File No.

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C., C.B-3, AS AMENDED, AN SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280, AS AMENDED

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC., NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

AFFIDAVIT OF SHANON FOREST
AFFIRMED this 23rd day of March, 2020

LEVENE TADMAN GOLUB LAW CORPORATION
Barristers and Solicitors
700 - 330 St. Mary Avenue
Winnipeg, MB R3C 3Z5

WAYNE M. ONCHULENKO
Telephone No. (204) 957-6402
Fax No. (204) 957-1696
File No.113885/WMO

QB BOX 105

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C., C.B-3, AS AMENDED, AN SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280, AS AMENDED

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NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC., NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

AFFIDAVIT OF SHANNON FOREST

I, **SHANNON FOREST**, of the City of Winnipeg, in the Province of Manitoba, **MAKE OATH AND SAY THAT:**

1. I am a Legal Assistant employed by the law firm Levene Tadman Golub Law Corporation, counsel for the Respondents herein and as such have personal knowledge of the facts and matters which are

hereinafter deposed to by me, except where same are stated to be based on information and belief, and which I believe to be true.

2. Attached hereto and marked as Exhibit "A" to this my Affidavit is a copy of an email forwarded on March 20, 2020 at 2:10 p.m. from Adam Bialek to Wayne Onchulenko attaching Southern District of New York Grand Jury Subpoena to Nygard, Inc. for appearance date March 13, 2020.

3. Attached hereto and marked as Exhibit "B" to this my Affidavit is a copy of an email forwarded on March 20, 2020 at 2:05 p.m. from Adam Bialek to Wayne Onchulenko attaching District of Minnesota Search and Seizure Warrant issued February 24, 2020.

4. Attached hereto and marked as Exhibit "C" to this my Affidavit is a copy of an email string on March 19, 2020 between Sharon Schneier and Jerry Hall attaching New York Superior Court Attorney List and 1st Department Attorney List.

5. Attached hereto and marked as Exhibit "D" to this my Affidavit is a copy of an email forwarded March 20, 2020 at 10:20 p.m. from Adam Bialek to Wayne Onchulenko attaching search warrant for the phone of Peter Nygard in Minneapolis.

6. I am advised by Wayne Onchulenko and do verily believe that Bruce Taylor has responded to all of Mr. Onchulenko's emails. The responses do not appear in this Affidavit because I am informed and do verily believe that Mr. Onchulenko believes they reasonably could be considered to be "Without Prejudice" negotiations. This is the same reason one of the attached emails from Mr. Onchulenko has been redacted.

7. Attached hereto and marked as Exhibit "E" to this my Affidavit is a copy of an email from Wayne Onchulenko to Bruce Taylor on March 20, 2020 commencing at 4:10 p.m. attaching urgent Notice of Motion.

8. Attached hereto and marked as Exhibit "F" to this my Affidavit is a copy of an email forwarded on March 20, 2020 at 4:40 p.m. from Wayne Onchulenko to Bruce Taylor.

9. Attached hereto and marked as Exhibit "G" to this my Affidavit is a copy of an email forwarded on March 21, 2020 at 6:02 p.m. from Wayne Onchulenko to Bruce Taylor and Ross McFadyen.

10. Attached hereto and marked as Exhibit "H" to this my Affidavit is a copy of an email forwarded March 21, 2020 at 4:48 p.m. from Wayne Onchulenko to David Jackson and Catherine Howden.

11. Attached hereto and marked as Exhibit "I" to this my Affidavit is a copy of an email forwarded by David Jackson to Wayne Onchulenko on March 22, 2020 at 10:49 a.m.

12. Attached hereto and marked as Exhibit "J" to this my Affidavit is a copy of an email forwarded by Catherine Howden to Wayne Onchulenko on March 22, 2020 at 11:57 a.m.

13. Attached hereto and marked as Exhibit "K" to this my Affidavit is a copy of an email exchange between Wayne Onchulenko and Adam Bialek on March 22, 2020 at 9:59 p.m.

14. I make this Affidavit *bona fide*.

AFFIRMED before me at the City of Winnipeg, in the Province of Manitoba this 23rd day of March, 2020

SHANNON FOREST

A Commissioner for Oaths in and for the Province of Manitoba

WAYNE ONCHULENKO
Notary Public and
Practising Manitoba Lawyer
700 - 330 St. Mary Avenue
Winnipeg, MB R3C 3Z5

This is exhibit " A " referred to in the
Affidavit of S. Forest
.....sworn
before me at Winn
.....this
23 day of Mar 20 20
.....
A Commissioner for Oaths
in and for the Province of Manitoba
Commission expires.....

WAYNE ONCHULENKO
Notary Public and
Practising Manitoba Lawyer
700 - 330 St. Mary Avenue
Winnipeg, MB R3C 3Z5

A

Wayne M. Onchulenko

From: Bialek, Adam <Adam.Bialek@wilsonelser.com>
Sent: March 20, 2020 2:10 PM
To: Wayne M. Onchulenko
Cc: abe.rubinfeld@att.net
Subject: 2020-02-25 Nygard Inc. Subpoena (003)
Attachments: 2020-02-25 Nygard Inc. Subpoena (003).pdf

Nygard Subpoena by the Feds

Grand Jury Subpoena

United States District Court
SOUTHERN DISTRICT OF NEW YORK

TO: Nygard, Inc.

GREETINGS:

WE COMMAND YOU that all and singular business and excuses being laid aside, you appear and attend before the GRAND JURY of the people of the United States for the Southern District of New York, at the United States Courthouse, 40 Foley Square, Room 220, in the Borough of Manhattan, City of New York, New York, in the Southern District of New York, at the following date, time and place:

Appearance Date: March 13, 2020 Appearance Time: 10:00 a.m.

to testify and give evidence in regard to an alleged violation of federal law and not to depart the Grand Jury without leave thereof, or of the United States Attorney, and that you bring with you and produce at the above time and place the following:

See Attached Rider NB: Personal appearance is not required if the requested documents and objects are (1) produced on or before the return date to Rachel Graves, rlgraves@fbi.gov, and (2) accompanied by an executed copy of the attached Declaration of Custodian of Records. Please provide the information in electronic format if available.

Failure to attend and produce any items hereby demanded will constitute contempt of court and will subject you to civil sanctions and criminal penalties, in addition to other penalties of the Law.

DATED: New York, New York
February 25, 2020

Geoffrey S. Berman/cc

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York

Celia Cohen
Assistant United States Attorney
One St. Andrew's Plaza
Telephone: (212) 637-2466
celia.cohen@usdoj.gov

rev. 01.27.12

RIDER

(Grand Jury Subpoena to Nygard, Inc. Dated February 25, 2020)

Please provide for the period **January 1, 2008 through the present:**

1. All emails to, from, ccing, or bccing Peter Nygard, including drafts and deleted emails;

2. All documents concerning travel by Peter Nygard outside of Canada;

3. A list of all company employees, whether or not salaried;

4. All documents, records, and communications concerning or reflecting guests (day and overnight) to 1 Yawl Street, Marina Del Rey, CA; 17 Yawl Street, Marina Del Rey, CA; Nygard Cay, Bahamas; or 1435 Broadway, New York, New York;

5. All documents, records, and communications with or about persons who have served as administrative or personal assistants to Peter Nygard;

6. Copies of all company data retention policies;

7. Every date in the last five years in which the company purged any data;

8. All documents, records, and communications concerning or reflecting the purging of data from February 13, 2020 to present;

9. All documents, records, and communications concerning or reflecting allegations of sexual misconduct, harassment, or assault by Peter Nygard; and

10. All documents, records, and communications concerning travel booked or paid for by the company for employees or non-employees traveling with Peter Nygard or at his request or direction, including any identification documents for such employees or non-employees.

Personal appearance is not required if the requested documents and objects are (1) produced on or before the return date to Rachel Graves, rlgraves@fbi.gov, and (2) accompanied by an executed copy of the attached Declaration of Custodian of Records. Please provide the information in electronic format if available.

Declaration of Custodian of Records

Pursuant to 28 U.S.C. § 1746, I, the undersigned, hereby declare:

My name is _____.
(name of declarant)

I am a United States citizen and I am over eighteen years of age. I am the custodian of records of the business named below, or I am otherwise qualified as a result of my position with the business named below to make this declaration.

I am in receipt of a Grand Jury Subpoena, dated February 25, 2020, and signed by Assistant United States Attorney Celia Cohen, requesting specified records of the business named below. Pursuant to Rules 902(11) and 803(6) of the Federal Rules of Evidence, I hereby certify that the records provided herewith and in response to the Subpoena:

(1) were made at or near the time of the occurrence of the matters set forth in the records, by, or from information transmitted by, a person with knowledge of those matters;

(2) were kept in the course of regularly conducted business activity; and

(3) were made by the regularly conducted business activity as a regular practice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____.
(date)

_____
(signature of declarant)

_____
(name and title of declarant)

_____
(name of business)

_____
(business address)

_____

_____

Definitions of terms used above:
As defined in Fed. R. Evid. 803(6), "record" includes a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses. The term, "business" as used in Fed. R. Evid. 803(6) and the above declaration includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

This is exhibit " B " referred to in the
Affidavit of S. Forest
.....sworn
before me at Winnipeg this
23 day of May 20 20
.....
A Commissioner for Oaths
in and for the Province of Manitoba
Commission expires.....

WAYNE ONCHULENKO
Notary Public and
Practising Manitoba Lawyer
700 - 330 St. Mary Avenue
Winnipeg, MB R3C 3Z5

Wayne M. Onchulenko

From: Bialek, Adam <Adam.Bialek@wilsonelser.com>
Sent: March 20, 2020 2:05 PM
To: Wayne M. Onchulenko
Cc: abe.rubinfeld@att.net
Subject: FW: Search Warrant executed in Minneapolis for Peter's phone
Attachments: IMG_1286.jpg; IMG_1285.jpg; IMG_1287.jpg; IMG_1284.jpg

This was the search warrant executed on Peter in Minnesota where the FBI took his phone

Adam Bialek
Attorney at Law
Wilson Elser Moskowitz Edelman & Dicker LLP
150 E 42nd Street
New York, NY 10017
212.915.5143 (Direct)
917.538.0616 (Cell)
212.490.3000 (Main)
212.490.3038 (Fax)
adam.bialek@wilsonelser.com

LKB

AO 93 (Rev. 12/09) Search and Seizure Warrant

B 08

UNITED STATES DISTRICT COURT

for the

District of Minnesota

IN THE MATTER OF THE SEARCH OF:
PETER NYGARD AND ANY BAGS OR CONTANERS IN HIS CUSTODY OR CONTROL

SEALED BY ORDER OF THE COURT

Case No. 20MJ153 ECW

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the State and District of Minnesota:

PETER NYGARD AND ANY BAGS OR CONTANERS IN HIS CUSTODY OR CONTROL.

The person or property to be searched, described above, is believed to conceal:

See Attachment A

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property.

