No. _______

IN THE

CHRISTIANA TAH; RANDOLPH MCCLAIN,
Petitioners,

—v.—

GLOBAL WITNESS PUBLISHING, INC., GLOBAL WITNESS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a complaint by a public plaintiff alleging defamation sufficiently pleads actual malice, in the absence of direct evidence, by presenting detailed factual allegations from which, when collectively considered, actual malice could plausibly be inferred.

LIST OF PARTIES

The Petitioners Christiana Tah and Randolph McClain are individuals.

The Respondents are Global Witness Publishing Inc., incorporated in the District of Columbia, and Global Witness, incorporated in the United Kingdom.

STATEMENT OF RELATED CASES

There are no related cases.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 991 F.3d 231 (D.C. Cir. 2021). App. 1. The Opinion of the District Court is reported at 413 F. Supp. 3d 1 (D.D.C. 2019). App. 48.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 2021. This Petition is timely filed within 150 days of that decision, as required by this Court's March 19, 2020 Order concerning the extension of time to file a petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND FEDERAL RULES PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> 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.

Federal Rule of Civil Procedure 8(a)(2) provides that a Claim for Relief must contain: "a short and plain statement of the claim showing that the pleader is entitled to relief . . ."

STATEMENT OF THE CASE

A. Introduction

This case presents the Court with an opportunity to make a long-overdue adjustment to the application of the First Amendment in defamation suits. This Court has not elaborated on the First Amendment "actual malice" defamation standard for thirty years. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). No current sitting Justice was on the Court when *Masson* was decided.

The actual malice standard created in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), has recently been called into question, including a dissenting opinion by Justice Gorsuch, *Berisha v. Lawson*, 141 S.Ct. 2424, 2425 (2021) (Gorsuch, J., dissenting from the denial of certiorari); two opinions by Justice Thomas, *Id.* at 2424 (Thomas, J., dissenting from the denial of certiorari), *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in the denial of certiorari); and the dissenting opinion from Judge Silberman below, *Tah v. Global Witness*, App. 21-47 (Silberman J., dissenting).

While some call for an outright rejection of *Sullivan* and the actual malice test, this Petition offers the Court the opportunity to make a critical and long-overdue adjustment to how the *Sullivan* standard is applied in the real world of federal defamation litigation *without* overruling *Sullivan* or entirely discarding the actual malice standard.

The actual malice standard is daunting enough on its own. The one fighting chance plaintiffs *do* have in actual malice cases, however, is to uncover evidence of knowledge of falsity or reckless disregard for truth or falsity through discovery. Given the subjective

nature of actual malice, and the reality that evidence will almost always be within the exclusive possession of the defendant, plaintiffs rarely possess direct evidence of actual malice at the pleading stage.

What plaintiffs may possess, however, are detailed facts from which actual malice could plausibly be inferred. These facts seldom, in themselves, constitute direct "smoking gun" clear and convincing evidence of actual malice. Indeed, when such facts are available, cases typically settle without resort to litigation. But often, plaintiffs do possess and plead, as Tah and McClain in this case did possess and plead, facts that are both highly suspicious and give rise to a plausible inference of actual malice.

This pragmatic real-world litigation dynamic in turn places enormous stress on the proper interpretation of the federal "plausibility" pleading standard articulated in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The decision below is emblematic of similar decisions by other Courts of Appeal applying *Twombly* and *Iqbal* in federal diversity defamation cases in a manner that effectively creates absolute immunity from defamation liability in all actual malice cases. There is one conflicting counter-example, a recent decision by the Second Circuit in *Palin v. New York Times Co.*, 940 F.3d 804 (2d Cir. 2019). This Petition demonstrates the conflict between *Palin* and the decision below, and other Circuit decisions aligned with it.

In the words of Justice Gorsuch, "over time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability." *Berisha*, 141 S.Ct. at 2428 (Gorsuch, J.) Yet surely

this Court *never* envisioned the *Sullivan* standard as an absolute end to defamation law in public plaintiff cases. And surely this Court *never* anticipated that *Twombly* and *Iqbal* would effectively end public plaintiff defamation cases in the federal system. Yet this "combination of ingredients" has led to this outcome. Two medications prescribed by a physician may each, considered alone, promise positive results. The unintended consequence of prescribing those two medications in combination, however, may create severely injurious or even lethal consequences as the two medications interact.

The actual malice standard adopted in *Sullivan* and the plausibility standard adopted in *Twombly* and *Iqbal* are both judicially crafted doctrines of this Court's own invention. Each doctrine may continue to make sense considered on its own terms, and this Petition does not invite the Court to invoke a nuclear option, abandoning either the actual malice or plausible pleading standards. This Petition does present, however, the ideal vehicle for the Court to instruct lower courts on how to apply *Twombly* and *Iqbal* in First Amendment actual malice cases. Quite simply, something must give. "Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public's business increasingly seem to leave even ordinary Americans without recourse for grievous defamation." *Berisha*, 141 S.Ct. at 2429 (Gorsuch, J.)

The dissenting opinion of Judge Silberman below demonstrated fact-by-fact and issue-by-issue how the Majority did exactly what federal courts should not do at the pleading stage. Courts should not pick apart in a "divide and conquer" tactic each discrete allegation, holding that standing alone the allegation does not in itself prove actual malice. Nor, once a

court determines that a complaint states facts which give rise to a plausible inference of actual malice, should a complaint be dismissed because a court regards a defendant's alternative exculpatory theory more plausible.

This Court should announce this rule: A complaint by a public plaintiff alleging defamation sufficiently pleads actual malice, even in the absence of direct evidence, by presenting detailed factual allegations from which, when collectively considered, actual malice could plausibly be inferred.

This Court should proceed to apply the rule by following Judge Silberman's roadmap, demonstrating to lower courts what the rule means in practical application, by holding that when plaintiffs allege facts plausibly probative of the existence of actual malice, as Tah and McClain have, dismissal is not permitted.

B. Factual and Procedural Background

In a long and distinguished career as a public servant in Liberia, Petitioner Christiana Tah occupied many government positions. In 2009, Tah was appointed Attorney General and Minister of Justice for Liberia by Liberian President Ellen Johnson Sirleaf, the first female African head of state, winner of the Nobel Peace Prize, and awardee of the American Presidential Medal of Freedom. Complaint ¶ 2.

Petitioner Randolph McClain was born in Liberia. He was educated in the United States, and had a long and distinguished career with the DuPont Company and DAK Americas, occupying numerous positions of scientific and business leadership. Following his retirement from DuPont and DAK Americas, McClain

returned to his native Liberia to offer leadership and public service. His service included the position of Chairman of the Board of the Liberia Telecommunications Corporation, and (of prime importance here) the position of President and Chief Executive Officer of the National Oil Company of Liberia ("NOCAL"), and Chairman of Liberia's Hydrocarbon Technical Committee. ("HTC") Complaint ¶ 3.

Global Witness is an international human rights watchdog organization. App. 2. This action arises from the publication of a report by Global Witness in March of 2018, entitled: *Catch me if you can* ("Report"). Tah and McClain alleged that the Report falsely accused them of accepting bribes and engaging in corruption in connection with an oil transaction between Liberia and Exxon Mobil Corporation ("Exxon").

The *Catch me if you can* Report chronicled the acquisition by Exxon of an offshore oil "production sharing contract" license in the waters off the coast of Liberia, known as "Block 13." Block 13 is a rectangular plot of territory in the ocean waters off the coast of Liberia owned by the nation of Liberia that potentially held valuable oil reserves. Ultimately, Block 13 failed to produce oil. App. 3.

NOCAL is a governmental corporation created pursuant to Liberia's Petroleum Law, responsible for the award of oil licenses. Its mission is to develop Liberia's hydrocarbon potentials for national self-sufficiency and sustainable development. In 2007, Liberia first licensed the production sharing contract rights to Block 13 to a company with both British and Liberian ties that was originally called Broadway Consolidated PLC, and later Peppercoast Petroleum

PLC. In 2010, it was determined that Broadway Consolidated was in default of certain terms in the production sharing contract with Liberia. App. 3.

In the wake of Broadway Consolidated's default, Tah and other Liberian officials, following the advice of outside legal counsel, decided to seek an outside buyer to come in and purchase the production sharing contract rights of Block 13 from Broadway Consolidated, on terms that would also be more favorable to the government of Liberia.

This strategy was adopted, and Liberia, with the aid of expert consultants, began the process of seeking prospective purchasers for Block 13. Exxon emerged as the prospective purchaser, and negotiations commenced. The negotiations led to an historic agreement in which Exxon would pay a substantial sum for the purchase of the production sharing contract for Block 13, a total of $120 million, of which $50 million would go directly to Liberia itself. App 3.

In its entire history, Liberia had never received a payment of such magnitude for the rights to extract natural resources. President Sirleaf and others within the Liberian government saw the Exxon deal as an historic victory for the Liberian people, in which the government of Liberia would for the first time receive a substantial payment for the sale of extraction rights. The Exxon deal was to serve as a model for all future contracts of this nature.

Upon completion of the contract between Liberia and Exxon, Liberian President Sirleaf instructed the Board of NOCAL ("the Board"), to distribute bonuses to all who assisted in concluding the deal. App. 50. McClain, as Secretary of the Board sought legal advice on the propriety under Liberian law of paying

bonuses as President Sirleaf had directed. The Board was advised that bonus payments were legally permissible. The Board then met to determine the recipients and amounts of the bonuses. The Board resolved to award bonuses to *all employees* of NOCAL, to all members of the Hydrocarbon Technical Committee, and to the five consultants who had assisted the Committee in the negotiation of the contract. The entire amount paid in bonuses totaled approximately $500,000. This was 1% of the $50 million premium that Exxon had paid to the Liberian goverment for the Block 13 rights. The seven negotiating team members of the Hydrocarbon Technical Committee, including Tah and McClain, received bonuses of $35,000 each. The five consultants were each sent bonuses of $15,000. The remaining balance of the $500,000, approximately $290,000, was distributed to all other NOCAL employees, numbering over 140 persons, including office staff, custodial workers, and drivers. App. 4.

In March 2018, Global Witness, on the verge of publication, sent letters to Tah, McClain, and others stating its conclusion that the payments were bribes, and demanding any reaction within seven days. Six individuals provided detailed responses. Four of those who responded were members of the Hydrocarbon Technical Committee and two were external consultants, including Jeff Wood, an American consultant hired by Liberia to assist in the negotiations with Exxon. While Tah, McClain, and others were outraged that Global Witness had already made up its mind that the payments were bribes, they nonetheless did reply, explaining in detail that the payments were bonuses entirely consistent with Liberian law, paid in appreciation for the historic success achieved through the Exxon

contract. Jeff Wood's response was particularly important, in that it explained the inherent improbability of the Global Witness bribery accusation, noting that the distribution of bonus payments to all employees of NOCAL was entirely inconsistent with the notion that the payments were bribes, and explaining in addition that the reason no similar payments had ever been made before was that no such successful deal benefiting Liberia had ever been concluded before. App. 6, 30-31.

On March 29, 2018, Global Witness published its *Catch me if you can* Report. The Report exploded like a bomb within Liberia and among members of the Liberian community world-wide. The Report accused Tah, McClain, and others of bribery to facilitate the Exxon deal, wreaking havoc to their reputations.

George Manneh Weah succeeded Ellen Sirleaf as the President of Liberia in 2018. Following publication of the *Catch me if you can* Report, President Weah appointed a Special Presidential Committee to investigate the allegations of bribery against Tah, McClain, and others identified in the Global Witness Report. The Special Presidential Committee issued its findings on May 10, 2018. The Special Committee Report unequivocally renounced the bribery allegations contained in the Global Witness Report as false. App. 54.

Armed with a finding by the Liberian government that the accusations of bribery by Global Witness were false, Tah and McClain commenced this action for defamation and false light invasion of privacy. The overarching theory of the Complaint was that Global Witness was fixated on a pre-determined story-line to bring down Exxon and Rex Tillerson, then the new U.S. Secretary of State, by advancing

the story that the Block 13 deal was corrupt and laced with bribery. That headlong fixation led to reckless disregard for the truth. Global Witness made a faint covering gesture to seek comment from those whom it was accusing at the eleventh hour, in emails that admitted that Global Witness had already made up its mind that Tah, McClain, and others had received bribes.

The Global Witness story was inherently improbable. The Global Witness Report itself admitted that it had no evidence that Exxon directed or knew about payments to government officials. Liberian officials, including all of the employees at NOCAL, had no reason to bribe themselves. The careful wordsmithing of the Global Witness Report, in which it studiously avoided ever actually asserting that bribery existed, while nonetheless making it clear to readers that it believed the payments were bribes, underscored the existence of actual malice, by communicating to readers the impression that it *knew* that bribes existed, when in fact *it knew that it did not know*.

Global Witness responded by filing an "anti-SLAPP" motion under the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5502(a). The anti-SLAPP motion, which if granted would have saddled Tah and McClain with Global Witness's attorney's fees, was accompanied by a motion to dismiss. The substance of Global Witness's motion to dismiss was that the Report was not capable of conveying the defamatory meaning or the "false light" alleged, and secondarily, that even if capable of being construed as defamatory, the Complaint failed to plausibly allege actual malice.

Tah and McClain prevailed on the anti-SLAPP issue. In *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015), the D.C. Circuit, in an opinion written by now-Justice and then-Judge Kavanaugh, held that the District's anti-SLAPP law could not be applied to federal courts siting in diversity, because application of the anti-SLAPP law conflicted with the Federal Rules of Civil Procedure. The *Abbas* ruling created a federal circuit split, which this Court has yet to resolve. *See Godin v. Schencks*, 629 F.3d 79, 81, 92 (1st Cir.2010) (applying Maine's anti-SLAPP law in a federal diversity case); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir.1999) (holding that California's anti-SLAPP law applies in federal diversity cases). Global Witness argued that the *Abbas* decision had been rendered erroneous by a subsequent decision of the District of Columbia Court of Appeals, *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. 2016), *cert. denied*, *National Review, Inc. v. Mann*, 1404 S.Ct. 344 (2019). The courts below rejected that assertion by Global Witness.

Turning to the merits, both courts below also rejected the first line of defense interposed by Global Witness, finding that average readers would have understood the Global Witness Report as asserting that Tah and McClain had accepted bribes. Both courts also accepted the allegations in the Complaint that the bribery allegations were false, a conclusion buttressed by the findings of the Special Commission appointed by the Liberian government. App. 22, 59-66.

Both courts below nonetheless held that dismissal was warranted because Tah and McClain had failed to plausibly plead actual malice. The Majority opinion for the Court of Appeals panel refused to find the

Global Witness story inherently improbable. The Majority refused to credit the argument that actual malice could plausibly be inferred from allegations that Global Witness pursued a pre-conceived story line; that Global Witness turned a blind eye to the detailed refutations of its story presented by Tah, McClain, Jeff Woods, and others; that the failure of the Report to include in its narrative the fact that the legal advisor to President Sirleaf was among those paid a bonus; and that Global Witness published its sensational bombshell story because it was motivated by a subjective fixation on catching Exxon and its former CEO Rex Tillerson in scandal. App. 13-20; 66-72.

Judge Silberman dissented. Judge Silberman deemed the Global Witness story inherently improbable. He credited the claim by Tah and McClain that Global Witness subjectively knew that it had not been able to determine whether the payments were corrupt bribery payments, yet proceeded to present to readers the defamatory message that Tah and McClain had taken bribes. App. 26-37. Judge Silberman also took issue with the Majority's view that a publisher "need not accept denials." He argued that the content of the denials are what matters, and that Global Witness had been provided with detailed explanations refuting its bribery accusations, with no evidence and no witnesses on the other side. Judge Silberman asserted that the cumulative balance of the evidence gave "Global Witness obvious reasons for doubt." App. 33-34.

This Petition ensued.

REASONS FOR GRANTING THE WRIT

A. Public Plaintiffs Face an Almost Impossible Hurdle in Surviving a Rule (12)(b)(6) Motion on Actual Malice Under *Iqbal* and *Twombly*

As commentators have observed: "One might wonder whether it is ever possible to survive a 12(b)(6) motion on the element of actual malice after *Iqbal* and *Twombly*." Clay Calvert, Emma Morehart, Sarah Papadelias, *Plausible Pleading & Media Defendant Status: Fulfilled Promises, Unfinished Business in Libel Law on the Golden Anniversary of Sullivan*, 49 Wake Forest L. Rev. 47, 69 (2014). While the answer may not be "never," it certainly is "hardly ever." *See, e.g., Michel v. NYP Holdings, Inc.*, 816 F.3d 686 (11th Cir. 2016) (sustaining motion to dismiss for failure to plausibly plead actual malice); *Biro v. Condé Nast*, 807 F.3d 541 (2d Cir. 2015) (same); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610 (7th Cir. 2013) (same); *Mayfield v. National Association for Stock Car Auto Racing, Inc.*, 674 F.3d 369 (4th Cir. 2012) (same); *Schatz v. Republican State Leadership Committee*, 669 F.3d 50 (1st Cir. 2012) (same).

Justice Thomas has correctly characterized the current regime as imposing on public plaintiffs an "'almost impossible' standard." *McKee*, 139 S. Ct. 675, quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771 (1985) (White, J., concurring in the judgment).

B. Discovery is Essential to a Fair Playing Field

"New York Times and its progeny made it essential to proving liability that the plaintiff focus on the

conduct and state of mind of the defendant." *Herbert v. Lando*, 441 U.S. 153, 160 (1979). In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), this Court recognized that "[t]he proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." *Id.* 120, n.9. To refit the famous sports adage, "Winning isn't everything; it's the only thing," in establishing actual malice, "Discovery isn't everything, it's the only thing."

