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In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM, 2016

ARGUED: OCTOBER 31, 2016
DECIDED: SEPTEMBER 12, 2017
AMENDED: MARCH 1, 2018

No. 16-1335-cv

DAN FRIEDMAN,
Plaintiff-Appellant

v.

BLOOMBERG L.P., CHRISTOPHER DOLMETSCH, ERIK LARSEN, MICHAEL
HYTHA, ANDREW DUNN, MILLTOWN PARTNERS, PATRICK HARVERSEN,
D.J. COLLINS, OLIVER RICKMAN, PALLADYNE INTERNATIONAL ASSET
MANAGEMENT B.V., ISMAEL ABUDHER, LILY YEO,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Connecticut.

No. 15 Civ. 43 – Alvin W. Thompson, *Judge.*

Before: WALKER, HALL, and CHIN, *Circuit Judges.*

1 Plaintiff-appellant Dan Friedman appeals from a decision of
2 the United States District Court for the District of Connecticut (Alvin
3 W. Thompson, *J.*) dismissing his defamation action and entering
4 judgment in favor of the defendants-appellees. At issue in this case is
5 whether Connecticut General Statute § 52-59b—which provides for
6 long-arm jurisdiction over certain out-of-state defendants except in
7 defamation actions—violates Friedman’s First or Fourteenth
8 Amendment rights. We conclude that it does not and AFFIRM the
9 district court’s dismissal of this action as to the out-of-state
10 defendants. We also consider whether the allegedly defamatory
11 statements at issue in this case, which were reported and published
12 by the remaining defendants, are privileged under New York Civil
13 Rights Law § 74 as a fair and true report of judicial proceedings or are
14 protected expressions of opinion. We AFFIRM in part and REVERSE
15 in part the district court’s determinations regarding these statements
16 and REMAND this action for proceedings against the remaining
17 defendants consistent with this opinion.

18

19

1 ALAN H. KAUFMAN, Kaufman PLLC, New York,
2 NY (Stephen G. Grygiel, Silverman, Thompson,
3 Slutkin & White, LLC, Baltimore, MD, *on the brief*)
4 *for Plaintiff-Appellant.*

5 SHARON L. SCHNEIER (Yonatan S. Berkovits, *on the*
6 *brief*), Davis Wright Tremaine LLP, New York,
7 NY, *for Defendants-Appellees Bloomberg L.P.,*
8 *Christopher Dolmetsch, Erik Larsen, Michael Hytha,*
9 *and Andrew Dunn.*

10 DEREK J.T. ADLER, Hughes Hubbard & Reed LLP,
11 New York, NY, *for Defendants-Appellees Palladyne*
12 *International Asset Management B.V., Ismael*
13 *Abudher, Lily Yeo, Milltown Partners LLP, Patrick*
14 *Haverson, David-John Collins and Oliver Rickman.*

15
16 _____
16 JOHN M. WALKER, JR., *Circuit Judge:*

17 Plaintiff-appellant Dan Friedman appeals from a decision of
18 the United States District Court for the District of Connecticut (Alvin
19 W. Thompson, *J.*) dismissing his defamation action and entering
20 judgment in favor of the defendants-appellees. At issue in this case is
21 whether Connecticut General Statute § 52-59b—which provides for
22 long-arm jurisdiction over certain out-of-state defendants except in
23 defamation actions—violates Friedman’s First or Fourteenth
24 Amendment rights. We conclude that it does not and AFFIRM the
25 district court’s dismissal of this action as to the out-of-state

1 defendants. We also consider whether the allegedly defamatory
2 statements at issue in this case, which were reported and published
3 by the remaining defendants, are privileged under New York Civil
4 Rights Law § 74 as a fair and true report of judicial proceedings or are
5 protected expressions of opinion. We AFFIRM in part and REVERSE
6 in part the district court's determinations regarding these statements
7 and REMAND this action for proceedings against the remaining
8 defendants consistent with this opinion.¹

9 **BACKGROUND**

10 This defamation action arises out of a news article published by
11 Bloomberg News that reported on a lawsuit Friedman filed against
12 his former employer, Palladyne International Asset Management,
13 and others. Friedman alleged in the lawsuit that Palladyne, a
14 purported hedge fund based in the Netherlands, fraudulently
15 induced him into working as its "head of risk" in order to create the

¹ After our initial disposition of this appeal, *see Friedman v. Bloomberg L.P.*, 871 F.3d 185 (2d Cir. 2017), defendants-appellees filed a petition for panel rehearing. We hereby GRANT the petition without the need for reargument, *see* Fed. R. App. P. 40(a)(4)(A), withdraw our opinion of September 12, 2017, and issue this amended opinion in its place. We also DENY as moot, pursuant to Fed. R. App. P. 29(b)(2), amici's motion to file a brief in support of rehearing.

