No. __________

In the

Supreme Court of the United States

BYD COMPANY LTD.

Petitioner,

v.

VICE MEDIA LLC,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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

CORPORATE DISCLOSURE STATEMENT

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

RELATED PROCEEDINGS

BYD Company Ltd. v. VICE Media LLC, No. 20-cv-3281 (AJN), U.S. District Court for the Southern District of New York. Order entered March 31, 2021, available at 531 F. Supp. 3d 810.

BYD Company Ltd. v. VICE Media LLC, No. 21-1097, U.S. Court of Appeals for the Second Circuit. Memorandum entered March 1, 2022, available at 2022 WL 598973.

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INTRODUCTION

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

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

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

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

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

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

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

In the case at bar, Petitioner pleaded a claim that, pre-*Iqbal* and *Twombly*, would have clearly merited discovery on the actual malice issue: Petitioner claimed Respondent published an article that misrepresented the contents of a non-governmental organization's report that was in the Respondent's possession at the time Respondent published its story. Under the pre-*Twombly* standard, a claim that Respondent had in its possession a report that said X, and Respondent misrepresented the report and published Y instead, would have been sufficient to move the case past the pleadings stage and into discovery on the actual malice issue. Petitioner would be permitted to take discovery directed to Respondent's mental state when it made the defamatory statement. However, the Second Circuit, applying the new *Sullivan*-on-steroids standard, concluded that Petitioner could not even take discovery as to whether Respondent was aware of the information in the NGO's report that contradicted Respondent's story. Because it was impossible for Petitioner to allege what specifically Respondent was subjectively thinking at the time of publication, the Second Circuit denied discovery. This was clear error.

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

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 2a) is reported at 2022 WL 598973 (2d Cir. Mar. 1, 2022). The opinion of the District Court (Pet. App. 54a) is reported at 531 F. Supp. 3d 810 (S.D.N.Y. 2021).

JURISDICTION

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

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

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to

assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE[2]

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

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

On or about April 11, 2020, Respondent VICE Media LLC ("Respondent" or "VICE") published an article on its website (the "Article") falsely claiming that BYD was implicated in one of the most publicized and brutal human rights violations of modern times,

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

the Chinese government's treatment of the Uyghur minority in Eastern China. VICE falsely claimed that BYD was "using forced Uighur labor in its supply chain."

VICE's claim was based on a single named source: a report by an Australian non-governmental organization called the Australian Strategic Policy Institute ("ASPI"). ASPI published the report, entitled *Uyghurs for sale: 'Re-education', forced labour and surveillance beyond Xinjiang* (the "ASPI Report"), on March 1, 2020.

The ASPI Report does not state that BYD "us[ed] forced Uyghur labor in its supply chain," as the Article claims. Rather, the ASPI Report is very specific in its allegation as to what BYD allegedly did: ASPI says that BYD did business with a company, which in turn owned a subsidiary that had used Uyghur forced labor. The ASPI Report does not say that the subsidiary of the third party company ever produced any products for or sold any raw materials to BYD, or that the subsidiary was even part of BYD's supply chain.

Specifically, the text of the ASPI Report contains only three mentions of BYD; most of its text concerns allegations relating to other companies such as Nike, Apple, and Calvin Klein. The first two mentions of BYD in the ASPI Report are exactly the same, and mention BYD as part of a list of companies that purportedly are "directly or indirectly benefiting from the use of Uyghur workers outside Xinjiang through potentially abusive labour transfer programs as recently as 2019." The ASPI Report provides no

further explanatory text, and, of course, "indirect benefit" is not remotely the same as "using forced labor in [the] supply chain," the allegation made by VICE.

The only other mention of BYD in the text of the ASPI Report alleges that a company named Dongguan Yidong Electronic Co. Ltd. ("Dongguan") supplies "directly" to BYD. The ASPI Report further alleges that Dongguan owns a subsidiary called Hubei Yihong Precision Manufacturing Co. Ltd. ("Hubei"), and that Hubei employed 105 Uyghur workers who were transferred to Hubei, presumably by the Chinese government. **There is no allegation in the ASPI Report that any of the 105 Uyghur workers who supposedly worked for Hubei ever worked on any aspect of BYD's supply chain or that BYD had any relationship whatsoever with Hubei, or benefitted in any way from Hubei or its workers.**[3]

BYD's Complaint contains extensive allegations of actual malice. The Complaint alleges that, prior to publication, VICE **knew** that the contents of the ASPI Report did not support its claim regarding BYD's alleged use of forced labor in its supply chain. The Complaint further alleges that VICE did not rely on any other source to support its claim regarding forced labor and recklessly disregarded information that

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[3] The ASPI Report also contains a diagram that shows an arrow between Hubei and BYD. However, the text accompanying the diagram refers the reader to the appendix, which confirms that ASPI's actual claim is that BYD did business with Hubei's parent, *not* that BYD used Hubei in its supply chain.

showed ASPI was an unreliable source, especially when used as the sole source for such an explosive allegation. BYD further alleges that the defamatory statement would foreseeably cause tremendous reputational and economic harm to BYD.

The defamatory statements in the Article have caused, and will continue to cause, extraordinary damage to BYD. Potential business deals were delayed, obstructed and/or terminated based directly on the false allegations in the Article.

BYD filed its Complaint on April 27, 2020. VICE moved to dismiss. After the parties filed opposition and reply papers, the District Court granted VICE's motion. In a published opinion, the District Court held that BYD failed to sufficiently allege actual malice in support of its claim based on the ASPI Report. The Second Circuit Court of Appeals affirmed on the same ground in an unpublished memorandum.

REASONS FOR GRANTING THE WRIT

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

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

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

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

Importantly, the Court's decision in *Sullivan* took a middle ground. The Alabama state courts had taken the position that defamation was categorically unprotected under the First Amendment. *New York Times Co. v. Sullivan*, 144 So. 2d 25, 40 (Ala. 1962) ("The First Amendment of the U. S. Constitution does not protect libelous publications."). On the other hand, Justices Black and Douglas of this Court took the position that defamation suits by public officials should be barred under all circumstances, even if the defendant knowingly lied about them. *Sullivan*, 376 U.S. at 293 (Black, J., concurring) ("The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment."). This Court struck a compromise and adopted an approach that permits suits and judgments against liars and those who consciously disregard the truth, so long as the proof at trial is clear and convincing. This Court later extended the same standard, described as "actual malice," to also apply to public figure plaintiffs. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

On at least two occasions, this Court has reaffirmed and clarified the actual malice standard. First, *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968), gave vivid examples of the sort of conduct that would constitute reckless disregard of the truth:

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

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

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

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

Thus, prior to *Iqbal* and *Twombly,* the balance struck by this Court was that defamation defendants

are protected from liability for their negligent publication of falsehoods of and concerning public figures, but when they act with the requisite scienter (reckless disregard of the truth), proven with clear and convincing evidence, there is no legal privilege against defamation liability. Plaintiffs thus would need to establish, with convincing clarity, what the defendants knew and when they knew it. This evidence would be obtained in discovery, because the information is not otherwise available to plaintiffs: defendants' state of mind certainly is not a matter of public record. And if the plaintiff is unable to obtain in discovery sufficient evidence of the defendant's reckless disregard of the truth, then the First Amendment would require that the defendant prevail in the case.

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

actual malice inquir[y] typically requires discovery." *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001). This was settled law pre-*Iqbal* and *Twombly*.

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

This Court's decisions in *Iqbal* and *Twombly* impose a "plausibility" standard on federal pleading. While the plausibility standard was not intended to be onerous, *see Twombly*, 550 U.S. at 556 ("And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.") (cleaned up), the lower courts have taken the opposite approach: they have declared that pleading actual malice in a defamation case now requires the plaintiff to have specific knowledge of what the defendant knew and/or was thinking at the time of the publication, and that pleading actual malice is, in fact, an "onerous task." *Earley v. Gatehouse Media Pennsylvania Holdings, Inc.*, 2015 WL 1163787 at *2 (M.D. Pa. Mar. 13, 2015).

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

defendants:

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

Id. at 702.

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

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

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

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

had not, in fact, spoken to all of the sources to whom they claimed to have spoken, or if they were misleading the public as to what those sources had said to them? The Eleventh Circuit has created a privilege to lie, because plaintiffs are being prevented from obtaining the discovery that would show the false statement of fact was made with knowing or reckless disregard for the truth.

