**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLUMBIA**

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| MILAN JANKOVIC, also known as PHILIP ZEPTER, FIELDPOINT B.V., and UNITED BUSINESS ACTIVITIES HOLDING, A.G.,<br><br>Plaintiffs,<br><br>vs.<br><br>INTERNATIONAL CRISIS GROUP, and Does 1 through 10,<br><br>Defendants. | Civil Action No. 1:04 CV 01198 (RBW) |

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


*Of Counsel:*
Peter C. Sheridan
Ivana Ognjanovic
Steven L. Weinberg
CHRISTENSEN, GLASER, FINK, JACOBS, WEIL & SHAPIRO, LLP
10250 Constellation Blvd., 19th Floor
Los Angeles, CA 90067
Telephone: (310) 282-6243
Facsimile: (310) 556-2920

Malcolm I. Lewin
MORRISON COHEN LLP
909 Third Avenue
New York, NY 10022
Telephone: (212) 735-8625
Facsimile: (212) 735-8708

William T. O'Brien (D.C. Bar No. 450891)
Lisa M. Norrett (D.C. Bar No. 464089)
John W. Lomas, Jr. (D.C. Bar No. 976555)
McKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 496-7500
Facsimile: (202) 496-7756

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## INTRODUCTION

The defamatory statements at issue in this case, most notably those linking Zepter to war criminal Slobodan Milosevic, have been read and continue to be read by hundreds of thousands of people in the United States and around the world, exposing Zepter to continuing contempt, ridicule, and embarrassment, and eviscerating Zepter's reputation and business goodwill. While the First Amendment protects certain types of speech, it does not protect ICG's baseless, unsupportable claims that Zepter, a private individual holding no public office and having no connection to the events described in Report 145, financed and supported one of the most infamous war criminals of the past century. Zepter is rightfully due an opportunity to vindicate his name from this attack on his reputation.

Indeed, the D.C. Circuit held that Zepter has a prima facie claim for defamation. Report 145 states as fact that Zepter is a member of a group individuals and companies who have financed the Milosevic regime and its parallel structures, benefited from monopolies and exchange rates, formed companies as fronts by State Security and Army Counterintelligence, appeared on visa ban lists, and had assets frozen by the United States and Europe. None of ICG's defenses save it from publishing these and the other defamatory statements in Report 145.

In its most recent motion to dismiss, ICG no longer contends that the neutral reportage doctrine applies, and it merely asserts the fair report privilege and fair comment protection in footnotes. (Def.'s Br. at 29 n.18, 34 n.27.) ICG now relies almost entirely on its argument that *all* of the statements in the Defamatory Passage regarding Zepter are protected opinion. This contention is not only contradicted by the statements themselves, which are verifiably false statements of fact, but also by ICG's own statements and the declarations attached hereto of prime examples of ICG's targeted audience – key decision-makers who reviewed ICG's reports

on the Balkans. As with all of ICG's reports, ICG admits that Report 145 is the product of "extensive research" and "fact gathering," and "recites numerous facts." (*Id*. at 8, 24.) The statements regarding Zepter are among these facts.

The factual nature of ICG's reports is further evident from the attached declarations, which convey the views of the very decision-makers ICG targeted with Report 145. Attached hereto is declaration of Wolfgang Petritsch, former High Representative in Bosnia and Herzegovina from August 1999 through May 2002. *See* Declaration of Wolfgang Petritsch (hereinafter "Petritsch Decl."). As the High Representative, Dr. Petritsch served as the chief civilian peace implementation officer in Bosnia and Herzegovina. (*Id.*. ¶ 2, 4.) In this capacity, he reviewed reports by ICG focused on the Balkans region. (*Id.*. ¶ 6.) Dr. Petritsch explains that, based on his review of the ICG Balkans reports, the "reports are written by investigators who engage in field research and fact gathering" and "contain detailed facts about the topic at issue, along with ICG's conclusions and policy recommendations." (*Id*. ¶ 8.) He further explains that he "considered the factual information that ICG provided in its reports during his tenure as the High Representative." (*Id.* ¶ 9.)

Similarly, as stated in the declaration of Malcolm I. Lewin, attached hereto, Mr. Lewin describes his conversation with William Montgomery, former Chief of Mission at the U.S. Embassy in Belgrade, Serbia and Montenegro (2001-2004), U.S. Ambassador to Croatia (1998-2001), and Special Advisor to the President and Secretary of State for Bosnian Peace Implementation (1996-1997). (Declaration of Malcolm I. Lewin (hereinafter "Lewin Decl.") ¶ 2.) Mr. Lewin discusses Ambassador Montgomery's views that "ICG presented itself as an organization that provided fact-based and objective reports, which were not based on opinions,

and that ICG's whole selling point to governments and other decision-makers was that its reports were fact-based." (*Id.* ¶ 5.)

Recognizing the weakness of its argument that these provably false statements of fact regarding Zepter are protected opinion, ICG also contends that such statements are opinions supported by "facially evident" facts disclosed to the reader. (Def.'s Br. at 28.) Instead of identifying any "facially evident" facts, however, ICG references a single footnote (at the end of the second paragraph of the three-paragraph Defamatory Passage) to the Treasury Department's Office of Financial Control's Specially Designated Nationals List ("SDN") webpage, which then provides access to a U.S. frozen asset list. (Ex. B to First Amended Complaint ("FAC"); *see also* Declaration of John W. Lomas, Jr. (hereinafter "Lomas Decl."), Ex. 1, at 17 n.80.)

Zepter never appeared on any U.S. frozen asset list**.** Nonetheless, ICG argues that because Zepter Banka (which is not even mentioned in the Defamatory Passage) was on the frozen asset list, the footnote to the SDN webpage provides "facially evident" facts supporting ICG's defamatory statements regarding Zepter. (Def.'s Br. at 27-28.) Putting aside that ICG argued exactly the opposite before the D.C. Circuit in this case, stating that there is "*no logical basis*" to attribute statements about Zepter Banka to Zepter personally (Lomas Decl., Ex. 2, at 28 (emphasis added)), ICG's argument fails by its own weight. The only reason Zepter Banka was on the U.S. frozen asset list was because it was a financial institution in Serbia at the time – *as all financial institutions in Serbia, Montenegro, and Yugoslavia were included on this list, regardless of whether those institutions supported the Milosevic regime*. (Lomas Decl., Ex. 3, at Sec. 5(f).) The Serbian bank, Eksimbanka, *acquired by the founding father* of ICG, George Soros (Lomas Decl., Ex. 4), was similarly included on this frozen asset list, as were more than a hundred banks (Lomas Decl., Ex. 5).

ICG also stretches its argument even further to say that Executive Order 13088, issued by President Clinton in 1998 and cited in the U.S. frozen asset list, is the "*facially* evident" disclosure of fact supporting all of the defamatory statements regarding Zepter. (Def.'s Br. at 28.) While ICG argues that this Executive Order was available to "any reader 'willing to perform minimal research'" (Def.'s Br. at 29), the Executive Order is not cited in Report 145, nor is it available on the SDN webpage ICG cites as its source for the frozen asset list. Even ICG itself was unable to perform this "minimal research" to uncover Executive Order 13088, which it first mentions in its most recent motion, having failed to mention it in all of its previous briefing on this issue, and raising it only after Zepter noted it in his recent reply brief.

While ICG now relies almost entirely on its opinion defense, it also maintains that the fair report privilege and fair comment protection apply to bar Zepter's claims. As ICG apparently concedes by now relegating those defenses to a footnote, such defenses similarly have no merit. None of the statements regarding Zepter in the Defamatory Passage are a fair summary of any official source cited or relied upon by ICG, and thus the fair report privilege does not apply. The fair report privilege is also a fact-based defense, not properly asserted at the motion to dismiss stage. Similarly, the fair comment protection is obsolete and, it does not apply to the false statements regarding Zepter.

Both the fair report privilege and fair comment protection are also defeated by the presence of malice. ICG did not and could not argue otherwise in its opposition to Zepter's motion for discovery. Here, ICG's claim that a U.S. frozen asset list and an Executive Order, which do not mention Zepter and have no relevance to the defamatory statements, are the only purported factual support for all of the false statements regarding Zepter in the Defamatory Passage demonstrates, at a minimum, the recklessness sufficient to establish malice. The

financial and business interests that Report 145's author James Lyon and ICG's patrons (including, in particular, George Soros) have in the Serbian region further demonstrate that ICG's attack on Zepter was more than likely intentional.

As with Zepter's defamation claims, Zepter's false light and tortious interference claims are actionable and should not be dismissed. Contrary to ICG's contention, Zepter's tortious interference claim is properly pled, as Zepter has alleged specific future business expectations that were commercially reasonable to anticipate, for which ICG tortiously interfered.

## FACTS AND BACKGROUND

### D.C. Circuit Opinion

On July 24, 2007, the D.C. Circuit found that Zepter had established a prima facie case of defamation. (D.C. Cir. Op. (D.I. 42), at 18.) Specifically, the D.C. Circuit held that the second passage of Report 145 could indeed be defamatory and lead a reasonable reader to conclude that (i) "Philip Zepter, personally, was a 'crony' of [infamous war criminal Slobodan] Milosevic who supported the regime in exchange for favorable treatment" (*id.* at 15), and (ii) "Philip Zepter was actively in alliance with Milosevic and his regime" (*id.* at 16). It reversed and remanded Zepter's "claims of defamation, false light invasion of privacy, and tortious interference with business expectancy relating to this portion of Report 145. (*Id.* at 18.) The D.C. Circuit found that Zepter had a viable defamation claim regardless of the qualifiers "some" or "many" that ICG used in certain of its statements concerning Zepter.

### Plaintiff Philip Zepter

In 1986, Zepter founded Zepter International, which later became Zepter Group. (FAC ¶¶ 1, 14.) Over the course of twenty years, Zepter built the Zepter Group into a successful, trustworthy, and respected enterprise with sales through companies based in more than fifty countries world-wide. (*Id.* ¶¶ 14-21.) The Zepter Group's success has earned Zepter and his

companies numerous awards for professional, industrial, and technological leadership. (*Id.* ¶¶ 19, 20.) Zepter also has been recognized for his individual community service efforts throughout Europe. (*Id*. ¶ 19.)

