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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT  
CIVIL ACTION  
No. 1781CV02701

WALTER TUVELL

vs.

JACK MARSHALL

**DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS**

This plaintiff, Walter Tuvell ("Tuvell"), is a Massachusetts resident. Among other things, Tuvell maintains a website, titled "Judicial Misconduct USA," a topic in which Plaintiff is deeply interested. The defendant, Jack Marshall ("Marshall"), is a Virginia resident. Among other things, Marshall maintains a website, titled "Ethics Alarms." On that website, Marshall holds himself out as an ethics expert and offers commentary, in the form of blog postings, on a variety of issues from his perspective as an ethicist. On August 26, 2017, Tuvell sent an email to Marshall. On August 27 and August 28, Marshall published on his website a handful of postings that concerned Tuvell and the email Tuvell had directed to Marshall. Marshall also "banned" Tuvell from the Ethics Alarms website, and explained his reasons in one of his postings on August 28. A few weeks later, Tuvell filed this civil action for defamation, arising out of Marshall's posts to his Ethics Alarms website and his banning of Tuvell from that site. Before the court is Marshall's motion to dismiss Tuvell's complaint for failure to state a claim. For the reasons set forth below, Marshall's motion to dismiss the complaint is **allowed**.

## **I. Standard**

A motion to dismiss may be granted where a party fails to state a claim on which relief can be granted. Mass R. Civ. P. 12(b)(6). “For purposes of deciding a motion to dismiss, [the court] accept[s] as true the allegations in the complaint, and draw[s] all reasonable inferences in favor of the party whose claims are the subject of the motion.” *Fairney v. Savogran Co.*, 422 Mass. 469, 470 (1996). The court, however, “do[es] not accept legal conclusions cast in the form of factual allegations.” *Schaer*, 432 Mass. at 477. In order to survive a motion to dismiss, a complaint must contain factual allegations “plausibly suggesting” that the pleader is entitled to relief. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548 (2007). When evaluating a Rule 12(b)(6) motion, the court may take into consideration not only the allegations in the complaint but also matters of public record, items appearing in the record of the case, exhibits attached to the complaint as well as documents relied upon in framing the complaint. See *Schaer*, 432 Mass. at 477; *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 224 (2011). See also *Watterson v. Page*, 987 F.2d 1, 3-4 (1993) (observing that “documents the authenticity of which are not disputed by the parties” may be considered on a motion to dismiss).

## **II. Facts<sup>1</sup>**

On August 26, 2017, Tuvell, who recently started visiting a website entitled “Ethics Alarms” (ethicsalarms.com), sent an email to Marshall, the website’s operator. On the website, Marshall holds himself out as an ethics expert and offers commentary, in the form of blog

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<sup>1</sup> Attached to Tuvell’s opposition brief is a printout of the webpage from the Ethics Alarm website which contains the statements alleged to be defamatory. The webpage was heavily relied upon and quoted by the plaintiff in drafting the complaint, and Marshall does not appear to contest that the attached printout is an accurate representation of the webpage. Thus, the Court may rely on this printout without converting the motion to one for summary judgment. See *Golchin*, 460 Mass. at 224; *Watterson*, 987 F.2d at 3-4.

postings, on a variety of issues from his perspective as an ethicist. Tuvell sent the email to the address listed on the website's "About" section.

Marshall did not reply directly to Tuvell's email. Instead, he addressed the email in the first part of a long post titled "Morning Ethics Warm-Up: 8/27/17." The relevant portion of Marshall's post, which did not refer to Tuvell by name, stated:

**1. I received a nice, polite e-mail from a new reader here** who accused me of engaging exclusively in "partisan/political rants." "Further," he wrote, "everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal/democrat is bad)."

The man is an academic, so one might expect a little fairness and circumspection, but then, the man is an academic. His description is in factual opposition to the contents of the blog (I'm trying to think of the last Republican leader, conservative or otherwise, I designated as "good"), but I know from whence the impression arises: the fact that the entire American Left, along with its sycophants and familiars, the universities, show business and the news media, have gone completely off the ethics rails since November 8, 2016. I don't know how else I am supposed to address that. It would have been nice, for balance's sake, if a conservative cast of white actors in, say, a hit musical called "The Ray Coniff Story" had stepped out of character and harassed, say, Chuck Shumer, but this didn't happen. If it had, I would have treated that breach of theater ethics exactly as I did the cast of Hamilton's harassment of Mike Pence. (I would not, however, have been attacked for doing so by my theater colleagues, and no, I haven't forgotten, and I'm not forgiving.)