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

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

Some courts have gone so far to announce that a defamation plaintiff, in the **complaint**, must specifically identify the individuals within a journalistic organization who knew that a particular statement was false or acted with reckless disregard for the truth, and what each specific person knew—without any discovery at all. *See Resolute Forest Products, Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1018 (N.D. Cal. 2017) (applying this standard to dismiss a complaint). Indeed, the Court of Appeals in the case at bar asserted this as an alternate basis for its determination that actual malice was not properly pleaded. *See* Pet. App. at 40a n. 5 (citing *Palin v. New York Times Co.*, 940 F.3d 804, 810 n. 9 (2d Cir. 2019); *Dongguk University v. Yale University*, 734 F.3d 113, 123 (2d Cir. 2013)). Under this standard, a plaintiff suing a newspaper would be required to identify what each reporter and editor knew at the time a story was published, without any discovery. This is completely antithetical to the balance struck in *Sullivan*; virtually no major media outlet would ever face liability, even for a deliberate falsehood, under such a standard.

The facts of this case present this Court with an opportunity to clarify the law in this area. Here, BYD's claim would have never been dismissed for failure to plead actual malice based on the pre-*Twombly* standard. BYD alleged that VICE falsely reported it used forced labor, when in fact it never did, and that VICE's reporting was based on a single source (the ASPI Report), which specifically states that its accusation against BYD is that BYD contracts with a company that has a subsidiary that allegedly

uses forced labor, **not** that BYD itself used forced labor in its supply chain. Pre-*Twombly*, BYD would have had the opportunity to develop this claim in discovery by: (1) asking VICE for information about whether it read the ASPI Report and what VICE understood the ASPI Report to be saying; (2) obtaining internal communications at VICE regarding what VICE knew at the time of publication, whether it considered ASPI to be a biased or untrustworthy source, and whether VICE had any other sources; and (3) questioning VICE's witnesses involved in the story regarding these same issues. Through this process, BYD would be able to establish whether VICE knowingly or recklessly disregarded the portion of the ASPI Report that explains that BYD merely contracted with a company that had a subsidiary that allegedly used forced labor, whether VICE had any proof or evidence that BYD actually used forced labor, and what (if anything) VICE did to confirm or check its story.

Under the new, expanded *Sullivan*-on-steroids privilege, however, the District Court and Second Circuit denied BYD the opportunity to take any discovery. Instead, they turned Rule 12(b)(6) on its head by relying solely on the unsworn statements in VICE's story, taking such statements to be true, and construing VICE's actions in the light most favorable to VICE. A vivid example of this relates to a graphic in the ASPI Report, to which VICE cited in its motion to dismiss. That graphic draws an arrow between Hubei (the subsidiary accused of using forced labor) and BYD. However, that same graphic expressly refers the reader to the ASPI Report's appendix for the supporting information, and the appendix explains

that, in fact, BYD merely contracted with Hubei's parent. The appendix does not indicate or substantiate any direct relationship between BYD and Hubei, or state that Hubei is in BYD's supply chain or indeed that BYD uses any of Hubei's labor for anything. Whether or not VICE was merely negligent in relying on the graphic, or negligently did not read the appendix, or in fact read the appendix but deliberately published its sensationalistic story, is the sort of issue that requires discovery. Yet that factual dispute was resolved in the defendant's favor at the pleading stage, thereby denying BYD discovery on the issue and potentially privileging VICE's defamatory statements even if they were in fact deliberate or reckless.

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

The approach of the lower courts in defamation pleading cases post-*Iqbal* and *Twombly* effectively creates a privilege to publish even intentionally false statements of fact, which the *Sullivan* majority explicitly rejected. For instance, one possibility (which BYD believes happened) is that VICE knew full well the limited nature of ASPI's accusations against BYD, and also that ASPI was a biased and therefore unreliable publication, and that VICE could

not find any corroborating source for the accusation. But VICE nevertheless decided to publish the "forced labor" accusation anyway because it was scandalous and would generate clicks and readership, to VICE's benefit. Pre-*Twombly*, BYD would have had an opportunity to **prove** that VICE acted with actual malice. Now, under the approach sanctioned by many lower courts including in the case at bar, publishers like VICE have an effective privilege to knowingly publish false statements of fact, as they know that a plaintiff will never find out (because they are not permitted discovery) what the reporters really knew or consciously disregarded. Injured plaintiffs, having no access to the publisher's internal editorial process, will virtually never be able to plead a claim that survives a Rule 12(b)(6) motion, no matter how egregious the false factual statement about the plaintiff, or how much damage it causes. This Court should grant certiorari to confirm that this is not the law, and set forth the correct standard.

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

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

As noted above, the Eleventh Circuit and the Eastern District of Pennsylvania represent one extreme. In *Michel*, the Eleventh Circuit specifically held that *Iqbal* and *Twombly* should be strictly

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

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

In *Schatz v. Republican Leadership Committee*, 669 F.3d 50, 55 (1st Cir. 2012), the First Circuit applied a standard that draws all reasonable inferences in the plaintiff's favor, which is the traditional standard with respect to pleadings motions. However, decisions from other courts discussed in this brief, including the decisions of the lower courts in this case, draw inferences in the defendant's favor (so, for instance, VICE was presumed by the lower courts to have relied on the diagram in the ASPI Report showing an arrow between Hubei and BYD, but was also presumed **not** to have had actual knowledge of the fact that the ASPI Report only said that BYD had a relationship with

Hubei's **parent**, not that Hubei supplied BYD).[4] Similarly, in *Nelson Auto Center*, the Eighth Circuit drew the inferences in favor of the defendant, presuming on the pleadings alone that the republication of a retracted story must have been an accident. Should inferences be drawn in the defendant's favor, or the plaintiff's? The cases are in conflict. This Court should grant certiorari to resolve the conflict and announce a definitive standard for pleadings motions in public figure defamation cases.

CONCLUSION

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

Respectfully submitted,

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[4] Notably, the Second Circuit, the same court that drew inferences in favor of VICE in this case, held in *Palin v. New York Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019), that all inferences should be drawn in the plaintiff's favor and, in fact, drew inferences in Sarah Palin's favor in reversing an order dismissing her defamation complaint.

APPENDIX

DISTRICT COURT OPINION

BYD Company Ltd., Plaintiff,
v.
VICE Media LLC, OPINION & ORDER, Defendant.
20-cv-3281 (AJN)

ALISON J. NATHAN, District Judge:

Plaintiff BYD Company Ltd. ("BYD") initiated this defamation action against Defendant VICE Media LLC ("VICE") on April 27, 2020. See Dkt. No. 1. VICE has moved to dismiss the Complaint. Dkt. No. 17. For the reasons that follow, VICE's motion to dismiss is GRANTED.

I. BACKGROUND

For the purpose of resolving Defendant's motion to dismiss, the Court accepts all well-pleaded facts in the Amended Complaint as true, and draws all reasonable inferences in Plaintiffs favor. *See Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007).

Plaintiff BYD is one of the world's largest producers and suppliers of electric vehicles. solar panels, lithium batteries, and protective masks and equipment, among other products. Dkt. No. 1 ("Compl.") ¶¶2-3, 18. Berkshire Hathaway is one of BYD's major investors. *Id.* ¶ 2. In the early months of the COVID-19 pandemic, BYD won a contract to supply the state of California with around $1 billion

worth of masks. *Id.*

On April 11, 2020, VICE published an article on its website with the headline *Trump Blacklisted This Chinese Company. Now It's Making Coronavirus Masks for U.S. Hospitals. Id.* ¶¶4, 28 & Ex. B. As relevant here, the article discusses the legislative history of a provision of the 2020 National Defense Authorization Act that prohibited the use of federal funds for the purchase of rail cars and buses from companies owned or subsidized by the Chinese government—a group of which BYD was a part. *See* Compl. 10, 29 & Ex. B. And the article also discussed a report by a group called the Australian Strategic Policy Institute ("ASPI" and "ASPI Report"), which included BYD in a list of 83 companies that had been associated with factories that had allegedly used forced Uyghur labor. *See* Compl. 5, 23-25 & Ex. A at 3, 5; *see also* Compl., Ex. B. BYD alleges that ASPI is biased and notes that the organization has been "repeatedly criticized publicly for making false statements of fact, with an anti-Chinese bias." *Id.* ¶¶5, 19-22.

