EFiled: May 03 2021 03:06PM EDT
Filing ID 66567100
Case Number 79,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CARTER PAGE, and individual, Plaintiff-Appellant, v. OATH INC., a corporation, Defendant-Appellee.	Case No. 79,2021 *On Appeal from the Superior Court of the State of Delaware*

AMENDED- APPELLANT'S OPENING BRIEF

OF COUNSEL:

Todd V. McMurtry (*PHV* admitted)
HEMMER DEFRANK WESSELS, PLLC
250 Grandview Drive, Ste. 500
Ft. Mitchell, KY 41017
Phone: (859) 344-1188
Fax: (859) 578-3869
tmcmurtry@hemmerlaw.com

K. Lawson Pedigo (*PHV* admitted)
MILLER KEFFER & PEDIGO, PLLC
3400 Carlisle Street, Suite 550
Dallas, TX 75204
Phone: (214) 696-2050
klpedigo@mkp-law.net

BELLEW LLC

Sean J. Bellew (No. 4072)
2961 Centerville Rd., Suite 302
Wilmington, DE 19808
Phone: (302) 353-4951
sjbellew@bellewllc.com

Attorneys for Plaintiff, Carter Page

Dated: May 3, 2021

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Pages**

Statutes **Pages**

Rules **Pages**

Other Authorities **Pages**

NATURE OF PROCEEDINGS

Page filed his Complaint for defamation against Oath in the Superior Court on July 27, 2020. (See Appendix [hereinafter "App'x"] at A-7). Page filed an Amended Complaint on September 1, 2020. (*Id.* at A-5). Oath filed a pre-answer motion to dismiss on September 18, 2020. (*Id.*). After the motion was fully briefed, oral argument was heard on January 27, 2021. (*Id.* at A-2). On February 11, 2021, the Superior Court granted Oath's motion to dismiss. (*Id.*). Now, Page appeals to the Supreme Court of Delaware, seeking reversal of the Superior Court's February 11, 2021 Memorandum Opinion and Order granting dismissal.

SUMMARY OF ARGUMENT

1. Mighty oaks from little acorns grow. Unfortunately, in this matter, small errors in the Superior Court's Memorandum Opinion and Order granting the defendant's motion to dismiss led to clear errors of law. The opinion mischaracterized facts in the record, or relied on innocuous details inordinately: small mistakes that became dispositive of the entire case. To correct them, this Court should reverse the dismissal and reinstate the suit.

2. Defendant Oath, Inc. published a total of eleven (11) articles that defame the plaintiff. Of those eleven, seven (7) were written by "contributors" and published on the defendant's HuffPost website (the "Seven Articles"); three (3) were written by full-time employees of Oath and were also published on the HuffPost site (the "Three Articles"); and one (1) was written by Oath's Chief Investigative Correspondent Michael R. Isikoff and was published on Oath's Yahoo website (the "Isikoff Article").[1] The Superior Court dismissed the appellant's defamation claims as to all eleven articles. It dismissed the claims regarding the Seven Articles on the grounds that these contributor-authors constituted "third-parties" for whose content Oath was immune under Section 230 of the Communications Decency Act. It dismissed the claims regarding the Three Articles on the grounds that the articles

[1] For a table setting forth the associated exhibit number of the eleven articles and the corresponding defense(s) raised for each article at issue, see App'x at A-222.

were true or substantially true. It dismissed the one, the Isikoff Article, for the same reason. It also ruled with respect to all eleven articles that the plaintiff had to allege not just that the defendant Oath acted with the requisite degree of fault, but that the plaintiff also had to plead and establish that all eleven individual authors themselves acted with "actual malice." Finally, the Superior Court held that, in any event, the Isikoff Article is protected by the "fair report privilege," even if it contains defamatory content.

3. In fact, none of these conclusions are correct. The "contributors" who wrote the Seven Articles were not "third parties," such as the typical anonymous user posting in the comment section, from whose defamation the website must be protected. It is not true to say, as did the Superior Court, that these writers could "control their content and post freely," as would be the case with website visitors adding their comments at the foot of an article. In fact, nowhere in the record below does the Superior Court's observation about these writers having control over content and posting appear. This "fact" is not part of the record. Instead, as the Amended Complaint alleges in its Exhibits,[2] these writers are professional freelance journalists or professional public pundits who have extensive publication records, whose articles Oath solicited, promoted, provided headlines, included author bylines

[2] The Amended Complaint and its Exhibits are located at App'x A-8 through A-141.

and "about the author" notes, and placed in prominent locations on its webpages. As the Amended Complaint makes clear, these Seven Articles were indistinguishable from articles whose authors happened to be employed full time by Oath. Thus, the Superior Court's conclusion that Oath enjoys Section 230 immunity for these Seven Articles, on the grounds that Oath is not responsible for these writers because they are third parties who "control their own publications," is incorrect. Section 230 immunizes platforms for the statements of independent, third-party content providers, not solicited and compensated professional journalists.

4. Likewise, the Superior Court made a small but consequential mistake in quoting from the opinion of *New York Times v. Sullivan*, 376 U.S. 254 (1964), the leading case that established the famous "actual malice" standard of fault that plaintiffs who are public figures must satisfy. As the Superior Court quoted, that opinion states that actual malice must be established with respect "to the persons . . . having responsibility for the publication." *Sullivan*, 376 U.S. at 287. According to the Amended Complaint, Oath is "the person responsible for the publication." It is beyond argument that a publisher is responsible for the content of its publications. This has been the common law and remains the law to this day. Yet from that innocuous line from the *Sullivan* opinion, the Superior Court came to the erroneous conclusion that the plaintiff must allege not just that Oath, the person whom the plaintiff's Amended Complaint seeks to hold responsible for its defamation, has

acted with requisite fault, but that every author of each article, all eleven of them, also acted with actual malice. This is not the law. Along with the publisher, many people may be involved with the publication of a single article, including writers, researchers, investigators, fact-checkers, and editors. *Sullivan* does not require a defamation plaintiff to plead and prove any one of them, or all of them, acted with fault, only that "the person responsible" acted with fault. According to the Complaint, Oath is "the person responsible."

5. This lawsuit was not brought against the eleven individual writers. The plaintiff is not required to prove actual malice of people who are not even parties to the suit, and who might not even be amenable to jurisdiction or discovery. *Sullivan* does not say that, and it would be quite revolutionary if it did. (Indeed, the *Sullivan* case itself did not apply the actual malice standard to whoever authored the offending article; only the defendant, the publisher New York Times, was held subject to the actual malice standard.) Dismissing all of the appellant's causes of action on this ground is clear error. The only person of whom the plaintiff is required to allege fault is the defendant, and the Amended Complaint does, as the Superior Court's opinion itself makes clear.

6. Finally, the Superior Court seizes on little words, such as "reportedly" or "sources say," in finding that the Isikoff article, and those other Oath articles that quoted from it or referred to it, are true or substantially true, and thus incapable of

defamatory meaning. Throughout the Isikoff Article, damning, defamatory statements about the plaintiff are couched with small qualifiers that together, in the Superior Court's view, add up to published articles that are true or substantially true. But this journalist's dodge has repeatedly been held not to suffice to immunize the publisher from defamation liability. A defendant cannot attribute to someone outrageous acts of treason and disloyalty, particularly where that person is a military veteran, and then escape all responsibility by terming the whole episode as "reported" or "sources say," or obscuring the truth with the passive voice. The irony is that this alleged treason was not "reported." As the FBI has now stated publicly, the Isikoff Article was the report.[3] In part manufactured by Isikoff himself and his collaborators, as the Amended Complaint and ongoing public revelations make clear, this "reported" story is full of false facts, false innuendo, and damning implications. Far from being substantially true, it is false from stem to stern. The key is actual malice. The Amended Complaint alleges that Correspondent Isikoff acted with actual malice. (Am. Compl. ¶¶ 4, 47, 64–117). He knew about the scheme to defame the plaintiff as part of an effort to influence the election. In the height of arrogance, he was fully aware that this spurious "report" was sent to the FBI, and

[3] This Court may take judicial notice of this statement of the FBI, which is not subject to reasonable dispute, is generally known from public records, and whose accuracy cannot reasonably be questioned. *Fawcett v. State*, 697 A.2d 385, 388 (Del. 1997) (citing D.R.E. 201(b)).

then characterized these spurious accusations as "reported," shielding his involvement and contradicting his own knowledge. New facts about this sordid attempt to compromise the FBI to influence the U.S. elections emerge regularly.

Without question, the "gist" or overall implication of this Isikoff Article is not truth or substantial truth; it is defamatory falsehood. Isikoff knew the article was false when he wrote it. (*Id.* ¶¶ 47, 86, 93, 98, 107, 109, 149). Contrary to the contrived and couched representations in the Isikoff Article, Plaintiff Carter Page did not meet with the alleged Russian operatives; Page did not refuse to cooperate with a government investigation; Page was not the subject of an "intelligence report"; no "intelligence report" had been filed with the FBI; Page was not, most fundamentally, acting in Russian interests and contrary to the interests of the United States; Page was not seeking to corrupt a presidential election. Ironically, it was Isikoff who did participate in a scheme to corrupt the presidential election by knowingly and maliciously describing what he knew was a fabricated "report" from a source Isikoff knew was not an "intelligence" source, and that no reasonable person would regard as such. The Isikoff article was false, and Isikoff and Oath knew it was false when they published it. Publishing an article one knows to be false is the very definition of "actual malice" required by the *Sullivan* opinion.