**Defendant International Crisis Group**

ICG is a non-profit entity funded by several wealthy individuals, primarily George Soros, as well as certain foundations and governments. (*Id*. ¶¶ 25, 26.) ICG claims to have a number of offices world-wide, including in Washington D.C. and Belgrade, Serbia. (*Id.* ¶ 25.) ICG claims it is the "world's eyes and ears" and "provid[es] detailed information unobtainable elsewhere." (Lomas Decl., Ex. 6.)

ICG states that it engages in "extensive field research and *fact-gathering*" (Def.'s. Br. at 21) and, in its attempt to influence world-wide policy makers, produces reports that are "grounded in [that] field research." (Lomas Decl., Ex. 1, at 30.) ICG asserts that its publications are widely disseminated and are successful in having a significant influence on policy makers, local and international governments, and international organizations, businesses, and media. (FAC ¶ 30.) ICG interjects itself into and materially affects the capital and commercial structures of the particular country or region in support of the personal business interests benefiting its representatives, employees, and agents. (*Id.* ¶ 31.) It is particularly active in the Balkan region and, with a $1 million grant from George Soros, established its first field office in the Balkans. (Lomas Decl., Ex. 7.)

George Soros is considered a founding father of ICG, and has funded ICG for years. (Lomas Decl., Ex. 8.) He also serves on ICG's board. (Lomas Decl., Ex. 9.) Soros's business and political interests in the Balkan region are well documented. For example, the Soros Investment Capital fund invested $200 million in Serbia, acquiring a controlling stake in Ekskimbanka, a private commercial bank in Serbia (which is, at a minimum, arguably in

competition with Zepter Banka) that provides a broad range of commercial banking products, including trade and term financing to small- and medium-sized enterprises, and financing the start-up of Serbia Broadband Networks, the leading cable television and broadband services company in Serbia. (Lomas Decl., Ex. 4.)

Critics of ICG have argued that ICG's policy recommendations are beholden to its patrons, particularly Soros. (Lomas Decl., Ex. 25.) For example, some have suggested that a 1998 ICG report advocating a takeover of the Trepca mine complex in Serbia was the first step in a Soros plan to secure ownership of that complex. (*Id.*) Soros allegedly invested $50 million in an attempt to seize control of the mines which have been recently valued at over $5 billion. (Lomas Decl., Ex. 10.)

**James Lyon**

ICG's Special Balkans Advisor, James Lyon, authored in whole or in part, numerous ICG publications, including the publication at issue. (FAC ¶ 54.) Like Soros, Lyon's business and political interests in the Balkans are well-documented. While ICG edited Lyon's biography on its website after Zepter attached it to his discovery motion to remove certain information regarding Lyon's business interests (Lomas Decl., Ex. 11), Lyon's biography previously discussed his operation of several of his own businesses in the region as well as his consulting work with numerous foreign and local companies and international government organizations and their subcontractors in Bosnia and Herzegovina. (Lomas Decl., Ex. 12.) In a National Public Radio report regarding the Bosnian economy, reporter Jack Rowland discussed Lyon as being one of the few American investors "stay[ing] the course" in Bosnia with business interests "ranging from glass to ready-mixed concrete." (Lomas Decl., Ex. 13.) In that report, Lyon was quoted as understanding that it takes bribery to be successful with one's business activities in Bosnia. (*Id.*)

A Yugoslavian newspaper reported that Lyon is known for leveraging his relationships, his local fame derived from authoring ICG reports, his attacks on governments in the Balkan region, and his understanding of how the Balkan region operates for monetary gain. (Lomas Decl., Ex.14.) According to the report, "Lyon always had business in his mind, or, at least, as much as he had an interest in preparing the [ICG] reports." (*Id.*) (alteration in original). The report goes on to note that Lyon has relationships with former associates of the Milosevic family and owners of the local arms dealing company. (*Id.*) Lyon has apparently made enemies with U.S. diplomatic officials in the region, with one diplomat dismissing Lyon's work as "'*incomplete*, sensationalist and scandal-mongering.'" (*Id.*) (emphasis added).

ICG knew that, before and during Lyon's employment with ICG, he had worked as an advisor to several foreign and regional companies and international governmental organizations and their subcontractors, in the course of which Lyon apparently became associated with direct and potential competitors of Zepter. (FAC ¶ 37.) Zepter believes that ICG encouraged Lyon in his roles as Director of ICG Bosnia and Director of ICG Serbia to continue to foster such relationships to assist ICG in its world-wide pursuits. (*Id*.)

**Report 145**

On July 17, 2003, ICG published extensively via mail and its website its Balkans Report No. 145, entitled "Serbian Reform Stalls Again" ("Report 145"). (*Id*. ¶ 53.) According to ICG, Report 145 "'analyzed the shortcomings of the government's crackdown on the military/criminal network behind the shooting [of Prime Minister Djindjic] and recommended stronger action on reform of the security services, judiciary, and media.'" (*Id*.) (alteration in original).

The second passage of Report 145 discusses a "New Serbian Oligarchy," including Zepter, which, among other things, claimed that Zepter supported "Milosevic and the parallel

structures that characterised his regime." (Lomas Decl., Ex. 1, at 17.) This passage states in relevant part:

> 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: . . . 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 characterized 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 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.

(*Id*. at 17-18 (footnotes omitted) (emphasis added).)

Report 145 defines these Milosevic-era "parallel structures" that Zepter and other individuals within the "New Serbian Oligarchy" supported, as the Zemun and Surcin Clans, the Red Berets, and the State Security or Security-Information Agency ("BIA"), also described in the Report as the "Milosevic-era parallel security and organised crime structures." ( *Id.* at 7.) All of these entities were closely associated with Milosevic and his regime and known for their

brutality and notoriety. In discussing one of these "parallel structures," namely the BIA, the Report explains that, among other things, the BIA "appears to have shadowy connections" to certain banks, and that "[i]t has been involved in the weapons trade." (*Id.* at 15.)

ICG and Lyon provided 152 footnotes in Report 145, including cites to several sources, some of which Zepter has been able to uncover on his own as highly suspect, if not fraudulent. These sources include various interviews with unnamed individuals and an alleged Office of the High Representative in Bosnia and Herzegovina ("OHR") Anti-Fraud Department ("AFD") report. (*Id.* at 15 n.69.)[1] The German Embassy, the primary source for the OHR report, denied any knowledge of the false weapons and money laundering allegations regarding Zepter that the OHR Report ascribes to it. (Lomas Decl., Ex. 16.) A letter enclosing information from the OHR Report and ICG about Zepter was purportedly sent from Charles Briefel, former Director of the Organization for Security and Cooperation in Europe ("OSCE") and Bill Potter, formerly with the OHR, to the government of Bosnia and Herzegovina. (Lomas Decl., Ex. 17.) Mr. Briefel denied sending the letter and explained that the OSCE letterhead on which the letter is printed is not authentic and that the OSCE facsimile records did not show any record of the transmission of the document. (*Id.*) OHR legal counsel would not comment on the authenticity of the OHR report, and an OHR spokesperson suggested that the AFD did not even exist. (Lomas Decl., Ex. 18.)

[1] Forbes Magazine commented on the credibility of the sources cited in Report 145, noting: "According to Lyon's reports, the dirt on Zepter came from such *murky* sources as a non-published document from the Office of the High Representative in Bosnia and Serbia and unnamed 'economic experts.'" (Lomas Decl., Ex.15 (emphasis added)).

**Report 141**

Report 145 is not the first ICG report that included false and defamatory statements about Zepter. On March 18, 2003, ICG published and distributed Report 141, entitled "Serbia After Djindjic" by mail and via ICG's website. (FAC ¶ 45.) Report 141 also was authored in whole or in part by Lyon within the scope of his employment as Director of ICG Serbia. (*Id.* ¶ 46.) According to ICG, Report 141 "'analyzed the political situation that had led to the assassination [of Serbian Prime Minister Zoran Djindjic].'" (*Id.* ¶ 45.) (alteration in original). Report 141 states:

> The March 2003 SFOR raids on the offices of several RS officials and businessmen, as well as the subsequent shutdown of their businesses and bank accounts, were designed to restrict this flow. Of particular concern is the fact that the Milosevic-era "businessmen" affiliated with Serbian State Security and mentioned earlier in this report, appear to control much of Republika Srpska's revenue flows through the Ministry of Finance, and have excessive influence over the office of the Premier. Another company that allegedly provides cover for money laundering and weapons shipments is the Zepter Group, owned by Milan Jankovic (a.k.a. Filip Zepter.) Milan Jankovic was a close personal friend of Zoran Djindjic, and the pair spent time together on holidays. The Belgrade media has reported that Jankovic is directly financing the Serbian government's lobbying effort in the United States.

(Ex. A to FAC; *see also* Lomas Decl., Ex. 19, at 15 (footnotes omitted) (emphasis added).)

These facts of and concerning Zepter and the Zepter Group as "cover for money laundering and weapons shipments" and the statement that Zepter was directly financing the Serbian government's lobbying effort in the United States are defamatory. (FAC ¶¶ 47, 48.)

**Lyon E-mail**

Another example of Lyon's pattern of peddling false information about Zepter is an e-mail Lyon sent on June 10, 2003. This e-mail included an alleged article from an unknown

source concerning the situation in Serbia after the assassination of Serbian Prime Minister Djindjic. (*Id.* ¶ 67.) Among other things, the e-mail states:

> The level of influence of the Milosevic-era tycoons on the Serbian government may be clearly seen in the presence of three key advisors to the Serbian Premier. These are . . . and shadowy security advisor Zoran Janjesevic, a former Zepter (and State Security) employee. Delta was a front company for the ruling couple (Milosevic and his wife Mira Markovic) that used plundered state assets to finance an economic empire in Serbia, Russia, and Cyprus. *Both Subotic and Zepter operated in front companies for State Security, with Subotic smuggling cigarettes and Zepter smuggling weapons (to Al-Qaeda among others) and laundering money*. All these companies served as financial pillars of the Milosevic regime. All three now have substantial influence over the Serbian government and have come into repeated conflict with the National Bank and Dinkic over suspicious money transfers.