YOU ARE COMMANDED to execute this warrant on or before 2/27/2020
(not to exceed 14 days)

_ in the daytime 6:00 a.m. to 10 p.m. X at any time in the day or night as I find reasonable cause has been established.

You must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to United States Magistrate Judge Elizabeth Cowan Wright.

Date and Time issued: 2/24/2020 at 1:42 pm

City and State: St. Paul, MN

Judge's Signature

The Honorable Elizabeth Cowan Wright
United States Magistrate Judge

Printed Name and Title

ATTACHMENT A

I. Devices Subject to Search and Seizure

Law enforcement personnel are authorized to search the person of Peter Nygard and any bags or containers in his custody and control in order to seize and search any cellphones (including smartphones), tablets (including iPads), and laptops in the custody or control of Peter Nygard in the District of Minnesota on February 24, 2020, including the cellphone with IMEI 353283071953314 (collectively, the "Subject Devices").

II. Review of ESI on the Subject Devices

Law enforcement personnel (who may include, in addition to law enforcement officers and agents, attorneys for the government, attorney support staff, agency personnel assisting the government in this investigation, and outside technical experts under government control) are authorized to review the ESI contained on the Subject Devices for evidence, fruits, and instrumentalities of sex trafficking of children and sex trafficking by force, fraud, and coercion, in violation of Title 18, United States Code, Section 1591(a), (b)(1) and (b)(2); conspiracy to commit sex trafficking, in violation of Title 18, United States Code, Section 1594(c); transportation of individuals to engage in prostitution, in violation of Title 18, United States Code, Section 2421; coercion and enticement of individuals to travel to engage in prostitution, in violation of Title 18, United States Code, Section 2422; and Travel Act violations, in violation of Title 18, United States Code, Section 1952(a)(3) (the "Subject Offenses") described as follows:

1. Evidence concerning the identity or location of the owner(s) or user(s) of the Subject Devices;

2. Passwords, encryption keys, and other access devices that may be necessary to access the Subject Devices;

3. Evidence concerning the identity or location of, and communications with, victims and co-conspirators;

4. Evidence of "pamper parties" and/or other female guest-centered events at Nyagrd's properties, including guest lists and contact information for guests;

5. Evidence concerning Nygard's travel within the United States;

6. Evidence concerning any contact with and/or payments (including cash, reimbursement, gifts, in-kind) to any victims, co-conspirators, and/or witnesses;

7. All communications with or about, contact information for, and meetings and appointments with any victims and/or co-co-conspirators (present, past, or those still being recruited);

8. All communications with and evidence of Nygard employees and/or associates involved in identifying and/or tracking female guests to Nygard's properties;

9. Voicemail and all SMS (simple message service) messages, data messages, text messages, stored email, MMS (Multimedia Messaging Service), and any other messages or other information stored on the subject Device pertaining to the Subject Offenses;

10. Files or media containing text, photos, sound recordings, or videos stored on the Subject Device pertaining to the Subject Offenses;

11. Communications and documents concerning allegations of Nygard engaging in any of the Subject Offenses;

12. Evidence of the use of Nygard corporate entities to facilitate or conceal Nygard's commission of the Subject Offenses;

13. Any banking or credit card information for Nygard or Nygard corporate entities.

In conducting this review, law enforcement personnel will make reasonable efforts to search only for files, documents, or other electronically stored information within the categories identified above. However, law enforcement personnel are authorized to conduct a complete review of all the ESI from the Subject Devices if necessary to evaluate its contents and to locate all data responsive to the warrant

III. Accessing ESI

During the execution of this search warrant, law enforcement personnel are authorized to press the fingers (including thumbs) of Peter Nygard to the Touch ID or other fingerprint sensor of the Subject Devices for the purpose of attempting to unlock the devices in order to search the contents as authorized by this warrant.

IV. Return of the Subject Devices

If the Government determines that the Subject Devices are no longer necessary to retrieve and preserve the data on the devices, and that the Subject Devices are not subject to seizure pursuant to Federal Rule of Criminal Procedure 41(c), the Government will return the Subject Devices upon request and in no event later than 60 days from the date of seizure unless additional time is granted by court order. Data that is encrypted or unreadable will not be returned unless law enforcement personnel have determined that the data is not (i) an instrumentality of the offense, (ii) a fruit of the criminal activity, (iii) contraband, (iv) otherwise unlawfully possessed, or (v) evidence of the Subject Offenses.

4

FD-597 (Rev. 4-13-2015) Page 1 of 1

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
Receipt for Property

Case ID: SFD-NY-3184038

On (date) 2/2-4/2020

Item (s) listed below were:
- [x] Collected/Seized
- [ ] Received From
- [ ] Returned To
- [ ] Released To

(Name) PETER WIGARD

(Street Address) WIGARD KEY

(City) NASSAU, BAHAMAS

Description of Item (s): 1 PHONE XS MAX S/N F2LXG3U4KTHK

Received By: _____ (Signature)

Received From: DECLINED TO SIGN (Signature)

Printed Name/Title: Special Agent/Task Force Officer

Printed Name/Title _____

This is exhibit " C " referred to in the
Affidavit of S. Forest
.....sworn
before me at Winnipeg this
23 day of Mar 20 21
.....
A Commissioner for Oaths
in and for the Province of Manitoba
Commission expires.....

WAYNE ONCHULENKO
Notary Public and
Practising Manitoba Lawyer
700 - 330 St. Mary Avenue
Winnipeg, MB R3C 3Z5

C

Wayne M. Onchulenko

From:	Schneier, Sharon <sharonschneier@dwt.com>
Sent:	March 19, 2020 12:22 PM
To:	Hall, Jerry L.
Cc:	Reisman, Steven J.; Giglio, Cindi M.; Bruce Taylor; Wayne M. Onchulenko; Powers, Ragan; Schneier, Sharon
Subject:	RE: Nygard: Chapter 15 proceedings
Attachments:	Documents for Receiver.zip; NY Supreme Court Attorney list.docx; First Department attorney list.docx

Jerry,

As discussed, I have provided information about the New York State Court and First Department proceedings As I mentioned we have various ongoing discovery disputes/motions before the Special Referee.

Let us know if you need additional information.

Thanks,

Sharon L. Schneier

From: Hall, Jerry L. <jerry.hall@katten.com>
Sent: Thursday, March 19, 2020 10:33 AM
To: Schneier, Sharon <sharonschneier@dwt.com>
Cc: Reisman, Steven J. <sreisman@katten.com>; Giglio, Cindi M. <cindi.giglio@katten.com>; Bruce Taylor <GBT@tdslaw.com>; WOnchulenko@ltglc.ca; Powers, Ragan <raganpowers@dwt.com>
Subject: RE: Nygard: Chapter 15 proceedings

[EXTERNAL]

Thanks, I will circulate the invite now.

Jerry L. Hall
Partner

Katten
Katten Muchin Rosenman LLP
575 Madison Avenue | New York, NY 10022-2585
direct +1.212.940.6446 mobile +1.202.812.2909
jerry.hall@katten.com | katten.com

From: Schneier, Sharon <sharonschneier@dwt.com>
Sent: Thursday, March 19, 2020 10:32 AM
To: Hall, Jerry L. <jerry.hall@katten.com>
Cc: Reisman, Steven J. <sreisman@katten.com>; Giglio, Cindi M. <cindi.giglio@katten.com>; Bruce Taylor <GBT@tdslaw.com>; WOnchulenko@ltglc.ca; Schneier, Sharon <sharonschneier@dwt.com>; Powers, Ragan <raganpowers@dwt.com>
Subject: RE: Nygard: Chapter 15 proceedings

EXTERNAL EMAIL – EXERCISE CAUTION

Jerry,

That works for me. I have included my colleague, Ragan Powers on this email, who practices in the bankruptcy and restructuring area so that he might be included on the invite.

Sharon

From: Hall, Jerry L. <jerry.hall@katten.com>
Sent: Thursday, March 19, 2020 10:26 AM
To: Schneier, Sharon <sharonschneier@dwt.com>
Cc: Reisman, Steven J. <sreisman@katten.com>; Giglio, Cindi M. <cindi.giglio@katten.com>; Bruce Taylor <GBT@tdslaw.com>; WOnchulenko@ltglc.ca
Subject: Nygard: Chapter 15 proceedings

[EXTERNAL]

Sharon,

Katten represents the receivers in chapter 15 proceedings filed last night. We understand you have questions and would like to discuss with us. May we propose 11:30 am ET for a call? If that works, I will circulate a dial in.

Jerry

Jerry L. Hall
Partner

Katten
Katten Muchin Rosenman LLP
575 Madison Avenue | New York, NY 10022-2585
direct +1.212.940.6446 mobile +1.202.812.2909
jerry.hall@katten.com | katten.com

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM
Justice

LOUIS BACON,

Plaintiff,

- v -

PETER NYGARD, NYGARD INTERNATIONAL PARTNERSHIP, NYGARD INC. and DOES 1-20,

Defendants.

INDEX NO. 150400/2015

Upon a telephonic conference with the Special Referee The Honorable Frank Maas (Ret.) ("The Special Referee"), it is hereby

ORDERED that the deadline for fact discovery remains February 28, 2020, subject to the Special Referee having authority to permit certain discovery beyond said date, but in no event later than April 1, 2020; and it is further

ORDERED that the parties may discuss proposals for expert disclosure with the Special Referee (*see generally* CPLR 3101 [d]), and the Court will consider a recommendation from the Special Referee regarding expert disclosure, with such recommendation being made by e-filed and e-mailed letter on or before April 1, 2020.

The foregoing constitutes the order of this Court.

HON. ROBERT D. KALISH

DATE: 2/20/2020

Check One: ☐ Case Disposed ☒ Non-Final Disposition

Check If Appropriate: ☐ Other (Specify _____)

OTHER ORDER – NON-MOTION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

Justice

---X

LOUIS BACON,

Plaintiff,

- v -

PETER NYGARD, NYGARD INTERNATIONAL PARTNERSHIP, NYGARD INC. and DOES 1-20,

Defendants.

---X

INDEX NO. 150400/2015

MOTION DATE 3/26/2019

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers 1, 25, 26, 28, 29, 30, 201, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 364, 365, 366, 433, 480, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 667, 668, 669, 670, 671, 672, 684, 685, 686 were read on this motion to dismiss (motion sequence 008).

Motion to dismiss, pursuant to CPLR 3211, is decided in accordance with the annexed memorandum decision and order.

7/18/2019
DATE

HON. ROBERT D. KALISH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

----------X

LOUIS BACON,

Plaintiff,

– against –

PETER NYGARD, NYGARD INTERNATIONAL PARTNERSHIP, NYGARD, INC. and DOES 1-20,

Defendants.

