).

Thus, even if Lyon attempted to solicit money from the plaintiff in return for Lyon's termination of his derogatory allegations about the plaintiff, this does not show a "willingness to publish falsehoods" about the plaintiff.[35] Id. To the contrary, during this alleged meeting, the plaintiff admits that Lyon told him that he "ha[d] reliable sources" and that he "believed" that what he wrote about the plaintiff was "true." Summ. J. Reply, ECF No. 163-12, Ex. 8 (Deposition of Philip Zepter ("Zepter Dep. I")) at 307:21-311:7. In fact, the plaintiff admits that allegations concerning the others identified along with him in the challenged passage of Report 145 as allegedly having supported Milosevic, are "mostly" true. Def.'s Summ. J. Mot.,

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[35] The plaintiff seems to contradict himself concerning his contact with Lyon before Report 145 was published. According to the plaintiff, the defendant, i.e., Lyon, "never contacted [the plaintiff] for comment concerning the allegations or anything else in Report 145 before publishing Report 145." ECF No. 157-1, Material Facts II ¶ 20 (emphasis added); see also Summ. J. Opp'n at 32. Yet the plaintiff testified during his deposition that he met with Lyon either "shortly before" or "shortly after[]" Report 145 was published. Summ. J. Opp'n, ECF No. 163-12, Ex. 8 (Zepter Dep. I) at 301:9-20. In light of this seeming contradiction, it can be reconciled only if what the plaintiff sought to convey is that his meeting with Lyon must have occurred after the defendant published Report 145. And even if Lyon had reason to subjectively doubt the accuracy of what he wrote after Report 145 was published, that is insufficient to demonstrate actual malice. See Parsi, 890 F. Supp. 2d at 88 ("[A] plaintiff must show [that the] defendant 'realized the inaccuracy at the time of publication.'" (emphasis in original) (quoting Bose Corp., 466 U.S. at 512)).

ECF No. 150-7, Ex. 22 (Deposition of Philip Zepter II ("Zepter Dep. II") at 292:3-5 ("I[am] in the same category like all these people that really have connections with the Milosevic regime."); id. at 292:6-11 ("Q: . . . Do you agree that the other people in the category who were listed did have [connections with Milosevic?]—A: Mostly. Yes."). So, there is no basis for the Court to find that Lyon had reason to subjectively entertain serious doubts as to the truth of what was published about the plaintiff in Report 145, as he was legally permitted to rely on confidential sources. See McFarlane, 91 F.3d at 1508. Although the Court certainly does not condone such journalistic behavior, if in fact it occurred,[36] the law of this Circuit does not permit the plaintiff to prove malice through "contemptible" behavior. See Tavoulareas, 817 F.2d at 796 ("[The defendant]'s avowed interest in [unlawfully] obtaining documentary evidence from [the plaintiff] . . . , no matter how contemptible the means to be employed, does not indicate a willingness to publish unsupported allegations." (emphasis in original)). The case law "resoundingly rejects the proposition that a motive to disparage someone is evidence of actual malice." Parsi, 890 F. Supp. 2d at 90.

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[36] The plaintiff filed a motion to strike expense receipts from Lyon that the defendant attached in its reply memorandum in support of the defendant's motion for summary judgment. Pl.'s Strike Mot. at 1. The expense receipts purportedly rebut Lyon's attempt to extort the plaintiff in Geneva, Switzerland. See id. at 2. But because the Court finds no actual malice on the part of the defendant in publishing the challenged passage of Report 145, notwithstanding any meeting between the plaintiff and Lyon, the plaintiff's motion is moot.

Finally, the Court's examination of the plaintiff's proffered evidence of actual malice in the aggregate does not compel a different outcome, see Lohrenz, 350 F.3d at 1283, 1284 (recognizing that plaintiff was entitled to "the benefit of the aggregate of her evidence" regarding actual malice, but finding no malice despite evidence that the defendant was "on a mission to advance a preconceived story line," that the defendant "acted on the basis of a biased source," and that the defendant had "incomplete information"); McFarlane, 91 F.3d at 1510, 1511-14 (finding "cumulative force of the evidence" of actual malice to be "very weak" where evidence demonstrated a "failure to contact any individual who would have had first-hand knowledge," a "lack of corroboration," a reliance on a source with "credibility" issues, as well as a document that yielded an "inconsistency"), as even collectively, it does not demonstrate clearly and convincingly that the challenged passage in Report 145 was fabricated, inherently improbable, or based on a source that the defendant or any of its employees had obvious reasons to doubt, Lohrenz, 350 F.3d at 1284. In sum, none of the plaintiff's proffered evidence is enough to bring this case before a jury that must find by clear and convincing evidence that the defendant maliciously published the challenged passage in Report 145.[37]

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[37] The plaintiff's argument that the defendant should be barred from relying on a report from the Office of the High Representative ("OHR Report") for any purpose in resolving the parties' dispute is well founded. Summ. J. Opp'n at 40-41. The defendant unequivocally represented to the Court on several occasions that the OHR Report was not relevant to

4. The Defendant's Motion to Strike Hearsay Declarations

The defendant sought to preclude the Court from considering, in its summary judgment analysis, the declarations of three individuals submitted by the plaintiff, by moving to strike them on hearsay grounds. See Def.'s Mot. to Strike at 1-3. Those declarations were provided by the following individuals: (1) Dris Sayad, Pl.'s Private Figure Mot., ECF No. 145-6, Declaration of Dris Sayad ("Sayad Decl."); (2) Vibor Mulic, Summ. J. Opp'n, ECF No. 158-8, Declaration of Vibor Mulic ("Mulic Decl."); and (3) Elmar Jordan, Summ. J. Opp'n, ECF No. 158-9, Declaration of Elmar Jordan ("Jordan Decl."). Def.'s Mot. to Strike at 1-2. The declaration of Dris Sayad generally describes the substance of a meeting he had with a man named Stanko Subotic, during which Subotic allegedly explained how he was the target of an extortion scheme by Lyon. See Pl.'s Private Figure Mot., ECF No. 145-6, Sayad Decl. ¶¶ 2-4, 6-7.

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this litigation. See id. (citing all instances where the defendant instructed the Court to ignore the OHR Report). The plaintiff has undoubtedly relied on that representation and to allow the defendant to change course now would certainly prejudice the plaintiff. See New Hampshire v. Maine, 532 U.S. 742, 749 (2001) ("'[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'" (alteration in original) (quoting Davis v. Wakelee, 156 U.S. 680, 689 (1895)). In light of the defendant's earlier representations, the Court must judicially estop it from relying on the OHR report.

Likewise, Vibor Mulic's declaration describes meetings he had with, among others, a man named Bogoljub Karic. See Summ. J. Opp'n, ECF No. 158-8, Mulic Decl. ¶ 4. During these meetings, Karic allegedly also described an extortion attempt by Lyon. Id. ¶¶ 5-7. Elmar Jordan's declaration calls into question the alleged Office of the High Representative report ("OHR Report") relied upon by the defendant in publishing Report 145. See Summ. J. Opp'n, ECF No. 158-9, Jordan Decl. ¶¶ 1-4. The Court will grant the defendant's motion to strike the declarations of Dris Sayad and Vibor Mulic, but deny the motion to strike the declaration of Elmar Jordan as moot because the defendant was judicially estopped from relying on the OHR report.