(Ex. C to FAC; *see also* Lomas Decl., Ex. 20 (emphasis added).) Neither Zepter nor the Zepter Group ever operated as front companies for State Security, smuggled weapons to Al-Qaeda or anyone else, or laundered money. (FAC ¶ 69.) The Zepter Group never served as a financial pillar of the criminal Milosevic regime, it does not have substantial "influence" over the Serbian government, and it has never made any suspicious money transfers. (*Id*.) Any "'suspicious money transfers'" would have been revealed in the various private and governmental audits or investigations of Zepter Group companies. (*Id*.) Yet no such transfers have ever appeared.

**Damage To Zepter**

ICG's defamatory statements regarding Zepter and his businesses have been, and continue to be, read by hundreds of thousands of people in the United States and other areas where Zepter resides, works, and conducts his business. (*Id*. ¶ 64.) The world-wide distribution of these statements has exposed Zepter to contempt, ridicule, and embarrassment, and damaged Zepter's reputation and the business goodwill associated with the Zepter name and trademark. (*Id*. ¶¶ 75-79.) For example, the small, close-knit Monegasque community where Zepter resides

has, since the publishing of these statements, treated Zepter as a social outcast, eroding his ability to conduct any business there. (*Id.* ¶ 77.) Zepter personally has suffered severe anxiety, damage to peace of mind, and emotional and even physical illness. (*Id.*)

## ARGUMENT

### I. THE STATEMENTS GIVING RISE TO ZEPTER'S PRIMA FACIE CASE OF DEFAMATION ARE PROVABLY FALSE FACTS THAT ARE NOT PROTECTED BY ANY OPINION DEFENSE

"In deciding a 12(b)(6) motion, a court 'construe[s] the complaint liberally in the plaintiff's favor,' 'accept[ing] as true all of the factual allegations contained in the complaint 'with the benefit of all reasonable inferences derived from the facts alleged." *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, --- F.3d ----, No. 07-7105, 2008 WL 1932768, at *4 (D.C. Cir. Apr. 29, 2008) (citations omitted) (alteration in original). The case must not be dismissed even if the court doubts that the plaintiff will ultimately prevail." *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 877 (D.C. 1998) (citing *Atkins v. Indus. Telecomms. Ass'n, Inc.*, 660 A.2d 885, 887 (D.C. 1995) (citations omitted)).

ICG cannot overcome this heavy burden because the statements in the Defamatory Passage are provably false statements of fact. Report 145, as ICG itself concedes, is based on "extensive field research and fact gathering" and "recites numerous facts." (Def.'s Br. at 8, 21.) The declarations attached hereto further demonstrate that ICG's targeted audience for Report 145 – world-wide policy-makers and decision-makers – view ICG's reports as providing objective facts, not opinions. As noted above, attached hereto is the declaration of Dr. Petritsch, the former High Representative in Bosnia and Herzegovina, who explains that ICG's reports provide detailed facts about the topic at issue, along with ICG's conclusions and policy recommendations. (Petritsch Decl. ¶ 7.) He further states that he reviewed the factual information in these ICG reports during his tenure as the High Representative. (*Id.* ¶ 8.)

The attached declaration of Zepter's counsel, Malcolm I. Lewin, similarly shows that these key policy-makers and decision-makers view ICG's reports as fact-based and not opinion-based. (*See* Lewin Decl.) In his declaration, Mr. Lewin conveys his conversation with William Montgomery, former Chief of Mission at the U.S. Embassy in Belgrade, Serbia and Montenegro (2001-2004), U.S. Ambassador to Croatia (1998-2001), and Special Advisor to the President and Secretary of State for Bosnian Peace Implementation (1996-1997). (Lewin Decl. ¶ 2.) Mr. Lewin discusses Ambassador Montgomery's views that "ICG presented itself as an organization that provided fact-based and objective reports, which were not based on opinions, and that ICG's whole selling point to governments and other decision-makers was that its reports were fact-based." (*Id.* ¶ 5.) "Through several years of reviewing ICG reports on the Balkans region, Ambassador Montgomery said that he came to believe that many of the facts in ICG's reports were erroneous and in at least one case, incredibly damaging." (*Id.* ¶ 7.) As shown in more detail below, because ICG's statements regarding Zepter are provably false statements of fact, such statements are actionable.

### A. The Statements Regarding Zepter Are Verifiably False Facts

The First Amendment protection that ICG seeks is not applicable if the statements are verifiable, i.e., capable of being proven true or false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21, 110 S. Ct. 2695, 2707-08 (1990). The issue of falsity in a defamation case is ultimately for a jury to decide. *Wallace*, 715 A.2d at 877. Statements are verifiable, for example, when one can determine the truth or falsity of that statement based on a core of objective evidence. *Milkovich*, 407 U.S. at 21, 110 S. Ct. at 2707-08.

Here, the passage in Report 145 that the D.C. Circuit found capable of a defamatory meaning contains verifiably false statements of fact. Those statements include:

- *Zepter's "companies were originally formed as fronts by State Security or Army Counterintelligence (KOS)" and "operated at the direct pleasure of [the Milsoevics]."*

This statement of fact is false and defamatory. Zepter's companies were not fronts for State Security or Army Counterintelligence, nor did they operate at the direct pleasure of the Milosevics. This statement can be proven false by reviewing a core of objective evidence. Jurors are often charged with reviewing evidence and making a determination of whether a company was merely a "front" for some illegal enterprise. Evidence regarding the formation of Zepter's companies, Zepter's employees and the individuals with whom those employees had relationships, Zepter company financial statements, and other objective evidence could all be assessed to show that Zepter's companies are legitimate and not front organizations.

- *Zepter "profited from special informal monopolies as well as the use of privileged exchange rates" in return for "financ[ing] the [Milosevic] regime and its parallel structures."*

This statement of fact is false and defamatory. Zepter did not profit from any monopolies or privileged exchange rates, nor has Zepter financed the Milosevic regime. These assertions are each capable of being proven false by reviewing objective evidence. For example, it is a fact that a monopoly is illegal in many countries and the existence or non-existence of monopolies is proven in courtrooms on a regular basis through objective evidence on issues of market power and concerted action among competitors. In addition, objective evidence of Zepter's transactions involving currency exchanges can be compared with the currency exchange rates at the time to show that Zepter's rates were not inappropriately more favorable. Further, Zepter's financial statements and records can be examined to show that he did not provide funding to Milosevic and his regime, or to any of the "parallel structures" that ICG identifies in Report 145.

- *Zepter has been on EU Visa ban lists and had his assets frozen in Europe and the US "[b]ecause of the "support [he] gave to Milosevic and the parallel structures that characterized his regime."*

This statement of fact is false and defamatory. Zepter has never been on any EU visa ban list and has never had his assets frozen in Europe or the US. The EU visa ban list and the frozen asset list are objective evidence from which the falsity of this assertion can be determined. Zepter also has not given any support to the Milosevic regime or the parallel structures that characterized his regime. As previously noted, this assertion can be proven false by an objective examination of Zepter's finances and other evidence that shows Zepter maintained no relationship with Milosevic and his regime, or the parallel structures that characterized his regime.

- *Zepter is a member of a "new Serbian oligarchy that finances many of the leading political parties and has tremendous influence over government decisions."*

This statement of fact is false and defamatory. Zepter does not finance leading political parties, nor does he have any influence over government decisions. This can be proven by a core of objective evidence such as reviewing Zepter's financial records.

- *The public associates Zepter with Milosevic and believes he benefited from the Milosevic regime.*
- *The public views Zepter as a beneficiary of the selective "enforcement of the 'extra-profit' law."*
- *"Most disturbing is the public's perception that -- at a time when the economy is worsening -- [Zepter's] companies' positions of power, influence and access to public resources seem to have changed very little."*

These statements of fact are false and defamatory. ICG provides no basis whatsoever to support its claim that the public perceives or associates Zepter as a Milosevic crony because he benefited from the Milosevic regime and the selective "enforcement of the 'extra-profit' law." Zepter is not viewed by the public in this way, as objectively evidenced by his commercial business success at that time. Zepter's success demonstrates that the public respected and admired him personally, his namesake brand, and his commercial product line.

ICG is simply hiding the fact that it is intentionally injecting additional false and defamatory facts about Zepter (*i.e.*, that he benefited from the Milosevic regime and the selective "enforcement of the 'extra -profit-law") behind the cover of this alleged public perception for which it can provide no support.

### B. Report 145's Context Further Reinforces To The Reader That The Statements Regarding Zepter Are Factual Allegations

ICG cannot defeat Zepter's claims with its asserted "opinion" defense, absent a showing that "it is *clear* [ICG] is expressing a subjective view, an interpretation, a theory, conjecture, surmise, or hyperbole, rather than claiming to be in possession of objectively verifiable facts." *Washington v. Smith*, 893 F. Supp. 60, 62 (D.D.C. 1995), *aff'd*, 80 F.3d 555 (D.C. Cir. 1996). As *Partington*, a case on which ICG relies on extensively, explains, *Milkovich* makes clear that all authors, even those of generally subjective pieces like book reviews, "must attempt to avoid creating the impression that they are asserting objective facts rather than merely stating subjective opinions." *Partington v. Bugliosi*, 56 F.3d 1147, 1155 (9th Cir. 1995).

