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Case Number: DA 22-0512

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0512

MICHAEL L. GOGUEN,
Plaintiff, Appellee, and Cross-Appellant,

v.

NYP HOLDINGS, INC.; ISABEL VINCENT,
Defendants and Appellants,

WILLIAM DIAL,
Defendant and Cross-Appellee

Appeal From Montana Eleventh Judicial District
Flathead County, DV-21-1382(A)
Honorable Amy Eddy

OPENING BRIEF OF DEFENDANTS-APPELLANTS NYP HOLDINGS, INC., AND ISABEL VINCENT

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STATEMENT OF THE ISSUES

1. Did the District Court err in determining that Montana law, not New York law, governs the privilege applicable to fair and true reports of judicial proceedings published by a New York newspaper?

2. If New York's fair report privilege does apply, should the Complaint be dismissed on the ground that the challenged statements are absolutely privileged as a matter of law under N.Y. Civ. Rights Law § 74?

3. If Montana's fair report privilege applies, did the Court err by finding that it could not determine as a matter of law that the Post Article is a fair and true report published without malice, when there is no dispute as to the content of the underlying judicial proceedings, and this Court's holding in *Lence v. Hagadone* dictates that the protection afforded by § 27-1-804(4), MCA, cannot be overcome by a media defendant's failure to independently investigate, or obtain comment from the plaintiff?

STATEMENT OF THE CASE

This appeal presents a straightforward application of a well-established rule: the media cannot be held liable for accurate reporting about judicial proceedings. Michael Goguen ("Goguen") alleges in his Complaint that he was defamed by a *New York Post* article titled, "*Tech billionaire allegedly kept spreadsheet of 5,000 women he had sex with*" (the "Post Article"). The Post Article accurately describes allegations made against Goguen in two civil lawsuits, including that Goguen plotted to kill rivals, subjected a former girlfriend to years of abuse, and leveraged his vast wealth to control

local law enforcement and destroy his enemies. None of these allegations are adopted as true by the Post Article, and every statement is attributed directly to court papers (including the headline), accompanied by reporting casting doubt on the credibility of Goguen's accusers.

Pursuant to M.. R. Civ. P. 12(b)(6), Defendants NYP Holdings, Inc., and its reporter, Isabel Vincent (together, the "Post") moved to dismiss on the following grounds: (i) that Montana's choice of law rules require application of New York's fair report privilege; (ii) that since the Post Article is – as a matter of law – a fair and accurate report of allegations made in lawsuits, it is absolutely privileged under New York's fair report privilege; and (iii) that Goguen's claim is also barred by Montana's fair report privilege because the Post Article is – as a matter of law – "a fair and true report without malice of a judicial [proceeding]."[1] § 27-1-804(4), MCA.

The District Court denied the Post's motion. Appendix ("Order"). *First*, the District Court found (without any analysis) that Montana law governs application of the fair report privilege in this case. *Id.* at 14. In its decision, the District Court stated incorrectly that "the Post agreed at oral argument that Montana law should apply to this analysis, as there was not an actual conflict between Montana and New York law." *Id.*

[1] The Post also moved for dismissal on the ground that published comments made by Defendant-Cross Appellee William Dial ("Dial") (including that Goguen "has to be stopped," is "a billionaire a la Harvey Weinstein and [Jeffrey] Epstein," and "people in this community [are] afraid of him,") are protected opinion. Dial filed a separate motion to dismiss, which was properly granted by the District Court. Goguen has filed a cross-appeal on that issue, which the Post opposes.

at 14. To the contrary, the Post established a clear conflict between New York's absolute privilege and Montana's qualified privilege and argued that Montana's choice of law rules require application of New York law on this question. Supplemental Appendix ("SA") Ex. 13 at 46:10-48:17, 49:1-49:14, 71:22-72:24, 75:2-10.

Second, the District Court held that while § 27-1-804(4), MCA applies preliminarily to 13 of the statements challenged in the Complaint, "the legal determination as to whether the fair report privilege applies" must await a jury's determination. Order at 17-18. The District Court found that the remaining statements (Nos. 10, 13 and 14) were not based on any judicial proceeding. *Id.* at 18.

The District Court further held that Goguen alleged malice sufficiently, including because he alleged that the Post failed to independently investigate the allegations reported in the Article. *Id.* at 18. The District Court did not acknowledge much less attempt to distinguish this Court's decision in *Lence v. Hagadone Inv. Co.*, which applied § 27-1-804(4), MCA as a matter of law, notwithstanding the newspaper defendant's failure to independently investigate allegations made in a lawsuit or obtain comment from the plaintiff. 258 Mont. 433, 438, 443, 853 P.2d 1230, 1233, 1237 (1993) *overruled on unrelated grounds by Sacco v. High Country Ind. Press*,271 Mont. 209, 896 P.2d 411 (1995).

The District Court certified its Order as final pursuant to M. R. Civ. P. 54(b), and on September 20, 2022, this Court found the certification to be in compliance with M. R. App. P. 6(6). This appeal followed.

STATEMENT OF THE FACTS

A. The Parties

Defendant NYP Holdings, Inc., publishes the *New York Post*. SA-1 ¶ 15. The Post's headquarters and principal place of business is in New York. *Id.* Defendant Isabel Vincent, who wrote the Post Article, is a resident of New York. *Id.* ¶ 16. Goguen alleges that he resides in Flathead County, Montana. *Id.* ¶ 14. Dial is the former Chief of Police in Whitefish, Montana. *Id.* ¶ 1.

B. The Amber Baptiste Lawsuit

In 2016, Goguen's former mistress, Amber Baptiste, sued him in California Superior Court for allegedly breaching the payment terms of a $40 million nondisclosure agreement (the "Baptiste Lawsuit"). *Id.* ¶ 28, SA-7. Baptiste alleged that Goguen "abused [her] sexually, physically and emotionally for over 13 years." SA-7 ¶ 1.[2] After "Baptiste willfully disobeyed numerous discovery orders, . . . the Court dismissed her breach of contract claim with prejudice" and proceeded to trial – without a jury – solely on Goguen's cross-complaint. SA-6 at 2:11-13. Baptiste failed to appear for trial and was not otherwise represented. *Id.* at 2:12-17. The court ruled in favor of Goguen, ordered Baptiste to pay $14 million in damages, and restrained her from repeating her allegations. *Id.* at 2:22-26; 38:20-40:18; SA-5.

[2] On a motion to dismiss, the Court may consider documents that are incorporated by reference into the Complaint. *Sagorin v. Sunrise Heating & Cooling, LLC*, 2022 MT 58, ¶ 10, 408 Mont. 119, 506 P.3d 1028.

C. The Matthew Marshall Lawsuit

On February 12, 2021, Matthew Marshall, a former employee of Goguen, and three other former employees filed a civil lawsuit against Goguen in the U.S. District Court of Montana (the "Marshall Lawsuit"). SA-1 ¶ 31. The Amended Complaint in that action, filed on September 21, 2021, alleged that Goguen engaged "in a nefarious racketeering Scheme involving prolific sexual and criminal misconduct." SA-8 ("Marshall Complaint") ¶¶ 5, 535-940.

