EFiled: Apr 16 2024 05:11PM EDT
Transaction ID 72759961
Case No. N24C-02-292 KMM

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CHRISTOPHER HARBORNE, AML GLOBAL LTD. (BVI), AML GLOBAL LTD. (HK), AML GLOBAL (HK) LTD., and AML GLOBAL PAYMENTS LLC, Plaintiffs, v. DOW JONES & COMPANY, INC. d/b/a THE WALL STREET JOURNAL, Defendant.	))))))))))))))	C.A. No. N24C-02-292 KMM TRIAL BY JURY OF 12 DEMANDED

DEFENDANT DOW JONES & COMPANY, INC.'S OPENING BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs, a major cryptocurrency stakeholder and his companies, spend the full 86 pages of their blunderbuss Complaint launching broadside attacks on the journalism behind the March 3, 2023 article "Crypto Companies Behind Tether Used Falsified Documents and Shell Companies to Get Bank Accounts" (the "Article") published in *The Wall Street Journal* (the "*Journal*"). But Plaintiffs fail in their efforts to alchemize these gratuitous attacks on journalistic ethics into a viable claim for legal relief against the *Journal*'s publisher Dow Jones & Company, Inc. ("Dow Jones") because the Complaint fails to plead facts sufficient to establish Plaintiffs' claims for defamation per se and defamation by implication. In addition, documents from Signature Bank upon which Plaintiffs allege the *Journal* relied and which are, therefore, incorporated in the Complaint by reference (and attached hereto), preclude Plaintiffs from establishing that the Article is materially false, or that the *Journal* acted with actual malice in publishing it. This Court should grant the *Journal*'s motion to dismiss.

The Article at issue concerns how, in 2018, the company behind the eponymous cryptocurrency Tether (a "stablecoin" pegged to the U.S. Dollar) and its sister company Bitfinex, a cryptocurrency trading platform, were desperate to maintain access to traditional banking. In its final five paragraphs, the Article discussed Christopher Harborne—who owns at least a 12% interest in Tether and

Bitfinex—and reported that one of his companies sought to open an account at Signature Bank. The Article reported that Harborne's Thai name, Chakrit Sakunkrit, was on a bank "Hotlist" and that a bank account opened for one of Harborne's companies was ultimately closed because of apparent connections to Bitfinex.

Nine months after the Article was published, Plaintiffs reached out to the *Journal* for the first time to complain about it. In the course of those discussions, the *Journal* determined that the paragraphs at issue, while substantially true, did not meet its exacting editorial standards. The *Journal* made the decision to remove the paragraphs and post a statement to that effect. Plaintiffs now offer extensive editorial criticism of the *Journal*, *see* Complaint (filed Feb. 28, 2024) ("Compl.") ¶¶ 42, 44, 45, 59, 128, but cannot, as a matter of law, prevail on their claims.

Harborne's claim for defamation per se is based on only part of one sentence—and no more in the 1,387-word Article—which reports that he was on a "Hotlist" at Signature Bank. This claim should be dismissed with prejudice because Plaintiff has not pled facts from which it is reasonably conceivable that the statement is not substantially true. In addition, among the Signature Bank documents is an internal Signature Bank email dated February 2018 with the subject line "Hotlist additions" that adds "Chakrit Sakunkrit" to the Hotlist. He will therefore never be able to carry his burden of establishing that the Hotlist Statement is false.

Similarly, all of Plaintiffs' claims should be dismissed because Plaintiffs failed to plead the *Journal* published the Article with actual malice. The Article reports on a matter of unquestionable public concern—the viability of "one of the world's largest crypto exchanges," Compl., Ex. A at 1—meaning the actual malice standard applies to these claims under governing law, even if Plaintiffs were not public figures. Not only are the bare bones allegations contained in the Complaint insufficient to meet the standard for actual malice, but also, the Signature Bank documents establish that (1) Harborne, despite the allegations in the Complaint, is closely associated with Bitfinex and Tether; (2) Signature Bank added the Sakunkrit name to a Hotlist; (3) AMLGP didn't disclose in its due diligence submission that Harborne also used the Sakunkrit name or that he had any connection to Bitfinex or Tether; and (4) Signature Bank had concerns about transactions between AMLGP and Bitfinex and ultimately closed AMLGP's bank account. In light of those facts, Plaintiffs will never be able to establish that the Article was published with subjective awareness of falsity.

FACTUAL BACKGROUND

A. The Parties

Dow Jones is a Delaware corporation headquartered in New York City, New York. It is the publisher of the *Journal*. Compl. ¶ 14.

Christopher Harborne, who also goes by his Thai name Chakrit Sakunkrit, is a British and Thai businessman and investor with "extensive holdings in aviation and cryptocurrency." *Id.* ¶ 9. Despite vociferously disclaiming connections to Tether and Bitfinex in the Complaint, *id*. ¶ 35, in fact, Harborne owns at least a 12% stake in both Bitfinex and Tether under his Thai name, making him one of four people who between them own a significant majority of the companies. *Id.* ¶¶ 9, 41. *See also* Transmittal Affidavit of Kevin C. Gilligan (Gilligan Aff.), Ex. 1 at 1, 5 (the "February Article") (incorporated by reference at Compl. ¶ 39 n.24). By Harborne's own admission, his acquisition of this significant stake was classified as a "change in control" under the law of the Bahamas, where Bitfinex and Tether are incorporated. Compl. ¶ 40 n.25.