#### 1. ICG's Reports Are Based On "Fact-Gathering" And "Extensive Research" And Provide Factual Statements

ICG expressly advertises to its readership that its reports are "grounded in field research." (Lomas Decl., Ex. 1, at 30.) ICG boasts of being the "world's eyes and ears" by "providing detailed information unobtainable elsewhere." (Lomas Decl., Ex. 6.) Its annual report highlights a reader's recognition that "[ICG's] *hallmark is injecting hard facts*, innovative prescriptions and fresh thinking into complex national and international debates." (Lomas Decl., Ex. 21, at 29 (emphasis added)). There can be no doubt that ICG's defamatory statements regarding Zepter are not innovative prescriptions or fresh thinking, but instead hard facts injected in its Balkans report to purportedly support its recommendations and conclusions.

ICG's investigative field staff, located within or close by the particular region at issue, gathers and recites these facts in its reports in support of ICG's expressed efforts to persuade world-wide decision-makers. (Lomas Decl., Ex. 6.) While anyone can offer an opinion, opinions are not credible and persuasive to readers, particularly the policy-makers ICG targets. Only when the reports are grounded in, and supported by, factual statements will ICG's targeted audience pay attention. ICG knows this and repeatedly tells us all that, indeed, its reports contain well-researched facts. Given that ICG is apparently succeeding in persuading critical world-wide decision-makers, ICG's readers must believe that its reports are what ICG claims – concrete facts on which ICG's recommendations are supported.

ICG's website provides statements from such policy-leaders. For example, it explains that the President of the European Commission noted that "[ICG's] … reports . . . have become documents of *reference*." (Lomas Decl., Ex. 22 (emphasis added)). World-wide news agencies are said to include facts from ICG's reports in their own reporting. (*See id*.) One BBC World News Desk reporter believed that an ICG "report on Somalia is typical of [ICG's] work: timely, authoritative and well *researched*. It is an essential *source* in my work." (*See id*.) (emphasis added).

The attached declarations conveying the views of ICG's targeted audience further demonstrate that ICG's reports provide factual statements, such as the statements regarding Zepter, and then provide policy prescriptions and recommendations, typically in the Executive Summary and Recommendations sections. As Dr. Petritsch explains, "ICG's reports are written by investigators who engage in field research and fact gathering. The reports contain detailed facts about the topic at issue, along with ICG's conclusions and policy recommendations." (Petritsch Decl. ¶ 7.) As the High Representative in Bosnia and Herzegovina, Dr. Petritsch was

the one of the key targets of ICG's Balkans reports and he "considered the factual information that ICG provided in its reports during [his] tenure as the High Representative." (*Id.* ¶ 8.)

Similarly, in Mr. Lewin's attached declaration, he notes Ambassador Montgomery's views that "ICG presented itself as an organization that provided fact-based and objective reports, which were not based on opinions, and that ICG's whole selling point to governments and other decision-makers was that its reports were fact-based." (Lewin Decl. ¶ 5.) He also mentions that Ambassador Montgomery believed that ICG's "reports contained detailed facts about the topic or situation at issue, and then provided conclusions and policy recommendations based on those facts. The conclusions and recommendations were typically outlined in the Executive Summary and Recommendation sections." (*Id*. ¶ 6.)

After claiming that such key international decision-makers rely on the self-described critical, groundbreaking research and information on world-wide conflicts contained in ICG's reports, ICG argues, remarkably, that the context of those reports is no different than a sports columnist's book review, an opinion of a woman's basketball coach in a Dick Vitale sports magazine, and a Hustler magazine parody. The incongruity of the comparison of these hyperbole-filled critical commentaries and an extensively researched, sourced, and informative report is obvious. A book reviewer does not claim to offer "detailed information unobtainable elsewhere." Dick Vitale is the definition of hyperbole and would expect any publication bearing his name to include his over-the-top style of commentary. Hustler certainly does not claim to be the product of "extensive field research and *fact-gathering.*"

Unlike these pure commentary pieces, ICG's reports aim to persuade policy-makers at the highest level to follow policy recommendations focused on preventing or solving global conflicts. To be effective in this mission, ICG must assert the facts that provide the basis for

those recommendations or its readers would find those recommendations unpersuasive and non-credible.

2. Readers Understand That Report 145 Purports To Provide Objective Facts

Significantly, ICG concedes that Report 145 "recites numerous facts." (Def.'s Br. at 8.) The 152 citations to sources, including countless "ICG interviews" with unnamed individuals, demonstrate to the reader that Report 145 claims to provide objective fact. *See Int'l Galleries, Inc. v. La Raza Chicago, Inc.*, No. 05-C-4991, 2007 WL 3334204, at *8 (N.D. Ill. Nov. 2, 2007) (writing that an ordinary reader is more likely to understand that a report with citations presents "facts . . . gleaned from persons with relevant knowledge," rather than opinions). ICG's readers also know that Report 145's author, James Lyon, claims to have access to many sources of information with relevant knowledge of the region, and expect Lyon to report facts he gleans from those sources. Lyon's biography on ICG's website promoted Lyon's connections to the Balkans region, boasting about Lyon's work for "numerous foreign and local companies and international government organizations and their subcontractors" there. (Lomas Decl., at 12.) ICG edited Lyon's biography and removed this information, however, after Zepter attached a copy of Lyon's biography as an exhibit to his discovery motion. His current biography no longer includes this information. (Lomas Decl., Ex. 11.)

3. The Alleged "Political" Nature Of Report 145 Is Irrelevant Because The Report Contains False Statements of Fact

ICG's claim that Report 145 is "political" in nature is of no consequence. The D.C. Circuit has held that factual assertions in reports on political issues are not immune from defamation claims. *Weyrich v. The New Republic Inc.*, 235 F.3d 617, 625-26 (D.C. Cir. 2001). The alleged "political" nature of Report 145 does not diminish the readers' expectation that ICG is reporting objective facts.

In We*yrich*, alleged defamatory statements appeared in the "The New Republic," a well-known source of political commentary self-described as a "Weekly Journal of Opinion." *Id*. at 625. Although most of the *Weyrich* article contained hyperbolic commentary, the D.C. Circuit still found actionable factual assertions in the article, including that the subject of the article had "snapped," was becoming "more and more isolated," had surrounded himself with a "coterie of sycophants," was "apoplectic" after a guest on the subject's show admitted his homosexuality, and had "psychological problems." *Id*.

The statements in Report 145 are certainly actionable given Report 145 does not even contain any of the obvious, hyperbolic content of the sort that appeared in *Weyrich*. Report 145 purports to be an informative report on current events in Serbia that is the product of "extensive research" and "fact gathering." (Def.'s Br. at 21.) ICG strives to persuade its readers to follow the recommendations outlined in Report 145, which are purportedly based on "information unobtainable elsewhere." (Lomas Decl., at 6.) As with the actionable statements in *Weyrich*, the assertions about Zepter "are not offered as forms of parody; they are presented as the truth." *Weyrich*, 235 F.3d at 626. Accordingly, readers of Report 145 would be much more likely to expect a presentation of objective fact. As ICG concedes, the readers' expectations are met; Report 145 "includes a recitation of numerous facts." (Def.'s Br. at 8.)

### C. The Defamatory Statements Regarding Zepter Are Not Conclusions Or Recommendations, But Are Instead The Factual Basis For ICG's Conclusions and Recommendations

The statements referring to Zepter are not the "points of view" or "opinions" that ICG argues fall under the protection of the First Amendment. (Def.'s Br. at 16-17.) Instead, those statements are the facts that inform ICG's ultimate recommendations and conclusions in Report 145, and ICG's targeted readers clearly understand that the reports offer objective facts. (Petritsch Decl. ¶ 7; Lewin Decl. ¶¶ 5-9.)

ICG reports that these conclusions and recommendations are based on "extensive field research and *fact gathering*," and explains that its readers depend on its authors to provide "informed" points of view. (Def.'s Br. at 21 (emphasis added)). According to ICG, Report 145 offers readers an analysis of the problems causing Serbia's troubles and summarizes "conclusions" and "recommendations" in sections titled "Conclusion," "Executive Summary," and "Recommendations." (*Id.*) Nowhere in those sections does ICG refer to Zepter because Report 145 does not, and does not claim to, offer an analysis of Zepter's alleged relationship with the Milosevic regime. (Lomas Decl., Ex. 1, at i-iii, 28.)

Instead, Report 145 states as fact that Zepter is a member of a group individuals and companies who have financed the Milosevic regime and its parallel structures, benefited from monopolies and exchange rates, formed companies as fronts by State Security and Army Counterintelligence, appeared on visa ban lists, and had assets frozen by the United States and Europe. ICG uses those statements of fact as support for its conclusion that a new Serbian oligarchy is obstructing reform and its recommendations on how the international community can assist Serbia in achieving reform.

ICG provides no "outline of fact" supporting these statements, nor any "explicit link" to any "express[ed] factual basis." *See Manufactured Home Cmtys., Inc. v. County of San Diego*, -- F.3d --, Nos. 05-56401, 05-56559, 2008 WL 600974, at *4 (9th Cir. Mar. 6, 2008) (rejecting the defendant's opinion defense because the "statements were not clearly attached to . . . an outline of fact, nor . . . explicitly link[ed] . . . to an express factual basis"). Instead, ICG provides the reader only the bald statements of fact themselves that ICG then uses as the factual basis for its conclusions and recommendations on why Serbian reforms are failing and what the international community can do to assist.

### D. If Any Question Regarding Fact Or Opinion Exists, The Jury Should Decide The Issue

It is not appropriate to grant a motion to dismiss on the basis of the "opinion" protection when questions exist regarding fact and opinion. In those circumstances, regardless of whether or not the reader could reasonably believe the alleged statements are facts, the record should be developed through discovery and the issue should go to the jury.