Index No. 150400/2015

Motion Date: 3/26/2019

Motion Seq. No.: 008

DECISION/ORDER

----------X

HON. ROBERT D. KALISH, J.S.C.:

The following e-filed documents, listed by NYSCEF document numbers 1, 25, 26, 28, 29, 30, 201, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 364, 365, 366, 433, 480, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 667, 668, 669, 670, 671, 672, 684, 685, 686 were read on this motion to dismiss (motion sequence 008).

In this action, plaintiff Louis Bacon alleges that defendant Peter Nygard, his companies and various unnamed parties engaged in a campaign to defame him with accusations including murder, arson, racism, bribery and smuggling. Defendants now move to dismiss, in whole or in part, 54 of the 64 allegedly defamatory statements in the Third Amended Complaint (TAC) (Doc. 481-546)[1] that survived defendants' previous motions to dismiss.

[1] References to "Doc." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system based on their corresponding NYSCEF Document Number. An explanation of which documents constitute the TAC is provided in section 2 below.

BACKGROUND

1. Procedural History

Plaintiff commenced this action on January 14, 2015, alleging 42 defamatory statements and asserting causes of action for defamation, prima facie tort, aiding and abetting and civil conspiracy (Doc. 1) (Summons and Complaint). An amended pleading was filed on March 3, 2015, adding 93 statements (for a total of 135) and asserting a new cause of action for intentional infliction of emotional distress (Doc. 25) (First Amended Complaint) (FAC). Rather than appearing in the body of that pleading, however, all of the 135 statements were set forth in chronological order in a separate numbered list annexed as Appendix A to the FAC (Doc. 26) (incorporated by reference by FAC ¶ 15). That appendix specified the exact words of each statement together with the date, publication or source, and alleged speaker or author of each one.

Defendants moved to dismiss statement nos. 1-105 as time-barred, and to dismiss the claims for prima facie tort and emotional distress as duplicative of the defamation claims (Doc. 28-30). Defendants, by their prior counsel, did not challenge the legal sufficiency of any of the 30 remaining non-timed-barred statements (nos. 106-135). By order dated July 28, 2015, the court, with The Honorable Cynthia S. Kern then presiding, granted the motion in its entirety (*Bacon v Nygard,* 2015 WL 4596382 [Sup Ct, NY Co 2015], *aff'd* 140 AD3d 577 [1st Dept 2016]).

Plaintiff filed the Second Amended Complaint (SAC) (Doc. 297) on March 6, 2016. In addition to the 30 statements (nos. 106-135) that were unchallenged in the motion to dismiss, Appendix A to the SAC (Doc. 298) (incorporated by reference by SAC ¶ 15) identified another

34 allegedly defamatory statements (nos. 136-169) that were published after the original commencement of the action. Appendix A also repeated the 105 statements that had previously been dismissed as time-barred, and the SAC reasserted the dismissed causes of action for intentional infliction of emotional distress and prima facie tort. Unlike the FAC, the SAC also included an Appendix B (Doc. 299-362) (incorporated by reference by SAC ¶15, fn.1), which supplied actual copies of the various publications, tweets, webpages, Facebook posts and other sources for the 64 statements listed in Appendix A.

In response, defendants moved to dismiss the action in its entirety on *forum non conveniens* grounds (Doc. 364-66). In the alternative, that motion challenged in whole or in part the legal sufficiency of 31 of the 34 new statements, as well as the sufficiency of the 30 earlier-asserted statements.[2] Defendants further sought dismissal of the previously dismissed statements and causes of action (statement nos. 1-105). In addition to his opposition on the merits to the motion, plaintiff argued that the single motion rule precluded a challenge to the 30 statements that could have been raised on defendants' first motion (Doc. 433 [P's Mem. in Opp. to Dismiss SAC], pp. 15-16).

After the motion was submitted, the parties entered into a stipulation (Doc. 480) permitting the filing of the TAC and agreeing that the motion would apply to the TAC rather than the SAC. The TAC is essentially identical to the SAC except for the elimination of the non-defamation causes of action and a few immaterial word changes. The TAC also includes

[2] Specifically, of the new statements (nos. 136-169), defendants did not challenge nos. 138, 141 and 147, sought partial dismissal of nos. 142-143, 149-152 and 154, and complete dismissal of the rest. Of the old statements (nos. 106-135), defendants sought partial dismissal of nos. 115, 127-28, and complete dismissal of the rest (Doc. 365 [D's Mem to Dismiss the SAC], p. 14 fn. 7).

Appendices A and B, setting forth the language and providing the source for the same alleged 64 defamatory statements as the SAC. However, TAC ¶ 15 purports to incorporate "Appendix A to this Second Amended Complaint" (emphasis supplied), rather than the Third Amended Complaint. Furthermore, the actual document filed under the document description "Appendix A to Third Amended Complaint" is captioned "Appendix A to Second Amended Complaint" (Doc. 482) (emphasis supplied). TAC Appendix A is, in fact, apparently the very same document that was annexed to the SAC, except that the new document number (482) is typed over the old one (298). The TAC also has the same Appendix B as the SAC (Doc. 483-546) (incorporated by reference by TAC ¶ 15, fn.1).

By order dated August 10, 2016, Justice Kern dismissed the action on *forum non conveniens* grounds, without reaching any other issue (*Bacon v Nygard*, 2016 WL 4363026 [Sup Ct, NY Co 2016]). The Appellate Division, First Department reversed on April 24, 2018 (*Bacon v Nygard*, 160 AD3d 565 [1st Dept 2018]), at which point the case was transferred to this part in view of Justice's Kern's elevation to the Appellate Division, First Department. At the conference upon remittitur on September 12, 2018, this court directed defendants to "retype and revamp the motion that was made" so that the issues left unresolved by the trial and appellate court could be determined (Transcript of oral argument, 9/12/2018 [Tr.] 5:8-13). The court cautioned that no new claims or arguments should be raised by either party, other than those involving a change in the controlling law (*id.*, 5:14-23; 6:11-18).

Defendants refiled their motion on October 11, 2018. By letter dated October 17, 2018 (Doc. 656), plaintiff objected that the motion had been enhanced in violation of the court's instructions by the inclusion of new grounds and arguments for dismissal. Specifically, plaintiff

complained of defendants' invocation of the Communications Decency Act (CDA); new arguments about republication with respect to embedded videos and third-party control; a new analysis for differentiating between opinion and fact; and a revised argument regarding the standard for immunity under New York Civil Rights Law § 74. Plaintiff further objected to defendants' reliance on substantially different case law, including 40 new authorities of which only four post-dated the briefing of the prior motion. At a phone conference with the court on October 19, 2018, defendants agreed, at a minimum, that the CDA claim would be withdrawn (D's Reply Mem. to Dismiss TAC [Doc. 671], p. 1 fn.2). Defendants also no longer challenge the sufficiency of statement no. 128.

2. The Third Amended Complaint

The substance of the Third Amended Complaint will be discussed below. However, for the purposes of this motion, the operative pleading must be precisely identified. Upon a careful examination of the parties' submissions, the court has determined that the complete complaint has not been properly placed into the record for this motion. Nevertheless, after reviewing the entire NYSCEF docket for this case, the court will deem, *sua sponte*, that document no. 562 ("Third Amended Complaint"), together with document no. 482 ("Appendix A to Second Amended Complaint") and document nos. 483-546, constitute the relevant pleading.

This clarification is important because on a CPLR 3211 motion, the court's analysis of plaintiff's claims is "limited to the four corners of the pleading" (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015]; *see also Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]). Consequently, dismissal will generally be precluded where the complaint has not been included in the moving papers (*344 E. 72 Ltd. Partnership v Dragatt*, 188 AD2d 324,

324,28 [1st Dept 1992]). This rule takes on special meaning in a defamation action, in which the plaintiff is required to set forth for the court's review the exact words of the offending statements (*see Offor v Mercy Med. Ctr.*, 171 AD3d 502, 502 [1st Dept 2019]; *Rubin v Napoli Bern Ripka Shkolnik, LLP*, 151 AD3d 603, 604 [1st Dept 2017]; CPLR 3016[a]).

While defendants' motion annexed the document entitled "Third Amended Complaint," (McNamara Affirm. [Doc. 650], Ex. B [Doc. 652]) the appendices setting forth the actual defamatory statements were not included in their papers.[3] At oral argument, the court and the parties consulted a couple of charts prepared by defendants (McNamara Affirm., Ex. D [Doc. 654]), the second of which ("Chart 2") did provide the relevant statements. Although the charts were helpful for the purpose of discussion, the court is of course required to review the actual, controlling pleading to ensure that a party's purported reproduction of it is accurate.

The omission of the complaint from the hard copy of the motion submitted to the court is not necessarily fatal, because "in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the document numbers on the e-filing system" (CPLR 2214[c]; *see Studio A Showroom, LLC v Yoon*, 99 AD3d 632, 952 N.Y.S.2d 879 [1st Dept 2012]). However, defendants did not do that either. Defendants' supporting affirmation referenced only the "Third Amended Complaint" (without the appendices) and the charts (McNamara Affirm. ¶¶ 13, 21). Nor was the document number for the relevant appendices provided in any of the memoranda of law. Moreover, there are no appendices filed under any of the electronic docket

[3] Defendants' memoranda suggest that some of the statements are set forth in the numbered paragraphs in the body of the complaint (see D's Mem. to Dismiss TAC, pp. 7 fn. 7, 11, 13), when in fact the paragraph number citations refer to the statements as numbered in the appendix.

entries under this motion sequence number 008.

Nevertheless, as noted, the court has concluded that "Appendix A to Second Amended Complaint," filed in connection with motion sequence number 006 under document number 482 is the correct appendix. Although it differs from Chart 2 in that it includes the first 105 previously dismissed statements, the remaining statements correspond to those in Chart 2.[4] Furthermore, despite its title, the document description field entry for the document is "Appendix A to Third Amended Complaint." It is also significant that the Third Amended Complaint misidentifies itself as the Second Amended Complaint in the paragraph referencing that appendix, as this suggests that the miscaptioning of the appendix was a similar error. The court deems the mislabeling to be a mere "mistake, omission, defect or irregularity" under CPLR 2001, and, under its power to correct errors, rules that it is Appendix A to the Third Amended Complaint (*see Greenwich Ins. Co. v New Amsterdam Assocs.*, 111 AD3d 543, 544 [1st Dept 2013]). Similarly, the court rules that Doc. nos. 483-546 constitute Appendix B to the TAC.

DISCUSSION

Defendants' renewed motion seeks to dismiss 54 statements -- 49 statements in their entirety (nos. 106-127, 129-135, 136, 145-146, 148, 153 and 155-169) and five statements in part (nos. 149-152 and 154).[5] The subject matter of the challenged statements fall into the following

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[4] The fact that defendants have requested dismissal of the 105 statements not appearing in Chart 2 (see D's Mem. to Dismiss TAC [Doc. 649], p.1 fn.2) is a further indication that the court has identified the relevant appendix.