"[D]iscovery . . . is the *only way* to determine whether a defendant acted knowingly or recklessly." Russell L. Weaver & Geoffrey Bennett, *Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 La. L. Rev. 1153, 1155 (1993) (emphasis added). Actual malice presents "a question of fact, which justifies exhaustive discovery into what information the defendant had and what she did with it." Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 Wm. & Mary L. Rev. 1633, 1668-69 (2013). Determining whether a defendant published with actual malice "is a complex factual issue that normally cannot be resolved without discovery." David Anderson, *Is Libel Law Worth Reforming?*, 140 U. Pa. L. Rev. 487, 511 (1991). As the Ninth Circuit observed in *Flowers v. Carville*, 310 F.3d 1118 (9th Cir. 2002), "the issue of 'actual malice' . . . cannot be properly disposed of by a motion to dismiss in this case, where there has been no discovery." *Id.* at 1131. *See also Metabolife International, Inc. v. Wornick*, 264 F.3d 832, 848 (9th Cir. 2001) (same).

At the pleading stage, however, details concerning the defendant's conduct and state of mind are largely outside a plaintiff's grasp. "Actual malice makes it difficult to plead facts supporting a reasonable

inference of a plausible claim because it is a demanding, subjective standard that does not readily lend itself to proof through direct evidence." Matthew Schafer, *Ten Years Later: Pleading Standards and Actual Malice*, Comm. Law, Winter 2020, at 1, 35. Under the current regime, public plaintiffs effectively have no chance. "Faced with a substantive standard that, for good reason, is higher than normal, they are also faced with a pleading standard that is virtually insurmountable, for reasons that are unclear at best." Judy M. Cornett, *Pleading Actual Malice in Defamation Actions After Twiqbal: A Circuit Survey*, 17 Nev. L.J. 709, 727 (2017).

The challenge for plaintiffs is that *direct* evidence of actual malice virtually never exists in any serious and significant defamation case. (If it does exist, the case is typically not litigated, but settled.) Prior to *Twombly* and *Iqbal*, the reality that plaintiffs must always prove actual malice through indirect and circumstantial evidence was well-recognized. As Judge Kozinski wrote for the Ninth Circuit: "As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence. By examining the editors' actions we try to understand their motives." *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1253 (9th Cir. 1997). "The fact that we can't look inside the editors' minds doesn't stop us from reaching conclusions about their thoughts; subjective standards are nearly always satisfied by circumstantial proof (as in most criminal prosecutions)." *Id.* at 1256. n. 20. The orthodoxy thus once was that plaintiffs were not punished at the pleading stage for the inevitable disadvantage they face in lack of access to evidence of a defendant's

state of mind. "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." *Flowers*, 310 F.3d at 1130.

This is no longer true. Now, as *Twombly* and *Iqbal* are currently being applied, public plaintiffs effectively *are* saddled with proving state of mind in the complaint, rendering the vast majority of complaints dead on arrival. The door to defamation recovery is effectively shut by the combination of the pro-defendant gloss that has accreted to the actual malice standard, and the accelerating willingness of courts applying *Twombly* and *Iqbal* to demand of plaintiffs the one thing they will virtually never possess at the pleading stage without the benefit of discovery—evidence of the subjective state of mind of the publisher. "[T]he plaintiff may not know the subjective state of the defendant's mind at the time of publication." Cornett, *supra*, at 727. Whether a defendant acted with actual malice "is usually *solely within the exclusive knowledge* of the defendant." *Id.* (emphasis added).

C. The D.C. Circuit's Decision Conflicts with the Second Circuit's Decision in *Palin*

In *Palin v. New York Times Co.*, Sarah Palin, the former Governor of Alaska and Republican nominee for Vice President, brought a defamation action against the *New York Times*. The opening sentence of the Second Circuit's decision in *Palin* could well be the opening sentence for any description of the *Tah* case here: "This case is ultimately about the First Amendment, but the subject matter implicated in

this appeal is far less dramatic: rules of procedure and pleading standards." *Palin*, 940 F.3d at 807.

Judge Silberman in his dissent below correctly observed that the Majority's decision distorted both the substantive meaning of the actual malice standard under *Sullivan* and the proper role of courts in ruling on Rule 12(b)(6) motions to dismiss in the libel context, creating a conflict with the Second Circuit's ruling in *Palin*. App. 37.

The Second Circuit's decision in *Palin* turned in part on the error committed by the District Court in holding an evidentiary hearing at the motion to dismiss stage, a procedural turn that the Second Circuit held ran "headlong into the federal rules." *Id.* at 810. "While we are cognizant of the difficult determinations that *Twombly* and *Iqbal* often place on district courts," the Second Circuit observed, "the district court's gatekeeping procedures must nevertheless comply with the Federal Rules of Civil Procedure." *Id.* at 812-13.

The Second Circuit also held that the district court's *substantive analysis* went beyond what was permissible at the pleading stage, even after *Twombly* and *Iqbal*. That is the portion of the Second Circuit's decision in *Palin* that cannot be reconciled with the approach taken by the D.C. Circuit below in *Tah*. Most critically for purposes of this Petition, the Second Circuit held that at the pleading stage, the defendant's mere *opportunity* to obtain facts that would have refuted the story was enough to give rise to a *permissible plausible inference* that the defendant did know those facts. It was thus error for the district court to choose between the two possible inferences, once innocent and one culpable. *Id.* at 814 (By crediting Bennet's testimony, the district court

rejected a permissible inference . . . That Palin's complaint sufficiently alleges that Bennet's opportunity to know the journalistic consensus that the connection was lacking gives rise to the inference that he actually did know.").

The Second Circuit similarly held that the district court failed to properly credit the probative value of allegations that political bias by the *Times* editor may have led to reckless disregard for the truth, holding that "[w]hen properly viewed in the plaintiff's favor, a reasonable factfinder could conclude this amounted to more than a mistake due to a research failure." *Id.* at 815. So too, the Second Circuit held that the district court erred in adopting an innocent explanation for a hyperlink connected to the article during the editorial process, noting that the "inclusion of the hyperlinked article gives rise to more than one plausible inference, and any inference to be drawn from the inclusion of the hyperlinked article was for the jury—not the court." *Id.* Finally, the Second Circuit generally found the district court to have erred because it consistently adopted the *Times*' theories over Palin's theories. *Id.* As Judge Silberman correctly observed in his dissent, the Majority below simply substituted its theory of what Global Witness had done with the theory advanced in the Complaint, and decided that the Majority's version was more plausible than the theory advanced in the Complaint. App. 34-36.

D. The Decision Below is an Exemplar of Everything Federal Courts Should Not be Permitted to Do Under the First Amendment or Federal Pleading Standards.

Comparing *Tah* to *Palin*, it is plain that the Court of Appeals in *Tah* did exactly what *Palin* held federal

courts may not do. The allegations in the Complaint supporting the existence of actual malice were factually detailed and dense, spanning some 19 paragraphs. They were far from formulaic recitations of the elements of actual malice, or mere conclusory and threadbare recitals.

The Petitioners understand that this Court does not sit to resolve fact-intensive disputes over the application of law to fact. That is not the purpose of the presentation here. The specificity presented in this Petition is rather offered to demonstrate the futility of the current regime. The Petitioners' Complaint provided an *abundance* of detail from which actual malice could plausibly be inferred but was still found wanting. The Complaint alleged:

> Global Witness deliberately and callously communicated to readers the defamatory accusation that Christiana Tah and Randolph McClain accepted a bribe even though at the time of its publication of *Catch me if you can* Global Witness was in possession of ample information discrediting the bribery allegation. Global Witness subjectively *knew* that it had not been able to determine whether or not the payments of $35,000 to Christiana Tah and Randolph McClain were corrupt bribery payments or innocent and deserved bonuses. Yet without resolving that subjective doubt, and notwithstanding the material in its possession that generated a high degree of subjective awareness that its story was false, Global Witness proceeded to present to readers the defamatory message that in fact Christiana Tah and Randolph McClain had taken bribes. This behavior went beyond

> ordinary negligence and escalated to publishing the defamatory bribery falsehood with knowledge of falsity or reckless disregard for truth or falsity. To advance its sensationalist agenda, Global Witness presented to readers a bribery charge *as if it knew the charge to be true* when in fact *it knew it did not know*. Complaint, ¶ 85.

The imputations of bribery published by Global Witness were inherently improbable. Moreover, prior to publication, the fundamental flaws in the Global Witness bribery thesis had been painstakingly *explained* to Global Witness.

Judge Silberman's dissent below persuasively demonstrated the underlying incoherence of the Global Witness Report. As the Complaint alleged, and as the Liberian Government's own investigation found, from the beginning the real target of the Global Witness Report was Exxon, and its former CEO, the then new U.S. Secretary of State, Rex Tillerson. The Complaint explained in elaborate detail why the desire of Global Witness to catch Exxon and Tillerson in scandal blinded Global Witness to the truth. Complaint, ¶¶, 87-90. For Exxon and Tillerson to be guilty of bribery, somebody had to be bribed. App. 30.

Yet as the Complaint pointed out, Global Witness had no evidence that Exxon itself directed or knew about payments to officials. This was stated in the Global Witness Report itself, and as pled in the Complaint, was emphasized by other reportage summarizing the Global Witness Report. Complaint, ¶ 73 ("The *Newsweek* article then channeled the sinister suggestion of the Global Witness Report that the payments came from the same bank account in

which Exxon had deposited its funds: 'The payments were probably made from the same bank account into which Exxon had just deposited $5 million for Block 13, although there is no evidence that Exxon itself directed or knew about payments to officials, according to the report.'").

Judge Silberman's dissent correctly honed in on this fundamental failing of the Global Witness Report, which *itself* acknowledged that Global Witness had no evidence that Exxon had paid any bribes. But despite its own confession that it had no evidence that Exxon had paid bribes, Global Witness did everything it could to convey to readers the impression that Exxon *had* paid bribes and that Tah and McClain were the recipients of those bribes.

As Judge Silberman pointed out, the admission in the Global Witness Report itself that it could not, despite its investigation, confirm that Exxon was guilty of bribery, should have led inexorably to the conclusion that the accusation that Tah and McClain had *accepted* bribes was inherently improbable:

> Appellants claim that Global Witness knew it lacked any support for insinuating that the payments to Tah and McClain were bribes. Thus, a jury could infer that Global Witness subjectively doubted the truth of its Report.
>
> I agree. In my view, because Global Witness's story is obviously missing (at least) one necessary component of bribery, it is inherently improbable. Although it accused Appellants of taking bribes from Exxon, Global Witness admits that it had "no evidence that Exxon directed the [National Oil Company] to pay Liberian officials, nor that Exxon knew such payments were

> occurring." J.A. 83 (emphasis added). In other words, despite all its investigating, Global Witness uncovered *nothing* to demonstrate that Exxon was the briber and *nothing* to even suggest there was an agreed upon exchange. *Accord Tah*, 413 F. Supp. 3d at 10 ("Global Witness's suspicions and calls for investigations of Exxon Mobil and [the National Oil Company] lacked *any* evidence that the former had involvement in monies paid to employees of the latter.") (emphasis in original). And with no privity between Exxon and the Technical Committee members, it is bizarre to accuse Appellants of taking a bribe. As *St. Amant* teaches, it is sufficient to infer—on this basis alone—that Appellee acted with knowing disregard for the veracity of its publication.

App. 26-27.[1]

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[1] Judge Silberman's incisive analysis on this point led to an ancillary exchange between the Majority and Judge Silberman, in which the Majority argued that Tah and McClain had not made this argument. This led to the caustic rejoinder by Judge Silberman that this "leads me to wonder whether we received the same briefs." App. 27. Suffice it to say, at minimum, that Tah and McClain in their Complaint *did* recite that Global Witness and other media organizations picking up on its Report disclaimed any proof that Exxon had paid bribes. Complaint, ¶ 73. But more importantly, as emphasized in the Complaint, in the arguments proffered to both Courts below, and in this Petition, the entire theory of the case brought here by Tah and McClain against Global Witness was that despite knowing it did not know whether bribery had occurred, Global Witness deliberately conveyed to readers the impression that it had. As Judge Silberman put it bluntly: "That sounds to me a whole lot like accusing Global Witness of publishing its story with no evidence to back it up." App. 27.

The Majority dismissed this argument, reading the Global Witness Report as implying that NOCAL, not Exxon, was the briber. As Judge Silberman rejoined, this claim by the Majority is utterly illogical and incoherent. NOCAL, an arm of the government of Liberia, had no reason to bribe its own employees, but it had every reason to congratulate its own employees on a job well done—for what was for Liberia the deal of a lifetime. The Complaint drove this home, in paragraph after paragraph, setting forth in detail how the fundamental flaws in the Global Witness story had been presented to Global Witness prior to publication.

Specifically, Jeff Wood painstakingly explained that the payments made by Exxon, including the $50 million that went to NOCAL, was in no sense "voluntary," as Global Witness had asserted, but was a bargained-for payment successfully negotiated by Liberia as part of Exxon's purchase price. App. 41. Wood explained that he would testify as a witness in any defamation action brought against Global Witness regarding the false bribery allegations. Wood's statements made it clear that it was deliberately misleading for Global Witness to equate the bribery allegations surrounding the original purchase of Block 13 by Broadway Consolidated in 2006 and 2007 with the very different bonus payments awarded following the highly successful 2013 Exxon deal. App. 28. Woods' statements also explained how the bonus payments to all NOCAL employees, "all the way down to the drivers and housekeeping staff," was "hardly consistent with an intent to bribe, and completely consistent with the payment of a bonus." Complaint ¶ 97. Wood refuted the claim that the payments were corrupt because there had been no similar payments in recent years,

explaining that the theory was entirely baseless, because there had *been no* successful Company deals consummated during those years. There had simply been no success to reward. App. 31. These communications to Global Witness were not "mere denials." Rather, these were communications that led to a plausible inference that Global Witness was guilty of "purposeful avoidance of the truth." *Harte-Hanks Communications Inc. v. Connaughton*, 491 U.S. 657, 692 (1989).

The Complaint buttressed these allegations with numerous facts reinforcing the inference that Global Witness led readers to believe bribery had occurred when Global Witness itself knew it had not been able to confirm the bribery accusation. The Majority opinion below picked apart each of these factual allegations, offering an exculpatory reason for each. Judge Silberman, in turn, offered an inculpatory reason for each. Yet if the *Palin* holding that federal courts are not to weigh competing plausible explanations of the facts on a 12(b)(6) motion is sound, the Majority's methodology, picking apart the Complaint's allegations by offering counter-explanations, was error, a kind of "plausibility creep," that if allowed to go unchecked, will swamp the law of defamation in federal forums.

Tah and McClain alleged that Global Witness, in its zeal to write a sensational story bringing down Exxon and Secretary Tillerson, pursued a preconceived story line plausibly probative of actual malice. Tah and McClain argued that letters seeking comment sent by Global Witness to various participants in the Block 13 deal, including Tah and McClain, were cynically calculated to provide Global Witness with journalistic cover. In those letters Global Witness stated that it had already concluded

that the payments to Tah and McClain and others were "most likely" bribes. Complaint ¶¶ 91–92, App. 62. The preconceived story blinded Global Witness to any evidence put before it that would contradict its sensationalist thesis. Tah and McClain did not assert that this was in itself dispositive of the existence of actual malice, but surely gave rise to a plausible inference probative of actual malice. The Majority opinion improperly rejected this thesis, asserting: "After all, virtually any work of investigative journalism begins with some measure of suspicion." App. 16. The Majority concluded that the fact that the letters came on the eve of publication provided "no support at all for the notion that Global Witness's conclusion was preconceived." App. 16. And turning the letters against Tah and McClain, the Majority noted that seeking such comment is standard journalistic practice. App. 16.

The Majority's labored effort to explain away the letters underscores that it was doing exactly what federal courts are not supposed to do, engaging in a weighing of the evidence at the pleading stage. This was symptomatic of the Majority's entire opinion, on issue after issue. As Judge Silberman observed, "[t]he Majority discounts these facts by weighing the evidence and drawing inferences against Tah and McClain." App. 34.

Given the detail of the refuations presented to it, it was certainly plausible that Global Witness had before it evidence that must have given it obvious reason to doubt the accuracy of the story. The Majority below acted as if Tah and McClain merely argued that actual malice inured in "Global Witness's failure to credit their denials." App. 17. But Tah and McClain did not argue anything so shallow as claiming that the *mere fact* of a denial is probative of

actual malice. Rather, it is the *content* of the denial that matters. As Judge Silberman pointed out, "the specific content of a denial may well give the publisher obvious reasons to doubt the veracity of the publication." App 33. Judge Silberman explained:

> Global Witness, however, did not have evidence on both sides of the issue. It had "no evidence"—and no witnesses—to contradict the six denials. The cumulative balance of the evidence thus gives Global Witness obvious reasons for doubt.
>
> I am dumbfounded by the Majority's assertion that the denials in our case contain "no readily verifiable information . . . that would provide 'obvious reasons to doubt.'" . . . The denials were specific, and it was within Global Witness's power to easily inquire into whether other employees received bonuses, the content of the Board's resolution approving the bonuses, and whether the $4 million to the National Oil Company was negotiated as part of the purchase price (etc.).

App. 34.

Similarly, the Majority flitted away the argument of Tah and McClain that the detailed allegations in the Complaint asserting ill-will and a subjective desire on the part of Global Witness to damage Exxon and Secretary Tillerson were probative of actual malice, describing this argument as "breathtaking" and dismissing it with the truism that "evidence of ill will 'is insufficient by itself to support a finding of actual malice.'" App. 19, quoting *Tavoulareas v. Piro*, 817 F.2d 762, 795 (D.C. Cir. 1987) (en banc).