When a reader could understand a statement to be fact or opinion, the issue becomes a factual question for the jury, and thus dismissal at the 12(b)(6) stage or even summary judgment stage is not appropriate. *See*, *e.g.*, *id.* at *2 (citations omitted) (finding that when statements are "'reasonably susceptible of an interpretation that implies a provably false assertion of fact,' they may be considered by the jury 'to determine whether such an interpretation was in fact conveyed'"); *Flotech, Inc. v. E.I. Du Pont de Nemours & Co.*, 814 F.2d 775, 778 (1st Cir. 1987) (explaining that "if a statement is susceptible of being read by a reasonable person as either a factual statement or an opinion, it is for the jury to determine"); *In re Global Crossing, Ltd. Secs. Litig.*, No. 02 Civ. 910 (GEL), 03 Civ. 1185 (GEL), 2004 WL 725969, at *6 (S.D.N.Y. Apr. 2, 2004) (denying defendant's motion to dismiss and explaining that when an alleged defamatory statement could "reasonably be construed as either fact or opinion, the issue should be resolved by a jury"); *Protective Factors Inc. v. Amer. Broad. Cos., Inc.*, No. 01cv11668, 2002 WL 1477174, at *3 (D. Mass. May 28, 2002) (stating that when a reasonable juror could understand the statement to be a fact or an opinion, "the issue must be left to the jury's determination"); *Yetman v. English*, 811 P.2d 323, 330 (Ariz. 1991) (leaving the issue of whether the statement constitutes fact or opinion to the jury because the average reader could understand the statement to be either one).

When the distinction between fact and opinion is not clear, the record should be developed through discovery. *In re Global Crossing*, 2004 WL 725969, at *6 (rejecting the defendant's motion to dismiss because "[r]esolution of [the fact-opinion] issue *must await the development, through discovery, of a more complete factual record*"(emphasis added)). For example, in *Flentye*, while some of the alleged defamatory statements were clearly not protected opinion, the court explained that "analysis of whether [the other] statements are fact or opinion will be better served with an adequate factual record to determine the context in which the statements were made." *Flentye v. Kathrein*, 485 F. Supp. 2d 903, 920-21 (N.D. Ill. 2007). Similarly, in *Penn Group*, the court noted that the comment at issue "could perhaps fairly be characterized as opinion," but also explained that "[a] colorable argument can be made . . . that a reasonable person could interpret this comment to imply facts that are said to be false." *Penn Group, LLC v. Slater*, No. 07 Civ. 729, 2007 WL 2020099, at *6 (S.D.N.Y. June 13, 2007). The *Penn Group* court explained that the context to decide the issue "cannot be determined on a motion to dismiss" and that the parties must first develop the record through discovery. *Id*.

## II. ICG'S OPINION DEFENSE FAILS BECAUSE THE DEFAMATORY PASSAGE IN REPORT 145 IMPLIES PROVABLY FALSE FACTS ABOUT ZEPTER

As discussed in detail above, the "opinion" privilege sought by ICG does not apply to the Defamatory Passage because it comprises false statements of fact about Zepter and is thus actionable. Yet even assuming, *arguendo*, that ICG's factual statements are opinions, ICG's asserted "opinion" defense fails because the Defamatory Passage implies false facts about Zepter. ICG argues that the Defamatory Passage is "opinion," but there is no blanket protection for statements that are considered opinion. *Milkovich*, 497 U.S. at 20, 110 S. Ct. at 2706; *White v. Fraternal Order of Police*, 909 F.2d 512, 522 (D.C. Cir. 1990). When a reader understands that a statement implies facts, that statement is not protected by any "opinion" defense.

*Milkovich*, 497 U.S. at 20. The implied fact test is meant only to protect "loose, figurative, hyperbolic language," none of which is present here. *White*, 909 F.2d at 522. Accordingly, ICG's opinion defense fails.

Statements imply facts when the support upon which those statements are based is either incorrect or incomplete, or if the author's assessment of the alleged support is erroneous. *Id.* Here, ICG fails to provide *any* support in Report 145 for these assertions and implications in the Defamatory Passage. Additionally, the fact explanation for the Defamatory Passage that ICG styles as its "deliberative process" is unfounded and erroneous. (Def.'s Br. at 29.) Because ICG fails in any way to support the statements regarding Zepter in the Defamatory Passage, ICG implies to Report 145's readers that Zepter, among other things, has engaged in sinister and criminal acts in alliance with the war criminal Slobodan Milosevic.

### A. ICG's Opinion Defense Fails Because ICG Does Not Provide Any Factual Basis For The Defamatory Passage

The statements in Report 145 imply provably false facts because ICG fails to provide a factual basis upon which a reader can evaluate its statements, and thus ICG's statements remain actionable. False and defamatory statements, whether facts or opinions, are actionable when an author fails to provide the reader with the factual basis for those statements. *Milkovich*, 497 U.S. at 20; *Houlahan v. World Wide Ass'n of Specialty Programs and Schs.*, No. 04-01161, 2006 WL 785326, at *3 (D.D.C. Mar. 28, 2006) (holding that because the defendant "does not provide the factual basis for his assertion . . . his statements are actionable"). Even when an author discloses a factual basis, the author still must explicitly link that basis to the alleged defamatory statement or the statement remains actionable. *Manufactured Home Cmtys., Inc.*, 2008 WL 600974, at *4 (rejecting the defendant's opinion defense because the "statements were not *clearly* attached to . . . an *outline of fact*, nor . . . *explicitly link[ed]* . . . to an express factual basis" (emphasis added)).

Here, ICG failed to disclose *any* factual basis for the statements in the Defamatory Passage. ICG contends that the "factual basis" for its statements asserting and implying that Zepter financed the Milosevic regime and its parallel structures, benefited from monopolies and exchange rates, and formed companies as fronts by State Security and Army Counterintelligence is "fully disclosed" on the "face" the remaining passage. (Def.'s Br. at 23-24.) As shown below, ICG's own explanation demonstrates the absurdity of its argument.

1. One Footnote To A Treasury Department Website Is Not A Sufficient Factual Basis For The Defamatory Statements In Report 145

ICG argues that a single footnote to a United States Treasury Department webpage is the "facially evident" disclosure of facts that supports its false statements regarding Zepter in the Defamatory Passage. (*Id.* at 28.) Of course, the contents of the website are not even close to "*facially* evident" in Report 145. According to ICG's modest proposal, a reader would have to set aside Report 145, then access a computer, log on to the Specially Designated Nationals List ("SDN") webpage of the Treasury Department's Office of Financial Control ("OFAC") website, navigate through a number of different archived frozen asset lists, and search for Zepter's name on each of those lists, only to ultimately find that Zepter never appeared on any such list. The reader may eventually find Zepter Banka on a frozen asset list, but even that list does not connect Zepter Banka's activities to Zepter individually, nor does it say anything about the subjects of ICG's statements in the Defamatory Passage, including but not limited to Milosevic, front companies, State Security, Army Counterintelligence, monopolies, or exchange rates.

Recognizing the obvious, that the frozen asset list does not provide support for these statements about Zepter, ICG argues, for the first time now, that Executive Order 13088, issued by President Clinton in 1998 and cited in the U.S. frozen asset list, is the "facially evident" disclosure of fact supporting all of the statements regarding Zepter in the Defamatory Passage.

While ICG argues that this Executive Order was available "to any reader 'willing to perform minimal research,'" it is not cited in Report 145, nor is it available on the SDN webpage. (Def.'s Br. at 25.) In fact, ICG itself was unable to perform this "minimal research" to uncover Executive Order 13088 until its most recent motion, having failed to mention it in all of its previous briefing on this issue.[2] It appears that ICG first learned about this Executive Order only in reading Zepter's reply brief supporting his motion for discovery.

Despite the fact that Executive Order 13088 is not "facially evident" to even ICG, the Order is irrelevant to ICG's defamatory statements regarding Zepter. The Order does not mention or have anything to do with Zepter. (Lomas Decl., Ex. 3.) Nor does it mention any of the topics in the Defamatory Passage, including Milosevic, parallel structures, monopolies, exchange rates, front companies, State Security, or Army Counterintelligence. (*Id.*) Instead, Executive Order 13088 simply ordered frozen the assets of *individuals* who had provided support to the governments of Serbia, Montenegro, or Yugoslavia, *and indiscriminately froze the assets of "all financial institutions" in Serbia, Montenegro, or Yugoslavia, regardless of whether those institutions supported the Milosevic regime*. (*Id.* at Sec. 5(f).) Another Serbian bank, Eksimbanka, *purchased by the founding father of ICG*, George Soros (Lomas Decl., Ex. 4), was similarly included on this frozen asset list, as were more than a hundred banks (Lomas Decl., Ex. 5). Zepter Banka was merely one of the many financial institutions indiscriminately added to the list.

[2] ICG's previous briefing on this issue includes an opening and reply brief in support of its motion to dismiss the original complaint, an opening and reply brief in support of its motion to dismiss the first amended complaint, its answering brief to Zepter's appeal to the D.C. Circuit, and its opposition brief to Zepter's recent discovery motion. In the discovery motion briefing, ICG argued that a different Executive Order issued in 2001 by a different President was the basis for its assertions about Zepter.

Contrary to ICG's claims about Zepter Banka, it has been recognized as conforming to the highest international banking standards. (FAC ¶ 24.) Indeed, when the European Union established a €5 million credit facility for investment in Serbian reconstruction in 2002, it chose Zepter Banka as one of the four Serbian banks through which to operate. (Lomas Decl., Ex. 23, 24.)

Accordingly, Report 145 does not provide any factual basis on its face or otherwise for the statements regarding Zepter. Even if a reader had independently conducted all the substantial research ICG describes in its brief, she would have learned merely that Zepter never appeared on any U.S. frozen asset list and that the United States indiscriminately added Zepter Banka to the list along with every other financial institution in Serbia, Montenegro, and Yugoslavia. This information therefore offers absolutely no support for any of ICG's defamatory statements regarding Zepter.

2. ICG's Decision To Couple Companies With Individuals Is Not A Fact That Can Support ICG's Characterization Of Zepter As A Milosevic "Crony"

ICG also argues that the connection between *Zepter Banka* and *Zepter* personally is further "*facially evident*" from the fact that "ICG associated certain named individuals with *particular identified companies*." (Def.'s Br. at 28 (emphasis added)). Report 145 provides no factual basis for this argument, no factual basis for linking the individual to the company, and no explanation for why its coupling is relevant. ICG has only manufactured this coupling argument after-the-fact in litigation in an attempt to justify its tie of Zepter to Zepter Banka's appearance on the frozen asset list, despite the fact that ICG previously argued that there is "no logical basis" to connect Zepter with Zepter Banka. (Lomas Decl., Ex. 2, at 28.)