[5] Defendants have withdrawn their previous challenge to statement no. 128. However, they have renewed their challenge to statements 1- 105 on law of the case grounds in view of Justice Kern's July 28, 2015 order dismissing them as time-barred. Although plaintiff previously resisted dismissal of those statements on the grounds that retaining the statements was necessary to either preserve the appellate record (see Ps 1/22/2016 letter to court [Doc. 201]) or establish malice (P's Mem. in Opp. to Dismiss SAC, p. 30), his papers are now silent on the issue and the

five categories:

(1) Bacon's familial ties to the Ku Klux Klan and Bacon's own racist beliefs (113-118, 125-127, 129, 132-133, 135-136, 148-162, 165-167, 169);
(2) Bacon's involvement in a fire at Nygard's Bahamian residence (nos. 119-124);
(3) A police search of Bacon's Bahamian residence (nos. 109-112);
(4) The death of one of Bacon's employees (nos. 107-108, 131, 145, 146, 163, 164); and
(5) Bacon's bribery of a Bahamian citizen (no. 106).[6]

Defendants invoke multiple grounds for dismissal. First, they contend that 16 of the statements (nos. 106–109, 111, 113, 117, 122–124, 126, 130, 135, 155, 165, 168) are hyperlinks or embedded videos that originate elsewhere on the internet and are thus nonactionable under the single publication rule. Second, they argue that 46 statements (nos. 106-118, 125-127, 129, 131-136, 145-146, 148-167, 169) are nonactionable as defamation because they are merely opinion, hyperbole, rhetoric or speculation. Third, they urge that six of the statements (nos. 119-124) are fair and accurate reports of judicial proceedings that are absolutely privileged under NY Civil Rights Law § 74.[7] Finally, defendants argue that plaintiff waived any claims pertaining to twelve statements (nos. 113, 125-27, 149-152, 165-167) regarding his familial connection to the Ku Klux Klan.

In response, plaintiff argues that the court need not even consider defendants' contentions regarding the first 29 statements (nos. 106-127 and 129-135) under the single motion rule, as defendants failed to move for dismissal of those claims on the prior CPLR 3211 motion.

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application is thus granted without opposition.

[6] Defendants also list a sixth category relating to investigations by governmental and regulatory entities into Bacon and his companies (149-52, 154), but only challenge the parts of those statements that fall into the racism category.

[7] This issue will not be discussed because, as set forth below, consideration of the underlying statements is barred by the single motion rule.

Plaintiff disputes that the single publication rule applies because defendants reproduced part of the defamatory statements when they posted the links and videos, and intended for them to reach a new audience. In rejecting the characterization of the statements as opinion, hyperbole, rhetoric or speculation, plaintiff asserts that the statements are based on objectively false facts. Plaintiff agrees that he is not asserting any claims based on statements made about any member of his family other than himself, but disputes that the statements referencing the Ku Klux Klan connection must be dismissed on that basis.

For the reasons set forth below, the branch of defendants' motion to dismiss with respect to statement nos. 106-135 is denied pursuant to the single motion rule. However, the motion is granted with respect to statement nos. 136, 148, 155-157, 160, 165-167 and 169 and is otherwise denied. In granting this limited portion of Defendants' motion to dismiss, this court is, in sum and substance, finding only that certain statements that assert an opinion that plaintiff is racist or otherwise associate plaintiff with the KKK are non-actionable as either rhetorical epithets or protected expressions of pure opinion, and that these statements do not, as Plaintiff argues, assert any facts about plaintiff, such as that he is in fact a member of the KKK. Justice Kern's prior order dismissed the defamation claims predicated on statements 1-105 as time barred, and, to the extent that this status was in dispute on this motion, that order remains effective.

1. The Single Motion Rule

The court will discuss plaintiff's argument under the single motion rule first because, having determined that it is meritorious, its resolution will dispense with the necessity of addressing over half of the challenged statements. As noted, defendants did not challenge the

legal sufficiency of 30 of the statements (nos. 106-135) on the prior motion, and now have expressly withdrawn their challenge to one of them (no. 128). The court finds that the single motion rule bars a challenge, on this motion, to the remaining 29 statements.

CPLR 3211 (e) codifies the single motion rule, which prohibits a party from bringing repetitive and subsequent motions to dismiss a pleading pursuant to the provisions of CPLR 3211 (a) after being given the full opportunity to raise the same argument (*Landes v Provident Realty Partners II, LP*, 137 AD3d 694 [1st Dept 2016]). The rule is designed to prevent delay before answer (*see Held v Kaufman*, 91 NY2d 425, 430 [1998]), to protect the pleader from being harassed by repeated CPLR 3211(a) motions (*Nassau Roofing & Sheet Metal Co. v Celotex Corp.*, 74 AD2d 679, 680 [3d Dept 1980]), and to conserve judicial resources (*Oakley v Cty. of Nassau*, 127 AD3d 946, 947 [2d Dept 2015]). The rule does not apply where the motion to dismiss is directed to new claims interposed in an amended complaint (*Kocourek v Booz Allen Hamilton Inc.*, 114 AD3d 567, 569 [1st Dept 2014]; *Barbarito v Zahavi*, 107 AD3d 416, 420 [1st Dept 2013]), but will bar a motion directed at causes of action in an amended pleading which are substantially similar and have merely been restated or renumbered (*Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738, 739 [2d Dept 2015]; *Swift v New York Med. Coll.*, 48 AD3d 671, 671 [2d Dept 2008]; *B.S.L. One Owners Corp. v Key Int'l Mfg., Inc.*, 225 AD2d 643, 644 [2d Dept 1996]).

Statements 106-127 and 129-135 were included, identical in form and bearing those very same numbers, in Appendix A to the FAC. When defendants moved to dismiss that pleading in 2015, they elected to challenge the legal sufficiency of only the claims for emotional distress and prima facie tort. As to the defamation claims, their sole ground for dismissal was the statute of

limitations. Accordingly, they are procedurally barred from now challenging them for failure to state a claim, although they may—if so advised—renew their objections at another juncture such as summary judgment (*Oakley*, 127 AD3d 946, 947; *see McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983]).

Defendants nevertheless argue that they were not in a position to challenge the sufficiency of the defamation claims without the more "fulsome" record provided by the additional appendices and allegations of the SAC and the TAC. They claim that until plaintiff supplied them with the full text of the articles and publications in which the statements appeared, they could not evaluate whether the statements were defamatory in the context in which they appeared. This contention is without merit, as the original appendix provided more than sufficient context to make that determination. Furthermore, the appendix supplied defendants with the sources and dates of the statements, so they could have easily accessed the articles if they believed some context was lacking. The question here is quite different from that in *Lemberg v John Blair Commcns., Inc.*, 258 AD2d 291, 292 (1st Dept 1999), where a second CPLR 3211 (a) motion was permitted as a follow-up to a more-definite-statement motion brought "to determine to whom and under what circumstances the allegedly slanderous statement had been uttered." Here, defendants had all of the necessary information regarding the audience and circumstances of the statements, and could have moved for amplification of the pleadings, as did the defendant in *Lemberg*, if they believed they required additional information.

Accordingly, as at oral argument, the court's review on this motion will be limited to statements nos. 136-169. To the extent any of statements in nos. 106-135 are the same or similar to the ones under review here, the parties should be guided by this decision if challenges

arise to nos. 106-135 at a later stage in these proceedings.

2. The Single Publication Rule

In view of the court's disposition above of the single motion rule issue, only three of the sixteen statements challenged under the single publication rule (nos. 155, 165, 168) remain for consideration. However, defendants' reliance on the latter rule is somewhat misplaced. As they acknowledge, "[t]hat rule provides that the statute of limitations for a defamation claim runs from the first publication of the defamatory material" (D's Reply Mem. to Dismiss TAC, p. 2) (emphasis supplied). Thus, in virtually every case the parties cite, the rule is deployed to determine whether a statement is a republication of an earlier time-barred one, such that the new statement restarts the limitations period (*see Firth v State*, 98 NY2d 365, 370 [2002]; *Rinaldi v Viking Penguin, Inc.*, 52 NY2d 422 [1981]; *Biro v. Conde Nast*, 171 AD3d 463, 463–64 [1st Dept 2019]; *Martin v Daily News L.P.*, 121 AD3d 90, 103 [1st Dept 2014]; *Penaherrera v N.Y. Times Co.*, 2013 WL 4013487, *6 [Sup Ct NY Co 2013]; *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 [3d Cir 2012]; *Clark v Viacom Int'l Inc.*, 617 F App'x 495, 499 (6th Cir 2015]; *Shepard v TheHuffingtonPost.com, Inc.*, 2012 WL 5584615, *2 [D Minn 2012]; *Salyer v S. Poverty Law Ctr., Inc.*, 701 F Supp 2d 912, 918 (WD Ky 2009]; *Sundance Image Tech., Inc. v Cone Editions Press, Ltd.*, 2007 WL 935703, *7 (SD Cal 2007]). Here, defendants have not raised a statute of limitations defense to any of the statements at issue, and do not claim that they linked to time-barred statements.[8] Rather, their claim is that posting a hyperlink or embedded video, by itself,

[8] Based on the Court's review of Appendix A, it appears that statement nos. 155, 165, and 168 contain embeds and / or links to content in statement nos. 153, 166 and 130 respectively. Given that there is no argument that the latter statement nos. are time-barred, it would seem that perhaps the single publication rule is not relevant. Whereas the single publication rule was intended to prevent the "endless retriggering of the statute of limitations" and the "multiplicity of

is not a publication of a statement.

The reasoning of those cases, nevertheless, does have some bearing upon that question. In *Firth*, the Court of Appeals recognized that an online republication can be actionable where it "is intended to and actually reaches a new audience" (*Firth*, 98 NY2d 365, 371). In a subsequent action by the same plaintiff, the Third Department held that the allegation that the same defamatory material was moved to a new internet address was sufficient to state a claim for republication (*Firth v State of New York*, 306 AD2d 666, 667 (3d Dept 2003). Subsequently, the First Department has found that additional factors relevant to whether a reposting is actionable include "whether the second publication is made on an occasion distinct from the initial one, the republished statement has been modified in form or in content, and the defendant has control over the decision to republish the subsequent publication" (*Martin*, 121 AD3d 90, 103–04 [1st Dept 2014] [internal quotation marks omitted], *quoting Hoesten v Best*, 34 AD3d 143, 150–151 [1st Dept 2006]). However, the court in *Martin* found that that there had been no republication of the allegedly defamatory article in question, where it had merely been restored to the same website with new hyperlinks to social media and networking sites (*Martin*, 121 AD3d 90, 104). In so holding, the court approved of the determination of the trial court (*Martin v Daily News, LP*, 951 NYS2d 87 [Sup Ct 2012]) that although the hyperlinks from the website may have reached a new audience, it was an audience created by the actions of the website's existing

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suits" across different fora, here, the original content was timely sued on in the same litigation (*Firth v State*, 98 NY2d 365, 370 [2002]; *see also Doctor's Data, Inc. v Barrett*, 170 F Supp 3d 1087, 1106 [ND Ill 2016] [holding that "the single publication rule is of import only where res judicata or statute of limitations defenses are at issue"].) However, given that there is no controlling authority on this question and the lack of argument on it, the court will consider the merits of whether the subject statements are actionable republications.

audience, not the defendant.