If a GOP figure working for CNN as an analyst, say, Jeffrey Lord, had used his connections at the network to forward debate questions to Donald Trump and then lied about it when he was caught red-handed, I would have eagerly written about it in highly critical terms—but the Republicans didn't cheat. Donna Brazile and the Democrats did.

If Hillary Clinton had been elected President and Donald Trump and the Republicans formed an anti-democratic movement called "the resistance," tried to use a single Federalist paper as a rationalization to change the rules of the election and then pressured performers not to allow the new President the privilege of a star-studded, up-beat inauguration to unify the nation, and if a large contingent of Republican Congressmen had boycotted the ceremony, saying that they did not consider Hillary as "legitimate President," Ethics Alarms would have been unmatched in expressing its contempt and condemnation. If

conservatives were trying to limit free speech according to what they considered “hateful,” a step toward dictatorship if there ever was one, I would be among the first to declare them a menace to society. They haven’t advocated such restrictions, however. Progressives have. The Mayor of Portland has called for a “hate speech” ban. What party is he from? Howard Dean said that “hate speech” wasn’t protected. What party was he the Chair of? I forget. What was the party—there was just one— of the mayors who announced that citizens holding certain views should get out of town?

“Need I go on? I could, *because the uniquely un-American, unfair and destructive conduct from Democrats, progressives and the anti-Trump deranged has continued unabated and without shame for 10 months now.* That’s not my fault, and I don’t take kindly to being criticized for doing my job in response to it. I have chronicled this as unethical, because it is **spectacularly** unethical, and remains the most significant ethics story of the past ten years, if not the 21st Century to date.

And the reluctance and refusal of educated and usually responsible liberals and Democrats to exhibit some courage and integrity and vigorously oppose this conduct as they should and have a duty as Americans to do—no, I am **not** impressed with the commenters here who protest, “Hey, I don’t approve of all of this! Don’t blame me!” as if they bear no responsibility—is the reason this execrable conduct continues. It is also why I have to keep writing about it.

(bold and italics in original). The post then went on to discuss other topics at some length in a similar fashion. Tuvell responded in the comment section of “Morning Ethics Warm-Up: 8/27/17” a few hours later, writing:

**Walter E. Tuvell**

I am the author of “Item #1” in Jack’s Morning Ethics Warm-Up for Aug 27 2017. For the record, here is the content of the email I sent him, which instigated Jack’s response:

Jack – I’ve been following your website (<https://ethicsalarms.com>) since I “discovered” it a couple of months ago. Its About page is especially lucid and luring.

The problem is, your posts don’t live up to the About advertisement. Specifically, the About page speaks only about whole-life ethics (a very laudable goal, what I was looking for), but says nothing about partisan/political rants. Yet, it seems like that’s what the website does, and only that. Further everything you say appears to be entirely one sided

(right/conservative/republican is good, left/liberal/democrat is bad).

Is that the way you really see things? Or I am missing something? Thx. – Walter Tuvell (PhD, Math, MIT & U.Chicago – i.e., “not-a-crank”)

I counter-respond as follows:

First: I am not an “academic” (well-educated, yes, but worklife has been in the computer industry). Nor am I an American leftist, sycophant, familiar, university, show business, news media, etc. Rather, I’m just a guy looking for serious ethical guidance in uncertain times, of the sort Jack mentions/advertises on his About page (<https://ethnicsalarms.com/about>).

Second: My note was not, I think, an “accusation,” but rather an “observation,” based on the deviance of the website’s content vs. the wording of its About page. Granted I’m a relatively new reader, so don’t have the benefit of long-term familiarity, but from what I’ve seen to date, everything has decidedly political/partisan, in one particular direction (from left to right). That seems biasedly unbalanced (black-and-white, no gray) to me.

Third: I maintain a website documenting a major cultural/governmental (but not “political/partisan”) phenomenon affecting many thousands of Americans yearly, namely Judicial Misconduct (<http://JudicialMisconduct.US>). THAT’S the sort of thing I wonder what an non-political/partisan (though legally trained/savvy) ethicist thinks about. Start, say, with the “Smoking Gun” at <http://JudicialMisconduct.US/CaseStudies/WETvIBM/Story#smokinggun>.

