No. _____

In the

Supreme Court of the United States

BYD COMPANY LTD.,

PETITIONER,

v.

ALLIANCE FOR AMERICAN MANUFACTURING, SCOTT NORMAN PAUL, CATHALIJNE ADAMS, AND MATTHEW MCMULLAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), *St. Amant v. Thompson*, 390 U.S. 727 (1968), and *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), balanced the reputational interests of public figures in defamation cases with the First Amendment interests of defendants, by requiring that public figure plaintiffs meet the significant burden of proving "actual malice" by clear and convincing evidence **at trial**, but permitting plaintiffs to plead such claims and obtain discovery to establish defendants' mental state and meet the actual malice standard.

The question presented is whether *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), *sub silentio* overturned the balance struck in *Sullivan* and its progeny, and created a new, more robust privilege, permitting even intentional or reckless defamation of public figures so long as plaintiffs do not have the facts regarding the defendant's mental state at the time of suit and would require discovery to prove that the defendant recklessly disregarded the truth.

CORPORATE DISCLOSURE STATEMENT

Petitioner BYD Company Ltd. is a nongovernmental corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

There are no related cases. However, *BYD Company Ltd. v. VICE Media, LLC*, No. 21-1518, currently awaiting disposition by this Court on a petition for certiorari, raises the same legal issue of pleading actual malice in a defamation case as is raised herein.

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INTRODUCTION

This case arises out of a troubling trend in the lower courts. At a time when Justices of this Court and other prominent judges have been discussing whether the *New York Times Co. v. Sullivan* "actual malice" standard for public figure defamation plaintiffs should be reexamined and perhaps curtailed or overturned,[1] many federal Courts of Appeal and District Courts have effectively created a new, broader privilege allowing people to defame public figures, even intentionally, without facing liability.

The mechanism that the lower courts have used is this Court's holdings in *Ashcroft v. Iqbal* and *Bell Atlantic Corp. v. Twombly*—cases that require plaintiffs to meet a "plausibility" standard when pleading. That plausibility standard is supposed to be minimal, merely requiring the plaintiff to provide the judiciary with some assurance that there is factual support for the claim. But in defamation cases, the *Iqbal/Twombly* standard is now commonly being used to dismiss any claim where the plaintiff does not, at the time of filing, already possess proof of the defendant's mental state. Plaintiffs are being denied the right to take discovery to obtain the necessary clear and convincing evidence that the defendant recklessly disregarded the truth, even though evidence of the defendant's mental state is usually in

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[1] *See, e.g., Berisha v. Lawson*, 141 S. Ct. 2424, 2424 (2021) (Thomas, J., dissenting from denial of cert.); *id.* at 2425 (Gorsuch, J., dissenting from denial of cert.); *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 243 (D.C. Cir. 2021) (Silberman, J., dissenting).

the control of the defendant at the time the complaint is filed. The effect of this practice by the lower courts is to broaden the *Sullivan* privilege in a manner that is almost unrecognizable. The original *Sullivan* privilege protected those who accidentally publish falsehoods, while allowing cases to proceed against those who recklessly disregard the truth. Now, however, even knowing, blatant liars can (and do) escape liability and successfully obtain a dismissal of defamation claims. The basis for these dismissals is that the plaintiff, having taken no discovery, cannot specifically allege the defendant's mental state at the time the defamatory statement was made.

This practice is a dangerous expansion of *Sullivan*, in favor of defamation defendants. The *Sullivan* standard was never intended to protect those who knowingly or recklessly lie, nor should it. But that is how *Sullivan* has evolved in the lower courts, post-*Iqbal/Twombly*.

This Court therefore should intervene and announce the proper standard for pleading defamation cases—a standard that does not misuse *Iqbal* and *Twombly* to resurrect the argument rejected in *Sullivan,* and create a new privilege to defame someone with impunity, even when the defendant knowingly lied or recklessly disregarded the truth. This is especially important given that so many commentators, judges, and even Justices of this Court have expressed concern about the breadth of even the original *Sullivan* privilege.

Independently, the lower courts applying the *Iqbal/Twombly* standard to actual malice have been

wildly inconsistent. Some are actually reversing the traditional standard of pleading and drawing inferences in the **defendant's** favor, while other decisions are at least somewhat more moderate and draw inferences in the plaintiff's favor. This Court should therefore step in to establish **how** *Iqbal/Twombly* should be applied to motions to dismiss in defamation cases.

In the case at bar, Petitioner pleaded a claim that, pre-*Iqbal* and *Twombly*, would have merited discovery on the actual malice issue: Petitioner claimed Respondent published an article that misrepresented the contents of a non-governmental organization's report that was in the Respondent's possession at the time Respondent published its story. Under the pre-*Twombly* standard, a claim that Respondent had in its possession a report that said X, and Respondent misrepresented the report and published Y instead, would have been sufficient to move the case past the pleadings stage and into discovery on the actual malice issue. Petitioner would have been permitted to take discovery directed to Respondent's mental state when it made the defamatory statement. However, the D.C. Circuit, applying the new *Sullivan*-on-steroids standard, concluded that Petitioner could not even take discovery as to whether Respondent was aware of the information in the NGO's report that contradicted Respondent's story. Instead, the D.C. Circuit affirmed the dismissal of the Complaint based not only on its misreading of the NGO's report, but also on its conclusion that Petitioner failed to allege facts and evidence regarding what specifically Respondent was subjectively thinking at the time of publication—information impossible for Petitioner to

know and allege without discovery. This was clear error.

This Court should grant certiorari and make clear that *Iqbal* and *Twombly* did not create a new First Amendment privilege to allow people to recklessly or even intentionally defame public figures by denying plaintiffs the only realistic mechanism—discovery—to prove the defendant's mental state.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App.25a) is reported at 2022 WL 1463866 (D.C. Cir. May 10, 2022). The opinion of the District Court (Pet. App. 2a) is reported at 554 F.Supp.3d 1 (D.D.C. 2021).

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1332 because the parties are diverse and the amount in controversy was over $75,000. The D.C. Circuit had appellate jurisdiction under 28 U.S.C. § 1291.

The Court of Appeals entered its decision on May 10, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE[2]

Petitioner BYD Company Ltd. (an acronym for "Build Your Dreams"; herein "Petitioner" or "BYD"), is a publicly-traded corporation and one of the world's largest producers and suppliers of electric vehicles, including electric cars, buses, trucks and forklifts, solar panels and lithium batteries, and personal protective equipment ("PPE") including masks used by frontline personnel during the COVID-19 pandemic, among many other innovative, important and useful products. Warren Buffet's company, Berkshire Hathaway, is a major investor in BYD. In 2020, BYD won a contract to supply the State of California with $1 billion worth of PPE masks to protect its nurses, doctors, caregivers, first responders and other frontline personnel during the COVID-19 pandemic. BYD is based in China.

Before the events that gave rise to this litigation, BYD enjoyed a very good reputation as a reliable supplier of quality products in the global marketplace.

Appellee Alliance for American Manufacturing ("AAM") exists to promote U.S.-based companies and disparage non-U.S. based companies, particularly

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[2] Because this is an appeal from an order dismissing the Complaint under Fed. R. Civ. P. 12(b)(6), the facts as plausibly pleaded by Petitioner are taken to be true.

companies based in China such as BYD.