1 appearance that it was a legitimate company. Friedman claimed that,
2 over the course of nearly eight months, Palladyne and an executive
3 recruiting firm made numerous misrepresentations to persuade him
4 to accept this position, including that Palladyne was “a diversified
5 investment company” with a “worldwide clientele” and “consistent,
6 optimized returns.” App’x at 15, 49, 61.

7 In November 2011, Friedman moved to the Netherlands and
8 began working for Palladyne. According to Friedman, he soon
9 discovered that Palladyne was a “kickback and money laundering
10 operation for the former dictatorial Ghaddafi [*sic*] regime in Libya,”
11 App’x at 39, and that Palladyne’s primary purpose was to channel
12 funds at the behest of the then-head of Libya’s state-run National Oil
13 Company, who was the father-in-law of Palladyne’s chief executive
14 officer. Friedman also learned that the United States Department of
15 Justice and the Securities and Exchange Commission were conducting
16 investigations that implicated Palladyne. In February 2012, after
17 Friedman voiced concerns to a colleague that Palladyne was not
18 engaging in legitimate investment activities and could face criminal

1 exposure, he was “abruptly terminated with no legally cognizable
2 explanation.” App’x at 75.

3 On March 25, 2014, Friedman sued Palladyne and the firm that
4 had recruited him for the position, as well as several of their
5 employees. Friedman asserted seven counts in his complaint,
6 including fraudulent inducement, and sought monetary damages
7 totaling \$499,401,000, plus interest, attorneys’ fees and costs. He also
8 sought, as additional punitive damages, two years of the employee
9 defendants’ salaries and bonuses. Friedman requested that “this
10 Court enter judgment on all Counts for the plaintiff.” App’x at 88.

11 On March 27, 2014, Bloomberg L.P. published online the article
12 at issue in this case. Entitled “Palladyne Accused in Suit of
13 Laundering Money for Qaddafi,” the article reported on Friedman’s
14 lawsuit. Friedman responded to this article by filing the instant
15 defamation action against (1) Bloomberg L.P. and the authors and
16 editors of the article (collectively, the “Bloomberg Defendants”); (2)
17 the Netherlands-based Palladyne and two of its senior officers
18 (collectively, the “Palladyne Defendants”); and (3) Milltown Partners,

1 LLP—a public relations company based in the United Kingdom that
2 worked for Palladyne and allegedly was a source of information for
3 the article—and several of its employees (collectively, the “Milltown
4 Defendants”).

5 Friedman alleged that the following statements in the article
6 were false and caused him serious and irreparable harm:

- 7 (1) A statement that “[Palladyne] was sued in the U.S. for as much
8 as \$500 million.”
9 (2) A quote from Palladyne that “[t]hese entirely untrue and
10 ludicrous allegations [in Friedman’s earlier lawsuit] have been
11 made by a former employee who has repeatedly tried to extort
12 money from the company. . . . He worked with us for just two
13 months before being dismissed for gross misconduct.”

14 App’x at 19, 37-38. Friedman further alleged that the Bloomberg
15 Defendants negligently published these statements without
16 contacting him for a response or otherwise verifying their accuracy,
17 and acted with reckless disregard by failing to correct or retract the

1 statements even after his lawyer alerted several of the Bloomberg
2 Defendants to their inaccuracy.²

3 The Milltown and Palladyne Defendants moved to dismiss this
4 case pursuant to Federal Rules of Civil Procedure 12(b)(2) for lack of
5 personal jurisdiction and 12(b)(6) for failure to state a claim. In
6 granting the motion, the district court concluded that Conn. Gen. Stat.
7 § 52-59b, which provides for jurisdiction over non-resident
8 individuals, foreign partnerships, and foreign voluntary associations
9 except in defamation cases, deprived it of personal jurisdiction over
10 the Milltown and Palladyne Defendants, all of which are foreign
11 entities. The district court further determined that even if
12 Palladyne—organized under the laws of the Netherlands as a *besloten*
13 *vennootschap*—were categorized as a corporation and not a foreign
14 partnership, Conn. Gen. Stat. § 33-929 would deprive it of personal
15 jurisdiction over Palladyne.

² There is an updated version of this article in the parties' joint appendix that includes a response from Friedman's lawyer. Because Friedman does not mention this version or attach it to his complaint, we do not consider it for purposes of this appeal.

1 lawsuit were successful; and (3) the “repeatedly tried to extort
2 money” statement suggests that he engaged in criminal conduct and
3 implies undisclosed facts that are detrimental to his character.