The declarations of Sayad and Mulic essentially serve as mouthpieces for Subotic and Karic, respectively. The defendant attempted to depose Subotic and Karic abroad in this case, but to no avail. See Pl.'s Private Figure Mot., ECF No. 145-6, Sayad Decl. ¶ 2 ("Mr. Subotic also agreed to give his deposition in this case at a later date. I have been advised that he did not appear when scheduled in a Geneva Court."); Summ. J. Opp'n, ECF No. 158-8, Mulic Decl. ¶ 3 ("I understand that Mr. Karic was going to testify in this action but that he was unable to do so."); see also Def.'s Mot. to Strike at 5, 9 (describing efforts to depose Subotic and Karic). The Court will not allow the plaintiff to subvert the discovery process by using these declarations to oppose the defendant's motion for summary judgment, as the defendant has not had the opportunity to cross-examine the

testimony of either Subotic or Karic.[38] Cf. United States ex rel. Fago v. M & T Mortgage Corp., No. 03-cv-1406(GK), 2006 WL 949899, at *1 (D.D.C. Apr. 11, 2006) (striking untimely declarations from individuals whose identities were not disclosed during discovery and whose depositions could not be taken); see also Judicial Watch, Inc. v. U.S. Dep't of Commerce, 224 F.R.D. 261, 263-64 (D.D.C. 2004) ("The 'requirement of personal knowledge by the affiant is unequivocal, and cannot be circumvented.'" (quoting Londrigan v. FBI, 670 F.2d 1164, 1174 (D.C. Cir. 1981))).

Further, consideration of these declarations would unfairly prejudice the defendant. Although the submission of declarations is appropriate in conjunction with summary judgment briefing, Fed. R. Civ. P. 56(c)(4),[39] the Court may strike declarations if they are irrelevant or unfairly prejudicial, see Wasserman v. Rodacker, No. 06-cv-1005 (RWR), 2007 WL 274748, at *2 (D.D.C.

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[38] The plaintiff argues that "at every step [the defendant] vigorously opposed any discovery from [Subotic and Karic]." Opp'n to Def.'s Strike Mot. at 6. But the plaintiff does not appear to dispute the defendant's contention that these witnesses' depositions were ultimately scheduled to occur until both declined to appear for their depositions. Def.'s Mot. to Strike at 5, 9; see also Def.'s Strike Mot. Reply at 6. The Court fails to see why, if the plaintiff is "[e]ndeavoring [t]o [h]ave . . . Subotic and . . . Karic [t]estify at [t]rial," Opp'n to Def.'s Strike Mot. at 6, he did not secure their depositions.

[39] Neither Sayad nor Mulic have "personal knowledge" of the alleged extortion attempts on Subotic and Karic, respectively. For this reason alone, the Court must also grant the defendant's motion to strike these two declarations. Fed. R. Civ. P. 56(c)(4).

Jan. 29, 2007); see also Judicial Watch, 224 F.R.D. at 264 ("[S]tatements that are impermissible hearsay, conclusory or self- serving are generally precluded.").

Here, the plaintiff's intent to demonstrate "that Lyon had engaged in similar extortionary conduct targeting others, including . . . Subotic and . . . Karic," Opp'n to Def.'s Strike Mot. at 6, is prohibited under the Federal Rules of Evidence, see Fed. R. Civ. P. 56(c)(4) ("declaration . . . must . . . set out facts that would be admissible in evidence" (emphasis added)). If considered, the evidence would clearly suggest that because Lyon allegedly attempted to extort others, then he must have engaged in the same type of behavior against the plaintiff as well. This is precisely the type of evidence that Federal Rule of Evidence 403, see Fed. R. Evid. 403 (excluding evidence where probative value is substantially outweighed by "unfair prejudice," "confus[ion of] the issues," or tendency to "mislead the jury"), and Federal Rule of Evidence 404 preclude, see Fed. R. Evid. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."); Fed. R. Evid. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."); see also Judicial Watch, 224 F.R.D. at 264 (striking portions of a declaration that were "impermissible attempts to place before the Court irrelevant, impugning and/or inflammatory

statements").[40] Accordingly, the Court did not consider these declarations in conducting its summary judgment analysis.[41]

IV. Conclusion

For the foregoing reasons, the Court concludes that the plaintiff is a limited-purpose public figure, who has failed to present clear and coninc-ing evidence for a reasonable jury to find actual malice on the part of the defendant. Therefore, summary judgment is granted in favor of the defendant on the plaintiff's defamation claim, as well as his false light invasion of privacy claim, and the plaintiff's motions for partial summary judgment are denied.[42]

SO ORDERED on this 4th day of November, 2014.

REGGIE B. WALTON
United States District Judge

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[40] For these reasons, the Court will ignore the declaration of Meho Omerovic as well. Opp'n to Def.'s Strike Mot., ECF No. 166-2.

[41] Nor would this evidence alone change the Court's outcome even if admissible. See Tavoulareas, 817 F.2d at 795 ("It is settled that ill will toward the plaintiff or bad motives are not elements of actual malice and that such evidence is insufficient by itself to support a finding of actual malice.").

[42] The Court has contemporaneously issued an Order consistent with this Memorandum Opinion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7044

September Term, 2009

1:04-cv-01198-RBW

Filed On: March 31, 2010

MILAN JANKOVIC, also known as PHILIP ZEPTER,

Appellant

—v.—

INTERNATIONAL CRISIS GROUP, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel,* Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Williams, Senior Circuit Judge

O R D E R

Upon consideration of appellees' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

* Circuit Judge Tatel did not participate in this matter.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7044

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Filed On: March 31, 2010

MILAN JANKOVIC, also known as PHILIP ZEPTER,

Appellant

—v.—

INTERNATIONAL CRISIS GROUP, et al.,

Appellees

BEFORE: Ginsburg and Griffith, Circuit Judges, and Williams, Senior Circuit Judge

O R D E R

Upon consideration of appellees' petition for panel rehearing filed on March 1, 2010, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7044

September Term, 2009

1:04-cv-01198-RBW

Filed On: January 29, 2010 [1228217]

MILAN JANKOVIC, also known as PHILIP ZEPTER,

Appellant

FIELDPOINT B.V. and UNITED BUSINESS ACTIVITIES HOLDING, A.G.,

Appellees

—v.—

INTERNATIONAL CRISIS GROUP, A NON-PROFIT ORGANIZATION, et al.,

Appellees

O R D E R

It is **ORDERED**, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C.

Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Mary Anne Lister
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 16, 2009

Decided January 29, 2010

No. 09-7044

MILAN JANKOVIC, also known as PHILIP ZEPTER,

Appellant

—v.—

INTERNATIONAL CRISIS GROUP, et al.,

Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 1:04-cv-01198-RBW)

William T. O'Brien argued the cause for appellant. With him on the briefs were *Lisa M. Norrett*, *John W. Lomas Jr.*, and *Malcolm I. Lewin*.

Amy L. Neuhardt argued the cause for appellee International Crisis Group. With her on the brief was *Jonathan L. Greenblatt*. *Neil H. Koslowe* entered an appearance.

Before: GINSBURG and GRIFFITH, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by Senior Circuit Judge WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: Milan Jankovic, also known as Philip Zepter, sued International Crisis Group and additional unnamed defendants Does 1 through 10 ("ICG," for the institution or for all defendants, as appropriate) for defamation, false light and intentional interference with business expectancy. The district court issued an order granting ICG's motion to dismiss (the "*Order*"), J.A. 1221-28 and Jankovic appeals. We reverse in part, affirm in part, and remand for additional proceedings.