These three grounds provide clear and persuasive reasons for this Court to reverse the decision to grant the defendant's motion to dismiss and to reinstate this claim.[4]

[4] The Superior Court also held that the "fair report privilege" supplies an additional ground for granting the motion to dismiss. This privilege, however, only applies if the report is made in good faith and without malice. As a result, this privilege is irrelevant to this matter: if the requisite fault is not established, then then defamation liability will not attach in the first place; if fault is established, then the fair report privilege by its own terms does not apply.

STATEMENT OF FACTS

Page, a U.S. Navy veteran, spent most of his life as a private figure working in the private sector. (*Id.* ¶ 14, 26). In 2016, he briefly served as an informal member of a volunteer foreign policy advisory committee to then-candidate Donald Trump's presidential campaign. (*Id.*). Page's life changed overnight when Oath published, through its subsidiaries Yahoo News and HuffPost, a total of eleven articles accusing Page of colluding with Russian officials to interfere in the 2016 U.S. presidential election. (*Id.* ¶ 29).

The false allegations originated from an article written by Yahoo's Chief Investigative Correspondent, Michael R. Isikoff. (*Id.* ¶ 4). Isikoff was a long-time friend of Glenn Simpson, the founder of a firm subcontracted by the Democratic National Committee's lawyers to generate opposition research. (*Id.* ¶¶ 34, 102). Simpson's firm, Fusion, hired a private foreign national, Christopher Steele, to create materials that claimed to connect the Trump campaign to Russian efforts to subvert the 2016 U.S. presidential election. (*Id.* ¶ 69). Steele sought to prevent Donald Trump from winning the election and had a reputation for poor judgment. (*Id.* ¶ 85). Steele created information that included easily detectible falsities and even used an officer in the Russian Intelligence Services as a sub-source. (*Id.* ¶ 85).

Steele met with Isikoff and gave him uncorroborated and unfinished reports that falsely allege that Page colluded with Russian officials to interfere in the 2016

U.S. presidential election. (*Id.* ¶¶ 4, 73, 81, 85, 99, Ex. 1). Isikoff knew of Steele's poor reputation and knew that he had been hired to create a controversy to influence the election. (*Id.* ¶ 107). Without fact-checking or verifying Steele's false allegations, Isikoff published them in an article on Oath's Yahoo website (the "Isikoff Article"). (*Id.* ¶ 4, 28–43). Federal officials, including the Department of Justice, have since debunked Steele's claims. (*Id.* ¶¶ 13, 40–43, 50, 52, 100). Even Steele himself described the reports as "uncorroborated" and "not to be consumed as finished product[s]." (*Id.* ¶ 73). Despite Isikoff's direct access to Steele and Fusion, Isikoff intentionally and recklessly failed to fact check or verify these incendiary claims about Page before publishing them while misrepresenting the identity of his principal sources. (*Id.* ¶¶ 47, 86, 93, 98, 107, 109, 149).

Oath's subsidiary HuffPost published a series of ten defamatory articles repeating similar claims about Page originating from the Isikoff Article. (*Id.* ¶ 45–63). HuffPost demonstrated the same intentional and reckless disregard in its failure to fact check or verify the false and defamatory claims. (*Id.* ¶¶ 3, 8, 44–63). As a result of Oath's acts, Page suffered severe damages. (*Id.* ¶¶ 40, 126–38).

ARGUMENT

I. OATH DOES NOT HAVE SECTION 230 IMMUNITY.

A. Question Presented.

Did the Superior Court err in applying Section 230 of the Communications Decency Act to immunize Oath by treating compensated, professional freelance journalists as if they were merely third-party readers of the website? (App'x at A-278 to A-281).

B. Standard of Review.

The standard of review is de novo. *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998). Pursuant to Del. Super. Ct. Civ. R. 12(b)(6), a court may grant a motion to dismiss if a complaint does not assert sufficient facts that, if proven, would entitle plaintiff to relief. "[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'" *Century Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC*, 27 A.3d 531, 537 (Del. 2011) (footnote omitted). The court must "accept all well-pleaded factual allegations in the Complaint as true, . . . draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof." *Id*. at 536 (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002). The reasonable "conceivability" standard asks whether there is a "possibility" of recovery. *Id*. at 537, n.13.

C. Merits of Argument.

The Superior Court dismissed the defamation counts pertaining to the Seven Articles because it determined that Oath was immune under Section 230. This was clear error. Section 230 of the Communications Decency Act, 47 U.S.C. §230, provides immunity for an "interactive computer service," such as Twitter or Facebook, that allow third parties, termed "information content providers," to post statements on its web platform. 47 U.S.C. §230(c)(1). This law, the famous "twenty-six words that created the internet," effectively immunizes social media platforms from liability when their users post defamatory statements. 47 U.S.C. §230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); s*ee also Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (holding operator of website that hosts consumer reviews immune from suit concerning defamatory posts by users of website). The widely accepted three-part test for immunity requires that (1) the defendant is a provider or user of an "interactive computer service," (2) the relevant information was provided by another information content provider, and (3) the claim seeks to hold the defendant liable as the publisher or speaker of the information provided by another information content provider. *Sikhs for Justice "SFJ", Inc. v. Facebook,*

Inc., 144 F. Supp. 3d 1088, 1092 (N.D. Cal. 2015), *aff'd sub nom*. *Sikhs for Justice, Inc. v. Facebook, Inc*., 697 Fed. App'x 526 (9th Cir. 2017).

Although Section 230 renders certain websites not liable for third-party statements, publishers remain responsible for their own statements. Those who post content are liable for their own defamatory content. The question in legal terms is whether, with respect to the Seven Articles, Oath is the "information content provider" of those articles, or is merely a neutral "interactive computer service." As is evident from the Amended Complaint, Oath is the information content provider; it is responsible for the Seven Articles. It solicited them, gave them "headline" treatment, added author bylines and "about the author" descriptions in italicized typeface, and provided room for comment sections at the foot of the articles. The sole difference between the Three Articles for which Oath admits it is responsible and the Seven Articles for which Oath denies responsibility is that the authors of the Seven Articles are denoted as "contributors" instead of "correspondents" in their "about the author" descriptions. This bare difference is meaningless to the average reader and does not suffice to exculpate Oath from responsibility. In its motion to dismiss below, Oath also claims that, somewhere on its website, it disclaims all responsibility for the content of articles authored by "contributors"; that alleged

disclaimer, however, is not visible on the article pages, all of which are included in the Amended Complaint as Exhibits.[5]

In any event, describing writers as "contributors" and adding a disclaimer of responsibility does not trigger Section 230 immunity; the Communications Decency Act has no "opt-in" provision. Were it so easy, every publisher would disclaim liability for its publications, opt in to Section 230, and render the tort of defamation a footnote to history. Instead, Section 230 contains carefully devised and fully defined terms, and only those defendants who meet its statutory terms (and not simply claim to meet its terms) enjoy the immunity it grants. The statute on this point is unambiguous: websites remain liable if the website "is responsible, in whole or in part, for the creation or development" of the article or post. 47 U.S.C. §230(f)(3). If the website is responsible for the article, "in whole or in part," and for its "creation or development," then as a matter of federal law the website is the responsible "information content provider" as to that content. *See Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (no Section 230 immunity if interactive computer service provider "contributes materially to the alleged illegality of the conduct"); *Gilmore v. Jones*, 370 F. Supp. 3d 630, 661–62 (W.D. Va. 2019) (holding that court will look at "totality of the

[5] This contention about a disclaimer appears on page 22 of the defendant's opening memorandum in support of its motion to dismiss. (App'x at A-175).

circumstances" to determine if website operator was not "passive" but went beyond "normal editorial functions"). There is a difference between deleting content and creating content:

> In passing Section 230, Congress sought to spare interactive computer services this grim choice [to either delete all defamatory material or be responsible for it] by allowing them to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete. In other words, Congress sought to immunize the *removal* of user-generated content, not the *creation* of content.

Roomates.com, 521 F.3d at 1168 (italics in original).

The federal statute provides a clear limitation: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information *provided by another information content provider*." 47 U.S.C. §230(f)(2)

(emphasis added). But if the information was not provided by "another information content provider," then the website, like any speaker, remains responsible for its own content. *See Roommates.com*, 521 F.3d at 1168 (loss of immunity if provider "contributes materially to the alleged illegality of the conduct"); *Gilmore*, 370 F. Supp. 3d at 661–62 (court will examine "totality of the circumstances" to determine if website operator was not "passive" but went beyond "normal editorial functions" to create content); *Carafano v. Metrosplash.com, Inc.*,

339 F.3d 1110, 1123 (9th Cir. 2003) ("Under the statutory scheme, an 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue.").