On March 3, 2020, AAM published a story written by Appellee Cathalijne Adams, entitled "Some of the World's Biggest Brands Depend on Forced Labor in China," claiming that BYD "Depend[s] on Forced Labor in China" and "profit[s] from this forced labor" (the "Article"). These statements are completely false. BYD does not use forced labor (*i.e.*, slave labor) in its supply chain, does not depend on forced labor, and does not profit from forced labor. AAM fabricated these facts for the purpose of causing tremendous harm to BYD, and these false statements in the Article did in fact have that effect on BYD's business.

The Article purports to be a description of the "ASPI Report," a report from a non-governmental organization in Australia published on or about March 1, 2020, entitled "Uyghurs for Sale: 'Reeducation,' forced labour and surveillance beyond Xinjiang." However, the ASPI Report contains a detailed statement of ASPI's findings with respect to various companies, and the findings related to BYD do not implicate BYD in the use or profit from forced labor. Rather, ASPI's findings regarding BYD are that BYD had business dealings with a company (Dongguan) that happens to own a subsidiary (Hubei) that allegedly used forced labor. The ASPI Report does not allege that BYD had any dealings whatsoever with the subsidiary, Hubei. BYD, in fact, has not had any business dealings with Hubei.

On one page of the ASPI Report, there is a diagram drawing an arrow between Hubei and BYD. However, that diagram refers readers back to the appendix for

the specific information regarding the relationships being purportedly depicted. In the Appendix to which they are directed, readers can easily see that the only facts actually being alleged concern a relationship between BYD and Dongguan, and that no relationship between BYD and Hubei is alleged in the report.

Thus, it is apparent from the face of the ASPI Report that BYD is being accused of nothing more than having a relationship with Dongguan. Dongguan happens to own a subsidiary, Hubei, which is not related to BYD, but which allegedly is implicated in the use of forced labor. There is no allegation in the ASPI Report that BYD is in any way related to Hubei or its alleged use of forced labor. Notwithstanding these facts, AAM and Adams falsely claimed in the Article that the ASPI Report states that BYD depends on, and profits from, forced labor. This statement is completely false, and AAM and Adams **knew** it was false when they published the Article.

The Complaint alleges that these two statements were made with actual malice because the contents of the ASPI Report were well known to AAM and Adams at the time of publication. AAM and Adams knew that the ASPI Report did not allege that BYD had any dealings with Hubei, the company that allegedly used forced labor. Nonetheless, they still published these false, defamatory, and very harmful statements of and concerning BYD.

The Complaint was filed on November 25, 2020. Respondents moved to dismiss the Complaint, arguing, *inter alia*, (1) that it failed to allege damages

in excess of $75,000, and thus failed to establish subject matter jurisdiction; and (2) that it failed to allege actual malice.

On April 21, 2021, the District Court granted the motion to dismiss in part. The Court held that Appellees were correct that BYD failed to specifically allege the amount in controversy for purposes of subject matter jurisdiction. BYD amended its Complaint, inserting additional allegations regarding the amount in controversy. Respondents again moved to dismiss, once more arguing that BYD failed to allege the amount in controversy, and reasserting their claims that BYD failed to allege actual malice.

On August 6, 2021, the District Court granted Respondents' second Motion to Dismiss in a published decision. This time, the District Court agreed with BYD that it had sufficiently alleged the amount in controversy. However, the District Court held that BYD had failed to adequately allege actual malice.

BYD timely noticed an appeal. After briefing, on May 10, 2022, the D.C. Circuit affirmed in an unpublished opinion, holding that because the ASPI Report contained generic conclusory statements about many companies "directly or indirectly benefitting from forced labor," this meant that Respondents could not have, as a matter of law, plausibly acted with actual malice. The D.C. Circuit's analysis completely ignored the portions of the ASPI Report that indicate that the actual allegation against BYD was simply that it did business with Dongguan and that Dongguan owned Hubei. The D.C. Circuit, relying on *Iqbal*, also faulted Petitioner for failing to allege facts

and evidence regarding Respondents' mental state to support its actual malice allegation beyond Respondents' possession of the ASPI Report and their bias against foreign companies.

REASONS FOR GRANTING THE WRIT

1. *Sullivan* Struck a Balance Where Public Figure Plaintiffs Were Required to Prove Actual Malice at Trial, But Could Take Discovery to Obtain Facts Regarding the Defendants' Mental State.

This Court's landmark decision in *New York Times Co. v. Sullivan* federalized certain aspects of defamation law due to First Amendment concerns. Among the requirements imposed are two that are at issue here:

a. That a public official must prove the defendant acted with "actual malice" (at least reckless disregard of the truth) to obtain a defamation judgment (this holding was later extended to public figures as well).

b. That actual malice must be proven at trial by clear and convincing evidence, not a mere preponderance of the evidence.

Importantly, the Court's decision in *Sullivan* took a middle ground. The Alabama state courts had taken the position that defamation was categorically unprotected under the First Amendment. *New York Times Co. v. Sullivan*, 144 So. 2d 25, 40 (Ala. 1962) ("The First Amendment of the U. S. Constitution does

not protect libelous publications."). On the other hand, Justices Black and Douglas of this Court took the position that defamation suits by public officials should be barred under all circumstances, even if the defendant knowingly lied about them. *Sullivan*, 376 U.S. at 293 (Black, J., concurring) ("The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment."). This Court struck a compromise and adopted an approach that permits suits and judgments against intentional liars and those who consciously disregard the truth, so long as the proof at trial is clear and convincing. This Court later extended the same standard, described as "actual malice," to also apply to public figure plaintiffs. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

The *Gertz* case was very clear that the *Sullivan* actual malice standard was a very aggressive, substantive protection of First Amendment interests that imposed significant costs on deserving defamation plaintiffs: "This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test." *Id.*

On at least two occasions, this Court has reaffirmed and clarified the actual malice standard.

First, *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968), gave vivid examples of the sort of conduct that would constitute reckless disregard of the truth:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

The *St. Amant* examples illustrate the **evidentiary** nature of the *Sullivan* actual malice standard. *St. Amant* posits that the defendant will testify he or she published in good faith but that such testimony would be insufficient to defeat liability. This presumes the complaint will not be dismissed based solely on the defendant's claimed good faith, and that discovery will be taken and testimony given. Similarly, *St. Amant* suggests that plaintiffs will have an opportunity to prove the defendant simply fabricated the story or relied on unverified or anonymous sourcing, or an unreliable source. This

holding presumes that plaintiffs will obtain discovery on the issue of actual malice because, realistically, such information can only be obtained in discovery: plaintiffs will know nothing about defendants' source or sources, or their mental state, before such discovery is taken.

This Court returned to actual malice in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989). There, the Court discussed two ways of defining reckless disregard for the truth: a "high degree of awareness of probable falsity" or the defendant having "entertained serious doubts as to the truth of his publication." *Id.* at 667. Again, the defendant's subjective mental state is paramount to the analysis: a plaintiff is not a mind-reader, and thus will need discovery to present evidence at trial that the defendant was aware of the probable falsity of the defamatory statement, or entertained serious doubts prior to publication. How else, besides discovery, can a plaintiff possibly obtain such evidence? *Connaughton* evaluated a full evidentiary record in determining that the actual malice standard was satisfied in that case, including proof that the newspaper in *Connaughton* made a decision not to listen to tapes that would have called its story into doubt. *Id.* at 683. No plaintiff could obtain this sort of evidence—that the reporters deliberately decided not to listen to tapes within their possession—without discovery.

The need for discovery of evidence to learn the mental state of defamation defendants, to satisfy the actual malice standard, was expressly endorsed by this Court in *Herbert v. Lando*, 441 U.S. 153 (1979).