Besides including BYD on that list of companies, the ASPI Report also discusses BYD's relationship to one of the subsidiaries that allegedly used forced labor, though in its discussion the Report does not allege that the factory ever produced any products or raw materials for BYD. Compl. ¶6. The Report mentions BYD's relationship to one of its suppliers named Dongguan Yidong Electronic Co. Ltd., and also mentions that a subsidiary of Dongguan employed 105 Uyghur workers. *Id.* ¶27.

In bringing this defamation action, BYD claims that VICE misrepresented the ASPI Report—specifically, that contrary to the representations made in the article, the report did not state that BYD used forced Uyghur labor in its supply chain. *Id.* ¶¶4, 6. And BYD also objects to the headline of the article, which included the word "blacklisted;" BYD insists that no such "blacklist" ever existed. *Id.*¶¶ 8—11. According to BYD, members of Congress included that provision in the NDAA due to the actions of a different Chinese company, even though BYD concedes that it was one of the companies affected by the legislation. *Id.* 10, 29. Still, BYD insists that the reference to a "blacklist" misrepresents the purpose behind the inclusion of that legislation by creating the appearance that Congress specifically targeted BYD. *Id.* BYD contends, in sum, that regardless of its criticisms of the ASPI Report, the Report never stated or intimated that BYD used forced Uyghur labor in its supply chain. *Id.* ¶30.

According to BYD, the article was defamatory for both of those reasons: First, for its allegations regarding Uyghur labor and BYD, and second, for its use of the word "blacklist." *Id.* ¶31. And BYD claims that VICE published those statements despite knowing that there was no "blacklist" and that the ASPI Report did not support the claim that BYD used forced labor in its supply chain. *Id.* BYD also alleges that VICE cited the ASPI Report with reckless disregard of ASPI's reliability. *Id.* According to the Complaint, several third parties have cited the VICE article as a reason to delay or end contemplated business transactions with BYD. *Id.* ¶32. And BYD insists that the article will continue to effect

significant reputational damage. *Id.* Two days after the article was published, BYD requested a retraction, but on April 20, 2020, VICE refused BYD's request. *Id.* ¶33.

On April 27, 2020, BYD initiated this defamation action against VICE. *See* Dkt. No. 1. VICE moved to dismiss the Complaint on August 17, 2020. Dkt. No. 17. The Court then offered BYD an opportunity to amend the Complaint, warning that declining to amend would constitute a waiver of its right to use the amendment process to cure any defects made apparent by VICE'S motion to dismiss. Dkt. No. 21 (citing *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC.*, 797 F.3d 160, 190 (2d Cir. 2015)). BYD declined to amend, Dkt. No. 22, and it filed its opposition to the motion to dismiss on September 14, 2020, see Dkt. No. 23. The motion is fully briefed. *See* Dkt. No. 26.

The Court has diversity jurisdiction under 28 U.S.C. § 1332, because there is complete diversity between the parties and because the amount in controversy surpasses $75,000. *See* Compl. 13-15. The Court has personal jurisdiction over VICE because VICE is based in New York, and venue is proper under 28 U.S.C. §§ 1391(b)(1) and (2) because VICE is located in this district and because the article was edited and published in this district. *Id.* 14, 16.

II. LEGAL STANDARD

When deciding a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept as true all

well-pleaded facts and draw all reasonable inferences in the light most favorable to the non-moving party. *See Kassner v. 2nd Ave. Delicatessen, Inc.,* 496 F.3d 229, 237 (2d Cir. 2007). Although factual allegations are afforded a presumption of truth, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)) (internal quotation mark omitted).

"To survive a motion to dismiss, the plaintiffs pleading 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 *Twombly*, 550 U.S. at 570); *see also Biro v. Conde Nast ("Biro II")*, 807 F.3d 541, 544-15 (2d Cir. 2015) ("*Iqbal* makes clear that, Rule 9(b)'s language notwithstanding, Rule 8's plausibility standard applies to pleading intent"). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Twombly*, 550 U.S. at 570. A plaintiff is not required to provide "detailed factual allegations" in the complaint. *Id.* at 555.

In addition to the allegations in the complaint itself, a court may consider documents attached as exhibits, incorporated by reference, or relied upon by the plaintiff in bringing suit, as well as any judicially noticeable matters. *See Halebian v. Bern*, 644 F.3d 122, 131 n.7 (2d Cir. 2011); *In re Harbinger Capital Partners Funds Investor Litig.*, No. 12-CV-1244 (AJN), 2013 WL 5441754, at *15 n.6 (S.D.N.Y. Sept.

30, 2013). "If a document relied on in the complaint contradicts allegations in the complaint, the document, not the allegations, control, and the court need not accept the allegations in the complaint as true." *TufAmerica, Inc. v. Diamond*, 968 F.Supp.2d 588, 592 (S.D.N.Y. 2013) (quoting *Poindexter v. EMI Record Grp. Inc.*, No. 11-CV- 559 (LTS), 2012 WL 1027639, at *2 (S.D.N.Y. Mar. 27, 2012)) (internal quotation marks omitted).

III. DISCUSSION

BYD brings a single cause of action for defamation. *See* Compl. ¶¶34-38. In moving to dismiss, VICE principally argues that the article's headline is a fair index of its truthful content and that the headline is a privileged fair report of governmental proceedings. *See* Dkt. No. 18 ("Def. Br.") at 10-14. VICE further argues that its reporting on the ASPI report is not actionable, id. at 15-16, that VICE's reliance on the ASPI Report precludes a finding of actual malice, *id.* 16-23, and that VICE's reporting is covered by the neutral reportage privilege, *id.* At 23.

New York law applies to this diversity action. "In diversity jurisdiction cases such as this, it is well settled that a federal court must look to the choice of law rales of the forum state." *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir. 1998) (citations omitted). The "preferred analytical tool in tort cases" under New York choice of law rales "is to apply 'interest analysis,' where the policies underlying the competing laws are considered." *Fin. One Pub. Co. v. Lehman Bros. Special Fin.*, 414 F.3d 325, 336 (2d Cir. 2005) (cleaned up). Here, VICE is headquartered in New York, and

the VICE article was published in New York. BYD has not disputed this application, and both sides cite exclusively to New York law in their respective briefings.

Under New York law, a defamation plaintiff must establish "(1) a written defamatory statement of and concerning the plaintiff, (2) publication to a third party, (3) fault, (4) falsity of the defamatory statement, and (5) special damages or per se actionability." *Palin v. New York Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019); *see also Celle v. Filipino Reporter Enterps. Inc.*, 209 F.3d 163, 176 (2d Cir. 2000) (citations omitted); *Kimso Apartments, LLC v. Rivera*, 180 A.D.3d 1033, 1034 (2d Dep't 2020). A public-figure plaintiff must also prove "that an allegedly libelous statement was made with actual malice, that is, made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Palin*, 940 F.3d at 809 (quoting *Church of Scientology Ini ' I v. Behar*, 238 F.3d 168, 173-74 (2d Cir. 2001)).

At the motion to dismiss stage, the Court "must decide whether the statements, considered in the context of the entire publication, are reasonably susceptible of a defamatory connotation, such that the issue is worthy of submission to a jury." *Palin*, 940 F.3d at 809 (citations and quotations omitted); *see also Levin v. McPhee*, 917 F. Supp. 230, 236 (S.D.N.Y. 1996), aff'd, 119 F.3d 189 (2d Cir. 1997) (describing the court's role in defamation cases as determining "as a matter of law whether the statements complained of are reasonably susceptible of a defamatory construction"). To do this, the Court must assess "not

only . . . the meaning of the words as they would be commonly understood . . . but [also] the words considered in the context of their publication." *Levin v. McPhee*, 119 F.3d 189, 195 (2d Cir. 1997) (citing *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 381 (1995)). Thus, allegedly defamatory statements "must be perused as the average reader would against the 'whole apparent scope and intent' of the writing." *Celle*, 209 F.3d at 177 (quoting *November v. Time Inc.*, 13 N.Y. 2d 175, 178 (1963)). If "the challenged statements are 'susceptible of multiple meanings, some of which are not defamatory,' the court may not conclude, as a matter of law, that the statements are or are not defamatory." *Kesner v. Dow Jones & Co., Inc.*, No. 20-CV-3454 (PAE), 2021 WL 256949, at *10-11 (S.D.N.Y. Jan. 26, 2021) (quoting *Celle*, 209 F.3d at 178).