It is evident from the Amended Complaint that the Seven Articles that were published by HuffPost were the responsibility of the website. These are not the anonymous posts of readers in the comment section; these are not the kind of posts that appear in a Twitter feed or in the Facebook comment bar. The Superior Court apparently believed that the "contributors" who authored the HuffPost articles were mere third-parties, equivalent to the casual reader adding a few lines in the "comment" section at the foot of the article. Indeed, the court's error is evident in its description of these "contributors" as people who "control their content and post freely" on the website. These factual contentions appear nowhere in the record. In fact, these contributors do not control their content and are not free to post on HuffPost's webpage. These writers are simply freelance writers. It is common in journalism for freelance writers to submit queries for potential work, to offer articles for publication, and to earn bylines and compensation. It does not matter that some of the articles on the HuffPost site were written by full-time writers employed by Oath and some others by freelancers. To the average reader, they are the same. Oath cannot claim Section 230 immunity simply by publishing submitted or solicited

articles by freelance writers. These are not the uncontrolled third-party "information content providers" contemplated by the statute.

It is evident from the text and appearance of each of these Seven Articles, all appended as Exhibits to the Amended Complaint, that they are the responsibility of the publisher. They are lengthy, consisting of multiple paragraphs, were provided headlines that appear in large, bold typeface, and are dated. The authors are identified by name in bold type. Each contributor is described in a note, such as "writer, political pundit, and former ABC News journalist," or "A 14-time Emmy nominee and host of 'Be Less Stupid.'" Several of the Seven Articles even include artwork. It is a mistake to include these Seven Articles, written by professional writers and policy pundits who were, discovery will reveal, selected for publication by Oath, fall within a statutory grant of immunity designed to shield social media platforms from the endless liability of amateur commenters posting defamatory content on their sites. HuffPost's selected freelance journalists, for whom publication on HuffPost is undoubtedly a point of pride and an entry on their professional resume, successfully pitched their story ideas to HuffPost, gaining access to valuable internet publication space. Discovery will investigate the selection and editorial process through which these Seven Articles passed, explore the writers' professional background, and inquire concerning their compensation for the HuffPost publication. Oath is as responsible for this content as it is for the articles

written by its employed correspondents. Indeed, it is just that single word, "correspondent" versus "contributor," that appears to distinguish the Seven Articles from the Three Articles. This distinction makes no difference. Section 230 immunity is a matter of federal law, not private contractual arrangement.

The fact that Oath is responsible for the Seven Articles by itself requires reversal of the Superior Court's ruling. Stripped of Section 230 immunity, each of these Seven Articles constitutes actionable defamation. If necessary, there is an additional ground that precludes Section 230 immunity for these Articles: the HuffPost website does not qualify, in the first place, as an "interactive computer service" for which the statute was written. The Superior Court's statement that "[t]he most common interactive computer services are websites" is true: many interactive computer services, such as Facebook, Twitter, Instagram, and other platforms are indeed "websites": they are part of the world wide web, which is itself part of the internet. *See Zeran v. AOL, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1121 (N.D. Cal. 2016), *aff'd*, 881 F.3d 739 (9th Cir. 2018). This fact, however, should not be taken to mean, as the Superior Court apparently concluded, that because some interactive computer services are websites, therefore all websites qualify as interactive computer services. They do not. "Interactive computer services" is a term defined by the statute. Had the Congress wished to include all websites in that definition it could have easily done so. Instead,

"interactive computer services" are those websites that constitute an "information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . .." 47 U.S.C. §230(f)(2). No court has held that an ordinary website such as Oath's HuffPost enjoys the benefit of the immunity created by Section 230. The HuffPost is just a company webpage. It is not a "service, system, or access provider." It is not Facebook or Instagram or MySpace or Twitter, all of which have been held to qualify as interactive computer services. It is not AOL or Verizon FIOS or Comcast Xfinity. It is not an internet hosting company such as DreamHost or GoDaddy, nor is it a search engine such as Google or Yahoo!, nor an online message board or some other online platform, like Reddit or Craigslist.

Oath has never suggested it is an open platform akin to Facebook or Twitter. No member of this Court or any other person is able to go online and publish an article on Oath's HuffPost website on one's own initiative. The HuffPost is just an online newspaper, just like so many online newspapers. It publishes headlined articles on current events, editorials, and international news. It has a sports section and provides the weather forecast. It is not even "interactive": it does not create room for millions of users to simultaneously share content, speak to each other, create topical conversation threads, and post their own videos and articles. It does not have massive servers that permit such mass interaction. It is just a newspaper website.

When it has wanted to, the federal Congress has shown itself perfectly capable of extending Section 230 immunity to new areas. *See* 48 U.S.C. §4102(c)(1) (providing that U.S. courts "shall not recognize or enforce" foreign defamation judgments that are inconsistent with §230); 47 U.S.C. §941(e)(1) (extending §230 protection to new class of entities). The Congress has not done so here. It is not proper for a judicial tribunal to expand the definitions stipulated in a federal statute.

II. ACTUAL MALICE WAS PROPERLY ALLEGED.

A. Question Presented.

Did the Superior Court err in concluding that the plaintiff was required to plead "actual malice" not just of the defendant, but of non-defendants, too? (App'x at A-274 to A-276).

B. Standard of Review.

Plaintiff hereby incorporates by reference the standard of review previously set forth in Part I.B of this Argument.

C. Merits of Argument.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) requires plaintiffs who are "public figures" to prove "actual malice" on the part of the defendant to recover for defamation. Actual malice means that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279–80. The Superior Court held that the plaintiff did constitute a "public figure" for the purpose of this controversy, a point that the appellant does not concede but need not address for the purposes of this appeal.[6] The Superior Court also implied that the Amended Complaint pleads "actual malice" with regard to Oath and the Isikoff

[6] The issue of whether plaintiff is a "public figure" requires discovery. At the appropriate time, the plaintiff will argue, if the facts support it, that he is not a public figure required to prove actual malice. Plaintiff expressly preserves this argument so that it may be raised at a later time.

article. The Superior Court's mistake is in concluding that the plaintiff must also establish the same fault respecting non-defendants. The Complaint alleges that the Defendant acted with actual malice, (Am. Compl. ¶¶ 64–117), and does so with numerous allegations of fact, and that is all the law requires.

The Superior Court misapplied the *Sullivan* standard. The opinion in that case requires that the plaintiff prove the actual malice of "the persons . . . having responsibility for the publication." In this case, the plaintiff has alleged that Oath, the publisher, is the "person responsible for the publication." *Sullivan* requires only that the plaintiff allege fault on the part of the person it seeks to hold responsible; the decision does not hold that each individual author of a defamatory article must also be the "person responsible," no more than it says the publisher, editor, researcher, or investigator is necessarily the "person responsible."

In this matter, the plaintiff has chosen to identify and allege the publisher Oath to be the person responsible; indeed, it is publishers, not the individual writers, who are most often held liable for the defamatory statements they publish. *Sullivan* does not require a defamation plaintiff to prove that any person, other than the defendant, acted with actual malice. In the seminal case itself, it was The New York Times, the publisher, and not the author of the article in issue, that was sued and concerning which the Court held that the plaintiff Sullivan was required to prove actual malice. Indeed, requiring that a defamation plaintiff establish the malice of each writer

would border on absurdity, as the plaintiff in a case such as this would be required to allege and prove that eleven different authors, plus Oath itself (and maybe others connected to the articles) all individually acted with actual malice. In practical effect, the only way to accomplish such a feat would be to join each author as a defendant to a lawsuit. These authors appear to reside all over the United States, and some may even be foreign nationals. Suing all of them in a single action would present potentially insurmountable difficulties establishing personal jurisdiction, satisfying venue, and conducting discovery, even assuming any witnesses or other evidence of such malice were subject to process in Delaware. Obviously, the Superior Court made an error. The plaintiff is required to prove the requisite fault only with respect to the defendant charged by the Amended Complaint with being the person responsible. In this matter, Oath, acting through its employee Isikoff, and in concert with others, is the "person responsible" for its own publication. Actual malice includes reckless disregard: that the defendant knew the truth but decided to publish a falsehood anyway. The Amended Complaint identifies Oath as that person, and supplies ample and factual pleadings that, if proven, substantiate Oath's actual malice.

Without question Oath is responsible for the articles written by its employees, including the Isikoff Article and the Three Articles that were published in the HuffPost. Oath does not deny that responsibility. As argued above, Oath is also

responsible for the Seven Articles, all of which were published with prominence on the HuffPost page, as the Exhibits to the Amended Complaint allege. Importantly, this suit as it pertains to the Seven Articles is not based in respondeat superior. It does not allege that the freelance journalists who wrote the Seven Articles, as independent contractors, themselves acted with actual malice, and that Oath is responsible in respondeat superior for their content as if they were employees. *See Secord v. Cockburn*, 747 F. Supp. 779, 787 (D.D.C. 1990). Instead, the Amended Complaint is against Oath, and alleges that it was Oath who controlled the article of Isikoff, its employee, whose conclusions were then the basis for the defamatory statements in the Seven Articles. Oath, with the Isikoff Article and with editorial control, was directly responsible for the content of the Seven Articles. The legal test is the extent to which the publisher exerted its control or influence over the content of the work. *DARE v. Rolling Stone Magazine*, 101 F. Supp. 2d 1270, 1278 (C.D. Cal. 2000) (holding that magazine exerted limited control over "the result of the work"); *Chaiken v. Village Voice Publishing Corp*., 119 F.3d 1018, 1033–34 (2nd Cir. 1997) (finding no liability because reporter independently selected topics and wrote without guidance). Where the publisher, as here, had "reason to believe" that the author's statements were unlikely to be true, the publisher is liable. *Geiger v. Dell Publishing Co.*, 719 F.2d 515, 518 (1st Cir. 1983). In any event, under the traditional rule, Oath is liable for its publication, regardless of the employment status

of its writer. "It is a well settled rule of defamation law that one who republishes libelous matter is subject to liability as if he had published it originally, even though he attributes the libelous statements to the original publisher." *Taj Mahal Travel v. Delta Airlines*, 164 F.3d 186, 190 (3d Cir. 1998).