In *Herbert*, the defendant in a defamation case asked this Court to establish an evidentiary privilege, based on the First Amendment, to prohibit defamation plaintiffs from inquiring into the editorial process of a news reporter. This Court rejected that argument, because recognition of such a privilege would make it impossible for many defamation plaintiffs to establish actual malice: "[I]t is plain enough that the suggested privilege for the editorial process would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by *New York Times*.... It may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself, but the relevance of answers to such inquiries ... can hardly be doubted." 441 U.S. at 170. The Court concluded that "our cases necessarily contemplate examination of the editorial process to prove the necessary awareness of probable falsehood." *Id.* at 172. "If the publication is false but there is an exonerating explanation, the defendant will surely testify to this effect.... Why should not the plaintiff be permitted to inquire before trial? On the other hand, if the publisher in fact had serious doubts about accuracy, but published nevertheless, no undue self-censorship will result from permitting the relevant inquiry." *Id.* at 173.

Thus, prior to *Iqbal* and *Twombly,* the balance struck by this Court was that defamation defendants are protected from liability for their negligent publication of falsehoods of and concerning public figures, but when they act with the requisite scienter (reckless disregard of the truth), proven with clear and convincing evidence, there is no legal privilege

against defamation liability. Plaintiffs thus would need to establish, with convincing clarity, what the defendants knew and when they knew it. This evidence would be obtained in discovery, because the information is not otherwise available to plaintiffs: defendants' state of mind certainly is not a matter of public record. And if the plaintiff is unable to obtain in discovery sufficient evidence of the defendant's reckless disregard of the truth, then the First Amendment would require that the defendant prevail in the case.

In accordance with the framework set out in this Court's defamation decisions, federal courts have permitted defamation plaintiffs to allege actual malice generally. For instance, *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir. 2002), contains a typical discussion of the issue, citing earlier cases from the Second and Fifth Circuits: "This case is before us on a motion to dismiss. We ask only whether the pleadings are sufficient, not whether the plaintiff could find evidence to support them.... The First Amendment imposes substantive requirements on the state of mind a public figure must prove in order to recover for defamation, but it doesn't require him to prove that state of mind in the complaint." *Id.* (citing *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579, 589 (5th Cir. 1967); *Boyd v. Nationwide Mutual Insurance Co.*, 208 F.3d 406, 410 (2d Cir. 2000)). As the Second Circuit summarized, "resolution of the ... actual malice inquir[y] typically requires discovery." *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001). This was settled law pre-*Iqbal* and *Twombly*.

2. After *Iqbal* and *Twombly*, the Courts of Appeal Changed the *Sullivan* Balance and Created a New First Amendment Privilege to Knowingly Defame.

This Court's decisions in *Iqbal* and *Twombly* impose a "plausibility" standard on federal pleading. The plausibility standard was not intended to be onerous. *See Twombly*, 550 U.S. at 556 ("And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.") (cleaned up). However, the lower courts have taken an approach that makes the standard onerous in defamation cases: they have effectively overturned this Court's decision in *Herbert* and created a new privilege for defamation defendants, declaring that pleading actual malice in a defamation case now requires the plaintiff to have specific knowledge of what the defendant knew and/or was thinking at the time of the publication. One court even went so far as to say it explicitly: pleading actual malice is now, in fact, an "onerous task." *Earley v. Gatehouse Media Pennsylvania Holdings, Inc.*, 2015 WL 1163787 at *2 (M.D. Pa. Mar. 13, 2015).

The Eleventh Circuit's decision in *Michel v. NYP Holdings, Inc.*, 816 F.3d 686 (11th Cir. 2016), vividly illustrates the broadened *Sullivan* privilege. In *Michel*, the Court of Appeals specifically held that the protections of *Sullivan* were insufficient, and the *Iqbal/Twombly* standard must be aggressively applied in defamation cases to provide **additional** First Amendment protections to defamation defendants:

> Moreover, application of the plausibility pleading standard makes particular sense when examining public figure defamation suits. In these cases, there is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation. Indeed, the actual malice standard was designed to allow publishers the "breathing space" needed to ensure robust reporting on public figures and events.... Forcing publishers to defend inappropriate suits through expensive discovery proceedings in all cases would constrict that breathing space in exactly the manner the actual malice standard was intended to prevent. The costs and efforts required to defend a lawsuit through that stage of litigation could chill free speech nearly as effectively as the absence of the actual malice standard altogether. Thus, a public figure bringing a defamation suit must plausibly plead actual malice in accordance with the requirements set forth in *Iqbal* and *Twombly*.

Id. at 702.

Thus, the *Michel* court is saying that the carefully balanced protections of *Sullivan* are not enough. The *Michel* court concludes that, even though *Sullivan* and its progeny authorized plaintiffs to obtain discovery and allowed them an opportunity to prove their claim of actual malice, this Court's decisions in *Iqbal* and *Twombly* effectively overruled that doctrine, and adopted a position akin to the absolute

First Amendment immunity for false statements, which was the position of Justices Black and Douglas that the majority of this Court **rejected** in *Sullivan*. Of course, only this Court can overturn its own precedents. *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 485 (1989).

The new standard requiring specific pleading of actual malice means that the lower courts are dismissing, at the pleading stage, defamation cases where discovery could and would confirm that the defendants did, indeed, recklessly disregard the truth. For instance, in *Michel*, the Eleventh Circuit pointed to the claim made by the defendants in the allegedly defamatory article that the reporters had spoken to numerous sources, as establishing that they did not act with actual malice. 816 F.3d at 704 ("The article indicates that the reporters spoke with, consulted, or otherwise reached out to a Foundation insider, event organizers, the founder of the Foundation, the venue, the Foundation's website, and state charity records.").

Of course, the self-serving, unsworn, out-of-court statements of journalists in their article are inadmissible hearsay, and *St. Amant* stated that even sworn statements by journalists that they acted in good faith would not be accepted as definitively negating actual malice. 390 U.S. at 732 ("The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true."). What if it turned out that the reporters in *Michel* were untruthful or exaggerating what they had done and had not, in fact, spoken to all of the sources to whom

they claimed to have spoken, or if they were misleading the public as to what those sources had said to them? The Eleventh Circuit has created a privilege to lie, because plaintiffs are being prevented from obtaining the discovery that would show the false statement of fact was made with knowing or reckless disregard for the truth.

Another example of the new, broader conception of the *Sullivan* privilege being applied by the lower courts is *Biro v. Conde Nast*, 807 F.3d 541 (2d Cir. 2015). In *Biro*, the Second Circuit held the plaintiff's *St. Amant* argument that the defendants relied wholly on unverified sources was foreclosed by the defendants' unsworn claim that they relied on multiple sources. 807 F.3d at 546. Again, if the defendants were lying about their sourcing, there is no remedy. This, again, creates the privilege to lie that the Court expressly rejected in *Sullivan*.

Numerous other cases have applied this new expansion of the *Sullivan* privilege to dismiss cases where discovery might have disclosed evidence of reckless disregard of the truth. *See, e.g.*, *Nelson Auto Center, Inc. v. Multimedia Holdings Corp.*, 951 F.3d 952, 959 (8th Cir. 2020) (defendants republished a statement **they had already retracted**; the court presumed that it "shows nothing more than mere oversight" and dismissed the complaint that pleaded the false statement was deliberate, not accidental); *Earley*, 2015 WL 1163787 at *3 (complaint that alleged that defendants knew the true facts at least a year before they published a defamatory statement did not make plausible allegations of actual malice).