Following this response, Marshall and Tuvell engaged in the following conversation in the comment section:

**Jack Marshall**

Thanks, Walter. I was hoping you would post.

**Jack Marshall**

And sorry for the mistake regarding your erudition. I come from a tradition where only scholars and academics attach their degrees and alma mater to their name. I know I don’t.

**walttuvell**

Right, Jack, you don't "wear you credentials on your sleeve," to your credit, which I generally agree with (though your bio does indicate you're a "Harvie (Harvard)," whereas I'm a "Techie (MIT)"). I only appended the "not-a-crank disclaimer" as a prophylactic, because "on the Internet, nobody knows you're a dog" ([https:// en.wikipedia.org/wiki/On the Internet, nobody knows you%27re a dog](https://en.wikipedia.org/wiki/On_the_Internet_nobody_knows_you%27re_a_dog)).The point being, that some sort of cred-establishment is more-or-less required upon an initial encounter, esp. on the Internet, where "everybody is a troll, until proven otherwise" (just like in Court, "everybody is a liar, until proven otherwise").

**Jack Marshall**

I know. Sorry, I was teasing. I am unusually anti-credentials. Some of the wisest, smartest people I know have none, and some of the biggest fools have an alphabet after their names. I am also disgusted with scholars, academics and alleged smart people right now. I shouldn't have taken it out on you.

I apologize, Walt; you didn't deserve the snark,

Just for that, you can call me partisan again.

The next day, on August 28, 2018, Tuvell, other readers of the blog, and Marshall engaged in a heated discussion in the "Morning Ethics Warm-Up: 8/27/17" post comment section. This conversation, which was essentially in two discussion threads, lasted until Marshall banned Tuvell from the website later that afternoon. The first discussion thread contained the following posts:

**Red Pill Ethics**

I mean it's nice of you to respond Walter, but Jack very clearly presented his case for why the ethics criticisms have been so one way – a large and sustained breakdown of ethics and reason in the left with many supporting examples. If you respond to anything I'd be most interested in hearing your response to that. Maybe something along the lines of an equivalent large and sustained breakdown of ethics and reason in the right with many supporting examples. If you can provide a good argument for that, then I'd 100% agree that the one sided coverage appears to show an ideological bent. If you can't... then maybe an apology is in order.

....

**walttuvell**

Red Pill Ethics: You say I should “apologize” if I don’t provide a case for (an examples of) large and sustained breakdown of ethics and reason on the right.

I have no idea what you’re talking about. It is not ME who supports OR denies any breakdown of ethics/reason on the left OR right. Thought, that appears to be what (all?) others here care about.

With the few short notes I’ve posted here, I’ve made it clear (but I’ll repeat again) that I care nothing about partisan politics, be it under the guise of “ethics” or just plain naked pot-calling-kettle-black. And I certainly won’t apologize for that.

To the contrary, I tuned into this site in the hope/expectation of finding a discussion of ethics, without the smokescreen of partisan politics clouding the air. I even proposed a topic, Judicial Misconduct, with examples (<http://JudicialMisconduct.US>). But no takers. Such things appear not to be what this site is about.

**texagg04**

“Such things appear not to be what this site is about.”

Then you should take the time to avail yourself of the 1000s of posts Jack has composed over the decade plus of his discussion group.

Jack isn’t partisan or biased. It’s just demonstrative of how far off the rails the Left has gone in it’s unethical conduct post election. And Jack IS frank about his view their their current insurrectionist and counter-constitutional mindset and conduct ARE the gravest threat to our nation.

So of course they seem to get more coverage. But that isn’t a bias problem of Jack’s.

**walttuvell**

I’ve already disclaimed my inexperience with this site, being a new-ish user of only a couple months’ standing. Unfortunately, from what I’m seeing, it’s doubtful that “taking the time” of absorbing the whole past of the site, as you suggest, will disabuse me of my initial assessments.

For, what you just wrote (and which you claim is representative of the site) is itself quintessential troll-like partisanship: “Everything Jack/we say is non-partisan, because the Left has gone unethically off the rails in their insurrectionist/counter-constitutional mindset/conduct, representing a grave threat to the nation.”

**texagg04**

So you're not going to even try?

Good strategy.

**walttuvell**

Correct. The whole partisan politics thing is tiresome/boring, and I have no dog in that fight. I just don't care about that whole "I-am-not, you-are-so" scene, from any direction. Silly.