The subjective "gotcha" motivation alleged in detail in the Complaint may not *in itself* constitute actual malice, but it is obviously *probative*, and could give rise to a plausible instance of actual malice given the sensationalist tenor of the Global Witness report, seeking to make headlines against Exxon and Secretary Tillerson, blinding Global Witness to the truth. Consider the cogent analysis of Judge McKinnon, joined by then-Judge Scalia, but then vacated by the full D.C. Circuit sitting en banc:

> The mere existence of a preconceived plan to "get" the subject of a defamatory story does not prove that the publisher acted knowingly or recklessly in publishing false information. But it is beyond question that one who is seeking to harm the subject of a story—whether motivated by simple ill will, or partisan political considerations, or otherwise laudable concern for the safety of the nation, or a mere desire to attract attention and boost circulation—is more likely to publish recklessly than one without such motive.

Tavoulareas v. Piro, 759 F.2d 90, 98 (D.C. Cir. 1985) (internal citations omitted), vacated and superseded on other grounds by *Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir. 1987) (en banc), *cert. denied*, 484 U.S. 870 (1987).

The opinion of the Majority below is also flatly inconsistent with this Court's statement in *Herbert v. Lando*, reciting that "'[t]he existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided

they are not too remote, including threats, prior or subsequent defamations, subsequent statements of the defendant, circumstances indicating the existence of rivalry, ill will, or hostility between the parties, facts tending to show a reckless disregard of the plaintiff's rights . . .'" *Herbert*, 441 U.S at 164, n. 12, quoting 50 Am.Jur.2d § 455 (1970).

As the opinion of Judges McKinnon and Scalia explained, the "idea that motive can be evidence of actual malice when it is not an element of the tort" is sound, for the distinction "is akin to that between motive to kill (*e.g.*, greed or hatred) and *intent* to kill in a murder prosecution. They are not the same thing. The second is an element of the crime of murder; the first is evidence admissible to prove that element." *Tavoulareas*, 759 F.2d at 98 n.34 (emphasis in original). Thus "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." *Harte-Hanks,* 491 U.S. at 668 (internal citations omitted).

Tah and McClain offered many other specific indicia of actual malice, none of them credited by the Majority. NOCAL paid bonuses to all those involved in the negotiations, including American consultants. App 31. It also paid bonuses to all employees of NOCAL, even the most low-ranking employees. As Judge Silberman put it, "for Global Witness's story to be true, Exxon was somehow spreading bribes left and right like Johnny Appleseed." App. 29. "The much more obvious explanation is that the 'bonuses' were in fact bonuses paid for outstanding performance." App. 29.

The Complaint emphasized the stunning failure of Global Witness to include the name of the Legal Advisor to President Sirleaf, Seward Cooper, as among the Hydrocarbon Technical Committee members who received a $35,000 bonus. Indeed, while the Committee had six members, as Global Witness knew, the sinister chart it displayed to graphically communicate its point that bribe money had flowed from Exxon through Company to the Committee members contained only *five* of the six members, conspicuously leaving out Seward Cooper's name. Complaint ¶ 99. Why might this matter? A plausible inference is that Global Witness realized that including Seward's name as one of the recipients could have caused its entire thesis to unravel. President Sirleaf ordered the bonus payments *after* successful completion of the contract with Exxon as a deserved bonus for a job well done. The payments were made only after a careful legal opinion was rendered approving the legality of the payments by Tah and Cooper, President Sirleaf's own legal advisor. That legal opinion was *grounded* in the supposition that there was *no quid pro quo*, not even a *demand*, for payment by any Committee member, including Seward Cooper himself. *Id.* A jury could conclude that the conspicuous omission of Cooper's name and title from its *Catch me if you can* Report was a deliberate manipulation to mask from readers a glaring inconsistency in its narrative, a manipulation plausibly probative of actual malice. The Majority's answer to this was an unabashed substitution of the Majority's inference over the inference to which Tah and McClain were entitled. The Majority argued that "[i]f anything, that one of the lawyers responsible for conducting a legal analysis of the payments was himself in line to

receive one makes the payments even more suspicious." App. 20. Yet Tah and McClain were entitled to the opposite inference—that it was Global Witness's omission of this detail that was suspicious. The Majority impermissibly weighed competing plausible inferences.

E. In Shutting Out the Vast Majority of Public Plaintiff Cases the Current Regime Undermines Both Society's Interest in Protecting Reputation and the Quality of Public Discourse

"The adverse consequences of the actual malice rule do not prove *Sullivan* itself wrong, but they do force consideration of the question whether the Court, in subsequent decisions, has extended the *Sullivan* principle too far." Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 Law and Social Inquiry 197, 205 (1993). (reviewing Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991)).

There may be universal agreement that somehow the *outcome* in *Sullivan* was both inevitable and just. The Court was faced with a punishing libel judgment against the *New York Times* arising from a paid advertisement from the Committee to Defend Martin Luther King in which the plaintiff, an obscure Alabama public commissioner never mentioned in the ad, was plainly seeking to punish the *Times* for daring to publish the essential truths of the civil rights struggle. Somehow the pernicious decision of the Alabama Supreme Court, in a case rife with racist suppression of press coverage of the civil right movement could not be allowed to stand. The ensuing debate over the propriety of the *Sullivan* decision has not been over the outcome but the means the Court

chose to get there, and costs those means have exacted on the protection of reputation and the quality of American public discourse. For "not all such suits look like *Sullivan*, and the use of the actual malice standard in even this limited category of cases often imposes serious costs: to reputation, of course, but also, at least potentially, to the nature and quality of public discourse." Kagan, *supra*, at 204-05.

The dual interests at stake are worth emphasis. "[T]he Court has reiterated its conviction—reflected in the laws of defamation of all of the States—that the individual's interest in his reputation is also a basic concern." *Herbert v. Lando*, 441 U.S. at 169. The protection of "his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), *quoting Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

For defamation plaintiffs, this is no theoretical abstraction. It is profoundly personal and destructive. Justice Thomas argued in *Berisha* that the lack of historical support for actual-malice requirement "is reason enough to take a second look at the Court's doctrine." *Berisha*, 141 S.Ct. at 2425. (Thomas, J.) History aside, Justice Thomas also noted the real-world damage caused by the current regime, observing: "Our reconsideration is all the more needed because of the doctrine's real-world effects. Public figure or private, lies impose real harm." *Id*. Christiana Tah and Randolph McClain were dedicated public servants who sacrificed greatly to combat corruption and promote progress and the rule of law for their native country, only to see their

efforts cynically trashed as collateral damage in an effort to embarrass Exxon and Secretary of State Tillerson. The decision below, and others like it around the nation, leave them and others like them, without recourse to remedy. "The Court would now shift this risk to the victim, even though he has done nothing to invite the calumny, is wholly innocent of fault, and is helpless to avoid his injury." *Gertz,* 418 U.S. at 390 (White, J., dissenting).

In the recent words of Justice Gorsuch, "Since 1964 . . . our Nation's media landscape has shifted in ways few could have foreseen." *Berisha*, 141 S.Ct. at 2427 (Gorsuch, J.), citing David Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan,* 81 Ohio St. L. J. 759, 794 (2020). "Our marketplace of ideas is being battered by a perfect storm of technological, economic, and political changes." *Id.* at 800. "When a defamatory message is posted on the Internet, one can view and track and permanently document the echo boom of comments, posts, tweets, and repetitions of the defamatory story as the falsehood spreads like a virulent virus across digital space." Rodney A. Smolla, *Law of Defamation* § 1:27.50 (2021 ed.).

The damage to public discourse exacted by a regime that effectively threatens to shut down a large swath of defamation actions should deeply concern the Court. This Court has recognized society's interest, expressed through the libel laws of the states, to both protect individual reputation and deter falsehoods in our public discourse, observing in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), that "New Hampshire has clearly expressed its interest in protecting such persons from libel, as well as in safeguarding its populace from falsehoods." *Id.* at 777.

"The level of discourse over public issues is not simply a function of the total amount of speech." Richard Epstein *Was New York Times v. Sullivan Wrong?*, 53 U. Chi. L. Rev. 782, 799-800 (1986). Today, with the proliferation of social media, internet, cable, satellite, broadcast, and print media, society is awash in the quantity of discourse. But the level of discourse "also depends on the *quality* of the speech." *Id.* at 800. (emphasis added). To the extent that no realistic roadblocks exist to the correction of error, the public is a loser. *Id.*

When the actual malice standard is combined with the *Twombly* and *Iqbal* standard, as interpreted by the D.C. Circuit and the other federal circuits that are aligned with it, there is effectively little or no law of defamation left. As Justice Thomas observed: "The proliferation of falsehoods is, and always has been, a serious matter. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires." *Berisha*, 141 S.Ct. at 2425 (Thomas, J.).

F. The Perils of Double Counting

The opinion below is of a piece with other opinions wrongly dismissing complaints at the pleading stage in order to protect the publisher from the expense of discovery. *See Michel*, 816 F.3d at 702 (claiming that the "costs and efforts required to defend a lawsuit through that stage of litigation could chill free speech."). This sort of reasoning is yet another powerful reason for the Court to grant this writ. To the extent that the opinion below or opinions such as *Michel* place a "thumb on the scale" at the pleading stage *against* public plaintiffs, they engage in a form of First Amendment "double counting" that this

Court has previously rejected. Such "double counting" involves the piling on of onerous procedural barriers to recovery, in addition to the First Amendment standards the law already provides.

As the Court explained in *Calder v. Jones*, 465 U.S. 783 (1984), "the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits." *Id.* at 790. Rejecting an attempt to place a thumb on the scale in procedural matters such as jurisdiction, the Court stated that "[t]o reintroduce those concerns at the jurisdictional stage would be a form of double counting." *Id.* The Court observed that it had "already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Id*. at 790-91.

"Many Members of this Court have raised questions about various aspects of *Sullivan*." *Berisha*, 141 S.Ct. at 2429 (Gorsuch, J.) (collecting statements). One critical "aspect of *Sullivan*" is procedural. The Court could and should harmonize the actual malice standard with *Twombly* and *Iqbal* by holding that a complaint by a public plaintiff alleging defamation sufficiently pleads actual malice, even in the absence of direct evidence, by presenting detailed factual allegations from which, when collectively viewed, actual malice could plausibly be inferred. At the very least, the time has come to once again engage these issues. "[T]he Court would profit from returning its attention . . . to a field so vital to the 'safe deposit' of our liberties." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: July 26, 2021

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 2020
Decided March 19, 2021

No. 19-7132

CHRISTIANA TAH AND RANDOLPH MCCLAIN,
Appellants

—v.—

GLOBAL WITNESS PUBLISHING, INC.
AND GLOBAL WITNESS,
Appellees

Consolidated with 19-7133

Appeals from the United States District Court
for the District of Columbia
(No. 1:18-cv-02109)

Rodney A. Smolla argued the cause for appellants/ cross-appellees. With him on the briefs was *Arthur V. Medel*.

Chad R. Bowman argued the cause for appellees/ cross-appellants. With him on the briefs were *David A. Schulz*, *Mara J. Gassmann*, and *Maxwell S. Mishkin*.

Gregory M. Lipper was on the brief for *amici curiae* Non-Governmental Organizations in support of appellees/cross-appellants.

Bruce D. Brown and *Katie Townsend* were on the brief for *amici curiae* Reporters Committee for Freedom of the Press and 26 Media Organizations in support of appellees/cross-appellants.

Before: SRINIVASAN, *Chief Judge*, TATEL, *Circuit Judge*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

Opinion dissenting in part filed by *Senior Circuit Judge* SILBERMAN.

TATEL, *Circuit Judge*: In this defamation action, two former Liberian officials allege that Global Witness, an international human rights organization, published a report falsely implying that they had accepted bribes in connection with the sale of an oil license for an offshore plot owned by Liberia. The district court dismissed the complaint for failing to plausibly allege actual malice. For the reasons set forth in this opinion, we affirm. The First Amendment provides broad protections for speech about public figures, and the former officials have failed to allege that Global Witness exceeded the bounds of those protections.

I.

Because this appeal comes to us from a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), "[w]e accept facts alleged in the complaint as true and draw all reasonable inferences from those facts in the plaintiffs' favor." *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 513–14 (D.C. Cir. 2016).

The dispute in this case traces its roots to an Atlantic Ocean plot owned by Liberia and thought to have potentially significant oil reserves. Compl. ¶ 18. The National Oil Company of Liberia (NOCAL), responsible under Liberian law for awarding oil licenses, first issued a license for the plot, known as "Block 13," in 2007 to a company called Broadway Consolidated PLC (BCP). *Id.* ¶¶ 19–21. That transaction was marred by "rumors of corruption," and when BCP failed to fulfill its obligations under its production sharing contract, Liberia began arranging to sell Block 13 to a different oil company. *Id.* ¶¶ 21–22.

ExxonMobil, a multinational oil company, was interested in purchasing Block 13 but wary of buying the license directly from BCP given the rumors of corruption surrounding the 2007 transaction. Accordingly, Exxon got a third-party, Canadian Overseas Petroleum Limited, to buy the Block 13 license and resell it to Exxon. In exchange, Exxon paid $120 million, of which $50 million went directly to Liberia—the most Liberia had ever received in a single natural resources deal. *Id.* ¶ 22. Unlike in the BCP transaction, Liberia was represented in these negotiations by the Hydrocarbon Technical Committee (HTC), a six-member government entity created to "superintend [] negotiations" between oil

companies and NOCAL. *Id.* ¶¶ 23–24. Plaintiffs Christiana Tah and Randolph McClain, Liberia's Minister of Justice and NOCAL's CEO respectively, were HTC members during the transaction.

After the deal was consummated, the Liberian President directed NOCAL's board to pay bonuses to those responsible for the new agreement as a "reward for exceptionally well-done service." *Id.* ¶¶ 25–26, 28. But before the board determined the size of the bonuses, McClain "asked two of the HTC members, the President's Legal Advisor, Seward Cooper, and Minister of Justice, Christiana Tah, if payment of such bonuses would be legally permissible." *Id.* ¶ 26. Cooper and Tah "concluded" that they were legal for "two … independent reasons." *Id.* ¶ 28. First, the pertinent Liberian anti-corruption law had "expired and was no longer legally operative." *Id.* And second, even had the law remained in force, the bonuses would still pass muster because they "had come at the initiative of [the] President" and "[n]o prospective recipient of the bonuses claimed to have demanded any such bonus payments." *Id.*

NOCAL's board then authorized "approximately $500,000" worth of bonuses. *Id.* ¶ 29. Each "member[] of the HTC, including … Tah and … McClain, received … $35,000," and each of "five consultants were … sent bonuses of $15,000." *Id.* The rest of the funds were split among the remaining NOCAL employees, including drivers and custodial workers. *Id.* The $35,000 payments to Tah and McClain are the focus of this case.

According to Global Witness's report, *Catch me if you can*, the organization first learned of Exxon's Block 13 deal from the Liberian Extractive Industries

Transparency Initiative (LEITI), a semi-autonomous Liberian agency that publishes information about payments made by energy companies to the Liberian government. Because of NOCAL's "tarnished track record of corrupt deals, Global Witness saw there was a risk of bribery and began its investigation." *Catch me if you can* ("Report") at 9; *see also* Compl. ¶ 42. Global Witness focused on Block 13 in order to highlight the "critical information" provided by section 1504 of the Dodd-Frank Act, *see* 15 U.S.C. § 78m(q), which "[l]ike LEITI, . . . requires all oil, gas, and mining companies to report the payments they make to governments." Report at 9.

Catch me if you can addresses Block 13's background and the corruption surrounding the BCP deal. For example, it states BCP was "likely part-owned by [now-former Liberian] government officials with the power to influence the award of oil licenses," and that the award of Block 13 to BCP therefore olated Liberian law. *Id.* at 12. The report also claims that the BCP license was approved due to bribery. It then explains how Exxon structured its transaction to alleviate its concerns about the BCP deal.

The report principally addresses the $35,000 payments in a section titled "Monrovia, 2013: Awash in Cash." *Id.* at 30–31. This section discusses what are repeatedly described as "unusual, large" payments made to HTC members, referencing Tah and McClain by name. *Id.* at 30. It states that NOCAL characterized the payments as "bonuses," using scare quotes whenever it repeats the word "bonus," and claims that the payments "appear . . . to be linked to the HTC's signing of Block 13." *Id.*

In support of its claim that the payments were "large" and "unusual," the report states that "there is

no sign of equivalent bonuses during" the surrounding years, "except for smaller yearly bonuses paid shortly before Christmas[;]" that "the payments represented a 160 percent increase on the reported highest salary paid to a Liberian minister[;]" and that one HTC member who was supposedly working for free nonetheless received a payment. *Id.* The report then gives the definition of bribery under Liberian law and references some of the corruption surrounding the 2007 BCP deal—specifically, payments NOCAL made to members of the Liberian legislature to ensure approval of that earlier license, which NOCAL deemed "lobbying fees," and which the Liberian Government's General Auditing Commission later "classified as bribes." *Id.*

A few weeks before Global Witness issued the report, it sent letters to HTC members informing each that "we believe that the payment made by NOCAL to you was most likely a bribe, paid as a reward to ensure that [Block] 13 was negotiated successfully," and asking for a response. Compl. ¶¶ 91–92. Several HTC members, including Tah, denied that the payments were bribes, insisting they were bonuses authorized by NOCAL's board that were "appropriately earned given the extraordinary success of the Exxon negotiations," and pointing out that all NOCAL employees received bonuses. *Id.* ¶¶ 93–95. Global Witness included excerpts from these denials in the report. Report at 30.