Harborne founded and/or owns the four company plaintiffs—AML Global Ltd. (BVI), AML Global Ltd. (HK), AML Global (HK) Ltd., and AML Global Payments LLC ("AMLGP") (together, the "AML Companies"). *Id*. ¶¶ 10-13, 21, 23. The Complaint describes the collective "AML Global Ltd." companies as "a jet fuel broker" founded in 2005. *Id*. ¶ 21 & n.18. But one of the plaintiffs, AMLGP, was founded in 2009 as a payment processing entity. *Id*. ¶ 23. As of 2018, AMLGP as an "agent for AML Global Ltd (BVI)" and "[did] not have significant assets or income for itself." Gilligan Aff., Ex. 2 at 101. It was also not owned by Harborne, but wholly owned by a man named Scott Elder. *Id*. at 109; Compl. ¶ 13.

B. Signature Bank Reporting Materials

The Complaint claims repeatedly that the *Journal* and its reporters "relied on" "[Signature Bank] bank account documents" in preparing the Article. Compl. ¶¶ 4, 78, 89, 97, 100. It also alleges that the *Journal* acted with actual malice because it ignored those documents. *Id*. ¶¶ 163(a), (f); 180(a), (f); 195(a), (f). Signature Bank documents upon which the *Journal* and its reporters relied ("Signature Documents") are attached as Exhibit 2 to the Transmittal Affidavit of Kevin C. Gilligan. These documents are correspondence and records spanning from February 23, 2018, to March 13, 2019, that relate to Signature Bank's treatment of bank accounts directly or indirectly connected to Bitfinex. Relevant to this matter, the Signature Documents show the following:

- On February 22, 2018, Signature Bank made the decision to close at least two bank accounts affiliated with BFXNA d/b/a Bitfinex "based on negative news and some other items that were cause of concern," Gilligan Aff., Ex. 2 at 1, 4;
- Chakrit Sakunkrit was added to the bank's Hotlist the next day, because he was an "Ultimate Beneficial Owner, Authorized signer or business associate of [then-Bitfinex CEO] Phil Potter and/or Bitfinex," *id*. at 4;
- Bitfinex executives again attempted to open an account at Signature starting on October 10, 2018, *id*. at 7, and in the course of that the company identified Chakrit Sakunkrit as a major Bitfinex shareholder, *id*. at 87;
- On November 15, 2018, the bank's compliance manager identified (among other concerns) the "red flag" that Bitfinex didn't transact in its own name but had relationships to a number of " 'payment processors' or account holders" whose identities and connections to Bitfinex were not clear, *id*. at 89;

- On November 20, 2018, AMLGP initiated the process of opening an account at Signature Bank, *id*. at 108;

- AMLGP submitted a due diligence package on December 14, 2018, that identified Christopher Harborne as the account signatory, but didn't mention the name Chakrit Sakunkrit or Sakunkrit/Harborne's ownership stake in Bitfinex, *id*. at 105, 109-110;

- Three days later, *after* a Signature banker asked why Harborne "also goes by the name Chakrit Sakunkrit[,]" AMLGP represented that Harborne "continues to use" his birth name "outside Thailand." *Id*. at 102;

- In early February 2019, Signature Bank's Compliance Officer reviewed recent statements from a Bank of America account that AMLGP planned to use to fund the Signature Bank account. He flagged that in October and November of 2018 "about $63 million came into the account at B of A from Sackville Bank (I presume Bitfinex)," noted "Bitfinex was not mentioned anywhere in the paperwork that was provided," and raised the additional concern that these deposits far exceeded the account's previous average monthly activity of "$6-8 million in/out," *id*. at 223; and

- Signature Bank subsequently questioned AMLGP about this unusual activity, including the transactions from Sackville Bank, *id*. at 263.

Signature Bank closed AMLGP's account soon thereafter. *See* Compl. ¶¶ 36-37 (AMLGP informed of the closure in early May 2019).

C. The March Article

On March 3, 2023, the *Journal* published an article titled "Crypto Companies Behind Tether Used Falsified Documents and Shell Companies to Get Bank Accounts," which explores different ways in which different intermediaries, companies, and executives affiliated with Tether sought to gain access to traditional banks. Compl., Ex. A (the "Article"). In support of its reporting, the Article cited

not just Signature Bank documents but also court documents, and information from unnamed sources not referenced in the Complaint and not included herein.