4 **I. Connecticut General Statute § 52-59b**

5 We review *de novo* an appeal from a district court’s dismissal
6 for lack of personal jurisdiction. *Whitaker v. Am. Telecasting, Inc.*, 261
7 F.3d 196, 208 (2d Cir. 2001). The plaintiff bears the burden of
8 demonstrating that the court has personal jurisdiction over each
9 defendant. *Id.* In determining whether such jurisdiction exists, a
10 court “must look first to the long-arm statute of the forum state. . . . If
11 the exercise of jurisdiction is appropriate under that statute, the court
12 must decide whether such exercise comports with the requisites of
13 due process.” *Id.* at 208 (citation omitted). The relevant long-arm
14 statute, Conn. Gen. Stat. § 52-59b(a), provides:

15 [A] court may exercise personal jurisdiction over any
16 nonresident individual, foreign partnership or foreign
17 voluntary association . . . who in person or through an
18 agent . . . (2) commits a tortious act within the state,
19 except as to a cause of action for defamation of character
20 arising from the act; (3) commits a tortious act outside the
21 state causing injury to person . . . within the state, except

1 as to a cause of action for defamation of character arising
2 from the act.⁴

3 Based on the plain language of Conn. Gen. Stat. § 52-59b, the
4 district court did not have personal jurisdiction in this defamation
5 action over the individual Milltown and Palladyne Defendants, who
6 are not Connecticut residents. Friedman argues, however, that the
7 long-arm statute's exclusion of out-of-state defendants in defamation
8 actions violates his First Amendment right to petition and Fourteenth
9 Amendment right to equal protection. We disagree.

10 The First Amendment provides, in relevant part, that
11 "Congress shall make no law . . . abridging . . . the right of the people
12 . . . to petition the Government for a redress of grievances." U.S.
13 CONST. amend. I. The right to petition, which applies to the states
14 through the Fourteenth Amendment, "extends to all departments of
15 the Government, including the courts." *City of N.Y. v. Beretta U.S.A.*
16 *Corp.*, 524 F.3d 384, 397 (2d Cir. 2008) (citation and internal quotation
17 marks omitted). A plaintiff's "constitutional right of access to the

⁴ Section 52-59b(a)(1) provides jurisdiction over certain out-of-state defendants who "[t]ransact[] any business within the state." Friedman did not appeal the district court's decision that this provision does not apply.

1 courts is violated where government officials obstruct legitimate
2 efforts to seek judicial redress." *Id.* (citation and brackets omitted); *see*
3 *also Christopher v. Harbury*, 536 U.S. 403, 413 (2002) (noting right-of-
4 access concerns are implicated when "systemic official action
5 frustrates a plaintiff or plaintiff class in preparing and filing suits at
6 the present time"); *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (requiring
7 prison authorities to provide inmates with adequate law libraries or
8 legal assistance to permit meaningful litigation of appeals).

9 A plaintiff's right of access to courts is not violated when, as
10 here, a state's long-arm statute does not provide for jurisdiction over
11 certain out-of-state defendants. Indeed, "[t]here is nothing to compel
12 a state to exercise jurisdiction over a foreign [defendant] unless it
13 chooses to do so, and the extent to which it so chooses is a matter for
14 the law of the state as made by its legislature." *Brown v. Lockheed*
15 *Martin Corp.*, 814 F.3d 619, 626 (2d Cir. 2016) (quoting *Arrowsmith v.*
16 *United Press Int'l*, 320 F.2d 219, 222 (2d Cir. 1963) (en banc)). In
17 *International Shoe Co. v. Washington*, the Supreme Court held that,
18 under the Due Process Clause of the Fourteenth Amendment, state

1 courts could exercise jurisdiction over out-of-state defendants if the
2 defendants had “certain minimum contacts with [the forum state]
3 such that the maintenance of the suit does not offend ‘traditional
4 notions of fair play and substantial justice.’” 326 U.S. 310, 316 (1945)
5 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Supreme
6 Court described the extent to which it would be constitutionally
7 permissible for state courts to exercise jurisdiction over these
8 defendants; it did not hold that state courts were required to exercise
9 such jurisdiction. *See id.* Relying on this principle, state legislatures
10 enacted long-arm statutes setting forth the terms under which their
11 courts could exercise jurisdiction over out-of-state defendants. *See*
12 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems*,
13 § 15.1.2A (5th ed. 2017). Although many states’ long-arm statutes
14 provide for jurisdiction that is coextensive with the limits of the Due
15 Process Clause, some do not permit the exercise of jurisdiction to the
16 full extent allowed by the federal Constitution. *Id.*; *see Best Van Lines,*
17 *Inc. v. Walker*, 490 F.3d 239, 244-45 (2d Cir. 2007).

1 The Connecticut long-arm statute at issue here, which
2 precludes its courts from exercising jurisdiction over certain foreign
3 defendants in defamation actions,⁵ does not provide for jurisdiction
4 to the limits of due process. *See* Conn. Gen. Stat. § 52-59b; *see also*
5 *International Shoe*, 326 U.S. at 316. The statute’s limitation does not,
6 however, violate Friedman’s First Amendment right of access to
7 courts. As we have noted, “[t]here is nothing to compel a state to
8 exercise jurisdiction over a foreign [defendant] unless it chooses to do
9 so,” *Brown*, 814 F.3d at 626, and Friedman does not have any right to
10 assert a claim against a foreign entity in the absence of a long-arm
11 statute that provides jurisdiction over such an entity. *See Whitaker*, 261
12 F.3d at 208; *see also George v. Strick Corp.*, 496 F.2d 10, 12 (10th Cir. 1974)
13 (“[P]ertinent federal cases do not compel state courts to open their
14 doors to every suit which meets the minimum contacts requirements
15 of the due process clause of the federal constitution.”); *Jennings v.*
16 *McCall Corp.*, 320 F.2d 64, 68 (8th Cir. 1963) (“[A] state court is free to

⁵ We note that Conn. Gen. Stat. § 52-59b(a)(1) does permit jurisdiction over out-of-state defendants in defamation actions if the defendant “[t]ransacts any business within the state.”