The report also discusses Exxon's relationship to these payments. It characterizes them as evidence of Exxon's possible "complicit[y]" in "Liberia's corrupt oil sector," declaring that "Exxon should have known better." *Id.* at 32–33. According to the report, "Exxon . . . knew it was buying a license with illegal origins"

and the payments were "in effect ... likely made with Exxon's money." *Id.* Although stating that "Global Witness believes that Exxon should have considered it possible that money the company provided to NOCAL could have been used as bribes in connection with Exxon's Block 13 deal," the report acknowledges that "Global Witness has no evidence that Exxon directed NOCAL to pay Liberian officials, nor that Exxon knew such payments were occurring." *Id.* at 31–32.

Lastly, Global Witness called on the Liberian government to investigate the payments and, in the event such investigation uncovers unlawful behavior, urged the U.S. Department of Justice "to determine if the company violated the [Foreign Corrupt Practices Act]." *Id.* at 32. Global Witness sent copies of the report to the U.S. Attorney General and the Chairman of the Securities and Exchange Commission. Compl. ¶¶ 100–02.

Following the report's publication, the Liberian government investigated the payments and concluded that they did not "constitute[] bribe[s] within the context of [Liberian] law" and were not "made so [the HTC] could undertake [an] official act." *Id.* ¶ 81 (internal quotation marks omitted). The Liberian government nonetheless recommended that the HTC members return the payments. *Id.* ¶ 83. Tah and McClain refused, asserting that the payments were above-board bonuses for a job well done. *Id.*

Believing that *Catch me if you can* falsely impugns their integrity and reputations, Tah and McClain sued Global Witness for defamation and false light invasion of privacy. They dispute none of the facts contained in the report but argue that Global

Witness falsely "communicated [through implication] . . . that . . . each took a bribe in exchange for their roles in the Exxon purchase of Block 13." *Id.* ¶ 31 (emphasis omitted).

Global Witness responded with a special motion to dismiss under the District of Columbia's anti-SLAPP (strategic lawsuits against public participation) statute, which seeks to protect speakers from lawsuits "filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016) (internal quotation marks omitted). To defeat such a motion, the plaintiff must "demonstrate[] that the claim is likely to succeed on the merits," even as the act severely limits discovery. D.C. Code § 16-5502(b). A prevailing defendant may seek an award of attorney's fees. *Id.* § 16-5504(a). Global Witness also filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), arguing that the complaint failed to plead defamation by implication, that any defamatory implication was protected opinion, and that, in any event, the complaint failed to plead actual malice as required under the First Amendment.

The district court denied Global Witness's special motion because, in its view, the D.C. anti-SLAPP statute did not apply in federal court. *Tah v. Global Witness Publishing, Inc.*, No. 18-cv-2109 (D.D.C. June 19, 2019). The court, however, granted Global Witness's Rule 12(b)(6) motion, finding that "the contents of the report are protected speech under the First Amendment and cannot sustain a defamation claim." *Tah v. Global Witness Publishing, Inc.*, 413 F. Supp. 3d 1, 3–4 (D.D.C. 2019).

Tah and McClain appeal, arguing, as they did in the district court, that their allegations are sufficient to state a plausible case of actual malice because Global Witness (1) began its investigation with a preconceived story line, (2) received denials from some of those involved, (3) harbored ill-will toward Exxon, and (4) omitted Seward Cooper from the list of payment recipients. Global Witness cross-appeals, arguing that the anti-SLAPP statute applies in federal court and that the district court's denial of the special motion to dismiss deprived it of the ability "to recover the expenses it has incurred in defending against this meritless attack." Appellees' Br. 67. Like the district court, we begin with the anti-SLAPP issue.

II.

Under the Supreme Court's decision in *Shady Grove Orthopedic Associates., P.A. v. Allstate Insurance Co.*, to decide whether a state (or district) law or rule—in this case the D.C. anti-SLAPP statute—applies in a federal court exercising diversity jurisdiction, we "first determine whether [a federal rule of civil procedure] answers the question in dispute." 559 U.S. 393, 398 (2010). If it does, the federal rule "governs ... unless it exceeds statutory authorization or Congress's rulemaking power." *Id.*

Applying the *Shady Grove* test, our court held in *Abbas v. Foreign Policy Group, LLC* that the D.C. anti-SLAPP act does not apply in federal court. 783 F.3d 1328, 1334–37 (D.C. Cir. 2015). Without controlling guidance from the D.C. Court of Appeals—at the time that court had yet to interpret the anti-SLAPP act—we construed the statute's

"likely to succeed on the merits" standard literally, finding that it "is different from and more difficult for plaintiffs to meet than the standards imposed by Federal Rules 12 and 56." *Id.* at 1335. Accordingly, we concluded that the D.C. anti-SLAPP statute impermissibly "conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial." *Id.* at 1334.

Global Witness argues that the D.C. Court of Appeals's subsequent decision in *Competitive Enterprise Institute v. Mann* effectively abrogates *Abbas*. There, interpreting the anti- SLAPP statute's special motion to dismiss provision for the first time, the Court of Appeals held, contrary to *Abbas*, that the "D.C. Anti-SLAPP Act's likelihood of success standard ... simply mirror[s] the standards imposed by Federal Rule 56," and that to decide a special motion to dismiss, the court "must assess the legal sufficiency of the evidence" as it currently stands at the time of the motion. *Mann*, 150 A.3d at 1236, 1238 n.32 (internal quotation marks omitted).

Even with this development, however, *Abbas* remains circuit law and controls this case. The reason comes from *Mann* itself, in which the Court of Appeals "agree[d] with *Abbas* that the special motion to dismiss is different from summary judgment" in two respects. *Id.* at 1238 n.32.

First, the special motion to dismiss "imposes the burden on plaintiffs." *Id.* Once a defendant makes a prima facie showing that the lawsuit in question qualifies as a SLAPP, the burden shifts to the plaintiff to defeat the special motion to dismiss. *Id.* at 1237. By contrast, even a "movant" defendant on a Federal Rule 56 summary judgment motion retains

some initial "burden of showing that there is no genuine issue of fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

Second, the Court of Appeals observed that, unlike a summary judgment motion, a special motion to dismiss will usually be decided "before discovery is completed." *Mann*, 150 A.3d at 1238 n.32. By contrast, under Federal Rule 56, summary judgment is typically "premature unless all parties have had a full opportunity to conduct discovery." *Convertino v. DOJ*, 684 F.3d 93, 99 (D.C. Cir. 2012) (internal quotation marks omitted). According to Global Witness, however, the allowance for discovery under the anti-SLAPP statute is identical to that under Federal Rule 56. The D.C. Court of Appeals's recent decision in *Fridman v. Orbis Business Intelligence Ltd.*, 229 A.3d 494 (D.C. 2020), forecloses this argument. There, the court addressed the provision of the anti-SLAPP act that stays discovery whenever a special motion to dismiss is filed, except for "[w]hen it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome." D.C. Code § 16-5502(c)(2). That standard, the court explained, "is difficult to meet," because the party requesting discovery must show that it is actually "likely" that "targeted discovery will enable him to defeat the special motion to dismiss." *Fridman*, 229 A.3d at 512–13. Thus, "discovery normally will not be allowed." *Id.* at 512. This differs from Federal Rule 56, under which full discovery is the norm, not the exception.

Although *Mann* may undermine some of *Abbas's* reasoning, the bottom line remains: the federal rules and the anti-SLAPP law "answer the same question

about the circumstances under which a court must dismiss a case before tria ... differently," and the anti-SLAPP law still "conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial." *Abbas*, 783 F.3d at 1333–34 (internal quotation marks omitted). Accordingly, the district court properly applied *Abbas* to this case and denied the special motion.

III.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "We assume the truth of all well-pleaded factual allegations and construe reasonable inferences from those allegations in a plaintiff's favor." *Nurriddin v. Bolden*, 818 F.3d 751, 756 (D.C. Cir. 2016). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

In a defamation by implication case under D.C. law, "the courts are charged with the responsibility of determining whether a challenged statement is capable of conveying a defamatory meaning." *White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990) (internal quotation marks omitted). A plaintiff must show first that the "communication, viewed in its entire context, ... conveys materially true facts from which a defamatory inference can reasonably be drawn," and second, that "the communication, by the particular manner or language in which the true facts are conveyed, supplies

additional, affirmative evidence suggesting that the defendant intends or endorses the defamatory inference." *Armstrong v. Thompson*, 80 A.3d 177, 184 (D.C. 2013) (emphasis omitted) (quoting *White*, 909 F.2d at 520). Where, as here, plaintiffs qualify as public officials—as Tah and McClain concede they do—the First Amendment requires that they also allege that the defamatory statement "was made with actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (internal quotation marks omitted). The First Amendment, the Supreme Court long ago observed, enshrines "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. The actual malice standard reflects the cornerstone First Amendment principle that "speech relating to public officials and public figures, as distinct from private persons, enjoys greater protection." *Jankovic v. International Crisis Group* (*Jankovic III*), 822 F.3d 576, 584 (D.C. Cir. 2016).

The actual malice standard is famously "daunting." *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1308 (D.C. Cir. 1996). A plaintiff must prove by "clear and convincing evidence" that the speaker made the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Jankovic III*, 822 F.3d at 589–90 (second part quoting *New York Times Co.*, 376 U.S. at 279–80). "[A]lthough the concept of reckless disregard cannot be fully encompassed in one infallible definition," the Supreme Court has "made clear that the defendant must have made the false publication with a high degree of awareness of probable falsity," or "must have entertained serious doubts as to the truth of his

publication." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (alteration omitted) (internal quotation marks omitted); *see also id.* at 688 (using these formulations interchangeably). The speaker's failure to meet an objective standard of reasonableness is insufficient; rather the speaker must have actually "harbored subjective doubt." *Jankovic III*, 822 F.3d at 589.

The dissent thinks this is an easy case. "In Global Witness's story," the dissent asserts, "Exxon was the briber," Dissenting Op. at 1, yet the report admits that "Global Witness ha[d] no evidence that Exxon directed NOCAL to pay Liberian officials, nor that Exxon knew such payments were occurring," Report at 31.

Critically, however, neither Tah nor McClain advances this theory—in their briefing to us, they never even mention the sentence on which the dissent relies. They make four specific arguments in support of their claim that Global Witness possessed actual malice, *supra* at 8, not one of which is that Global Witness had no evidence that Exxon was the briber, and for good reason. At most, the report implies that NOCAL, not Exxon, was the briber, thus rendering any lack of evidence as to Exxon's direction or knowledge of the payments totally irrelevant. *See* Report at 32 (stating that Exxon "knew the risk" and "should have considered it possible that money the company provided to *NOCAL* could have been used as bribes in connection with Exxon's Block 13 deal" (emphasis added)); *id.* (noting that Global Witness asked Exxon for comment on any "safeguards the company may have put in place to prevent the possible misuse of its funds *by NOCAL*" (emphasis added)). Contrary to the dissent, *see* Dissenting Op.

at 6, a generic statement accusing someone of acting with reckless disregard—here, Tah and McClain's claim that "Global Witness subjectively *knew* that it had not been able to determine whether the payments of $35,000 to Christiana Tah and Randolph McClain were corrupt bribery payments," Appellants' Br. 36—simply cannot be read to shoehorn in every conceivable actual malice theory. Indeed, when our dissenting colleague surfaced his theory at oral argument, it was so foreign to appellants' counsel that our colleague had to spoon-feed him after he failed to get the initial hint. *See* Oral Arg. Tr. at 10 ("Well, no, it's worse. Isn't it stronger than that, counsel? We have no evidence."). As our dissenting colleague himself has made clear, "we do not consider arguments not presented to us." *Diamond Walnut Growers, Inc. v. NLRB*, 113 F.3d 1259, 1263 (D.C. Cir. 1997) (en banc). Or put another way, "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

We turn, then, to the "legal questions presented and argued" by Tah and McClain. They advance what the district court described as "several interlocking theories to support the allegation of actual malice." *Tah*, 413 F. Supp. 3d at 12. We agree with the district court that these theories fail to support a plausible claim that Global Witness acted with actual malice.

Tah and McClain first allege that Global Witness began their investigation with "a preconceived story line" that they argue "is plainly probative of actual malice." Appellants' Br. 19 (emphasis omitted). In

support, they point out that the letters in which Global Witness asked for comment state that the $35,000 payments were “most likely” bribes. Compl. ¶¶ 91–92.

Our court, however, has made clear that “preconceived notions” or “suspicion[s]” usually do “little to show actual malice.” *Jankovic III*, 822 F.3d at 597. After all, virtually any work of investigative journalism begins with some measure of suspicion. Thus, “concoct[ing] a pre-conceived storyline” by itself is “not antithetical to the truthful presentation of facts.” *Id.* at 597 (internal quotation marks omitted). Moreover, because Global Witness sent the letters toward the end of its investigative process and just a few weeks before publication, the letters provide no support at all for the notion that Global Witness’s conclusion was preconceived. As the district court correctly observed, “[t]hat Global Witness had arrived at its conclusion, right or wrong, by the time it reached out for comment and shortly before publication is commonplace and no surprise.” *Tah*, 413 F. Supp. 3d at 13. Finally, seeking comment in advance of publication is a standard journalistic practice. *See, e.g.*, *Responses*, Associated Press, http://www.ap.org/about/news-values-and-principles/telling-the-story/responses (“We must make significant efforts to reach anyone who may be portrayed in a negative way in our stories, and we must give them a reasonable amount of time to get back to us before we move the story.”). Drawing a pernicious inference from adherence to such professional standards would turn First Amendment case law on its head. In any event, even an “extreme departure from professional standards” is insufficient to prove actual malice on its own. *Harte-Hanks*, 491 U.S. at 665.

Next, Tah and McClain seek to draw an inference of actual malice from Global Witness's failure to credit their denials. This too finds no support in our First Amendment case law. A publisher "need not accept 'denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.'" *Lohrenz v. Donnelly*, 350 F.3d 1272, 1285 (D.C. Cir. 2003) (quoting *Harte-Hanks*, 491 U.S. at 691 n.37). Although consistent with each other, the denials contain no "evidence that could be readily verified" of the sort that would provide "obvious reasons to doubt the veracity of [Global Witness's] publication." *Id.* (internal quotation marks omitted). As the district court pointed out, the denials "fail" even to "contest the facts that are [stated] in the Report." *Tah*, 413 F. Supp. 3d at 13.

According to the dissent, our description of the law is "obviously fallacious," Dissenting Op. at 10, an odd accusation given that we have done nothing more than quote from our court's decision in *Lohrenz*. Undaunted, the dissent attempts to distinguish *Lohrenz* on the ground that Global Witness "had 'no evidence'—and no witnesses—to contradict the six denials." *Id.* at 11 (quoting Report at 31). But that quotation comes from the same sentence in *Catch me if you can* that the dissent relies on for the proposition—irrelevant to the arguments made by Tah and McClain, *see supra* at 13—that Global Witness had no evidence that *Exxon* had paid bribes.

Contrary to the dissent, moreover, nothing in the six denials comes close to the kind of "readily verifi[able]" evidence, *Lohrenz* 350 F.3d at 1285, needed to support a plausible—and we emphasize the

word plausible—case that Global Witness published with a "high degree of awareness of probable falsity," *Harte-Hanks*, 491 U.S. at 688 (alteration omitted) (internal quotation marks omitted). *See* Dissenting Op. at 12. To be sure, as the dissent points out, the denials state that more than 140 others, such as NOCAL drivers and janitors, also received bonuses. But as the report explains, "the vast majority of these payments were smaller . . . by two orders of magnitude" and "were not made to people who signed the Exxon deal." Report at 32. Indeed, the denials themselves characterized the payments the HTC received as rewards for those "who performed exceptionally in conducting the negotiations on the Exxon Contract," a rationale obviously inapplicable to payments to other company employees. Compl. ¶ 93 (quoting Tah's denial); *see also id.* ¶ 94 (quoting McClain's denial, which stated "[a]ny bonus given by our superiors was in acknowledgement of the Team's extraordinary work after the completion of the landmark Contract"). It is also true that the denials explain, as does the report, that the pot of money used to make the payments was "negotiated" as part of the larger Exxon deal, Dissenting Op. at 12; Report at 32, but we fail to see how that contradicts the idea that the payments were bribes from NOCAL. The dissent refers to the NOCAL board resolution approving the payments, presumably because the denials claim that the payments were "authorized by NOCAL's Board of Directors." Compl. ¶ 93 (quoting Tah's denial). But according to the report, Global Witness "requested, but had not yet received" a copy of the board resolution, and the complaint alleges nothing to the contrary. Report at 31.

Tah and McClain next argue that Global Witness harbored ill-will and desired "to catch Exxon and [CEO Rex] Tillerson in scandal." Appellants' Br. 25. In support, they rely on the fact that the report is critical of Exxon and that Global Witness subsequently sent letters reiterating the report's conclusions to the Department of Justice and the Securities and Exchange Commission. Our court, however, has made clear that evidence of ill will "is insufficient by itself to support a finding of actual malice." *Tavoulareas v. Piro*, 817 F.2d 762, 795 (D.C. Cir. 1987) (en banc); *see also Harte-Hanks*, 491 U.S. at 665 ("Petitioner is plainly correct in recognizing ... that a newspaper's motive in publishing a story ... cannot provide a sufficient basis for finding actual malice."). Regardless, neither the report's critical nature nor the letters sent to the Attorney General and the SEC plausibly supports an ill-will theory. As the district court aptly put it, the report's "conclusion is not evidence of its conception." *Tah*, 413 F. Supp. 3d at 13.

The implications of Tah and McClain's theory are breathtaking: they would find support for an inference of actual malice in a wide swath of investigative journalism that turns out to be critical of its subject. "It would be sadly ironic for judges in our adversarial system to conclude ... that the mere taking of an adversarial stance is antithetical to the truthful presentation of facts." *Tavoulareas*, 817 F.2d at 795.