At the time the Marshall Lawsuit was filed, Marshall was under federal indictment for actions arising from his business dealings with Goguen. SA-1 ¶¶ 30-31. On November 19, 2021, Marshall pleaded guilty to wire fraud, money laundering and tax evasion. *Id.* ¶ 30.[3]

D. The New York Post Article

The Post Article was published online on November 20, 2021, and in the Post's print edition on November 21, 2021.[4] SA-1 ¶ 1, SA-2-3. The District Court identified the following challenged statements from the Post Article, which are relevant on this

[3] On March 3, 2022, months after the Post Article was published, Marshall was sentenced to 72 months in custody. The Marshall Lawsuit was subsequently dismissed "for its prolixity," and its failure to state a RICO claim. *Marshall v. Goguen*, No. Cv 21-19-M-DWM, 2022 WL 1641776, at *1 (D. Mont. May 24, 2022).

[4] The headline in the print edition was, "*'He's Like Weinstein or Epstein' **A civil complaint alleges** billionaire kept harem, had sex with 5,000 women and planned murder in small town*." SA-2 (emphasis added).

appeal:[5]

1. Goguen "transformed" Whitefish, Montana, into "his private fiefdom" and "a dark banana republic."

2. Goguen "allegedly controls local law enforcement."

3. Goguen "has a spreadsheet documenting his sexual encounters with 5,000 women."

4. Goguen "outfitted a local bar he owns with a 'boom boom room' used 'to maintain women for the purpose of committing illicit sexual activity.'"

5. Plaintiff "could not obtain a security clearance . . . because of the allegations of sexual abuse, court papers allege."

6. "Women [] tried to complain to police about Goguen's alleged sexual assaults . . . according to court papers."

7. Members of the Flathead County Sherriff's Department were "on Goguen's payroll, according to court papers."

8. Pam Doe "told a local police officer that Goguen had allegedly sexually assaulted her."

9. "Pam Doe later recanted her story with police after signing a non-disparagement agreement with Goguen."

10. "Threats to publicize unsubstantiated incidents of sexual impropriety unnerved [] Goguen and other Valley luminaries, according to a federal indictment."

11. "Mistress Amber Baptiste . . . accused [Goguen] of 'constant sexual abuse,' including 'countless hours of forced sodomy,' court papers say. He also demanded that she refer to him as 'king' and 'emperor.'"

12. "Baptiste said, she underwent surgery for a ruptured anal canal after Goguen 'forcibly sodomized her and left her bleeding

[5] For the convenience of the Court, a comparison of statements in the Post Article with relevant allegations in the Baptiste and Marshall Lawsuits is provided as Ex. 16 to the Supplemental Appendix.

> and alone on the floor of a hotel room in a foreign country,' court papers claimed."
>
> 13. Goguen "secur[ed] a restraining order against Baptiste from filing any similar suits against him."
>
> 14. Goguen "filed a counter-claim" against Baptiste.
>
> 15. "Goguen ... falsely told the FBI that Marshall did not have the requisite experience, had stolen and then laundered funds from Goguen . . . court papers allege."
>
> 16. "But according to the civil complaint, Marshall spent the cash on Goguen's orders and was not reimbursed by Goguen."

Order at 7-14 (citing SA-1 ¶ 33).[6] The Post Article further states that "person after person has apparently tried to take [Goguen] down – only to end up taken down themselves." SA-2-3. For example, it states that Goguen's former friend, Bryan Nash – who accused Goguen of being a pedophile – "pleaded guilty to blackmailing Goguen, and was later sentenced to five years of probation." *Id.* It also states that Marshall "accepted a plea agreement in federal court in Montana for wire fraud, tax evasion and conning Goguen out of millions of dollars." *Id.* The underlined words are hyperlinked to an article in the *Flathead Beacon* titled, "Whitefish Security CEO Pleads Guilty to Federal Crimes in Scheme to Defraud Billionaire Goguen,"[7] which, in turn, includes a hyperlink to another *Flathead Beacon* article titled, "Justice Department Watchdog

[6] Exhibit 16 to the Supplemental Appendix includes four additional statements challenged in the Complaint that are substantially accurate reports of the Marshall Complaint. SA-16 (Stmts. A-D).

[7] https://flatheadbeacon.com/2021/11/10/whitefish-security-ceo-pleads-guilty-to-federal-crimes-in-scheme-to-defraud-billionaire-goguen/ (last visited Jan. 2, 2022).

Levels Misconduct Charges Against Former Whitefish Police Chief," stating that Dial was under investigation for (among other things) allegedly "colluding with Marshall to entrap a fellow Whitefish police officer."[8] SA-3. The Post Article also describes Baptiste's allegations as "unproven" and "unsubstantiated" and notes that Goguen prevailed in his countersuit against her. SA-2-3.

As noted in the Post Article, Goguen's lawyer did not return Vincent's request for comment. SA-1 ¶ 47.

E. The Second New York Post Article

On November 21, 2021, the day after the Post Article appeared online, Goguen posted a statement on Twitter, vehemently denying the allegations reported in the Post Article. SA-9. Just a few hours later, the Post published a second article based on Goguen's Tweet, titled, "*Tech billionaire Michael Goguen fires back at bombshell allegations*" (the "Second Article"). SA-10. The Second Article (which was published before the Post received any communication from Goguen's lawyers) states that Goguen issued a "scathing rebuke" of the allegations reported by the Post, and quoted from his Tweet at length. *Id.*

F. The New York Post's Clarifications to the Post Article

On November 21, 2021, Goguen's counsel sent a demand letter to the Post. SA-1 ¶ 3, SA-4. The Post responded on November 24, 2021, explaining that all of the

[8] https://flatheadbeacon.com/2021/08/26/justice-department-watchdog-levels-misconduct-charges-against-former-whitefish-police-chief/ (last visited Jan. 2, 2022).

statements in the Post Article are either privileged or protected opinion. SA-11. Nevertheless, the Post agreed to exercise its editorial discretion to clarify two points: the Post revised its description of the Baptiste Lawsuit to clarify that "the state court found all of Baptiste's allegations to be 'false and defamatory,'" that she was found "liable for extortion and fraud," and that she was "ordered to pay Goguen roughly $14 million in damages." SA-1 ¶¶ 33(j), (n); SA-11-12. The Post also corrected an error in a photo caption, clarifying that the allegations against Goguen were made in a civil suit, not an "indictment" (which was already clear since the Article refers *five times* to the allegations stemming from a civil suit). *Id.*

STANDARD OF REVIEW

This Court reviews *de novo* a district court's ruling on a motion to dismiss under M. R. Civ. P. 12(b)(6). *Powell v. Salvation Army* , 287 Mont. 99, 102, 951 P.2d 1352, 1354 (1997). "A claim is subject to dismissal under Rule 12(b)(6) if it . . . fails to state sufficient facts that, if true, would entitle the claimant to relief under the claim." *In re Estate of Swanberg*, 2020 MT 153, ¶ 6, 400 Mont. 247, 465 P.3d 1165. "[T]he complaint must state something more than facts which, at most, would breed only a suspicion that the claimant may be entitled to relief." *Id.*

SUMMARY OF THE ARGUMENT

The Post Article is privileged as a matter of law. Every single sentence in the article is a substantially accurate description of allegations made in the Marshall and Baptiste Lawsuits, and is directly attributed to the court papers. The Article is also fair:

no reasonable reader could believe that the Post adopted the allegations as true, particularly since the Article attributes all of the statements to court papers, highlights the credibility issues that have "taken down" each of Goguen's accusers, and expressly characterizes Baptiste's allegations as "unproven" and "unsubstantiated." Such reports are protected by the First Amendment and the Montana Constitution. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492, 95 S.Ct. 1029, 1044-45 (1975) ("With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."); *Cox v. Lee Enters., Inc.*, 222 Mont. 527, 529-30, 723 P.2d 238, 240 (1986) ("The right to inspect public documents and be fully informed of their contents finds strong expression in our state constitution.") (citing Mont. Const. art. II, § 9, guaranteeing right to examine public documents).

