21-1097

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BYD COMPANY LTD.

Plaintiff-Appellant

v.

VICE MEDIA LLC

Defendant-Appellee

Appeal from the United States District Court for the Southern District of New York (Case No. 1:20-cv-03281-AJN, Hon. Alison J. Nathan, presiding)

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

BYD Company Ltd. is a publicly held corporation and has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

Appellant BYD Company Ltd. ("BYD"), a manufacturer of electric buses, personal protective equipment and many other products, was defamed by Appellee VICE Media LLC ("VICE"), an online news organization, which misrepresented in a news article the contents of a non-governmental organization's report (the "ASPI Report"). Specifically, VICE stated in its article that the ASPI Report alleged that BYD used forced labor in its supply chain, and also that then-President Trump "blacklisted" BYD from selling electric buses in the United States. Both of these statements were false. BYD suffered substantial damages as a result of the defamation, and its Complaint so alleges. Specifically, BYD pleaded that several third parties specifically raised the defamatory statements in VICE's article as a reason to delay or terminate contemplated business with BYD.

The District Court erroneously dismissed BYD's Complaint. The District Court held that as a matter of law, BYD had failed to plead "actual malice", i.e., that VICE's statements were made with knowledge of or in reckless disregard of the truth. However, BYD's claims are based on VICE's deliberate misrepresentation of the content of the written ASPI Report, which VICE had in its possession when writing and publishing the article at issue. In other words, VICE: (1) had read the ASPI Report, which it cited and claimed to rely on, and (2) falsely

stated and materially deviated from the contents of the ASPI Report. It is literally impossible for a journalist to falsely state and materially deviate from the contents of a written report, whose contents are known to the journalist, without knowing that the statements are false. If a complaint sufficiently pleads falsity, it sufficiently pleads actual malice as well. Thus, the District Court erred in dismissing the Complaint on the grounds of failure to plead actual malice.

The District Court made a second error: holding that VICE had the right to describe BYD as having been "blacklisted" by former President Trump, when BYD had not in fact been blacklisted. There was no Presidential blacklist of specific companies such as BYD; rather, the U.S. Congress passed a law prohibiting **any** future federal funds from being used to purchase transit vehicles from Chinese-based companies. The article states or strongly implies that BYD was singled out by the U.S. President. But BYD was not singled out at all, nor put onto a list, nor did there even exist any list: either by the President or by Congress.

The result of the District Court's rulings is that BYD cannot pursue its claims for damages suffered based on widely-disseminated statements that falsely portrayed BYD as having engaged in human rights violations so horrible that the U.S. President was moved to blacklist it. This Court should correct the District Court's error and reverse and remand.

JURISDICTIONAL STATEMENT

The District Court had original subject matter jurisdiction under 28 U.S.C. § 1332 because there is complete diversity between the parties and an amount in controversy over $75,000, and personal jurisdiction because VICE resides in the State of New York.

The District Court entered a final judgment on March 31, 2021, and BYD noticed a timely appeal on April 28, 2021. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court err in holding that BYD, as a matter of law, had failed to sufficiently allege actual malice where BYD alleged that VICE materially misrepresented the contents of a written report which VICE claimed to be summarizing?

2. Did the District Court err in holding that the statements in VICE's April 11, 2020 headline and story, falsely claiming that BYD had been "blacklisted" by President Trump, were non-actionable as a matter of law under New York law?

STATEMENT OF THE CASE[1]

BYD (an acronym for "Build Your Dreams"), is a publicly-traded corporation based in China. BYD is 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 front-line personnel during the COVID-19 pandemic, among many other innovative, important and useful products. Appendix at 11. Warren Buffet's company, Berkshire Hathaway, is a major investor in BYD. *Id*. 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. *Id*.

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. *Id*.