Finally, Tah and McClain argue that "the stunning failure of Global Witness to include ... Seward Cooper, as among the [HTC] members who received a $35,000 bonus" reveals actual malice because Cooper, along with Tah, determined that the payments were

legal. Appellants' Br. 34. We do not see how this omission shows awareness of falsity or reckless disregard for the truth. If anything, that one of the lawyers responsible for conducting a legal analysis of the payments was himself in line to receive one makes the payments even more suspicious.

For all these reasons, Tah and McClain have failed to plausibly allege that Global Witness acted with actual malice. This deficiency proves fatal not only to their defamation claims but to their false light claims as well. *See Farah v. Esquire Magazine*, 736 F.3d 528, 540 (D.C. Cir. 2013) (explaining that a "plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim" and that "[t]he First Amendment considerations that apply to defamation therefore apply also to [plaintiffs'] counts for false light" (internal quotation marks omitted)).

IV.

We affirm the district court's dismissal of the complaint, as well as its denial of the anti-SLAPP motion.

So ordered.

SILBERMAN, *Senior Circuit Judge*, dissenting in part: Global Witness (Appellee) falsely insinuated that former Liberian officials (Appellants) took bribes from Exxon. It admitted that it had *no evidence* that Exxon had contacted Appellants, directly or indirectly, with respect to the alleged payments. And the evidence Global Witness did have suggested the payments at issue were proper staff bonuses, not bribes. Nevertheless, the Majority creates a whole new theory of the case—one not advanced by any Party—that the Appellants were bribed not by Exxon, but by their *own* principal, the National Oil Company. According to the Majority, its new narrative is so unassailable that, even at the 12(b)(6) stage, it precludes an inference that Global Witness harbored subjective doubts as to the implied accusation of bribery.

I

As Global Witness explained, "this is a story of bribery." J.A. 58. Bribery, as it is commonly understood, involves a *quid pro quo*. *See McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016); *accord* J.A. 82 ("[A] payment given so a public servant will undertake an official act."). As such, bribery has three necessary components: A briber, a bribee, and an exchange. In Global Witness's story, it seems obvious that Exxon was the briber, Appellants were the bribees, and the trade was $35,000 to ensure the deal goes through. Without one element, there is obviously no bribery. In other words, if no briber—or no bribe—then no bribee.

In its cross-appeal, Global Witness contends that its Report was not even defamatory—it simply raised

questions. Of course, Appellants disagree, claiming that the Report, *Catch me if you can*, falsely insinuated that they took bribes from Exxon to approve the Block 13 deal.

The district court easily determined that Global Witness's story contained the defamatory implication that Appellants took bribes from Exxon. *Tah v. Glob. Witness Publ'g, Inc.*, 413 F. Supp. 3d 1, 10 (D.D.C. 2019) ("[T]he import of the Report [is] that there was bribery—either by [the National Oil Company], Exxon, or both—in connection with the post-negotiation payments to Liberia's chief representatives."); *id.* at 9 (Global Witness's Report "literally [drew] a line between Exxon's money, the bonuses, and the sale of the license for Block 13"); *accord* Appellant Br. 15 ("The story was that Exxon . . . brazenly engineered a Liberian oil purchase through bribery."). According to Global Witness, Exxon's payment to the National Oil Company and the subsequent bonuses were "unusual" and "suspicious." J.A. 82, 83, 85. Exxon, as Global Witness saw it, "was under no obligation to pay most of the money" it transferred to the National Oil Company; "$4 million of its $5 million payment was characterized as a '*bonus*.'" J.A. 84 (emphasis in original). And, as Global Witness reminds its readers, the National Oil Company has a record of bribing officials on behalf of oil companies. The "bonuses" then paid to the officials were, Global Witness wrote, "unusual, large payments to officials who signed the Exxon deal." J.A. 85. Global Witness further noted that these individual "bonuses" were likely derived from the same bank account into which Exxon paid the initial $4 million "bonus" to the National Oil Company.

The court explained how Global Witness "tied ExxonMobil's payments [to the National Oil Company] for the acquisition of rights in Block 13 with how [the Company] shared some of that money with its negotiators, including Plaintiffs." *Tah*, 413 F. Supp. 3d at 9. One chart in the Report tracked payments from Exxon to the National Oil Company to members of the Hydrocarbon Technical Committee, including Appellants Christiana Tah and Randolph McClain. The district court noted that this chart, listing the amount of each official's bonus, "had the effect of literally drawing a line between Exxon's money, the bonuses, and the sale of the license for Block 13." *Id.*

The Report also connected Exxon to the bribes by making repeated parallels to the 2003 transaction. In that deal, Global Witness asserted that the National Oil Company paid bribes to legislators on behalf of the Broadway Consolidated oil company to secure ratification of its purchase. J.A. 68; *see also* J.A. 84 (noting that the National Oil Company had also paid bribes on behalf of Oranto Petroleum). And now, Exxon was stepping into Broadway's shows. As the district court explained, "a reasonable reader easily could have understood the Report to imply that the [earlier legislative] bribes and the 2013 [Technical Committee] bonuses were of a piece." *Tah*, 413 F. Supp. 3d at 9. And, the district judge noted, "[i]f that were not the case, the Report would have *no reason* to advocate for an investigation" (since there is no direct evidence of bribery). *Id.* at 10 (emphasis added).

The court also rejected the Appellee's argument that its story actually negated any inference of

bribery because it expressly stated that "Global Witness has no evidence that Exxon directed [the National Oil Company] to pay Liberian officials, nor that Exxon knew such payments were occurring." *Id.* (quoting J.A. 83). After the Report repeatedly insinuated bribery, this disclaimer "did not negate the inference that ExxonMobil's money was, in part, paid as bribes to [Company] representatives who signed the lease agreement." *Id*. This statement merely "admit[ed] that the Global Witness suspicions and calls for investigations of ExxonMobil and [the National Oil Company] lacked *any* evidence that the former had involvement in monies paid to employees of the latter." *Id*. (emphasis in original).

II

My disagreement with the district court is limited to the actual malice question (my disagreement with the Majority is much broader). In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court set forth the well-known rule that, to hold a defendant liable for defaming a public figure, a plaintiff must prove the defendant acted with "actual malice." *Id.* at 279–80. That is, with knowledge that the statement was false or with reckless disregard for the truth. *Id.* at 280. As the Supreme Court saw it, this scienter requirement appropriately balanced (as a policy matter) the vindication of reputational harms with the need to protect unintentional falsehoods that inevitably arise as part of vibrant debate. *Id.* at 271–72. The actual-malice rule makes the speaker's state of mind the constitutional gravamen in any defamation case brought by a public figure.

The Majority emphasizes that actual malice is a subjective test. Majority Op. 12 (citing *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 589 (D.C. Cir. 2016)). But it is important not to confuse what a plaintiff must ultimately show with the kind of evidence he may use to make that showing. It is the rare case in which a defendant will confess his state of mind and thus allow the plaintiff to prove actual malice with direct evidence. Accordingly, as the Appellee concedes, actual malice "is ordinarily inferred from objective facts." *Washington Post Co. v. Keogh*, 365 F.2d 965, 967 (D.C. Cir. 1966); *accord* Appellee Br. 50.

In *St. Amant v. Thompson*, the Supreme Court listed three examples of objective circumstances that permit a subjective inference of actual malice: (1) "where a story is fabricated by the defendant . . . or is based wholly on an unverified anonymous telephone call;" (2) "when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation;" and (3) "where there are obvious reasons to doubt" the basis for the story. 390 U.S. 727, 732 (1968); *see also Tavoulareas v. Piro*, 817 F.2d 762, 790 (D.C. Cir. 1987) (en banc). So even in the absence of contradictory evidence, a story may be so facially implausible or factually flimsy that the jury may infer that it must have been published with reckless disregard for the truth. *See Hunt v. Liberty Lobby*, 720 F.2d 631, 646 (11th Cir. 1983). And even assuming a plausible story, the question remains whether "the cumulative force of the evidence to the contrary" should give the publisher obvious reasons for doubt. *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1514 (D.C. Cir. 1996); *see Jankovic*, 822 F.3d at 597. If the

publisher moves forward without reasonably dispelling his doubts, actual malice may be inferred. *Lohrenz v. Donnelly*, 350 F.3d 1272, 1284 (D.C. Cir. 2003).

St. Amant's examples thus suggest a straight-forward framework for evaluating contentions of actual malice. We first assess the inherent plausibility of a defendant's story as well as the facts in support. And if we find the story objectively plausible, we then ask whether evidence to the contrary creates obvious reasons for doubt.

* * *

I turn to whether Global Witness's accusation that Exxon bribed the Appellants—the case before us—is facially plausible. Appellants claim that Global Witness knew it lacked any support for insinuating that the payments to Tah and McClain were bribes. Thus, a jury could infer that Global Witness subjectively doubted the truth of its Report.

I agree. In my view, because Global Witness's story is obviously missing (at least) one necessary component of bribery, it is inherently improbable. Although it accused Appellants of taking bribes from Exxon, Global Witness admits that it had "*no evidence* that Exxon directed the [National Oil Company] to pay Liberian officials, nor that Exxon knew such payments were occurring." J.A. 83 (emphasis added). In other words, despite all its investigating, Global Witness uncovered *nothing* to demonstrate that Exxon was the briber and *nothing* to even suggest there was an agreed upon exchange. *Accord Tah*, 413 F. Supp. 3d at 10 ("Global Witness's suspicions and calls for investigations of ExxonMobil and [the National Oil Company] lacked *any* evidence

that the former had involvement in monies paid to employees of the latter.") (emphasis in original). And with no privity between Exxon and the Technical Committee members, it is bizarre to accuse Appellants of taking a bribe. As *St. Amant* teaches, it is sufficient to infer—on this basis alone—that Appellee acted with knowing disregard for the veracity of its publication.

The Majority's assertion that this argument was never made by the Appellants leads me to wonder whether we received the same briefs. In my copy, Appellants argue that "Global Witness subjectively *knew* that it had not been able to determine whether the payments of $35,000 to Christiana Tah and Randolph McClain were corrupt bribery payments. Yet . . . Global Witness proceeded to present to readers the defamatory message that in fact [] Tah and [] McClain had taken bribes." Appellant Br. 36 (emphasis in original). That sounds to me a whole lot like accusing Global Witness of publishing its story with no evidence to back it up. The Majority, moreover, faults me for assessing the inherent (im)plausibility of Global Witness's story, without a specific request from Tah and McClain to do so. But (as discussed) "inherently implausible" is a *legal standard* by which we assess Appellants' *arguments*—not an argument to be advanced. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); *cf. Eldred v. Ashcroft*, 255 F.3d 849, 853 (D.C. Cir. 2001) (Sentelle, J., dissenting) ("Merely because the parties fail to advance the proper legal theory underlying their claim does not—indeed cannot—prevent a court from arriving at the proper legal disposition.").

To be sure, Appellants did not quote the "no evidence" paragraph in their brief; it was "the Court" at oral argument that focused on this damning language. But it is hardly a new argument; it is only evidence—although powerful evidence—supporting Appellants' argument. Apparently, the Majority also recognizes the significance of the passage and wishes to rule it out of order. But the Appellee itself injected this statement into the controversy when it brandished it as supposedly exculpatory evidence. Appellee Br. 19, 35.

Global Witness points to other facts that support its story, but none amount to a hill of beans. It emphasizes the obvious point: Payments were made to Appellants. Then it notes these payments were "likely" sent from the same account where Exxon deposited its $4 million "bonus" to the National Oil Company itself. Although a sly suggestion of wrongdoing, when you think about it, it's a non sequitur. If that were support for a bribe, any investment banker's commission could be illegal.

Next, Global Witness justifies its story based on a past "history" of bribery by the National Oil Company. The Company had previously, in connection with the 2003 bid, paid out bribes to legislators on behalf of another oil company in order to ratify a transaction. Our situation is quite different; in this case, the recipients of the "bribes" were the National Oil Company's own agents and employees. And connecting bribery to the 2013 circumstances from the wholly separate 2003 bid—in which Tah and McClain were not even involved—is a grossly unfair inference. Global Witness attempts to tar the conduct of two parties to a transaction with

the prior bad acts of entirely different people. That is entirely illegitimate.

It is significant, moreover, that the National Oil Company paid out bonuses to *all* those involved in the negotiations—including American consultants—as well as low-ranking employees. Yet the story focuses on members of the Technical Committee as if they were special transgressors. But for Global Witness's story to be true, Exxon was somehow spreading bribes left and right like Johnny Appleseed. The much more obvious explanation is that the "bonuses" were in fact bonuses paid for outstanding performance. Certainly at the 12(b)(6) stage, Appellants are entitled to that inference (Global Witness is not entitled to its speculative inference to the contrary). *See Palin v. New York Times Co.*, 940 F.3d 804, 815 (2d Cir. 2019).

The timing and manner of the payments are further indications of bonuses, not bribes. Recall that in connection with Broadway's 2003 bid for Block 13, Global Witness explained that the National Oil Company supposedly paid most of Broadway's bribes to legislators *before* approval of the deal. In contrast, the 2013 payments from the National Oil Company to its own negotiators, staff, and consultants occurred *after* the deal was completed. J.A. 67. The latter payments—as Global Witness knew—were only initiated after the approval of a board resolution authorizing up to $500,000 in bonuses. And, as Global Witness also acknowledges, the board had the full legal authority to take this action. These payments, openly made, are also indicia of proper bonuses; bribes, which are illegal everywhere, are typically made in the dark. *See DiBella v. Hopkins*, 403 F.3d 102, 117 (2d Cir. 2005) (defendant knew

that payments to plaintiff were not surreptitious, which supported the jury's conclusion that the defendant made a bribery accusation with actual malice).

For all these reasons, I consider Global Witness's Report inherently improbable. On its face, it's a house of cards: With "no evidence" supporting Exxon as a briber, Tah and McClain could not be Exxon's bribees. Nor is there any evidence—not a shred—that the bonuses paid by the National Oil Company to Appellants were themselves bribes. There is no indication that the National Oil Company had a corrupt motive, nor that Appellants were asked to perform an illegal or improper task. I would therefore conclude, based on the foregoing alone, that it is sufficient to infer actual malice at the 12(b)(6) stage since the story is *inherently* improbable.

* * *

There is more: Global Witness had additional, "obvious reasons" to doubt its Report, which would also support an inference of actual malice. *St. Amant*, 390 U.S. at 732 (example three). *All* the eyewitnesses to the transaction that responded to Global Witness explained precisely *why it was wrong*. And Global Witness had no facts that would cause it to discount these explanations.

Six individuals—four members of the Technical Committee and two consultants—responded to Global Witness's accusations of bribery. Each denied that bribery occurred. At least four offered specific, fact-based explanations as to why Global Witness was wrong. Christiana Tah (a Yale Law School graduate)[1] explained that bonus payments were

[1] That surely is not inculpatory.

made to *all* National Oil Company staff *after* the Exxon deal was concluded. Robert Sirleaf, a Technical Committee member and chair of the Company's Board of Directors, similarly explained that bonuses were paid to the entire company after the Parties concluded the contract and exchanged consideration. And, he added, a bonus was called for: Liberia received a signing payment fifteen times larger than in any prior transaction. Natty Davis, another Committee member and the Chair of the National Investment Commission, added that the decision to pay the bonuses was approved by a formal resolution of the Company's board. Randolph McClain noted that the Exxon contract was "extraordinary enough to be used as a model for all future contracts of this nature." J.A. 44.

Two American consultants—not mentioned by the Majority and not targeted by Global Witness's story—also told Global Witness that its Report was false. Each received $15,000 bonuses. One consultant, Jeff Wood, explained that Exxon's payment to the National Oil Company was not "voluntary" as Global Witness reported—it was negotiated as part of the transaction. J.A. 45. Moreover, Wood noted, it made no sense to equate legislative bribes paid following Broadway's 2003 bid to the National Oil Company's 2013 payments to its own staff. Wood again explained that all the employees of the National Oil Company received payments, not just those that signed the deal. Last, Wood wrote that it was absurd to infer bribery because no similar bonuses had been paid in recent years. Since no other deals had been concluded, there was no success to reward.

The Majority, however, asserts that a publisher "need not accept denials, however vehement" as a matter of law. Majority Op. 15 (quoting *Lohrenz*, 350 F.3d at 1285); *see also* Appellee Br. 54 ("[D]enials do not and cannot constitute 'evidence' as a matter of law."). This proposition is obviously fallacious.[2] It of course depends on the substance and context of the denial. If denials were legally irrelevant, then any response of the target could be ignored.[3] Indeed, the Supreme Court—even while professing in dicta that the mere *existence* of a denial need not be considered—has evaluated the *contents* of denials to determine whether a publisher acted with actual malice. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 691–92 (1989). And it has noted that certain key denials should reasonably be expected to kill stories. *Id.* at 682.

To be sure, we discounted the probative value of the denials in *Lohrenz v. Donnelly*. 350 F.3d 1272.

[2] The Majority protests that it has "done nothing more than quote" from *Lohrenz*. Majority Op. 15–16. But those quotations (strung together out of order) do not give an accurate impression of our holding in that case. In *Lohrenz*, we held at the summary judgment stage that "[u]nlike evidence that could be readily verified, *the Navy's denials* did not give [the defendant] 'obvious reasons' to doubt the veracity of her publication." 350 F.3d at 1285 (emphasis added and internal citations omitted). This was because, as we explained, those denials were mere assertions contradicted by other evidence. *Id.*

[3] Suppose a reporter plans to accuse X of robbery in New York City on December 1st. But X denies the allegation, explaining that he was in Los Angeles on that date. Obviously, this denial would need to be considered and verified by a responsible reporter.