The District Court's decision departs sharply from this Court's precedents and, if left in place, would impose substantial, new burdens on the media's ability to report on judicial proceedings. ***First***, even if Montana law controls Goguen's underlying defamation claim (an issue not contested on this appeal), Montana's choice of law rules compel application of New York's fair report privilege. A true conflict exists between Montana's qualified fair report privilege, which is lost upon a showing of malice, and the privilege recognized by N.Y. Civ. Rights Law § 74, which is absolute and unqualified. Under Montana law, the law of the state of injury will not control if, "with respect to a particular issue, a different state has a more significant relationship."

Phillips v. Gen. Motors Corp., 2000 MT 55, ¶ 32, 298 Mont. 438, 995 P.2d 1002.. Since the fair report privilege is designed to protect speakers, not to provide a remedy to plaintiffs, courts outside of New York routinely find that New York has the most significant interest in governing the privilege afforded to New York publishers. This makes sense: Relying on the privilege law of a publisher's domicile promotes certainty and predictability for journalists who might otherwise be faced with the daunting challenge of having to research the privilege laws of multiple states before publishing a single report about a lawsuit. The fair report privilege protects the press from this burden and the chilling effect it would have on the reporting of judicial proceedings.

Second, under New York's fair report privilege, N.Y. Civ. Rights Law § 74, fair and true reports of judicial proceedings are ***absolutely privileged***, regardless of whether the defendant acted with malice. Since each of the challenged statements accurately describes allegations made in the Marshall and Baptiste Complaints, and the Post Article details the credibility issues affecting Goguen's accusers, Goguen's claim is precluded as a matter of law pursuant to N.Y. Civ. Rights Law § 74.

Third, even if New York law were not applicable, the Post Article is also squarely protected by Montana's fair report privilege, § 27-1-804(4), MCA, and the Complaint should have been dismissed as a matter of law on that basis under Rule 12(b)(6). *See Lence*, 258 Mont. at 443, 853 P.2d at 1237 (holding that applicability of § 27-1-804(4), MCA is a question of law when there is no dispute as to the content of the underlying proceedings) (citing *Rasmussen v. Bennett* , 228 Mont. 106, 110, 741 P.2d 755, 758

(1987). Even though the Montana privilege is qualified and can be defeated by a showing that the defendant acted maliciously, nothing in the Complaint, and no set of facts, could provide a basis for showing that the Post published the Article with malice. As this Court has already held on remarkably similar facts, § 27-1-804(4), MCA applies *as a matter of law* to substantially accurate reports of judicial proceedings, even where the media defendant fails to independently investigate the reported allegations, and even when it does not give the plaintiff an opportunity to comment. *Lence*, 258 Mont. at 438, 443, 853 P.2d at 1233, 1237 (affirming summary judgment). This is particularly true where (as here) the defendant publishes a second article focused on the plaintiff's objections. *Id*., 258 Mont. at 437, 853 P.2d at 1233.

The District Court's decision is squarely at odds with *Lence* and if left in place will significantly impair reporting on court proceedings involving Montana litigants. As just one example, the Marshall Complaint, which was dismissed in part for its "prolixity," is 236-pages long and contains more than 950 paragraphs of allegations. As a practical matter, a daily newspaper cannot be expected to independently investigate each of those allegations before reporting on them, and the whole point of the fair report privilege is to protect against this. *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 717 (4th Cir. 1991) ("[T]he reality of the newsgathering process counsels against requiring the press to guarantee that every allegation on the part of a public disputant is correct.").

Since there is no set of facts that would entitle Goguen to relief, the District Court's Order should be reversed, and the Complaint should be dismissed with prejudice.

ARGUMENT

I. MONTANA'S CHOICE OF LAW RULES REQUIRE APPLICATION OF NEW YORK'S FAIR REPORT PRIVILEGE

When there is an actual conflict between the laws of potentially interested states, Montana's choice of law rules require a "careful, step-by-step" analysis to evaluate the competing policy interests at stake. *Mitchell v. State Farm Ins. Co.*, 2003 MT 102, ¶ 17, 315 Mont. 281, 68 P.3d 703. Though there is an initial presumption in favor of the law of the state where the plaintiff is injured, that presumption is overcome if, "with respect to the particular issue, a different state has a more significant relationship." *Phillips*, ¶ 32.

Since New York has the most significant interest in regulating the conduct of its publishers, courts routinely apply the New York privilege when, as is the case here, a non-New York plaintiff sues a New York publisher over coverage of judicial proceedings outside New York. *See, e.g.*, *Kinsey v. N.Y. Times Co*., 991 F.3d 171, 178 (2d Cir. 2021); *Jacob v. Lorenz*, 21 Civ. 6807 (ER), –- F. Supp. 3d –-, 2022 U.S. Dist. LEXIS 161822, at *23-24 n.11 (S.D.N.Y. Sept. 7, 2022); *Wilkow v. Forbes, Inc*., No. 99 C 3477, 2000 U.S. Dist. LEXIS 6587 (N.D. Ill. May 15, 2000), *aff'd*, 241 F. 3d 552 (7th

Cir. 2001); *Miller v. Gizmodo Media Grp.*, No. 18-24227-CIV, 2019 U.S. Dist. LEXIS 69428 (S.D. Fla. Apr. 24, 2019). The same result should apply here.

A. An Actual Conflict Exists Between Montana and New York Law

An actual conflict exists between the fair report privileges of New York and Montana. Under New York law, "[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 []." N.Y. Civ. Rights Law § 74. This privilege is ***absolute*** and cannot be defeated by allegations of bad faith or malice. *Kinsey*, 991 F.3d at 176. Montana law immunizes "fair and true report[s]" of judicial proceedings, but only if such reports are published "without malice." § 27-1-804(4), MCA. Montana applies the Restatement (Second) Conflicts of Law to resolve conflicts of law sounding in tort. *Phillips*, ¶ 32.

B. Montana Law Permits Application of New York's Fair Report Privilege, Regardless of Which State's Law Controls the Underlying Defamation Claim

The Court should apply New York law to govern the privilege issue regardless of which state's law governs Goguen's underlying defamation claim.[9] The heart of the Restatement approach, which has been adopted by this Court, is to compare the competing "policies and interests underlying the *particular issue* before the court." *Phillips*, ¶ 22 (emphasis added). This issue-based approach means that courts "are not

[9] For purposes of this appeal, the Post takes no position on which state's law controls the underlying defamation claim. The Court need not reach that question to decide the choice of law issue with respect to privilege.

bound to decide all issues under the local law of a single state." Restatement (Second) Conflicts of Law § 145 cmt. d. Rather, "[e]ach issue [receives] separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states."[10] *Id.* "By prescribing this analytical approach, the Second Restatement follows the principle of *depecage*." *Act I, LLC v. Davis*, 60 P.3d 145, 149(Wyo. 2002) (quoting *Ruiz v. Blentech Corp.*, 89 F.3d 320, 323-24 (7th Cir. 1996)). *See also Otto v. Newfield Exploration Co.*, No. CV 15-66, 2016 U.S. Dist. LEXIS 195741, at *17 (D. Mont. July 26, 2016) ("Depecage is a 'widely approved process when there are issues to which the different laws applied are separable.'") (quoting *Diamond Ranch Academy, Inc. v. Filer*, 117 F. Supp. 3d 1313, 1322 (D. Utah 2015)).[11] *See also* Restatement (Second) Conflicts of Law § 163 (providing that this issue-based analysis approach applies specifically to questions of privilege).