* * *

Jankovic is the founder of Zepter Group, which provides "a wide range of products and services, including banking, insurance, telecommunications, and retail sales of consumer products." J.A. 20. ICG is a non-profit organization that describes itself as "working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict." International Crisis Group, *Serbian Reform Stalls Again*, *ICG Balkans Report No. 145* at 30 (July 17, 2003) ("*Report 145*") J.A. 82-124. ICG's "reports and briefing papers are distributed widely by email and printed copy to officials in foreign ministries and international organisations and made generally available at the same time via the organisation's Internet site." *Id*. The language at issue in this case appears in ICG's *Report 145*, which addresses the deceleration of Serbian reforms—reforms initially spurred

by the assassination of Premier Zoran Djindjic. We excerpt it below, numbering the sentences to assist discussion:

> [1] The unwillingness to continue the crackdown reflects the power of the Milosevic-era financial structures that—with the rigid oversight once provided by the dictator removed—have transformed themselves into a new Serbian oligarchy that finances many of the leading political parties and has tremendous influence over government decisions. [2] Some of the companies were originally formed as fronts by State Security or Army Counterintelligence (KOS), while others operated at the direct pleasure of the ruling couple. [3] Under Milosevic, many of these companies profited from special informal monopolies, as well as the use of privileged exchange rates. [4] In return, many of them financed the regime and its parallel structures.
>
> [5] Some of the individuals and companies are well known to average Serbs: Delta Holding (Milorad Miskovic), Karic (Bogoljub Karic), Pink (Zeljko Mitrovic), Zepter (Milan Jankovic, aka Filip Zepter), Kapital Banka (Djordje Nicovic), Toza Markovic (Dmitar Segrt), Progres (Mirko Marjanovic), Simpo (Dragan Tomic), Komercijalna Banka (Ljubomir Mihajlovic), Novokabel (Djordje Siradovic), Stanko Subotic, Dibek (Milan Beko), ABC (Radisav Rodic), Hemofarm (Miodrag Babic), AIK Banka Nis (Ljubisa Jovanovic) and Dijamant (Savo Knezevic) are but some of the most prominent. [6] Because

> of the support they gave to Milosevic and the parallel structures that characterised his regime, many of these individuals or companies have at one time or another been on EU visa ban lists, while others have had their assets frozen in Europe or the US.[80]
>
> [7] In the popular mind, they and their companies were associated with the Milosevic regime and benefited from it directly. [8] The DOS campaign platform in September 2000 promised that crony companies and their owners would be forced to answer for past misdeeds. [9] Few of the Milosevic crony companies have been subjected to legal action, however. [10] The enforcement of the "extra-profit" law is often viewed as selective and there have been only a handful of instances in which back taxes, perhaps 65 million Euros worth, have been collected.[81] [11] Most disturbing is the public's perception that—at a time when the economy is worsening—these companies' positions of power, influence and access to public resources seem to have changed very little.
>
> [80] http://europa.eu.int/index.eu.htm#; http://www.treas.gov/offices/eotffc/ofac/sdn/index.html
>
> [81] ICG interview with Finance Minister Djelic.

Report 145 at 17.

Plaintiff initially alleged that the above passage (as well as two others in *Report 145*) contained defamatory statements, placed him in a false light, and intentionally interfered with his business expectancies. *Jankovic v. Int'l Crisis Group*, 429 Supp. 2d 165, 168-69 (D.D.C. 2006).

The district court dismissed these claims, characterizing the passages as "not capable of defamatory meaning" and ruling that, as a result, they could not support either of the other claims. *Id*. at 179. In *Jankovic v. Int'l Crisis Group*, 494 F.3d 1080 (D.C. Cir. 2007), we reversed the district court's dismissal in part, finding that the passage excerpted above was susceptible of a defamatory reading. *Id*. at 1091.

Specifically, following the sequence laid out in *Moldea v. New York Times Co.* 15 F.3d 1137, 1142 (D.C. Cir. 1994) (*Moldea I*), we first found that, despite "numerous qualifiers," a reasonable reader could construe the passage as asserting "that Philip Zepter, personally, was a 'crony' of Milosevic who supported the regime in exchange for favorable treatment" and "that Philip Zepter was actively in alliance with Milosevic and his regime." *Jankovic*, 494 F.3d at 1091.

The understanding that *Report 145* accused Jankovic of "supporting" the Milosevic regime clearly derives from sentences 5 and 6 of the passage. Sentence 5 lists "Zepter (Milan Jankovic, aka Filip Zepter)" as belonging to the new Serbian oligarchy described in the first sentence. Sentence 6 imputes support of Milosevic ("and the parallel structures that characterised his regime") to those named in sentence 5. In addition, sentences 1 through 4 implied the quid pro quo feature that we identified ("in exchange for favorable treatment").

We note that sentences 2, 3, 4 and 6 use the pronouns "some" or "many," leaving open the possibility that readers of *Report 145* might not

suppose that the companies and individuals named in sentence 5 were generally guilty of the conduct charged in sentences 2, 3, 4 and 6. But the prior panel, though recognizing that the passage contained a number of "qualifiers," *Jankovic*, 494 F.3d at 1091, could not have reached its interpretation unless it supposed that ordinary, reasonable readers could read the report as implying that those named in sentence 5 were guilty of supporting Milosevic and of receiving favorable treatment in exchange. Even if we disagreed with that understanding, which we do not, we are bound to it under the doctrine of law of the case. *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) ("[T]he *same issue* presented a second time in the *same case* in the *same court* should lead to the *same result*.") (emphasis in original).

As to the defamatory quality of the assertions, we observed that "[m]erely associating somebody with a foreign government would not ordinarily be defamatory"; but, citing a case involving the apartheid regime of South Africa, we found that in this case the relationship asserted could be "sufficiently 'odious, infamous, or ridiculous'" to so qualify. *Jankovic*, 494 F.3d at 1091 (citing *Southern Air Transport, Inc. v. ABC, Inc.*, 877 F.2d 1010 (D.C. Cir.1989)). We remanded to the district court with instructions that it consider "the applicability and merits of . . . Opinion and Fair Comment Protection, the Fair Report Privilege, or the Neutral-Reportage Doctrine." *Id.*

On remand, ICG filed a motion seeking dismissal on grounds of opinion, fair comment, and fair report privilege. Jankovic opposed and

also sought discovery on facts relating to the asserted defenses. The district court denied Jankovic's discovery motion and concluded that the passage was shielded by the fair report and fair comment privileges and protected as opinion. Holding that the passage was non-actionable, the district court dismissed all of Jankovic's claims. *Order* at 2. The court also held that the claim for intentional interference with business expectancy was inadequately pled. *Id*. at 6-7.

Jankovic now challenges all these rulings. We review the district court's dismissal *de novo*. *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 623-24 (D.C. Cir. 2001). While we affirm dismissal of the claim for intentional interference with business expectancy, we hold that none of the privileges or protections raised by ICG applies to the assertions that Jankovic supported the Milosevic regime and that he received advantages in exchange. Accordingly, we remand the case for further proceedings on the claims for defamation and false light.

* * *

A. The privileges and defenses

Fair report. Under applicable District of Columbia law, a defendant must "clear[] two major hurdles" to qualify for the fair report privilege. *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 89 (D.C. App. 1980). It must show, first, that its publication was a "fair and accurate report" of a qualified government source, and, second, that the publication properly attributed the statement to the official source. *Id*. See also *Dameron v. Washington Magazine, Inc.*, 779 F.2d

736 (D.C. Cir. 1985); *Prins v. Int'l Telephone & Telegraph Corp.*, 757 F. Supp. 87, 93 (D.D.C. 1991).