A. BYD is a limited-purpose public figure

As a threshold matter, the Court must determine whether BYD is a public figure for purposes of its defamation claim. The Supreme Court has distinguished between two kinds of "public figures." A general-purpose public figure is one who has "assumed [a] role[] of especial prominence in the affairs of society." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). A limited-purpose public figure, meanwhile, is one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 351-52. This doctrine is based upon "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." *Contemp. Mission, Inc. v. New*

York Times Co., 842 F.2d 612, 619 (2d Cir. 1988) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

VICE argues that BYD is at least a limited purpose public figure. *See* Def. Br. at 17-18. BYD does not oppose VICE's contention, and in its opposition brief it "assumes *arguendo* that its public role in the distribution of needed supplies in the COVID-19 crisis makes it at least a limited purpose public figure." Dkt. No. 23 ("PI. Opp. Br.") at 6 n.l. Furthermore, the Complaint is pled as a public-figure defamation action and, in BYD's brief in opposition, BYD only recites the actual malice standard that applies if plaintiffs are public figures. *See Greene v. Paramount Pictures Corp.*, 340 F. Supp. 3d 161, 169 (E.D.N.Y. 2018), *aff'd,* 813 F. App'x 728 (2d Cir. 2020) ("Plaintiff elected not to pursue a private-figure defamation claim, leaving only his public-figure claim based on actual malice."). In addition, BYD's "failure to oppose Defendants' specific argument in a motion to dismiss is deemed waiver of that issue." *Kao v. British Airways, PLC*, No. 17-CV-0232 (LGS), 2018 WL 501609, at *5 (S.D.N.Y. Jan. 19, 2018) (citing *Arista Records, LLC v. Tkach*, 122 F. Supp. 3d 32, 38-39 (S.D.N.Y. 2015)). As BYD has failed to oppose VICE's specific argument that it is at least a limited purpose public figure, and as BYD has opted to pursue only its public figure claim based on actual malice, the Court concludes that BYD is a limited purpose public figure for purposes of this defamation claim.

B. BYD has failed to state a claim that article's headline is defamatory

The Court turns first to BYD's claim that the article's headline—"Trump Blacklisted This Chinese Company. Now It's Making Coronavirus Masks for U.S. Hospitals"—is defamatory. According to BYD, the headline is defamatory because the reference to a "blacklist" is "qualitatively different from a statute that simply prohibits certain governmental actions." PI. Opp. Br. at 16. Here, BYD emphasizes the lack of any "list" as further proof of the defamatory nature of the headline. Further, BYD argues that the headline is actionable because it contains several false statements of fact—including that there was a "blacklist," that the legislation specifically targeted BYD, and that it was Congress and not President Trump that mentioned BYD. PI. Opp. Br. at 17-21.

Under New York law, an article's headline is not actionable in a defamation case if it is "a 'fair index' of the 'substantially accurate' material included in the article." *Test Masters Educ. Sews., Inc. v. NYP Holdings, Inc.*, 603 F. Supp. 2d 584, 589 (S.D.N.Y. 2009) (quoting *Gunduz v. New York Post Co., Inc.*, 188 A.D. 2d 294, 294 (1st Dep't 1992)). Consistent with this, "[a] newspaper need not choose the most delicate word available in constructing its headline," and it is instead "permitted some drama in grabbing its reader's attention." *Id*. And even headlines that are "unfortunate, sensationalist and drafted simply to gamer attention" are not actionable if they are a "fair index of the underlying article." *St. Louis v. NYP Holdings, Inc.*, 2017 WL 887255, at *2 (Sup Ct. N.Y. Cty. Feb. 6, 2017). Whether "a headline is a fair index

of the body of the article is a question of law." *Kesner v. Dow Jones & Co., Inc.*, No. 20-CY-3454 (PAE), 2021 WL 256949, at *12 (citing *Mondello v. Newsday, Inc.*, 6 A.D.3d 586, 587 (2d Dep't 2004)). In conducting this analysis, "[c]ontext is key," and "[t]he dispositive inquiry is whether a reasonable reader could have concluded that the article[] w[as] conveying [defamatory] facts." *Triano v. Gannett Satellite Info. Network, Inc.*, No. 09-CV-2497 (KMK), 2010 WL 3932334, at *5 (S.D.N.Y. Sept. 29, 2010) (quoting *Finkel v. Dauber*, 906 N.Y.S. 2d 697, 701, 702 (Sup. Ct. 2010)) (alterations in original). In addition, where, as here, the headline does not identify the defamation plaintiff by name, the headline is "not independently actionable as defamation" and "must instead be evaluated in the context of the entire article." *Kesner*, 2021 WL 256949, at *16 (citation omitted); see also Triano, 2010 WL 3932334, at *4 (collecting cases).

Applying these principles, the Court concludes that as a matter of law, the headline fairly indexes the content of the article and that the fair index privilege applies. BYD does not contend that the article's summary of the NDAA legislative proceedings is inaccurate or false; it challenges the headline on the basis of its contention that President Trump did not "blacklist" BYD. But the article makes clear that the headline references the NDAA. Its second paragraph explains that BYD was "prohibited by law from bidding for some federal contracts in the United States." And in providing context for the legislation, the article also explains that the NDAA "bans federal funds from being used to buy BYD electric buses" and that President Donald Trump "signed the ban into law in December." *See* Compl., Ex. B at 68. The article also

provides context for why BYD, among a select few other companies, was within the scope of the provision, including Senator Jon Cornyn's reference to BYD in explaining his reasons for supporting it. And while the headline references President Trump as the relevant actor, the article also makes clear that Congress included the provision in the NDAA and that President Trump's role was limited to signing the NDAA into law.

BYD takes umbrage at the reference to a "blacklist," but the context of the article makes clear to a reasonable reader that the reference to a "blacklist" invokes a more colloquial use one that at most constitutes "rhetorical hyperbole." *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). Analogously, in *McDougal v. Fox News Network, LLC* the court concluded that the use of the word "extortion" was not actionable, even though the elements of extortion were not present, because the use of the word "extortion" was mere rhetorical hyperbole. *See McDougal v. Fox News Network, LLC*, No. 19-CV-l1161 (MKV), 2020 WL 5731954, at *5-6 (S.D.N.Y. Sept. 24, 2020). That same principle governs here. The headline conveys the substantial truth that the relevant provision of the NDAA sought to address the effect that BYD, as one of a few companies affected by the provision, could outbid American rivals. And because the article sets forth the full context of the NDAA, no reasonable reader would conclude that the headline referenced a literal blacklist. "[A] person reading the article"—as necessary to identify BYD as the company referenced in the headline—"would understand the headline's locution." *Kesner*, 2021 WL 256949, at *16; *see also*

Triano, 2010 WL 3932334, at *5.

The cases on which BYD relies are readily distinguishable, for they involve headlines that directly named the defamation plaintiffs and were thus independently actionable. In *Schermerhorn v. Rosenberg*, 73 A.D.2d 276 (2d Dep't 1980), for instance, the headline "Schermerhom Says NDDC Can Do Without Blacks"—identified the plaintiff by name. The court reasoned that "[a] headline is often all that is read by the casual reader and therefore separately carries a potential for injury as great as any other false publication." *Schermerhorn,* 73 A.D. 2d at 287. That is inapplicable here; to understand that the headline referenced BYD, a reasonable reader would have to read the article, and in doing so would understand the full context and the hyperbolic nature of the language. In addition, unlike here, the headline in *Schermerhorn* was defamatory because it falsely attributed speech to the plaintiff. *See White v. Berkshire-Hathaway, Inc*., 802 N.Y.S. 2d 910, 912 (Sup. Ct. 2005); *Chaiken v. VVPubl'g Corp*., 907 F. Supp. 689, 698 (S.D.N.Y. 1995), *aff'dsub nom. Chaiken v. VV Pub. Corp*., 119 F.3d 1018 (2d Cir. 1997). Along similar lines, in *Kaelin v. Globe Communications Corp*., 162 F.3d 1036 (9th Cir. 1998), the court concluded that the clear import of the headline—which read "COPS THINK KATO DID IT" was that the defamation plaintiff was suspected of murder, whereas the article, located 17 pages away from the cover, made clear that he was suspected only of perjury. *Id*. at 1041. The distance between the headline and the article exacerbated the potentially misleading nature of the headline. By contrast, the headline here does no such thing; a reader would not

know that the headline referred to BYD until reading the article, and no reasonable reader would conclude that the headline's reference to a "blacklist" was meant to be literal or that the headline contradicts the substance of the article.