1 choose for itself the standards to be applied in determining the
2 circumstances under which a foreign [entity] would be amenable to
3 suit, assuming of course that minimum due process requirements are
4 met. . . . [It is] a state's privilege to impose its own jurisdictional
5 limitations.”). Friedman, therefore, has failed to show that this statute
6 violates his First Amendment right of access to courts.⁶

7 Conn. Gen. Stat. § 52-59b also does not violate Friedman’s equal
8 protection rights under the Fourteenth Amendment. Friedman
9 argues that, applying strict scrutiny, the statute violates the Equal
10 Protection Clause by “restricting the rights of defamation plaintiffs as
11 a class without utilizing the least restrictive means.” Appellant’s Br.
12 at 44-45. However, we apply strict scrutiny only when the challenged
13 statute either (1) burdens a fundamental right or (2) targets a suspect

⁶ Friedman also states, without explanation, that the long-arm statute’s exception for out-of-state defendants in defamation actions violates his due process rights. Federal due process, however, does not compel a state to provide for jurisdiction over out-of-state defendants. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 440 (1952) (“The suggestion that federal due process compels the State to open its courts to such a case [against a foreign defendant] has no substance.”). Instead, the Due Process Clause *limits* the extent to which a state court may exercise jurisdiction over such defendants. *See International Shoe*, 326 U.S. at 316.

1 class. *See Heller v. Doe*, 509 U.S. 312, 319 (1993). Friedman has not
2 shown that his claim falls within either category. As we have
3 discussed, a state is not required to extend its courts' jurisdiction over
4 specific foreign defendants and, in the absence of a long-arm statute
5 providing for such jurisdiction, a plaintiff does not have a
6 fundamental right to bring an action against those foreign defendants.
7 Further, Friedman does not argue that state residents defamed by out-
8 of-state entities are a suspect class.

9 Under rational basis review, which is applicable here, "we are
10 required to defer to the legislative choice, absent a showing that the
11 legislature acted arbitrarily or irrationally." *Gronne v. Abrams*, 793
12 F.2d 74, 77 (2d Cir. 1986). The party challenging the law, therefore,
13 "must disprove every conceivable basis which might support it."
14 *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) (citation and
15 internal quotation marks omitted), *aff'd*, 133 S. Ct. 2675 (2013).
16 Friedman argues that the statute's legislative history does not state a
17 rational basis for excluding defamation actions. A legislature,
18 however, "need not actually articulate at any time the purpose or

1 rationale supporting its classification. . . . Instead, a classification must
2 be upheld against [an] equal protection challenge if there is any
3 reasonably conceivable state of facts that could provide a rational
4 basis for the classification.” *Heller*, 509 U.S. at 320 (citations and
5 internal quotation marks omitted).

6 Conn. Gen. Stat. § 52-59b was modeled after a nearly identical
7 provision in New York state’s long-arm statute. See N.Y. C.P.L.R. §
8 302; *Savin v. Ranier*, 898 F.2d 304, 306 (2d Cir. 1990). We have
9 previously noted, in the context of the New York statute, that one
10 rational basis for excluding defamation actions against out-of-state
11 defendants is “to avoid unnecessary inhibitions on freedom of
12 speech” and that “[t]hese important civil liberties are entitled to
13 special protections lest procedural burdens shackle them.” *Best Van*
14 *Lines*, 490 F.3d at 245 (quoting *Legros v. Irving*, 38 A.D.2d 53, 55 (N.Y.
15 App. Div. 1st Dep’t 1971)); see also *SPCA of Upstate N.Y., Inc. v. Am.*
16 *Working Collie Ass’n*, 18 N.Y.3d 400, 404 (2012) (“Defamation claims
17 are accorded separate treatment to reflect the state’s policy of
18 preventing disproportionate restrictions on freedom of expression.”).

1 The New York state exception for defamation actions was initially
2 intended, at least in part, to ensure that “newspapers published in
3 other states [would not be forced] to defend themselves in states
4 where they had no substantial interests.” *Best Van Lines*, 490 F.3d at
5 245 (quoting *Legros*, 38 A.D.2d at 55).

