UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CATE STREET CAPITAL INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	1:14-cv-00200-JCN
	)	
INDUSTRY INTELLIGENCE INC., et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [1]

In this action, Plaintiffs Cate Street Capital, Inc. and John Hallé allege that they were defamed through an article entitled "The Maine Problem" in the May 2014 edition of *The Reel Time Report*, which is a monthly trade report authored by Defendant Verle Sutton and published by Defendant Industry Intelligence, Inc. In their amended complaint, Plaintiffs cite four specific passages of the article that they maintain are defamatory. (Am. Compl. ¶ 12(a)-(d), ECF No. 34.)

The matter is before the Court on Defendants' Motion for Summary Judgment (ECF No. 65). Through their motion, Defendants contend that the statements are not actionable because one of the statements is substantially true and the remaining three statements constitute the author's opinions, or other permissible discourse.

Following a review of the summary judgment record, and after consideration of the parties' arguments, the Court grants in part and denies in part Defendants' motion.

[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge John C. Nivison conduct all proceedings in this case, including trial, and to order entry of judgment.

BACKGROUND [2]

GNP Maine Holdings, LLC, d/b/a Great Northern Paper Company, LLC, acquired the assets of the Great Northern Paper Mill in 2011. (Defendants' Statement of Material Facts (DSMF) ¶ 1, ECF No. 66.) [3] Plaintiff Cate Street Capital, Inc. managed GNP Maine Holdings. (*Id.* ¶ 2.) Plaintiff John Hallé is the CEO of Cate Street Capital. (*Id.*)

Defendant Industry Intelligence, Inc. offers market intelligence and information management solutions to its clients in the forest products, packing and food industries. (*Id.* ¶ 3.) Defendant Industry Intelligence publishes to paid subscribers *The Reel Time Report*, which is written by Defendant Sutton. (*Id.* ¶ 5.) Defendant Sutton, who has worked as an executive in sales, marketing and management in the paper industry since the late 1970's, initiated *The Reel Time Report* in 1999 to provide commentary, advocacy and analysis of the printing paper industry. (*Id.* ¶ 7.) Defendant Sutton sold *The Reel Time Report* to a predecessor of Defendant Industry Intelligence in 2003, but continues to supply the publication's content. (*Id.* ¶ 8.)

In its May 2014 edition, *The Reel Time Report* included an article entitled "The Maine Problem." [4] (*Id.* ¶ 9.) The article chronicled some of the history of the Great Northern Paper Mill, with a particular focus on its operations after it was acquired by Plaintiffs – operations that the article reported as costing the taxpayers of the State of Maine tens of millions of dollars in loans, grants and guarantees. (*Id.* ¶ 10.) The article also described a pending agreement by which the

[2] The facts set forth herein are derived from the parties' Local Rule 56 statements of material facts, and are presented in the light most favorable to Plaintiffs.

[3] Citations to Defendants' Statement of Material Facts are meant to include reference to Plaintiffs' Opposing Statement (ECF No. 70), wherein Plaintiffs admit, qualify, or deny Defendants' statements.

[4] Affidavit of Verle Sutton, Ex. A, ECF No. 67-1. The May 2014 edition of *The Reel Time Report* was sent to 647 subscribers. (Plaintiffs' Corrected Statement of Additional Material Facts ¶ 13, ECF No. 74-1.)

State would provide substantial financing for another Cate Street project (a wood pellet production facility), and questioned the political wisdom of that agreement. (*Id.* ¶ 11.)

Plaintiffs allege that the following statements from the article are false and defamatory statements of and concerning the Plaintiffs:

1

> In addition, Cate Street's CEO, John Hallé, has been convicted of cheating a former partner out of $1.0 million.