Separately, BYD's claim regarding the headline also fails because the headline and the article are privileged under New York Civil Rights Law Section 74, which provides, in relevant part, that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding." The New York Court of Appeals has explained that "[w]hen determining whether an article constitutes a 'fair and true' report" for purposes of Section 74, "the language used therein should not be dissected and analyzed with a lexicographer's precision." *Holy Spirit Ass'n for Unification of World Christianity v. New York Times Co.*, 49 N.Y. 2d 63, 68 (1979). Accordingly, "[a] fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated." *Id.* at 67 (citation omitted). VICE contends, convincingly, that its reporting on the NDAA and on the inclusion of that provision constitutes a fair and true report of a legislative proceeding as contemplated by Section 74.

BYD does not respond to this argument in its opposition brief. "Plaintiffs' failure to oppose Defendants' specific argument in a motion to dismiss is deemed waiver of that issue." *Kao v. Brit. Airways, PLC*, No. 17-CV-0232 (LGS), 2018 WL 501609, at *5 (S.D.N.Y. Jan. 19, 2018) (citing *Arista Records, LLC v.*

Tkach, 122 F. Supp. 3d 32, 38-39 (S.D.N.Y. 2015)). Accordingly, this provides separate grounds to conclude that the headline and the relevant content of the article are privileged and therefore not actionable. Even if BYD had opposed this argument, however, the Court would conclude that the article provides a substantially fair and true report of the legislative proceedings that leave the reader with an accurate impression of how the NDAA came to bar federal funds from going to BYD. "New York courts adopt a 'liberal interpretation of the 'fair and true report' standard o f . . . § 74 so as to provide broad protection to news accounts of . . . proceedings." *Friedman v. Bloomberg L.P.*, 884 F.3d 83, 93 (2d Cir. 2017) (quoting Becher v. Troy Publ'g Co., 183 A.D. 2d 230, 233 (N.Y. App. Div. 3d Dep't 1992) (alterations in original). Thus, "[a] statement is deemed a fair and true report if it is 'substantially accurate,' that is 'if, despite minor inaccuracies, it does not produce a different effect on a reader than would a report containing the precise truth.'" Id. (quoting *Karades v. Ackerley Grp. Inc.*, 423 F.3d 107, 119 (2d Cir. 2005)). The headline here and the corresponding text in the article fall within the scope of § 74, for even if the language used is at times hyperbolic, the discussion of the legislative process is "fair and true" and conveys accurately the nature of the proceedings. *Test Masters*, 603 F. Supp. 2d at 589.

Under both the fair index privilege and New York Civil Rights Law Section 74, the headline is nonactionable for defamation and BYD's claims relying on the headline fail on these bases.

C. BYD fails to plausibly allege actual malice

In addition to challenging the headline, BYD claims that several aspects of the article as they relate to the Report are defamatory. To plausibly plead a defamation claim, a public-figure plaintiff must a show "that an allegedly libelous statement was made with actual malice, that is, made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" Palin, 940 F.3d at 809 (quoting *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173—74 (2d Cir. 2001)).

The actual malice standard is subjective. *Khan v. New York Times Co.*, 269 A.D. 2d 74, 76 (1st Dep't 2000). "A 'reckless disregard' for the truth requires more than a departure from reasonably prudent conduct." Id. at 77. The standard covers "only those false statements made with the high degree of awareness of their probable falsity." *Garrison v. State of La.*, 379 U.S. 64, 74 (1964). The allegations, that is, must "permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [its] publication." *St. Amantv. Thompson*, 390 U.S. 727, 731 (1968); *see also Biro II*, 807 F.3d at 546. To survive a motion to dismiss, a plaintiff may plausibly plead actual malice by alleging that "a story [was] fabricated by the defendant" if the defendant provides no source for the allegedly defamatory statements or if the purported source denies giving the information," or by "pointing] to the fact that the allegedly defamatory statements were 'based wholly on an unverified anonymous telephone call' or were published despite 'obvious [specified] reasons to doubt the veracity of the informant or the accuracy of his reports,'" or by

emphasizing the "'inherently improbable' nature of the statements themselves." *Biro II* , 807 F.3d at 545-46 (citing *St. Amant*, 390 U.S. at 732). While the list is not exhaustive, it provides a useful guidepost for the kinds of allegations that are pled with sufficient specificity to survive a motion to dismiss.

1. BYD fails to plausibly allege that VICE acted knowingly

The Court first assesses whether BYD has plausibly pled that VICE acted knowingly. BYD sets forth no nonconclusory allegations to support the proposition that VICE made any defamatory statements with knowledge that the statements were false. At most, its conclusory allegations rely on a purported inference that VICE must have known that it was misreporting the contents of the Report in its article or that the headline was drafted with actual malice. *See* Compl. 7, 31; PI. Opp. Br. at 6, 8. Even drawing all reasonable inferences in BYD's favor, however, the claim fails.

BYD fails to plausibly establish any basis of subjective knowledge. The Complaint alleges no nonconclusory facts that support the proposition that VICE knew that it was reporting falsities. Instead, in conclusory fashion the Complaint asserts that "[p]rior to publication, VICE Media knew that there was no 'blacklist', and knew that the contents of the ASPI Report did not support its claim regarding BYD's alleged use of forced labor in its supply chain." Compl ¶31. In addition, at no point does BYD make any allegations about specific individuals at VICE to whom such knowledge could be imputed. This is

relevant because "the state of mind required for actual malice would have to be brought home to the persons in the . . . organization having responsibility for the publication" of the article. *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964). Even at this juncture, the allegations are insufficient. *See Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013) ("States of mind may be pleaded generally, but a plaintiff still must point to details sufficient to render a claim plausible.").

It is true that "court[s] typically will infer actual malice from objective facts," in recognition of the fact that " a defendant in a defamation action will rarely admit that he published the relevant statements with actual malice." *Biro II*, 807 F.3d at 545 (citing *Celle*, 209 at 183 (quotation marks omitted)). Thus, that the Complaint is devoid of any nonconclusory allegations does not end the inquiry into whether actual malice is adequately pled. Even then, none of the objective facts alleged in the Complaint plausibly support a reasonable inference that anyone at VICE knowingly falsified or misrepresented what the ASPI Report said.

To allege actual malice, BYD asserts that subjective knowledge can be assumed due to the fact that, according to BYD, the headline is misleading and that the article misstates what the ASPI Report said about BYD. The argument appears to conflate the falsity element of a defamation claim with the actual malice requirement that applies to limited-purpose public figures. But "inaccuracy itself will not demonstrate 'actual malice' in a libel case." *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1350 (S.D.N.Y.

1977); *see also Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 511 & n.30 (1984) (noting that falsity does not establish knowledge of falsity or reckless disregard of truth); *Kramer v. City of New York*, No. 04-CV-106 (HB), 2004 WL 2429811, at *8 (S.D.N.Y. Nov. 1, 2004). Without any corroborating allegations that could establish that someone at VICE knew that it was misrepresenting the contents of the ASPI Report, the argument that subjective knowledge can be inferred from the purportedly false statements does not conform to the plausibility standard that applies to pleading actual malice. See *Biro II*, 807 F.3d at 545.