As the Article sets forth, in and around 2018, Tether and Bitfinex struggled to maintain access to the global banking system. *Id.* Bitfinex had earlier described a loss of banking access as "an existential threat to their business" that "threaten[ed] its corporate existence." *Id.* at 1; *see also iFinex Inc. et al. v. Wells Fargo & Co. et al.*, 3:17-cv-01882 (N.D. Cal. Apr 05, 2017), Dkt. 1 (Compl.) ¶ 47; Dkt. 8 (Declaration of Michael Baratz), Exs. 1, 3-12. The Article reported that, faced with this existential threat, Bitfinex had turned to what an executive characterized as "cat-and-mouse tricks" to maintain access. Compl., Ex. A at 3. The company sought access through several means: First, it turned to intermediaries, including one that created "fake sales invoices and contracts" to "circumvent the banking system." *Id*. at 1. Second, it opened accounts in the name of questionable third-party companies, including one that was later identified as having been used to launder money for a terrorist organization. *Id*. at 3. Third, it moved more than $1 billion into a shady "payment processor" called Crypto Capital Corp., which used "shell companies to open networks of bank accounts," but ended up allegedly defrauding Bitfinex of $850 million, and left their customers struggling to withdraw funds. *Id*. Finally, Bitfinex executives attempted repeatedly to "expand their bank access with an

account at New York's Signature Bank," but each time the bank closed their accounts. *Id*. at 4.

Citing the Signature Documents, the Article reported how "AML Global" then attempted to open an account at Signature Bank, which would ostensibly be used to trade cryptocurrency on an exchange called Kraken. *Id*. It reported that the account would be controlled by Harborne, but the application "didn't say that Mr. Harborne owned roughly 12% of both Tether and Bitfinex under another name, Chakrit Sakunkrit." *Id.* The Article reported how bank employees then noticed that "an account that was supposed to be trading on Kraken was getting huge inflows from what appeared to them as Bitfinex." *Id*. The bank closed the AML account three months later. *Id*.; Compl. ¶ 37.

D. The Retraction and Statement

In December 2023, nine months after the Article was published the *Journal* received a letter from Plaintiffs demanding a retraction. Compl. ¶ 104. The parties exchanged correspondence for a number of weeks. *Id*. ¶¶ 105-106, 116-121. On February 21, 2024, the *Journal* decided to remove the portion of the March Article describing AMLGP's attempt to open a Signature Bank account, and add an editor's note explaining the retraction. Compl. ¶ 124. This decision was made after a determination that the passage, while substantially accurate, did not meet the *Journal*'s exacting editorial standards.

E. The Complaint

On February 28, 2024, Harborne and the AML Companies filed their Complaint against the *Journal*, alleging three causes of action: Count 1, for defamation per se based on only one statement, that Harborne's Thai name "had earlier been added to a list of names the bank felt were trying to evade anti-money-laundering controls when the companies' earlier accounts were closed" (the "Hotlist Statement"); Count 2, for defamation by implication of Harborne; and Count 3, for defamation by implication of the AML Companies.

ARGUMENT

This Court should dismiss Plaintiffs' Complaint. Plaintiffs have not adequately alleged that the Hotlist Statement is false, nor have they pled sufficient facts to support a theory of actual malice. Indeed, the facts alleged in the Complaint and documents incorporated by reference make it impossible for Plaintiffs to carry their burden of pleading that the Hotlist Statement is false and/or that the *Journal* acted with a subjective knowledge of falsity in publishing the Article. For these reasons, the Court should grant the motion and dismiss the Complaint in its entirety.

I. DELAWARE COURTS REGULARLY DISPOSE OF DEFAMATION CLAIMS ON DISMISSAL MOTIONS

Pursuant to Superior Court Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint fails to assert sufficient facts that, if proven, would entitle the plaintiff to relief, *i.e.* if it fails to plead its claim with

"reasonable 'conceivability.'" *Central Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 537 n.13 (Del. 2011). Courts will not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party." *Price v. E.I. duPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011). Moreover, a "claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law." *Owens v. Lead Stories, LLC*, No. CV S20C-10-016 CAK, 2021 WL 3076686, at *12 (Del. Super. July 20, 2021) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001)), *aff'd*, 273 A.3d 275 (Del. 2022).

On a motion to dismiss a court may consider documents that are "integral to a claim and incorporated into a complaint." *ShotSpotter Inc. v. VICE Media*, LLC, No. CV N21C-10-082 SKR, 2022 WL 2373418, at *4 (Del. Super. June 30, 2022). Documents incorporated into a Complaint include not only documents attached as exhibits, but also documents referenced and relied upon in the Complaint, and materials "integrated by way of" exhibits and other documents incorporated into the pleadings. *Id*. *See also Freedman v. Adams*, No. CV 4199-VCN, 2012 WL 1345638, at *5 (Del. Ch. Mar. 30, 2012) ("When a plaintiff expressly refers to and heavily relies upon documents in her complaint, these documents are considered to be incorporated by reference into the complaint.") (citing *Albert v. Alex. Brown Mgmt. Servs., Inc*., 2005 WL 1594085, at *12 (Del. Ch. June 29, 2005))), *aff'd*, 58

A.3d 414 (Del. 2013). The incorporation-by-reference doctrine operates to "permit[] a court to review the actual documents [referenced in a pleading] to ensure that the plaintiff has not misrepresented their contents and that any inference the plaintiff seeks to have drawn is a reasonable one." *In re Genworth Fin., Inc. Consol. Derivative Litig.*, No. CV 11901-VCS, 2021 WL 4452338, at *12 n.16 (Del. Ch. Sept. 29, 2021) (citation and quotation marks omitted).