There are serious problems on the score of proper "attribution." The pertinent government source is referenced in footnote 80 of *Report 145*, which contains the Uniform Resource Locator ("URL") for an Office of Foreign Assets Control (OFAC) website: http://www.treas.gov/offices/eotffc/ofac/sdn/index.html (last visited Dec. 22, 2009). The cited URL is currently non-functional: the Treasury's server returns an error message saying that it is not aware of the page.

ICG asserts that those who now access that URL will be "automatically transfer[red] to the now-current OFAC webpage regarding the Specially Designated Nationals ('SDN') List at http://www.treas.gov/offices/enforcement/ofac/sdn/index.html" (last visited Dec. 22, 2009). ICG Br. at 32 n.18. Not only is that not correct, but this second OFAC URL is also non-functioning.

Whatever the efficacy of the URLs as such, ICG claims that footnote 80 adequately attributes the defamatory statements to the OFAC's frozen assets list for 1998, and to *Executive Order 13088: Blocking Property of the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Serbia, and the Republic of Montenegro, and Prohibiting New Investment in the Republic of Serbia in Response to the Situation in Kosovo* (June 9, 1998), 63 Fed. Reg 32109 (the "*Executive Order*"). ICG Br. at 33; see also *id*. at 42. We will assume in ICG's favor that *Report 145* adequately leads the reader to either or both of these sources.

As we shall see, however, *Report 145* does not give a "fair and accurate" report of either of them. The apparent listing of Zepter Banka appears on page 40 of a 42-page single-spaced list that ICG offered to the district court as "a true and correct copy of the screen shot of SDN Changes 1998." J.A. 454, 576. At page 9 of this "screen shot" is a heading indicating that the names below (which include more than 100 banks) were added to the frozen assets list on June 18, 1998:

> 06/18/98: The following names have been added to the list of Specially Designated Nationals and Blocked Persons in connection with an Executive Order issued by President Clinton blocking property of the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Serbia, and the Republic of Montenegro, and Prohibiting new investment in the Republic of Serbia in response to the situation in Kosovo.

J.A. 545.

This listing, standing alone, tells only that it occurred pursuant to the *Executive Order* and that the entities either were property of the Yugoslav, Serbian or Montenegrin governments or somehow had a role in enabling investment in the Republic of Serbia. Not a word suggests that Zepter Banka, let alone Phillip Zepter, *supported* the Milosevic regime or received advantages in exchange.

In the *Executive Order* itself, President Clinton ordered (with immaterial exceptions):

> [A]ll property and interests in property of the Governments of the Federal Republic of

> Yugoslavia (Serbia and Montenegro), the Republic of Serbia, and the Republic of Montenegro that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons . . . are hereby blocked.

63 Fed. Reg. at 32109, § 1(a). The order defines the "government of the Federal Republic of Yugoslavia (Serbia and Montenegro)" as

> the government of the Federal Republic of Yugoslavia (Serbia and Montenegro), its agencies, instrumentalities, and controlled entities, *including all financial institutions* and state-owned and socially owned entities organized or located in the Federal Republic of Yugoslavia (Serbia and Montenegro) as of June 9, 1998.

Id. § 5(e) (emphasis added). It similarly defines the governments of Serbia and Montenegro to include all financial institutions organized or located in those countries.

Id. §§ 5(f), 5(g). These definitions are replicated in regulations of the Office of Foreign Assets Control of the Treasury Department. 31 C.F.R. §§ 586.306-308.

Later Treasury regulations explain:

> These governments are defined in §§ 586.306 and 586.308 of the Regulations, respectively, and include "all financial institutions and state-owned and socially-owned entities organized or located" in the territories of the FRY (S&M) state and the Republic of Serbia,

> respectively, as well as "any persons acting or purporting to act for or on behalf of"' those governments.

64 Fed. Reg. 60660/3 (Nov. 8, 1999).

These definitions make it clear that the regulations treat *all* financial institutions as agencies, instrumentalities, or controlled entities of the governments of the various territories where they are organized or located. As a financial institution, Zepter Banka would appear on the frozen assets list *whatever its relationship was to the Milosevic regime*, so long as it met either the locational or the organizational criterion. Thus *Report 145*'s assertions that Zepter Banka gave "support" to Milosevic, and that its U.S. assets were frozen because of that support, are not fair or accurate reports of any government document ICG has identified. Accordingly, the fair report privilege is of no use to ICG.

Opinion, non-verifiable propositions. Although the parties direct arguments to whether ICG's assertions are "opinion," the Supreme Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990), made clear that the First Amendment gives no protection to an assertion "sufficiently factual to be susceptible of being proved true or false," *id*. at 21, *even if* the assertion is expressed by implication in "a statement of 'opinion,'" *id*. at 20. See also *Moldea v. New York Times Co.*, 22 F.3d 310, 313 (D.C. Cir. 1994). (ICG does not suggest that liability under the law of the District of Columbia might (in this respect) be narrower than what the First Amendment allows.)

In finding non-verifiability, the district court focused on the word "crony," *Order* at 4-5, which we indeed used in our summary of *Report 145*'s relevant statements. But regardless of whether that epithet is verifiable standing alone, the question here is the verifiability of ICG's assertions that the plaintiff "gave" "support" to Milosevic (sentence 6), and that he gave support "in exchange for favorable treatment" (as the prior panel summarized the reasonably understood meaning of the relevant sentences, see 494 F.3d at 1091). To resolve the issue of "verifiability," we need not probe arcane matters of epistemology; both propositions are verifiable in the practical sense that our legal system is ready to make decisions on the basis of how such issues are resolved—decisions profoundly impacting people's lives.

As to "support," for example, the Supreme Court has upheld the authority of the executive branch to detain an individual, including a citizen, on a showing that he was (among other things) "'part of or *supporting* forces hostile to the United States or coalition partners.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (emphasis added). Similarly, whether support is offered in exchange for favorable treatment is analogous to the factual inquiry underlying the offense of bribery. See 18 U.S.C. § 201(b) ("Whoever . . . directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with intent . . . to influence any official act . . . shall be fined . . . or imprisoned for not more than fifteen years, or both."). If such points are verifiable enough to be the bases for prolonged detention,

they are surely (at least in the potentially defamatory constructions understood by the prior panel) verifiable enough for defamation liability.

As part of its "opinion" argument, ICG says that the "factual basis for the connection between Zepter and the Milosevic regime that this Court held could be gleaned from [*Report 145*] is fully disclosed to the reader," and that therefore ICG should be immune under the doctrine that "a statement of opinion that is based upon true facts that are revealed to readers . . . [is] generally . . . not actionable so long as the opinion does not otherwise imply unstated defamatory facts." ICG Br. at 29 (quoting *Moldea I*, 15 F.3d at 1144-45). But as we explained above, the proposition that we said a reasonable reader could derive from *Report 145*—that Zepter supported the Milosevic regime or "the parallel structures that characterised his regime"—is based on ICG's assertions in sentences 5 and 6 that Zepter or Zepter Banka appeared on the frozen assets list *because of* support that was provided to Milosevic. Though Zepter Banka did appear on the frozen assets list, there is no evidence in the record that its appearance was based upon support for Milosevic, as opposed its simply being a financial institution in the region (and therefore automatically listed). Whether or not the defamatory reading of the passage constitutes an opinion, this aspect of *Moldea I* protects only opinions based on true facts, accurately disclosed. As ICG falsely stated the basis for the frozen assets lists, the doctrine is of no use to it. See *Milkovich*, 497 U.S. at 18-19 ("Even if the speaker states the facts upon which he bases his opinion, if those facts are either

incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.”).