2

> Brookfield has indicated 1) that it will keep providing free energy to the mill until May, and 2) that it is willing to forgive the $2.5 million owed to it by Cate Street. However, in exchange for this cooperation, Brookfield insists on being supplied with Cate Street's financial information: total of unpaid debt; business plan indicating where funds are coming from to restart the mill; how much of Cate Street's money is being invested to restart the mill; and then the big question – and the one I would really like to see answered – how much has Cate Street skimmed off the top during the last two years? Or, in polite terms, what are the management fees Cate Street has charged Great Northern during the last two years, and what is the plan going forward? [5]

3

> I could be wrong about Cate Street. I have long thought that the company simply had an incredibly naïve and incompetent management team. That might not be the case at all. It could be akin to fraud; perhaps not legal fraud that could get you sent to jail, but the kind of fraud that could eventually get you sent to some other unpleasant location. Perhaps the game plan all along was just to ride Great Northern as long as it would last, taking a big cut along the way. Great Northern's slow demise might have lined the pockets of Cate Street owners, and perhaps others.

4

> Cate Street not only gets a free pass for its unsurpassed incompetence (and possible fraud-like management fees), but the State of Maine has offered Cate Street another $16 million (of the $25 million requested) to start up the long-awaited wood pellet business.

[5] As described in the article, Brookfield owned the hydroelectric facilities historically associated with the paper mill. Brookfield also owned the paper making facilities prior to the Cate Street acquisition.

(*Id.* ¶ 12; Am. Compl. ¶ 12.)

On May 24, 2002, Richard Davimos, Jr., brought a civil action against Plaintiff Hallé in the Supreme Court of the State of New York, County of New York, for breach of contract and fraud. (*Id.* ¶ 13.) Following a bench trial in 2007, the court found in favor of Mr. Davimos, and awarded him $1,000,000 plus interest in damages. (*Id.* ¶¶ 14 – 15.) Mr. Davimos then moved the court for judgment on his fraud claim against Plaintiff Hallé. (*Id.* ¶ 16.) As reflected in a judgment executed June 26, 2008,[6] the court found in favor of Mr. Davimos on the fraud claim. (*Id.*) The judgment in the matter of *Davimos v. Hallé* does not reference an alleged violation of a criminal statute and does not constitute a criminal conviction. (Plaintiffs' Corrected Statement of Additional Material Facts (PSMF) ¶¶ 2 – 3, ECF No. 74-1.)

The New York Appellate Division, First Department, upheld the trial court's judgment.[7] (DSMF ¶ 18.) The New York appellate decision does not state that Plaintiff Hallé "cheated" Mr. Davimos out of $1 million. Rather, as reflected by the decision, the appellate court affirmed the finding that he guaranteed a $1 million promissory note provided by a Total Film Group (TFG) subsidiary to Mr. Davimos. (PSMF ¶ 4.)

Defendant Sutton asserts that the statement, "Cate Street's CEO, John Hallé, has been convicted of cheating a former partner out of $1.0 million," was based on a May 2, 2014, article in *The Bangor Daily News*. (*Id.* ¶ 5.) The article does not report that Plaintiff Hallé was found guilty of violating a criminal law, use the word "convicted," or otherwise suggest that Plaintiff was the subject of a criminal or official administrative investigation. (*Id.* ¶ 6.) *The Bangor Daily News* article also does not report that the conduct for which Plaintiff was found responsible was

[6] Affidavit of Bernard Kubetz, Ex. A, ECF No. 68-1.

[7] Affidavit of Bernard Kubetz, Ex. B, ECF No. 68-2.

criminally actionable, nor does it state that the conduct involved cheating a former business partner out of $1 million. (*Id.* ¶ ¶ 7, 8.)

In a May 2, 2015, draft of "The Maine Problem," Defendant Sutton wrote that "Mr. Hallé is accused of cheating a former partner out of $1 million." In the final version, Defendant changed the word "accused" to "convicted." (*Id.* ¶ 9.)