Applying these standards, Delaware courts regularly dispose of defamation claims on motions to dismiss. *See*, *e.g.*, *Page v. Oath Inc.*, 270 A.3d 833, 836 (Del.) (per curiam) (affirming dismissal on grounds of substantial truth and failure to plead actual malice), *cert. denied*, 142 S. Ct. 2717 (2022); *Owens*, 2021 WL 3076686, at *13 (dismissing on grounds that plaintiff had failed to plead false statements of fact and actual malice)), *aff'd*, 283 A.3d 1140 (Del. 2022); *ShotSpotter Inc.*, 2022 WL 2373418, at *11-12 (dismissing on grounds of substantial truth, lack of defamatory meaning, and failure to plead actual malice); *Cousins v. Goodier*, 2021 WL 3355471, at *3 (Del. Super. July 30, 2021) (dismissing on grounds that statements at issue were protected opinion); *Orthopaedic Assocs. of S. Delaware, P.A. v. Pfaff*, No. CV S17C–07–016 ESB, 2018 WL 822020, at *6 (Del. Super. Feb. 9, 2018) (dismissing for lack of defamatory meaning).

These cases reflect Delaware courts' recognition of the "unique positioning of defamation claims," in which early dismissal "not only protects against the costs

of meritless litigation, but provides assurance to those exercising their First Amendment rights that doing so will not needlessly become prohibitively expensive." *ShotSpotter*, 2022 WL 2373418, at *6 (quoting *Owens*, 2021 WL 3076686, at *9). *See also id*. (noting courts must "'expeditiously weed out unmeritorious defamation suits'" in order to "'preserve First Amendment freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth.'" (quoting *Kahl v. Bureau of Natl. Affairs, Inc*., 856 F.3d 106, 109 (D.C. Cir. 2017) (Kavanaugh, J.)).

II. NEW YORK LAW GOVERNS PLAINTIFFS' CLAIMS

New York substantive law applies because it is the state with the most significant relationship to this action.

When conducting choice-of-law analyses, Delaware courts rely on the Restatement (Second) of Conflict of Laws (the "Restatement"), which follows the "most significant relationship" test. Restatement §150; *Schmidt v. Wash. Newspaper Publ'g Co.*, 2019 WL 4785560, at *2 (Del. Super. Sept. 30, 2019) (*citing Smith v. Delaware State Univ.*, 47 A.3d 472, 480 (Del. 2012)) , *amended on recon.*, 2019 WL 7000039 (Del. Super. Dec. 20, 2019);. *See also Evans v. TheHuffingtonPost.com, Inc.*, No. 22-1180-GBW, 2023 WL 5275383 (D. Del. Aug. 16, 2023). Often, the place with the most significant relationship is the place of the plaintiff's domicile,

since this ostensibly is the forum where the plaintiff's injury occurred. *See* Restatement § 150(2)-(3); *Schmidt*, 2019 WL 4785560, at *2.

Here, however, the domicile analysis is not and cannot be dispositive because *none* of the Plaintiffs are domiciled in a U.S. state. Harborne and three of the plaintiff AML Companies are based or incorporated in Thailand, the British Virgin Islands, Hong Kong, and Singapore. Compl. ¶¶ 9-12. United States courts cannot apply foreign countries' defamation laws because they lack First Amendment safeguards. *See, e.g.*, *Abdullah v. Sheridan Square Press, Inc.*, No. 93 Civ. 2515 (LLS), 1994 WL 419847 (S.D.N.Y. May 4, 1994) (dismissing cause of action brought under English law as "antithetical to [] First Amendment protections"); *Soojung Jang v. Trs. of St. Johnsbury Acad.*, 331 F. Supp. 3d 312, 330–32 (D. Vt. 2018) (applying Vermont law to defamation claims brought by citizen and resident of South Korea). The only other plaintiff, AMLGP, is incorporated in Wyoming and has its principal place of business in California, but the Complaint pleads that its sole member is a resident of Thailand and that the company is therefore itself "stateless." Compl. ¶ 13.

As a result, the Restatement § 150's presumption that the law of the domicile applies is overcome by the "significantly sufficient considerations" warranting the application of another state's law under Restatement Sections 6 and 145.

Here, the sufficiently significant considerations point squarely to the application of New York law. The points of contact in this case, as described in Restatement § 145, are overwhelmingly in New York. The Article was reported, edited, and published from the *Journal*'s principal place of business in New York, *see* Compl. ¶ 14, and the statements at issue concern an attempt to open an account at a New York bank. *Id*. ¶ 31. In fact, no other state can claim such an interest in this matter, as Plaintiffs have no connection to Delaware and Plaintiffs allege that the principal monetary damages they have suffered are centered in Lithuania and the Eurozone. *Id*. ¶ 150.