Even assuming that BYD could establish a plausible inference in such a manner, however, the claim of subjective knowledge in this case is unavailing. Notably, the article does not assert as truth that BYD had Uyghurs working in its supply chains; rather, it states that BYD was one of the 83 companies "identified in the report." Compl., Ex. B at 73. Furthermore, the article also includes BYD's previous statements denying allegations of labor abuses and noting that "the company has been called a 'model employer' by labor advocates." *Id*. at 73-74. It is true, of course, that "merely reporting what another has said obviously does not insulate a reporter from liability for defamation." *Stern v. Cosby*, 645 F. Supp. 2d 258, 282 (S.D.N.Y. 2009). But the manner in which the information was presented is nonetheless relevant; rather than VICE stating as truth the allegations contained in the Report, it provided a link to the Report and it cited BYD's prior denials of similar allegations. *See, e.g., Harte—Hanks Comms., Inc. v. Connaughton,* 491 U.S. 657, 695 (1989)

(Blackmun, J., concurring) ("[T]his Court's decisions dealing with actual malice have placed considerable emphasis on the manner in which the allegedly false content was presented by the publisher. Under our precedents, I find significant the fact that the article in this case accurately portrayed Thompson's allegations as allegations, and also printed Connaughton's partial denial of their truth.") (citations omitted)). *See also Ryan v. Brooks*, 634 F.2d 726, 729, 732-34 (4th Cir. 1980) (declining to find actual malice as a matter of law where the defendant merely summarized two prior news accounts); *Adelson v. Harris*, 973 F. Supp. 2d 467, 502-03 (S.D.N.Y. 2013), aff'd, 876 F.3d 413 (2d Cir. 2017) (collecting cases).

To argue that BYD acted with subjective knowledge of the alleged falsity of its statements, BYD relies on *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), going so far as to say that its theory of actual malice is "the same" as the Supreme Court's theory in *Masson*. *See* PI. Opp. Br. at 9. But the present case is readily distinguishable. The key issue in *Masson* involved the journalist's fabrication of quotations—there, the journalist *quoted* the plaintiff as saying things that the plaintiff never said. *See Masson*, 501 U.S. at 502. The Court in *Masson* held that minor alterations of actual quotations were not actionable unless those alterations effected a "material change in the meaning conveyed by the statement." *Id.* at 517.

But *Masson* is of limited utility to BYD because, even read liberally and finding all inferences in its favor, BYD's claim is not that VICE fabricated any

quotations; the core of BYD's claim is that VICE misrepresented what the ASPI Report actually found, not that VICE quoted the report as saying something it never said. Contrary to the alterations at issue in *Masson*, BYD's allegation of subjective knowledge is further rendered implausible because the objected-to language in the article—that "BYD was one of 83 companies identified in the report as using forced Uighur labor in its supply chain," see Compl. ¶30—parallels certain parts of the ASPI Report. The Report states that "Uyghurs are working in factories that are in the supply chains of at least 83 well-known global brands in the technology, clothing, and automotive sectors," and it lists BYD as one of those 83 brands. Compl., Ex. A, ASPI Report, at 3, 5. And the Report also claims that "27 factories in nine Chinese provinces that are using Uyghur labour transferred from Xinjiang since 2017," and that those "claim to be part of the supply chain of 83 well-known global brands," including BYD. *Id.* at 4—5. The circumstances are thus different from the misquoting at issue in *Masson*. *See Themed Restaurants, Inc. v. Zagat Surv.*, LLC, 781 N.Y.S.2d 441, 447 (Sup. Ct. 2004), aff'd, 21 A.D. 3d 826 (1st Dep't 2005) (in resolving a motion to dismiss, noting that "neither imprecise phrasing nor simple misinterpretation render a statement actionable"). As the Court explained in *Masson*, "[i]f every alteration constituted the falsity required to prove actual malice, the practice of journalism, which the First Amendment standard is designed to protect, would require a radical change, one inconsistent with our precedents and First Amendment principles." *Masson*, 501 U.S. at 514. Even drawing all reasonable inferences in BYD's favor, the alleged misrepresentations in the

article do not fall within the ambit of material alterations that might plausibly sustain an actual malice claim without any supporting factual allegations.

BYD's reliance on *Palin v. New York Times Co.*, 940 F.3d 804 (2d Cir. 2019), is also misplaced. In *Palin*, the Second Circuit concluded that actual malice was adequately alleged because (1) the speaker of defamatory statements possessed an editorial and political advocacy background sufficient to suggest he published the statements with deliberate or reckless disregard for their truth, in light of the fact that he had previously seen publication of articles that dispelled the allegations of the publication at issue and that there were specific and nonconclusory allegations regarding his political bias toward the plaintiff; (2) the drafting and editorial process of the statements in question lent itself to a reasonable inference of deliberate or reckless falsification; (3) the article hyperlinked to a source that directly contradicted the allegedly defamatory statements, which further supported such an inference; and (4) the newspaper's subsequent correction to the allegedly defamatory article did not undermine the plausibility of that inference. *See Palin*, 940 F.3d at 813-15; *see also McDougal v. Fox News Network, LLC*, No. 19-CV-l1161 (MKV), 2020 WL 5731954, at *8 (S.D.N.Y. Sept. 24, 2020). Unlike in *Palin*, there are no allegations here to suggest that any journalists at VICE had a similar editorial background, and the only allegations of bias are impermissibly conclusory. *See* PI. Opp. Br. at 1. Furthermore, there are no factual allegations regarding the drafting or editorial process of the statements in question that would render plausible a claim of actual malice. Finally, unlike in *Palin*, BYD

advances no nonconclusory allegations of subjective knowledge; in *Palin*, the Second Circuit deemed it relevant that the editor had previously served as an editor for publications that had debunked the allegedly defamatory statements. *See Palin*, 940 F.3d at 814. Indeed, further distinguishing this case from Palin is the fact that there are no allegations specific to the individuals responsible for the allegedly defamatory statements. See *Sullivan*, 376 U.S. at 287. BYD's theory that *Palin* compels denial of the motion to dismiss because at the motion to dismiss stage, "[t]he test is whether the complaint is plausible, not whether it is less plausible than an alternative explanation," see PI Opp. Br. at 10-11 (quoting *Palin*, 940 F.3d at 815), misses the point. The Court is not resting its conclusion on a theory that VICE's theory is more plausible than BYD's; rather, the Court concludes that BYD's theory that VICE fabricated something the report said is implausible, considering the parallels between what is stated in the Report and what BYD objects to in the article.

At this stage, BYD is, of course, entitled to have that all reasonable inferences drawn in its favor. But its claim that VICE acted knowingly is unsupported by any factual allegations in the Complaint. And even at this juncture, BYD's claim that knowledge can be inferred from the Complaint on the basis of the text of the article is implausible. "The truth of factual allegations that are contradicted by documents properly considered on a motion to dismiss need not be accepted." *In re Aegon N.V. Sec. Litig.*, No. 03-CV-0603 (RWS), 2004 WL 1415973, at *5 (S.D.N.Y. June 23, 2004); *see also Rapoport v. Asia E/ecs. Holding Co.*, 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000). For these

reasons, BYD has failed to state a claim that VICE acted with knowledge of the alleged falsities, even after drawing all reasonable inferences in its favor.

2. BYD fails to plausibly allege that VICE acted with reckless disregard for the truth

The Court next assesses whether the facts in the Complaint plausibly establish that VICE acted with reckless disregard for the truth. For purposes of actual malice, recklessness is measured not by "whether a reasonably prudent man would have published, or would have investigated before publishing," but instead "whether there is sufficient evidence 'to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" *Church of Scientology Int 7 v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001) (citing *St. Amant*, 390 U.S. at 731).

As above, there are no factual allegations regarding VICE's subjective knowledge, including that VICE harbored any doubts about the veracity of its reporting. BYD recapitulates its arguments as to actual knowledge by framing them in the alternative as reckless disregard for the truth. *See* PI. Opp. Br. at 1. But as above, without any factual predicate to support the conclusory assertion that VICE acted with reckless disregard for the truth, any claim as to an inference of actual malice based on the text of the article fails. Even read in the light most favorable to BYD, the article's language, standing alone, does not surpass actual malice's "high bar." *McDougal v. Fox News Network, LLC*, No. 19-CV-l 1161 (MKV), 2020 WL 5731954, at *8 (S.D.N.Y. Sept. 24, 2020).