On or about April 11, 2020, 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, the Chinese government's

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[1] "In considering a motion to dismiss pursuant to Rule 12(b)(6), the court is required to accept as true the factual allegations in the complaint, draw all reasonable inferences in favor of the plaintiff, and refrain from assessing the weight of the evidence that might be offered in support of the complaint." *Roth v. Jennings*, 489 F.3d 499, 503 (2d Cir. 2007).

treatment of the Uyghur minority in Eastern China. Appendix at 12. VICE falsely claimed that BYD was "using forced Uighur labor in its supply chain" (the "Forced Labor Claim"). *Id*.[2]

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"). *Id*.[3] The ASPI Report, entitled *Uyghurs for Sale: 'Re-education', forced labour and surveillance beyond Xinjiang*, was published on March 1, 2020. Appendix at 12, 15, 20 *et seq*.[4]

The ASPI Report does **not** state that BYD "us[ed] forced Uyghur labor in its supply chain", as the Article claims. Appendix at 12, 15-16. Rather, the ASPI Report merely says that BYD did business with a company, which owned a subsidiary that had used Uyghur forced labor. Appendix at 12, 16. The ASPI Report does **not** say that the subsidiary of the third party company ever produced

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[2] "Uighur" is an alternate spelling of "Uyghur".
[3] ASPI has been extensively and publicly criticized for its work. Appendix at 15. The Wikipedia page for ASPI contains a section devoted to criticism of the organization, including an allegation that its report on a digital identity system had numerous factual errors. *Id*. Critics have claimed that ASPI has an anti-China agenda and seeks to foment a new Cold War with China. *Id*. ASPI receives funding from strategic rivals of the Chinese government. *Id*.
[4] The ASPI Report contains a disclaimer prior to the body of the text, stating: "No person should rely on the contents of this publication without first obtaining advice from a qualified professional." Appendix at 15.

any products or sold any raw materials for BYD, or that the subsidiary was even part of BYD's supply chain. Appendix at 12, 16.

Specifically, the ASPI Report contains only three mentions of BYD; most of its text concerns allegations relating to other companies, such as Nike. Appendix at 15, 20 *et seq*. 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". Appendix at 15-16. No further explanatory text is provided. Appendix at 16.

The only other mention of BYD in the ASPI Report alleges that a company named Dongguan Yidong Electronic Co. Ltd. ("Dongguan") supplies "directly" to BYD. Appendix at 16. 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. *Id*. 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. *Id*.

The Article also contains a second blatantly defamatory statement: that former President Trump "blacklisted" BYD from selling its electric buses in the United States (the "Blacklist Claim"). Indeed, the headline of the Article at issue reads: "Trump blacklisted this Chinese company. Now It's Making Coronavirus Masks for U.S. Hospitals". Appendix at 13, 16.

In fact, there was and is no such "blacklist". What actually occurred is that the U.S. Congress (not President Trump) determined that an entirely separate Chinese company, China Railway Rolling Stock Corporation, a state-owned entity, was using its public subsidies to undercut other producers of transit vehicles and unfairly compete in the market. Appendix at 13, 16. Accordingly, Congress passed, and President Trump signed, language in an omnibus defense authorization bill that prohibited future federal funds from being used to purchase transit vehicles from Chinese-based companies. Appendix at 16. This ban was not connected to any allegation of wrongdoing on the part of BYD, did not create any sort of blacklist, and was the product of Congressional legislation, not any action on the part of President Trump to single out specific bad actors. *Id.*

The Complaint contains extensive allegations of actual malice. The Complaint alleges that, prior to publication, VICE 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. Appendix at 17. The Complaint further alleges that VICE did not rely on any other source to support its claim regarding forced labor, and recklessly disregarded the fact that ASPI was an unreliable source for any such claim, especially when used as the sole source for such an explosive allegation which foreseeably would cause tremendous reputational and economic harm to BYD. *Id*.

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

BYD filed its Complaint on April 27, 2020. Appendix at 5. On August 17, 2020, VICE moved to dismiss the Complaint. Appendix at 7. VICE argued that the Forced Labor Statement either was not made with actual malice or was protected under New York law as "neutral reportage". District Court Dkt. No. 18 at 15-25. VICE further argued that the Blacklist Statement was protected as a "fair index" of the Article as well as a "fair report" of the U.S. government's action in banning Chinese companies from selling transit vehicles. *Id.* at 10-15.

After Opposition and Reply papers were filed, the District Court granted VICE's motion. Appendix at 92 *et seq*. The District Court held that with respect

to the Blacklist Claim, the headline using the term "blacklist" was a "fair index" of the Article, and that it was a "fair report" of the proceedings before the U.S. Congress. Appendix at 99 *et seq*. With respect to the Forced Labor Claim, the District Court held that BYD failed to sufficiently allege actual malice. Appendix at 104 *et seq*.