ICG's coupling argument also fails because Report 145 only couples Zepter (the individual) with "Zepter," the well-known *consumer goods* enterprise that manufactures and

sells, among other things, cookware, beauty products, home furnishings, and fashion accessories. (Lomas Decl., Ex. 1, at 17.)[3] Zepter Banka, which is a separate and distinct entity from the Zepter company, is not named in the coupling or mentioned at all in the remaining passage. ICG's "coupling" argument thus has no merit and offers no support for the defamatory statements about Zepter.

3. Facts That A Reader Must Research Independently Outside Of Report 145 Are Not "Facially Evident" Or Disclosed To The Reader

ICG cites a number of inapposite cases in arguing that the facts supporting its statements regarding Zepter are "facially evident" to the reader. None of these cases involve defamatory statements alleging criminal conduct as in this case. Also, in stark contrast to the non-existent factual support for ICG's statements regarding Zepter, the cases ICG cites involve statements with detailed factual support. For example, ICG cites *Phantom Touring*, which involved a newspaper article full of figurative and hyperbolic commentary about a comedy version of Phantom of the Opera. In *Phantom Touring*, the First Circuit explained how critical a sufficient disclosure of fact is:

> *Of greatest importance*, however, is the breadth of Kelly's articles, which not only discussed *all the facts underlying his views* but also gave information from which readers might draw contrary conclusions. In effect, the articles offered *a self-contained give-and-take, a kind of verbal debate* between Kelly and those persons responsible for booking and marketing appellant's "Phantom." Because *all sides of the issue, as well as the rationale for Kelly's view, were exposed*, the assertion of deceit reasonably could be understood only as Kelly's personal conclusion about the information presented, not as a statement of fact.

[3] It is not even clear that ICG is coupling Zepter with any Zepter company. The relevant statement in Report 145 reads "Some of the individuals and companies are well known to average Serbs: [listing companies and individuals] . . . Zepter (Milan Jankovic, aka, Filip Zepter) . . ." A reasonable reader could simply understand that statement to be referring to Zepter the individual by his last name and then providing Zepter's full name in parentheses).

*Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 730 (1st Cir.1992) (emphasis added). Similarly, in *Riley*, the author of a book recounting a toxic tort lawsuit "report[ed] in *great detail* the factual basis for" the alleged defamatory statements. *Riley v. Harr*, 292 F.3d 282, 293 (1st Cir. 2002). The author even provided facts that created problems for the theory presented, so that the reader could make her own conclusions. *Id.*

In *Beattie*, the author concluded that an appraiser presented a misleading valuation after he "*detailed the deficiencies*" in that appraisal and presented *four bullet-point statements that summarized the authors' criticisms*. *Beattie v. Fleet Nat'l Bank*, 746 A.2d 717, 720 (R.I. 2000). The alleged defamatory statement in *Chapin* that the plaintiff charged "hefty-mark ups" for "Gift Pacs" sent to American troops overseas was supported by "the rest of the article, [which], ***in some detail***, recounts [the author's] efforts to estimate the wholesale cost of the items in the Gift Pac." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993) (emphasis added).

The detailed factual support offered in these publications contrasts sharply with the purported factual support here – a single footnote listing only a website address and ICG's irrelevant "coupling" of individuals and companies. None of the authors in those cases required their readers to perform independent research to discover the factual bases for their opinions. Instead, those authors provided explicit facts in the text that allowed readers to arrive at their own conclusions. ICG's alleged basis for the defamatory statements regarding Zepter is revealed only to those who choose to go on an independent fact-finding scavenger hunt with merely a website address buried in a footnote as a starting point. Any reasonable reader, particularly ICG's busy targeted audience, would not have the time, nor inclination to do their own research to discover the unidentified facts in a report that they have been told and expect is the product of

extensive research and fact-gathering.[4] Nor would ICG's readers subscribe to ICG's publications if they expected to have to research the factual basis for ICG's conclusions.

### B. ICG's Opinion Defense Also Fails Because There Is No Supportable Interpretation

ICG's argument that the Defamatory Passage is not actionable because it contains "opinions" that are "supportable interpretation[s]" of (1) a U.S. frozen asset list and (2) ICG's own decision to "couple" individuals and companies, is without merit. Even if any of ICG's statements in the Defamatory Passage could be considered "opinion," those statements imply false and defamatory facts about Zepter because ICG's assessment of its so-called factual basis for the passage is wholly erroneous. Such statements are thus not protected by any "opinion" defense. *Milkovich*, 497 U.S. at 18-19, 86 S. Ct. at 2705-06.

#### 1. The Supportable Interpretation Standard Does Not Apply Here

ICG argues that the Defamatory Passage is protected under the "supportable interpretation" standard first announced in *Moldea v. New York Times Co.*, 22 F.3d 310, 317 (D.C. Cir. 1994) ("*Moldea II*"). The "supportable interpretation" standard assesses "whether *no reasonable person could find*" that the defamatory statements in question were supportable interpretations of the underlying material or facts. *Moldea II*, 22 F.3d at 317. ICG is simply wrong. As shown below, the supportable interpretation standard does not apply because it is

[4] The absurdity of ICG's argument is further evident when one considers the argument's broader implications. ICG argues that it disclosed the basis for the Defamatory Passage because any reader could go to the footnoted website address, review all of the relevant facts, and then come to her own conclusion based on those facts. ICG's argument relies on the premise that its readers must do all the work to discover the relevant facts underlying the statements in ICG's report. If readers had to engage in this extensive independent research, ICG's reports could not be the persuasive and influential documents it claims them to be.

limited to (1) book reviews or similar critical commentaries and (2) accounts of inherently ambiguous materials, neither of which are at issue here.

The supportable interpretation standard is an exception to the general rule that all statements are actionable if "'a reasonable juror could conclude that [they were] false.'" *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 194 n.32 (D.C. Cir. 2006) (citing *Moldea v. New York Times Co.*, 15 F.3d 1137 (D.C. Cir. 1994) ("*Moldea I*")) (alteration in original). It is limited to book reviews or similar commentaries and accounts of inherently ambiguous materials. *Id*. (stating that "*[f]or book reviews*, we concluded that a 'supportable interpretation' standard was appropriate (emphasis added)); *Moldea II*, 22 F.3d at 315 (explaining that the supportable interpretation standard only applies "when a writer is evaluating or giving *an account of inherently ambiguous* materials or subject matter" (emphasis added)).

Here, as the defamatory inference that Zepter had ties to the Milosevic regime does not appear in a book review or critical commentary, nor is it an account of "inherently ambiguous materials," the supportable interpretation standard does not apply. *Moldea II*, 22 F.3d at 315.

a. Report 145 is Not a Book Review or Critical Commentary

The D.C. Circuit has applied the supportable interpretation standard in only two cases – *Moldea II*, 22 F.3d at 315, and *Washington v. Smith*, 80 F.3d at 557. In both cases, the statements at issue were part of critical commentaries on sports-related subjects where the readers expected hyperbolic and figurative viewpoints that they could take "with a grain of salt." *Id*. at 557 (citing *Moldea II*, 22 F.3d at 313). Indeed, the D.C. Circuit has explained that the test of whether a statement implies a provably false fact "is intended to protect the use of 'loose, figurative or hyperbolic language' which would preclude an impression that the author was seriously maintaining a provable fact." *White*, 909 F.2d at 522.

As explained in Section I.B., Report 145 does not contain the "loose, figurative, hyperbolic language" found in a Hustler magazine parody, or book reviews and sports preview magazines written by "'sports columnists [who] frequently offer intemperate denunciations'" and "'railings'" that readers take "'with a grain of salt.'" *Washington*, 893 F. Supp. at 64. Rather, as ICG urges in its both its briefing in this litigation and its website, Report 145 aims to provide world-wide policy makers with information "unobtainable elsewhere" that inform policy recommendations toward regions suffering from crisis and conflict. Report 145 is thus not the type of publication to which the supportable interpretation standard applies.[5]

b. The U.S. Frozen Asset List is not Inherently Ambiguous

Nor does the Defamatory Passage provide an account of inherently ambiguous materials. ICG argues that the defamatory inference regarding Zepter stems from its evaluation of the U.S. frozen asset list. (Def.'s Br. at 24.) The list does not require one to engage in any sort of analysis or procedure to determine whether a name is or is not on the list; to the contrary, either a

[5] On these issues, the Tenth Circuit refers to a helpful explanation of the distinction between actionable, or "deductive," statements and non-actionable, or "evaluative," statements. *Jefferson County Sch. Dist. v. Moody's Investor Servs., Inc.*, 175 F.3d 848, 853 (10th Cir. 1999). Non-actionable, "evaluative" statements are those that are too indefinite and amorphous to prove and include critical commentaries making use of hyperbole such as those found in *Moldea*, *Washington*, and *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876 (1988). *See id*. Actionable, deductive statements, on the other hand, state or imply facts that may be proven false, such as a statement that implies someone has engaged in a sinister or criminal act. *See id*.

ICG claims its reports include analytical reports grounded in "research" and "fact-gathering." This type of analytical-deductive writing is not comparable to the purely "evaluative opinions" found in the critical commentaries at issue in cases such as *Moldea*, *Washington* and *Hustler*. The Defamatory Passage expressly states that Zepter is part of a group of individuals and companies funding and supporting a war criminal, setting up front companies, benefiting from monopolies and privileged exchange rates, being added to visa ban lists, and having their assets frozen. This passage unequivocally implies that Zepter has sponsored, and acted in alliance with, a war criminal, and engaged in criminal, or at least sinister, activities, including those listed by ICG in the report. Zepter can and will prove that none of those implications are true.

name appears on the government list or it does not. Because reasonable minds cannot differ as to who does or does not appear on the lists, they are not "inherently ambiguous materials." *See Moldea II*, 22 F.3d at 316.