DISCUSSION

A. Summary Judgment Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "After the moving party has presented evidence in support of its motion for summary judgment, 'the burden shifts to the nonmoving party, with respect to each issue on which he has the burden of proof, to demonstrate that a trier of fact reasonably could find in his favor.'" *Woodward v. Emulex Corp.*, 714 F.3d 632, 637 (1st Cir. 2013) (quoting *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998)).

A court reviews the factual record in the light most favorable to the non-moving party, resolving evidentiary conflicts and drawing reasonable inferences in the non-movant's favor. *Hannon v. Beard*, 645 F.3d 45, 47 – 48 (1st Cir. 2011). If the court's review of the record reveals evidence sufficient to support findings in favor of the non-moving party on one or more of his claims, then there is a trial-worthy controversy and summary judgment must be denied to the extent there are supported claims. Unsupported claims are properly dismissed. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 – 24 (1986) ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses.").

B. Defamation

To prevail on a defamation claim, a plaintiff must establish:

(1) a false and defamatory statement pertaining to the plaintiff;

(2) an unprivileged publication to a third party;

(3) fault amounting at least to negligence; and

(4) either special harm caused by the defamatory statement or a defamatory statement that is actionable even in the absence of special harm (i.e., defamation "per se," sometimes described as defamation for which "malice" may be implied).

Cookson v. Brewer Sch. Dep't, 2009 ME 57, ¶ 27, 974 A.2d 276, 285; *Morgan v. Kooistra*, 2008 ME 26, ¶ 26, 941 A.2d 447, 455; *see also Marston v. Newavom*, 629 A.2d 587, 593 (Me. 1993) ("When [defamation] per se is established, a plaintiff need not prove special damages or malice in order to recover a substantial award.").

In this case, the parties do not dispute the substance of the statements that are alleged to be defamatory. The issue is the legal significance of the statements. To assess whether the statements are actionable, a review of certain relevant legal principles is helpful.

A statement that cannot be proved to be true or false will not support a defamation claim. *Levesque v. Doocy*, 557 F. Supp. 2d 157, 165 (D. Me. 2008); *Fiacco v. Sigma Alpha Epsilon Fraternity*, 484 F. Supp. 2d 158, 173 (D. Me. 2007), *aff'd*, 528 F.3d 94 (1st Cir. 2008); *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991). In addition, "[a] statement is not actionable if it is clear the maker did not intend to state an objective fact but rather to present an interpretation of the facts." *Fortier v. Int'l Bhd. of Elec. Workers, Local 2327*, 605 A.2d 79, 80 (Me. 1992). The Supreme Court has noted that statements that are neither true nor false are statements of opinion and are constitutionally protected, providing "assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the

discourse of our Nation," and ensuring "that debate on public issues remains uninhibited, robust, and wide-open." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (internal quotations omitted). Statements couched as opinion may be actionable, however, if they imply the existence of undisclosed defamatory facts. *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 127 (1st Cir. 1997) (citing *Milkovich*, 497 U.S. at 18 – 19). In *Levinsky's*, the First Circuit quoted with approval the following statement of the law:

> A statement of fact is not shielded from an action for defamation by being prefaced with the words 'in my opinion,' but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.

Id. (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)). Whether a statement is a statement of fact or opinion is a question of law. *Ballard v. Wagner*, 2005 ME 86, ¶ 11, 877 A.2d 1083, 1087. Summary judgment is appropriate if "the wording … in light of the circumstances is incapable of a defamatory interpretation." *Fortier*, 605 A.2d at 80. "If the average reader could reasonably understand the statement as either fact or opinion, the question of which it is will be submitted to the jury." *Caron v. Bangor Publ'g Co.*, 470 A.2d 782, 784 (Me. 1984).