Since the conflict here relates specifically to the fair report privilege, the "most significant interest" analysis must be applied with respect to that "particular issue."

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[10] *See also* Restatement (Second) Conflicts of Law § 150(1) ("The rights and liabilities that arise from defamatory matter in any one edition of a [] newspaper . . . are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties . . . .").

[11] The federal court in *Otto* did not "reject" depecage, as Goguen argued below, but ultimately determined that depecage was not warranted in that case because North Dakota's interest was more significant than Montana's. *Id.* at *17-18. Though the court also worried about the possibility that application of different states' laws could make jury instructions confusing, *id.*, that is not a concern here since the privilege issue precludes Goguen's claim and should be resolved by the Court as a matter of law.

Restatement (Second) Conflicts of Law §§ 6(2), 145(2)(d). As set forth below, the Restatement analysis supports application of New York's fair report privilege here.

C. New York Has the Most Significant Interest in Governing the Conduct of Its Publishers

To decide which state has the most significant interest with respect to a particular issue in a tort claim, Montana courts consider several factors "to be evaluated according to their relative importance with respect to the particular issue:"

> (1) The place where the injury occurred; (2) The place where the conduct causing the injury occurred; (3) The domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) The place where the relationship, if any, between the parties is centered.

Phillips, ¶ 29 (citing Restatement (Second) § 145(2)). Courts next look to the interests and public policies of the competing states, guided by the seven factors identified in § 6(2):

> (1) The needs of the interstate and international systems; (2) The relevant policies of the forum; (3) The relevant policies of the interested states and the relative interests of those states in the determination of a particular issue; (4) The protection of justified expectations; (5) The basic policies underlying the particular field of law; (6) Certainty, predictability, and uniformity of result; and (7) Ease in the determination and application of the law to be applied.

Application of these factors here demonstrates that New York has the most significant relationship to the privilege issue, *i.e.*, the "particular issue" before the Court.

Goguen alleges that he was injured in Montana, Compl. ¶ 20, but he also alleges that a substantial portion of his alleged injury ("in excess of $500 million") involves

damages to his "recently launched [] venture capital fund with third party investors," without alleging where the fund operated or where the investors are located. *Id.* ¶ 64. The allegations in the Baptiste Lawsuit involved conduct that occurred while Goguen was domiciled in California, the alleged breach of a contract that was formed under California law, and the 2016 loss of his job at California-based Sequoia Capital. SA-7 ¶¶ 9, 10, 15. The place of injury is afforded less weight here because "[t]he Post Article was published online and was accessible worldwide." *Miller*, 2019 U.S. Dist. LEXIS 69428, at *14 (applying Section 74 to multistate defamation case). *See* Restatement (Second) Conflicts of Law § 145, cmt. e ("[T]here may be little reason in logic or persuasiveness to say that one state rather than another is the place of injury, or when, such as in the case of multistate defamation, injury has occurred in two or more states.").

The remaining Section 145 factors either weigh in favor of applying New York's privilege law or are neutral. Goguen is domiciled in Montana, but the Post operates in and is published in New York. There is no relationship between Goguen and the Post Defendants.

The Section 6(2) factors focus on policy and heavily favor the application of New York's fair report privilege, just as many other jurisdictions have found in similar cases. The purpose of the fair report privilege is to safeguard the free press. *Cummings v. City of N.Y*, No. 19-cv-7723, 2020 U.S. Dist. LEXIS 31572, at *42 (S.D.N.Y. Feb. 24, 2020). A publisher's home state has the most significant interest in protecting that interest. Certainty and predictability are also served by subjecting journalists to a single privilege

standard rather than to a patchwork quilt of different standards in every jurisdiction where they publish. *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1092 (S.D.N.Y. 1984) ("[Publishers'] justified expectation that their conduct will be judged by the rules of jurisdictions in which they carry on their activities merits protection.").

For example, in *Kinsey*, the Second Circuit applied New York's fair report privilege to a libel case involving a Maryland plaintiff:

> Despite the fact that Kinsey lived in Maryland, and that the incident took place in his city of employment, the District of Columbia, . . . New York is the jurisdiction with the most significant interest in the litigation. As its name suggests, the Times is domiciled in New York and the alleged defamatory statement emanated from New York. Moreover, while Maryland has an interest in protecting its citizens from defamatory conduct, New York has strong policy interests in regulating the conduct of its citizens and its media. The above-listed factors therefore weigh in favor of applying New York's fair report privilege to the instant dispute.

991 F.3d at 178 (footnotes omitted).

Wilkow is also illustrative. In that case, an Illinois plaintiff sued a New York magazine for defamation. 2000 U.S. Dist. LEXIS 6587, at *1-2. The court found that New York's fair report privilege applied, even though Illinois law governed the underlying defamation claim:

> New York has a strong interest in encouraging unfettered expression by protecting certain types of speech within its borders. Thus, it made its privilege absolute. Moreover, New York's interest in fixing the scope of a privilege applicable to conduct taking place within its borders is paramount. 'In addition, the policy behind exempting those who speak in certain contexts is to encourage unfettered expression . . . by

> ensuring that such statements do not subject the speaker to liability.' This policy would be wholly eviscerated if conduct occurring in New York was evaluated under another state's privilege laws.
>
> Finally, ***the fair reporting privilege is meant to protect speakers, not provide a remedy to plaintiffs***. While conduct in New York may impact residents of other states, as is the case here, the fact remains that the conduct took place in New York, where the New York legislature has spoken regarding the breadth of its privilege. Thus, the court finds that New York's policy has a more substantial relationship with the conduct at issue here.

Id. at *19-21 (emphasis added, internal citations omitted).[12] *See also Miller*, 2019 U.S. Dist. LEXIS 69428 (relying on *Wilkow* and applying Section 74 to defamation claim brought by Virginia plaintiff against New York media company).[13]

N.Y. Civ. Rights Law § 74 protects a New York publisher from a claim "wherever it may be deemed to have arisen," *Edmiston v. Time, Inc.*, 257 F. Supp. 22, 24 (S.D.N.Y. 1966), and courts outside New York routinely apply the New York privilege in libel cases arising from online publications, even when the plaintiff is domiciled elsewhere. *See*, *e.g.*, *Nix v. ESPN, Inc.*, 772 F. App'x 807 (11th Cir. 2019) (per curiam); *Wilkow*,

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[12] Goguen argued below that this "reasoning was not affirmed on appeal," Opp. at 13, but that it is misleading because the parties did not dispute that Section 74 applied, and the court stated that it was not reaching the privilege issue because the plaintiff's claim failed under Illinois law. *Wilkow*, 241 F.3d at 555.