**texagg04**

Suit yourself.

**Jack Marshall**

KABOOM! If it is silly, why did you choose that precise issue to begin with?

**walttuvell**

Oh Come On, Jack, I did NOT "choose that precise issue," and you know it. I wrote a private note to you about "am I missing something," in thinking I was seeing mostly partisan-politics-pretending-to-be-ethics. THAT'S the "topic" I chose (expecting a simple private response). Instead, it got twisted (intentionally?).

The topic of THIS ("silliness") subthread is that some people think I should give some sort of apology, and/or some sort of arguments/examples about how the Left is better than the Right in some sense — "as if" I'm some kind of Leftist and believe that — because somehow I got tagged with being some sort of Leftist in some sense. But I've made no proclamations/hints whatsoever about being any such thing. Perhaps this happened because I was misperceived initially as an "academic," and some people somehow lump "academics" into the Left. Though in fact I've long disavowed being either Right or Left, and care nothing about it, because it's a silly tempest-in-a-teapot.

Why are you (and others) pretending otherwise?

**Chris**

Walt, some advice from one of this blog's leftists: Move on. Jack's blog is very valuable to me, and has taught me a lot about ethics. From my perspective most of his posts lately have been about politics, but that's because politics are a great window into the ethics of a country, especially at this moment in time. I \*do\* agree with you that Jack, like all people, has a bias, and I think he's been less careful about mitigating



that bias lately. But I've made a case for that when I've seen it, whereas you have just repeated it without really citing evidence for it. If you choose to stick around I hope you will do the same, but right now you're going in circles trying to justify your original comment, which, to me, was overly broad and unsupported.

The second discussion thread contained the following posts:

**Jack Marshall**

Walt, I'm not obligated to do this, but just for you, I picked the last full month of the blog, and kept score, running backwards, regarding whether a post criticized the left or the right. In doing so, I ignored the Daily updates, since they are mixed topics, and also decided to place criticism of President Trump down as criticism of the right, as he is technically a Republican. I did not score posts that did not involve politicians, government, new reporting or public policy debates.

I stopped after checking 16 posts, when the score was 8 to 8. I have done this before, with similar results. I'm sure, indeed I know, that there are periods when the balance is not this close, but I picked July 2017 at random. My survey simply does not support your claim. Neither would your own survey.

People are wedded to their own world view, come here, see that i designate some position that they have an emotional attachment to as based on unethical principles, and default to bias as an explanation.

Your claim is simply unsupportable on the facts, as is the claim that the blog is primarily political in nature. As I often note, the fact that the Left has inexplicably bundled issues and made it part of its cant does not make rejection of one of those issues partisan or political. Saying that illegal immigrants should get a free pass to the benefits of citizenship isn't liberal, it's idiotic and wrong. Holding that gay Americans shouldn't have all attendant rights of citizenship isn't a conservative position, it's an ignorant position.

You can believe what you choose; most people do. But I work extremely hard to avoid exactly the kind of bias you accuse me of, and I stand by the results. I am not always right, but when I am wrong, it is not because of partisan bias.

**walttuvell**

Unfortunately, you're misrepresenting me (see initial email) again, because all you doing is "keeping Left/Right score." I don't care about Left/Right anything! What I care about is Ethics per se, as opposed to partisan political rants of any kind, which is what appears to dominate

this site (and seemingly from the Right=Good point of view, but that's a sub-observation, not the main theme of my interest).

I was initially attracted to you because you're trained/savvy in the law, and I wanted to ask you opinion about the ethics of Judicial Misconduct, specifically in the sense of institutional abuse of the Summary Judgment process (e.g., <http://judicialmisconduct.us/CaseStudies/WETvIBM/Story#smokinggun>). You've done nothing to address that, and nobody on this site appears to have any inclination to so.

Fair enough. But at least please be straightforward about it, instead of twisting what I'm saying beyond all recognition.

**walttuvell**

Oh, and another thing: Why in the world did I ever think that Jack (and by extension this blog/website) might be interested in Judicial Misconduct?

Why, because it's advertised on the About page, of course: "I [Jack] specialize in legal ethics ..."

**Jack Marshall**

Or, you could search for judicial ethics, or judges, right on the blog! The last judicial conduct post was almost exactly a month ago. They come up when they come up.