6 For the first time in his reply brief on appeal, Friedman
7 challenges this rational basis by arguing that “[t]he internet . . .
8 dramatically changes the impact of the long arm defamation
9 exclusion” and “creates a wide defamation liability-free zone for out
10 of state publishers,” such as Bloomberg L.P., if they publish
11 defamatory statements online. Appellant’s Reply Br. at 25-30. At
12 issue in this appeal, however, is the statute’s defamation exception
13 with respect to the individual Milltown and Palladyne Defendants,
14 who are the alleged sources for the challenged statements in the
15 Bloomberg article. As we described earlier, one conceivable basis for
16 affording special protection to out-of-state defendants in defamation
17 actions is to avoid any unnecessary inhibition on their freedom of
18 speech. *See Best Van Lines*, 490 F.3d at 245; *see also* Vincent C.

1 Alexander, Practice Commentaries, N.Y. C.P.L.R. § 302, at C302:10
2 (McKinney 2008) (“The [New York State long arm statute’s] exclusion
3 . . . recognizes the ease with which a written or oral utterance may
4 occur in New York, thereby subjecting numerous individuals . . . to
5 suit in New York despite their potentially remote connection to the
6 state.”). Because Friedman fails to counter this rational basis, we
7 conclude that his equal protection argument is unavailing. *See*
8 *Windsor*, 699 F.3d at 180.

9 In sum, we agree with the district court that Conn. Gen. Stat. §
10 52-59b does not violate Friedman’s First or Fourteenth Amendment
11 rights. We therefore affirm the district court’s dismissal pursuant to
12 this statute of Friedman’s defamation claim against the Milltown and
13 Palladyne Defendants for lack of personal jurisdiction.

14 **II. The Allegedly Defamatory Statements**

15 Because the parties do not dispute that we have personal
16 jurisdiction over the Bloomberg Defendants for their allegedly
17 defamatory statements, we turn to the district court’s dismissal of
18 Friedman’s claim against those defendants for failure to state a claim.

1 We review *de novo* a district court's grant of a motion to dismiss under
2 Rule 12(b)(6), accepting as true the factual allegations in the complaint
3 and drawing all inferences in the plaintiff's favor. *Biro v. Conde Nast*,
4 807 F.3d 541, 544 (2d Cir. 2015).

5 **a. The "For As Much As \$500 Million" Statement**

6 We first address the Bloomberg Defendants' argument that the
7 article's statement that Friedman sued Palladyne "for as much as \$500
8 million" is protected under N.Y. Civ. Rights Law § 74. This statute
9 provides that "[a] civil action cannot be maintained against any
10 person, firm or corporation, for the publication of a fair and true
11 report of any judicial proceeding." N.Y. Civ. Rights Law § 74. New
12 York courts adopt a "liberal interpretation of the 'fair and true report'
13 standard of . . . § 74 so as to provide broad protection to news accounts
14 of judicial . . . proceedings." *Becher v. Troy Publ'g Co.*, 183 A.D.2d 230,
15 233 (N.Y. App. Div. 3d Dep't 1992). A statement is deemed a fair and
16 true report if it is "substantially accurate," that is "if, despite minor
17 inaccuracies, it does not produce a different effect on a reader than

1 would a report containing the precise truth.” *Karades v. Ackerley Grp.*
2 *Inc.*, 423 F.3d 107, 119 (2d Cir. 2005) (citations omitted).

3 Here, the Bloomberg Defendants’ statement that Friedman’s
4 suit was “for as much as \$500 million” was a fair and true report of a
5 judicial proceeding. The statement was a description of the prayer for
6 relief in Friedman’s complaint, which requested that “the Court enter
7 judgment on all Counts for the plaintiff,” totaling \$499,401,000,
8 exclusive of attorneys’ fees and costs. App’x at 89. Nowhere did the
9 complaint state that Friedman was pleading any counts in the
10 alternative or that the damages could not be aggregated. Even though
11 some of these damages would be barred as duplicative if Friedman
12 were successful in his lawsuit, it was not necessary for this
13 explanation to be included in the article. The Bloomberg Defendants’
14 characterization of the damages sought was an accurate description
15 of what was written in the complaint. *See Lacher v. Engel*, 33 A.D.3d
16 10, 17 (N.Y. App. Div. 1st Dep’t 2006) (“Comments that essentially
17 summarize or restate the allegations of a pleading filed in an action .
18 . . fall within § 74’s privilege.”). As the district court noted, “[t]o the

1 extent there was an inaccuracy here, it is found in the language
2 [Friedman] used in the prayer for relief.” Special App’x at 31.