[13] Goguen relied below on *Lewis v. Reader's Digest Ass'n*, 162 Mont. 401, 512 P.2d 702 (1973), to urge the District Court to forego the required Restatement analysis and just apply Montana law. But *Lewis* was decided nearly 30 years before this Court adopted the Restatement's choice of law standard, and *Lewis* addressed issues of personal jurisdiction, not choice of law or the fair report privilege.

2000 U.S. Dist. LEXIS 6587; *Gubarev v. BuzzFeed, Inc.*, 340 F. Supp. 3d 1304, 1313-20 (S.D. Fla. 2018); *Miller*, 2019 U.S. Dist. LEXIS 69428. The New York privilege also applies when New York publishers report on judicial proceedings in other states. *Kinsey*, 991 F.3d at 178; *Jacob*, U.S. Dist. LEXIS 161822, at *23-24 n.11; *Miller*, 2019 U.S. Dist. LEXIS 69428; *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 479 (S.D.N.Y. 2012).

The Court should apply the fair report privilege of the Post's domicile, N.Y. Civ. Rights Law § 74.

II. THE POST ARTICLE IS ABSOLUTELY PRIVILEGED AS A FAIR AND TRUE REPORT OF THE BAPTISTE AND MARSHALL LAWSUITS

Applicability of N.Y. Civ. Rights Law § 74 is a question of law. *Holy Spirit Ass'n for Unification of World Christianity v. N.Y. Times Co.*, 49 N.Y.2d 63, 65-68 (N.Y. 1979). New York Courts routinely grant Rule 12(b)(6) motions on fair report privilege grounds, based on a comparison between a challenged article and the court documents on which it reports. *See, e.g.*, *Kinsey*, 991 F.3d at 174; *Saleh v. N.Y. Post*, 78 A.D.3d 1149, 1151-52 (N.Y. App. Div. 2010); *Napoli v. N.Y. Post*, 175 A.D.3d 433 (N.Y. App. Div. 2019).

Performing that comparison here, *see* SA-16, shows – as a matter of law – that ***every*** statement challenged in the Complaint is a substantially accurate report of the Marshall and Baptiste Lawsuits that would not leave a different impression in the mind of a reader than the pleadings themselves. *Daniel Goldreyer, Ltd. v. Van de Wetering*,

217 A.D.2d 434, 436 (N.Y. App. Div. 1995). The Post Article is thus absolutely privileged pursuant to N.Y. Civ. Law § 74.

While the District Court correctly found that nearly all of the statements were "based" on the Marshall and Baptiste Lawsuits, it erred by finding that Statement Nos. 10, 13, and 14 were not. More fundamentally, it was error not to find that *all* of the challenged statements are privileged as a matter of law, since they are not only "based" on those proceedings but are also substantially accurate reports of the allegations therein.

A. *All* of the Challenged Statements Are Privileged

The Court correctly held that Statement Nos. 1-9, 11, 12, 15 and 16 are "based on either the Baptiste or Marshall pleadings." Order at 17. But, as illustrated in Exhibit 16 to the Supplemental Appendix, *all* of the statements are also substantially accurate reports of those proceedings and, thus, privileged.

None of Goguen's arguments save his claim. He pleads that the allegations made by Marshall and Baptiste are false, SA-1 ¶¶ 7, 33, but underlying "truth" is "irrelevant" under the fair report privilege. Hon. Robert D. Sack, 1 SACK ON DEFAMATION § 7.3.5 (5th ed. 2017). "The question is not whether or not the statement is 'true.' The question is whether it is a substantially accurate description of the claims made in the . . . proceeding." *Mulder v. Donaldson, Lufkin & Jenrette*, 161 Misc. 2d 698, 705 (N.Y. Sup. Ct. 1994), *aff'd*, 208 A.D.2d 301 (N.Y. App. Div. 1995). Significantly, accurate reporting about allegations in a complaint is privileged, even if the party against whom the allegations are made ultimately prevails (as Goguen did against Baptiste). *Id.*

Also without merit is Goguen's contention that certain challenged statements, *e.g.*, that Goguen allegedly "transformed" Whitefish "into his private fiefdom" and "a dark banana republic," SA-1 ¶¶ 1, 6, 33(a), cannot be privileged because they are not direct quotes from the Marshall Complaint. In applying the fair report privilege, the language used by the defendant "should not be dissected and analyzed with a lexicographer's precision;" and "must be accorded some degree of liberality." *Holy Spirit Ass'n*, 49 N.Y.2d at 68. "The test is whether the published account of the proceeding would have a different effect on the reader's mind than the actual truth, if published." *Daniel Goldreyer*, 217 A.D.2d at 436.[14] Here, the words "fiefdom" and "dark banana republic" are not only hyperbolic, they also convey the allegations in the Marshall Complaint accurately. The media is granted a "certain amount of literary license" in determining what is a "fair report," *McClatchy Newspapers, Inc. v. Super. Ct.*, 189 Cal. App. 3d 961, 975-76 (Cal. 1987), and colorful descriptions of allegations in a lawsuit are simply not actionable, *Akassy v. N.Y. Daily News*, No. 14CV1725, 2017 U.S. Dist. LEXIS 9155 (S.D.N.Y. Jan. 23, 2017) (news article describing plaintiff as "[w]acko rapist" and "homeless, ascot-wearing sex-fiend" absolutely privileged pursuant to N.Y. Civ. Rights Law § 74).

Goguen next alleges that the Post Article is not "fair" because it does not address the credibility of his accusers. SA-1 ¶¶ 8, 26-31, 40. But again, N.Y. Civ. Rights

[14] *See also Lence*, 258 Mont. at 442, 853 P.2d at 1236 (fair report privilege protects substantially true report of allegations).

Law § 74 requires only substantial accuracy, not a recitation of the plaintiff's side of the story. *Zappin*, 769 F. App'x at 8-10. In fact, the Post Article goes beyond what is required by N.Y. Civ. Rights Law § 74, stating that Marshall pleaded guilty to "wire fraud, tax evasion and conning Goguen out of millions of dollars," that he "agreed to pay up to $3.5 million in restitution," and linking to articles describing the indictment in even greater detail.[15] SA-3. It further states that another Goguen accuser "pleaded guilty to blackmailing Goguen" and links to additional reporting that Dial allegedly "collude[ed] with Marshall" and "l[ied] to city, state and federal investigators." *Id.* It also states explicitly that Baptiste's allegations were "unproven" and "unsubstantiated," that she was enjoined from repeating her allegations in a lawsuit, and that Goguen prevailed in his countersuit. *Id*. No reasonable reader could have read this to mean that the Post was adopting the allegations against Goguen as true.

Goguen's allegations of malice are also insufficient to overcome the protection of N.Y. Civ. Rights Law § 74. *See Biro*, 883 F. Supp. 2d at 477 (the privilege is absolute, unqualified and "is not defeated by the presence of malice or bad faith."); *Freeze Right Refrigeration & Air Conditioning Servs., Inc. v. City of N.Y.*, 101 A.D.2d 175, 183 (N.Y. App. Div. 1984) (N.Y. Civ. Rights Law § 74 does not require that the media independently investigate allegations made in an official proceeding.). New York's fair

[15] "The hyperlink is the twenty-first century equivalent of the footnote[.]" *Adelson v. Harris*, 973 F. Supp. 2d 467, 484 (S.D.N.Y. 2013).

report privilege applies here as a matter of law, and Goguen's claim should be dismissed on that basis.