**texagg04**

You sound more and more like another incarnation of a guy who would frequent this blog beating on ONE topic and ONE topic only...every thread that guy began seemed "new" but ended up ALWAYS redirecting to Supreme Court malfeasance and Judicial misconduct...

Hm.

He'd always get banned...

Then he'd always come back under another name.

**walttuvell**

Oh, yes. Damnation by (invalid) innuendo. Trying to twist my one-and-only post into a multiplicity of "threads." Very clever/subtle/bogus. NOT

**Jack Marshall**

I just banned Walt. Read my post about it. He's special.

## Jack Marshall

I have already spammed two more posts by the jerk.

Marshall's post discussing the ban, which immediately followed the above thread, read as follows:

### **ATTENTION: Walt Tuvell is banned from commenting here.**

I don't even care to spend any more time on him, but I'll give some background. He sandbagged me. He submitted nothing but whiny posts denying that he had accused Ethics Alarms of being obsessed with partisan political topics, then denied he had done that, then said the all he was looking for was a discussion of a judicial conduct issue (but did this initially with a link in a comment to another commenter, causing me to miss it) then just posted a comment saying that the blog advertised itself as covering judicial misconduct and doesn't (there are **dozens** of judicial ethics posts), and THEN, when I finally get the link to the ethics issue he says he was seeking a reaction to—**HINT**: if you want a reaction to a specific issue, the best way is to write me at [jamproethics@verizon.net](mailto:jamproethics@verizon.net), and ask, "What do you think about this?" If it's a good issue, I'll respond like a good little ethicist and jump through your hoop.

But no, Walt began by accusing me of pure partisan bias, and issued bitching comment after bitching comment until, finally, he actually revealed his agenda, and GUESS WHAT?

Come on, guess!

Walt's "issue" is about **his own case**, and the link goes to **his single issue website**, which you can try to wade through here<sup>2</sup>

The case is **Tuvell v IBM**, and skimming his messy post that teeters on the edge of madness, I discern that the reason Walt is interested in judicial misconduct is that the judge decided that his case was lousy, and dismissed it. That obviously means that the judge is unethical.

I was going to, as a favor to Walt, because i am a nice guy, show my good faith by addressing his issue even *though he didn't have the courtesy or honesty of fairness to come right out and say what he wanted*. Then I read as much of the entry on his blog—which purports to be about judicial misconduct in summary judgments generally, but is in fact only about his case—as I could stand, and realized that Walt is, in technical terms—this is an opinion, Walt, not an assertion of fact, you

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<sup>2</sup> In Marshall's post, a hyperlink to Tuvell's Judicial Misconduct USA website was at the word "here."

can't sue me: put down the banana— a few cherries short of a sundae. This became clear in this passage.

*Tuvell suffered severe shock/dismay/devastation, and worse. For, Tuvell was/is a long-term victim of whistleblowing/ bullying-instigated PTSD, stemming from previous defamatory/ abusive workplace incidents he'd experienced more than a decade previously while at another employer, but which was since in remission ("passive"/"dormant" phase). Knabe/ Feldman's accusation immediately caused/"triggered" Tuvell to reexperience an acute/"active" PTSD "flashback"/relapse.*

I used to get letters from people like this, long rambling things with court cites and exclamation points. I answer phone calls from people like Walt, and try to help them if possible, but it's usually futile, and often they keep calling and calling until I have to just duck the calls. And I get e-mails with long, rambling court documents. This is the first time, however, someone has abused Ethics Alarms for a personal agenda.

I'm sorry for Walt's troubles, but he was not honest, and misrepresented his purpose by the charming device of insulting my integrity. Obviously, he wanted to check and see whether my sympathies would be with his cause before submitting it for consideration. As I tell my clients, I can't be bought, and you take your chances.

Walt was also obviously looking for a cheap, as in free, expert opinion that he could use in his crusade against the judge.

*What an asshole!* The fact that he may be a desperate asshole doesn't justify wasting my time, and others who responded to him and misrepresenting his motives.

For this, Walt earns the ultimate ban. He will not be re-instated, and if he submits one more comment having been so warned, I will delete every one of his comments so the stench of his abuse no longer lingers here.

*Can you tell that I'm ticked off?*

(bold and italics in original).