Some courts have gone so far to announce that a defamation plaintiff, in the **complaint**, must specifically identify the individuals within a journalistic organization who knew that a particular statement was false or acted with reckless disregard for the truth, and what each specific person knew—without any discovery at all. *See Resolute Forest Products, Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1018 (N.D. Cal. 2017) (applying this standard to dismiss a complaint). Under this standard, a plaintiff suing a newspaper would be required to identify what each reporter and editor knew at the time a story was published, without any discovery. This is completely antithetical to the balance struck in *Sullivan*; virtually no major media outlet would ever face liability, even for a deliberate falsehood, under such a standard.

The facts of this case present this Court with an opportunity to clarify the law in this area. Here, BYD's claim would have never been dismissed for failure to plead actual malice based on the pre-*Twombly* standard. BYD alleged that Respondents falsely reported it used forced labor, when in fact it never did, and that Respondents' reporting was based on a single source (the ASPI Report), which specifically states that its accusation against BYD is that BYD contracts with a company that has a subsidiary (unrelated to BYD) that allegedly uses forced labor, **not** that BYD itself used forced labor in its supply chain. Pre-*Twombly*, BYD would have had the opportunity to develop this claim in discovery by: (1) asking Respondents whether they read the ASPI Report and what they understood the ASPI Report to be saying; (2) obtaining Respondents' internal

communications regarding what they knew at the time of publication, whether they considered ASPI to be a biased or untrustworthy source, and whether they had any other sources; and (3) questioning Respondents' witnesses involved in the story regarding these same issues. Through this discovery process, which would have been routine pre-*Twombly*, BYD would be able to establish whether Respondents knowingly or recklessly disregarded the portion of the ASPI Report that explains that BYD merely contracted with a company that had a subsidiary that allegedly used forced labor, whether Respondents had any proof or evidence that BYD actually used forced labor, and what (if anything) Respondents did to confirm or check their story.

Under the new, expanded *Sullivan*-on-steroids privilege, however, the District Court and D.C. Circuit denied BYD the opportunity to take any discovery. Instead, they turned Rule 12(b)(6) on its head by relying solely on the unsworn statements in Respondents' Article, taking such statements to be true, and construing Respondents' actions in the light most favorable to Respondents.

Whether or not the District Court's or D.C. Circuit's construction of the facts regarding actual malice is correct is an issue that cannot be evaluated on a motion to dismiss. In that posture, courts should not be evaluating and excusing a defendant's mental state based on contestable facts, and especially not when doing so upsets the careful balance that this Court struck in *Sullivan*, which took into account the various competing interests in defamation cases.

The approach of the lower courts in defamation pleading cases post-*Iqbal* and *Twombly* effectively creates a privilege to publish even intentionally false statements of fact, which the *Sullivan* majority explicitly rejected. For instance, one possibility (which BYD believes occurred) is that Respondents knew full well the limited nature of ASPI's accusations against BYD, and also that ASPI was a biased and therefore unreliable publication. However, Respondents could not find any corroborating source for the defamatory statement. Respondents then nevertheless decided to publish the "forced labor" accusation anyway because it was scandalous and they wanted to harm BYD and threaten its ability to sell electric vehicles and buses in the United States. Pre-*Twombly*, BYD would have had an opportunity to **prove** that Respondents acted with actual malice. Now, under the approach sanctioned by many lower courts including in the case at bar, publishers have an effective privilege to knowingly publish false statements of fact, because they know that a plaintiff will never find out (because they are not permitted discovery) what the reporters really knew or consciously disregarded. Injured plaintiffs, having no access to the publisher's internal editorial process, will virtually never be able to plead a claim that survives a Rule 12(b)(6) motion, no matter how egregious the false factual statement about the plaintiff, or how much damage it causes. Courts have created, through *Iqbal* and *Twombly*, the very privilege that this Court rejected in *Herbert*. This Court should grant certiorari to confirm that this is not the law, and set forth the correct standard.

3. This Court Should Resolve the Conflict in the Lower Courts as to How *Iqbal* and *Twombly* Apply to Defamation Cases.

Independently, certiorari also is warranted because there are significant conflicts among the lower courts regarding the actual standard to be applied to *Iqbal*/*Twombly* motions interposed against public figure defamation complaints.

As noted above, the Eleventh Circuit and the Eastern District of Pennsylvania represent one extreme. In *Michel*, the Eleventh Circuit specifically held that *Iqbal* and *Twombly* should be strictly enforced to extend additional First Amendment protections, beyond *Sullivan*, to defamation defendants. 816 F.3d at 702. The Eastern District of Pennsylvania has repeatedly held that the burden of pleading actual malice in a defamation case is "onerous," a total departure from the pre-*Twombly* practice whereby defamation plaintiffs would routinely get discovery on actual malice. *Early*, 2015 WL 1163787 at *2; *Pace v. Baker-White*, 432 F. Supp. 3d 495, 513 (E.D. Pa. 2020).

In contrast, other courts have applied a somewhat more relaxed standard. For instance, in *Nelson Auto Center*, the Eighth Circuit required only that a plaintiff raise a reasonable expectation of successfully discovering evidence of actual malice. 951 F.3d at 958.

In *Schatz v. Republican Leadership Committee*, 669 F.3d 50, 55 (1st Cir. 2012), the First Circuit applied a standard that draws all reasonable

inferences in the plaintiff's favor, which is the traditional standard with respect to pleadings motions.

Should inferences be drawn in the defendant's favor, or the plaintiff's? The cases are in conflict. This Court should grant certiorari to resolve the conflict and announce a definitive standard for pleadings motions in public figure defamation cases.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: August 8, 2022

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APPENDIX

DISTRICT COURT OPINION

United States District Court, District of Columbia.
BYD COMPANY LTD., Plaintiff
v.
ALLIANCE FOR AMERICAN MANUFACTURING, et al., Defendants.
Case No. 1:20-cv-03458 (TNM)
|
Signed 08/06/2021

MEMORANDUM OPINION

TREVOR N. McFADDEN, U.S.D.J.

BYD Company Ltd. has filed an amended complaint alleging defamation against a nonprofit organization, the Alliance for American Manufacturing, and several of its employees. As before, Defendants move to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim. The Court disagrees with their jurisdictional arguments but agrees that BYD fails to state a claim. The Court will dismiss the amended complaint without prejudice.

I.

BYD "is one of the world's largest producers and suppliers of electric vehicles including electric cars, buses, trucks, and forklifts, as well as solar panels, lithium batteries, and protective masks and equipment, among many other ... products." Am. Compl. ¶ 1, ECF No. 22. The company is incorporated in and has its principal place of

business in the People's Republic of China. Id. ¶ 5. The Alliance for American Manufacturing is "a non-profit organization that advocates in favor of American-made products." Id. ¶ 2. It is headquartered in Washington, D.C., and the individual employee-Defendants live nearby. Id. ¶¶ 6–9.