To the extent that BYD argues that VICE acted with actual malice by relying on a single source, the claim runs contrary to longstanding principles governing defamation suits. "[R]eliance on anonymous or unreliable sources without further investigation may support an inference of actual malice," where the plaintiff includes additional allegations to buttress that inference. *Biro II*, 807 F.3d at 546 (emphasis added); *see also Cabello-Rondon v. Dow Jones & Co., Inc.*, 720 F. App'x 87, 89 (2d Cir. 2018). BYD alleges that ASPI is "biased and discriminatory against China and Chinese businesses," that "ASPI has been extensively and publicly criticized for its work," and that "[t]he Wikipedia page for ASPI contains a section devoted to criticism of the organization." Compl. ¶¶19-20. And BYD also alleges that ASPI has "an anti-China agenda" and that it "receives funding from strategic rivals of the Chinese government." *Id.* ¶¶21-22. But none of these allegations, even read with all inferences drawn in BYD's favor, plausibly establish that VICE recklessly disregarded the truth in reporting, as none come close to plausibly alleging that anyone at VICE was "subjectively aware that the source was unreliable." *Secord v. Cockburn*, 747 F. Supp. 779, 789 (D.D.C. 1990).

BYD's claim that VICE should have investigated ASPI's reputation prior to citing the Report also fails as a matter of law. "A failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). "[T]here is no

rule that an author must conduct an investigation absent a showing that he had reason to doubt the veracity of his sources, or possessed other information leading him to question the truth of his assertion." *World Boxing Council v. Cosell*, 715 F. Supp. 1259, 1266 (S.D.N.Y. 1989); *see also Cabello-Rondon v. Dow Jones & Co., Inc.*, No. 16-CV-3346 (KBF), 2017 WL 3531551, at *9 (S.D.N.Y. Aug. 16, 2017), *aff'd*, 720 F. App'x 87 (2d Cir. 2018). None of the facts in the Complaint allege that VICE had "obvious reasons" to doubt the veracity of ASPI prior to publishing or that it possessed information that should have put it on notice as to the veracity of the report. *See Biro v. Conde Nast ("Biro I*), 963 F. Supp. 2d 255, 278, 285 (S.D.N.Y. 2013), *aff'd*, 807 F.3d 541 (2d Cir. 2015), and aff'd, 622 F. App'x 67 (2d Cir. 2015); *see also Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 56, 58 (1st Cir. 2012) (noting that a failure to perform an "additional investigation" was insufficient to allege actual malice).

BYD asserts that had VICE researched ASPI's reputation, including on Wikipedia, it would have been put on notice that ASPI has been criticized in the past for alleged bias. *See* Compl. ¶¶20-22. But BYD's theory would impose on VICE a duty to investigate even in circumstances where VICE had no subjective reason to doubt the veracity of its sources; the claim is essentially that had VICE investigated, it would have learned about the criticisms that have been directed at ASPI in the past. In light of the fact that the Complaint is devoid of any factual allegations to support the proposition that there were "obvious reason[s]" why VICE should have been on notice that it had a duty to investigate further, such a failure to

investigate would at most constitute negligence. *Cf. Schatz*, 669 F.3d at 58. Indeed, other than the Complaint's conclusory language, BYD's allegations amount to a claim that VICE acted "negligently" or that it would have been "prudent" to verify prior to publishing. *Biro I*, 963 F. Supp. 2d at 278. But that is not the test for actual malice; "the operative question is whether a defendant failed to investigate in the face of 'actual, subjective doubts as to the accuracy of the story.'" *Id.* Even read in the light most favorable to BYD, the facts alleged in the Complaint do not support such a theory, and the allegations do not rise to the level of actual malice.

In sum, stripping the Complaint from its barebones assertions of subjective knowledge makes clear that the remaining factual content does not "permit[] the reasonable inference that the defendant is liable" for the kind of subjective knowledge BYD is claiming here. *Shay v. Walters*, 702 F.3d 76, 82-83 (1st Cir. 2012) (internal quotation marks and citation omitted); *see also Biro I,* 963 F. Supp. 2d at 276, 280. There are no facts to support a theory of subjective knowledge, even after drawing all reasonable inferences in BYD's favor, such that a finding of actual malice would be proper on those grounds. And in light of the deficit of any nonconclusory allegations that VICE acted with knowledge of falsity, BYD's claim as to knowledge fails.

Because BYD has failed to plead facts that plausibly establish that VICE acted with actual malice, its defamation claim fails as a matter of law. Accordingly, the motion to dismiss is GRANTED.

VICE also argues that the neutral reportage privilege protects its statements regarding the ASPI Report. See Def. Br. at 23-25. The Court does not reach this argument because it concludes that BYD has failed to plausibly allege actual malice.

D. The dismissal is with prejudice

BYD was given an opportunity to amend after VICE filed its motion to dismiss, Dkt. No. 21, and it opted not to do so, Dkt. No. 22. Because BYD was previously afforded the opportunity to amend its Complaint, the Complaint is dismissed with prejudice. *See De Jesus v. Sears, Roebuck & Co.,* 87 F.3d 65, 72 (2d Cir. 1996) (dismissal with prejudice is proper when "a party has been given ample prior opportunity to allege a claim"). In any event, leave to amend may be denied "when amendment would be futile." Tocker v. Philip Morris Cos., 470 F.3d 481, 491 (2d Cir. 2006). The Court concludes that amendment would be futile, which provides further grounds for dismissal with prejudice.

IV. CONCLUSION

For the reasons stated above, VICE'S motion to dismiss is GRANTED with prejudice. Because the Court resolves this motion on the papers, VICE's request for oral argument, Dkt. No. 27, is denied. The Clerk of Court is respectfully directed to enter judgment and close the case.

This resolves Dkt. Nos. 17 and 27.

SO ORDERED.
Dated: March 31, 2021
New York, New York
ALISON J. NATHAN
United States District Judge

SECOND CIRCUIT OPINION

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of March, two thousand twenty-two.

Present: DEBRA ANN LIVINGSTON,
Chief Judge,
AMALYA L. KEARSE,
EUNICE C. LEE,
Circuit Judges.

BYD COMPANY LTD.,
Plaintiff-Appellant,

v. 21-1097

VICE MEDIA LLC,
Defendant-Appellee.

For Plaintiff-Appellant: DILAN A. ESPER and Charles J. Harder, Harder LLP, New York, NY.

For Defendant-Appellee: RACHEL F. STROM and Amanda B. Levine, Davis Wright Tremaine LLP, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Nathan, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant BYD Company Ltd. ("BYD") appeals from a March 31, 2021, judgment of the

United States District Court for the Southern District of New York (Nathan, *J.*), granting Defendant-Appellee VICE Media LLC's ("VICE") motion to dismiss BYD's complaint (the "Complaint") pursuant to Federal Rule of Civil Procedure 12(b)(6). In the Complaint, BYD brought one count of defamation under New York law, alleging that VICE defamed it when it published an article on its website on April 11, 2020 (the "VICE Article"), titled: "Trump Blacklisted This Chinese Company. Now It's Making Coronavirus Masks for U.S. Hospitals." App'x at 77. The district court dismissed the Complaint with prejudice on the ground that it fails to state a claim upon which relief can be granted because, among other reasons, the content of the headline of the VICE Article is privileged under New York law, and the Complaint did not plausibly plead actual malice with respect to an allegedly defamatory statement in the body of the VICE Article.[1] BYD timely appealed. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, which we reference only as necessary to explain our decision to affirm.