B. Statement Nos. 10, 13 and 14 Clearly Relate to the Marshall and Baptiste Lawsuits

It was also error for the District Court to find that Statement Nos. 10, 13 and 14 are not "based" on the Marshall and Baptiste proceedings. Like all the other challenged statements, they are absolutely privileged as a matter of law.

1. Statement No. 10

Statement No. 10 is a substantially accurate description of the Marshall Complaint, which alleges that Goguen was fired by Sequoia Capital in 2016 after Baptiste made her allegations. SA-8 ¶ 316. Goguen does not even dispute this. What he takes issue with is the Post Article's incorrect attribution in a photo caption to a "federal indictment," an error that was immediately corrected by the Post. SA-1 ¶ 33(j).

Courts evaluate challenged statements "from the standpoint of the average reader, judging the statement not in isolation, but within the context in which it is made." *Jonas v. Lake Cty. Leader*, 953 F. Supp. 2d 1117, 1120-21 (D. Mont. 2013) (quoting *Knievel v. ESPN*, 393 F.3d 1068, 1074 (9th Cir. 2005)). *See also Williams v. Pasma*, 202 Mont. 66, 74, 656 P.2d 212, 216 (1982) (no liability where defendant stated incorrectly that plaintiff was "under federal indictment," even though he had only been charged).

The Post Article states five separate times that the allegations made against Goguen were part of a "***civil***" suit and states explicitly that criminal charges against Goguen have *not* been pursued. SA-2-3. The headline of the print version of the Post

Article even includes the words, "A civil complaint alleges . . ." SA-2. Moreover, the statement did not say that it was Goguen who was indicted, and the only people discussed in the Post Article as having been indicted are Marshall and Nash (not Goguen). Taken in context, no reasonable reader could have thought that Goguen was the subject of a federal indictment. *See also Jonas v. Hagadone Mont. Publ'g*, No. CV 13-30-M-DLC-JCL, 2013 U.S. Dist. LEXIS 201248, at *10 (D. Mont. Dec. 6, 2013) ("Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified.") (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S.Ct. 2419, 2433 (1991)). Statement No. 10 is absolutely privileged.

2. Statement Nos. 13 and 14

Statement Nos. 13 and 14 accurately describe the Baptiste Lawsuit. Both statements come from a single sentence in the Post Article: "Goguen won a countersuit in the three-year legal battle, securing a restraining order against Baptiste from filing any similar suits against him." SA-2-3.

Goguen alleges that this sentence is misleading because it does not state that the California court found Baptiste's allegations to be "false" or that she was enjoined from repeating them. SA-1 ¶¶ 33(m), (n). To the contrary, the Post Article refers to Baptiste's allegations as "unsubstantiated" and "unproven" and makes clear that Goguen prevailed on his counterclaims. SA-2-3. A reasonable reader would clearly understand that Ms. Baptiste lost in court and that she was "restrained from filing any similar suits against Goguen." *Id.* Again, "[t]here is no requirement that the publication report the plaintiff's

side of the controversy," just that the publication report on the official proceeding with substantial accuracy. *Zappin v. NYP Holdings Inc.*, 769 F. App'x 5, 10 (2d Cir. 2019) (citation and internal quotation marks omitted). Statement Nos. 13 and 14 are also absolutely privileged pursuant to N.Y. Civ. Rights Law § 74.

In sum, since all of the challenged statements are both fair and substantially accurate reports of the Marshall and Baptiste Lawsuits, the Post Article is ***absolutely privileged*** as a matter of law pursuant to N.Y. Civ. Rights Law § 74.

III. THE POST ARTICLE IS ALSO PRIVILEGED UNDER MONTANA'S FAIR REPORT PRIVILEGE

Even if N.Y. Civ. Rights Law § 74 were not applicable, the District Court also erred by not finding the Post Article to be privileged as a matter of law pursuant to § 27-1-804(4), MCA. As discussed above, each of the challenged statements is a fair and substantially accurate report of the Marshall and Baptiste pleadings, *see supra* § II, and the Complaint also fails to sufficiently plead malice.

A. Application of § 27-1-804(4), MCA Is Properly Decided at the Pleading Stage

As a preliminary matter, it was error for the District Court to find that fairness, truth, and malice can only be decided by a jury. Order at 18. To the contrary, "[w]hether a publication is privileged is a question of law for the court, where there is no dispute about the content of the proceedings on which the publication is based." *Lence*, 258 Mont. at 443, 853 P.2d at 1237. *See also Griffin v. Opinion Publ'g Co.*, 114 Mont. 502, 138 P.2d 580, 586 ("[W]hether the publication complained of was privileged . . . is a

question of law to be decided by the court whenever the evidence is undisputed."), *overruled on different grounds by State v. Helfrich*, 277 Mont. 452, 922 P.2d 1159 (1996). Just as in *Lence*, there can be no dispute here about the content of the Marshall and Baptiste proceedings – the relevant court documents were incorporated by reference into Goguen's Complaint. *See* SA-5-7.

Goguen relies on Article 2, Section 7 of the Montana Constitution to argue that application of § 27-1-804(4), MCA presents a fact question, but his reliance on that provision is misplaced. Article 2, Section 7 provides that, "[i]n all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts." But, notwithstanding Article 2, Section 7, "the function of the court and jury is not greatly different in the trial of libel from what it is in other cases," and "it is for the court and not the jury to pass upon demurrers to the complaint." *Griffin*, 114 Mont. at 512, 138 P.2d at 586.[16]

The District Court found that truth, fairness and malice present questions for the jury, but the cases on which it relied are easily distinguishable. *See* Order at 18 (citing *Sible v. Lee Enters.*, 224 Mont. 163, 729 P.2d 1271 (1987); and *Cox*, 222 Mont. at 530, 723 P.2d at 240. *Sible* was decided before *Lence* and did not involve the fair report privilege or any other privilege set forth in § 27-1-804, MCA. Therefore, *Sible* cannot

[16] *See also McLeod v. State Dep't of Transp.*, 2009 MT 130, ¶ 21, 350 Mont. 285, , 206 P.3d 956 ("[P]reliminary determination of whether a publication is privileged is a question of law for the court.").

be considered authority with respect to either the fair report privilege or, as discussed in greater detail below, the standard of malice applicable to § 27-1-804(4), MCA. *See infra* § III(C)(1).

As for *Cox*, that case addressed a narrow, certified question about whether civil complaints are protected by § 27-1-804(4), MCA. *Cox*, 222 Mont. at 530, 723 P.2d at 240. The only mention of the jury's province in *Cox* was that a jury would determine "whether the Billings Gazette should respond in damages." *Id.* The Court also observed that "[f]airness, truth and malice will be at the controversy's core" but did not address whether these issues were questions of law or reserved for the jury. *Id.*

The fact is that Montana courts decide the applicability of qualified privileges as a matter of law, and they do so at the pleading stage. *See, e.g.*, *Cherewick v. Gildehaus*, No. DA13-0481, SA-15 (Mont. Dist. Ct. 22nd Dist. Carbon Cty. June 27, 2013) (granting 12(b)(6) motion on grounds of 27-1-804(3)), *aff'd*, 2014 MT 59N; *Smith v. Roope*, No. DV-19-22, SA-14 (Mont. Dist. Ct. 3d Dist. Powell Cty. Mar. 3, 2020) (granting petition for summary dismissal of libel claim on ground that complaint contained "no evidence of malicious intent"), *aff'd* 2020 MT 290N. *See also Spreadbury v. Bitterroot Pub. Lib.*, CV 11-64-M-DWM-JCL, 2011 U.S. Dist. LEXIS 114270, at *4 (D. Mont. Oct. 4, 2011). Indeed, early dismissal of suits that invoke the fair report privilege is critical, because "the purpose of the privilege is not served completely by freeing republishers from liability alone; the threat from extended litigation itself deserves its own response." *Howell v. Enter. Publ'g Co.*, 920 N.E.2d 1, 13 (Mass. 2010)

For this reason, other states – including those that, like Montana, have statutory fair report privileges qualified by malice – also regularly grant Rule 12(b)(6) motions on fair report grounds.[17] The Post's motion should have been granted as a matter of law.