When assessing the truth or falsity of a particular statement, a minor factual inaccuracy is not actionable as defamation. *Fiacco*, 484 F. Supp. 2d at 173. "Falsity 'overlooks minor inaccuracies and concentrates upon substantial truth.'" *Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 108 (1st Cir. 2000) (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991)). "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Masson*, 501 U.S. at 517 (internal quotations omitted). If the statement would not have a different impact on the mind of the reader from what a true statement

would have, the falsity is regarded as immaterial for purposes of defamation. *Veilleux*, 206 F.3d at 108; *Fiacco*, 484 F. Supp. 2d at 173 – 74. Whether a statement conveys a defamatory message is a question of law. *Bakal v. Weare*, 583 A.2d 1028, 1030 (Me. 1990).

1. Convicted of cheating

Plaintiffs allege that Defendants' report that Plaintiff Hallé was "convicted of cheating a former partner out of $1.0 million" is false. In support of their argument, Plaintiffs cite the undisputed record evidence that establishes that Plaintiff Hallé was not charged criminally and thus was not convicted of a crime. Defendants contend that because a court in a civil action found that Plaintiff Hallé committed fraud, the statement is substantially true and thus not actionable.

Preliminarily, to the extent that Plaintiffs argue that Defendants' use of the word "cheating" alone is defamatory, Plaintiffs' argument fails. In a civil action, the New York court found that Plaintiff Hallé committed fraud. "Words take on meaning in the company of other words. They are gregarious. They take on tone and color from syntax and context. In defamation actions, words should be construed as they would be understood by the average reader." *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1316 (3d Cir. 1994) (citation omitted.) In context, the average reader would not perceive a material difference between fraud and cheating.

The more significant question is whether Defendants' use of the word "convicted," which is associated with criminal proceedings and findings, is substantially true. As a general proposition, society views a criminal conviction much differently than a civil judgment. That a criminal conviction can result in imprisonment and that one's criminal record is typically a factor in employment decisions are consistent with this view. In addition, the fact that under Maine law, allegations of criminal conduct have been considered defamatory per se is consistent with the proposition. *See, e.g., Briola v. J. P. Bass Pub. Co.*, 25 A.2d 489, 490 (Me. 1942); *see also Rippett*

v. Bemis, 672 A.2d 82, 86 (Me. 1996) ("False accusations of criminal wrongdoing comprise defamation per se.") (concluding in the context of the defense of truth that summary judgment was inappropriate because "[c]riminal intent is a question of fact for the factfinder"); *Niehoff v. Sahagian*, 149 Me. 396, 403, 103 A.2d 211, 215 (Me. 1954) ("It is not a question of the intent of the speaker, or author, or even of the understanding of the plaintiff, but of the understanding of those to whom the words are addressed and of the natural and probable effect of the words upon them."); *Parker v. Kirkpatrick*, 126 A. 825, 826 (Me. 1924) ("The words claimed to have been employed by the defendant, imputing, as they did, a crime, were admittedly slanderous, and, if false and not privileged, were actionable per se.").[8]

The significance of even an allegation of criminal conduct was evident in *St. Surin*, where the Third Circuit concluded that a newspaper's report that a person was going to be "charged" criminally when he was not charged, but was the subject of an administrative investigation, was actionable despite the newspaper's contention that the statement was substantially true. *St. Surin*, 21 F.3d at 1316 – 17. The law thus recognizes that the "sting" of a false report regarding a person's mere involvement in criminal proceedings is significant and differs in kind from the "sting" of an assertion that a person was involved in some other legal proceedings.

As the court in *McGarry v. CBS, Inc.*, 2:91-cv-04638 (E.D. Pa. Dec. 23, 1991), recognized, a false report that a person was convicted of a crime has even greater significance. In *McGarry*, the court determined[9] that the substantial truth defense was unavailable where the defendant

[8] The Court's reference to authority for the proposition that false allegations of criminal conduct have been considered defamatory per se is not intended as a finding that Defendants' statement in this case is defamatory per se. Rather, the Court's reference is meant simply to demonstrate the significance of allegations of criminal conduct. The Court makes no finding in this decision as to whether the alleged statement is defamatory per se.