"We review *de novo* the grant of a motion to dismiss under Rule 12(b)(6) . . . , accepting as true the factual allegations in the complaint and drawing all inferences in the plaintiff's favor." *Biro v. Conde Nast* ("*Biro II*"), 807 F.3d 541, 544 (2d Cir. 2015). To survive

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[1] The parties' briefs assume that New York law controls. That is "sufficient to establish choice of law." *Fed. Ins. Co. v. Am. Home Assur. Co.*, 639 F.3d 557, 566 (2d Cir. 2011).

a motion to dismiss, "a complaint must contain 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A. "Blacklist" Headline

BYD argues on appeal that the district court erred in concluding that the claims advanced in the headline of the VICE Article are protected under New York's fair and true reporting privilege. Section 74 of the New York Civil Rights Law provides, in relevant part, that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding." N.Y. Civ. Rights Law § 74. "To be 'fair and true,' the account need only be 'substantially accurate.'" *McRedmond v. Sutton Place Rest. & Bar, Inc.*, 851 N.Y.S.2d 478, 480 (1st Dep't 2008) (internal quotation marks and citation omitted). "A report is 'substantially accurate' if, despite minor inaccuracies, it does not produce a different effect on a reader than would a report containing the precise truth." *Karedes v. Ackerley Grp., Inc.*, 423 F.3d 107, 119 (2d Cir. 2005) (internal quotation marks and citation omitted). " A fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated." *Holy Spirit Ass'n for Unification of World Christianity v. New York Times Co.*, 49 N.Y.2d 63, 67 (1979) (internal quotation marks, citation, and alteration omitted). Moreover, "[w]hen determining whether an article constitutes a 'fair and true' report, the language used therein should not be dissected and analyzed with a

lexicographer's precision." *Id.* at 68. "Nor should a fair report which is not misleading, composed and phrased in good faith under the exigencies of a publication deadline, be thereafter parsed and dissected on the basis of precise denotative meanings which may literally, although not contextually, be ascribed to the words used." *Id.*

The district court properly concluded that both the headline and corresponding text of the VICE Article are privileged under New York Civil Rights Law § 74. The claim that BYD was "blacklisted" by President Trump is supported by the legislative history and text of Section 7613 of the National Defense Authorization Act for Fiscal Year 2020 ("NDAA"), signed into law by President Trump, which provides that federal funds

> shall not be used . . . for the procurement of rolling stock for use in public transportation if the manufacturer . . . is owned or controlled by, is a subsidiary of, or is otherwise related legally or financially to a corporation based in a country that—
>
> > "(i) is identified as a nonmarket economy country (as defined in section 771(18) of the Tariff Act of 1930 (19 U.S.C. 1677(18))) as of the date of enactment of this subsection;
> >
> > "(ii) was identified by the United States Trade Representative in the most recent report required by section 182 of the Trade Act of 1974 (19 U.S.C. 2242) as a foreign country included on the priority watch list defined in subsection (g)(3) of that section; and

> "(iii) is subject to monitoring by the Trade Representative under section 306 of the Trade Act of 1974 (19 U.S.C. 2416).

NDAA, Pub. L. No. 116-92, § 7613, 133 Stat. 1198, 2314 (2019). Because China meets the criteria of § 7613, as legislators, commentators, and BYD itself have acknowledged, *see* Supp. App'x at 16–17, 21, 29, 34–35, 37, the NDAA prohibits the use of federal funds for the purchase of rail cars and buses from BYD, an electric vehicle manufacturer based in Shenzhen, China, thus placing it on a forbidden list of manufacturers — in other words, a "blacklist." While BYD may wish for us to apply a "lexicographer's precision" to this term, "pars[ing] and dissect[ing]" a claim that is substantially true, that is not the law. *Holy Spirit*, 49 N.Y.2d at 68. We therefore affirm the district court's holding that the headline of the VICE Article is privileged under New York Civil Rights Law § 74.[2]

B. Statement Regarding Forced Labor

BYD next argues that the district court erred in concluding that the Complaint failed to plausibly allege actual malice with respect to a statement in the

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[2] BYD also appeals the district court's holding that the headline of the VICE Article is protected as a "fair index" of the Article's contents. *See Karedes*, 423 F.3d at 115 n.1 (recognizing the existence of a "fair index" privilege under New York law). Because we affirm the district court's decision on the alternative ground that the headline is privileged as a fair and true report of a legislative proceeding, we need not reach that holding.

body of the VICE Article claiming that a report from the Australian Strategic Policy Institute (the "ASPI Report") "identified" BYD as "one of 83 companies . . . using forced Uighur labor in its supply chain." App'x at 83. BYD asserts that VICE drafted that statement with actual malice because the ASPI Report "never said that BYD used forced labor in its supply chain." Br. of BYD at 12.

"Limited-purpose public figures who seek damages for defamatory statements must show that the statements were made with 'actual malice'—that is, with knowledge that the statements were false or with reckless disregard as to their falsity."[3] *Biro II*, 807 F.3d at 544. The standard imposes a "heavy burden of proof, a burden that is designed to assure to the freedoms of speech and press that breathing space essential to their fruitful exercise." *Contemp. Mission, Inc. v. New York Times Co.*, 842 F.2d 612, 621 (2d Cir. 1988) (internal quotation marks and citations omitted). "Despite its name, the actual malice standard does not measure malice in the sense of ill will or animosity, but instead the speaker's subjective doubts about the truth of the publication." *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001). "Although actual malice is subjective, a court typically will infer actual malice from objective facts, understanding that a defendant in a defamation action will rarely admit that he published the relevant statements with actual malice." *Biro II*, 807 F.3d at 545 (internal quotation marks and citation omitted).

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[3] BYD has conceded that it is a limited-purpose public figure for purposes of this appeal.

"The reckless conduct needed to show actual malice is not measured by whether a reasonably prudent man would have published, . . . but by whether there is sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Scientology*, 238 F.3d at 174 (internal quotation marks and citation omitted). Further, "[a]ctual malice can be established using circumstantial evidence." *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 123 (2d Cir. 2013).

Federal Rule of Civil Procedure 9(b) allows malice to "be alleged generally," Fed. R. Civ. P. 9(b), "but 'does not give [a plaintiff] license to evade the less rigid—though still operative—strictures of Rule 8.'" *Biro II*, 807 F.3d at 545 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 686–87 (2009)). And under Rule 8's plausible pleading standard, "a complaint must contain 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* at 544 (quoting *Twombly*, 550 U.S. at 570). "A claim is plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678). "But 'naked assertions' or 'conclusory statements' are not enough." *Id.* (quoting *Iqbal*, 556 U.S. at 678).

The district court properly concluded that the Complaint failed adequately to plead actual malice with respect to the VICE Article's statement that the ASPI Report alleged that BYD used forced Uyghur labor in its supply chain. The ASPI Report amply

supports the VICE Article's description of its allegations.[4] The ASPI Report provides:

> In all, ASPI's research has identified 83 foreign and Chinese companies *directly or indirectly benefiting from the use of Uyghur workers* outside Xinjiang through potentially abusive labour transfer programs as recently as 2019: . . . BYD . . . .

App'x at 26 (emphasis added). To the extent that there is an appreciable difference in meaning between the statement that BYD used forced Uyghur labor "in its supply chain," App'x at 83, and the statement that BYD "directly or indirectly benefit[ted]" from such labor, App'x at 26, standing alone, it is far too insignificant to support a claim of actual malice.

Moreover, the VICE Article's description is buttressed by other statements in the ASPI Report as well. The ASPI Report further alleges that a company by the name of Hubei Yihong Precision Manufacturing Co. Ltd ("Hubei Yihong") used forced Uyghur labor, that Hubei Yihong is a subsidiary of Dongguan Yidong Electronic Co. Ltd ("Dongguan Yidong"), and that Dongguan Yidong "suppl[ies]

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[4] We may consider both the VICE Article and the ASPI Report because both documents were attached as exhibits to the Complaint. *See United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 106 (2d Cir. 2021) ("In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint.").

directly to BYD." App'x at 55. These allegations place forced Uyghur labor directly into BYD's supply chain. Finally, the ASPI Report contains a flow chart purporting to show forced Uyghur labor moving from China's Xinjiang Province to Hubei Yihong, and components manufactured at Hubei Yihong moving to Dongguan Yidong, and finally, to BYD. App'x at 45. In other words, *through BYD's supply chain*. We therefore conclude that BYD's actual malice claim is not "plausible on its face" under Fed. R. Civ. P. 8, and that the district court did not err in so holding.[5] *Biro II*, 807 F.3d at 544 (quoting *Twombly*, 550 U.S. at 570).

We have considered BYD's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court

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[5] We note also that BYD's pleading with respect to actual malice is also flawed in that it does not "identify the individual responsible for publication" of the challenged statements in the VICE Article. *Palin v. New York Times Co.*, 940 F.3d 804, 810 n.9 (2d Cir. 2019) (quoting *Dongguk*, 734 F.3d at 123). For when actual malice is at issue, "the critical question is the state of mind *of those responsible for the publication*." *Id.* at 810 (emphasis added). But even if it is assumed *arguendo* that the Complaint implicitly pleads that the authors of the VICE Article, Daniel Newhauser and Keegan Hamilton, acted with actual malice, for the reasons set forth above, the Complaint still fails to meet the pleading standard.