ICG makes an additional somewhat muddled effort to pull the sting of *Report 145*. ICG Br. at 29-35. This portion of its brief appears to rely on the notion that authors of the report saved it from any defamatory character by sprinkling the pronouns “many” and “some” throughout its allegations. As we said earlier, that reading is inconsistent with the interpretation reached by the prior panel and is thus of no help to ICG.

Fair comment. ICG argues “fair comment” also as a free-standing doctrine under District of Columbia law (separately from its role in ICG’s First Amendment non-verifiability defense). ICG Br. at 40-41. But a conclusion based on a misstatement of fact is not protected by the privilege. See *Washington Times Co. v. Bonner*, 86 F.2d 836, 841 n.4 (D.C. Cir. 1936) (“[T]he facts asserted as predicate of the fair comment must be true . . . .”). As we explained above, ICG here relies on the appearance of Zepter Banka on the frozen assets lists. Those lists, however, do not buttress accusations that Zepter Banka or Jankovic supported Milosevic or did so “in exchange for favorable treatment.” Accordingly, the key passages of *Report 145* are not protected as fair comment.

In short, the excerpted passage is not protected as fair comment, fair report or opinion, whether for purposes of defamation, false light or intentional interference with business expectancy.

B. Intentional Interference with Business Expectancy

We have said that a plaintiff must plead, as necessary elements for a claim for intentional interference with business expectancy under District of Columbia law: "(1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage." *Bennett Enters. v. Domino's Pizza, Inc.*, 45 F.3d 493, 499 (D.C. Cir.1995).

For the first element Jankovic appears to rely entirely on allegations of harm to his business generally. His complaint alleges, for example: "Plaintiffs' businesses have suffered a loss of current growth and business opportunities, a loss of future growth and business opportunities, and a loss of access to markets that otherwise would have been available, amounting to general damages in an amount to be proven at trial." Complaint ¶ 104.

But the first element of the tort, "a valid business relationship or expectancy," appears to require rather specific business opportunities (to be sure, however, not ones necessarily manifested in any contract). The cases invoked by the parties all revolve around relatively specific anticipated transactions: a prospective book deal, *Browning v. Clinton*, 292 F.3d 235 (D.C. Cir. 2002); "three potential sources of prospective employment," *Kimmel v. Gallaudet Univ.*, 639 F. Supp. 2d 34, 45 (D.D.C. 2009); development of a specific property

in the District of Columbia, *Carr v. Brown*, 395 A.2d 79, 82-84 (D.C. 1978); opportunity to represent a trustee in a specific litigation, *Dem. State Comm. of D.C. v. Bebchick*, 706 A.2d 569 (D.C. 1998). See also *Laser Labs, Inc. v. ETL Testing Labs., Inc.*, 29 F. Supp. 2d 21 (D. Mass. 1998) (dismissing a claim for intentional interference with business expectancy under Massachusetts law where plaintiff failed to allege interference with specific expectancies). The opportunities alleged by Jankovic, by contrast, appear to be simply the generic opportunities of any successful enterprise, a type of injury that can be protected by an award of damages in a successful defamation suit. See Robert D. Sack, Sack on Defamation, Libel, Slander and Related Problems § 10.5.1 (3d ed. 2009) (citing cases). Accordingly, we affirm the district court's dismissal of the business expectancy claim.

Conclusion

While we affirm the district court's dismissal of Jankovic's claim for intentional interference with a business expectancy, we reverse its dismissal of the remaining counts, and remand for proceedings consistent with this opinion.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7095

September Term, 2006

04cv01198

Filed On: July 24, 2007 [1055786]

MILAN JANKOVIC, a/k/a PHILIP ZEPTER, et al.,

Appellants

—v.—

INTERNATIONAL CRISIS GROUP,
A NON-PROFIT ORGANIZATION, et al.,

Appellees

O R D E R

It is **ORDERED**, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 20, 2007

Decided July 24, 2007

No. 06-7095

MILAN JANKOVIC, a/k/a PHILIP ZEPTER, et al.,

Appellants

—v.—

INTERNATIONAL CRISIS GROUP,
A NON-PROFIT ORGANIZATION, et al.,

Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 04cv01198)

William T. O'Brien argued the cause for appellants. With him on the briefs were *Lisa M. Norrett* and *Malcolm I. Lewin*.

Amy L. Neuhardt argued the cause for appellees. With her on the brief were *Jonathan L. Greenblatt* and *Cynthia P. Abelow*.

Before: ROGERS, GRIFFITH and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: In this diversity action, Milan Jankovic, who goes by the name Philip Zepter, and two of his related business entities—Fieldpoint B.V. and United Business Activities Holding, A.G.—appeal the dismissal of their complaint for defamation, tortious interference with business expectancy, and false light invasion of privacy against International Crisis Group ("ICG") and one of its employees, James Lyon. At issue are three documents that allegedly link Philip Zepter and his business interests to Serbian president Slobodan Milosevic, who was put on trial as a war criminal before his death. The district court found that the presence of Lyon in the case destroyed diversity. After the complaint was amended to exclude Lyon, the district court, applying District of Columbia law, dismissed claims relating to two of these documents—a report authored by ICG ("Report 141") and an email sent by Lyon—because the statute of limitations had expired. The district court dismissed the remaining claims after finding that the third document, ICG's Report 145, was not capable of defamatory meaning and could not

support claims for the related torts. We affirm the district court's dismissal of the original complaint and its dismissal of the claims relating to Report 141 and the Lyon email. However, because one of the passages in Report 145 is capable of defamatory meaning, we reverse the dismissal of the amended complaint in part.

I.

ICG is a nonprofit organization registered under District of Columbia law whose mission is "to prevent and resolve deadly conflict." To this end, it produces analytical reports, newsletters, briefing papers, and other publications targeted at influencing and advising international decision-makers. Among these publications are two reports. On March 18, 2003, a report entitled *Serbia after Djindjic* was issued bearing the ICG logo above the words "Belgrade/Brussels." This report, numbered 141, recommends various reforms in the wake of the assassination of the Serbian premier. Report 145, issued July 17, 2003, is a follow-up entitled *Serbian Reform Stalls Again*, again with the ICG logo and "Belgrade/Brussels" on the cover. Both reports reference Philip Zepter, the individual, as well as the Zepter Group of businesses. Citing Belgrade media sources, Report 141 asserts that the Zepter Group "allegedly provides cover for money laundering and weapons shipments." Report 145 lists Philip Zepter as a member of the "new Serbian oligarchy" that benefitted from close ties to Milosevic and continues to prosper through unchecked access to public resources. Additionally, according to the amended complaint, James Lyon sent an email

that disseminated a six-paragraph article of unknown origin that reported that "Zepter operated in front companies for State Security, . . . smuggling weapons (to Al-Qaeda among others) and laundering money." Lyon was ICG's "main investigator and Project Director for the Balkans" and the "Director of ICG Serbia" when Reports 141 and 145 were issued.