SUMMARY OF THE ARGUMENT

BYD sufficiently alleged actual malice. Actual malice requires only that the defendant either knew that its statements were false, or recklessly disregarded the truth. In this case, the allegation is that VICE misstated the contents of the ASPI Report. VICE obviously admitted in its story that it had access to and had read the ASPI Report, thus, by definition, if it made a false statement about the report's contents, it did so with knowledge that it was false.

The District Court's analysis of this issue simply missed this central point. The District Court concluded that BYD failed to allege VICE's subjective knowledge that its statements were false, but it is literally impossible that a journalist who materially misstates the contents of a report that is in the journalist's possession could be making an inadvertent false statement. The Court rejected this argument because it supposedly "conflated" falsity with actual malice, but where

the defendant is personally aware of the true facts (such as the content of a written report that it is purporting to summarize in an article), the two issues **are** conflated.

The District Court also erred in construing VICE's Article as if it merely said that BYD was mentioned in the ASPI Report. Construed as a whole, the VICE Article portrayed BYD not merely as mentioned in the report, but actually as having used forced labor itself. VICE specifically said in the Article that BYD "us[ed] forced labor in its supply chain". That statement cannot be construed as merely saying BYD was mentioned in a long report on supply chain issues. The District Court hypothesized a more anodyne, vague article than the one actually published, and held that had VICE published **that** article, it would not have defamed BYD. However, the actual Article that VICE **did** publish falsely accused BYD of using forced labor, and falsely stated that the ASPI Report said that BYD, in fact, used forced labor.

The District Court's judgment as to the Blacklist Claim also should be reversed. The District Court found the headline (saying it was a "blacklist") was a fair index of the article. However, a "blacklist" is a completely different concept from the broad Congressional action prohibiting federal funds from being used to buy transit vehicles from Chinese-based companies, that the Article describes. The

headline tells readers that BYD was singled out as a bad actor; the actual action of Congress did not in any way do so.

For the same reason, the claim of a "blacklist" does not fairly report what Congress actually did. Congress' action did not constitute a presidential "blacklisting" of BYD. Accordingly, the judgment should be reversed.

STANDARD OF REVIEW

"A district court's grant of a motion to dismiss pursuant to [Rule] 12(b)(6) is reviewed *de novo* on appeal." *Gant v. Wallingford Board of Education*, 69 F.3d 669, 672 (2d Cir. 1995).

ARGUMENT

I. BYD HAS PLEADED ACTUAL MALICE.

The District Court's error on actual malice can be summed up simply and succinctly: a journalist writes and publishes a story concerning a written report; the report is available to the journalist; the journalist's story about the report makes material, false statements about its contents.

When this occurs, the false statements are inherently made with actual malice, *i.e.,* with knowledge of or reckless disregard for the truth. Because the journalist had possession of the full content of the report at the time of publication, and materially falsified what the report said, actual malice is a foregone conclusion. In

this situation, when a journalist writes that a material fact is contained in the report, when the alleged fact is actually *not* in the report, this is by definition a knowingly false statement, or at the very least, reckless disregard for the truth. The journalist *knew* what was in the report, but chose to report its contents falsely.

BYD alleges precisely this in its Complaint. The ASPI Report never said that BYD used forced labor in its supply chain. The only substantive allegation contained in the report is that BYD did business with another company (Dongguan), which owned a third company (Hubei), that allegedly used forced labor. The report never connects Hubei to BYD. Yet VICE did, thereby defaming BYD. VICE possessed the ASPI Report, and knew what the ASPI Report said. Nonetheless, VICE published the false statement that BYD "us[ed] forced Uighur labor in its supply chain." This allegation meets the minimal threshold for a plausible allegation of actual malice.

A. BYD is Only Required to Make a *Plausible Allegation* that VICE Published with Knowledge of the Truth or Reckless Disregard for It.

This Court has set forth a liberal standard for the pleading of the actual malice element in a defamation case. "A public-figure plaintiff must plead plausible grounds to infer actual malice by alleging enough facts to raise a reasonable

expectation that discovery will reveal evidence of actual malice." *Biro v. Condé Nast*, 807 F.3d 541, 546 (2d Cir. 2015) (cleaned up).[5]

"Actual malice" refers to knowledge that a statement is false, or reckless disregard for the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

Thus, so long as the Complaint alleges facts that would cause the Court to reasonably expect that at the close of discovery, there would be evidence that VICE knew its statements were false at the time it published them or consciously disregarded the truth, the pleading of actual malice is sufficient.