2. No Reasonable Person Could Find That The Report's Defamatory Assertions Are Supported By Anything In Report 145

As the supportable interpretation standard does not apply, the appropriate standard is whether, after discovery, a reasonable juror could find that the inference is a false characterization of the disclosed facts. *Moldea I*, 15 F.3d at 1146-47; *see also Trudeau*, 456 F.3d at 194. Here, however, ICG's statements are so erroneous that they fail under either standard.

ICG concedes that its entire basis for associating Zepter to a war criminal is Zepter Banka's appearance (with all other Serbian banks) on a frozen asset list, and ICG's own decision to couple Zepter the individual with Zepter the company. (Def.'s Br. at 24.) Because no reasonable person could follow ICG's tortured logic and agree with ICG that the defamatory passage was a supportable interpretation of the cited sources, ICG's related statements implicating Zepter are not protected.[6]

a. Zepter has Never Been on the U.S. Frozen Asset List

ICG claims that the Treasury Department's frozen asset list and Executive Order 13088 are the basis for its assertion that Zepter provided support to the Milosevic regime. (Def.'s Br. at 24-26.) As explained above, however, Zepter has never appeared on any frozen asset list.

[6] Contrary to ICG's assertions, the relevant analysis is not simply whether the Remaining Passage "discloses the factual basis for and reasoning behind any conclusion regarding Zepter's alleged ties to the Milosevic regime," (Def.'s Br. at 23), nor is the law simply such that, "where the basis of an allegedly defamatory statement of opinion is disclosed to the reader, the statement is entitled to full First Amendment protection." (Def.'s Br. at 17.) Merely disclosing the basis for an opinion does make that opinion supported and therefore entitled to protection under *Moldea II*.

Seeking to avoid this inconvenient truth, ICG now claims that a reader could reasonably conclude that Zepter personally financed and supported the Milosevic regime because Zepter Banka at one time appeared on the U.S. frozen asset list. (*Id*.) But ICG has previously recognized that ***"[n]o logical basis exists***" to connect Zepter to statements made about Zepter Banka, which is only one "of the dozens of companies (necessarily operated by others on a day-to-day basis) with which he is associated." (Lomas Decl., Ex. 2, at 28.)

In addition, a reader of Report 145 could never have understood ICG to be connecting Zepter to Zepter Banka's appearance on the frozen asset list because Report 145 does not list who actually appeared in the frozen asset list. A reader could only learn that information by performing her own independent research. Because Zepter Banka does not appear anywhere in the Defamatory Passage that reader would never even know to look for Zepter Banka on the list. Accordingly, Zepter Banka's appearance cannot be a basis for any inference that Zepter is a crony of and in active alliance with Milosevic.

b. ICG's Purported Sources Do Not State That Zepter Banka Provided Financial or Other Support to the Milosevic Regime

Nor, as ICG falsely claims, does the frozen asset list or Executive Order 13088 state that Zepter Banka ever provided support for the Milosevic regime. Instead, the Executive Order indiscriminately ordered that *all financial institutions in Serbia, Yugoslavia, and Montenegro* be added to the frozen asset list in furtherance of the Order's goal to stop new investment in those countries and block transactions involving property of the governments in those countries. Indeed, the list of financial institutions added to the frozen asset list by this Executive Order includes over one hundred banks, such as Eksimbanka, a competitor of Zepter Banka. (Lomas Decl., Ex. 5.) In 2002, before Report 145 was published and before President Bush ended the standing order freezing assets at all Serbian financial institutions, including Zepter Banka and

Eksimbanka, the George Soros-led Soros Capital Investment Bank acquired a controlling stake in Eksimbanka. (Lomas Decl., Ex. 4.) Soros serves on ICG's Board and, in 1996, financed ICG's first field office in the Balkans with a $1 million gift. (Lomas Decl., Exs. 7, 9.) He has continued to finance ICG's operations. (Lomas Decl., Ex. 8.)

Zepter Banka, in sharp contrast to ICG's characterization of it, has been recognized as conforming to the highest international banking standards. (FAC ¶ 24.) When the European Union established a €5 million credit facility for investment in Serbian reconstruction in 2002, it chose Zepter Banka as one of the four Serbian banks through which to operate. (Lomas Decl., Exs. 23, 24.)

Contrary to ICG's assertions (*see, e.g.*, Def.'s Br. at 24, 28-29, 33), merely disclosing the basis for its decision to include Zepter in the group of persons and entities tied to Milosevic does not make that decision "supported" and therefore entitled to protection under *Moldea II*. Thus, even under the more stringent "supportable interpretation" standard inapplicable here, no reasonable person could find that ICG's false inclusion of Zepter as a member of a group of individuals and companies that has financed the Milosevic regime and its parallel structures, benefited from monopolies and exchange rates, formed companies as fronts by State Security and Army Counterintelligence, appeared on visa ban lists, and had assets frozen by the United States and Europe Union, was a supportable interpretation of the government list. Neither the list, or the next level of information in the Executive Order, include anything related to those assertions.

In reality, the only "source" for ICG's inclusion of Zepter in the group was its own baseless decision to do so. That, however, is insufficient grounds for protection. As ICG's

decision to include Zepter in the group of persons and entities tied to Milosevic is not a supportable interpretation, ICG's related statements implicating Zepter are not protected.

## III. NEITHER THE FAIR REPORT NOR FAIR COMMENT DEFENSE DEFEATS ZEPTER'S CLAIMS

ICG claims that the fair report privilege renders the Defamatory Passage in Report 145 non-actionable because the statements in the passage are based on official sources, namely, a U.S. frozen asset list and Executive Order 13088. ICG is wrong. Not only is it improper to apply the fair report privilege at the 12(b)(6) stage, ICG did not rely on any Executive Order in Report 145, nor did it fairly or accurately summarize any official sources.

### A. The Fair Report Privilege Is Not Properly Applied At The 12(b)(6) Stage

ICG claims the fair report privilege renders the defamatory statements in Report 145 non-actionable because those statements are based on an official source, namely a U.S. frozen asset list. As more fully explained in Zepter's opening and reply briefs supporting its motion for discovery, whether an official document or proceeding is fairly summarized or reported for purposes of the privilege is a factual question, and thus dismissal at the 12(b)(6) stage is inappropriate. *Schiavone Constr. Co. v. Time, Inc.*, 735 F.2d 94, 98 (3d Cir. 1984) (reversing dismissal on the basis of the fair report privilege because whether the report was fair is a question of fact not resolvable at the 12(b)(6) stage); *Oparaugo v. Watts*, 884 A.2d 63, 81 (D.C. 2005) (reversing dismissal on the basis of the fair report privilege because the record was insufficient to resolve the factual issues regarding the alleged official document).

### B. Report 145 Does Not Rely On Any Executive Orders

The fair report privilege is not applicable when the author does not cite to or rely on the official source. *Bufalino v. Associated Press*, 692 F.2d 266, 271 (2d Cir. 1982) (rejecting the fair report privilege because the record did not show that the defendant actually relied on the source);

*see also Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985) (explaining that "[i]t must be apparent either from *specific attribution* or from the overall context that the article is quoting, paraphrasing, or otherwise drawing upon official documents or proceedings." (emphasis added)). Sources identified only "'after-the-fact through a frantic search of official records'" cannot be the basis for the assertion of the privilege. *Id*. (citations omitted).

Here, the record demonstrates that ICG did not rely on any Executive Orders for the Defamatory Passage. Report 145 makes no mention of any Executive Order. In fact, ICG never mentioned an Executive Order until its response to Zepter's motion for discovery. Apparently that Executive Order was identified "after-the-fact through a frantic search of official records," because it was not the Executive Order that ICG relies on so extensively in its motion to dismiss. If Zepter had never identified Executive Order 13088 in its reply brief supporting its discovery motion, ICG would probably never have found it.

### C. ICG Did Not Fairly Summarize The U.S. Frozen Asset List Or Any Related Executive Orders

ICG's assertion of the fair report privilege also fails because ICG did not fairly and accurately summarize any official sources. The D.C Circuit has explained that the fair report privilege does not apply if the report was '"garbled or fragmentary to the point where a false imputation is made about the plaintiff which would not be present had a full and accurate report been made . . . or if the reports are otherwise unfair or inaccurate . . . ."' *Id*. at 739 (citations omitted).

ICG claims that all the assertions and implications about Zepter (the individual) and Zepter (the company) in the Defamatory Passage are a fair summary of a U.S. frozen asset list and an Executive Order. Zepter (the individual) and Zepter (the company) never appeared on any frozen asset list, nor were they mentioned in any Executive Order. Although Zepter Banka

appeared on a U.S. frozen asset list, ICG did not include Zepter Banka among the individuals and companies in the Defamatory Passage.

Nor, as explained in Section II.A, did any frozen asset list or Executive Order state that either Zepter or any Zepter company provided financial or other support to the Milosevic regime or its "parallel structures." The lists and orders that ICG claims are fairly reported official sources also do not discuss monopolies, exchange rates, front companies, State Security, Army Counterintelligence, or visa ban lists. As the statements in the Defamatory Passage find no support in any source identified or relied on, the passage is not protected by any fair report privilege. *Id*. at 739; *Prins v. Int'l Tel. and Tel. Corp.*, 757 F. Supp. 87, 93-94 (D.D.C. 1991).

### D. The Fair Comment Protection Does Not Apply

While ICG asserts the fair comment protection in a footnote, this defense has been described as obsolete. *Pearce v. E.F. Hutton Group, Inc.*, 664 F. Supp. 1490, 1503 (D.D.C. 1987) (stating that "it is clear that the [fair comment] doctrine is now obsolete."). Regardless, it would not apply here, as the "fair comment" privilege only protects opinions, and does not shield false statements of fact like the statements about Zepter in Report 145. *Id*. at 1504. Furthermore, the fair comment privilege applies only "'where the reader is aware of the factual foundation of a comment.'" *Lane v. Random House, Inc.,* 985 F. Supp. 141, 150 (D.D.C. 1995) (quoting *Milkovich*, 497 U.S. at 30 n.7, 110 S. Ct. at 2712 n.7, (Brennan, J., dissenting).) As explained in Section II, there is no factual foundation for the Defamatory Passage of which any reader could have been aware.