The policy considerations set forth in Restatement § 6 also favor New York law. New York has a strong policy interest in regulating its media and protecting its journalists and citizens from meritless speech-based lawsuits. This policy is reflected in the state's recently amended laws enshrining strong protections against strategic litigations against public participation, or "SLAPP" suits. *See* N.Y. Civ. Rights Law § 76-a ("anti-SLAPP Statute"). *See also Evans*, 2023 WL 5275383 (under Delaware choice of law, New York substantive law applied over law of plaintiff's domicile—Mississippi—as New York's policy interest in protecting its press through the anti-SLAPP Statute overcame Mississippi's interest in protecting its citizens). The *Journal* and its journalists likewise have a justified expectation that they can claim the protections of New York's substantive defamation law, which

incorporates safeguards beyond those federally required under the First Amendment. *See also Goguen v. NYP Holdings, Inc.*, 544 P.3d 868, 882, 883 (Mont. 2024) (Restatement §§ 6 and 145 factors required applying New York law to defamation claims arising from a New York publication because "[a]pplying New York law results in certainty and predictability for publishers."); *Michel v. NYP Holdings, Inc.*, 816 F.3d 686 (11th Cir. 2016) (same reasoning supported application of New York law in defamation case brought by Florida resident). In short, the Restatement factors overwhelmingly favor the application of New York law.

III. HARBORNE'S DEFAMATION PER SE CLAIM SHOULD BE DISMISSED (COUNT ONE)

Harborne's defamation per se claim should be dismissed because Plaintiffs have not pled the statement at issue is substantially false, nor can they. Under New York law, Harborne bears the burden of establishing, by clear and convincing evidence, that an allegedly defamatory statement is false. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, (1986); *DiBella v. Hopkins*, 403 F.3d 102, 112 (2d Cir. 2005). At the pleading stage, Plaintiffs must plead facts to support this element of their claim, and "[c]onclusory allegations unsupported by specific facts" are insufficient. *Owens*, 2021 WL 3076686, at *12. *See also Page*, 270 A.3d at 843–44.

A statement is considered substantially true if its "gist" is accurate—i.e., the error would not create a "different effect on the reader's mind than the actual truth,

if published." *Daniel Goldreyer, Ltd. v. Van de Wetering*, 217 A.D.2d 434, 436 (1st Dep't 1995). *See also Cholowsky v. Civiletti*, 16 Misc. 3d 1138(A), at *3 (Sup. Ct. Suffolk Cnty. 1992) (article was substantially accurate though it reported plaintiff "illegally dump[ed] hazardous waste," when in fact he was only "planning" to do so), *aff'd*, 69 A.D.3d 110 (2d Dep't 2009). *See also Page*, 270 A.3d at 844 (under Delaware law, "[w]hen deciding whether a statement is substantially true, we compare the 'effect of the alleged libel versus the effect of the precise truth on the mind of the recipient or average reader[,]' and see if the effect is the same") (citation omitted). Under this standard, "[w]hen the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done." *Tannerite Sports, LLC v. NBCUniversal News Grp., a division of NBCUniversal Media, LLC*, 864 F.3d 236, 243 (2d Cir. 2017) (citations omitted).

When assessing falsity at the pleading stage, a Delaware court must look carefully at whether a complaint alleges *facts* from which it is reasonably conceivable to prove falsity. *See, e.g.*, *Owens*, 2021 WL 3076686, at *13 (holding that there were "no facts alleged in the Amended Complaint supporting Plaintiffs' claim that [the] statements [at issue] are false under the reasonable conceivability standard.").

Courts applying New York substantive law likewise ask whether a plaintiff has pled enough factual support to satisfy its burden of pleading falsity. For example, in *Cabello-Rondón v. Dow Jones & Co.*, No. 16-CV-3346 (KBF), 2017 WL 3531551, at *5 (S.D.N.Y. Aug. 16, 2017), *aff'd*, 720 F. App'x 87 (2d Cir. 2018), the court held that a plaintiff had not pled the material falsity of a report that he was the "biggest target" or "a leading target" of an investigation into money laundering and drug trafficking, where he did "not actually contest the existence of the investigation." *Id*. at *6. The court did so because the defamatory gist of the story was that the plaintiff *was* under investigation, not that he was the biggest (as opposed to the smallest) target of the investigation. *See also Aboutaam v. Dow Jones & Co*., No. 156399/2017, 2019 WL 1359772, at *22 (Sup. Ct. N.Y. Cnty. Mar. 26, 2019) (rejecting claims that report on investigations into plaintiff was false, where plaintiff had only pled that he had "never been contacted about any such investigation" and wasn't guilty), *aff'd*, 180 A.D.3d 573 (1st Dep't 2020).