B. BYD Pleaded Actual Malice Sufficiently.

BYD's Complaint easily meets this standard. BYD incorporated into its Complaint the ASPI Report, which contains only three references to BYD: two generic references to BYD as one of 83 companies which supposedly "benefitted directly or indirectly" from forced labor, with no further explanation, and the allegation that BYD once did business with a company (Dongguan) which owns an unrelated subsidiary (Hubei) with *no connection to BYD*, which had been accused of using forced labor.

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[5] BYD concedes for purposes of this appeal that it is at least a limited purpose public figure.

VICE, in contrast, said this about the ASPI Report: "BYD was one of 83 companies identified in the report as using forced Uighur labor in its supply chain." This is not ambiguous. VICE stated that the ASPI Report concluded that BYD used forced Uyghur labor in its supply chain. The ASPI Report, in fact, never says that. This pleads a plausible theory of not only falsity, but actual malice as well, because VICE read the report that it was falsely summarizing and thus knew that its statement about the report was false. The legal standard merely requires that the pleading allege enough facts that discovery might reveal VICE had knowledge. Under the facts alleged in the Complaint, it was impossible for VICE *not* to know that its statement about BYD was false. VICE had read the ASPI Report, and *knew* the report did not say what VICE said that it said.

C. The District Court's Analysis Is Inconsistent with the *Masson* Case.

The District Court fundamentally erred by misinterpreting the U.S. Supreme Court case that governs cases involving falsified texts. The controlling case is *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). In *Masson*, the magazine argued that even though it altered quotations by the plaintiff in a profile published in the magazine, it did not do so with actual malice. The court held that the actual malice standard in a case involving altered quotations depends on whether

"the alteration results in a material change in the meaning conveyed by the statement". *Id.* at 517.

Applied to this case, if VICE's alteration of what the ASPI Report said materially changed its meaning, then VICE acted with actual malice. Here, there has been such a material change. The ASPI Report said that BYD was one of 83 companies that benefitted, either directly or indirectly, from forced labor, and that BYD did business with a company that owned an unrelated subsidiary that had been implicated in the practice. In contrast, VICE wrote that the ASPI Report concluded that BYD used forced labor in its supply chain. That is a classic case of an alteration that clearly changes the meaning.

In ASPI's telling, BYD may have had a questionable association. In VICE's telling, BYD is enslaving people to make its products. This is precisely the sort of material alteration that *Masson* prohibits.

The District Court purported to distinguish *Masson* because that case involved fabricated quotations by the plaintiff, whereas the case at bar involved fabricated statements from a third party report. However, nothing in *Masson* or any other case recognizes a different standard for fabricating content from third party reports. To the contrary, *Masson* contains broad language that is generally applicable to defamation claims based on the misrepresentation of texts known to the defendant.

Masson, 501 U.S. at 516 ("The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication."). *Masson*'s test—that minor alterations that do not change the meaning are fine, but deliberately changing the meaning satisfies the actual malice requirement—fits just as well with respect to alterations of third party content as it does to alterations of the plaintiff's statements. Moreover, *Masson* derives its test from the general law of defamation, not specific to altered quotations: "The statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced. Our definition of actual malice relies upon this historical understanding." *Masson*, 501 U.S. at 517 (cleaned up). The District Court's cramped construction of *Masson* as only applying to a narrow band of cases involving alterations of the plaintiff's own words was manifestly erroneous.

The District Court further purported to distinguish *Masson* by misapplying its test. The District Court reasoned that "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,' ...—parallels certain parts of the ASPI Report". Appendix at 108. However, this is not the test that *Masson* applies. In *Masson*, some of the fabricated quotes in Janet Malcolm's *New Yorker* article also "paralleled" things that plaintiff Masson actually said; the issue was that Malcolm altered the quotes and

materially changed the meaning. Here, the same thing happened. Just because BYD was one of 83 companies "identified" in the report does not immunize VICE from lying and saying that BYD was identified as *using forced labor* when the report never said that.

The Complaint therefore plausibly alleges a theory of actual malice: that VICE, with the ASPI Report in hand and knowing that it never specifically said that BYD used forced labor in its supply chain, decided to make its story more provocative and attention-grabbing by grossly overclaiming what the report actually said and removing the report's qualifications. At the very least, this Court should conclude that discovery could reveal facts showing that VICE knew that its article was making a material alteration of the ASPI Report's claim regarding BYD (which is the minimal pleading standard for this issue). The District Court erred, and its decision with respect to the Forced Labor Claim should be reversed.