BYD alleges that the American Alliance for Manufacturing and its employees (collectively, the "Alliance") defamed it in three separate statements. Id. ¶¶ 19–22. The first statement appeared in a blog post on the Alliance's website and claimed BYD "depend[ed]" on and "profit[ed] from" forced labor in China. Defs.' Mot. to Dismiss Ex. B ("Ex. B") at 2, 4, ECF No. 23-4.1 The second statement, which also appeared in an Alliance blog post, questioned why California selected BYD, an "automaker," to produce medical equipment for the state under a $1 billion contract. Defs.' Mot. to Dismiss Ex. C ("Ex. C") at 3, ECF No. 23-5. The post catalogs many issues with BYD's performance under the contract and notes that BYD issued California a $500 million refund after its N95 masks failed to secure federal certification. Id. The third statement, from an Alliance press release, accused BYD of maintaining "links" to the Chinese government and military. Defs.' Mot. to Dismiss Ex. D ("Ex. D") at 2, ECF No. 23-6. The press release quoted Alliance President Scott Paul, who claimed U.S. lawmakers had

"irrefutable evidence" that BYD is "simply an arm of China's military and government." Id.[1]

The Court dismissed BYD's first complaint because it failed to allege damages that met the jurisdictional threshold for diversity cases. See BYD Co. Ltd. v. All. for Am. Mfg., No. 1:20-CV-03458 (TNM), 2021 WL 1564445, at *1 (D.D.C. Apr. 21, 2021). In its amended complaint, BYD claims it "suffered extensive, specific damages as a result of the Defendants' statements" and lists several contracts it allegedly lost due to the Alliance's defamation. Am. Compl. ¶¶ 24–26. BYD alleges that the Alliance made all three statements with actual malice, id. ¶ 27, and it seeks compensatory and punitive damages, permanent injunctive relief, and costs, id. ¶ 37. The Alliance moves to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). See Defs.' Mot. to Dismiss the Am. Compl. ("Mot. Dismiss"), ECF No. 23. The motion is now ripe.

II.

To survive a motion to dismiss under Rule 12(b)(1), the plaintiff bears the burden of proving that the Court has subject matter jurisdiction to hear its claims. See Arpaio v. Obama, 797 F.3d 11, 19 (D.C. Cir. 2015). In evaluating a motion to dismiss under Rule 12(b)(1), the Court must "treat the

[1] All citations are to the page numbers generated by this Court's CM/ECF system.

complaint's factual allegations *6 as true ... and must grant plaintiff[s] the benefit of all inferences that can be derived from the facts alleged." Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113 (D.C. Cir. 2000) (cleaned up).

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Hurd v. District of Columbia, 864 F.3d 671, 678 (D.C. Cir. 2017) (cleaned up). A plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The Court accepts the complaint's factual allegations as true and grants the plaintiff "all inferences that can be derived from the facts alleged." L. Xia v. Tillerson, 865 F.3d 643, 649 (D.C. Cir. 2017) (cleaned up). The Court need not, however, credit "a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678, 129 S.Ct. 1937 (cleaned up). The Court considers "only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint[,] and matters of which [it] may take judicial notice." Hurd, 864 F.3d at 678 (cleaned up).

Rule 12 plays an especially important role in defamation cases, such as this one. "The Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits." Kahl v. Bureau of Nat'l Affairs, Inc., 856 F.3d 106, 109 (D.C. Cir. 2017) (cleaned up). "Early resolution of defamation cases under Federal Rule of Civil Procedure 12(b)(6) not

only protects against the costs of meritless litigation, but provides assurance to those exercising their First Amendment rights that doing so will not needlessly become prohibitively expensive." Fairbanks v. Roller, 314 F. Supp. 3d 85, 89 (D.D.C. 2018) (internal citation omitted).

III.

BYD maintains the Court has diversity jurisdiction over this case. See Am. Compl. ¶ 10. Diversity jurisdiction requires an amount in controversy exceeding $75,000 and, as relevant here, a dispute between "citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. § 1332(a)(2).2 The Alliance does not contest jurisdiction based on citizenship. Instead, it argues BYD "has once again failed to plead facts sufficient to establish that it suffered any cognizable damages as a result of the Alliance's statements." Mot. Dismiss at 1. Specifically, the Alliance contends BYD fails to show how the Alliance's statements harmed BYD. Id. And even if it could make this showing, the Alliance argues BYD would still flunk the amount-in-controversy requirement because the National Defense Authorization Act for FY 2020 (NDAA) "created a massive barrier to BYD's ability to compete" for the very contracts it says it lost because of the Alliance's alleged defamation. Defs.' Mem. in Supp. of Mot. to Dismiss the Am. Compl. ("Defs.' Mem.") at 7, ECF No. 23-1.[2]

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[2] As in its original complaint, BYD mistakenly cites 28 U.S.C. § 1332(a)(1). Compl. ¶ 10, ECF No. 1; Am. Compl. ¶ 10. This provision does not apply because BYD is a foreign corporation.

The Court considers (A) whether BYD's pleadings meet the amount-in-controversy threshold, and (B) the effect of the NDAA.

A.

BYD added three paragraphs to its amended complaint that contain specific allegations of lost profits resulting from the Alliance's statements. First, BYD claims it "has not been able to complete two contracts to sell electric buses to two major urban transit companies in the United States." Am. Compl. ¶ 24. Second, BYD claims it "lost a potential contract in 2021 with the Utah Transit Agency, which would have netted BYD approximately $44 million dollars." Id. ¶ 25. Third, BYD claims "other potential customers ... have indicated to BYD a reticence to deal with the company because of the public controversy that resulted from Defendants' false statements." Id. ¶ 26.

The Alliance maintains these are mere assertions and that BYD does not show how the Alliance's speech cost it business. Defs.' Mem. at 15–18. The Alliance argues that the Court "need not accept inferences drawn by the plaintiff ... if those inferences are unsupported by facts alleged in the complaint or amount to merely legal conclusions." Defs.' Mem. at 16 (quoting Rosenkrantz v. Inter-Am. Dev. Bank, No. CV 20-3670 (BAH), 2021 WL 1254367, at *6 (D.D.C. Apr. 5, 2021)). In the

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The Court construes BYD's amended complaint as seeking jurisdiction under § 1332(a)(2).

Alliance's telling, BYD is alleging supposedly defamatory statements and purported injuries but not explaining causality—it's asking the Court to fill in the blanks.

But the law is generous to plaintiffs on amounts in controversy. To justify dismissal, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289, 58 S.Ct. 586, 82 L.Ed. 845 (1938). "[T]he Supreme Court's yardstick [in St. Paul Mercury] demands that courts be very confident that a party cannot recover the jurisdictional amount before dismissing the case for want of jurisdiction." Rosenboro v. Kim, 994 F.2d 13, 17 (D.C. Cir. 1993). Thus, at the motion-to-dismiss stage, a court "should find jurisdiction ... even if it has serious doubts as to the bases for establishing an amount-in-controversy." Bronner v. Duggan, 317 F. Supp. 3d 284, 288 (D.D.C. 2018).

This is a low bar for BYD to surmount. Given the amount of BYD's alleged losses and the Court's duty to "treat the complaint's factual allegations as true ... [and] grant plaintiff the benefit of all inferences that can be derived from the facts alleged," the Court finds that BYD has now met the amount-in-controversy requirement. Sparrow, 216 F.3d at 1113 (cleaned up).

B.

Next, the Alliance contends that the NDAA "effectively prohibits municipal transit agencies ...

from pursuing business with certain qualifying companies, such as BYD." Defs.' Mem. at 20 (emphasis added). Because the contracts at issue are between BYD and municipal agencies, and because Congress added the NDAA language "before any of the allegedly defamatory statements were published," the Alliance argues its statements could not have had any effect on BYD's contracts. Id.

But the Alliance puts a lot of weight on the word effectively. All the Alliance shows is that the NDAA might have affected BYD's contracts. And in any event, the NDAA has a two-year phase-in period during which municipalities can keep purchasing rolling stock from companies such as BYD. See 49 U.S.C. § 5323(u)(5)(B) ("[T]his subsection ... shall not apply to the award of a contract or subcontract made by a public transportation agency with any rolling stock manufacturer for the 2-year period beginning on or after the date of enactment of this subsection."). By the Alliance's own account, the President signed the NDAA into law in December 2019. See Defs.' Mem. at 20. Thus, the NDAA could not have affected any of BYD's sales before December 2021.