[9] The *McGarry* court made its decision in the context of an agreement by the parties that the defense of substantial truth "should be ruled on at the outset of discovery." 1991 WL 280247, at *1.

reported that the plaintiff, a tax collector, had been "convicted" of stealing tax money, when in fact the plaintiff was only charged with theft and had avoided conviction by participation in a pretrial diversion program. 1991 WL 280247, at *2. In other words, a false report of a conviction was sufficient to support a defamation claim even when the plaintiff had engaged in the reported criminal conduct. [10]

Defendants nevertheless argue in part that because Defendants did not report that the New York court imposed a sentence, "a reasonable reader would be led to understand that there were no criminal charges" and thus the claim should fail. (Reply at 5.) Defendants thus maintain that the average reader does not appreciate that "convicted" is necessarily associated with a criminal judgment and not a civil judgment. For the Court to adopt Defendants' reasoning, the Court would have to conclude that the average reader lacks an understanding of the significance of a "conviction" in the judicial process. While most readers likely have had limited, if any, personal experience with the criminal justice system, given the multiple sources of information available to the public regarding the criminal justice system, the Court can reasonably conclude that the average reader would understand and appreciate that use of the term "convicted" suggests criminal, as opposed to civil, responsibility.[11]

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[10] Even when a person was found to have committed a crime, but the false statement misidentified the crime that the person committed, the fact finder has been permitted to consider whether the statement was defamatory. *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1068, 1073 – 74 (5th Cir. 1987) (affirming denial of summary judgment on defense of substantial truth where defendant reported that plaintiffs, former deputies, were convicted of releasing an inmate from prison on weekends in exchange for stolen goods, and the truth was that the deputies were convicted of malfeasance for releasing the inmate on weekends, but were not convicted of bribery or receipt of stolen property) (applying Louisiana law); *Fiber Sys. Int'l, Inc. v. Roehrs*, 470 F.3d 1150, 1155, 1163 – 64 (5th Cir. 2006) (affirming jury verdict that the counterclaim defendants' statements that counterclaim plaintiffs were thieves and had stolen intellectual property was defamatory even though the jury also found that the counterclaim plaintiffs' conduct violated 18 U.S.C. § 1030(a)(4),which prohibits fraudulent access to a computer to obtain anything of value) (applying Texas law); *Acker v. Conn. Newspapers Pub. Co.*, 2013 WL 541160, at *4 – 7 (Conn. Super. Ct. Jan. 11, 2013) (denying summary judgment where defendant reported that SPCA director had been convicted of cruelty to animals, but in fact the conviction was for breach of the peace and failure to vaccinate).

[11] This conclusion is reinforced when one considers society's general use of the word "convict" as a noun. Not only in American legal usage, but also in American popular usage, to be a "convict" is to be someone found guilty of an

The context in which Defendants made the statement supports the conclusion that the average reader could reasonably conclude that Plaintiff Hallé was convicted of a crime.[12] In the sentence that immediately precedes the statement, Defendants wrote, "[i]ncidentally, Cate Street is also being sued for nearly $1.0 million in the State of Wyoming in connection with a failed water recycling business." (Motion at 3.) Defendants then wrote, "[i]n addition, Cate Street's CEO, John Hallé, has been convicted of cheating a former partner out of $1.0 million." (*Id.*) Defendants' use of the word "sued," which an average reader would understand references a civil matter, is in contrast to Defendants' use of the term "convicted." Particularly in context, the average reader could reasonably conclude that one proceeding involved a civil lawsuit and the other involved a criminal proceeding.[13]

As explained above, a false assertion that a person was engaged in or was convicted of criminal conduct is actionable. Given that Plaintiff Hallé was not charged with or convicted of criminal conduct (PSMF ¶¶ 2, 3, 7), Defendants are not entitled to summary judgment based on their contention that Defendants' assertion that Plaintiff Hallé was "convicted of cheating" is substantially true. That is, because the statement "is capable of bearing a defamatory meaning, the

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offense who is serving or has served a prison sentence. *Convict*, Black's Law Dictionary (9th ed. 2009); *Convict*, American Heritage Dictionary of the English Language (4th ed. 2000).