Lohrenz involved a publication that questioned the competence of a female fighter pilot. According to the story, the pilot was substandard, should not be flying, and was only assigned to the F-14 program on account of a "politically driven policy." *Id*. at 1284. The publisher's source was one of the pilot's former training officers, who we characterized as "a knowledgeable, non-anonymous source." *Id*. Furthermore, the publisher had obtained additional information from the Navy that confirmed the training officer's claims—namely, that the pilot had received a number of accommodations during training, which other officers agreed were "excessive." J.A. 1285. Nevertheless, the Navy denied the story, and officials told the publisher that its conclusions were inaccurate.

But as we explained, the fact of a denial, *in itself*, "hardly alert[s] the conscientious reporter to the likelihood of error." *Lohrenz*, 350 F.3d at 1285 (quoting *Harte-Hanks*, 491 U.S. at 691 n.37). Rather, the specific content of a denial may well give the publisher obvious reasons to doubt the veracity of the publication. *See id.*; *Montgomery v. Risen*, 197 F. Supp. 3d 219, 263 (D.D.C. 2016), *aff'd,* 875 F.3d 709 (D.C. Cir. 2017). So in *Lohrenz*, we reasoned that the Navy's denials were contradicted by the publisher's interview with the flight instructor. 350 F.3d at 1285. In light of the evidence on both sides of the question, the *Lohrenz* publisher did not have any obvious reason to doubt its story.

Global Witness, however, did not have evidence on both sides of the issue. It had "no evidence"—and no witnesses—to contradict the six denials. The cumulative balance of the evidence thus gives Global

Witness obvious reasons for doubt. *See McFarlane*, 91 F.3d at 1514.

I am dumbfounded by the Majority's assertion that the denials in our case contain "no readily verifiable information . . . that would provide 'obvious reasons to doubt.'" Majority Op. 15. The denials were specific, and it was within Global Witness's power to easily inquire into whether other employees received bonuses, the content of the Board's resolution approving the bonuses, and whether the $4 million to the National Oil Company was negotiated as part of the purchase price (etc.).

The Majority discounts these facts by weighing the evidence and drawing inferences against Tah and McClain. *See* Majority Op. 17 ("[T]he dissent refers to the NOCAL board resolution approving the payments . . . . *But* . . . Global Witness 'requested, but had not yet received' a copy . . . *and* the complaint alleged nothing to the contrary.") (emphases added); *id.* at 16 (discounting the fact that bonuses were paid to all employees because the largest bonuses were paid to the Technical Committee). Such weighing of the evidence is, of course, impermissible at the 12(b)(6) stage. As the Second Circuit recently reiterated in another defamation case, "[I]t is not the [] court's province to dismiss a plausible complaint because it is not as plausible as the defendant's theory." *Palin*, 940 F.3d at 815.

* * *

In sum, the dramatic indication of actual malice is the statement in Global Witness's story to which we have previously referred. J.A. 83 (Global Witness had "*no evidence* that Exxon directed the [National Oil

Company] to pay Liberian officials, nor that Exxon knew such payments were occurring.").[4] As we noted, Global Witness raised this point itself in a futile effort to rebut defamation. But Global Witness is hoist on its own petard. As I have explained, rarely does he who defames another actually admit doubts as to the truth of the accusation. This statement comes as close as it gets to such a concession. In light of that admission, Global Witness's story is not just implausible, it's ridiculous.

Circumventing the devastating impact of this statement, the Majority creates a new narrative: The Global Witness Report accused *only* the National Oil Company—*not* Exxon— of paying bribes. With all due respect, the Majority is employing judicial jiu-jitsu. At no time did the Appellee even hint—in its briefs or oral argument—that was its defense. The Appellee argues the district court erred in finding the Report defamatory for only three reasons: because (1) it calls for investigations, Appellee Br. 31–34; (2) it includes a disclaimer that Global Witness had not determined the payments were improper, Appellee Br. 34–35; and (3) the Report never uses the word "bribe" to describe the payments, Appellee Br. 35–36. The Majority's judicial refashioning of the defamatory

[4] Perhaps the lack of evidence explains why the district court was confused as to whether the bribes came from Exxon—which is the obvious import of the story—or the National Oil Company— which makes no sense. *See Tah*, 413 F. Supp. 3d at 10 ("[T]he import of the Report [was] that there was bribery—either by [the National Oil Company], Exxon, or both—in connection with the post-negotiation payments to Liberia's chief representatives."). Of course, "both" implies that even though the National Oil Company may have paid out the bribes, it did so on Exxon's behalf.

implication is entirely illegitimate. *See Diamond Walnut Growers, Inc. v. NLRB*, 113 F.3d 1259, 1263 (D.C. Cir. 1997) (en banc).

The Majority cloaks its improper fashioning of a wholly new argument by accusing me of doing the same. But if I'm misreading Global Witness's Report to imply that Exxon bribed Appellants, I'm in quite good company. After all, the district court endorsed my reading. *Tah*, 413 F. Supp. 3d at 10. So did the Appellant. Appellant Br. 15, 23–24. And the Liberian government. *See* J.A. 42. Even the Appellee assumes that if the Report contains a defamatory implication, it would be that Exxon bribed Tah and McClain. Otherwise, the Appellee would not have argued its disclaimer, that "Global Witness has no evidence that Exxon directed [the National Oil Company] to pay Liberian officials," is somehow exculpatory. Appellee Br. 34–35. As the Majority recognizes, this statement is irrelevant if one assumes that the *National Oil Company* was the briber. In sum, the Majority's theory not only falls out of the clear blue sky, but it is also a *sub silento* overruling of the district judge. After all, Exxon looms over the whole story. It is impossible to visualize the article without Exxon playing the part of the evil genius, orchestrating the implied corruption. The Majority's theory is not just a new argument—it's a new case.

Perhaps the Majority's theory is not advanced by any Party because the theory makes even less sense than if Exxon were the briber. In the revisionist view, the National Oil Company bribed its own agents and employees to do their jobs. Tellingly, the Majority offers no motive for a bribe. After all, the Liberian government *ordered* the sale of the Block 13 license

for failure to make any progress in developing potential oil reserves. J.A. 69. So there is no reason to think that the Appellants had the authority to hold up the transaction. Nor is there a reason to believe the National Oil Company would have benefitted from the delay.

In any event, the Majority's narrative is procedurally inappropriate. At the 12(b)(6) stage, we accept all reasonable defamatory readings of the Report advanced by the plaintiff. *See Weyrich v. New Republic, Inc.*, 235 F.3d 617, 627 (D.C. Cir. 2001). As the district court ably explained, there can be no doubt that one defamatory implication of the Report is that Exxon bribed Appellants. That allegation—actually pressed by Tah and McClain—must be analyzed for actual malice.

* * *

The Majority's opinion creates a profoundly troubling precedent. By fashioning a different defamatory implication on its own, the Majority embraces a telling example of judicial "creativity." Still, its approach seems *sui generis*; I rather doubt we will ever see its like again. On the other hand, the Majority's misunderstanding of the doctrinal framework of *New York Times v. Sullivan*'s actual malice concept is profoundly erroneous. And that will distort our libel law. But perhaps most troublesome is the conflict it creates with the Second Circuit (not to mention the Supreme Court) concerning the role of a court when applying Rule 12(b)(6) in the libel context. "The test is whether the complaint is plausible, not whether it is less plausible than an alternative explanation." *Palin*, 940 F.3d at 815.

III

After observing my colleagues' efforts to stretch the actual malice rule like a rubber band, I am prompted to urge the overruling of *New York Times v. Sullivan.* Justice Thomas has already persuasively demonstrated that *New York Times* was a policy-driven decision masquerading as constitutional law. *See McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari). The holding has *no relation* to the text, history, or structure of the Constitution, and it baldly constitutionalized an area of law refined over centuries of common law adjudication. *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 380–88 (1974) (White, J., dissenting). As with the rest of the opinion, the actual malice requirement was simply cut from whole cloth. *New York Times* should be overruled on these grounds alone.

Nevertheless, I recognize how difficult it will be to persuade the Supreme Court to overrule such a "landmark" decision. After all, doing so would incur the wrath of press and media. *See* Martin Tolchin, *Press is Condemned by a Federal Judge for Court Coverage*, New York Times A13 (June 15, 1992) (discussing the "Greenhouse effect"). But new considerations have arisen over the last 50 years that make the *New York Times* decision (which I believe I have faithfully applied in my dissent) a threat to American Democracy. It must go.

Twenty-five years ago, I urged the overruling of a similarly illegitimate constitutional decision, *Monroe v. Pape*, 365 U.S. 167 (1961). Our court was confronted with the vexing question of whether qualified immunity shielded government officials accused of constitutional torts from discovery into

their motivations. *See Crawford-El v. Britton*, 93 F.3d 813, 815 (D.C. Cir. 1996) (en banc), *vacated*, 523 U.S. 574 (1998). In a concurring opinion, I suggested a solution to accommodate *Pape*: When a defendant offers a proper motive, we should allow an objective inquiry into only whether the proffered motive is pretextual. *Id.* at 834–35; *cf. Halperin v. Kissinger*, 807 F.2d 180, 188 (D.C. Cir. 1986). When *Crawford-El* reached the Supreme Court, four Justices agreed with my approach. 523 U.S. at 602 (Rehnquist, C.J., dissenting); *id.* at 612 (Scalia, J., dissenting).

But I went even further in my concurrence: I urged the Supreme Court to overrule *Pape* (and, while they're at it, *Bivens*[5] as well). 93 F.3d at 832. Justices Scalia and Thomas agreed with me. *Crawford-El*, 523 U.S. at 612 (Scalia, J. dissenting). Both *Pape* and *Bivens* are prime examples of rank policymaking by the High Court, not legitimate exercises of constitutional interpretation. *See also Hernandez v. Mesa*, 140 S. Ct. 735, 752 (2020) (Thomas, J., concurring) (continuing to call for the Court to abandon *Bivens*).

I recognized, however, that convincing the Court to overrule these precedents would be an uphill battle. As I wrote, the Court has committed itself to a constitutional Brezhnev doctrine.[6] That is, once the

[5] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[6] "When forces that are hostile to socialism try to turn the development of some socialist country towards capitalism, it becomes not only a problem of the country concerned, but a common problem and concern of all socialist countries." Leonid Brezhnev, *Remarks to the Fifth Congress of the Polish United Workers' Party* (Nov. 13, 1968). Thus, one a country has turned communist, it can never be allowed to go back.

Court has "constitutionalized" a new area of the law, it will never willingly retreat. The long-term consequence of this policy is obvious: An ever-expanding sphere of influence for the Judiciary at the expense of the policymaking branches.

In a short concurring opinion, Justice Kennedy lamented my criticism. He warned that "[w]e must guard against disdain for the judicial system," *i.e.*, the Supreme Court. *Crawford-El*, 523 U.S. at 601. In his view, criticism of the Court is tantamount to an attack on the Constitution. He cautioned, "if the Constitution is to endure, it must from age to age retain 'th[e] veneration which time bestows.'" *Id.* (quoting *The Federalist* No. 49, at 314 (Madison) (C. Rossiter ed., 1961)). Apparently, maintaining a veneer of infallibility is more important than correcting fundamental missteps.

To the charge of disdain, I plead guilty. I readily admit that I have little regard for holdings of the Court that dress up policymaking in constitutional garb. That is the real attack on the Constitution, in which—it should go without saying—the Framers chose to allocate political power to the political branches. The notion that the Court should somehow act in a policy role as a Council of Revision is illegitimate. *See* 1 *The Records of the Federal Convention of 1787*, at 138, 140 (Max Farrand ed., 1911). It will be recalled that maintaining the Brezhnev doctrine strained the resources and legitimacy of the Soviet Union until it could no longer be sustained.

Admittedly, the context of the *Times* opinion made the Court's decision attractive as a policy matter. The case centered on a full-page advertisement soliciting

donations for the civil rights movement and legal defense of Dr. Martin Luther King, Jr. 376 U.S. at 256–57. The advertisement claimed that civil rights proponents faced an "unprecedented wave of terror" from "Southern violators" denying constitutional guarantees to African Americans. *Id.* at 256. It described "truckloads of police armed with shotguns and tear-gas" that "ringed" a college campus in Montgomery, Alabama. *Id.* at 257. It further asserted that state authorities padlocked the dining hall "in an attempt to starve [the students] into submission." *Id.* Various claims in the ad were inaccurate, and *The Times* eventually published a retraction. *Id.* at 261.

Sullivan sued, alleging the advertisement's false statements libeled him because, as commissioner of public affairs, he supervised the police department. *Id.* at 256, 262. After just two hours and twenty minutes of deliberation, an Alabama jury awarded Sullivan $500,000 (the largest libel judgment in Alabama history), and the state Supreme Court affirmed. Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* 33, 45 (1991).

When the Supreme Court reversed, its decision was seen as a "triumph for civil rights and racial equality." *E.g.*, Geoffrey Stone, *New York Times Co. v. Sullivan*, in *The Oxford Companion to the Supreme Court of the United States* 586–87 (1992). The point of these suits had less to do with repairing reputations and more to do with deterring the northern press from covering civil rights abuses. Southern officials, as Anthony Lewis succinctly explains, had thus twisted "the traditional libel action . . . into a state political weapon to intimidate the press":

> The aim was to discourage not false but true accounts of libel under a system of white supremacy: stories about men being lynched for trying to vote, about cynical judges using the law to suppress constitutional rights, about police chiefs turning attack dogs on men and women who wanted to drink a Coke at a department-store lunch counter. It was to scare the national press—newspapers, magazines, the television networks—off the civil rights story.

Lewis, *Make no Law* at 35.

Indeed, the day after the Alabama court's verdict, the *Alabama Journal* (a Montgomery paper) celebrated the result. An editorial trumpeted that the case would cause the "reckless publishers of the North ... to make a re-survey of their habit of permitting anything detrimental to the South and its people to appear in their columns." *Id.* at 34. "The Times was summoned more than a thousand miles to Montgomery to answer for its offense. Other newspapers and magazines face the same prospect." *Id.* Even before the Supreme Court issued the *Times* decision, a second suit filed by a mayor—based on the same ad—had already resulted in another $500,000 verdict against *The Times*. *Id.* at 35. And three additional suits remained pending. *Id.* CBS had similarly been sued for $1.5 million over a televised program that depicted the difficulties of African Americans in registering to vote. *Id.* at 36. By 1964, southern officials had filed almost $300 million in libel suits against the northern press. *Id.*

One can understand, if not approve, the Supreme Court's policy-driven decision.[7] There can be no doubt that the *New York Times* case has increased the power of the media. Although the institutional press, it could be argued, needed that protection to cover the civil rights movement, that power is now abused. In light of today's very different challenges, I doubt the Court would invent the same rule.

As the case has subsequently been interpreted, it allows the press to cast false aspersions on public figures with near impunity.[8] It would be one thing if this were a two-sided phenomenon. *Cf. New York Times*, 376 U.S. at 305 (Goldberg, J., concurring) (reasoning that the press will publish the responses of public officials to reports or accusations). *But see* Suzanne Garment, *The Culture of Mistrust in American Politics* 74–75, 81–82 (1992) (noting that the press more often manufactures scandals involv-

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[7] It should be noted that precisely what should have been done is a matter of debate. See, e.g., Richard A. Epstein, *Was New York Times v. Sullivan Wrong*, 53 U. CHI. L. REV. 782, 791 (1986); see also Lewis Green, *The New York Times Rule: Judicial Overkill* 12 VILLANOVA L. REV. 725, 735 (1967).

[8] *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 769 (1985) (White, J., concurring):

> The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

ing political conservatives). The increased power of the press is so dangerous today because we are very close to one-party control of these institutions. Our court was once concerned about the institutional consolidation of the press leading to a "bland and homogenous" marketplace of ideas. *See Hale v. FCC*, 425 F.2d 556, 562 (D.C. Cir. 1970) (Tamm, J., concurring). It turns out that *ideological* consolidation of the press (helped along by economic consolidation) is the far greater threat.[9]

Although the bias against the Republican Party—not just controversial individuals—is rather shocking today, this is not new; it is a long-term, secular trend going back at least to the '70s.[10] (I do not mean to defend or criticize the behavior of any particular politician). Two of the three most influential papers (at least historically), *The New York Times* and *The Washington Post*, are virtually Democratic Party broadsheets. And the news section of *The Wall Street Journal* leans in the same direction. The orientation

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[9] We once explained why major American cities lost their second mainframe papers due to market forces. *See generally Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1288 (D.C. Cir.), *aff'd*, 493 U.S. 38 (1989). That second paper was sometimes right of center, e.g., *The New York Herald Tribune* and *The Washington Star*, leaving the residual paper in a local monopoly position. As large American cities became heavily Democratic Party bastions, so too did the local dominant paper. *See* Gentzkow and Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers*, 78 ECONOMETRICA 35 (Jan. 2010).

[10] Who can forget Candy Crowley's debate moderation? *See, e.g.*, Noah Rothman, *Candy Crowley's Debate Moderation Exemplifies Why Americans Do Not Trust Their Media*, Mediaite (Oct. 17, 2012); Dylan Byers, *Crowley fact-checks Mitt*, Politico (Oct. 17, 2012).

of these three papers is followed by *The Associated Press* and most large papers across the country (such as the *Los Angeles Times*, *Miami Herald*, and *Boston Globe*). Nearly all television—network and cable—is a Democratic Party trumpet. Even the government-supported National Public Radio follows along.