The Court has jurisdiction and turns next to the Alliance's 12(b)(6) arguments.[3]

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[3] BYD claims it is improper to consider the Alliance's 12(b)(6) arguments because the Court's April 21, 2021 Order "granted Defendants' motion on the sole ground of subject matter jurisdiction and denied the remainder." Pl.'s Mem. of P. & A. in Opp'n to Defs.' Second Mot. Dismiss ("Pl.'s Mem. Opp'n") at 17, ECF No. 24. Not so. "When a defendant files a motion to dismiss under Rule 12(b)(1) and Rule 12(b)(6), this Circuit has

IV.

Because of First Amendment protections, courts scrutinize defamation cases "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). This is especially true when, as here, the plaintiff is a public figure.[4] Protected speech against public figures can "include vehement, caustic, and sometimes unpleasantly sharp attacks." Id.

"Under District of Columbia law, a defamation claim requires: (1) a false and defamatory statement; (2) published without privilege to a third party; (3) made with the requisite fault; and (4) damages." Fairbanks, 314 F. Supp. 3d at 90. To plead "requisite fault," a public figure must allege "that the defendant published the defamatory falsehood with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was

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held that the court must first examine the Rule 12(b)(1) challenges, because if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." Schmidt v. U.S. Capitol Police Bd., 826 F. Supp. 2d 59, 64 (D.D.C. 2011) (cleaned up). The Court did not reach the merits of the 12(b)(6) arguments in its prior order because it determined it lacked jurisdiction. Only now that BYD has overcome the 12(b)(1) hurdle must the Court consider 12(b)(6).

[4] BYD concedes it is "at least a limited purpose public figure." Pl.'s Mem. Opp'n at 19 n.3.

false or not." Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1292 (D.C. Cir. 1988) (cleaned up). "Reckless disregard" means that the speaker acted with a "high degree of awareness of [the statement's] probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). This is a "subjective" standard. McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1508 (D.C. Cir. 1996).

The Alliance argues that BYD failed to adequately plead that it made any of its three allegedly defamatory statements with actual malice. Mot. Dismiss at 2. It submitted several exhibits in support of its arguments. BYD responds that the Court should not consider any of them, arguing "Defendants' Exhibits are not documents attached as exhibits or incorporated by reference in the Complaint." Pl.'s Mem. Opp'n at 19 n.2.

The Court disagrees. The Alliance's first five exhibits consist of the three articles containing the allegedly defamatory statements at issue plus two research reports that served as the impetus for the Alliance's statements. Decl. of Bezalel A. Stern in Supp. of Defs.' Mot. to Dismiss the Am. Compl. ("Stern Decl.") ¶¶ 2–6, ECF No. 23-2. One of these research reports, the ASPI Report, is mentioned by name in BYD's amended complaint. Am. Compl. ¶¶ 15–18. The Alliance's sixth and final exhibit is the source code for one of the blog posts containing one of its allegedly defamatory statements. Stern Decl. ¶ 7. The source code is part of the blog post. BYD thus incorporated all these exhibits into its amended complaint. And despite repeatedly arguing that the Alliance fails to provide legal authorities establishing

that its exhibits are part of the record, BYD never disputes their authenticity. The Court will therefore consider them in adjudicating the Alliance's FRCP 12(b)(6) motion. See Kaempe v. Myers, 367 F.3d 958, 965 (D.C. Cir. 2004) ("It is also clear that these documents—which were appended to [Defendant's] motion to dismiss and whose authenticity is not disputed—may be considered here because they are referred to in the complaint and are integral to [Plaintiff's] conversion claim.").

The Court next addresses each of the Alliance's statements in turn.

A.

The Alliance's first allegedly defamatory statement appeared in a March 2020 blog post on the Alliance's website. The post, titled "Some of the World's Biggest Brands Depend on Forced Labor" (Forced Labor Story), reports on purported associations between global brands and Uyghurs in China who had allegedly been "transferred from re-education camps to a network of 27 Chinese factories for state-sponsored forced labor." Ex. B at 3. The blog post links to articles published by Reuters and the New York Times, but its primary source and focus is a report written by the Australian Strategic Policy Institute (ASPI). Id. The post's sole reference to BYD states: "It should come as little surprise that several known bad actors are also profiting from this forced labor, including ... Build Your Dreams (BYD)." Id. at 4.

BYD contends that the Forced Labor Story "is not supported by any facts whatsoever, including any facts contained in the ASPI report." Am. Compl. ¶ 19. Calling the Forced Labor Story "a complete fabrication by Defendants," BYD states that "all ASPI reported is that BYD had business dealings with a company (Dongguan) that happens to own a subsidiary (Hubei) that allegedly used forced labor.... BYD, in fact, has not had any business dealings with Hubei." Id. ¶ 20. In BYD's telling, a close reading of the ASPI Report provides "support for the proposition that Defendants did not rely in good faith on the ASPI Report when they wrote and published the Forced Labor Story, and in fact entertained serious doubts as to the truth of Defendants' own statements about BYD." Pl.'s Mem. Opp'n at 21.

But more is needed. BYD pleads no nonconclusory facts alleging the Alliance knew what it was reporting was false or questioned its truth. See Hourani v. Psybersolutions LLC, 164 F. Supp. 3d 128, 141 (D.D.C. 2016) ("To allege actual malice, a plaintiff must assert that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.") (cleaned up), aff'd, 690 F. App'x 1 (D.C. Cir. 2017). The closest BYD comes to pleading actual malice is its claim that because the Alliance "linked [to] the ASPI Report [in] the Forced Labor Story, [it] must have known that the ASPI Report did not establish that BYD profited in any way from forced labor." Am. Compl. ¶ 27.

More, even granting BYD's contention that the Alliance misrepresented the ASPI Report, it does not

reasonably follow that the Alliance knew it was misrepresenting it. It is just as likely—if not more—that the Alliance merely had a different interpretation of the ASPI Report. BYD offers a barely disguised legal conclusion. And the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 193 (D.C. Cir. 2006) (cleaned up).

BYD doubles down on this argument in its briefing. It explains that "[t]he theory of actual malice pleaded is that [the Alliance] had the ASPI Report in [its] possession, obviously read it, and yet ... knowingly or recklessly wrote and published two statements that completely misstated the conclusions of the ASPI Report.... It is an entirely reasonable inference that [the Alliance] ... entertained serious doubts about the truth of such statements." Pl.'s Mem. Opp'n at 19. Once more, BYD asserts the Alliance must have acted knowingly or recklessly just because its statements were (according to BYD) false. But if BYD's pleadings were sufficient, there would be no reason for courts to require plaintiffs to show defendants spoke with "knowledge that [their speech] was false or with reckless disregard of whether it was false or not." Liberty Lobby, 838 F.2d at 1292 (cleaned up). A court could assume the requisite state of mind if a plaintiff pled that a defendant's statements were false.

The Court will not accept BYD's invitation to rewrite the law of defamation. To draw reasonable inferences in BYD's favor, the Court needs facts alleging the Alliance's awareness of, or disregard for,

the truthfulness of its statement. BYD gives the Court only speculation.