Here, Harborne has simply failed to plead facts that would render the "gist" of the Hotlist Statement false. The allegedly defamatory statement is that Harborne's Thai name "had earlier been added to a list of names the bank felt were trying to evade anti-money-laundering controls when the companies' earlier accounts were closed." Compl. ¶ 155. But the Complaint includes only bare bones and conclusory allegations in support of a theory of falsity. First, it contends that

"Mr. Harborne never tried to evade anti-money-laundering controls, whether under his English or Thai name[.]" *Id*. ¶ 158. But the Hotlist Statement doesn't accuse Harborne of in fact attempting to evade anti-money-laundering controls; it reported that Signature Bank felt he was trying to do so. As in *Cabello-Rondón* and *Aboutaam*, Plaintiff cannot render a report about suspicions false by alleging those suspicions were unfounded. Next, the Complaint alleges that "Harborne's name (English or Thai) is not on a list of names Signature Bank felt were trying to evade money laundering controls." Compl. ¶¶ 155, 158. But this conclusory assertion, devoid of supporting facts, is insufficient to meet Delaware's pleading requirements.

The only other effort Harborne makes to plead falsity is to claim that Signature Bank did not "inform[] [him] that it suspected him of anything improper or illegal," *id*. ¶ 158, and he cannot have been on the Hotlist because AMLGP was able to provisionally open a bank account. *Id*. ¶ 98. These speculative claims—particularly in light of the Complaint's telling concession that the AMLGP account was closed by the bank with no explanation only months later—are also insufficient to satisfy the pleading standard. And as in *Aboutaam*, the fact that Harborne did not know the bank had concerns about his connections does not establish that the bank had no such concerns. 2019 WL 1359772, at *21. Thus, the Complaint fails to offer facts from which it is "reasonably conceivable" he can prove falsity.

Indeed, the Signature Documents incorporated into the Complaint demonstrate Harborne will not be able to make a showing of substantial falsity. *See Malpiede*, 780 A.2d at 1083 ("[A] claim may be dismissed if . . . the exhibits incorporated into the complaint effectively negate the claim as a matter of law"); *Page*, 270 A.3d at 849 (dismissing for substantial truth in light of the contents of an Inspector General Report "relied on extensively in the amended complaint"). These documents show that Chakrit Sakunkrit ***was in fact put on the Signature Bank Hotlist*** in February 2018, after the bank decided to close accounts opened for Bitfinex, as the Article reports Gilligan Aff., Ex. 2 at 4, 1. Specifically, the documents include a February 23, 2018 email from a bank compliance executive reading "I have added the following names to our Hotlist. We currently have 2 accounts which will be closed in 60 days." *Id.* at 4-5. The document first lists Bitfinex and says "The Bank made the decision not to move forward with this relationship based on negative news and some other items that were cause of concern." *Id*. It then lists Chakrit Sakunkrit because he was the "Ultimate Beneficial Owner, Authorized signer or business associate of Phil Potter [then-Chief Strategy Officer of Bitfinex] and/or Bitfinex." *Id*. Thus, just as the Article reported, Sakunkrit's name was added to a "Hotlist" of individuals the bank had flagged for scrutiny.

And if that's not enough, the substantial truth of the Hotlist Statement is further underscored by Signature Documents from early 2019. These documents show soon after AMLGP's account was provisionally opened, the same Signature Bank executive raised concerns about how AMLGP's application had said it would be trading on Kraken, but "about $63 million came into [an AMLGP] account at B of A from Sackville Bank (I presume Bitfinex)" and "Bitfinex was not mentioned anywhere in the paperwork that was provided." *Id.* at 223. Thus, Signature Bank remained concerned about apparent connections to Bitfinex as a matter of compliance. In short, the Signature Bank documents preclude Plaintiffs from pleading material falsity.

To the extent Plaintiff argues that the Hotlist Statement is materially false because the document doesn't on its face cite suspicions of "trying to evade anti-money-laundering controls," this argument is unavailing. The gist of the allegedly defamatory statement is that Harborne/Sakunkrit's connections to Bitfinex, and Bitfinex's questionable banking arrangements, raised red flags at Signature Bank. Whether the "Hotlist" was because of suspected failure to meet transparency requirements banks put in place to comply with anti-money-laundering regulations, *see, e.g.*, 31 C.F.R. §§ 1010.210, 1010.230, 1020.210, 1020.220, or some other behavior worthy of declining to do business with high-value clients, the simple facts are that Signature Bank (1) put Sakunkrit on a Hotlist because of concerns about

Bitfinex and Harborne/Sakunkrit's connections to the company; and (2) ultimately closed AMLGP's account. In light of these documented facts incorporated into the pleadings, Harborne has not pled, and cannot plead, that the "gist" of the Hotlist Statement is false.

Nor is the *Journal*'s decision to remove the passage or add an editor's note evidence of material falsity. Editorial precision and material falsity are two different standards. As the Second Circuit has held, "[t]he libel law is not a system of technicalities, but reasonable regulations whereby the public may be furnished news and information, but not false stories about any one. This system of 'reasonable regulation' would be damaged by an overly technical or exacting conception of truth in publication." *Tannerite Sports*, 864 F.3d at 243 (citation omitted). The *Journal* is entitled to hold itself to standards higher than what the law requires, and should not be exposed to liability for doing so.