The Supreme Court has provided some specific examples of what constitutes actual malice. In *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 691–92 (1989), the Court ruled that, although failure to adhere to professional standards does not necessarily amount to actual malice, intentional avoidance of facts may lead to a finding of reckless disregard for the truth. In *Harte-Hanks*, the Court ruled that the journalists should have been suspicious of contradictory facts, but nevertheless their failure to interview key sources and refusal to listen to a revealing tape recording indicated an intentional avoidance of the truth. *Id.* at 692–93. Similarly, Oath and its employee Isikoff were aware of contradictory facts, should have been suspicious of the Steele claims, yet made no investigation and failed to speak to Page or make other inquiries prior to publication. Although a publisher who has no obvious reasons to doubt the accuracy of a story is not required to initiate an investigation that might plant such doubt, once doubt exists, the publisher must act reasonably in dispelling it. *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991).

In addition, the Superior Court opinion at several junctures refers to the Amended Complaint's allegations of actual malice as "conclusory." (App'x at A-243 to A-246). Although this characterization is offered with respect to the allegations regarding the ten of the eleven individual authors (with regard to whom alleging actual malice is not a requirement), it is important that this Court, conducting de novo review, understand that the allegations of actual malice in the Amended Complaint concerning Oath are factual, numerous, and, if proven, collectively establish Oath's fault. To wit:

- Oath was motivated to publish these scandalous falsehoods by the "economic expectation . . . to increase 'clicks' and globally drive internet traffic to its various websites" (Am. Compl. ¶ 2);

- The scheme in which Oath participated to defame the plaintiff was "funded by the DNC, working in collaboration with its law firm Perkins Coie;" the DNC "resources [were] expended" for this purpose (*Id.* ¶ 6);

- The defamatory attack on the plaintiff "was in perfect alignment with the political bias and aims of the senior management" at Oath and was devised to influence the presidential election; the CEO was a public political ally of presidential candidate Hillary Clinton (*Id.* ¶ 10);

- Oath's employee Correspondent Michael Isikoff published facts he knew to be false without verifying them, according to the factual findings of the High Court of Justice in London, England (*Id.* ¶¶ 64, 93);

- As part of this scheme to "set up" Page, Perkins Coie retained Fusion GPS for the purpose of developing "negative information" creating a fictitious tie to Russia (*Id.* ¶ 65);

- The reports on which Oath relied were known by Oath to contain "clear errors," yet Oath published them anyway (*Id.* ¶ 80–81);

- Isikoff failed to provide the plaintiff with a reasonable opportunity to explain or deny the accusations Oath was to publish the next morning (*Id.* ¶ 83–84);

- Isikoff claimed he received his information from a "well-placed Western intelligence source" when in fact he did not, and he knew it (*Id.* ¶ 99);

- Steele, the ultimate source of the defamatory information, was an agent of Russia and a possible Russian operative or dupe (*Id.* ¶ 101), and Isikoff was aware of Steele's dubious background and character (*Id.* ¶ 102);

- Oath knew the statements contained in the Fusion report were false (*Id.* ¶ 106–107);

- Fusion told Oath prior to publication that its report was not true (*Id.* ¶ 115).

This is but a sample; the Complaint is rife with factual allegations that describe actual malice. (*Id.* ¶¶ 64–117). Again, "actual malice" requires that the defendant knew the truth yet chose to publish a falsehood anyway. These allegations from the Amended Complaint establish precisely, and factually, that standard. The Complaint alleges, with facts, that Oath and its employee Isikoff knew the truth but chose to publish a falsehood in service of an ulterior motivation. (*E.g.*, *id.* ¶ 107). These allegations are factual, not conclusory: either these matters alleged did take place, or they did not. For instances, either Fusion told Oath prior to publication that its report was not true, or it did not; either Isikoff was aware that he should not trust Steele, or he was not; either Perkins Coie retained Fusion for the express purpose of procuring

these false allegations, or it did not; and so on.[7] These are all questions of fact; if proved, they provide substantial evidence of actual malice.

Again, these are only some of the allegations from the Amended Complaint that prove actual malice. (There will be more at trial: new factual information about this national scandal emerges nearly every week). Each of these allegations is factual: each involves definable conduct, each can be proven true or false, and each will be determined by the jury. If proven, they together, in whole or in part, establish actual malice: specifically, that Oath, acting through Isikoff, in league with the DNC, Perkins Coie, Fusion, and Steele, knew the truth but decided to help manufacture and then publish a falsehood. This is the very textbook definition of "actual malice" established by *Sullivan*. Most emphatically, it is not wild political speculation to state that Oath knew the truth yet published falsehood: this was the conclusion reached by two separate investigations, including the Report of the Inspector General of the United States on behalf of the Department of Justice and the investigation of the Special Counsel, Robert Mueller, in the aftermath of the most extensive federal investigation since Watergate.[8] That Oath and its collaborators layered and obscured

[7] For a comprehensive list of false statements of fact and of statements Oath made with actual malice against plaintiff under *St. Amant v. Thompson*, 30 U.S. 727 (1968), see App'x A-223 to A-228.

[8] This Court may take judicial notice of the conclusions in these reports, which are not subject to reasonable dispute, are generally known from public records, and whose accuracy cannot reasonably be questioned. *Fawcett v. State*, 697 A.2d 385, 388 (Del. 1997) (citing D.R.E. 201(b)).

their trail of fiction through multiple entities is not suggestive of a wild conspiracy theory; it is suggestive of political operatives who knew what they were doing and were aware of the scandal that would erupt were they to accuse a presidential nominee of the Republican Party of secret collaboration with America's ultimate political rival and erstwhile enemy.

III. THESE PUBLICATIONS ARE NOT TRUE NOR SUBSTANTIALLY TRUE.

A. Question Presented.

Did the Superior Court err in holding that the Isikoff Article is true or substantially true, when every fact it raises has been shown to be unequivocally false, but its contentions of fact are preceded by qualifying words or couched in the passive voice? (App'x at A-269 to A-271, A-276 to A-278).

B. Standard of Review.

Plaintiff hereby incorporates by reference the standard of review previously set forth in Part I.B of this Argument.

C. Merits of Argument.

Finally, the Superior Court incorrectly held that the Isikoff Article is "true or substantially true," thus also protecting the other articles that refer to it. To be clear, the Superior Court did not find any of the facts mentioned in the Isikoff Article to be true; indeed, it could not plausibly find them to be true: each of the substantive statements contained in the Isikoff Article has been determined to be false by either the admissions of the persons or entities involved in creating the falsehoods, or by the conclusions of the official government investigations. In short, there is no dispute that Carter Page did not hold a meeting, surreptitious or otherwise, with Russian agents. There is no dispute that anyone who might plausibly be described as a "Western intelligence source" had implicated Page. None of the contentions were

true, and none of the innuendo from the statements, implying that the Trump campaign was under the influence or control of Russian interests, was true or even plausible. History needs to be corrected on this point. Official government authorities have concluded, publicly, that the entire "Russian influence on the U.S. election" story was a hoax, a purposefully contrived hoax that, ironically, was itself designed to influence the presidential election.

Here is the truth, as alleged in the Amended Complaint: that Isikoff knew the Steele fabrications were false (Am. Compl. ¶ 107), that he had a hand in sending them to the FBI, and then, once they were submitted, wrote a "ground-breaking" story that breathlessly claimed that "reports from a Western intelligence source" had been submitted to the FBI implicating Trump advisor Carter Page (*Id.* ¶ 29–43, 87, 95, 98–99, 105). That's the Russian collusion scandal, reduced to its essence. The Isikoff Article is not true, nor is its "gist" substantially true. The entire tone and tenor of the article unmistakably connotes a "false gist," and that gist is that the reporter had come across an ongoing federal investigation involving corruption and disloyalty at the highest possible level. Yet Isikoff was clever: his article unmistakably conveys this clear implication, but does so through the crafty deployment of qualifying words and passive verbs that seek to disguise his actual knowledge and participation.

The Supreme Court has been clear in stating that "minor" words should not be decisive in determining truth or substantial truth. *Masson*, 501 U.S. at 517 (holding common law of defamation "overlooks minor inaccuracies and focuses upon substantial truth"). The key is determining what "impression" the article would make on the mind of the average reader. *See Doe No. 1 v. Cahill*, 884 A.2d 451, 463 (Del. 2005) (explaining that the test is whether "a third party would understand the character of the communication as defamatory"). "A statement is substantially true if, even if not literally true, it does not create an impression in the mind of the listener more damaging than a literally true statement would." *Masson*, 501 U.S. at 517. Merely adding qualifying words or distancing oneself from the report does not create a shield from defamation liability. *Milkovich v. Lorain Journal*, 497 U.S. 1, 18–19 (1990) (prefacing a defamatory statement with "in my opinion" does not render the statement non-actionable opinion). As the court in *Milkovich* explained:

> Simply couching such statements . . . does not dispel these implications; and the statement, 'in my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' As Judge Friendly aptly stated [in *Cianci*, *infra*]: '[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'

Id. (internal citations omitted).