Philip Zepter and the corporations (collectively "Zepter") filed suit on January 12, 2004, in the Court of First Instance of Brussels, Belgium. The complaint named James Lyon of Provo, Utah, and "[t]he non-profit association INTERNATIONAL CRISIS GROUP, in short ICG, entered in the register of enterprises . . . with registered office located in . . . BRUSSELS." However, as Zepter would later learn, this was not the non-profit organization responsible for the publications. According to Zepter's amended complaint, "[i]n responding initially, in Brussels, to the Brussels Action complaint, ICG for the first time represented that there were two ICG corporate entities, one in Brussels and another in the United States." Am. Compl. ¶ 72. In response to an action under 28 U.S.C. § 1782 to conduct discovery in the United States for the Belgian action, filed on June 18, 2004, Zepter learned that the organization it sued in Belgium, which is incorporated under Belgian law, is distinct from the International Crisis Group that employs Lyon and issued Reports 141 and 145. As ICG now explains, it is incorporated in Washington, D.C., but headquartered in Brussels, with offices worldwide. *See* Appellees' Br. at 3. The Belgian entity, which it calls International Crisis Group

Agence Internationale Sans but Lucratif ("AISBL"), is "an inactive corporation" with "no paid employees and . . . no responsibility for publishing ICG's reports." *Id*. at 4.

On July 15, 2004, Zepter filed a complaint in the United States District Court for the District of Columbia against ICG incorporated here. On August 23, 2005, the district court dismissed that complaint without prejudice on the ground that it was clear Lyon is domiciled in Belgrade—and not Provo, Utah—therefore destroying complete diversity because a stateless citizen is not diverse with an alien like Zepter. Alternatively, the district court noted that it was clear the court lacked personal jurisdiction over Lyon. On September 15, 2005, Zepter filed an amended complaint that removed Lyon as a defendant. ICG moved to dismiss, and on May 1, 2006, the district court granted the motion, finding that the statute of limitations had expired, without any valid defenses, as to Report 141 and the Lyon email and that the claims related to Report 145 failed as a matter of law. *See Jankovic v. Int'l Crisis Group*, 429 F. Supp. 2d 165 (D.D.C. 2006).

II.

Zepter first contends that the district court erred by dismissing the original complaint for want of subject-matter jurisdiction because Lyon is actually domiciled in Utah, and because the district court should have authorized jurisdictional discovery to prove this point. We need not resolve these disputes, however, because Zepter does not challenge on appeal the district

court's alternative ruling that Lyon lacked sufficient ties to the District of Columbia to warrant an exercise of personal jurisdiction. Personal jurisdiction is "'an essential element of the jurisdiction of a district . . . court,' without which the court is 'powerless to proceed to an adjudication.'" *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (quoting *Employers Reins. Corp. v. Bryant*, 299 U.S. 374, 382 (1937)). A complaint may be dismissed for lack of personal jurisdiction without settling whether subject-matter jurisdiction exists. Because Zepter has waived any challenge to personal jurisdiction by failing to raise the issue, *see Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990), this court cannot upset the district court's dismissal of the original complaint.

Under District of Columbia law, which applies to this diversity action, claims of defamation are subject to a one-year limitations period. D.C. CODE § 12-301(4). No statutory period is provided for tortious interference with business expectancy or false light invasion of privacy, but where, as here, "a stated cause of action is 'intertwined' with one for which a limitations period is prescribed, [courts operating under District of Columbia law] apply the specifically stated period." *Mittleman v. United States*, 104 F.3d 410, 415 (D.C. Cir. 1997).

Only Report 145 was published within a year of the initiation of this lawsuit on July 15, 2004. Zepter contends, however, that there is a valid defense to the statute of limitations under the doctrines of lulling, equitable tolling, and equitable estoppel. Alternatively, Zepter maintains that the foreseeable republication of ICG's

reports on the Internet resets the one-year clock. The district court rejected these defenses and our review is *de novo*. *See Chung v. U.S. Dep't of Justice*, 333 F.3d 273, 278 (D.C. Cir. 2003). We agree with the district court.

A defendant who engages in "inequitable conduct" can be equitably estopped from invoking the statute of limitations. *Id.* at 278. Zepter contends that the doctrine applies here because ICG "*actively concealed* the identity of the authorship of the Publications at issue and thwarted the Zepter Plaintiffs' discovery attempts." Appellants' Br. at 23. At the motion-to-dismiss stage, the court must accept this allegation as true. *See Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (per curiam). Nonetheless, ICG is not equitably estopped from pleading the statute of limitations. District of Columbia law distinguishes between a party that conceals the existence of a cause of action and a party that conceals its own identity. Under *Chappelle's Estate v. Sanders*, 442 A.2d 157, 158-59 (D.C. 1982), equitable estoppel encompasses only the former. The *Chappelle* rule remains the law of the District of Columbia. *See Cevenini v. Archbishop of Wash.*, 707 A.2d 768, 773-74 (D.C. 1998); *Diamond v. Davis*, 680 A.2d 364, 380 n.14 (D.C. 1996). Zepter does not maintain that ICG did anything to conceal the existence of Zepter's claim.

The similar doctrine of equitable tolling does not concern the conduct of the defendant but rather applies when the plaintiff "despite all due diligence . . . is unable to obtain vital information bearing on the existence of his claim." *Chung*, 333

F.3d at 278 (quoting *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1367 (D.C. Cir. 1998)). This defense of Zepter's fares no better, as the District of Columbia Court of Appeals has made clear that "good-faith mistakes of forum" do not qualify for equitable tolling even if "the defendant was on notice of the claim as of the initial filing in an improper forum that occurred within the limitations period." *Sayyad v. Fawzi*, 674 A.2d 905, 906 (D.C. 1996) (per curiam).

Similar to equitable estoppel, the doctrine of lulling applies when the defendant "ha[s] done something that amounted to an affirmative inducement to plaintiffs to delay bringing action," *Bailey v. Greenberg*, 516 A.2d 934, 937 (D.C. 1986) (quoting *Hornblower v. George Wash. Univ.*, 31 App. D.C. 64, 75 (1908)), as when a defendant promises to settle a dispute outside of court, *see, e.g.*, *id.* at 939; *East v. Graphic Arts Indus. Joint Pension Trust*, 718 A.2d 153, 156-57 (D.C. 1998). At most, Zepter contends that ICG's *inaction* delayed its filing of this lawsuit. Because Zepter alleges no specific act of affirmative inducement, the doctrine of lulling is unavailing.

Finally, Zepter maintains that foreseeable republication of a libelous document by a third-party resets the limitations clock and that the district court should have allowed discovery "to enable [Zepter] to ascertain the dates of those republications and present them to the [district court]." Appellants' Br. at 35. Like most common-law jurisdictions, the District of Columbia has adopted the modern "single publication" rule regarding the accrual of libel claims. *See Mullin v. Wash. Free Weekly, Inc.*, 785 A.2d 296, 298 n.2

(D.C. 2001); *Ogden v. Ass'n of U.S. Army*, 177 F. Supp. 498 (D.D.C. 1959); RESTATEMENT (SECOND) OF TORTS § 577A. Thus, "for purposes of the statute of limitations in defamation claims, a book, magazine, or newspaper has one publication date, the date on which it is first generally available to the public." *Mullin*, 785 A.2d at 298 n.2. Copies of the original are still part of the single publication but republication in a new edition creates a new publication on the rationale that the intent is to reach a new audience. *See* RESTATEMENT § 577A cmt. d & illus. 5-6.