### E. ICG's Conduct Defeats Any Assertion Of The Fair Report Privilege And The Fair Comment Protection

The law is clear in D.C. that a defamation claim may not be dismissed on the basis of a qualified privilege, such as the fair report or fair comment defenses that ICG asserts, when either

common-law or actual malice is at issue. *Oparaugo,* 884 A.2d at 81 (the fair report privilege "can be defeated by the presence of malice"); *Moss v. Stockard*, 580 A.2d 1011, 1026 (D.C. 1990) (noting that either common-law malice or "actual malice" will defeat a qualified privilege); *Fisher v. Washington Post Co.*, 212 A.2d 335, 337 (D.C. App. 1965) ( "Fair comment or criticism on a matter of public interest is not actionable *so long as the comment is not motivated by malice*." (emphasis added)). ICG did not and could not rebut this in its opposition to Zepter's Motion For Discovery.

The presence of malice requires a factual inquiry and is thus not resolvable at the pleadings stage. *Oparaugo,* 884 A.2d at 82 (explaining that "[w]hether a person acts with malice is ordinarily a question of fact for the jury"). At the pleadings stage, a plaintiff merely needs to plead malice to defeat a motion to dismiss on the basis of a qualified privilege. *Caudle v. Thomason*, 942 F. Supp. 635, 640 (D.D.C. 1996); *Herman v. Labor Coop. Educ. & Publ'g Soc'y*, 139 F. Supp. 35, 38 (D.D.C. 1956); *Oparaugo,* 884 A.2d at 81. The common-law malice sufficient to defeat qualified privileges is the equivalent of bad faith. *Moss*, 580 A.2d at 1024. Zepter included allegations of malice sufficient to defeat ICG's assertions throughout his FAC. (FAC ¶¶ 4, 79, 84, 86, 87, 91, 101, 102, 113.)

As explained above, ICG's after-the-fact explanation for its decision to attack Zepter in the Defamatory Passage is supported by a frozen asset list on which Zepter never appeared on, and has no "no logical basis." At a minimum, this demonstrates that ICG acted with the recklessness sufficient to establish malice. In addition, Zepter has already, without the aid of court-ordered discovery, offered more than enough evidence on these allegations to show that ICG more likely acted with an intent to harm Zepter.

Through Zepter's investigation, Zepter has already learned that ICG's founder and primary sponsor, George Soros, has extensive business interests in Serbia and the Balkans and acquired Ekskimbanka, a Serbian bank in competition with Zepter Banka. (Lomas Decl., Ex. 4.) Other donors as well as the primary investigator and author of Report 145, ICG Serbia Project Director, James Lyon, also have extensive business interests in the region. (FAC ¶¶ 36, 37.)

Lyon's interests are well-documented notwithstanding ICG's recent revisions to his biography. (Lomas Decl., Ex. 11.) He operated several of his own businesses in the Balkans and consulted for numerous foreign and local companies and international government organizations and their subcontractors in Bosnia and Herzegovina. (Lomas Decl., Ex. 12.) In a National Public Radio report regarding the Bosnian economy, reporter Jack Rowland discussed Lyon being one of the few American investors "stay[ing] the course" in Bosnia with business interests "ranging from glass to ready-mixed concrete." (Lomas Decl., Ex. 13.) In that report, Lyon was quoted as understanding that it takes bribery to be successful with one's business activities in Bosnia. (*Id.*)

A Yugoslavian newspaper reported that Lyon is known for leveraging his relationships, his fame derived from authoring ICG reports, his attacks on local government, and his understanding of how the region operates for monetary gain. (Lomas Decl., Ex. 14.) According to the report, "Lyon always had business in his mind, or, at least, as much as he had an interest in preparing the [ICG] reports." (*Id.*) (alteration in original). The report goes on to note that Lyon has relationships with former associates of the Milosevic family and owners of the local arms dealing company. (*Id.*) He has apparently made enemies with U.S. diplomatic officials in the region, with one diplomat dismissing Lyon's work as "'incomplete, sensationalist and scandal-mongering.'" (*Id.*) Zepter's findings and allegations establish a solid prima facie case that ICG

and its employee Lyon intentionally and with malice published the defamatory statements regarding Zepter to further their own political and economic agendas, and those of their political and business allies.

ICG's assertions, having no logical basis, coupled with the financial and business interests that Report 145's author, James Lyon, and ICG's founder and primary sponsor, George Soros, have in the Serbian region, indicate that ICG's decision to include Zepter in Report 145 was more likely an intentional attempt to smear Zepter's name.

## IV. ICG'S DEFENSES DO NOT DEFEAT ZEPTER'S FALSE LIGHT CLAIM

ICG's motion to dismiss should also be denied with respect to Zepter's false light claim. The D.C. Court of Appeals recently clarified that where the same allegations underlay a plaintiff's defamation and false light claims, courts will analyze the claims "in the same manner." *Blodgett v. Univ. Club*, 930 A.2d 210, 223 (D.C. 2007). As shown above, the false and defamatory inference in Report 145 is neither an opinion nor protected by any opinion privilege. Accordingly, just as the statement's unprotected falsity dictates denial of ICG's motion to dismiss with respect to Zepter's defamation claims, so too does it require denial of ICG's motion with respect to Zepter's false light claim.

## V. ZEPTER'S TORTIOUS INTERFERENCE CLAIM IS PROPERLY PLED

ICG's arguments regarding Zepter's tortious interference with business expectancy claim have no merit as (1) the false and defamatory inference in Report 145 is not protected by any privilege, and (2) Zepter properly alleged tortious interference with business expectancy. Accordingly, ICG's motion to dismiss Zepter's tortious interference claims should similarly be denied.

A claim of tortious interference with business expectancy (known under D.C. law as intentional interference with prospective economic advantage) requires, in part, "the existence of

a valid business relationship or expectancy." *Siegel v. Ridgewells, Inc.*, 511 F. Supp. 2d 188, 195 (D.D.C. 2007). Significantly, an expectancy need not be definite; rather, it need only be "commercially reasonable to anticipate." *Carr v. Brown*, 395 A.2d 79, 84 (D.C. 1978); *see also Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (noting that the business expectancy "must be 'commercially reasonable to anticipate'"). In considering whether a business expectancy meets this standard, courts will look at the context of the expectancy:

> For the most part the 'expectancies' thus protected have been those of future contractual relations, such as . . . the opportunity of obtaining customers. In such cases there is a *background of business experience on the basis of which it is possible to estimate with some fair amount of success both the value of what has been lost and the likelihood that the plaintiff would have received it* if the defendant had not interfered.

*Carr*, 395 A.2d at 84 (emphasis added). In *Browning*, the D.C. Circuit found that, although the plaintiff's "allegation that she 'had a reasonable business expectancy' of selling her book to a publisher might, standing alone, fall short," the allegations that she had received favorable press coverage for her story and "encouragement" from one publishing editor "could support an inference that it was 'commercially reasonable [for her] to anticipate' selling the book." *Browning*, 292 F.3d at 242-43 (denying motion to dismiss plaintiff's tortious interference with prospective business opportunity claim).

Here, Zepter has more than adequately pled business expectancies that were "commercially reasonable to anticipate."[7] The damage to Zepter's reputation as a result of the Defamatory Passage "has caused a loss of continued growth" for his businesses and has "hurt current sales and access to possible future sales." (FAC ¶¶ 97-98.) Zepter's "background of

[7] As ICG does not challenge the sufficiency of the First Amended Complaint with respect to the remaining elements, they are not discussed here. The complaint is sufficient as to all elements of Zepter's claim.

business experience" -- *e.g.*, the global expanse of his businesses, the international awards he has received for the success of his businesses, and the consistent past growth of his businesses -- soundly establishes that such continued growth and future sales were "commercially reasonable to anticipate." (*See, e.g.*, *id*. ¶¶ 14-24, 97.) Zepter has established this element of his claim.[8] ICG's motion should therefore be denied.

## CONCLUSION

For the reasons discussed above, Zepter respectfully requests that this Court deny ICG's Motion to Dismiss.

[8] To the extent ICG asserts that a greater degree of specificity is required to establish this element, the case law does not support such an argument. As the *Browning* court stated, even though it thought the plaintiff's allegations "thin," such allegations had to be read "liberally in [the plaintiff's] favor and bearing in mind that discovery and summary judgment motions, *not Rule 12(b)(6) dismissals*, are the appropriate vehicles for weeding out unmeritorious claims." *Browning*, 292 F.3d at 243 (emphasis added).

Respectfully submitted,

/s/ William T. O'Brien

William T. O'Brien (DC Bar No. 450891)
Lisa M. Norrett (DC Bar No. 464089)
John W. Lomas, Jr. (DC Bar No. 976555)
McKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 496-7500
Facsimile: (202) 496-7756

*Of Counsel:*
Peter C. Sheridan
Ivana Ognjanovic
Steven L. Weinberg
CHRISTENSEN, GLASER, FINK,
JACOBS, WEIL & SHAPIRO, LLP
10250 Constellation Blvd., 19th Floor
Los Angeles, CA 90067
Telephone: (310) 282-6243
Facsimile: (310) 556-2920

Malcolm I. Lewin
MORRISON COHEN LLP
909 Third Avenue
New York, NY 10022
Telephone: (212) 735-8625
Facsimile: (212) 735-8708

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*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 23, 2008, I electronically filed the foregoing Plaintiff's Opposition To Defendant's Post-Remand Renewed Motion To Dismiss The First Amended Complaint with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorney of record:

Jonathan L. Greenblatt
Neil H. Koslowe
Shearman & Sterling, LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

/s/ John W. Lomas, Jr.
John W. Lomas, Jr.