Couching the Steele fabrications in qualifying language does not exonerate the publisher. *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 61 (2d Cir. 1980) ("one

who republishes a libel is subject to liability just as if he had published it originally, even though he attributes the libelous statement to the original publisher, and even though he expressly disavows the truth of the statement." (citing *Hoover v. Peerless Publications, Inc*., 461 F. Supp. 1206, 1209 (E.D. Pa. 1978))); RESTATEMENT (SECOND) OF TORTS §578 (1977) ("one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it"); *Olinger v. American Savings and Loan Assoc*., 409 F.2d 142, 144 (D.C. Cir. 1969) ("[t]he law affords no protection to those who couch their libel in the form of reports or repetition" and that "the repeater cannot defend on the ground of truth simply by proving that the source named did, in fact, utter the statement"). As the *Cianci* court explained, "any different rule would permit the expansion of a defamatory private statement, actionable but without serious consequences, into an article reaching thousands of readers, without liability on the part of the republisher." *Cianci*, 639 F.2d at 61.

In similar fashion, couching a statement in terms of qualification (e.g., "reportedly," "apparently," "purportedly") does not dispel the factual assertions or implications in the statement. The Isikoff Article, as a whole and in parts, conveys a single false message: it implies an ongoing and serious federal investigation, instead of a contrived set-up in which the reporter himself played a part. Among the more egregious of the Isikoff Article's false claims:

- "U.S. intelligence officials are seeking to determine whether an American businessman identified by Donald Trump as one of his foreign policy advisers has opened up private communications with senior Russian officials – including talks about the possible lifting of economic sanctions if the Republican nominee becomes president, according to multiple sources who have been briefed on the issue."

This statement is factual and false: no intelligence officials were "seeking to determine" this fact; Isikoff had known about the falsity of the Steele fabrications forwarded to the FBI, yet then wrote an article that implied a serious investigation was underway. The blame he puts on the "multiple sources" is facile and misleading: Isikoff knew these sources all relied on the Steele report, which he knew to be fabricated.[9]

- "The activities of Trump adviser Carter Page, who has extensive business interests in Russia, have been discussed with senior members of Congress during recent briefings about suspected efforts by Moscow to influence the presidential election, the sources said."

Again, the gist of this claim is false: it implies that members of Congress have been "briefed," when in fact the DNC-generated Steele fabrications were merely transmitted from Steele to Democratic leaders in Congress, such as Senate majority leader Harry Reid. The artful employment of the passive voice by this professional journalist purposely obscures the subject: who provided the briefing about these supposed suspicions? The truth, of which Isikoff was fully aware, was that it was

[9] It also should matter that the FBI eventually realized and stated publicly that there had been but one source, Steele, and that it had mistakenly taken Isikoff's Article as a second source.

Steele who generated the fake materials that were transmitted to these "Democratic leaders." Isikoff knew that Steele is a notorious fabricator-for-hire who had been retained at the behest of the Clinton campaign and the DNC, which funneled Steele's payments through a private law firm to obscure their source. Failure to disclose the truth when he knew it was Isikoff's method of creating a false impression or gist.

- "But U.S. officials have since received intelligence reports that during that same three-day trip, Page met with Igor Sechin, a longtime Putin associate and former Russian deputy prime minister . . . a well-placed Western intelligence source tells Yahoo News."

Once again, the passive voice hides the subject. Truthful reporting would have been that "the DNC, obscuring its involvement through layers of nominally independent operatives, paid an unreliable agent to create the false impression that members of Trump's team were conspiring with sanctioned Russian operatives, and that Democratic members of Congress were in on it." Isikoff personally knew this description to be the truth; he knew that the claim that Page met with Sechin was invented. He should have reported the matter forthrightly. Instead, he chose, through the use of heavy innuendo, the passive voice, and qualifying words, to make the story appear quite the opposite of the truth. Isikoff knew that Page had never met with Sechin.

- "That meeting, if confirmed, is viewed as especially problematic by U.S. officials because the Treasury Department in August 2014 named Sechin to a list of Russian officials and businessmen sanctioned over Russia's 'illegitimate and unlawful actions in the Ukraine."

Isikoff pretends that this meeting, which he knew never took place in fact, might be "confirmed," and that if confirmed, "is viewed as especially problematic." The passive voice again is deployed to hide the subject. Who might hold this view? Isikoff knew it was nobody, as no intelligence report had been made, no real investigation was underway, no meeting could possibly be "confirmed," and thus no one alive can possibly "view" this story as anything but a complete fabrication.

- "At their alleged meeting, Sechin raised the issue of the lifting of sanctions with Page, the Western intelligence source said."

By supplying made-up details about this made-up meeting, Isikoff lends the claim of the meeting considerable believability. Once again, however, the factual part of this statement is utterly false: Page did not and has never in his life met with Sechin. The very idea that Sechin would have "raised the issue of lifting sanctions" is doubly false. Yet, as usual, Isikoff hides behind barely qualifying language, terming the charge an allegation, and attributing it to a Western intelligence source. The charge itself, however, was scurrilous, and Isikoff knew it. He had no good faith basis in fact for the allegation; he knew the story of the secret meeting was a complete fabrication, and he knew that the true source of the fabrication, namely Steele, was a professional muck-raker employed by the DNC. Isikoff knew the sole purpose of the false claim was to influence the election, yet he chose to dress it up as something more, alluding to factual discussions that supposedly or "allegedly" took place at a meeting that Isikoff knew never happened, all in response to an "intelligence source"

that was just a contrivance. In the minds of the "third-party" reader, which is the standard for defamation liability, this sentence conveys the unmistakable gist that Page was working with a sanctioned Russian operative to steal a presidential election.

The Amended Complaint lists many more instances of falsehoods in the Isikoff Article and in the ten HuffPost articles. For defamation liability, the false statements need not be literally untrue. Instead, they need only to imply falsehood. *Martin v. Widener Univ. School of Law*, Super. Ct. Case No. 91C-03-255, 1992 Del. Super. LEXIS 267, at *51–52 (Del. Super. Ct. June 4, 1992). In *Martin*, the court explained: "[a] libel by implication is actionable if 'it imputes something which tends to disgrace a man, lower him in, or exclude him from society or bring him into contempt or ridicule.'" *Id.* (citing *Klein v. Sunbeam Corp.,* 94 A.2d 385, 390 (Del. 1952)). A libel need not be direct and open. *Id.* ("The publication must be judged by its general tenor; and if, taking their terms in their ordinary acceptation, it conveys a degrading imputation, however indirectly, it is a libel." (internal citation omitted)); *see also Spence v. Funk*, 396 A.2d 967, 972 (Del. 1978) (reiterating that slander need not be in express terms, but is "to be judged of by the effect it produced on the mind") (internal citation omitted). The implication from Isikoff's prevarications is that there was a serious, ongoing investigation by the federal government to determine if Carter Page, policy advisor to the Donald Trump campaign, had engaged in secret

meetings with Russian operatives to discuss post-election benefits for Russia, should Trump win. The article implied that the reporter had learned of this ongoing investigation through intelligence sources. As the Amended Complaint alleges and history has established, none of this was true, and even the attribution to an "intelligence source" was a gross and mendacious exaggeration. Yet the Isikoff article did its intended work, spawning a national scandal that damaged the Trump campaign, produced literally years of intense public dialogue, and resulted in a major federal investigation. Although cleverly couched in precatory language and attributing its claims to "sources," the clear gist of the Isikoff Article is false. That the writer Isikoff knew it to be false amounts to actual malice, makes the Article actionable, and renders the publisher Oath liable for its contents.

IV. THE "FAIR REPORT" PRIVILEGE DOES NOT APPLY.

A. Question Presented.

Did the Superior Court err in concluding that the Isikoff Article was protected from defamation liability under the fair report privilege when "actual malice" was alleged, and the privilege is a "qualified" privilege that excludes statements made with actual malice? (App'x at A-271 to A-272).

B. Standard of Review.

Plaintiff hereby incorporates by reference the standard of review previously set forth in Part I.B of this Argument.

C. Merits of Argument.

The Superior Court also held that the Isikoff Article was protected from defamation liability under the privilege for "fair and accurate report." This privilege is a "qualified privilege": it requires that the statements in the Article be made in good faith, believing them to be true and accurate, and without malice. *See Schiavone Constr. Co. v. Time, Inc*., 847 F.2d 1069, 1085 (3d Cir. 1988) (applying New Jersey law). This privilege exempts from defamation liability publishers who "re-publish" defamatory statements made during an official proceeding, such as a court hearing or legislative debate. *Kanaga v. Gannett Co.*, 687 A.2d 173, 182 (Del. 1996). This privilege does not apply here. First, as Isikoff and therefore Oath were aware, there was no ongoing official proceeding: instead, persons who had been

provided with Steele's report simply gave it to certain Democratic members of Congress and certain FBI officials. Second, as alleged extensively in the Amended Complaint, Isikoff and Oath did not act in good faith; instead, they acted with actual malice, thus disqualifying the Oath's articles from the privilege. (Am. Compl. ¶¶ 64–117).