The District of Columbia courts have not specifically applied the single publication rule to the posting of identical material by a third-party on the Internet. Courts in other jurisdictions have applied the single publication rule to allegations of defamation on the Internet but have not addressed republication on third-party websites. *See In re Davis*, 347 B.R. 607, 611-12 (W.D. Ky. 2006); *Churchill v. State*, 876 A.2d 311, 316-19 (N.J. Super. Ct. App. Div. 2005); *Firth v. State*, 706 N.Y.S.2d 835, 842-43 (Ct. Cl. 2000). The single publication rule was designed as an accommodation to new forms of communication, and in applying the rule to the Internet, the court must be mindful of the rule's purpose, which according to the Restatement consists of "avoiding multiplicity of suits, as well as harassment of defendants and possible hardship upon the plaintiff himself." RESTATEMENT § 577A cmt. d. Here, Zepter alleges that, as a result of ICG's distribution of Report 141, its defamatory language has been "incorporated in and further disseminated through various other websites and

publications." Am. Compl. ¶ 65. In the print media world, the copying of an article by a reader—even for wide distribution—does not constitute a new publication. *See* RESTATEMENT § 577A cmt. d & illus. 6. The equivalent occurrence should be treated no differently on the Internet. At best, the third-party reproductions alleged by Zepter constitute "mere continuing *impact* from past violations [that] is not actionable" as a new cause of action, *Knox v. Davis*, 260 F.3d 1009, 1013-14 (9th Cir. 2001) (internal quotation marks omitted) (citing *Del. State Coll. v. Ricks*, 449 250 (1980)). Notably, Zepter does not allege that ICG updated the content of Report 141 or took steps beyond its initial publication to expand the audience for its Report, and the court need not address these possibilities. *See* Sapna Kumar, Comment, *Website Libel and the Single Publication Rule*, 70 U. Chi. L. Rev. 639, 657-61 (2003). Based on Zepter's allegations, ICG can be held to account for only a single publication of Report 141, but these claims are time-barred.

III.

This leaves only the claims stemming from Report 145, entitled *Serbian Reform Stalls Again*, which was issued on July 17, 2003. Zepter faults three passages in the 28-page report that reference "Zepter Banka," "Filip Zepter," and "a Zepter company," respectively. Report 145 does not mention either of the corporate appellants, Fieldpoint B.V. or United Business Activities Holding, A.G.

A plaintiff claiming defamation must show:

> (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.

Croixland Props. L.P. v. Corcoran, 174 F.3d 213, 215 (D.C. Cir. 1999) (quoting *Crowley v. N. Am. Telecomms. Ass'n*, 691 A.2d 1169, 1172 n.2 (D.C. 1997)). As a threshold issue, Zepter contends that ICG relied upon exhibits beyond the scope of the amended complaint, and the district court's reliance, in turn, would require converting the Rule 12 motion to a Rule 56 summary judgment motion and affording discovery to Zepter. The extrinsic evidence, however, is public record information from Zepter's filings in New York seeking discovery in the Belgian action. Zepter opposes consideration of what he himself filed in court. However, such materials may properly be considered on a motion to dismiss. *See Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1222-23 (D.C. Cir. 1993). Turning, then, to the merits of the district court's dismissal, the passages in Report 145 raise distinct issues.

A.

The first passage appears in a discussion of the continued influence of the Bezbednosno-Informativna Agencija ("BIA"), Serbia's state-security agency. The passage reads:

> The BIA as a whole is deeply compromised by criminal activities as well as numerous other illegal actions under Milosevic. It appears to have shadowy connections to at least two banks—Komercijalna Banka and Kapital Banka—and maintains close ties with a third, Zepter Banka. It has been involved in the weapons trade, through such front companies as Grmec. Its most dangerous component is the so-called military line, composed of former [Serbian Counter-intelligence] officers who transferred from the army in the early 1990s. Many of these are engaged in economic activities connected to some of the mentioned banks.

Report 145, at 15 (footnotes omitted). The district court concluded that this statement was not "concerning the plaintiffs" because it references Zepter Banka instead of Philip Zepter, Fieldpoint, or United Business. *Jankovic*, 429 F. Supp. 2d at 174-76.

"To satisfy the 'of and concerning' element, it suffices that the statements at issue lead the listener to conclude that the speaker is referring to the plaintiff by description, even if the plaintiff is never named or is misnamed." *Croixland*, 174 F.3d at 216. In *Croixland*, the defendants stated that the owner of a race track was "connected to organized crime" but misidentified the race track owner. *Id*. at 215-16. This court held that a complaint filed by the actual race track owner should not be dismissed because "[e]ven if the lobbyists misidentified the owner of the facility, it did not remove the taint to the true owner," especially after "[d]rawing favorable inferences for

the non-moving party and viewing the alleged remarks from the perspective of the listeners." *Id.* at 217 (citations omitted). An action could also have been sustained by the company named in the statements that did not actually own the race track. *See Peck v. Tribune Co.*, 214 U.S. 185, 188-89 (1909).

As the district court recognized, the first passage of Report 145 neither mentions Philip Zepter directly nor refers to him indirectly, except to the extent that he shares a name with his company. So *Croixland* does not help Philip Zepter; rather, the question is whether the namesake of a corporation can be defamed when false misdeeds are attributed to his company. In the reverse situation, the Restatement provides that "[a] corporation is not defamed by communications defamatory of its officers, agents or stockholders unless they also reflect discredit upon the method by which the corporation conducts its business." RESTATEMENT § 561 cmt. b.

Stated generally, "[d]efamation is personal; . . . [a]llegations of defamation by an organization and its members are not interchangeable. Statements which refer to individual members of an organization do not implicate the organization. By the same reasoning, statements which refer to an organization do not implicate its members." *Provisional Gov't of New Afrika v. ABC, Inc.*, 609 F. Supp. 104, 108 (D.D.C. 1985) (citation omitted). This principle is not absolute, of course. If, for example, one person is solely in charge of corporate decision making, an attack on a corporation would vicariously attack the decision maker. *See, e.g.*, *Brayton v. Crowell-Collier Publ'g Co.*, 205 F.2d

644, 645 (2d Cir. 1953); *Caudle v. Thomason*, 942 F. Supp. 635, 638 (D.D.C. 1996). But matters that might "reflect[] poorly upon an individual" are not necessarily "concerning" that person. *Patzer v. Liberty Commc'ns, Inc.*, 650 P.2d 141, 143 (Or. Ct. App. 1982).

Applying this standard, the first excerpt concerns neither Fieldpoint nor United Business. Their connection is that Fieldpoint owns the Zepter trademarks and United Business distributes Zepter products under these trademarks. Fieldpoint and United Business are essentially investors in the Zepter name. But "[t]he mere fact that a publication might injure the investors in a business does not give rise to a claim for defamation in those investors unless the publication appears to refer to the investors individually." *AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1005 (4th Cir. 1990).

Nor could the excerpt be deemed to concern Philip Zepter personally. The amended complaint emphasizes the expansiveness of the Zepter enterprise:

> [t]he Zepter Group is now a global enterprise with sales through separate companies based in more than fifty countries on five continents across the world, and with a network of more than 2,500 regular employees, 100,000 sales consultants, eighty-nine shops, and more than fifty pavillions located in major cities throughout the world.

Am. Compl. ¶ 14. Accepting this as true, it cannot be the case that a reasonable reader of the first

excerpt of Report 145 would conclude that Philip Zepter personally had engaged in illicit activities simply because a bank bearing his name—one of many banks in the Zepter Group, *see id.* ¶ 24—"maintains close ties with" Serbian state security.[1]

B.