B. The Challenged Statements Are Fair and True Reports As a Matter of Law

Under § 27-1-804(4), MCA, the Post Article is fair and true for the same reasons that it is under N.Y. Civ. Rights Law § 74. *See supra* § II. It simply does not matter whether the underlying statements are true: all that matters is whether the *report* of the official proceedings is substantially accurate. *See Lence*, 258 Mont. at 442, 853 P.2d at 1236 ("[The defendant newspaper] did not allege that Lence had actually committed acts of fraud, professional misconduct and theft, but merely reported accurately that Semenza had filed a complaint alleging such acts []."); *Spreadbury*, 2011 U.S. Dist. LEXIS 114270, at *5-6 (article held to be substantially accurate report of plaintiff's arrest despite plaintiff's claim that reporter should have known the charge lacked merit). As this Court recognized in *Lence*, the First Amendment precludes liability for accurate reporting of judicial proceedings, regardless of whether the statement is also privileged

[17] *See, e.g.*, *Porter v. Guam Publ'ns, Inc.*, 643 F.2d 615 (9th Cir. 1981); *Jelm v. Galan*, No. 58093, 1991 Ohio App. LEXIS 936, at *8-9 (Ohio Ct. App. 1991); *KBMT Operating Co. v. Toledo*, 492 S.W.3d 710 (Tex. 2016); *Ratheal v. McCarthy*, No. 2:17CV997DAK, 2018 U.S. Dist. LEXIS 161074 (D. Utah Sept. 19, 2018); *Cruse v. Frabrizio*, No. 3:13-18768, 2014 U.S. Dist. LEXIS 90107 (S.D. W. Va. July 2, 2014); *Doneghy v. WKYT 27 News First*, No. 2014-CA-001850-MR, 2016 Ky. App. Unpub. LEXIS 800 (Ky. Ct. App. Dec. 2, 2016); *Jones v. Hannah*, No. 2013-CA-000359-MR, 2015 Ky. App. Unpub. LEXIS 1 (Jan. 9, 2015).

under state law. 258 Mont. at 442-43, 853 P.2d at 1236. Since the Post Article accurately reported the allegations in the Marshall and Baptiste Lawsuits, it is – as a matter of law – not only protected by the First Amendment, but also a fair and true report under § 27-1-804(4), MCA.

C. No Set of Facts Support Goguen's Malice Claim

Also insufficient to overcome the Montana privilege are Goguen's allegations of malice. Goguen alleges that the Post acted maliciously because it failed to independently investigate the allegations reported, and because the Post failed to obtain Goguen's comment for the Article. SA-1 ¶¶ 40, 42-51. But as stated above, this Court has already held as a matter of law that neither of these allegations is sufficient to defeat the privilege afforded by § 27-1-804(4), MCA. *Lence*, 258 Mont. at 438, 443, 853 P.2d at 1233, 1237.

1. Failure to Investigate Does Not Defeat the Privilege

It was error for the District Court to find that § 27-1-804(4), MCA requires the media to independently investigate allegations made in a judicial proceeding before reporting on them. That finding is directly contrary to *Lence* and the overwhelming weight of authority from other jurisdictions.

In *Lence*, the author of the challenged article admitted at her deposition that she did not investigate the allegations made in a complaint filed with the Montana Supreme Court's Commission on Practice, because "It's not my job to determine who's calling who names and who's right." *Lence*, 258 Mont. at 438, 853 P.2d at 1233. This Court agreed, holding that § 27-1-804(4), MCA applied as a matter of law to substantially

accurate reports of judicial proceedings, notwithstanding the reporter's failure to investigate. *Id.* at 443, 853 P.2d at 1236.[18]

The District Court did not even address *Lence*, much less attempt to distinguish it from this case. The only case cited by the District Court on this issue was *Sible*. Order at 18. But as stated above, *Sible* did not even mention the fair report privilege, or the standard of malice applicable to any qualified privilege. In fact, prior to the District Court's decision in this case, the only published decision that ever cited *Sible* on the issue of malice was *Spreadbury*, 2011 U.S. Dist. LEXIS 114270, at *4, which found on a Rule 12(b)(6) motion that an alleged failure to investigate was *not* sufficient to withstand dismissal pursuant to § 27-1-804, MCA, where the allegations in a judicial proceeding were reported with substantial accuracy.

Any effort to import *Sible's* articulation of malice to the fair report privilege context is directly precluded by *Lence*, which this Court decided six years later, and is this Court's *only* decision addressing whether an alleged failure to investigate overcomes the protection of § 1-27-804(4), MCA. Quite apart from whether *Sible* stated the correct

[18] Goguen claimed below that under Montana law, a reporter is liable for repeating accusations without conducting independent investigation. Opp. at 19 (citing *Kelly v. Indep. Publ'g Co.* , 45 Mont. 127, 138-39, 122 P. 735 (1912)). But in *Kelly*, which was decided 110 years ago, the Court specifically held that the challenged statements were *not* covered by the fair report privilege because they were not part of a judicial proceeding. *Id.* at 137-38, 122 P. at 738. *Lence*, not *Kelly* is controlling law on Montana's fair report privilege.

standard of malice,[19] there is good reason why *Lence* articulated a different standard with respect to the fair report privilege. The fair report privilege exists to protect substantially accurate reports of judicial proceedings made without malice, even if the statements would otherwise give rise to liability. *See, e.g.*, *Sack*, § 7.3.5 ("The privilege is designed to enable the public to know what is being said in its courts . . . irrespective of whether the person who conveys the statements believes they are true or is confident he or she can establish that belief in court."). Indeed, courts have "'traditionally stopped short of imposing extensive investigatory requirements on a news organization reporting on a governmental activity or document,' as such a duty would obviate the need for and purpose of the fair report privilege." *Cruse*, 2014 U.S. Dist. LEXIS 90107 (granting 12(b)(6) motion on fair report grounds) (citing *Reuber*, 925 F. 2d at 712). *See also Reuber*, 925 F. 2d at 713 ("[A] reporter acts as an agent for members of an otherwise preoccupied public which could, if it possessed the time, energy, or inclination, inform itself about the operations of government.").

This reasoning also squares with *Cox*, where the Court found:

> While we are aware that pleadings are one-sided and may contain, by design, highly defamatory statements, we believe the information found in such pleadings is of sufficient value as to warrant the encouragement of its publication.

[19] The U.S. Supreme Court has made clear that failure to investigate alone does not constitute malice. *Harte–Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 2696 (1989); *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325 (1968).