CONCLUSION

Due to the errors of the Superior Court in applying Section 230 immunity, its misreading of the pleading requirements with respect to actual malice, and its deciding as a matter of law that the Isikoff Article was true or substantially true, appellant Carter Page has been denied an opportunity to litigate his claim for defamation. This Court should reverse the decision of the Superior Court in granting defendant's motion to dismiss, and remand this suit for trial.

Respectfully submitted this 3rd day of May, 2021,

OF COUNSEL:

Todd V. McMurtry (*PHV* admitted)
HEMMER DEFRANK WESSELS, PLLC
250 Grandview Drive, Ste. 500
Ft. Mitchell, KY 41017
Phone: (859) 344-1188
Fax: (859) 578-3869
tmcmurtry@hemmerlaw.com

K. Lawson Pedigo (*PHV* admitted)
MILLER KEFFER & PEDIGO, PLLC
3400 Carlisle Street, Suite 550
Dallas, TX 75204
Phone: (214) 696-2050
klpedigo@mkp-law.net

BELLEW LLC

/s/ Sean J. Bellew
Sean J. Bellew (No. 4072)
2961 Centerville Rd., Suite 302
Wilmington, DE 19808
Phone: (302) 353-4951
sjbellew@bellewllc.com

Attorneys for Plaintiff, Carter Page

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

CARTER PAGE, an individual,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. S20C-07-030 CAK
	)	
OATH INC., a corporation,	)	
	)	
Defendant.	)	

Submitted: January 27, 2021
Decided: February 11, 2021

Defendant's Motion to Dismiss for Failure to State a Claim

GRANTED

MEMORANDUM OPINION AND ORDER

Attorneys for Plaintiff[1]

Sean J. Bellew, Esquire, Bellew LLC, 2961 Centerville Road, Suite 302, Wilmington, DE 19808.

Todd V. McMurtry, Esquire, Hemmer DeFrank Wessels, PLLC, 250 Grandview Drive, Suite 500, Fort Mitchell, KY41017 (*Pro Hac Vice*).

K. Lawson Pedigo, Miller Keffer & Pedigo PLLC, 3400 Carlisle Street, Suite 550, Dallas, TX 75204 (*Pro Hac Vice*).

---

[1] L. Lin Wood, Esquire, had been granted *pro hac vice* status to appear for Plaintiff. I revoked that status in an opinion dated January 11, 2021for the reasons stated therein. Mr. Wood "filed" a motion to reargue that decision which was not signed by local counsel, as required by Delaware Superior Court Civil Rule 90.1, and it was sent attached to an email and not electronically filed as required by our Court's rules and procedures. *See* Delaware Superior Court Civil Rule 79.1. Mr. Wood's disregard for our Rules is consistent with his practice in other courts, part of the reason his *pro hac vice* status was revoked.

Attorneys for Defendant

T. Brad Davey, Esquire and Jonathan A. Choa, Esquire, Potter Anderson & Corroon LLP, Hercules Plaza, P.O. Box 951, Wilmington, DE 19899.

Elbert Lin, Esquire and David M. Parker, Esquire, Hunton Andrews Kurth LLP, 951 E. Byrd Street, Richmond, VA 23219 (*Pro Hac Vice*).

Jonathan D. Reichman, Esquire and Jennifer L. Bloom, Esquire, Hunton Andrews Kurth LLP, 200 Park Avenue, New York, NY 10166 (*Pro Hac Vice*).

KARSNITZ, J.

FACTUAL BACKGROUND

Defamation suits are at the intersection of tort law and the exercise of free speech. One person's defamatory insult is another's rhetorical hyperbole.[2] This suit brings to one jurisdiction an offshoot of the international and politically charged dispute concerning claims of ties between the Trump campaign and Russia. While the context of the case is seductive and tantalizing, the law and its application is for me straightforward.

Plaintiff Carter Page ("Plaintiff" or "Dr. Page") was unknown to the general public and the media until he became an advisor on Russian affairs to the Trump campaign. Dr. Page is a graduate of the Naval Academy who upon discharge became involved in investment banking. Apparently, he developed contacts in Russia and spoke out concerning relations between Russia and the United States. It was not until he began advising the Trump campaign, and its ties with Russia, that Dr. Page became the focus of American authorities, politicians, and the media in general. One could not have lived through the recent past without being aware of the Trump/Russia controversy.

Defendant, Oath, Inc. ("Defendant" or "Oath") is a Delaware corporation and the parent company of, inter alia, Yahoo! News ("Yahoo") and TheHuffingtonPost.com

---

[2] *See*, e.g., *Letter Carriers v. Austin*, 418 U.S. 264 (1974), in which rhetorical hyperbole is described as extravagant exaggeration employed to rhetorical effect.

("HuffPost"). At this stage of the case I must accept the well pled allegations of the Complaint as true.[3] In it, Dr. Page takes issue with eleven articles for which he seeks to hold Oath responsible. Dr. Page's primary issue is with an article written by Michael Isikoff and published by Yahoo in September 2016 (the "Isikoff Article"). The Isikoff Article discusses the now famous, or infamous, depending upon your political perspective, Steele dossier (the "Dossier"). Of special concern to Dr. Page is Mr. Isikoff's description of the Dossier as an "intelligence report," and Steele as a "well placed intelligence source." Three other articles which Dr. Page alleges are defamatory are original content of Defendant's subsidiary HuffPost. Seven additional articles were contributed to HuffPost. Dr. Page claims all eleven articles are defamatory, and Defendant is legally culpable for their publication. Dr. Page's Complaint alleges that, as a result of the articles he was held up to ridicule, subjected to threats, including death threats, and suffered other damages.

Defendant has filed a motion to dismiss the Complaint alleging three defenses. Defendant contends that the Isikoff Article, and the three HuffPost original content articles, are essentially true. As to the seven HuffPost contributor articles, Defendant claims protection under Section 230 of the Communications Decency Act.[4] Finally, Defendant contends that Dr. Page is a limited purpose public figure, and actual malice has not been sufficiently alleged.

---

[3] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).
[4] 47 U.S.C. § 230(c)(1).

The Federal Litigation

On September 14, 2017, Dr. Page sued Oath in the United Stated District Court for the Southern District of New York. There, Page asserted a federal claim based on allegations that the Articles, *inter alia*, were acts of "international terrorism."[5] He also asserted New York state-law claims for defamation and tortious interference,[6] the same claims originally asserted in this Court. The District Court granted Oath's motion to dismiss.[7] It rejected Dr. Page's federal terrorism claim on the merits, declined to exercise supplemental jurisdiction over Dr. Page's New York state-law claims, and dismissed the case.[8] The Second Circuit affirmed in a summary order.[9]

The Delaware Litigation

On July 27, 2020, Dr. Page filed his Complaint with this Court against Oath[10] with respect to the Articles, alleging both defamation and tortious interference under Delaware law. He amended his Complaint on September 1, 2020, making minor

---

[5] Compl. ¶¶ 165–72, *Page v. Oath et al.*, No. 17 CIV. 6990 (LGS) (S.D.N.Y. Sept. 14, 2017) ("SDNY Compl.").

[6] *Id.* ¶¶ 154–64, 178–84.

[7] *Page v. Oath Inc.*, No. 17 CIV. 6990 (LGS), 2018 WL 1406621 (S.D.N.Y. Mar. 20, 2018) ("*Page I*").

[8] *Id.* at *4.

[9] *Page v. United States Agency for Glob. Media*, 797 F. App'x 550, 554 (2d Cir. 2019).

[10] In its Opening Brief in support of its Motion to Dismiss, Defendant argues that, with respect to the ten HuffPost Articles, Plaintiff sued the wrong corporate entity, because HuffPost is operated by TheHuffingtonPost.com, Inc., a corporate subsidiary of Oath, Inc. *See, e.g., Murray v. TheHuffingtonPost.com, Inc.*, 21 F. Supp. 3d 879 (S.D. Oh. 2014) ("TheHuffingtonPost.com [is] a Delaware media company that operates the website The Huffington Post."). However, Defendant did not move to dismiss the case of this ground, but instead reserved the right to assert this argument later in the case if necessary. I have not considered that argument and express no opinion thereon. Because Plaintiff's claims fail for the other reasons stated herein, it is unnecessary to consider this argument.

revisions and deleting references to a lawsuit (now dismissed) that he had brought against the Democratic National Committee. He later dropped the tortious interference claim, leaving only the defamation claim for me to consider. Under that claim, Dr. Page alleges defamation with respect to all eleven Articles.

On September 18, 2020, Defendant filed a Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted under Superior Court Civil Rule 12(b)(6). The parties briefed the motion, and I held Oral Argument on January 27, 2021.