II. BYD PLEADED A SUFFICIENT CAUSE OF ACTION WITH RESPECT TO THE BLACKLIST CLAIM.

The District Court also erred in dismissing the Blacklist Claim. The District Court's reasoning was that the headline that BYD was blacklisted by President Trump was either a "fair index" of the contents of VICE's article, or a "fair report" of what Congress actually did. However, both these doctrines are limited to

substantially accurate summaries, and VICE's headline neither substantially accurately summarized its own article, nor substantially accurately summarized what Congress actually did. Therefore, neither privilege is available and the judgment should be reversed as to the Blacklist Claim as well.

The "fair index" privilege applies to headlines that are "a 'fair index' of the 'substantially accurate' material included in the article". *Test Masters Educational Services v. NYP Holdings, Inc.*, 603 F. Supp. 2d 584, 589 (S.D.N.Y. 2009) (quoting *Gunduz v. New York Post Co.*, 188 A.D. 2d 294, 294 (1st Dep't 1992)). There are thus two elements to the privilege: the headline itself must fairly summarize the content of the article, and the material being summarized must be substantially accurate. The privilege protects "dramatic" or "sensational" headlines. *Test Masters Educational Services*, 603 F. Supp. at 589; *St. Louis v. NYP Holdings, Inc.*, 2017 WL 887255, at *2 (N.Y. Cty. Supr. Ct. Feb. 6, 2017).

The "fair index" rule, however, is not a license for a publisher to put defamatory material (as opposed to merely dramatic or sensationalistic material) into a headline. In *Schermerhorn v. Rosenberg*, 426 N.Y.S.2d 274 (2d Dep't 1980), the court held that the headline "SCHERMERHORN SAYS NDDC CAN DO WITHOUT BLACKS" was defamatory, even though the rest of the article accurately explained that what Schermerhorn, a State Senator, had actually said was

that the NDDC (Newburgh Development District Corporation) Board was probably constitutionally prohibited from creating a preference for Black applicants to the NDDC. The headline was susceptible to multiple interpretations, one of which was defamatory, and thus was not a "fair index" to the article—only a jury could determine the issue. *Id.* at 286, 426 N.Y.S.2d at 283 ("The rule in this State is that '(d)efamatory headlines are actionable though the matter following is not, unless they fairly indicate the substance of the matter to which they refer, and * * * unless they are a fair index of the matter contained in a truthful report.'").

Here, what actually occurred was that Congress passed a law, which President Trump signed, prohibiting states and municipalities from receiving federal funds for the purchase of goods (such as vehicles) sold by Chinese-based companies generally (no companies were singled out). There was no "blacklist", just a general prohibition on how federal funds could be spent. VICE told the world that BYD, specifically, had been blacklisted. This was not a fair index of VICE's article.

The District Court erroneously reasoned that the term "blacklist" was rhetorical hyperbole and that a reader could determine by reading the entire article that BYD was not, in fact, blacklisted. However, a "blacklist" is a term with a definite meaning: as pleaded in the Complaint, "[a] 'blacklist' is defined by the Oxford English dictionary as 'a list of people or things that are regarded as

unacceptable or untrustworthy and should be excluded or avoided.'" Other sources are in accord. *Merriam-Webster's Online Dictionary*, "blacklist" ("1: a list of persons who are disapproved of or are to be punished or boycotted 2: a list of banned or excluded things of disreputable character") (at https://www.merriamwebster.com/dictionary/blacklist); *State v. Dabney*, 141 P. 2d 303, 307 (Okla. Crim. App. 1943) (quoting Black's Law Dictionary: "A list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate . . .").

Under controlling Second Circuit law, a statement is not "rhetorical hyperbole" if it "reasonably implies a defamatory fact capable of being proven false". *Flamm v. American Ass'n of University Women*, 201 F.3d 144, 153 (2d Cir. 2000). A "blacklist" is a real, tangible thing—a list of persons or entities that are unacceptable or untrustworthy. There can be no doubt that VICE meant the term in its common, everyday meaning. VICE was saying that BYD had been singled out by President Trump as being unacceptable and untrustworthy, and thus not eligible to sell its electric buses in the United States. There was nothing hyperbolic about VICE's usage of the term "blacklist".