3 Friedman argues, however, that the statement was neither fair
4 nor substantially accurate because Bloomberg L.P. did not contact
5 him for a response and, as a sophisticated media company, it should
6 have known that Friedman would not have been able to recover as
7 much as \$500 million. Friedman cites no case law in support of his
8 argument that the Bloomberg Defendants were compelled to seek his
9 response in order for an accurate report of the language of his
10 complaint to be “fair.” And the outcome that Friedman requests—
11 that we require “sophisticated” reporters to determine the legal
12 question of whether claims asserted in a complaint are duplicative
13 even if they are not pled in the alternative—would be excessively
14 burdensome for the media and would conflict with the general
15 purpose of § 74. *Cf. Becher*, 183 A.D.2d at 234 (“Newspapers cannot
16 be held to a standard of strict accountability for use of legal terms of

1 art in a way that is not precisely or technically correct by every
2 possible definition.” (citation omitted)).⁷

3 Accordingly, because we find that § 74 applies, we affirm the
4 district court’s dismissal of Friedman’s defamation claim based on the
5 “as much as \$500 million” statement.

6 **b. The “Repeatedly Tried to Extort” Statement**

7 We next address Palladyne’s quote in the Bloomberg article
8 that Friedman “has repeatedly tried to extort money from the
9 company.” App’x at 38. Friedman argues that this statement is
10 reasonably susceptible to a defamatory meaning—that he engaged in
11 criminal conduct—and implies the existence of undisclosed facts that
12 are detrimental to his character. We agree that the district court erred
13 in dismissing Friedman’s claim based on this statement.

⁷ Friedman further argues that he is entitled to discovery to determine the source of this statement. However, “once it is established that the publication is reporting on a judicial proceeding, how a reporter gathers his information concerning a judicial proceeding is immaterial provided his or her story is a fair and substantially accurate portrayal of the events in question.” See *Cholowsky v. Civiletti*, 69 A.D.3d 110, 115 (N.Y. App. Div. 2d Dep’t 2009) (citations and brackets omitted). We therefore find this argument unpersuasive.

1 Contrary to our view that the “as much as \$500 million”
2 statement is protected under New York Civil Rights Law § 74, we
3 conclude that § 74 does not protect Bloomberg against Friedman’s
4 claim as to the “repeatedly tried to extort” statement. Section 74
5 protects the reporting of a defendant’s publicly stated legal position
6 only where the report is “a substantially accurate description of
7 [defendant’s] position in the lawsuit.” *Hudson v. Goldman Sachs & Co.*,
8 283 A.D.2d 246, 247 (1st Dep’t 2001); *see also Hudson v. Goldman Sachs*
9 *& Co.*, 304 A.D.2d 315, 316 (1st Dep’t 2003) (applying the privilege
10 because defendant ultimately took its publicly stated position in the
11 lawsuit). This rule aligns with the initial impetus for the privilege,
12 which was so that the public, which “generally may not attend the
13 sittings of the courts, . . . may be kept informed by the press of what
14 goes on in the courts.” *Williams v. Williams*, 23 N.Y.2d 592, 597 (N.Y.
15 1969).

16 Consequently, even reading the privilege most broadly, the
17 privilege applies here only if Palladyne’s contention that Friedman
18 “repeatedly tried to extort” it is a description of a position Palladyne

1 has asserted or might assert in litigation. But Bloomberg offers no
2 basis on which Palladyne might conceivably rely on Friedman's
3 purported extortion attempts, as represented in the statement, to
4 assert a legal defense against Friedman's claims or to make a
5 counterclaim. This is fatal to Bloomberg's assertion of the § 74
6 privilege.

7 Bloomberg, relying on the *Hudson* cases, asserts that a litigant's
8 publicly stated legal position need not be taken in a formal litigation
9 filing for the § 74 privilege to attach to reporting of that stated
10 position. Assuming *arguendo* that Bloomberg's assertion is correct,
11 the § 74 privilege still requires that the published statement be a
12 "substantially accurate report" of the litigation. *Hudson*, 304 A.D.2d
13 at 316; *see also Greenberg v. Spitzer*, 155 A.D.3d 27, 50 (2d Dep't 2017)
14 (reversing trial court's application of the privilege as to statements
15 that "went beyond merely summarizing or restating the . . .
16 proceedings" because, "[w]hen viewed in context, we cannot say, as
17 a matter of law, that the statements provided substantially accurate
18 reporting of the . . . case"). As discussed, Palladyne's accusation of

1 Friedman's repeated attempts at extortion is not an accurate report of
2 Friedman's lawsuit against Palladyne. Stated differently, by
3 reporting the "repeatedly tried to extort" statement, Bloomberg was
4 in no way informing the public of what was "go[ing] on in the courts."
5 *Williams*, 23 N.Y.2d at 597. The § 74 privilege does not apply.

6 Having rejected Bloomberg's assertion of privilege, we turn to
7 the merits of Friedman's claim. Under New York law, which the
8 parties do not dispute applies here, a plaintiff must establish the
9 following elements to recover a claim for libel:

10 (1) a written defamatory statement of fact concerning the
11 plaintiff; (2) publication to a third party; (3) fault (either
12 negligence or actual malice depending on the status of the
13 libeled party); (4) falsity of the defamatory statement; and (5)
14 special damages or per se actionability.

15 *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 176 (2d Cir. 2000).