This speculation is especially glaring considering the ASPI Report's ample support for the Forced Labor Story's claim about BYD. The ASPI Report's Executive Summary states: "ASPI's research has identified 83 foreign and Chinese companies directly or indirectly benefitting from the use of Uyghur workers outside Xinjiang through potentially abusive labour [sic] transfer programs as recently as 2019: ... BYD." Defs.' Mot. to Dismiss Ex. A ("Ex. A") at 8, ECF No. 23-3. Elsewhere, the ASPI Report states that 105 Uyghur workers were transferred to Hubei, a subsidiary of Dongguan, which in turn directly supplies BYD. Id. at 37. BYD claims this relationship is too attenuated to show that it benefits from forced labor, and it maintains that it has no relationship with Hubei. Am. Compl. ¶ 20. But Figure 17 of the ASPI Report contradicts this claim and depicts Hubei directly supplying BYD. Ex. A at 27.

The ASPI Report also provides endnotes for many of its claims. BYD contends that the endnotes do not provide enough support. Pl.'s Mem. Opp'n at 21. But to defeat a defamation claim, the Alliance need not have tracked down and verified that each endnote supports each claim. Because the actual malice standard is subjective, what matters is not whether the endnotes actually support the claims in ASPI's Report but whether the Alliance thought they did. St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968) (analyzing

whether "defendant in fact entertained serious doubts as to the truth of his publication").

To be sure, the Forced Labor Story applies its own veneer to the ASPI Report. The Story reports that BYD "profit[s]" from forced labor, for example. Ex. B at 4. The word "profits" does not appear in the ASPI Report. But the ASPI Report does say BYD "directly or indirectly benefit[s]" from forced labor. Ex. A at 8. And BYD must plead the existence of more than minor linguistic differences to make out a claim for defamation. Liberty Lobby, Inc. v. Rees, 852 F.2d 595, 600–01 (D.C. Cir. 1988) ("[M]inor inaccuracies will not give rise to a defamation claim when the ultimate defamatory implications are themselves not actionable.... [A]ctual malice is not established in cases in which the statement is substantially accurate").

BYD fails to make out a claim for defamation as to the Alliance's first statement.

B.

The Alliance's second allegedly defamatory statement is another blog post. The post, titled "California has a $1 Billion Contract for PPE with BYD, a Company Controlled by the Chinese State," was published in the early days of the COVID-19 pandemic. Ex. C at 2. It focuses on the lack of American-made personal protective equipment (PPE) and individual states' difficulties in acquiring medical supplies. Id. at 3–7. Illinois, for example, "was able to get some [PPE] out of China by handing some dude a $3.4 million check in a McDonald's

parking lot off I-55." Id. at 4. The post acknowledges that, with stories such as these, the need for PPE was dire. But it asks why BYD, an "automaker," is now manufacturing medical supplies. Id. at 3. And it highlights the company's early woes, including its failure to receive federal certification for its N95 masks. Id. This failure forced BYD to refund California $500 million. Id.

BYD's primary complaint about the post is its headline, claiming that BYD is "controlled" by the Chinese government. Am. Compl. ¶ 21. Pointing to "extensive information online that establishes that BYD has private ownership and is not state-owned," BYD quotes McFarlane for the proposition that "[a]lthough failure to investigate will not alone support a finding of actual malice ... the purposeful avoidance of truth is in a different category." Pl.'s Mem. Opp'n at 22–23 (quoting McFarlane, 91 F.3d at 1510).

But BYD alleges no facts showing the Alliance's awareness of BYD's purported private ownership. See McFarlane, 91 F.3d at 1508 ("[B]ecause the actual malice inquiry is subjective ... the inference of actual malice must necessarily be drawn solely upon the basis of the information that was available to and considered by the defendant prior to publication.") (emphasis added). BYD baldly asserts that the Alliance "knew that BYD is a private corporation" and "[n]evertheless ... knowingly or recklessly wrote and published the false statements." Pl.'s Mem. Opp'n at 22 (emphasis in original). This is a legal conclusion and does not pass muster.

More, the Radarlock Report is full of allegations that reasonably could have led the Alliance to the opposite conclusion. The Report, titled "Building the China Dream: BYD & China's Grand Strategic Offensive," Defs.' Mot. to Dismiss Ex. E ("Ex. E") at 2, ECF No. 23-7, states, among other things, that:

> • BYD is "part of a government-directed and-supported 'innovation center' that seeks explicitly to combine 'domestic and foreign resources' to build up a Chinese-dominated next-generation vehicle industry." Id. at 7.
>
> • The Company's leadership "boasts direct ties to the [Chinese Communist Party's] industrial policy apparatus and [military-civil fusion] project." Id.
>
> • A joint venture between BYD and a state-owned electronics company "helps the State to integrate and guide the various technological arms that Beijing deploys and combines in the Network Great Power Strategy." Id. at 11–12.
>
> • "In 2018, [BYD] announced 'strategic cooperation' with the China Academy of Launch Vehicle Technology ... the largest research and production base of missile weapons and launch vehicles in China. Press releases from the time announced this cooperation as a 'new step' for both entities in 'military-civil fusion' (MCF)." Id. at 13.

> • "BYD—through the web of state- and military-affiliated entities that it supports—allows Beijing access to and a position of leverage over global supply chains, technology flows, and, ultimately, data." Id. at 17.

The Alliance's claim that BYD is "control[led]" by the Chinese government is a reasonable gloss on these statements. Ex. C. Even granting BYD's claim that it is a private company, the Court agrees that "[b]eing a private corporation ... is not exclusive of, or a bar against, being 'under the control of' or being an 'arm of the state.' " Reply in Supp. of Defs.' Mot. to Dismiss ("Repl. Supp. Mot. Dismiss") at 15, ECF No. 25. Especially in China. Even if this were a close call, under the First Amendment, close calls go against public figures. See Fairbanks, 314 F. Supp. 3d at 90 ("The First Amendment requires public figures suing in defamation to demonstrate by at least a fair preponderance of the evidence that the allegedly defamatory statement is false, with close cases decided against them.") (cleaned up). BYD thus does not plausibly allege the Alliance's second statement was defamatory.

C.

The Alliance's third allegedly defamatory statement is in a press release. The release bears the title, "Congress Must Act After New Evidence Links CRRC and BYD to Chinese Government and Military." Ex. D. It cites the same Radarlock Report discussed above, and it says that BYD "is both deeply subsidized by Beijing and work[s] hand-in-hand with Party leaders, China's military, and Huawei to

penetrate the U.S. market." Id. at 2. The press release quotes the Alliance's President Scott Paul as saying that U.S. lawmakers "now have irrefutable evidence that CRCC and BYD are simply an arm of China's military and government." Id. It also urges Congress to block BYD's sales in the United States, citing "the wealth of new evidence linking CRRC and BYD to China's 'military-civil fusion' regime that leverages China's commercial and military capabilities in an effort to dominate the U.S. market." Id. at 3.

Invoking now-familiar arguments, BYD contends the press release is defamatory because "BYD is not an 'arm' of either China's military or its government" but "is a privately held, privately run corporation that happens to be chartered and located in mainland China." Am. Compl. ¶ 22. BYD alleges—without pleading any supporting facts—that the Alliance published the press release "in an effort to spread mistruths about BYD ... and thereby encourage discrimination against BYD and its products to impede its ability to compete fairly in the marketplace for supply contracts in the United States." Pl.'s Mem. Opp'n at 22. The Alliance must have known its statements were false, BYD claims, because "there is extensive information online that establishes BYD has private ownership and is not state-owned." Id. at 22–23.