In *Haefner v New York Media, LLC,* 82 AD3d 481, 482 (1st Dept 2011), the First Department similarly held that "the continuous access to a web article via links on [defendant's] website was not a republication." Although there was also a link to the article from a third party website, the court noted the link was effected without defendants' acquiescence or participation.

The court concludes that the single publication rule does not bar plaintiff's reliance on the links and embeds. It is alleged that all three statements are posts by Nygard's lawyer, Keod Smith, deliberately using his Facebook platform to draw a larger audience to websites which are themselves allegedly operated by defendants or their proxies. Plaintiff alleges that defendants thus had complete control over the republications, and, at this early stage of the litigation, plaintiff is entitled to the inference that these statements are not merely being accessed by the websites' original audiences, or being viewed by third parties who stumbled across the website's passive links. Defendants' argument that the embeds are under the exclusive control of a third-party host rather than the embedding website (D's Mem. to Dismiss TAC, p. 4) therefore has no force because defendants allegedly control both websites.

Furthermore, statement no. 165 attempts to direct special attention to the accusation against plaintiff by introducing the linked website with the title "Moments In History: Louis Bacon – A Chip Off The Old Racist KKK Moore Block?" And although nos. 155 and 168 are not accompanied by such descriptive introductions, the court rejects defendants' argument that such commentary is always required to constitute a republication. While there is authority for the position that a hyperlink that merely identifies the location of a republication, rather than duplicating or restating the defamatory content, is not a republication (*see Biro,* 171 AD3d 463,

364; *Mirage Entm't, Inc. v FEG Entretenimientos SA.*, 326 F Supp 3d 26, 39 [SD NY 2018]; *Doctor's Data, Inc. v Barrett*, 170 F Supp 3d 1087, 1137 [ND Ill. 2016]; *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175), the court concludes that those cases have little application under the circumstances presented here where plaintiff alleges that defendants created several media platforms specifically to attack him and promote the statements (*see, e.g., Daniels v Kostreva*, 2017 WL 519227, *4 [ED NY 2017] [defendant created website solely about plaintiff with the sole purpose of disseminating injurious falsehoods], *reconsideration denied*, 2017 WL 818371 [ED NY 2017]).

3. The Allegedly Defamatory Statements

This court's application of the single motion rule, above, obviates the need to consider any of the statements relating to the police raid (nos. 109-112) and bribery (no. 106). What remain for review are 17 statements relating to racism (nos. 136, 149-155, 158-162, 165-167, 169),[9] two statements regarding the fire at Nygard's residence (nos. 161-162), and four statements regarding the death of Bacon's employee (nos. 145-146, 163-164).

A. Statements Regarding Plaintiff's Alleged Racism

A number of the statements label plaintiff as an "avowed racist" (Nos.158-59) or a "white Supremacist" (Nos. 161-62). Others imply his racism with the phrases "Bacon is KKK" (136, 149-52, 154) or "Louis KKK Bacon" (nos. 160, 169), or otherwise suggest that he holds racist

[9] At oral argument, the court disposed of no. 148 (mock mugshot of plaintiff with his name emblazoned above it in confederate flag colors) (Tr. 29:11-20) and nos. 156-57 (mock mugshot as in no. 148, together with second picture of plaintiff surrounded by confederate imagery and accompanied by the words "Louis Moore Bacon Unmasked: Modern Day Racism out of the Carolinas, Rooted in the Navel String of Louis Bacon Moore, Now being Exported to the Bahamas") (*id.*, 44:19-45:10).

views (nos. 148-57, 165-67). Defendants contend that the statements are nonactionable opinion, hyperbole or rhetoric, and that some of them cannot reasonably be attributed to defendants. Plaintiff argues that these statements assert false facts about him and can reasonably be attributed to defendants.

Defamation is "the making of a false statement that 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society'" (*Manfredonia v Weiss*, 37 AD3d 286, 286 [1st Dept 2007], quoting *Sydney v. MacFadden Newspaper Publ. Corp.*, 242 NY 208, 211–212 [1926]). An action for defamation seeks to compensate the plaintiff for the injury to his or her reputation caused by the defendant's written expression, which is libel, or by the latter's oral expression, which is slander (*Intellect Art Multimedia, Inc. v Milewski*, 24 Misc 3d 1248(A) [Sup Ct, NY County 2009] [Gische, J.]; *Idema v Wager*, 120 F Supp 2d 361, 365 [SDNY 2000], *affd*, 29 Fed Appx 676 [2d Cir 2002]). To state a claim for defamation, a plaintiff must allege: (1) a false statement that is (2) published to a third party without privilege or authorization (3) constituting fault as judged by, at a minimum, a negligence standard and that (4) causes special harm, unless the statement constitutes defamation per se (in which case damages are presumed) (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]; *Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014]; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]).

"Since falsity is a sine qua non of a libel claim and since only assertions of fact are capable of being proven false, a libel action cannot be maintained unless it is premised on published assertions of fact, rather than on assertions of opinion" (*Sandals Resorts Int'l Ltd. v*

Google, Inc., 86 AD3d 32, 38, [1st Dept 2011] [internal citations, quotations marks and emendation omitted]). "Distinguishing between fact and opinion is a question of law for the courts, to be decided based on what the average person hearing or reading the communication would take it to mean" (*Davis v Boeheim*, 24 NY3d 262, 269 [2014]).

New York applies three factors to determine whether a reasonable reader would consider a statement fact or opinion: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact" (*Davis*, 24 NY3d 262, 270) (citations and quotations omitted). Furthermore, as the Court of Appeals has explained:

> A "pure opinion" is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be a "pure opinion" if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a "mixed opinion" and is actionable. The actionable element of a "mixed opinion" is not the false statement itself-it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking.

Steinhilber v Alphons, 68 NY2d 283, 289-90 (1986) [citations and quotations omitted]. Applying a holistic approach, a court should not "sift[]through a communication for the purpose of isolating and identifying assertions of fact" but "should look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the . . . plaintiff" (*Davis*, 24 NY3d 262, 270 (citations and quotations omitted). Where internet postings are at issue, a court

should take into consideration the "freewheeling, anything-goes writing style" the medium encourages, keeping in mind that readers give less credence to online accusations (*Sandals*, 86 AD3d 32, 43).

In defamation cases involving allegations of racism, labeling a person with an epithet such as "racist" or "Nazi," without more, has generally been found to be a nonactionable expression of opinion and/or rhetorical hyperbole (*see Wanamaker v VHA, Inc.*, 19 AD3d 1011, 1012 [4th Dept 2005], *appeal and rearg denied* 21 AD3d 1442 [4th Dept 2005]; *Schwartz v Nordstrom, Inc.*, 160 AD2d 240, 241 [1st Dept 1990], *appeal dismissed* 76 NY2d 845 [1990], *appeal denied* 76 NY2d 711 [1990]; *Borzellieri v Daily News, LP,* 2013 WL 1734778 ,*4 [Sup Ct, Queens County 2013].) When defendants disclose the facts upon which the characterization is based, their characterizing the plaintiff as racist is usually found to be a protected expression of opinion (*see e.g. Russell v Davies*, 97 AD3d 649, 651 [2d Dept 2012] [defendants supported statements that plaintiff was racist and anti-Semitic with express reference to an article plaintiff wrote]); *Silverman v Daily News, L.P.,* 129 AD3d 1054, 1055 [2d Dept 2015] [defendant supported accusation that plaintiff authored racist writings and had ties to a white supremacist group with reference to written materials authored by plaintiff]); *Wanamaker, supra*). However, falsely attributing specific biased statements or actions to a plaintiff may give rise to a claim for defamation (*see e.g. Herlihy v Metro. Museum of Art*, 214 AD2d 250, 254 [1st Dept 1995] [defendant attributed to plaintiff statements that "you Jews are such liars" and "you Jews are all alike" and that Jewish volunteers were "f--king whores," "liars" and "undependable"]; *Como v Riley*, 287 AD2d 416, 416 [1st Dept 2001] [email claiming that plaintiff's office cubicle contained a statuette of a black man hanging from a white noose]).

a. "Avowed Racist" (Nos. 158-159)

Statement nos. 158 and 159 (Doc. 535-536) are identical paragraphs appearing in an article posted at both Re-Negotiate.org and Re-Negotiate.net, political commentary websites allegedly controlled by Nygard through his lawyer, Keod Smith. In introducing the mission of the websites, the article states:

> We make our case, in part, by exposing the offensive and despicable charade of the organization known as "Save the Bays" which is financed and controlled by Louis Bacon, an avowed racist with a family past and presence [sic] steeped in the filth of the KKK, racism, oppression and segregation.

The remainder of the article is devoted to vowing to fight plaintiff's alleged effort to use his wealth to wrest control of the Bahamas from the Bahamian people.

In tone and content, the article is very similar to the email under consideration in *Sandals*, which questioned the exploitation of native Jamaicans by foreign corporations profiting from the tourist industry. There, the First Department rejected the defamation claim, despite acknowledging that the email could be viewed as an accusation that the plaintiff resort engaged in racially discriminatory employment practices. The court found that the email's overall purpose was "not to characterize Sandals Resorts as racist . . . [i]t [was] to call to the reader's attention the writer's belief that the native people of Jamaica, specifically the taxpayers, are providing financial support for the resorts on their island, but are not reaping commensurate financial rewards for that investment" (*Sandals*, 86 AD3d 32, 42–43). The *Sandals* court also noted that the email's author's opinion was based upon disclosed facts, with each remark either prompted by or responsive to a hyperlink.

Notwithstanding certain similarities, the court finds the instant case distinguishable from

Sandals. In *Sandals*, the author of the email merely raised questions regarding the plaintiff's hiring practices, without any direct accusation of racism. Here, defendants used the phrase "avowed racist," not merely "racist," and the court finds that it is more than a bald hyperbolic epithet. Rather, it suggests that the author is privy to some undisclosed information regarding a private or public proclamation of racism by plaintiff.

In addition, the scales tip in favor of denial, at this early stage, given the allegations of a complex defamatory campaign waged over several years and motivated by a feud between two wealthy neighbors. Whereas a court might consider a single instance of expression—made in the heat of the moment—to be protected opinion out of concern that making it actionable might chill public discourse, that same concern is not present here (*see Restis v Am. Coalition Against Nuclear Iran, Inc.*, 53 F Supp 3d 705, 721 [SDNY 2014]; *compare 600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 137 [1992]).

b. "White Supremacist" (Nos. 161-162)

Statement nos. 161 and 162 (Doc. 538-39) appear in essentially identical print and online versions of a New York Post feature. The article provides the biographies of Bacon and Nygard, the long-running history of hostilities between the two, and includes this paragraph:

> Nygard insists Bacon is a white supremacist. "There is documentation that Mr. Bacon's great-grandfather was a leader of the Ku Klux Klan in Wilmington [NC]," his rep tells the Post. "Unlike Mr. Bacon, Mr. Nygard has opened his home to black Bahamians for years."