[12] "Context matters in assessing [defamation] claims[.] …. The court must consider all the words used, not merely a particular phrase or sentence." *Amrak Prod., Inc. v. Morton*, 410 F.3d 69, 72 – 73 (1st Cir. 2005) (citations and internal quotation marks omitted.

[13] Defendants cite the reference in the next sentence to a monetary amount owed and the accrual of interest on that amount to support their contention that the average reader clearly would have inferred that the New York matter involved a civil judgment. The subsequent sentence reads: "The $1.0 million (that has not been paid) is, after fourteen years, now up to $2.3 million, according to the New York Judge's ruling." (Reply at 5.) The Court is not persuaded that the average reader would discern that the matter involved a civil judgment based on the mere reference to the amount owed and the interest that has accrued. Defendants' contention arguably requires the average reader to have a greater knowledge of the judicial process than is needed to understand that the term "convicted" is associated with criminal conduct.

matter goes to the factfinder to determine if the statement was understood by the recipient as defamatory." *Schoff v. York Cnty.*, 2000 ME 205, 761 A.2d 869, 871 n.2.

2. Skimmed off the top

In a discussion of the financial arrangements among Cate Street, Brookfield, and the State of Maine, Defendant Sutton wrote, "how much has Cate Street skimmed off the top during the last two years?," and then revised the inquiry as "what are the management fees Cate Street has charged Great Northern during the last two years, and what is the plan going forward?"

In essence, Defendants contend that Defendant Sutton's queries might suggest an opinion, but do not include any factual assertions. As the First Circuit observed in *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724 (1st Cir. 1992), "the relevant question is not whether challenged language may be described as an opinion, but whether it reasonably would be understood to declare or imply provable assertions of fact." *Id.* at 727 (citing *Milkovich*, 497 U.S. at 20).

The use of questions, as Defendants employed, does not automatically shield an author from defamation liability. When commenting upon the Supreme Court's decision in *Milkovich*, the First Circuit noted, "while the author's readers implicitly were invited to draw their own conclusions from the mixed information provided, the *Milkovich* readers implicitly were told that only one conclusion was possible." *Phantom Touring, Inc.*, 953 F.2d at 731. In this case, Defendants' use of the questions does not suggest, explicitly or implicitly, that the reader reach only one conclusion. In fact, Defendants' specific reference to and inquiry about the management fees demonstrate that Defendants invited readers to question Plaintiffs' financial arrangement, but did not describe or define the nature of the arrangement. In other words, the statements cannot "reasonably … be understood to declare or imply provable assertions of fact." *Id*. at 727.

3. Akin to fraud; lined the pockets

When commenting upon Plaintiff Cate Street's performance when compared to the money that it received, Defendant Sutton wrote, "I could be wrong about Cate Street. I have long thought that the company simply had an incredibly naïve and incompetent management team. That might not be the case at all." After observing that Plaintiff Cate Street's performance "could be akin to fraud," Defendant Sutton further wrote, "[p]erhaps the game plan all along was just to ride Great Northern as long as it would last, taking a big cut along the way. Great Northern's slow demise might have lined the pockets of Cate Street owners, and perhaps others."