STANDARD OF REVIEW

Under well settled Delaware law, with respect to a motion to dismiss for failure to state a claim under Delaware Superior Court Rule 12(b)(6), "a trial court must accept as true all of the well-pleaded allegations of fact."[11] "A trial court is not, however, required to accept as true conclusory allegations 'without specific supporting factual allegations.'"[12]In addition, a court must accept "only those 'reasonable inferences that logically flow from the face of the complaint' and 'is not required to accept every strained interpretation of the allegations proposed by the plaintiff.'" [13]

Defendant has asked me to decide whether Plaintiff has stated a claim for defamation against Defendant based on the Articles. For a variety of reasons, discussed

---

[11] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).
[12] *Id.* (citation omitted).
[13] *Id.* (citation omitted).

more fully below, I find that he has not. Therefore, this case must be dismissed for failure to state a claim under Delaware Superior Court Rule 12(b)(6)

ANALYSIS

Choice of Law

A preliminary issue is what State's law governs the defamation analysis. In its Opening Brief in support of its Motion to Dismiss, Defendant argued at some length that New York, rather than Delaware, law governed its tortious interference claim, which was later dropped. However, Defendant argued that a choice of law analysis is unnecessary for the defamation claims, at least at this stage of the case, because it would not affect the arguments in its Motion to Dismiss. I agree, and I express no opinion on choice of law.

The Isikoff Article

Truth

Plaintiff claims that several statements made in the Isikoff Article are false:

(1) He met with Russian officials Sechin and Diveykin in the Kremlin;

(2) U.S. officials had received intelligence reports of these meetings;

(3) A well-placed Western intelligence source had told Yahoo! News that U.S. officials had received these reports; and,

(4) The author of the Isikoff Article (Michael Isikoff) knew these statements were false, or probably false.

However, I find nothing in the Complaint which supports Plaintiff's claims that these statements in the Isikoff Article were false. As a general matter, the article simply says that U.S. intelligence agencies were investigating reports of Plaintiff's meetings with Russian officials, which Plaintiff admits is true, and led to his surveillance for over a year under FISA warrants. The article does not claim that Plaintiff actually met with those officials.

Dr. Page puts particular emphasis on items (2) and (3), above, contending that (a) the Dossier was not an "intelligence report," but rather opposition research, and (b) Steele should not be considered a well-placed Western intelligence source. To me this argument is either sophistry or political spin. An intelligence report is simply a report of information potentially relevant to an investigation. It can take many forms, be true or false, and can be used as opposition research and an intelligence report. Dr. Page also argues that labelling the Dossier an intelligence report suggests that it comes from a governmental agency. None of Dr. Page's descriptions or interpretations of intelligence report meet the standard of what a reasonable person would conclude, which is the standard I must apply.

Additionally, in my view the use of the term "well-placed intelligence source" does not unfairly give credence to the reporting. Again, in my opinion, the description was fair, and did not defame Dr. Page.

Thus, under Delaware law, Plaintiff fails to state a defamation claim based on the

Isikoff Article. None of the allegations in the Complaint shows that the statements in that article are false. A defamation plaintiff must plead "a false and defamatory communication,"[14] and Plaintiff has not done so.

Moreover, under Delaware law, "[i]mmaterial errors do not render a statement defamatory so long as the 'gist' or 'sting' of the statement is true."[15] An article "is substantially true," and therefore not actionable, if the "alleged libel" was no "more damaging to the plaintiff's reputation, in the mind of the average reader, than a truthful statement would have been."[16] Here, the gist of the Isikoff Article is that the U.S. government was investigating possible meetings between Plaintiff and Russian officials. Whether that investigation was confirmed by a well-placed Western intelligence source or based on an intelligence report would make little difference in the mind of the average reader.

"Fair Reporting" Privilege

Further, because the Isikoff Article is true, it is also protected under the Delaware privilege for fair reports of governmental proceedings. This privilege immunizes "fair and accurate" reports of "governmental" proceedings.[17] Plaintiff admits that he was a

---

[14] *Albright v. Harris*, No. 2019 WL 6711549, at *1 (Del. Super. Ct. Dec. 9, 2019).
[15] *Pazuniak Law Office, LLC v. Pi-Net Int'l, Inc.*, 2016 WL 3742772, at *6 (Del. Super. Ct. July 7, 2016) (citing *Gannett Co. v. Re*, 496 A.2d 553, 557 (Del.1985)); *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991).
[16] *Gannett Co. v. Re*, 496 A.2d 553, 557 (Del. 1985).
[17] *Read v. News-Journal Co.*, 474 A.2d 119, 120 (Del. 1984).

target of the U.S. Government's and the U.S. Congress's investigations.[18] Because the Isikoff Article provided a fair and accurate report of those proceedings, the fair report privilege applies. Indeed, a federal court has held that the investigations *were* official government proceedings.[19] Plaintiff acknowledges that governmental acts of executive officials qualify as official proceedings. The investigation here was conducted by U.S. intelligence official in the executive branch. As a fair and accurate report of this investigation, the Isikoff Article is protected.

The Ten HuffPost Articles

Plaintiff also claims defamation by the ten HuffPost Articles. Three of the ten HuffPost Articles were original HuffPost content, rather than third-party "contributors." Seven of the HuffPost Articles were posted by third-party "contributors." With respect to all ten of the HuffPost Articles, Plaintiff's defamation claim fails for three reasons.

First, as a public figure, Plaintiff fails to allege actual malice by any of the ten individual authors of the HuffPost Articles, instead focusing all his allegations on others.

Second, the three HuffPost Articles authored by HuffPost employees are true.

Third, Defendant is not liable under the federal Communications Decency Act for the seven HuffPost Articles which were posted by third-party "contributors."

---

[18] Am. Compl. ¶ 41.

[19] *Gubarev v. BuzzFeed, Inc.*, 340 F. Supp. 3d 1304, 1317 (S.D. Fla. 2018), appeal dismissed, No. 19-10837-JJ, 2019 WL 4184055 (11th Cir. Apr. 24, 2019).

Public Figure

Public figures face a "heightened pleading standard" in defamation cases.[20] "There are two types of public figures: all-purpose and limited-purpose."[21] An all-purpose public figure "achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes," while a limited-purpose public figure "injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."[22] "The question of whether a plaintiff is a public figure is 'one of law, not of fact.'"[23]

Plaintiff was at least a limited-purpose public figure when the HuffPost Articles were published. I take judicial notice[24] of the fact that on March 21, 2016, six months before the first HuffPost Articles, presidential candidate Donald Trump named Plaintiff as one of five members of his "foreign policy team."[25] Days later, Plaintiff discussed his Russian ties in a two-hour interview with Bloomberg.[26] He therefore "inject[ed] himself"

---

[20] *Agar v. Judy*, 151 A.3d 456, 477 (Del. Ch. 2017).

[21] *Id.*

[22] *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)).

[23] *Id.*, at 477 (citation omitted).

[24] *Judy v. Preferred Communication Systems, Inc.*, 2016 WL 4992687 (Del. Ch. Sept.19, 2016), at *2 (authorizing "judicial notice, in a motion to dismiss context, of documents of public record" (citation omitted)).

[25] Am. Compl. Ex. 1 at 2–3 (linking to Post Opinions Staff, *A transcript of Donald Trump's meeting with The Washington Post editorial board*, Wash. Post (Mar. 21, 2016), https://www.washingtonpost.com/blogs/postpartisan/wp/2016/03/21/a- transcript-of-donald-trumps-meeting-with-the-washington-post- editorialboard/?utm_term=.a7b86fdc7173). *See also* Am. Compl. ¶ 14 (admitting that he was a foreign policy advisor to President Trump's 2016 campaign).

[26] Zachary Mider, *Trump's New Russia Advisor Has Deep Ties to Kremlin's Gazprom*, BLOOMBERG (Mar. 30, 2016), https://www.bloomberg.com/news/articles/2016-03-30/trump-russia-adviser- carter-

into any public controversy relating to the Trump campaign, particularly one concerning Trump's connections to Russia. Thus, in my view, Plaintiff is a public figure.

Actual Malice

As a public figure, Dr. Page must both plead and prove that the allegedly defamatory statements were made with "actual malice;" i.e., the speakers "knew [each] statement was false or acted with reckless disregard for the truth."[27] This is a "subjective" standard requiring "a high degree of... awareness of probable falsity."[28] Moreover, Plaintiff must plead that the individual authors of the HuffPost Articles acted with actual malice. Organizations like Defendant cannot have institutional knowledge of falsity. Actual malice must be "brought home to the persons . . . having responsibility for the [allegedly defamatory] publication."[29] Further, Plaintiff must plead facts that permit that conclusion. "A trial court is not . . . required to accept as true conclusory allegations 'without specific supporting factual allegations.'"[30]

Unlike the Isikoff Article, Plaintiff does not allege facts about any of the individual authors of the HuffPost Articles. He asserts only that Defendant acted with actual malice.[31] Plaintiff also asserts that Defendant's former CEO, Tim Armstrong,

---

page-interview).
[27] *Agar*, 151 A.3d at 477 (citing *Doe v. Cahill*, 884 A.2d 451, 463 (Del. 2005)).
[28] *Harte- Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (citation omitted).
[29] *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964).
[30] *Hughes*, 897 A.2d at 168.
[31] Am. Compl. ¶¶ 9, 106–110, 116.