As for the District Court's claim that the reader could determine what VICE was really saying from the entire article, this flips the fair index privilege on its head

by holding that a publication can say whatever it wants in a headline, no matter how false the impression it gives, so long as the truth is found somewhere deep in the article itself. This essentially removes the "fairness" element of the "fair index" privilege: the problem with a defamatory headline is precisely that the headline is what sticks in the person's mind even if details in the story contradict it. Often a reader reads the headline only, and develops an impression about the subject of the story from only that. A defamatory headline thus can cause substantial harm to the subject of that defamatory statement. Also, readers commonly read a headline and the first paragraph or two, and then move on to another story. In that situation, the subject of the story can be defamed if the true facts are not made clear immediately. One cannot expect the average news reader to read an entire article to obtain the true facts and clarify a defamatory headline. The *Schermerhorn* case illustrates this problem.

Another illustrative case is *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998). In *Kaelin*, the Globe ran the headline "Cops Think Kato Did It", as a headline for a story about O.J. Simpson's famous houseguest. The story, and even the sub-headline, explained that in fact the police suspected him of perjury, not the double murders that Simpson was eventually tried for. But nonetheless, the Ninth Circuit held that Kaelin could bring suit. "Globe argues that the 'it' refers to

perjury. Even assuming that such a reading is reasonably possible, it is not the only reading that is reasonably possible as a matter of law. So long as the publication is reasonably susceptible of a defamatory meaning, a factual question for the jury exists." *Id.* at 1040.

In sum, the fair index privilege protects the right of a journalist to summarize, but not to use headlines that create a false impression. States and municipalities may have been barred from federal dollars to purchase the goods of companies based in China, but BYD was certainly never "blacklisted" by President Trump. VICE did not merely summarize; it created a false impression.

Kesner v. Dow Jones & Co., 2021 WL 256949 (S.D.N.Y. Jan. 26, 2021), cited by the District Court, draws a useful context as to what a "fair index" headline looks like. There, the plaintiff claimed that a headline that said he was at the "center of the SEC pump and dump case" falsely accused him of criminal conduct. However, that headline did not contain any specific allegation that the plaintiff did anything wrong—a witness can be at the center of a pump and dump case; a defense lawyer could be at the center of a pump and dump case; so could a prosecutor, or even a victim. The headline fairly indexes an article that contains specifics about the plaintiff's involvement in the case.

By contrast, here, the headline makes a very specific claim that BYD was blacklisted, not some vague allegation of BYD somehow being involved in a controversy. It is not a fair index.

The District Court also held that if VICE's "blacklist" headline was not a fair index, it was a fair report of a governmental proceeding and covered by the privilege contained in NYCRL § 74, which provides 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".

First, the District Court holds this argument was waived by BYD. However, the argument as to why it is not a fair report is the same as the argument as to why it is not a fair index: "blacklist" does not accurately describe what was actually done. In any event, the District Court ruled on this issue on the merits, and it presents a pure legal issue that this Court can review. *United States v. Gomez*, 877 F.3d 76, 92 (2d Cir. 2017) (purportedly waived argument may be considered on appeal "where the issue is purely legal and there is no need for additional fact-finding").

The District Court's ruling on fair report was erroneous for the same reason that its ruling on fair index was—"blacklist" does not fairly describe what actually happened, and instead told readers that BYD was singled out for bad conduct rather

than what actually happened: states and municipalities were prohibited from obtaining federal funds for goods acquired from companies based in China.

The District Court noted that the test for a fair report is whether "if, despite minor inaccuracies, it does not produce a different effect on a reader than would a report containing the precise truth". *Friedman v. Bloomberg L.P.*, 884 F.3d 83, 93 (2d Cir. 2017). "Blacklist" was not a minor inaccuracy. It was a major one. It changed the entire tenor of the report from one in which BYD is just one of several companies affected by a law prohibiting federal funds from being used to purchase products from Chinese companies (the truth) into a wrongdoer who was singled out by the President of the United States, presumably for wrongful conduct (the VICE headline). This produces a completely different effect on the reader. Thus, for the exact same reason it is not a fair index, it also is not a fair report.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and remanded.

Dated: July 15, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32 because this brief contains 5,411 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

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CERTIFICATE OF SERVICE

I certify that on July 21, 2021 I served a copy of

CORRECTED APPELLANTS OPENING BRIEF and **CORRECTED APPELLANTS APPENDIX**

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