222 Mont. at 529, 723 P.2d at 240 (citation omitted).

Other courts interpreting statutory fair report privileges qualified by malice have also held that the privilege is not overcome by the media's failure to investigate. For example, South Dakota's fair report statute, SDC 47.0503, is identical to § 27-1-804(4), MCA, and that state's Supreme Court has held that the privilege cannot be overcome by "failure of defendant to investigate the validity of statements[]." *Hackworth v. Larson*, 165 N.W.2d 705, 711 , (S.D. 1969) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964)). Other courts interpreting qualified privileges are in accord. *See, e.g.*, *Gamler v. Akron Beacon Journal*, 5:91CV2600, 1995 WL 472176 (N.D. Ohio 1995); *Birmingham Broad. (WVTM-TV) LLC v. Hill*, 303 So. 3d 1148, 1158 (Ala. 2020); *KBMT Operating Co*. v. *Toledo*, 492 S.W.3d 710, 711 (Tex. 2016). *See also Reuber*, 925 F.2d at 717 ("[T]he reality of the newsgathering process counsels against requiring the press to guarantee that every allegation on the part of a public disputant is correct.").

As this Court held in *Lence*, the privilege afforded by § 27-1-804(4), MCA cannot be overcome by Goguen's allegation that the Post failed to independently investigate the allegations made in the Baptiste and Marshall lawsuits.

2. Failure To Obtain Goguen's Comment Does Not Overcome the Privilege

Goguen's allegation that the Post should have done more to obtain his comment also fails to plead malice. In *Lence*, the reporter of the challenged article testified about

why she did not even attempt to obtain the plaintiff's comment:

> The story was based on the complaint filed with the Commission on Practice. And just as I would not contact people named in a civil suit about their part in it, I would not contact those named in a complaint to the Commission on Practice.

258 Mont. at 438, 853 P.2d at 1233. The Court held that even though the defendant "published the story without giving Lence an opportunity to comment," *id.*, § 27-1-804(4), MCA still protected the article as a matter of law, *id.* 258 Mont. at 443, 853 P.2d at 1237. Here, the Post actually *did* try to obtain Goguen's comment: he admits that Vincent's call for comment to his lawyer went unreturned. Compl. ¶¶ 43-49. The fact that Goguen thinks the Post should have given him more time to respond cannot give rise to malice since the Montana privilege would have applied even if the Post made no attempt to get his comment at all. *See also Cabello-Rondón v. Dow Jones & Co.*, No. 16-cv-3346 (KBF), 2017 U.S. Dist. LEXIS 131114, at *28-29 (S.D.N.Y. Aug. 16, 2017) (no malice where "the article makes clear that the authors sought comment from [plaintiff]'s representatives . . . before publication"), *aff'd*, 720 F. App'x 87 (2d Cir. 2018).

Moreover, the Complaint completely ignores the judicially noticeable fact that the Post published the Second Article containing Goguen's "scathing rebuke" just hours after Goguen posted it on Twitter. SA-10. *See Lence*, 258 Mont. at 437, 853 P.2d at 1232-33 (finding no malice where newspaper published plaintiff's responses in a second

article); *N.Y. Times Co. v. Connor*, 365 F.2d 567, 577 (5th Cir. 1966) (defendant's publication of plaintiff's rebuttal statement shows absence of malice).

Goguen's admission that the Post voluntarily revised the original article for clarity after receiving the letter from his attorneys, SA-1 ¶ 33, further shows as a matter of law that the Post did not act maliciously. *See Logan v. District of Columbia*, 447 F. Supp. 1328, 1332 (D.D.C. 1978) (published correction "tends to negate any inference of actual malice") *aff'd*, 578 F.2d 42 (D.C. Cir. 1978).

3. The Challenged Graphic Does Not Evidence Malice

The Complaint also alleges unpersuasively that the graphic accompanying the Article is somehow "evidence of malice." *See* SA-1 ¶ 41. The challenged graphic juxtaposes Goguen's photograph against images of Baptiste, cash, and the silhouette of a woman on a stripper pole. SA-3. This is an almost literal, graphic representation of the various claims made against Goguen in the lawsuits at issue. Goguen does not dispute that he had an extramarital affair with Baptiste, or that the Marshall Complaint describes Goguen's "boom boom" room, featuring a "built-in full size stripper pole," where Goguen "could procure young women to engage in sexual acts . . . for money." SA-8 ¶ 417. Since the graphic is a truthful report of the Baptiste and Marshall lawsuits, it cannot be evidence of malice. *Lence*, 258 Mont. at 442, 853 P.2d at 1236; *Spreadbury*, 2011 U.S. Dist. LEXIS 114270, at *5-6. At most, it may be unflattering to Goguen, but the fair report privilege does not require the press to tell "the plaintiff's side of the controversy." *Zappin*, 769 F. App'x at 10. *See also Lence*, 258 Mont. at 438, 442, 853

P.2d at 1233, 1236. An unflattering graphic cannot salvage Goguen's defective pleading of malice.

4. Goguen Cannot Plead Any Set of Facts to Show That the Post Acted Maliciously

As set forth above, the facts alleged by Goguen were already held by this Court in *Lence* to be insufficient to overcome the privilege. And while this Court "has yet to address" the precise malice standard applicable to § 27-1-804(4), MCA, *Stamey v. Howell*, CV-16-23-M-DLC, 2016 U.S. Dist. LEXIS 169318, at *13 (D. Mont. Dec. 7, 2016), there is no set of facts that Goguen could prove that would establish malice under *any* standard.

Certainly Goguen's allegations do not plead constitutional malice (*i.e.*, knowledge of falsity or reckless disregard for the truth). Since the Post Article accurately reported on allegations without adopting them as true, pleading constitutional malice here would have required Goguen to plausibly allege that the Post "fail[ed] to do what [wa]s reasonably necessary to ensure that the report [was an] accurate and complete or a fair abridgment" of the Marshall and Baptiste Complaints. Restatement (Second) of Torts § 611 cmt. b. None of the allegations in the Complaint make that claim, nor could they. *See Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 12, 90 S.Ct. 1537, 1541 (1970) (holding that where a newspaper reports accurately about an official proceeding, "it cannot even be claimed" that such a report was published with constitutional malice); *Spreadbury*, 2011 U.S. Dist. LEXIS 114270, at *5-6 (substantially accurate report of

arrest precludes finding of malice). Nor does anything in Goguen's complaint suggest that the Post acted "solely for the purpose of causing harm" to Goguen. Restatement (First) of Torts § 611 (1938).

Goguen's main argument for avoiding dismissal is that he was only required to plead malice "generally." *See* M.. R. Civ. P. 9(b). That is a red herring, because generality is not the fatal defect in Goguen's pleading. To the contrary, he attempts to plead malice with more than 22 paragraphs of alleged facts. SA-1 ¶¶ 5, 8, 10, 26-31, 40-51. The problem for Goguen is that, as set forth above, none of these allegations (which closely mirror those in *Lence*) come close to pleading malice (or falsity).

Accordingly, it was error for the District Court to find that Goguen's claim is not precluded as a matter of law by § 27-1-804(4), MCA.

CONCLUSION

For the foregoing reasons, the Post Article is privileged as a matter of law under N.Y. Civ. Rights Law § 74 and § 27-1-804(4), MCA. The District Court's Order should be REVERSED, and the Complaint should be dismissed with prejudice.

DATED this 16th day of December, 2022.

Respectfully submitted,

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word for Office 365 is 9,994, excluding the cover page, table of contents, table of authorities, certificate of compliance and certificate of service.

Dated: December 16, 2022.

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