16 With respect to the first element of this cause of action, which is the
17 focus of this appeal, we must consider whether (1) "the challenged
18 statements reasonably imply the alleged defamatory meaning" and
19 (2) "if so, whether that defamatory meaning is capable of being
20 proven false." See *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144,
21 150-51 (2d Cir. 2000). A defendant is not liable for "statements that

1 cannot reasonably be interpreted as stating actual facts about an
2 individual, including statements of imaginative expression or
3 rhetorical hyperbole.” *Id.* (citation and internal quotation marks
4 omitted).

5 Here, the district court found that, based on the context in
6 which Palladyne’s statement was made, a reasonable reader would
7 understand Palladyne’s use of the word “extort” to be “rhetorical
8 hyperbole, a vigorous epithet . . . reflect[ing] Palladyne’s belief that
9 an upset former employee had filed a frivolous lawsuit against
10 Palladyne in order to get money.” Special App’x at 44. In dismissing
11 Friedman’s claim, the district court relied in particular on *Greenbelt*
12 *Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 14 (1970). There, the Supreme
13 Court determined that statements in a newspaper, reporting that
14 attendees of city council meetings had characterized the plaintiff’s
15 negotiations with the city as “blackmail,” were merely “rhetorical
16 hyperbole” and were not actionable defamatory statements. *Id.* The
17 Court dismissed the defamation claim, concluding that:

18 It is simply impossible to believe that a reader who reached
19 the word “blackmail” in either article would not have

1 understood exactly what was meant: it was [plaintiff's]
2 public and wholly legal negotiating proposals that were
3 being criticized. No reader could have thought that either
4 the speakers at the meetings or the newspaper articles
5 reporting their words were charging [plaintiff] with the
6 commission of a criminal offense. On the contrary, even the
7 most careless reader must have perceived that the word was
8 no more than rhetorical hyperbole, a vigorous epithet used
9 by those who considered [plaintiff's] negotiating position
10 extremely unreasonable.

11 *Id.* (footnote omitted). On appeal, the Bloomberg Defendants also cite
12 to several New York state cases in which courts have held that, in
13 certain contexts, a defendant's use of the term "extort" may be
14 "rhetorical hyperbole" that is not actionable.

15 In *Melius v. Glacken*, for example, the then-mayor of Freeport
16 stated in a public debate that the plaintiff's lawsuit against him and
17 other officials, alleging that they had conspired to take away the
18 plaintiff's property, was an attempt to "extort money" because the
19 plaintiff was seeking an amount "far in excess of the appraised value"
20 of the property. 94 A.D.3d 959, 959-60 (N.Y. App. Div. 2d Dep't 2012).
21 After the plaintiff sued the mayor for defamation, the court
22 determined that based on the context in which the challenged
23 statements were made—in response to a question about the plaintiff's

1 lawsuit and in a “heated” public debate—a reasonable listener would
2 have understood that the mayor was stating his opinion about the
3 merits of plaintiff’s lawsuit and not accusing the plaintiff of criminal
4 conduct. *Id.* at 960. The court held that the statement was not
5 actionable because the mayor had explained the factual basis for his
6 belief that the plaintiff was attempting to extort money—that the
7 plaintiff sought an amount “far in excess of the appraised value” of
8 the property—and therefore his statement did not imply the existence
9 of undisclosed facts that were detrimental to the plaintiff’s character.
10 *Id.* at 960-61; *see also Sabharwal & Finkel, LLC v. Sorrell*, 117 A.D.3d 437,
11 437-38 (N.Y. App. Div. 1st Dep’t 2014) (defendant’s statement that
12 plaintiff had broached topic of settlement “to ‘extort’ money” not
13 actionable because reasonable readers would understand it was an
14 “opinion[] about the merits of the lawsuit and the motivation of [the]
15 attorneys, rather than [a] statement[] of fact”); *G&R Moojestic Treats,*
16 *Inc. v. Maggiemoo’s Int’l, LLC*, No. 03 CIV.10027 (RWS), 2004 WL
17 1172762, at *1-2 (S.D.N.Y. May 27, 2004) (defendant’s quote in article
18 characterizing plaintiff’s lawsuit as “approaching extortion” not

1 actionable because “no reasonable reader could understand [the]
2 statements as saying that plaintiff committed the criminal act of
3 extortion”); *Trustco Bank of N.Y. v. Capital Newspaper Div. of Hearst*
4 *Corp.*, 213 A.D.2d 940, 942 (N.Y. App. Div. 3d Dep’t 1995) (defendant’s
5 use of the word “extortion” to describe lawsuit filed against him not
6 actionable).