As has become apparent, Silicon Valley also has an enormous influence over the distribution of news. And it similarly filters news delivery in ways favorable to the Democratic Party. *See* Kaitlyn Tiffany, *Twitter Goofed It*, The Atlantic (2020) ("Within a few hours, Facebook announced that it would limit [a *New York Post*] story's spread on its platform while its third-party fact-checkers somehow investigated the information. Soon after, Twitter took an even more dramatic stance: Without immediate public explanation, it completely banned users from posting the link to the story.").[11]

It is well-accepted that viewpoint discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 387 (1992). But ideological homogeneity in the media—

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[11] Of course, I do not take a position on the legality of big tech's behavior. Some emphasize these companies are private and therefore not subject to the First Amendment. Yet—even if correct—it is not an adequate excuse for big tech's bias. The First Amendment is more than just a legal provision: It embodies the most important value of American Democracy. Repression of political speech by large institutions with market power therefore is—I say this advisedly—fundamentally un-American. As one who lived through the McCarthy era, it is hard to fathom how honorable men and women can support such actions. One would hope that someone, in any institution, would emulate Margaret Chase Smith.

or in the channels of information distribution—risks repressing certain ideas from the public consciousness just as surely as if access were restricted by the government.

To be sure, there are a few notable exceptions to Democratic Party ideological control: *Fox News*, *The New York Post*, and *The Wall Street Journal*'s editorial page.[12] It should be sobering for those concerned about news bias that these institutions are controlled by a single man and his son. Will a lone holdout remain in what is otherwise a frighteningly orthodox media culture? After all, there are serious efforts to muzzle *Fox News*. And although upstart (mainly online) conservative networks have emerged in recent years, their visibility has been decidedly curtailed by Social Media, either by direct bans or content-based censorship.

There can be little question that the overwhelming uniformity of news bias in the United States has an enormous political impact.[13] That was empirically and persuasively demonstrated in Tim Groseclose's insightful book, *Left Turn: How Liberal Media Bias Distorts the American Mind* (2011). Professor Groseclose showed that media bias is significantly to the left. *Id.* at 192–197; *see also id.* at 169–77. And this distorted market has the effect, according to Groseclose, of aiding Democratic Party candidates by 8–10% in the typical election. *Id.* at *ix*, 201–33. And now, a decade after this book's publication, the press

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[12] Admittedly, a number of Fox's commentators lean as far to the right as the commentators and reporters of the mainstream outlets lean to the left.

[13] The reasons for press bias are too complicated to address here. But they surely relate to bias at academic institutions.

and media do not even pretend to be neutral news services.

It should be borne in mind that the first step taken by any potential authoritarian or dictatorial regime is to gain control of communications, particularly the delivery of news. It is fair to conclude, therefore, that one-party control of the press and media is a threat to a viable democracy. It may even give rise to countervailing extremism. The First Amendment guarantees a free press to foster a vibrant trade in ideas. But a biased press can distort the marketplace. And when the media has proven its willingness—if not eagerness—to so distort, it is a profound mistake to stand by unjustified legal rules that serve only to enhance the press' power.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 18-2109 (RMC)

CHRISTIANA TAH, *et al.*,
Plaintiffs,

—v.—

GLOBAL WITNESS PUBLISHING, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

In 2013, a high-level team of officials of the Government of Liberia helped negotiate the successful sale of off-shore oil drilling rights to the ExxonMobil Corporation. The Liberian government then awarded bonuses of $35,000 from the proceeds to senior members of the negotiating team, including former Liberian Minister of Justice and Attorney General Christiana Tah and former Chief Executive Officer of the National Oil Company of Liberia Randolph McClain. Corruption-watchdog Global Witness of London and its U.S. arm, Global Witness Publishing, Inc., issued a report that is alleged to imply that Minister Tah and Mr. McClain had

effectively received bribes to facilitate the sale. Minister Tah and Mr. McClain sue the two Global Witness entities for defamation. Although the Court agrees that the report implies bribery, and takes as true that bribery did not occur, the contents of the report are protected speech under the First Amendment and cannot sustain a defamation claim. Accordingly, the Court will dismiss the Complaint.

I. BACKGROUND

A. The Block 13 Negotiations

"Block 13" is rectangular plot of territory in the ocean waters off the coast of Liberia. In the belief that Block 13 held valuable oil reserves, the National Oil Company of Liberia (NOCAL), the Liberian government-owned corporation responsible for awarding oil licenses, agreed in 2007 to license the development of Block 13 to Broadway Consolidated PLC (Broadway Consolidated), for which Liberia would receive a share of the oil production. Broadway Consolidated failed to make headway in the work over the next three years, however, so in 2010 Liberia sought another buyer to take over the license on terms more favorable to the country. ExxonMobil expressed interest.

Negotiations between ExxonMobil and Liberia were conducted on Liberia's behalf by the Hydrocarbon Technical Committee (HTC or Committee), a governmental body which was created by statute "to superintend the negotiations between entities such as Exxon and the government of Liberia, through its state-owned oil company NOCAL." Compl. [Dkt. 1] ¶ 24. At the time of the negotiations, the HTC had six

members, including Presidential Legal Advisor Seward M. Cooper and the Plaintiffs, Minister Tah and Mr. McClain. Mr. McClain served as its Chair.

Exxon was unwilling to acquire drilling rights in Block 13 directly from Broadway Consolidated, in part due to rumors of corruption surrounding the original license. However, in 2013 Exxon agreed to an arrangement whereby a third party, Canadian Overseas Petroleum Limited (COPL), purchased the license from Broadway Consolidated and Exxon purchased it from COPL, with an additional payment directly to Liberia. In this manner, Exxon paid $120 million for Block 13 with approximately $50 million going to Liberia itself. Plaintiffs allege that "the Liberian government saw the Exxon deal as an historic victory for the Liberian people, in which the government of Liberia would for the first time receive a substantial payment for the sale of extraction rights." *Id.* ¶ 22.

After the negotiations with Exxon were finalized, Liberian President Ellen Johnson Sirleaf instructed, unsolicited, NOCAL to pay bonuses to the government employees who had participated. *Id.* ¶ 25. Mr. McClain asked Mr. Cooper and Minister Tah, who are both lawyers, if such payments were lawful. Both agreed that they were. Thereafter, the Board of Directors of NOCAL adopted a resolution directing payment of $500,000 in bonuses, made from the proceeds of the negotiations, to HTC and NOCAL officials and staff. Payments were made to over 140 employees, including office staff, custodial workers, and drivers. However, the largest bonuses, $35,000 each, went to the six members of the HTC.

B. The Global Witness Report

Global Witness is a non-profit, non-governmental organization based in London which conducts operations in the United States through its offices in Washington, D.C., known as Global Witness Publishing, Inc. Global Witness specializes in "global witness investigation" and its mission centers on "exposing economic networks behind conflict, corruption, and environmental destruction." *Id.* ¶ 4-5.

In March 2018, Global Witness published an investigative report titled "Catch me if you can: Exxon's complicity in Liberian oil sector corruption and how its Washington Lobbyists fight to keep oil deals secret." Compl., Ex. A, Global Witness, Catch me if you can (2018) (Report) [Dkt. 1-1]. The Report, which remains available online, was 35 pages long and included 125 footnotes documenting the 2013 sale of a license to Exxon to develop Block 13, as well as the history of Block 13 more generally. The Report used the sale of Block 13 as a case study to discuss the value of Section 1504 of the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), a law of the United States. Section 1504 requires oil, gas, and mining companies to disclose payments made to foreign governments—the types of disclosures which Global Witness says make the investigation of the Block 13 sale possible and which companies like Exxon oppose. *See* Report at 11.

The Report presented a less-than-innocent version of the history and licensing of Block 13. According to Global Witness, Block 13 was "born in the shadows," *id.*, and the Report suggested that the "untested" Broadway Consolidated was awarded the initial Block 13 license "because the company was likely

part-owned by government officials with the power to influence the award of oil licenses." *Id.* at 12. Global Witness believed this partial ownership by Liberian government officials continued through the sale of Block 13 to COPL. The Report further asserted that the licensing of Block 13 to Broadway Consolidated was ratified by the Liberian legislature only after NOCAL spent $118,400 in lobbying fees in 2006 and 2007, which Liberia's General Auditing Commission later determined were actually bribes for favorable votes. *Id.* at 16.

According to the Report, when Exxon became interested in acquiring the license to develop Block 13, Exxon chose to structure the acquisition through COPL as an intermediary because it had "concern over issues regarding US anti-corruption laws" and believed that "Liberian shareholders/beneficial owners of [Broadway Consolidated] may have been government officials at the time of the allocation." *Id.* at 20. The Report opined that "Exxon proposed to use COPL as a go-between that would, Exxon appears to have thought, shield it from any US legal risks posed by Block 13." *Id.* The Report described the complex movement of funds and property interests constituting Exxon's purchase of development rights in Block 13. It also stated that COPL's relationship with Broadway Consolidated may not have been fully at arm's-length and called for an investigation of Exxon by authorities in the United States, Canada, the United Kingdom, and Liberia to determine whether Exxon had violated any anti-corruption laws. *Id.* at 27-28.

In addressing the Liberian government's role in the 2013 license transfers, the Report stated that NOCAL made "unusual, large payments" to Liberian

government officials "in connection with the 2013 award of Block 13" and emphasized those payments made to members of the HTC, connecting the relative size of the payments, the definition of bribery in Liberian law, and NOCAL's history of bribery payments in 2006 and 2007. *Id.* at 30. The Report also included a chart prepared by Global Witness that identified the roles six HTC and NOCAL officers played in the negotiations with Exxon and naming each of them.

Global Witness sought pre-publication comments from the HTC and NOCAL officials; excerpts of those comments, which denied that the bonuses were bribes, were included in the Report. The Report acknowledged that "Global Witness has no evidence that Exxon directed NOCAL to pay Liberian officials, nor that Exxon knew such payments were occurring," *id.* at 31, and conceded that over 140 staff members received such bonuses, but concluded:

> The vast majority of these payments were smaller than those made to HTC members by two orders of magnitude. Also, unlike payments to the HTC members, these staff payments were not made to people who signed the Exxon deal.

Id. at 32. Among a host of recommendations, the Report called for Liberian authorities to investigate "whether NOCAL violated Liberian law when it distributed payments in 2013 to officials who signed the Block 13 license," and for the Liberian government to "review its policies on bonuses paid to staff." *Id.* at 35.

C. Report Aftermath

Shortly thereafter, several news organizations, including Newsweek and Front Page Africa, published summaries of the Report with headlines such as "Rex Tillerson's Exxon Mobil Involved in Corrupt Oil Deals in Liberia, Investigation Reveals." Compl. ¶ 72 (quoting Christina Maza, *Rex Tillerson's Exxon Mobil Involved in Corrupt Oil Deals in Liberia, Investigation Reveals*, Newsweek, Mar. 29, 2018, *available at* http://bit.ly/2kCN5IU). As a result of the Report, the new President of Liberia, George Manneh Weah, appointed a Special Presidential Committee to investigate. *Id.* ¶ 74 (citing *Report of the Special Presidential Committee Appointed to Examine the March 2018 Global Witness Report of the National Oil Company of Liberia (NOCAL)* (2018) (Special Presidential Committee Report)). The Special Presidential Committee, which issued its own findings in May 2018, understood its mandate to be:

> to examine the allegations of March 2018, made by Global Witness (GW), . . . that in negotiating the Concession [license] agreement between ExxonMobil and the Government of Liberia for Liberia's offshore Oil Block LB13, some prominent Liberian government officials who led the negotiation received bribe in amounts ranging up to US $35,000 each.

Id. ¶ 75. It determined that the bonus payments were not bribes under Liberian law. *Id.* ¶ 81. However, the Special Presidential Committee recommended that the bonus payments to the six members of the HTC be returned. *Id.* ¶ 83. Plaintiffs believe there is no legal basis to require them to return the bonuses and have not done so. *Id.*

Based on the negative publicity following the Report, Plaintiffs filed suit in this Court alleging Defamation *per se* (Count I) and False Light Invasion of Privacy (Count II). Global Witness moved to dismiss. The matter is now ripe.[1]

II. LEGAL STANDARDS

A. Motion to Dismiss

A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face. *See* Fed. R. Civ. P. 12(b)(6). A complaint must be sufficient "to give a defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). To survive a motion to dismiss, a complaint must contain sufficient factual information, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). A court must assume the truth of all well-pleaded factual allegations and construe reasonable inferences from those allegations in favor of the plaintiff. *See Sissel v. Dep't of Health & Human Servs.*, 760 F.3d 1, 4 (D.C. Cir. 2014). However, a court need not accept inferences drawn by a plaintiff if such inferences are not supported by the facts set out in the complaint. *See Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Further, a

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[1] *See* Defs.' Mot. to Dismiss [Dkt. 11]; Pls.' Resp. to Defs.' Mot. to Dismiss for Failure to State a Claim (Opp'n) [Dkt. 17]; Reply Mem. in Supp. of Defs.' Mot. to Dismiss for Failure to State a Claim (Reply) [Dkt. 18].

court need not accept legal conclusions set forth in a complaint. *See Iqbal*, 556 U.S. at 678.

B. Applicable Law[2]

"To state a cause of action for defamation, [a] plaintiff must allege and prove four elements: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005) (internal quotations omitted).[3] Further, under the First Amendment, public figures suing for defamation must "demonstrate by clear and convincing evidence 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 false or not.'" *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964)).

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[2] The Court has diversity jurisdiction over this case because Plaintiffs are residents of Maryland and North Carolina, Global Witness operates out of London and D.C., and the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332. Venue is proper because D.C. is "a district in which any defendant is subject to the court's personal jurisdiction." 28 U.S.C. § 1391(b)(3).

[3] The parties do not dispute that D.C. substantive law governs this case. *Cf. Weyrich v. New Republic, Inc.*, 235 F.3d 617, 626-27 (D.C. Cir. 2001) (discussing choice of law in a defamation action brought in a diversity case in D.C.).

"To succeed on a claim of false light invasion of privacy, a plaintiff must show: '(1) publicity (2) about a false statement, representation, or imputation (3) understood to be of and concerning the plaintiff, and (4) which places the plaintiff in a false light that would be offensive to a reasonable person.'" *Armstrong v. Thompson*, 80 A.3d 177, 188 (D.C. 2013) (quoting *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 859 (D.C. 1999)). "These elements are similar to those involved in analysis of a defamation claim, and 'a plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion.'" *Id.* (quoting *Moldea v. N.Y. Times*, 22 F.3d 310, 319 (D.C. Cir. 1988)). "In fact, where the plaintiff rests both his defamation and false light claims on the same allegations, ... the claims will be analyzed in the same manner." *Blodgett v. Univ. Club*, 930 A.2d 210, 223 (D.C. 2007).

III. ANALYSIS

Plaintiffs allege that Global Witness' Report defamed them by accusing them of accepting bribes in connection with the negotiations with Exxon that led to that corporation's acquisition of a license to develop Block 13. Plaintiffs acknowledge that the Report never explicitly accused them of taking bribes. However, they argue that "the totality of the meaning conveyed, through headlines, sub-headings, text and graphics" clearly implied that they took bribes and that reasonable readers could come away with that understanding. Compl. ¶ 34.

"Whether a statement is capable of defamatory meaning is a question of law, but '[i]t is only when

the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense that it can rule as a matter of law, that it was not libelous.'" *Weyrich*, 235 F.3d at 627 (quoting *White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990)). Moreover, implied defamation comes with its own particular complications. "District of Columbia law . . . clearly contemplates the possibility that a defamatory inference may be derived from a factually accurate news report." *S. Air Transp., Inc. v. Am. Broad. Cos.*, 877 F.2d 1010, 1014 (D.C. Cir. 1989). But "[b]ecause the Constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580 (D.C. 2000) (quoting *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092-93 (4th Cir. 1993)). Thus, "if a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established." *White*, 909 F.2d at 520. However, "if the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant *intends* or *endorses* the defamatory inference, the communication will be deemed capable of bearing that meaning." *Id.*; *see also Guilford Transp.*, 760 A.2d at 580 ("The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference.").

A. Defamatory Implications of the Report

Although Plaintiffs concede that the Report contained only accurate facts and never specifically described the bonuses as bribes, the Court finds that the Report could reasonably be interpreted to imply that the bonuses were bribes and that the implication was conveyed by the manner in which Global Witness presented its investigation.

The implication began with the cover page. The title "Catch me if you can" clearly suggested wrongdoing, and specifically wrongdoing for which there is not yet enough evidence to convict. Below the title was an image of a businessman running away, already partially off the page, as if almost beyond capture, followed by the caption "Exxon's complicity in Liberian oil sector corruption and how its Washington lobbyists fight to keep oil deals secret." Report (cover page). The Report's first page further framed its contents: "This is a story of bribery, suspected secret shareholders, and an audacious attempt by oil giant Exxon to bypass US anti-corruption laws." *Id.* at 6. Whatever other details the Report offered, these headlines provided the context and conclusions of its authors at Global Witness. *Cf. Afro-Am. Publ'g Co. Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1966) (finding false statements in a newspaper caption "were critical in the total impact of the article"); *id.* ("The article contained other items that were true, but in the setting already described these only reinforced the defamatory impression.").

The Report further framed its discussion of the Block 13 negotiations as evidence of the value of transparency laws covering the oil, gas, and mining industries. Such laws were praised because they

allowed Global Witness to see, for example, "how much money Exxon paid to Liberia's oil agency NOCAL, which has a history of corruption." Report at 9. In this way, Global Witness tied ExxonMobil's payments for the acquisition of rights in Block 13 with how NOCAL shared some of that money with its negotiators, including Plaintiffs. The Report cited "NOCAL's tarnished track record of corrupt deals" to explain that Global Witness "saw there was a risk of bribery and began its investigation." *Id.*

For almost 20 pages, the Report then detailed previous corruption or concerns regarding corruption in the oil sector in Liberia. In that specific context, the Report opined that "[t]here are grounds to suspect that [Broadway Consolidated] obtained Block 13 because the company was likely part-owned by government officials with the power to influence the award of oil licenses." *Id.* at 12; *see generally id.* at 12-15 (describing Liberian officials' possible connections to Broadway Consolidated). The Report also stated that the initial license sold to Broadway Consolidated was ratified by the Liberian legislature only after "NOCAL spent $118,400 to bribe members of the Liberian legislature so that they would approve the award." *Id.* at 16. The Report cast aspersions at Exxon's interest in Block 13, noting suspected "concern over issues regarding US anti-corruption laws." *Id.* at 17. Such concerns, according to the Report, caused Exxon to develop "an ingenious escape plan" "to use COPL as a go-between that would, Exxon appears to have thought, shield it from any US legal risks." *Id.* at 20. The Report warned that "Exxon's attempt to use COPL to shield itself from US anti-corruption laws may have been misguided," *id.* at 27, and advocated investigations by U.S. and Liberian authorities. *Id.* at 29.