Through the statements, Defendant Sutton offers his belief that the money did not benefit Great Northern either due to incompetence or perhaps something more questionable. "[T]he First Amendment prohibits defamation actions based on loose, figurative language that no reasonable person would believe presented facts." *Levinsky's*, 127 F.3d at 128 (citing *Letter Carriers v. Austin*, 418 U.S. 264, 284 – 86 (1974) (holding that use of the word "traitor" to define a worker who crossed a picket line was not actionable); *Greenbelt Co–op. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13 – 14 (1970) (holding that a newspaper's characterization of a developer's negotiating position as "blackmail" was not defamatory; the word was simply an epithet and, under the circumstances, did not suggest commission of a crime); *Phantom Touring*, 953 F.2d at 728 (calling a play "a rip-off, a fraud, a scandal, a snake-oil job" was mere hyperbole and, thus, constitutionally protected)).

When viewed in context, Defendant Sutton's use of words such as "could," "might," and "perhaps" do not "imply provable assertions of fact." *Id*. Instead, while using language that might fairly be described as dramatic to underscore his unfavorable view of Plaintiff Cate Street's performance, Defendant Sutton expresses his thoughts about the manner in which Plaintiff Cate Street managed Great Northern, and about the possible explanations for Plaintiff Cate Street's

management decisions and overall performance. Under the circumstances, Defendant Sutton's statements are not actionable.

4. Unsurpassed incompetence; possible fraud-like management fees

For similar reasons, Defendant Sutton's statement that "Cate Street not only gets a free pass for its unsurpassed incompetence (and possible fraud-like management fees)" is not actionable.

CONCLUSION

Based on the foregoing analysis, the Court grants in part and denies in part Defendants' Motion for Summary Judgment.[14] In particular, the Court grants Defendants summary judgment on the defamation claim asserted by Plaintiff Cate Street (Count I)[15]; grants Defendants summary judgment on the defamation claim asserted by Plaintiff John Hallé to the extent that the claim is based on statements 2, 3, and 4 discussed above; and denies Defendants summary judgment on the defamation claim asserted by Plaintiff John Hallé to the extent that the claim is based on the statement that Plaintiff Hallé was "convicted of cheating."

/s/ John C. Nivison
U.S. Magistrate Judge

Dated this 28th day of October, 2015.

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[14] Plaintiffs request that should the court find no genuine issue regarding a particular statement, "and it is conceivable that the context of the Article or other factual information is relevant," that they be able to conduct depositions. (Opposition at 16.) Plaintiffs' request is denied. "Whether [a] statement is capable of conveying a defamatory message at all is a question of law," *Bakal*, 583 A.2d at 1030, to be assessed "in the light of what might reasonably have been understood … by the persons who read it," *Picard v. Brennan*, 307 A.2d 833, 835 (Me. 1973). Plaintiffs do not articulate, nor does the Court perceive, how discovery will inform this assessment. *Filiatrault v. Comverse Tech., Inc.*, 275 F.3d 131, 138 (1st Cir. 2001) ("[A] party who seeks to invoke the prophylaxis of Rule 56(f) must articulate some plausible basis to support a belief that discoverable material exists which, if available, would suffice to raise a trialworthy issue.").

[15] To be actionable, an allegedly false statement must "be 'of and concerning' the plaintiff." *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991). Although the Court concludes that one of the statements in question is actionable, that statement is of and concerning Plaintiff Hallé, not Plaintiff Cate Street. *See also Davric Maine Corp. v. Scott*, No. CV-05-580, 2006 WL 2960682, at *2 (Me. Super. July 18, 2006) (explaining that "an action for defamation 'is personal to the plaintiff and cannot be founded on defamation of another'") (quoting Prosser and Keaton, *Torts* § 111 at 778 n.48 (5th ed. 1984)); Restatement (Second) of Torts § 564 (1977) (explaining that a defamatory statement concerns the person to whom the reader or recipient reasonably understands the statement relates).

CATE STREET CAPITAL INC et al v. INDUSTRY INTELLIGENCE INC et al
Assigned to: MAGISTRATE JUDGE JOHN C. NIVISON
Cause: 28:1332 Diversity-Personal Injury

Date Filed: 05/13/2014
Jury Demand: None
Nature of Suit: 320 Assault Libel & Slander
Jurisdiction: Diversity

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