(alterations in original).

On the one hand, the epithet "white supremacist" standing alone falls within the same hyperbolic opinion category as "Nazi" or "racist," and the court rejects plaintiff's argument that

those mere labels necessarily imply a confirmed membership in a hate group or subscription to its ideology. A reasonable reader would not be compelled to conclude that plaintiff was a white supremacist based on his ancestral connection to the KKK, but would understand that defendants were basing their (possibly unreasonable) opinion on that disclosed information. On the other hand, defendants do impliedly accuse plaintiff of the specific racist practice of excluding black Bahamians from his home.[10] Accordingly, the court cannot find that the statement is non-defamatory as a matter of law at this early stage.

The court rejects defendants' argument that they cannot be held responsible for content published by independent news entities such as the Post (and Vanity Fair, see below). "Although one who makes a defamatory statement is not responsible for its recommunication without his authority or request by another over whom he has no control" (*Nat'l Puerto Rican Day Parade, Inc. v Casa Publications, Inc.*, 79 AD3d 592, 594–95 [1st Dept 2010], *quoting Hoffman v Landers*, 146 AD2d 744, 747 [2d Dept 1989]), the articles themselves indicate that defendants or their agents were providing authorized statements as part of interviews with the articles' authors.

c. "Bacon is KKK," "Louis KKK Bacon" and other KKK References (nos. 136, 149-152, 154-155, 160, 165-167, 169)

Statement no. 136 (Doc. 513) consists of the "Bacon is KKK" message, accompanied by a picture of a burning cross, displayed on a sign carried by a Klan-hooded Bahamian protester. The photograph in which the sign appears was taken at a "hate march" allegedly arranged by defendants to harass plaintiff.

[10] Statement nos. 161-162 also contain statements that Bacon was involved in a fire at Nygard's Bahamian Residence which, as will be discussed infra, this court also finds to be actionable at this early stage.

Statement nos. 149-152 and 154 (Doc. 526-529, 531) are substantially similar copies of an article entitled "Louis Moore Unmasked" consisting of text accompanied by pictures. The article was distributed in pamphlet form by hand, and posted at the LouisBacon.Unleashed.wix.com and LouisBacon.Unmasked.org websites. The pictures include a mock mugshot of plaintiff with his name written in the colors of the confederate flag; a picture of plaintiff alongside images of Klan members and a burning cross, with the title "on the Trail of the KKK in the Bahamas;" and images of protest marchers wearing shirts bearing images of hooded Klansmen, burning crosses, and the words "Bacon is KKK." The challenged text consists of these two excerpts:

> We have to be ever careful when a man such as Louis Bacon with his confirmed lineage to the Ku Klux Klan, openly espousing its principles and ideology as forming his philosophy . . . .
>
> From his public utterances, Bacon gives the impression that he is not trying to infiltrate The Bahamas in such a way to orchestrate the repeat of another 'Wilmington Race Riot, 1898' of which his maternal great grandfather, Lt. Colonel Roger Moore, in whose honor he has named and built his multi-billion dollar hedge fund (Moore Capital Management LLC), was leader and shot caller – LIE!!!"

Statement no. 155 is a YouTube video embedded on Keod Smith's Facebook page entitled "Re-Negotiate.Org's Emancipation Day video Great Freedom Beach Party & Concert." The video shows a still photo of plaintiff's face, followed by photos of a lynched black man, hooded Klan members and a burning cross, followed by the words "Petition Expel Louis Bacon."

Statement nos. 160 and 169 (Doc. 537, 546) appear in essentially identical print and online versions of a Vanity Fair feature. The article recounts the parties' disputes, and includes this paragraph:

> Outside, on his [Nygard's] volleyball court, one of several large signs reads ITS [sic] TIME TO THROW THE TRASH OUT! LOUIS KKK BACON. The signs (which Nygard says have since been taken down) are pointed out toward the water, in case anybody sailing by in Clifton Bay should want to know more about the man.

Statement no. 165 is a post on Keod Smith's Facebook page with the title "Moments In History: Louis Bacon – A Chip Off The Old Racist KKK Moore Block?" The post displays an image of plaintiff next to Klansmen, two lynching victims, accompanied by the words "Louis Bacon Bears Gifts to the Bahamas – A KKK Trojan Horse?" It also links to an article posted at Re-Negotiate.net bearing the same title as the Facebook post and reproduces the following language from the article:

> Court documents in the Bahamas now reveal that Louis Moore Bacon's use of his Hedge Fund billions to attack The Bahamas press and numerous Bahamian journalists, was designed, not only to stop them disclosing to the world that his genealogy is rooted in the Ku Klux Klan ("KKK"), but that as recently as 2013, he continued to show his pride in his racist ancestry, and actually considers himself to be a chip of[f] that racist block.

Statement nos. 166-67 (Doc. 543-44) are posts at Re-negotiate.org and Re-negotiate.net which display the same texts and images as no. 165, and provide the full version of the article. In addition to elaborating upon the involvement of plaintiff's ancestors with the Klan, the article asserts:

> Bacon exposed himself as an unrepentant racist when, in a Foreword he wrote for the 2001 publication of a book called "Wilmington Through the Lens of Louis T. Moore" . . . he adopted Colonel Moore's racist character and views when he said ". . . my grandfather [Louis T. Moore, the son of KKK leader, Colonel Roger Moore], imbued me . . . through his genes, with the valued importance of roots and history . . . I am proud to carry his name . . . ."
>
> ***
>
> Fast-forward to 2013 when Bacon raised eyebrows around the world from the

> podium of the Audubon Society Award ceremony in New York City, citing passages after passages from the racist tome "Gone with the Wind", which he proudly said influenced his life and conduct in all he is today.

With regard to statements nos. 136, 155, 160 and 169, the Court finds that these statements merely contain rhetorical epithets or juxtapose plaintiff to iconography associated with racism and the KKK. As such, they at most assert pure opinions that plaintiff is racist. Accordingly, these statements nos. standing alone cannot serve as predicate statements for defamation liability. The images accompanying statement nos. 165-67 are nonactionable for the same reason. The court also does not find the cited excerpts from the article defamatory, as the author discloses the basis (however debatable) for labeling plaintiff a racist. Plaintiff does not appear to dispute the quotes attributed to him, and in identifying the defamatory statements in Appendix A points only to the articles title and images.

However, the passage in the "Louis Moore Unmasked" article, in statement nos. 149-152 and 154, accusing plaintiff of "openly espousing [the Klan's] principles and ideology as forming his philosophy," like the references to him as an "avowed racist" in nos. 158-59, cannot be dismissed as non-defamatory as a matter of law at this early stage. The article does not disclose the source of plaintiff's alleged racist espousals.

As the court finds that statement nos. 149-152 and 158-159, taken as a whole, cannot be found to be non-defamatory as a matter of law at this early stage, the court need not consider whether certain other portions within these statements are merely non-actionable expressions of opinion. Accordingly, to the extent that defendants move for an order finding that certain portions are non-defamatory as a matter of law, that branch of defendants' motion is denied.

Accordingly, this court finds that the statements nos. 136, 155, 160, 165-67 and 169 are

non-defamatory as a matter of law, as the only portions alleged to be defamatory are non-actionable rhetorical epithets or pure opinions, and as such any claims for defamation based on these statements are dismissed. Although statement nos. 149-52 and 154 arguably contain some non-actionable rhetorical epithets, these statements also contain actionable statements that plaintiff espoused racist beliefs, and as such the branch of Plaintiff's motion to dismiss any defamation claims for these statements is denied. Furthermore, the court notes that although that statements nos. 136, 155, 160, 165-67 and 169 cannot by themselves serve as predicates for defamation liability, this does not mean that these statements are not admissible or that information concerning them is not discoverable, as these statements – although protected – give context to the allegedly wider defamation campaign.

B. Statements Concerning Arson and Murder

a. Bacon's Involvement in a Fire at Nygard's Bahamian Residence (Nos. 161, 162)

The versions of the New York Post article discussed above each contain an additional statement (also numbered 161 and 162) as follows:

> One year later, in November 2009, the bulk of Nygard Cay was destroyed in a fire. In his filing, Bacon alleges that Nygard planted stories accusing him of arson, citing a 2014 Daily News article that said Bacon told his groundskeeper, Dan Tuckfield, now dead, to "find a way to burn Mr. Nygard's f—king house down"
>
> Nygard maintains Bacon had something to do with it. "The burn was complete and instantaneous and of suspicious origin," a Nygard rep tells the Post.

Other than the earlier-rejected argument that they cannot be held responsible for statements they made to the press, defendants' papers do not appear to challenge the actionability of this statement. At oral argument, defendants' counsel was equivocal on whether its legal

sufficiency was being conceded, or that the only challenge to the statement was under the Civil Rights Law (Tr. 54:20-55:9). However, defendants' counsel later seemed to suggest that the statement was nonactionable speculation, in part because the first paragraph quoted above was not reproduced in Chart 2 from Appendix B (*id*, 56:17-57:8).

Whatever the case, the court finds that the statement constitutes an actionable defamatory accusation of arson. Defendants asserted that plaintiff had "something to do" with the fire, and as plaintiff's counsel observed, "I don't think that anybody would reasonably say that he was trying to put the fire out" (*id.*, 58:12-14). And although defendants disclosed the basis for their opinion – that the burn was complete and instantaneous – their attribution of responsibility to plaintiff implies that their belief rests on some undisclosed facts regarding his involvement. That Nygard is plaintiff's neighbor further militates in treating the above statements as actionable mixed opinion, at this early stage, given that a reasonable reader might believe that someone in Nygard's position would have additional knowledge as to how or why plaintiff might have burned down his home.

b. Bacon's Involvement in the Death of an Employee (nos. 145-146, 163-164)

Statements 145-146, 163-164 (Doc. 522-523, 540-541) are articles questioning whether plaintiff may have been involved in the murder of Dan Tuckfield, a member of his household staff. Nos. 145-146 are both the same article, "Suspicious Death in Louis Bacon's Jacuzzi Opens Up New Criminal Concerns," published in The Bahama Journal and The Bahamas National. The challenged language is:

> Sunday, May 2nd 2010, will be five years since Dan Tuckfield, the ex-Life Guard and expert swimmer, died mysteriously in the nude in the jacuzzi in the private section of the palatial enclave of The

> Point House, Lyford Cay belonging to Hedge Fund billionaire Louis Bacon.
>
> Now, new inquiries having arisen into the suspicious way in which Bahamian officials under the FNM Government signed Tuckfield's controversial death certificate and his body reportedly being cremated within 48 hours of it being discovered and hustled out of The Bahamas, could spell new trouble for the embattled Hedge Fund Manager.
>
> ***
>
> Did Tuckfield know too much? Was he a loose end with a loose mouth.
>
> ***
>
> Examiners are now asking for answers to some simple questions, but this reportedly has not been made easy because certain files with pertinent evidence and documents pertaining to Tuckfield's death investigation have gone missing from the vaults of the authorities.
>
> Simplistically put, the question reportedly being investigated relates to whether Tuckfield's death was actually as a result of the reported heart attack, or was he murdered.
>
> Investigators are now carefully examining the motive behind Bacon's representatives pressing to have Tuckfield's body released so soon after it was discovered when they knew or ought to have known that the body was expected to be cremated.