BYD does not plead the Alliance possessed subjective knowledge of the "extensive information online" purportedly showing BYD's private ownership. See McFarlane, 91 F.3d at 1508 ("[T]he actual malice inquiry is subjective."). If BYD meant

to argue that the Alliance ignored this information or failed to investigate—and therefore acted recklessly—it misconstrues the standard. See Hourani, 164 F. Supp. 3d at 141 ("It is not enough to prove simply that the defendant failed to investigate or check the accuracy of a false statement, he must have had a subjective awareness of the probable falsity of the publication.") (cleaned up). Recall that the Radarlock Report contained ample information to support the claim that BYD has ties to the Chinese government and military. See supra IV.B.

In any event, BYD's claim about the press release is time-barred. The statute of limitations for defamation claims in the District is one year. D.C. Code § 12-301(4) (2019). "Defamation occurs on publication, and the statute of limitations runs from the date of publication." Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 882 (D.C. 1998) (cleaned up). As explained below, the press release was published on October 25, 2019. BYD therefore needed to sue prior to October 25, 2020, but it did not file its initial complaint until a month later. See Compl.

BYD argues the Alliance's press release is undated, but the Alliance provides three indicators of its date: (1) publicly available source code; (2) a screenshot of the press release with the date included; and (3) a link to a dated external article published the same day as the press release. Because the external article is no longer available, the Court only relies on the first two indicators.

BYD rejects the source code as evidence because "[n]o authority is cited" for the proposition that source code "is the proper subject of judicial notice." Pl.'s Mem. Opp'n at 26. But a court "may take judicial notice of facts contained in public records of other proceedings, and of historical, political, or statistical facts, and any other facts that are verifiable with certainty." Johnson v. Comm'n on Pres. Debates, 202 F. Supp. 3d 159, 167 (D.D.C. 2016) (cleaned up). Anyone with a web browser can view a webpage's source code, so it is "verifiable with certainty." And notably, BYD does not dispute the validity of the source code. Instead, BYD argues that the Alliance does not "take into account the possibility that the Press Release was subsequently modified in a manner to qualify as republication." Pl.'s Mem. Opp'n at 26. Citing Jankovic v. International Crisis Group, 494 F.3d 1080 (D.C. Cir. 2007), BYD explains that if the Alliance modified and republished the webpage, it could reset the statute of limitations to run from the date of republication. Id.

Several problems doom BYD's argument. First, BYD forgets that it bears the burden of pleading sufficient "factual content [to allow] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678, 129 S.Ct. 1937. BYD pleads no facts from which the Court can infer that the Alliance republished or even might have republished the press release. It only raises the "possibility" that the press release was republished. Pl.'s Mem. Opp'n at 26. The Court will not draw inferences based on mere possibilities.

Second, BYD does not even address the screenshot of the press release the Alliance included in its memorandum in support of its motion to dismiss. See Defs.' Mem. at 35. Instead, BYD claims the Alliance "concede[s]" that the press release is "undated," and for support cites its own complaint. See Pl.'s Mem. Opp'n at 25. The Alliance concedes no such thing. Instead, the Alliance directs the Court to access the press release through the "Press Release directory" on its website. Defs.' Mem. at 35. Accessed this way, the press release shows it was published on October 25, 2019. Id.

The Court finds the date of the press release is not subject to "reasonable dispute" and takes judicial notice that the press release was published on October 25, 2019. Hurd, 864 F.3d at 686. BYD's claim about the press release is time-barred.

V.

The Alliance asks the Court to dismiss the complaint with prejudice. Mot. Dismiss at 2. But "[a] dismissal with prejudice is warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." Firestone v. Firestone, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (cleaned up). It remains possible that BYD can cure the deficiencies in its complaint by alleging facts showing that the Alliance published its two blog posts with actual malice.

For these reasons, the Alliance's motion to dismiss will be granted in part, and the court will dismiss BYD's complaint without prejudice. BYD has now had two bites at the apple. It should expect that a third bite would be its last.

D. C. CIRCUIT COURT OPINION

BYD COMPANY LTD., Appellant
v.
ALLIANCE FOR AMERICAN MANUFACTURING, *et al.*, Appellees

No. 21-7099

Appeal from the United States District Court for the District of Columbia (No. 1:20-cv-03458)

Before: Henderson, Pillard, and Katsas, Circuit Judges.

JUDGMENT

Per Curiam

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. See D.C. Cir. R. 36(d). For the following reasons, it is ORDERED that the judgment of the district court be AFFIRMED.

BYD Company Ltd., a Chinese corporation, brings defamation claims against the Alliance for American Manufacturing and three of its employees. The claims before us arise from two short articles that the Alliance published on its website. The

articles state that BYD benefits from forced labor and is controlled by the Chinese government. The district court dismissed the complaint for failure to plausibly allege that the Alliance published the articles with actual malice. *BYD Co. v. Alliance for Am. Mfg.*, 554 F. Supp. 3d 1 (D.D.C. 2021). We affirm.

To establish defamation under D.C. law, a plaintiff must show, among other things, that the defendant made a false and defamatory statement and acted with the requisite level of fault. *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001). For statements about a public figure, the fault standard is actual malice, which means the defendant made the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 116 (D.C. Cir. 2017) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964)). It is not enough that the defendant "should have known" that its statement was false; the defendant must have "in fact harbored subjective doubt" about the truth of its claim. *Jankovic v. Int'l Crisis Grp.,* 822 F.3d 576, 589 (D.C. Cir. 2016). BYD concedes that it is a public figure for the purposes of this case. Thus, to survive a motion to dismiss, BYD must allege facts that support a plausible inference of actual malice. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). BYD's complaint falls far short of that standard.

The first disputed article is titled "Some of the World's Biggest Brands Depend on Forced Labor in China." A. 442. It describes a think-tank report that accuses the Chinese government of sending members of its Uyghur population into forced labor. The article further states that "several known bad actors are also profiting from this forced labor, including ... Build Your Dreams (BYD)." A. 443. BYD alleges that the report does not support this claim and that the Alliance must have known as much. But the report does support the claim. The report lists BYD as among the companies "directly or indirectly benefiting from the use of" forced labor. A. 412. And it states that a subsidiary of BYD's direct supplier uses over 100 forced laborers to make its products. A. 419. BYD further alleges that the Alliance is biased against foreign companies, but bias alone does not support an inference of actual malice. *Tavoulareas v. Piro*, 817 F.2d 762, 795 (D.C. Cir. 1987) (en banc). Tavoulareas left open the possibility that ill will could support a finding of actual malice "when combined with other, more substantial evidence of a defendant's bad faith." Id. But BYD's complaint makes no allegations of that sort.

The second article is titled "California has a $1 Billion Contract for PPE with BYD, a Company Controlled by the Chinese State." A. 446. BYD contends that its status as a privately owned corporation is well known, which it says supports a plausible inference that the Alliance remained willfully blind. But the "failure to investigate will not alone support a finding of actual malice." *McFarlane*

v. Sheridan Square Press, Inc., 91 F.3d 1501, 1510 (D.C. Cir. 1996) (cleaned up). To raise an inference of actual malice based on willful blindness, BYD needed to allege something more, such as facts showing that the Alliance had "reason to doubt the veracity of its source." Id. BYD's sparse complaint makes no such allegations. In any event, a privately owned company may be controlled by a government, so knowledge that BYD was privately owned would suggest little if anything about a claim that the Chinese government effectively controlled it.

For these reasons, we affirm the district court's judgment. Pursuant to D.C. Circuit Rule 34, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).