The second passage discusses the "New Serbian Oligarchy." Three paragraphs are relevant:

> The unwillingness to continue the crackdown reflects the power of the Milosevic-era financial structures that—with the rigid oversight once provided by the dictator removed—have transformed themselves into a new Serbian oligarchy that finances many of the leading political parties and has tremendous influence over government decisions. Some of the companies were originally formed as fronts by the State Security or Army Counterintelligence (KOS), while others operated at the direct pleasure of the ruling couple. Under Milosevic, many of these companies profited from special

[1] Alternatively, Zepter contends that he should have been allowed to amend his complaint a second time in order to allege additional facts. ICG responds that Zepter never requested leave to amend in the district court, and Zepter offers no reply. Zepter does not seek to amend the complaint to assure the court of its jurisdiction. *See* 28 U.S.C. § 1652; *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 469 F.3d 129, 132 (D.C. Cir. 2006). Therefore, because Zepter did not raise this issue before the district court, it has been waived. *See Yee v. City of Escondido*, 503 U.S. 519, 533-38 (1992); *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984).

> informal monopolies, as well as the use of privileged exchange rates. In return, many of them financed the regime and its parallel structures.
>
> Some of the individuals and companies are well known to average Serbs: [fifteen individuals and their companies, including] Zepter (Milan Jankovic, aka Filip Zepter) . . . are but some of the most prominent. Because of the support they gave to Milosevic and the parallel structures that characterised his regime, many of these individuals or companies have at one time or another been on EU visa ban lists, while others have had their assets frozen in Europe or the US.
>
> In the popular mind, they and their companies were associated with the Milosevic regime and benefited from it directly. The [Democratic Opposition of Serbia] campaign platform in September 2000 promised that crony companies and their owners would be forced to answer for past misdeeds. Few of the Milosevic crony companies have been subjected to legal action, however. The enforcement of the 'extra-profit' law is often viewed as selective and there have been only a handful of instances in which back taxes, perhaps 65 million Euros worth, have been collected. Most disturbing is the public's perception that—at a time when the economy is worsening—these companies' positions of power, influence and access to public resources seem to have changed very little.

Report 145, at 17-18 (footnotes omitted).

Again, this passage makes no mention of Fieldpoint or United Business. The broad mention of Zepter is not sufficient to render the passage defamatory as to Fieldpoint and United Business. "When a statement refers to a group, a member of that group may claim defamation if the group's size or other circumstances are such that a reasonable listener could conclude the statement referred to each member or 'solely or especially' to the plaintiff." *Browning v. Clinton*, 292 F.3d 235, 247 (D.C. Cir. 2002) (quoting *Serv. Parking Corp. v. Wash. Times Co.*, 92 F.2d 502, 506 (D.C. Cir. 1937)). The Zepter Group is an expansive global enterprise, and there are no indications that Fieldpoint or United Business were "solely or especially" targeted by this statement.

As to Philip Zepter, this passage presents questions about what qualifies as a defamatory statement. When confronted with a motion to dismiss, a court must evaluate "[w]hether a statement is capable of defamatory meaning," a question of law. *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 627 (D.C. Cir. 2001). Applying District of Columbia law, "[a] statement is 'defamatory' if it tends to injure the plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990). An "allegedly defamatory remark must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous, or ridiculous.'" *Howard Univ. v. Best*, 484 A.2d 958, 989 (D.C. 1984). The district court concluded that this passage "does not rise to the 'odious, infamous, or ridiculous' level." *Jankovic*, 429 F. Supp. 2d at 178.

Although this passage has numerous qualifiers —for example, the Report says only that "some" of the companies were fronts for state security—we are unable to say that a reader of this passage could not reasonably conclude that Philip Zepter, personally, was a "crony" of Milosevic who supported the regime in exchange for favorable treatment. *See Heard v. Johnson*, 810 A.2d 871, 886 (D.C. 2002). If this tie is sufficiently "odious, infamous, or ridiculous," then the complaint has properly stated a cause of action for defamation. The district court concluded that because Report 145 does not mention "war crimes or ethnic cleansing by Milosevic or the Serbian Government," the "allegations of mutual support" should be described as "political, not criminal" and therefore not capable of defamatory meaning. *Jankovic*, 429 F. Supp. 2d at 177. Merely associating somebody with a foreign government would not ordinarily be defamatory, but in *Southern Air Transport, Inc. v. ABC, Inc.*, 877 F.2d 1010 (D.C. Cir. 1989), this court acknowledged that "[a]n inference that [a plaintiff company] was engaged in dealings with the [apartheid] government of South Africa clearly would have a defamatory meaning because of the intense antipathy felt by a great number of Americans towards South Africa." *Id.* at 1015. In that light, the passage could lead a reasonable reader to conclude that Philip Zepter was actively in alliance with Milosevic and his regime, and so, Philip Zepter has made sufficient allegations to establish a prima facie case of defamation. ICG objects, however, that various privileges and protections defeat Zepter's claims, and we will

remand the claims related to this second passage for the district court, in the first instance, to address the applicability and merits of the Opinion and Fair Comment Protection, the Fair Report Privilege, or the Neutral-Reportage Doctrine.

C.

The third passage is brief:

> Two other individuals with close ties to Milosevic- era financiers hold key positions of influence within the Premier Zivkovic's cabinet. The chief of staff, Nemanja Kolesar, is a former employee of Delta, while Zoran Janjusevic, an advisor, is a former employee of both State Security and a Zepter company.

Report 145, at 18. The amended complaint alleges that it was defamatory to assert that Philip Zepter "holds a key position of influence." Am. Compl. ¶ 59. However, Zepter appears to misread the passage, which refers to "a former employee of . . . a Zepter company," not to Philip Zepter himself. Hence, this statement is not "of and concerning" Philip Zepter, Fieldpoint, or United Business, and the district court was correct to dismiss the related allegations.

D.

In addition to his defamation claims, Zepter alleges tortious interference with business expectancy and false light invasion of privacy. Am. Compl. ¶¶ 95-119. The district court found that "because all of the plaintiffs' claims are rooted in the same alleged defamatory conduct, they must

all be dismissed for the reasons their defamation claims cannot be maintained." *Jankovic*, 429 F. Supp. 2d at 179. As to the first and third excerpts in Report 145, this is true; statements not concerning a plaintiff do not affront privacy rights or business expectancies. However, as to the second excerpt, the standards for defamation and false light privacy are not identical.

The District of Columbia follows the Restatement position that:

> To prevail on a false light claim under District of Columbia law, appellant must show that (a) the published material places appellant in a false light which "would be highly offensive to a reasonable person," and (b) "the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Weyrich, 235 F.3d at 628 (quoting RESTATEMENT § 652E). Thus, "before finding that a statement is not actionable, because it is not reasonably capable of defamatory meaning, [the district court] must also satisfy itself that the statement does not arguably place appellant in a 'highly offensive' false light." *Id.*

Accordingly, we affirm the district court's dismissal of the original and amended complaints, except that we reverse and remand as to claims of defamation, false light invasion of privacy, and tortious interference with business expectancy relating to the second passage of Report 145 as applied to Philip Zepter personally.

28 U.S.C.A. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Currentness

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C.A. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

Currentness

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the

district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or

rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are

citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes

in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against

whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2]) and section 28(f)(5)(E) of

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[1] So in original. Reference to "16(f)(3)" probably should be preceded by "section".

[2] So in original. Probably should be "77p(f)(3)".

the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass

action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C.A. § 1367

§ 1367. Supplemental jurisdiction

Currentness

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S.C.A. Const. Amend. I-Religion

Amendment I. Establishment clause; Free Exercise clause

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *.

U.S.C.A. Const. Amend. I-Speech

Amendment I. Free Speech clause; Free Press clause

Currentness

Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *.

U.S.C.A. Const. Amend. I-Assemblage

Amendment I. Assembly clause; Petition clause

Currentness

Congress shall make no law * * * abridging * * * the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.