IV. PLAINTIFFS CANNOT PLEAD ACTUAL MALICE AS TO THE REPORTING ON THE ATTEMPT TO OPEN A SIGNATURE BANK ACCOUNT

Finally, the Complaint should be dismissed in its entirety because Plaintiffs are required to adequately plead that the *Journal* made false and defamatory statements with actual malice, and they have failed to do so. Indeed, the Signature Documents make this showing impossible.

Since 2020, New York law has required that any plaintiff asserting a defamation claim arising from a communication "in a public forum in connection with an issue of public interest" must prove "by clear and convincing evidence" that the communication "was made with knowledge of its falsity or with reckless disregard of whether it was false"—i.e. with actual malice—in order to recover damages. N.Y. Civ. Rights Law § 76-a; *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (articulating same definition of actual malice). Under the statute, "an issue of public interest" is "construed broadly" as "any subject other than a 'purely private matter.'" *Sackler v. Am. Broad. Cos.*, 71 Misc. 3d 693, 698 (Sup. Ct. N.Y. Cnty. 2021) (citation omitted). *See also US Dominion, Inc. v. Fox News Network, LLC*, No. CV N21C-03-257 EMD, 2021 WL 5984265, at *17 (Del. Super. Dec. 16, 2021) ("public interest" under New York's anti-SLAPP Statute "should be construed broadly" and the statute applied to any "defamation case premised on any statement other than a statement addressing 'a purely private matter.'"). Here, there can be no dispute that the viability of "one of the world's largest crypto exchanges," Compl., Ex. A at 1, including the related banking activity of a 12% owner, is a matter of public interest. *Lindberg v. Dow Jones & Co.*, 2021 WL 3605621, *8, (S.D.N.Y. Aug. 11, 2021) (matters of public concern "encompass[] reports of improper business practices, particularly where such conduct may result in loss to stakeholders") (citing *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 102 n. 9

(2d Cir. 2000) (concluding that there was no doubt that "allegedly improper valuation of substantial investments made by a publicly held company" were a matter of public concern). Accordingly, Plaintiffs must plead and prove actual malice as an element of their claim under New York law.

To do so, Plaintiffs must "demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he *subjectively* entertained serious doubt as to the truth of his statement." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 n.30 (1984) (emphasis added); *see also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). On a motion to dismiss, "pleading 'actual malice buzz-words' is simply not enough to nudge a case into discovery," *Biro v. Condé Nast*, 963 F. Supp. 2d 255, 279-80 (S.D.N.Y. 2013), *aff'd*, 807 F.3d 541 (2d Cir. 2015), nor will pleading "conclusory" or "unsupported" allegations of actual malice be sufficient. *O'Gara v. Coleman*, No. CV 2018-0708-KSJM, 2020 WL 752070, at *11-12 (Del. Ch. Ct. Feb. 14, 2020). Moreover, since actual malice requires a knowledge of or reckless disregard for *falsity*, "[t]he substantial truth of the statement bears on whether the person responsible for publishing the statement had actual malice." *Page*, 270 A.3d at 845. And, Delaware courts have recognized that "[t]he standard for malice is heightened in a defamation by implication claim." *ShotSpotter*, 2022 WL 2373418, at *14.

Applying these principles, Delaware courts routinely dismiss defamation claims prior to discovery based on the failure to adequately plead facts supporting a theory of actual malice. *See*, *e.g.*, *Owens, LLC*, 2021 WL 3076686, at *15; *Page*, 2021 WL 528472, at *5; *ShotSpotter*, 2022 WL 2373418, at *12-14. This Court should do the same.

On a 12(b)(6) motion to dismiss, the question for a Delaware Court applying New York's anti-SLAPP Statute "is whether, based on [Plaintiffs'] present allegations, it is reasonably conceivable that [Plaintiffs] will establish actual malice by clear and convincing evidence at trial." *US Dominion, Inc.*, 2021 WL 5984265, at *19. Plaintiffs cannot meet this standard.

First, the allegations contained in the Complaint, *see* Compl. ¶¶ 163, 180, 195, are insufficient as a matter of law. For example, Plaintiffs allege that the Article's reporters had an unreliable source at Signature Bank whose claims could be easily disproven, Compl. ¶¶ 139, 163(b), but don't explain what "source" that refers to or what these easily disproven claims were. Plaintiffs also, as part and parcel of their disingenuous efforts through the Complaint to distance themselves from Bitfinex, allege that the Article unfairly shoehorned Plaintiffs into a "preconceived narrative" about Bitfinex, *id*. ¶¶ 136, 145, in which they had no place. This false claim elides the fact that Harborne is one of Bitfinex's largest shareholders.

The Complaint also plays fast and loose with irrelevant facts. Despite the fact that the Article did not call AML a shell company, Plaintiffs accuse the *Journal* of having prior knowledge that "AML" was not one. Compl. ¶¶ 142, 144. Next, the Complaint also claims that the *Journal*'s "own reporting . . . demonstrated that neither AML nor [Harborne] was a malefactor," *id*. ¶¶ 163(e), 180(e), 195(e). But the referenced "reporting" amounts to a single source who allegedly made no comment on Harborne's behavior other than calling him "yet another 'rich guy.' " *Id*. ¶ 65.