7 Here, the Bloomberg article discussed Friedman’s lawsuit and
8 then included the following quote from Palladyne: “These entirely
9 untrue and ludicrous allegations have been made by a former
10 employee who has repeatedly tried to extort money from the
11 company. . . . He worked with us for just two months before being
12 dismissed for gross misconduct.” App’x at 38. As in the cases cited
13 by the district court and the Bloomberg Defendants, the article clearly
14 indicated that Palladyne made these statements in the context of a
15 “heated” dispute. See *Melius*, 94 A.D.3d at 959-60. The article
16 described Friedman’s allegations that Palladyne was “nothing more
17 than a façade created to conceal criminal transactions” and noted that
18 Friedman alleged that he had been fired by Palladyne with “no legally

1 cognizable explanation” after voicing his concerns to a colleague
2 about the firm’s criminal exposure. App’x at 37-38.

3 However, unlike the cases cited by the district court and the
4 Bloomberg Defendants, a reasonable reader could interpret
5 Palladyne’s use of the word “extort” here as more than just “rhetorical
6 hyperbole” describing Palladyne’s belief that the lawsuit was
7 frivolous. *See Flamm*, 201 F.3d at 150-51. Palladyne did not simply
8 state that Friedman’s *lawsuit* was an attempt to extort money from the
9 company. Instead, Palladyne stated that Friedman “repeatedly” tried
10 to extort money from them. This statement can be read as something
11 other than a characterization of Friedman’s underlying lawsuit
12 against Palladyne and is reasonably susceptible to a defamatory
13 meaning—that Friedman actually committed the criminal act of
14 extortion—a statement that is capable of being proven false. *Id.*

15 This interpretation also is reasonable when the statement is
16 read in the context of Palladyne’s entire quote. After asserting that
17 Friedman had “repeatedly” tried to extort money from them,
18 Palladyne went on to state that Friedman was “dismissed for gross

1 misconduct.” App’x at 38. Palladyne did not explain whether there
2 was a connection between these two statements. A reasonable reader,
3 therefore, could have believed that Friedman’s “gross misconduct”
4 consisted of multiple attempts to “extort” money and that Friedman
5 was fired for engaging in this criminal conduct.

6 Further, even if a reasonable reader could interpret the word
7 “extort” as hyperbolic language describing Friedman’s conduct, and
8 not an assertion that Friedman had committed the criminal act of
9 extortion, this statement still would be actionable. A statement of
10 opinion is actionable under New York law if it implies that “the
11 speaker knows certain facts, unknown to his audience, which support
12 his opinion and are detrimental to the person about whom he is
13 speaking.” *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290 (1986); *see also*
14 *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977) (“Liability
15 for libel may attach . . . when a negative characterization of a person
16 is coupled with a clear but false implication that the author is privy to
17 facts about the person that are unknown to the general reader.”).
18 Here, Palladyne’s statement can be read to imply the existence of

1 undisclosed facts that would be detrimental to Friedman's character.
2 *See Hotchner*, 551 F.2d at 913. Palladyne indicated that Friedman had
3 taken prior actions that were attempts to "extort" money from the
4 company, but Palladyne did not explain what those prior acts were or
5 provide any details that would shed light on its use of the word
6 "extort," whether outside of the context of Friedman's lawsuit or as a
7 reference to it. *See Melius*, 94 A.D.3d at 961.

8 The Bloomberg Defendants argue that the article makes clear
9 that Palladyne's statement refers to the fact that Friedman voiced
10 concerns about the firm's criminal exposure and then filed this
11 lawsuit in an attempt to extract money from Palladyne. We disagree
12 that it is clear. Although the article stated that Friedman was fired
13 after "relating his concerns about the firm's criminal exposure to a
14 colleague," App'x at 37, a reasonable inference remains, based on
15 Palladyne's statement that Friedman had "repeatedly" attempted to
16 extort the company, that there were multiple acts that Friedman had
17 taken which rose to the level of "extortion."

1 Thus, even if Palladyne was asserting an opinion about
2 Friedman’s prior conduct, Palladyne’s statement can still be read as
3 conveying a negative characterization of Friedman without stating
4 sufficient facts to provide the context for that characterization. Under
5 New York law, such a statement is actionable. *See Hotchner*, 551 F.2d
6 at 913. We therefore reverse the district court’s dismissal of
7 Friedman’s defamation claim based on this statement.

8 On remand, it will be up to the jury to decide both (1) whether
9 readers understood Palladyne’s statement—“repeatedly tried to
10 extort”—to mean that Friedman engaged in criminal conduct and
11 (2) whether that statement in fact defamed Friedman. *See Sack on*
12 *Defamation* § 2:4:16 (“Once the judge has determined that the words
13 complained of are capable of a defamatory meaning, that is, are not
14 nondefamatory as a matter of law, it is for the jury to determine
15 whether they were so understood and whether they in fact defamed
16 the plaintiff.”) (footnotes omitted)). We express no view as to how
17 those issues should be decided by the fact finder.

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CONCLUSION

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For the reasons stated above, we AFFIRM the district court's

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dismissal of Friedman's claims against the Milltown and Palladyne

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Defendants, and AFFIRM in part and REVERSE in part the dismissal

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of his claims against the Bloomberg Defendants. We REMAND the

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case to the district court for further proceedings consistent with this

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opinion.