Nos. 163-164 are a similar article, "Was Dan Tuckfield Murdered?" posted at both Re-Negotiate.org and Re-Negotiate.net:

> Louis Bacon, Hedge Fund Magnate Implicated in 'Murder in the Hamptons' – Bahamas Style; New Court Documents Show
>
> ***
>
> New court documents filed in the Supreme Court of the Bahamas on Monday December 7th, raised harrowing and serious questions that suggests a cover-up in Tuckfield's death.

***

> Brown's filed documents, although [a] denial of Bacon's claim, does go on to show that the surrounding facts do actually point to a suspicious death, and acts of Bacon or his surrogates to amount to fabrication, perjury and wrongful death which might support the basis for murder.

Plaintiff contends that Tuckfield was a beloved longtime member of plaintiff's staff who died of a heart failure, and that defendants planted the articles to promote an accusation of murder disguised as speculation. He argues that the alleged conjecture is based on false facts, including the claim that the body was cremated immediately, and that the innuendo regarding the existence of suspicions of murder and a cover-up are fabricated. Defendants counter that the articles merely express opinion based upon disclosed facts regarding the circumstances of Tuckfield's death.

At this early stage, this court cannot find that these assertions of criminal conduct are non-defamatory as a matter of law. The statements suggest that writer holds a strong and sincere belief in plaintiff's guilt based on undisclosed information regarding his motives and conduct. Defendants cannot take refuge in the defense that they are merely asking questions (*see Gross v New York Times Co.*, 82 NY2d 146, 154 (1993] ("[C]harges that plaintiff engaged in cover-ups, directed the creation of 'misleading' autopsy reports and was guilty of 'possibly illegal' conduct . . . although couched in the language of hypothesis or conclusion, actually would be understood by the reasonable reader as assertions of fact").[11]

[11] Although Defendants' counsel argued that these statements were privileged pursuant to Civil Rights Law § 74 during oral arguments, this argument was not made in the papers, and the Court will not address it here.

C. Statements Relating to Plaintiff's Familial KKK History (Nos. 149-152, 154, and 165-167

Defendants contend that plaintiff waived the right to assert any claim relating to statements about his family's historical ties to the Klan. Plaintiff concedes that he is only seeking relief for claims made about him, but disputes that he waived the right to pursue any claim that may otherwise arise from those numbered statements. The court has ruled on all of those statements in subsection (c) above, and plaintiff may pursue his claims to the extent indicated.

4. Discovery of Evidence Related to Dismissed Statements.

The court notes that the dismissal of defamation claims predicated on any particular statement means only that the statement cannot, standing alone, be the basis of a claim. By granting this motion in part, this court has ruled that certain statements expressing pure opinions that plaintiff holds racist beliefs are non-actionable. In this vein, this court has found that various statements associating plaintiff with the KKK are non-actionable, as rhetorical epithets expressing the opinion that plaintiff holds racist beliefs, and has rejected plaintiff's argument that these statements assert that plaintiff is in fact a card-carrying member of the KKK. However, as noted above, questions of defamation are extremely context oriented, and, plaintiff has alleged a complex campaign against his reputation extending over several years. Accordingly, for the purpose of discovery, plaintiff's inquiry into a particular statement should not be curtailed merely because the statement is comprised, in part, or in whole of some nonactionable expression of opinion.

CONCLUSION

The court has considered the remainder of the parties' arguments and finds them to be unavailing.

Accordingly, it is hereby

ORDERED that the motion of defendants Peter Nygard, Nygard International Partnership and Nygard, Inc. is granted to the extent that the portion of plaintiff Louis Bacon's first and second causes of action for defamation and defamation per se as predicated on: (1) statement numbers 1-105 in Appendix A to the Third Amended Complaint (Doc. 482) are dismissed as time-barred; and (2) statement numbers 136, 148, 155-157, 160, 165-167 and 169 are dismissed for failure to state a claim; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that plaintiff is directed to serve the instant Decision and Order with notice of entry within 20 days of the below date; and it is further

ORDERED that defendants are directed to serve an answer to the Third Amended Complaint within 20 days after service of a copy of this Decision and Order with notice of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the Decision and Order of the court.

Dated: July 18, 2019

ENTER:

J.S.C.
HON. ROBERT D. KALISH
J.S.C.

NYSCEF
Appellate Division - 1st Dept

Document List
Appeal # 2019-05211

Created on:03/19/2020 12:12 PM

Case Caption: **Louis Bacon v. Peter Nygard et al**

Judge Name:

Doc#	Document Type/Information	Status	Date Received	Filed By
1	COPY OF NOTICE OF APPEAL WITH PROOF OF FILING / INFORMATIONAL STATEMENT / ORDER OR JDMT APPEALED FROM - *Corrected*	Processed	12/05/2019	Carmody, W.
2	PROOF OF SERVICE OF NOTIFICATION OF CASE NUMBER - *Corrected*	Processed	01/07/2020	Carmody, W.
3	JOINT APPENDIX Joint Appendix - Volume 1 of 2	Processed	02/18/2020	Joyce, E.
4	JOINT APPENDIX Joint Appendix - Volume 2 of 2	Processed	02/18/2020	Joyce, E.
5	APPELLANT'S BRIEF - *Corrected* Brief For Plaintiff-Appellant-Respondent	Processed	03/05/2020	Joyce, E.
6	PROOF OF SERVICE - Notice of Hard Copy Submission	Processed	02/18/2020	Card, J.
7	PROOF OF SERVICE - Affidavit of Service of CD-ROM	Processed	02/18/2020	Joyce, E.
8	NOTE OF ISSUE Note of Issue	Processed	02/18/2020	Joyce, E.
9	STIPULATION - Regarding Appeal Briefing Schedule	Processed	02/24/2020	Joyce, E.

This is exhibit " D " referred to in the
Affidavit of S. Forest
.....sworn
before me at Winnipeg, Man this
23 day of March 20 22
.....
A Commissioner for Oaths
in and for the Province of Manitoba
Commission expires.....

WAYNE ONCHULENKO
Notary Public and
Practising Manitoba Lawyer
700 - 330 St. Mary Avenue
Winnipeg, MB R3C 3Z5

D

Wayne M. Onchulenko

From: Bialek, Adam <Adam.Bialek@wilsonelser.com>
Sent: March 20, 2020 10:20 PM
To: Wayne M. Onchulenko
Subject: RE: Search Warrant executed in Minneapolis for Peter's phone

These are documents issued by the US Courts seeking evidence in a criminal investigation into Peter Nygard and his companies.

Adam Bialek
Attorney at Law
Wilson Elser Moskowitz Edelman & Dicker LLP
150 E 42nd Street
New York, NY 10017
212.915.5143 (Direct)
917.538.0616 (Cell)
212.490.3000 (Main)
212.490.3038 (Fax)
adam.bialek@wilsonelser.com

From: Wayne M. Onchulenko [mailto:WOnchulenko@ltglc.ca]
Sent: Friday, March 20, 2020 5:16 PM
To: Bialek, Adam <Adam.Bialek@wilsonelser.com>
Subject: RE: Search Warrant executed in Minneapolis for Peter's phone

[EXTERNAL EMAIL]

Hi Adam

How would these two (this one and the Subpoena) matters be properly described?

Wayne M Onchulenko*

Levene Tadman Golub

700- 330 St. Mary Avenue | Winnipeg, MB R3C 3Z5

204 957.6402 v
204 957.1696 f
Bar Admissions: Manitoba, Ontario and Nunavut

* Services provided through Wayne M. Onchulenko Law Corporation

This is exhibit " E " referred to in the
Affidavit of S. Forest sworn
before me at Winnipeg this
23 day of March 20
A Commissioner for Oaths
in and for the Province of Manitoba
Commission expires

WAYNE ONCHULENKO
Notary Public and
Practising Manitoba Lawyer
700 - 330 St. Mary Avenue
Winnipeg, MB R3C 3Z5

E

Wayne M. Onchulenko

From: Wayne M. Onchulenko
Sent: March 20, 2020 4:10 PM
To: Bruce Taylor; Ross McFadyen
Cc: Debby Prymak; Leiba Feldman; Brittni Van Dasselaar
Subject: FW: e-filing on QB File CI20-01-26627
Attachments: QB e-filing form - March 20, 2020.PDF; Notice of Motion Hearing Mar 20 2020 disclosure.pdf

Gentlemen

Further to my voicemail and email of earlier this afternoon I have filed the attached urgent motion.

Please call if you have a moment.

Wayne M Onchulenko*

Levene Tadman Golub

700- 330 St. Mary Avenue | Winnipeg, MB R3C 3Z5

204 957.6402 v
204 957.1696 f
Bar Admissions: Manitoba, Ontario and Nunavut

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---

From: Brittni Van Dasselaar <BVanDasselaar@ltglc.ca>
Sent: March 20, 2020 4:05 PM
To: 'QBRegistry@gov.mb.ca' <QBRegistry@gov.mb.ca>
Cc: Wayne M. Onchulenko <WOnchulenko@ltglc.ca>; Nunziata Masi <NMasi@ltglc.ca>
Subject: e-filing on QB File CI20-01-26627

Hello Cheryl,

Please file the attached document. Will the fee be forwarded directly to you again?

This is exhibit " F " referred to in the
Affidavit of S - Forest
sworn
before me at Wpg. Man this
23 day of Mar 20 21
A Commissioner for Oaths
in and for the Province of Manitoba
Commission expires

WAYNE ONCHULENKO
Notary Public and
Practising Manitoba Lawyer
700 - 330 St. Mary Avenue
Winnipeg, MB R3C 3Z5

F

Wayne M. Onchulenko

From: Wayne M. Onchulenko
Sent: March 20, 2020 4:53 PM
To: Bruce Taylor
Cc: Debby Prymak; Leiba Feldman
Subject: RE: e-filing on QB File CI20-01-26627 [LAW-TDS.FID1853952]

Hi Bruce

I have left a message for Cheryl but have not heard back from her. I am not sure if she was in this week although her voicemail did not say call someone else.

[redacted]

The urgency for the disclosure is the Criminal proceeding against Nygard Inc and Mr. Nygard (so say the New York lawyers).