Next, the Complaint alleges that the *Journal* failed to provide Plaintiffs a "meaningful opportunity" for comment because its reporter reached out to Harborne through what it describes as "insufficient and ineffective" channels. Compl. ¶¶ 48, 50-58, 163(c). Initially, the law is clear that in the absence of any reason to doubt a report, a failure to investigate all sources is not evidence of actual malice. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (a "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard"). Indeed, a "failure to contact" the subject of an allegedly defamatory report "provides even less support for a finding of actual malice" because a reporter "could reasonably expect [the subject] to deny any involvement regardless of the facts." *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1510-11 (D.C. Cir. 1996). And in any event, the

Complaint admits that the Article's reporter Ben Foldy reached out via Harborne's AML Global email address, and does not dispute this address was correct. Indeed, the Complaint conspicuously *avoids* alleging that Harborne never received this email to his AML Global account. Instead, it alleges Foldy should not have used this email address because the prior month, a message he tried to send to the AML Global email address "didn't send." Compl.¶¶ 47. This is a knowingly false allegation. As Plaintiffs well know, Foldy's message was referring to a previous *LinkedIn mesage* that "didn't send." *See* Gilligan Aff., Ex.3. Foldy had no issues with Harborne's AML Global email account, and the *Journal* is not responsible for Harborne's own failure to respond. *See Polish Am. Immigration Relief Comm., Inc. v. Relax*, 189 A.D.2d 370, 375 (1st Dep't 1993) (by refusing to respond to requests for comment, plaintiff failed to exercise "self-help" – "the first remedy of any victim of defamation" – and could not raise a factual question of actual malice).

Finally, the Complaint claims the *Journal*'s "refus[al] to retract" demonstrates actual malice. Yet the Complaint admits that the *Journal did* retract, removing all the Article's reporting about Plaintiffs. Moreover, the law has been clear for decades that a failure to retract is not evidence of actual malice. *Sullivan*, 376 U.S. at 286 (failure to retract upon demand is "not adequate evidence of malice for constitutional purposes"); *Shotspotter*, 2022 WL 2373418, at *14 (claim of refusal to retract was categorically insufficient to plead actual malice). *See also D.A.R.E*, 101 F. Supp. 2d

at 1287. This is because actual malice is "a subjective inquiry, 'focusing upon the state of mind of the publisher of the allegedly libelous statements ***at the time of publication***,'" *Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 37 (2014) (citation omitted) (emphasis added), and therefore cannot be shown through events that occurred *after* publication. In short, the Complaint offers "insufficient evidence" of actual malice "to defeat a motion to dismiss" under Delaware pleading standards. *ShotSpotter*, 2022 WL 2373418, at *14.

More significantly, the Signature Documents incorporated into the Complaint make it inconceivable that Plaintiffs could prove by clear and convincing evidence that the *Journal* subjectively doubted the truth of the Article's reporting about them. To the contrary, these documents—upon which Plaintiffs allege the *Journal* relied—entirely *support* the Article's reporting. Specifically, the Signature Documents corroborate the Article's account of Plaintiffs' relationship with Signature Bank. They establish:

- Harborne is closely associated with Bitfinex and Tether;
- Signature Bank added the Sakunkrit name to a Hotlist in early 2018;
- AMLGP didn't disclose in its due diligence submission that Harborne also used the Sakunkrit name or that he had any connection to Bitfinex, and when asked about the Sakunkrit name misleadingly suggested that it wasn't used outside Thailand; and
- Signature Bank raised concerns about what appeared to be unusual transactions between AMLGP and Bitfinex.

Moreover, as Plaintiffs admit, the AMLGP account was closed a few months later. Compl. ¶¶ 36-37. These facts, which Plaintiffs plead were known to the *Journal*, preclude them from pleading actual malice.

Even to the extent the Article reported these facts imperfectly—for example, being insufficiently clear that the apparent unusual transactions with Bitfinex were in a Bank of America account that funded the Signature Bank account, rather than the Signature Bank account itself, or failing to note that even though Harborne did not disclose his Thai name the bank itself eventually became aware of it—this is insufficient to raise any inference of actual malice. As one Delaware court noted in dismissing for failure to plead actual malice, "[s]loppy reporting does not establish recklessness. Inaccuracy itself will not demonstrate actual malice in a libel case; 'even a dozen errors' in the Article due to mistakes or bad judgment do not substitute for knowing falsehood or reckless disregard as to falsity." *ShotSpotter*, 2022 WL 2373418, at *13 (quoting *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977)).

In short, the Complaint and the incorporated documents not only fail to offer facts in support of a "reasonably conceivable" theory of actual malice, they affirmatively demonstrate that such a showing is impossible.

CONCLUSION

For the foregoing reasons, the court should dismiss the Complaint with prejudice.

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Dated: April 16, 2024