As a result, the Report did not cover the roles of the HTC's members, including Plaintiffs, in a vacuum. With its context of historical corruption and suspicions of further corruption, a reasonable reader could have understood the heading of the section, "Monrovia [Liberia], 2013: Awash in cash," with the subtitle "Some Unusual, Large Payments," to be referring to bribery payments in euphemistic language. *Id.* at 30. If such a reasonable reader missed the point of the titles, the contents of this section of the Report clarified the point. For example, the Report admitted that NOCAL described the challenged payments to staff and the HTC as "bonuses," but then continued to place quotation marks around the word bonuses, *i.e.*, "bonuses," and generally stated that the payments were "called" bonuses instead of endorsing use of that term itself. *See id.* at 30-32. These linguistic choices could be understood to distinguish between NOCAL's use of "bonuses" to hide "bribes," which is what the Report inferred they actually were. The chart prepared by Global Witness and included in the Report tracked payments from Exxon, by which it acquired rights to develop Block 13, to bonuses paid by NOCAL to six Liberian officials involved in the negotiation, including Plaintiffs. *Id.* at 31. The chart specifically listed the amount of each official's bonus and the critical role each of them played in the negotiations, which had the effect of literally drawing a line between Exxon's money, the bonuses, and the sale of the license for Block 13. *See id.* at 31.

The Court finds that a reasonable reader easily could have understood the Report to imply that the 2006-07 bribes and the 2013 HTC bonuses were of a piece. If that were not the case, Global Witness would

not have needed to request and include denials of bribery by HTC members in the Report. *Id.*; Compl. ¶ 91 ("The letter . . . stated . . . "we believe that the payment made by NOCAL to you was most likely a bribe."). If that were not the case, the Report would have had no reason to advocate for an investigation of "payments to officials by NOCAL in 2013 to determine whether any Liberian laws may have been broken." Report at 32.

Global Witness argues that the Report explicitly negated any inference that Plaintiffs accepted bribes because it expressly stated that "Global Witness has no evidence that Exxon directed NOCAL to pay Liberian officials, nor that Exxon knew such payments were occurring." *Id.* at 31. First, of course, this statement was about ExxonMobil and not NOCAL, the actual payor. Second, it did not negate the inference that ExxonMobil's money was, in part, paid as bribes to the NOCAL representatives who signed the lease agreement. However, this statement did admit that the Global Witness suspicions and calls for investigations of ExxonMobil and NOCAL lacked *any* evidence that the former had involvement in monies paid to employees of the latter. At best, it might have been read to leave the question open as to why NOCAL paid such monies to its own personnel.

Global Witness also argues that the Report openly identified bribes associated with other payments in Liberia and that, in the tradition of *expressio unius*, the omission of similar language from descriptions of the payments to Plaintiffs implied that they were *not* bribes. The attempted distinction fails to persuade: whenever the Report explicitly described bribery, it was only after other organizations, such as components of the Liberian government itself, had

already reached that conclusion. *See, e.g.*, *id.* at 30 ("These 2006 and 2007 payments have been classified as bribes by the Liberian Government's General Auditing Commission."). The conclusions by others that bribery occurred in other transactions does not diminish the import of the Report that there was bribery—either by NOCAL, Exxon, or both—in connection with the post-negotiation payments to Liberia's chief representatives.

Finally, Global Witness argues that it is only asking "*whether* the payments to Plaintiffs were illegal," and that questions cannot imply defamatory meaning. Reply at 7; *see Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1338 (D.C. Cir. 2015) ("[I]t is generally settled as a matter of defamation law in other jurisdictions that a question, 'however embarrassing or unpleasant to its subject, is not accusation.'") (quoting *Chapin*, 993 F.2d at 1094). *But see id.* at 1339 ("[A] question's wording or tone or context sometimes may be read as implying the writer's answer to that question."). But Global Witness is clearly doing more than "just asking questions" when it calls for an official investigation by governmental bodies; it reasonably implies that there is evidence to justify an investigation of criminal liability, and thereby potential criminal liability itself. Further, capping the Report with a question only protects the question, not the other statements that imply bribery.

The most compelling evidence that the Report could reasonably be read to suggest bribery is that the Liberian government *actually* understood the Report that way. As the Special Presidential Committee put it:

> His Excellency, George Manneh Weah, President of Liberia, constituted a five-member Special Presidential Committee (SPC) to examine the allegations . . . made by Global Witness (GW) . . . alleging . . . that in negotiating the Concession agreement between ExxonMobil and the Government of Liberia . . . , some prominent Liberian government officials who led the negotiation received bribe in amounts ranging up to US $35,000 each.

Compl. ¶ 3 (quoting Special Presidential Committee Report at 3) (emphasis omitted). Moreover, the Special Presidential Committee articulated its mandate as a duty to "[d]etermine if the individuals specifically and collaterally named in the Report indeed received perquisite, emoluments or benefits, directly or indirectly, on account of any duty required of them by the Government and, if yes, determine whether or not the amount so paid and received constitutes Bribe under our law." *Id.* ¶ 76 (quoting Special Presidential Committee Report at 4) (emphasis omitted). Finally, the Special Presidential Committee summarized the Report as such:

> Clearly, from the preamble, the Report is three-prong:
>
> 1. *The story about Bribery, apparently, involving Liberian officials*;
> 2. Efforts by Exxon to by-pass US Anti-Corruption Law . . . ; and
> 3. About how the United States can support efforts to mitigate corruption in all dealings involving its national corporations and the local countries where these companies operate.

Id. ¶ 77 (quoting Special Presidential Committee Report at 11) (emphasis added).[4]

Global Witness notes that "[t]he test ... is not whether some actual readers were misled, but whether the hypothetical reasonable reader could be (after time for reflection)." *Farah v. Esquire Magazine*, 736 F.3d 528, 537 (D.C. Cir. 2013) (citing *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 442-43 (10th Cir. 1982) and *New Times v. Isaacks*, 146 S.W.3d 144, 151 (Tex. 2004)); *see also* Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. Ill. L. Rev. 799, 842 (2010) ("[T]he [Supreme] Court clearly endorsed the principle that speakers should not be held liable for 'mis-readings' of their speech by idiosyncratic or unsophisticated audience members.") (citing *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970)). Global Witness correctly cites the test but overlooks that a publication must also be read "in the sense in which it would be understood by the readers to whom it was addressed." *Afro-Am. Publ'g*, 366 F.2d at 655; *see also Farah*, 736 F.3d at 537 (considering the defamatory statements'

[4] Global Witness does not address the Special Presidential Committee Report and, instead, traces "the first appearance in the press of any suggestion that the Report implied bribery ... [to] a letter written by Minister Tah herself." Reply at 8. But Minister Tah's letter responded to Global Witness' request for comment which explicitly accused her of accepting a bribe, see Compl. ¶ 91 ("The letter ... stated ... 'we believe that the payment made by NOCAL to you was most likely a bribe.'"), and excerpts from her letter were quoted in the Report. See Report at 30 ("'I did not receive money or an offer to pay money from Exxon Mobil for the award of the oil contract.'"). Global Witness' argument that Minister Tah is herself responsible fails because Global Witness clearly originated the accusation itself.

meaning to a publisher's reader base). In that regard, although not dispositive, the considered views of the investigatory committee formed by the Government of Liberia—which investigation the Report had urged—is insightful. *Cf. Vasquez v. Whole Foods Market, Inc.*, 302 F. Supp. 3d 36, 64 (D.D.C. 2018) ("A plaintiff can rely upon extrinsic evidence to show that listeners understood the statements to pertain to the plaintiff."). In the face of the Special Presidential Committee Report, there is evidence beyond, and supportive of, what a hypothetical reasonable Liberian official might have understood the Report to mean.

For the reasons above, the Court concludes that Global Witness' Report made a defamatory statement concerning Plaintiffs.

B. Actual Malice

Global Witness argues that even if statements in the Report were defamatory, those statements cannot form the basis of a defamation claim because they were not published with "actual malice" towards Minister Tah or Mr. McClain. This defense is based upon the First Amendment principle that public officials[5] who sue for defamation must "demonstrate by clear and convincing evidence that the defendant published the defamatory falsehood with 'actual

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[5] Global Witness argues that as high-ranking government officials Plaintiffs qualify as public officials. *See* Mem. at 34; *cf. Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) ("[T]he public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility over the conduct of government affairs."). Plaintiffs do not contest this designation and have pled actual malice. *See, e.g.*, Compl. ¶¶ 84, 86.

malice,' that is, with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Liberty Lobby*, 838 F.2d at 1292 (quoting *Sullivan*, 376 U.S. at 280). "The standard of actual malice is a daunting one." *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1308 (D.C. Cir. 1996). A plaintiff must allege facts that, if proven, provide "clear and convincing evidence" that "would 'permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1512 (D.C. Cir. 1996) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). When a plaintiff alleges actual malice based only upon circumstantial evidence, "the plaintiff must show, by clear and convincing evidence, that when the defendants published the alleged defamations they were subjectively aware that it was highly probable that the story was '(1) fabricated; (2) so inherently improbably that only a reckless person would have put [it] in circulation; or (3) based wholly on . . . some other source that appellees had obvious reasons to doubt.'" *Lohrenz v. Donnelly*, 350 F.3d 1272, 1283 (D.C. Cir. 2003) (quoting *Tavoulareas v. Piro*, 817 F.2d 762, 788-98 (D.C. Cir. 1987)).

Plaintiffs advance several interlocking theories to support the allegation of actual malice which, in summary, contend that Global Witness had a preconceived story line charging Exxon with corrupt foreign dealings, which it pursued without regard to Plaintiffs. *Cf. Harris v. City of Seattle*, 152 Fed. App'x. 565, 568 (9th Cir. 2005) ("Thus, 'evidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is

evidence of actual malice, and may often prove to be quite powerful evidence.'") (quoting Rodney A. Smolla, 1 Law of Defamation § 3:71 (2005)).

In this regard, Plaintiffs assert that Global Witness "was already determined to publish a sensational account accusing Exxon of paying bribes in order to secure the purchase of Block 13." Opp'n at 13. The assertion is clear but Plaintiffs offer few facts to support it. They cite the subtitle of the Report, that is, "Exxon's complicity in Liberian oil sector corruption and how its Washington lobbyists fight to keep oil deals secret." Compl. ¶ 87. They also cite the prominent role given by the Report to former Exxon CEO, Rex Tillerson, then U.S. Secretary of State, as well as the Special Presidential Committee's determination that "the real object of its Report was not Liberia, but the conduct of Exxon." *Id.* ¶¶ 88-89 (quoting Special Presidential Committee Report at 11). But the Report's conclusion is not evidence of its conception and a conclusory allegation that there was "a preconceived story line is not sufficient to demonstrate actual malice." *Jankovic v. Int'l Crisis Grp.*, 72 F. Supp. 3d 284, 312 (D.D.C. 2014); *see also Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 597 (D.C. Cir. 2016) ("Evidence of ... preconceived notions about [plaintiff] does little to show actual malice.").

The rest of the evidence is similarly weak. Plaintiffs do not allege any facts establishing or explaining why Global Witness sought to target Secretary Tillerson. Even if they had, "evidence of ill will or bad motives will support a finding of actual malice only when combined with other, more substantial evidence of a defendant's bad faith," which Plaintiffs do not offer. *Tavoulareas*, 817 F.2d at 795. That is, Plaintiffs do not allege facts

supporting a culture of reckless reporting and disregard for the truth at Global Witness. More specifically, Plaintiffs identify no facts that have been molded to conform to this preconceived story line, and an "adversarial stance is certainly not indicative of actual malice under the circumstances where, as here, the reporter conducted a detailed investigation." *Id.*; *see also id.* at 796 ("[T]he First Amendment forbids penalizing the press for encouraging its reporters to expose wrongdoing by public corporations and public figures."). Indeed, Plaintiffs contest none of the facts in the Report, even if they disagree with the inference that may be drawn therefrom. *Cf. Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982) ("Stanley conceived of a story line; solicited Stang, a writer with a known and unreasonable propensity to label persons or organizations as Communist, to write the article; and after the article was submitted, made virtually no effort to check the validity of statements … , and in fact added further defamatory material based on Stang's 'facts.'"). Without more than is mustered here, there is not "clear and convincing evidence" that Global Witness was aware that its story was fabricated or too improbable to circulate.[6]

Plaintiffs seek to avoid this conclusion by arguing that Global Witness accused them of bribery when it asked for their pre-publication comments on the Report and then ignored their denials. Compl. ¶¶ 91-97. These facts are not enough to show actual malice. That Global Witness had arrived at its conclusion,

[6] Because Plaintiffs allege implied defamation, and because they do not contest the underlying facts, the implication of bribery must be reasonable, *i.e.*, not so improbable as to be reckless, or else Plaintiffs could not state a claim.

right or wrong, by the time it reached out for comment and shortly before publication is commonplace and no surprise. More to the point, "publishers need not accept 'denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.'" *Lohrenz v. Donnelly*, 350 F.3d 1272, 1285 (D.C. Cir. 2003) (quoting *Harte-Hanks Comm'ns, Inc. v. Connaughton*, 491 U.S. 657, 691 n.37 (1989)) (internal quotations omitted).[7] The emptiness of a denial as evidence is particularly apt here because not only did Plaintiffs' denials fail to contest the facts that are in the Report, the Report also included excerpts from Plaintiffs' denials and called out the additional facts on which Plaintiffs' denials relied. *See, e.g.*, Report at 30 ("Block 13 was the only oil license awarded during the period."); *id.* at 32 (acknowledging that "NOCAL also distributed $290,000 in what the agency called bonuses to over 140 members of staff and consultants"); *id.* at 31 ("Global Witness has no evidence that Exxon directed NOCAL to pay Liberian officials, nor that Exxon knew such payments were occurring."). Notably, "reporting perspectives at odds with the publisher's own[] 'tend[s] to rebut a claim of malice, not to establish one.'" *Lohrenz*, 350 F.3d at 1286 (quoting *McFarlane*, 74 F.3d at 1304).

Plaintiffs also argue that malice is evident because the Report targeted them and none of the consultants

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[7] For this same reason, the HTC consultants' corroborating denials had no more effect on evidence of malice than Plaintiffs' own. *See Lohrenz*, 350 F.3d at 1285 (corroborating denials did not give defendant "'obvious reasons' to doubt the veracity of her publication").

to the HTC during the negotiations, even though the consultants also received bonuses. But the Report stated its rationale for focusing on Plaintiffs and not others: "unlike payments to the HTC members, these staff payments were not made to people who signed the Exxon deal." Report at 32. Plaintiffs find no caselaw to support the argument that a defendant's failure to accuse more persons of illegal conduct makes an accusation against a few more or less malicious. Moreover, Plaintiffs' theory of actual malice is that Global Witness had a preconceived story line targeting Exxon, not Plaintiffs. In that context, it is especially unclear how selectively naming Plaintiffs, but not the consultants, contributes to that narrative.

Plaintiffs further argue that Global Witness excluded Presidential Advisor Cooper's name from the Report because his advisory opinion that the payments were legal under Liberian law would pose "a glaring inconsistency in [the Report's] narrative." Opp'n 38-39; Compl. ¶ 99. This argument lacks persuasive weight. There are no allegations that Global Witness knew of Mr. Cooper's opinion.[8] The record might be read to suggest that Global Witness acted "on the basis of . . . incomplete information" because it did not know of Mr. Cooper's advice to Plaintiffs. *Lohrenz*, 350 F.3d at 1284. Assuming that to be true, it "does not 'demonstrate with clear and convincing evidence that the defendants realized that their statement was false or that they subjectively entertained serious doubts as to the truth of their statement.'" *Id.* (quoting *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 511 n.30 (1984))

[8] As a member of the HTC and recipient of a $35,000 bonus, for the purposes of actual malice Mr. Cooper's legal opinion serves the same purpose as Minister Tah's denial.

(internal marks omitted); *cf. St. Amant*, 390 U.S. at 732 ("But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.").

Lastly, Plaintiffs argue that their allegations of malice are entitled to a liberal interpretation when evaluated in response to a motion to dismiss. *See* Opp'n at 42-44. True enough. But "actual malice does not automatically become a question for the jury whenever the plaintiff introduces pieces of circumstantial evidence tending to show that the defendant published in bad faith." *Tavoulareas*, 817 F.2d at 789. "Such an approach would be inadequate to ensure correct application of both the actual malice standard and the requirement of clear and convincing evidence." *Id.* Without clear and convincing evidence of actual malice, and only strands of evidence, Plaintiffs' pleadings fail to meet their burden.

IV. CONCLUSION

Although Plaintiffs sufficiently plead that the Global Witness impliedly defamed them, their pleadings are insufficient to overcome First Amendment protections for speech. Accordingly, the Court will grant Global Witness' Motion to Dismiss, Dkt. 11, in its entirety. A memorializing Order accompanies this Memorandum Opinion.

Date: September 27, 2019

[SEAL]
/s/ Rosemary M. Collyer
ROSEMARY M. COLLYER
United States District Judge