### **III. Discussion**

In his complaint, Tuvell brings a single claim for defamation based on statements Marshall made in his "Morning Ethics Warm-Up: 8/27/17" post (hereinafter, "Initial Post") and in the post's comment section (hereinafter "Marshall's Comments"), particularly the comment

titled “ATTENTION: Walt Tuvell is banned from commenting here.” Tuvell asserts that the Initial Post falsely accused him of being an “academic” (a term Tuvell claims was intended as derogatory) and falsely attributed negative partisan traits to him, and that Marshall’s Comments mischaracterized his email to Marshall, his own comments, the Judicial Misconduct USA website, and his lawsuit against IBM, and otherwise leveled inappropriate insults against him. As explained below, nothing in either in the Initial Post or Marshall’s Comments can serve as a basis for Tuvell’s defamation claim.

To withstand a motion to dismiss a defamation claim, a complaint must put forward allegations establishing four elements: (1) the defendant made a statement “of and concerning” concerning the plaintiff to a third party; (2) the statement could damage the plaintiff’s reputation in the community;<sup>3</sup> (3) the defendant was at fault for making the statement; and (4) the statement caused economic loss or is one of the specific circumstances actionable without economic loss. See *Scholz v. Delp*, 473 Mass. 242, 249 (2015); *Driscoll v. Trustees of Milton Academy*, 70 Mass. App. Ct. 285, 298 (2007); *Eyal v. Helen Broadcasting Corp.*, 411 Mass. 426, 429 (1991). Moreover, the alleged statement must “be one of fact rather than opinion.” *Scholz*, 473 Mass. at 249. An expression of opinion “no matter how unjustified or unreasonable the opinion may be or how derogatory it is” is inactionable unless it “impl[ies] the existence of undisclosed defamatory facts on which the opinion purports to be based.” *Id.* at 249-250, 252-253 (internal quotes omitted).<sup>4</sup> See also *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 267 (1993) (“Our

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<sup>3</sup> Put differently, the plaintiff must allege that defendant made a statement that “would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community.” *Phelan v. May Dept. Stores Co.*, 443 Mass. 52, 56 (2004), quoting *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 853 (1975).

<sup>4</sup> In other words, a statement which neither contains nor refers to objectively verifiable facts, and therefore cannot be proved false, is not actionable. *Scholz*, 473 Mass. at 250.

cases protect expressions of opinion based on disclosed information because we trust that the recipient of such opinions will reject ideas which he or she finds unwarranted by the disclosed information.”).<sup>5</sup> Rhetorical flourish or hyperbole is likewise inactionable. *Dulgarian v. Stone*, 420 Mass. 843, 850-851 (1995); *Lyons*, 415 Mass. at 266-267. In analyzing whether a statement is a fact or opinion, the court “examine[s] the statement in its totality in the context in which it was uttered,” taking care to consider “all the words used, not merely a particular phrase or sentence,” any “cautionary terms used by the person publishing the statement,” and “all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.” *Downey v. Chutehall Constr.*, 86 Mass. App. Ct. 660, 664 (2014).

With these principals in mind, the Court turns to Tuvell’s allegations of defamation. To the extent Tuvell’s claim is based on any of the statements in the Initial Post, the claim fails to satisfy the first element of a defamation claim – the alleged statement published by the defendant was “of and concerning” the plaintiff. This element can be satisfied by showing that “either that the defendant intended its words to refer to the plaintiff and that they were so understood [by a third party], or that the defendant’s words reasonably could be interpreted to refer to the plaintiff and that the defendant was negligent in publishing them in such a way that they could be so understood.” *Driscoll*, 70 Mass. App. Ct. at 298, quoting *Eyal*, 411 Mass. at 430. Here, the Initial Post did not mention Tuvell by name or provide any other identifying information about

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<sup>5</sup> *Lyons* provides a helpful example of the difference between actionable and inactionable opinion: “[I]f I write, without more, that a person is an alcoholic, I may well have committed a libel prima facie; but it is otherwise if I write that I saw the person take a martini at lunch and accordingly state that he is an alcoholic.” *Id.* at 262, quoting Restatement (Second) Torts, § 566 (1977).

him, and Tuvell has not put forward allegations indicating that the readers of Ethics Alarms understood the post to be referring to him specifically at the time it was published.<sup>6</sup> Indeed, the allegations in the complaint and readers' comments to the Initial Post, indicate that readers only learned that Tuvell was the author of the email discussed in the Initial Post after Tuvell *himself* voluntarily disclosed this information. Accordingly, the statements in the Initial Post cannot be the subject of a defamation claim. See *Driscoll* 70 Mass. App. Ct. at 298 (no claim for defamation where plaintiff not mentioned by name in communication); Cf. *Reilly v. Associated Press*, 59 Mass. App. Ct. 764, 777 (2003) (statement was "of and concerning" plaintiff where plaintiff "only person identified in the article").<sup>7</sup>