"professionally supported" Hillary Clinton, and that "on his watch, HuffPost posted a statement on it[s] website . . . that said, 'Trump is a serial liar who incites violence.'"[32]

Plaintiff fails to state a claim for defamation because the only facts he pleads concern people other than the authors of the HuffPost Articles. Setting aside bare legal conclusions, "political opposition alone does not constitute actual malice,"[33] and, even if it did, these allegations say nothing about the state of mind of the authors of the HuffPost Articles.

Plaintiff also claims that the Dossier was "inherently improbable" or contained statements that "could easily be exposed as false if fact-checked."[34] However, it is well established that "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."[35] Moreover, none of the HuffPost Articles reported on the Dossier as established fact. Plaintiff himself says that "[a]t most, the Steele Dossier contained some potential leads to pursue."[36] Similarly, all that the HuffPost Articles stated is that investigators were pursuing leads.

Even if Plaintiff could avoid his fatal failure as a public figure to plead actual malice, his claim would still fail with respect to all ten of the HuffPost Articles. The three HuffPost Articles authored by HuffPost employees are true, and Defendant

---

[32] *Id.* ¶ 116.
[33] *Palin v. N.Y. Times Co.*, 940 F.3d 804, 814 (2d Cir. 2019).
[34] Am. Compl. ¶ 74.
[35] *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).
[36] Am. Compl. ¶ 75.

cannot be liable for the seven HuffPost Articles authored by third-party "contributors" under Section 230 of the Communications Decency Act.

Truth of the Three HuffPost Articles Authored by HuffPost Employees

Setting aside these seven Huff Post Articles authored by "contributors," the remaining three HuffPost Articles are all true.

The first of these Articles, dated September 25, 2016, is titled "Trump Campaign: That Adviser Reportedly Talking with Russian Officials Isn't an Adviser Anymore." According to Plaintiff, this Article "republished" many of the statements in the Yahoo Article. Like the Yahoo Article, this first Article only states that officials had received reports of Plaintiff's alleged meetings.[37] The title refers to Dr. Page as "That Advisor Reportedly Talking with Russian Officials."[38] As in the Yahoo Article, this Article makes clear that these reports had not been confirmed.[39] "Carter Page ... reportedly has had discussions with senior Russian officials ... ."[40] "Members of Congress have been briefed on Page discussing sanctions relief with Russia, Yahoo News reported Friday."[41] "If Page is in talks with Russian officials . . . ."[42] This first HuffPost Article is therefore true for the reasons discussed with respect to the Yahoo Article earlier in this opinion.

The second of these Articles, dated May 22, 2017, mostly concerns General

---

[37] Am. Compl. Ex. 2.
[38] *Id.* at 1.
[39] *Id.*
[40] *Id.*
[41] *Id.* at *2.*
[42] *Id.*

Michael Flynn, but contains one statement about Plaintiff: that the Senate Intelligence Committee had requested documents from Plaintiff, who was so far refusing to cooperate. This second article is true also. Contrary to Plaintiff's assertion, this second Article does not say or suggest that Plaintiff was "obstructing a congressional investigation."[43] It states only that, at the time of publication, Plaintiff was "so far refusing to cooperate" with document requests from the Senate Intelligence Committee.[44] Dr. Page claims this is false because he did "offer[] significant cooperation and a substantial quantity of documents."[45] But he does not say he had done so at the time this article was published.[46] The qualifier "so far" conveyed that Dr. Page still had time to produce the requested documents. Readers would not conclude that Dr. Page's permissible delay was "obstructing a congressional investigation."[47] Thus this second Article is true.

The third of these Articles, dated May 19, 2017, also makes a statement about Plaintiff: questioning why Trump continues to stand by Flynn despite denouncing his ties to Paul Manafort and Carter Page. Plaintiff simply misquotes the third Article.[48] Plaintiff claims that "President Trump never 'denounced' Dr. Page."[49] But this third

---

[43] Am. Compl. Ex. 2 and ¶ 54.
[44] Am. Compl. Ex. 5 at 2.
[45] Am. Compl. ¶ 54.
[46] *Id.*
[47] *Id.*
[48] Am. Compl. Ex. 9.
[49] Am. Compl. ¶ 59.

Article only says that Trump "denounce[d] his ties" to Page."[50] Trump's campaign manager said Plaintiff was "no longer an adviser."[51] Plaintiff does not dispute this fact, and admits "he was unable to contribute any material assistance" to the Trump campaign.[52] Thus this third Article is true.

Immunity of Defendant under Section 230

Seven of the HuffPost Articles were authored by third-party "contributors."[53] As Plaintiff has acknowledged in another forum, HuffPost warned when these Articles were posted that it is "not responsible for . . . the opinions expressed by content contributors."[54]

Section 230 of the federal Communications Decency Act ("Section 230") immunizes websites from liability for the unlawful speech of third parties. "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[55] This immunity "prevent[s] lawsuits from shutting down websites,"[56], because "[t]he specter of tort liability in an area of such prolific speech would have an obvious chilling effect."[57]

Section 230 expressly preempts Delaware law. "No cause of action may be

---

[50] Am. Compl. Ex. 9 at 2.
[51] Am. Compl. Ex. 2 at 1.
[52] Am. Compl. ¶ 48.
[53] Am. Compl. Ex. 2 (authored by "Brad Schreiber, Contributor"); Exs. 4, 6–8, 10–11.
[54] SDNY Compl. ¶ 126 (quoting HuffPost Terms of Service).
[55] 47 U.S.C. § 230(c)(1).
[56] *Batzel v. Smith*, 333 F.3d 1018, 1027–28 (9th Cir. 2003), *reh'g denied by* 351 F.3d 904, (9th Cir. 2003).
[57] *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

brought and no liability may be imposed under any State or local law that is inconsistent with this section."[58]

Importantly, Section 230 grants "immunity from suit rather than a mere defense to liability."[59] Courts therefore apply Section 230 "at the earliest possible stage of the case," often on a motion to dismiss as in this case, because such immunity would be "effectively lost" if defendants were subject to costly litigation.[60]

Section 230 bars suit where (1) the defendant provides an "interactive computer service"; (2) the complained-of statements were made by "another information content provider"; and (3) the claim "seek[s] to treat the defendant as a publisher or speaker of [that] third party content."[61] Here, all three of these elements are satisfied.

First, HuffPost provides an "interactive computer service," which is defined as an "information service . . . that provides or enables computer access by multiple users to a computer server."[62] Courts have "adopt[ed] a relatively expansive definition of 'interactive computer service.'"[63] "[T]he most common interactive computer services are websites."[64] "Websites [that publish third party content] are under the umbrella of

---

[58] 47 U.S.C. § 230(e)(3).
[59] *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009).
[60] *Id.* at 254. *See also, e.g., AdvanFort Co. v. Cartner*, No. 1:15-cv-220, 2015 WL 12516240, at *5 (E.D. Va. Oct. 30, 2015); *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1058 (E.D. Mo. 2011); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735, 2009 WL 1704355, at *5 (S.D.N.Y. June 15, 2009).
[61] *Gibson*, 2009 WL 1704355, at *3.
[62] 47 U.S.C. § 230(f)(2).
[63] *Carafano*, 339 F. 3d at 1123; *see also Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 n.6 (E.D. Pa. 2006) (same).
[64] *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016) (citation omitted).

protection of Section 230."[65]

Second, HuffPost was not the "information content provider" for these seven Articles. That is because Section 230 "protects websites from liability . . . for material posted on their websites by someone else."[66] This is true regardless of whether HuffPost exercised "traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content."[67] Indeed, such conduct is precisely what Section 230 was designed to protect.[68] "[A] central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted."[69]

Third, Plaintiff clearly seeks to hold Defendant liable as the publisher or speaker of this third-party content. Both of his claims depend on Defendant having "made" or "published" the relevant statements.[70]

At Oral Argument, Dr. Page claimed for the first time that Defendant had no Section 230 protection and was responsible for the publication of the seven HuffPost contributor articles as if they were Defendant's original content. This argument ignores, and does not comport with, Defendant's process of expressly noting that the authors of the articles were contributors, and it was not responsible for the content. In its publication, Defendant told readers that the articles were written by contributors who

---

[65] *Collins v. Purdue Univ.*, 703 F. Supp. 2d 862, 878 (N.D. Ind. 2010).
[66] *Perlman v. Vox Media, Inc.*, 2020 WL 3474143, at *2 n.24 (Del. Super. Ct. June 24, 2020).
[67] *Dowbenko v. Google Inc.*, 582 F. App'x 801, 805 (11th Cir. 2014) (quoting *Zeran*, 129 F.3d at 330).
[68] *Id.*
[69] *Batzel*, 333 F.3d at 1031.
[70] *See, e.g.*, Am. Compl. ¶¶ 144, 147, 160–61.

control their own work and post freely to the site.

This is not a controversial application of Section 230. The law was designed to foster a "true diversity of political discourse."[71] By allowing third parties to comment on an issue of immense political concern, HuffPost did just that. With respect to these seven articles, all three elements of Section 230 are satisfied, and Dr. Page's claim must be dismissed.

For the reasons stated above, I **GRANT** Defendant's Motion to Dismiss for Failure to State a Claim. This case is dismissed.

IT IS SO ORDERED.

Craig A. Karsnitz

cc: Prothonotary

[71] 47 U.S.C.A. § 230(a)(3).