Wayne M Onchulenko*

Levene Tadman Golub

700- 330 St. Mary Avenue | Winnipeg, MB R3C 3Z5

204 957.6402 v
204 957.1696 f
Bar Admissions: Manitoba, Ontario and Nunavut

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This is exhibit " 6 " referred to in the
Affidavit of S Forest
sworn
before me at Winnipeg this
23 day of March 20 22
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in and for the Province of Manitoba
Commission expires

WAYNE ONCHULENKO
Notary Public and
Practising Manitoba Lawyer
700 - 330 St. Mary Avenue
Winnipeg, MB R3C 3Z5

6

Wayne M. Onchulenko

From: Wayne M. Onchulenko
Sent: March 21, 2020 6:02 PM
To: Ross McFadyen; Bruce Taylor
Cc: Debby Prymak; Leiba Feldman
Subject: Further to my earlier emails

Gentlemen

Justice Edmond has directed that" the parties need to work out a process to deal with documents that may not be relevant to the receivership" over the weekend and if we cannot then I will call Monday and he will direct how we are to proceed.

It is important we have access to these documents immediately.

This will be hard to do if you do not respond to my emails or calls.

Please advise if I will hear from you today?

Wayne M Onchulenko*

Levene Tadman Golub

700- 330 St. Mary Avenue | Winnipeg, MB R3C 3Z5

204 957.6402 v
204 957.1696 f
Bar Admissions: Manitoba, Ontario and Nunavut

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This is exhibit " H " referred to in the
Affidavit of S. Forest
sworn
before me at Winnipeg this
23 day of May 20 22
A Commissioner for Oaths
in and for the Province of Manitoba
Commission expires

WAYNE ONCHULENKO
Notary Public and
Practising Manitoba Lawyer
700 - 330 St. Mary Avenue
Winnipeg, MB R3C 3Z5

H

Wayne M. Onchulenko

From: Wayne M. Onchulenko
Sent: March 21, 2020 4:48 PM
To: Jackson, David; Catherine Howden
Subject: FW: e-filing on QB File CI20-01-26627
Attachments: QB e-filing form - March 20, 2020.PDF; Notice of Motion Hearing Mar 20 2020 disclosure.pdf

Wayne M Onchulenko*

Levene Tadman Golub

700- 330 St. Mary Avenue | Winnipeg, MB R3C 3Z5

204 957.6402 v
204 957.1696 f
Bar Admissions: Manitoba, Ontario and Nunavut

* Services provided through Wayne M. Onchulenko Law Corporation

---

From: Wayne M. Onchulenko
Sent: March 20, 2020 4:33 PM
To: jedmond@judicom.ca; Ross McFadyen <RAM@tdslaw.com>; Bruce Taylor <GBT@tdslaw.com>
Cc: Debby Prymak <DPrymak@ltglc.ca>; Leiba Feldman <LFeldman@ltglc.ca>; Brittni Van Dasselaar <BVanDasselaar@ltglc.ca>
Subject: FW: e-filing on QB File CI20-01-26627

My Lord

Attached find the filed motion.

Wayne M Onchulenko*

Levene Tadman Golub

700- 330 St. Mary Avenue | Winnipeg, MB R3C 3Z5

204 957.6402 v
204 957.1696 f
Bar Admissions: Manitoba, Ontario and Nunavut

* Services provided through Wayne M. Onchulenko Law Corporation

---

From: Brittni Van Dasselaar <BVanDasselaar@ltglc.ca>
Sent: March 20, 2020 4:05 PM
To: 'QBRegistry@gov.mb.ca' <QBRegistry@gov.mb.ca>
Cc: Wayne M. Onchulenko <WOnchulenko@ltglc.ca>; Nunziata Masi <NMasi@ltglc.ca>
Subject: e-filing on QB File CI20-01-26627

Hello Cheryl,

Please file the attached document. Will the fee be forwarded directly to you again?

Thanks,

Brittni VanDasselaar
Legal Assistant to Timothy J. Valgardson and Nunziata Masi
Levene Tadman Golub Law Corporation
700 - 330 St. Mary Avenue
Winnipeg, Manitoba R3C 3Z5
Telephone: 204-957-6442
Fax: 204-957-1696

This is exhibit " I " referred to in the
Affidavit of S. Forest
sworn
before me at Winnipeg this
23 day of March 20 22

A Commissioner for Oaths
in and for the Province of Manitoba
Commission expires

WAYNE ONCHULENKO
Notary Public and
Practising Manitoba Lawyer
700 - 330 St. Mary Avenue
Winnipeg, MB R3C 3Z5

I

Wayne M. Onchulenko

From: Jackson, David <djackson@tmlawyers.com>
Sent: March 22, 2020 10:49 AM
To: Wayne M. Onchulenko
Subject: Re: e-filing on QB File CI20-01-26627
Attachments: image816d4b.PNG

Thanks, Wayne. Though I do not see that I was copied by the judge + don't really see any need to be at this juncture. Cheers!

David R.M. Jackson
Partner

[Taylor McCaffrey LLP]<https://www.tmlawyers.com>

2200-201 Portage Avenue, Winnipeg, MB R3B 3L3
Direct Line: 204.988.0375 | Direct Fax: 204.953.7178 Professional services provided by D.R.M. Jackson Law Corporation

Legal Assistant: Laura Leigh Buley | llbuley@tmlawyers.com | Direct Line: 204.988.0374

TMLAWYERS.COM<https://www.tmlawyers.com> | TM News<www.tmlawyers.com/resources/?resourcetype=News> | LinkedIn<http://www.linkedin.com/company/taylor-mccaffrey-llp> | Twitter<https://twitter.com/TM_Lawyers> | vCard<https://www.tmlawyers.com/wp-content/uploads/DavidJackson.vcf> | Parking Guide<http://www.tmlawyers.com/parking-directions> | Online Payment<https://www.tmlawyers.com/pay-online>

From: Wayne M. Onchulenko
Sent: Saturday, March 21, 2020 10:15 PM
To: Jackson, David
Subject: Fwd: e-filing on QB File CI20-01-26627

This is exhibit " I " referred to in the
Affidavit of S. BYRD
.....sworn
before me at Winnipeg this
23 day of March 20 20
.....
A Commissioner for Oaths
in and for the Province of Manitoba
Commission expires.....

WAYNE ONCHULENKO
Notary Public and
Practising Manitoba Lawyer
700 - 330 St. Mary Avenue
Winnipeg, MB R3C 3Z5

"J"

Wayne M. Onchulenko

From: Catherine Howden <howden@pitblado.com>
Sent: March 22, 2020 11:30 AM
To: Wayne M. Onchulenko
Cc: Wasserman, Marc (MWasserman@osler.com); Dacks, Jeremy (JDacks@osler.com); Sachar, Karin (KSachar@osler.com); Rosenblat, Dave (drosenblat@osler.com)
Subject: RE: Motion for Disclosure of documents and access to documents

Wayne:

Our client, as the senior secured creditor of the respondents, and the party funding the receivership proceedings, has an interest in all matters brought before the court in the receivership proceedings. In future, please serve us with any communications with Justice Edmond, or any documents filed in court by the respondents.

Thank you.

Catherine

Catherine Howden
Partner
howden@pitblado.com
D. 204.956.3532

Pitblado LAW

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From: Wayne M. Onchulenko [mailto:WOnchulenko@ltglc.ca]
Sent: Saturday, March 21, 2020 4:48 PM
To: Jackson, David; Catherine Howden
Subject: FW: Motion for Disclosure of documents and access to documents

FYI

And service. I am not sure your clients are interested in a discovery motion but as Justice Edmond copied you with his response I thought you should have the information. The next email is the motion.

Wayne M Onchulenko*

Levene Tadman Golub

700- 330 St. Mary Avenue | Winnipeg, MB R3C 3Z5

This is exhibit " K " referred to in the
Affidavit of S. Farzst
.....sworn
before me at Winnipeg this
23rd day of March 20 20
.....
A Commissioner for Oaths
in and for the Province of Manitoba
Commission expires.....

WAYNE ONCHULENKO
Notary Public and
Practising Manitoba Lawyer
700 - 330 St. Mary Avenue
Winnipeg, MB R3C 3Z5

Wayne M. Onchulenko

From: Bialek, Adam <Adam.Bialek@wilsonelser.com>
Sent: March 22, 2020 9:59 PM
To: Wayne M. Onchulenko
Cc: abe.rubinfeld@att.net; Aniit Tuli
Subject: RE: Search Warrant executed in Minneapolis for Peter's phone

Peter is under criminal investigation. Every moment matters. The lack of access is hampering his ability to defend himself. Moreover, insofar as there is a hearing on the Chapter 15 in the US on Wednesday, there is a need to get the documents immediately so that Peter can properly address certain issues if they arise on Wednesday (e.g. why certain cases should be stayed). In addition, there is an active litigation in CA against Peter only and the lack of access is hampering his ability to defend himself.

Let me know if you need anything further.

Adam Bialek
Attorney at Law
Wilson Elser Moskowitz Edelman & Dicker LLP
150 E 42nd Street
New York, NY 10017
212.915.5143 (Direct)
917.538.0616 (Cell)
212.490.3000 (Main)
212.490.3038 (Fax)
adam.bialek@wilsonelser.com

From: Wayne M. Onchulenko [mailto:WOnchulenko@ltglc.ca]
Sent: Sunday, March 22, 2020 9:08 PM
To: Bialek, Adam <Adam.Bialek@wilsonelser.com>
Subject: Re: Search Warrant executed in Minneapolis for Peter's phone

[EXTERNAL EMAIL]

It is the timing question (tomorrow vs next week) on which I would like you to comment

Sent from my iPhone

> On Mar 22, 2020, at 8:03 PM, Bialek, Adam <Adam.Bialek@wilsonelser.com> wrote:
>
> The documents in those files are important to Peter's defense of himself.
>
> Adam R. Bialek
> Wilson Elser Moskowitz Edelman & Dicker LLP
> 150 E. 42nd St.
> New York, NY 10017
> (212) 490-3000
> Direct (212) 915-5143

Fax (212) 490-3038
Cell (917) 538-0616
Adam.Bialek@wilsonelser.com

On Mar 22, 2020, at 7:49 PM, Wayne M. Onchulenko <WOnchulenko@ltglc.ca> wrote:

[EXTERNAL EMAIL]

Hi Adam

I assume I will be asked by the judge why it is important I get these documents this Monday instead of next Monday. Can you help me with the appropriate response.

Wayne M Onchulenko*

<image001.png>

700- 330 St. Mary Avenue | Winnipeg, MB R3C 3Z5

204 957.6402 v
204 957.1696 f
Bar Admissions: Manitoba, Ontario and Nunavut

* Services provided through Wayne M. Onchulenko Law Corporation

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From: Bialek, Adam <Adam.Bialek@wilsonelser.com>
Sent: March 20, 2020 10:20 PM
To: Wayne M. Onchulenko <WOnchulenko@ltglc.ca>
Subject: RE: Search Warrant executed in Minneapolis for Peter's phone

These are documents issued by the US Courts seeking evidence in a criminal investigation into Peter Nygard and his companies.

Adam Bialek
Attorney at Law