As for Marshall's Comments, those statements likewise cannot serve as a basis for Tuvell's defamation claim because they can only be reasonably understood as expressions of opinion rather than fact. Given the language Marshall employed and the medium in which Marshall's statements were made – a personal blog where Marshall shares his views on ethics, politics and other matters, his remarks about Tuvell's email, comments, Judicial Misconduct USA website, and lawsuit against IBM plainly expressed his opinions. See *Scholz*, 473 Mass. at 252 (fact that statements made in an entertainment news column indicated that they were

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<sup>6</sup> Marshall's reference to the email he had received from a reader served only as a means for Marshall to transition to a much broader discussion, namely, the perceived ethical lapses of the political left, a topic unrelated to Tuvell.

<sup>7</sup> Tuvell takes particular issue with Marshall's statements in the Initial Post that the author of the email was an "academic" and that the "American Left" (which includes academics) "have gone completely off the ethics rails since November 8, 2016." Even if Tuvell had been identified as the author of the email, these statements could not serve as a basis for a defamation claim. The term "academic," even when used in this context, cannot be properly viewed as a statement that "would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any *considerable* and respectable segment in the community" and is therefore not defamatory. *Phelan*, 443 Mass. at 56 (emphasis added). Moreover, Marshall's assertion that the American Left has "completely gone off the ethics rails" is protected rhetorical hyperbole and opinion. It is an observation that can neither be proven true nor false in any definitive sense.

opinion). Furthermore, these opinions were based on disclosed information. Tuvell's email and comments were in the comment section when Marshall made these statements, as was a hyperlink to Tuvell's website, which discusses his lawsuit against IBM. Marshall's readers, therefore, were fully aware of the basis for Marshall's opinions on these topics and were able to assess whether Marshall's opinions were warranted.<sup>8</sup> See *Scholz*, 473 Mass. at 253-254 (statements in articles that allegedly insinuated that plaintiff was responsible for a suicide constituted inactionable opinion because articles "lay[ed] out the bases for their conclusions" and therefore "clearly indicated to the reasonable reader that the proponent of the expressed opinion engaged in speculation and deduction based on the disclosed facts.") (internal quotations omitted); *Lyons*, 415 Mass. at 264-266 (article stating that plaintiffs' picketing held a political convention "hostage" and which advanced various explanations for picketers' motives was inactionable opinion because it was based on nondefamatory facts disclosed in the article).<sup>9</sup> Accordingly, because the statements are nonactionable opinion, Tuvell cannot prevail on his defamation claim in so far as it is based on Marshall's Comments.

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<sup>8</sup> Marshall's statement that "the judge [in *Tuvell v. IBM*] decided that his case was lousy" is clearly based on the information found on Tuvell's Judicial Misconduct USA website, rather than his reading of the judge's rulings in the case.

<sup>9</sup> To the extent Tuvell complains about Marshall's statements that he was "special," "a jerk," an "asshole," "a few cherries short of a sundae," and the like, those statements were also opinions based on disclosed information, or constituted rhetorical hyperbole that could not be reasonably interpreted to state an actual fact. See *Tech Plus, Inc. v. Ansel*, 59 Mass. App. Ct. 12, 25 (2003) (statement that plaintiff was "sick," "mentally ill" and "lived with two hundred cats" was, in context, protected as rhetorical hyperbole); *Fleming v. Benzaquin*, 390 Mass. 175, 180-181 (1983) (statements that state trooper was a "little monkey," "tough guy," "absolute barbarian," "lunkhead," "meathead," and "nut" were non-actionable); *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 728 (1st Cir.), cert. denied, 504 U.S. 974 (1992) (description of theater production as "a rip-off, a fraud, a scandal, a snake-oil job" was "obviously protected hyperbole").



#### **IV. Conclusion**

For the reasons set forth above, Tuvell has failed to state a claim for defamation and Marshall's motion to dismiss is **allowed**.

A handwritten signature in black ink, appearing to read 'C. Barry-Smith', written over a horizontal line.

Christopher K. Barry-Smith  
Justice of the Superior Court

DATE: August 13, 2018