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Case Number 79,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CARTER PAGE, an individual,	)	
	)	
Plaintiff Below,	)	
Appellant,	)	No. 79, 2021
	)	
v.	)	Court below: Superior Court for the
	)	State of Delaware, C.A. No. S20C-
OATH INC., a corporation,	)	07-030 CAK
	)	
Defendant Below,	)	
Appellee.	)	

APPELLEE'S ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

By his own admission, Plaintiff Carter Page is a former advisor to Donald Trump with ties to Russia. In the lead-up to the 2016 presidential election, Yahoo! News reported in an article (the "Yahoo Article") that U.S. intelligence agencies had "received reports" that Page had met with several Russian officials. According to Page, these reports were politically motivated and false. But as Page himself admits, U.S. intelligence agencies took them seriously, surveilling Page under a FISA warrant for over a year. Elsewhere, Page has sued those intelligence agencies for "unlawful surveillance and investigation."

Page also sued Oath Inc. ("Oath"), claiming that the Yahoo Article and ten articles published on HuffPost inaccurately reported or commented on this federal investigation. He first sued in the U.S. District Court for the Southern District of New York, where the court held that the Yahoo Article was literally true in the course of rejecting Page's claim under federal law for "international terrorism." The court then dismissed Page's state-law defamation claim on jurisdictional grounds, and Page later refiled that claim in the Delaware Superior Court below.

The Superior Court correctly dismissed the defamation claim, on several different grounds, with respect to all the articles. Like the Southern District of New York, the Superior Court held that the Yahoo Article was true, because it merely says that U.S. intelligence agencies "received reports" of Page's meetings

with Russian officials, all of which Page admits is true. As both courts recognized, the article does not claim that Page *actually* met with these officials, and in fact repeatedly stresses that those meetings were unconfirmed. Page also quibbled over terms like "intelligence report" and "Western intelligence source," but both courts held that these terms were accurate and, in any event, any inaccuracy would be immaterial. The Superior Court also held that the Yahoo Article was protected under the fair report privilege because it accurately and fairly reported on the federal investigation into Page and the Trump campaign—"an issue of immense political concern."

With his reading of the Yahoo Article now twice rejected, Page makes several new arguments in this court—all of which are waived and also fail on the merits. Primarily, he argues that even if this article is literally true, it created a "false gist" that he was the subject of a "serious, ongoing investigation." But the law does not create liability for literally true statements on the basis of an allegedly "false gist." And in any event, Page *was* the subject of a "serious ongoing investigation." This argument, and others he raises on appeal for the first time, are no more persuasive than his original ones regarding the Yahoo Article.

Page's arguments on the ten articles on the HuffPost website fare no better. He focuses mainly on Section 230 of the Communications Decency Act, which has recently become a hot-button issue for reasons unrelated to this case. But his

threshold problem is actual malice. As the Superior Court correctly recognized, Page failed to plead facts showing that any *individual* responsible for these articles acted with actual malice. Page now admits this deficiency in his complaint, arguing instead that he was required to plead only that Oath *as an organization* acted with actual malice. That is plainly wrong—it is well settled that actual malice must be "brought home to the *persons* . . . having responsibility for the [challenged] publication."[1] Because Page did not do so, the Superior Court properly found that Page failed to plead actual malice for all ten articles on the HuffPost website, and this Court need not reach the applicability of Section 230, or any other argument relating to those articles.

Nevertheless, the Superior Court also correctly relied on Section 230 as an independent ground for dismissing claims against seven of the ten articles on the HuffPost website which were authored by third-party contributors. On appeal, Page claims there is "nothing in the record" showing that these contributors were really third parties, but it says so on the face of the articles themselves, which Page attached to his complaint. Page then baldly asserts that HuffPost must have had

[1] *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964) (emphasis added). *See also, e.g., Holbrook v. Harman Auto., Inc.*, 58 F.3d 222, 225 (6th Cir. 1995) ("[W]here, as here, the defendant is an institution rather than an individual, the question is whether the individual responsible for the statement's publication acted with the requisite culpable state of mind.") (citing *Sullivan*).

some role in soliciting or editing these seven articles, but he did not allege any such conduct in his complaint, and it would not be enough to destroy Section 230 immunity anyway.

With respect to the three *non*-contributor articles on the HuffPost website, the Superior Court correctly held—as an alternative ground to Page's failure to plead actual malice—that the articles are true. Page all but concedes this holding, as he no longer challenges the truth of any statements in those articles.

Sensitive to First Amendment principles, the Superior Court dismissed this case before discovery could further chill core protected speech. This ruling was correct. Page may or may not have a claim against the federal government for launching an investigation based on allegedly flimsy evidence—his lawsuit in DC will settle that issue. But he has no claim against Oath for merely reporting the fact of that investigation to the public, or for allowing contributors to comment on that investigation. The Superior Court's decision should be affirmed in its entirety.

SUMMARY OF ARGUMENT

1. DENIED. The Superior Court correctly held that Page failed to state a claim with respect to any of the articles.

2. DENIED. Oath did not publish the eleven articles at issue—ten were posted on HuffPost's webpages, and seven of those were authored by third-party contributors. Admitted that the Superior Court dismissed Page's claim with respect to all eleven articles. It correctly dismissed his claim regarding the Yahoo Article because the article is true (or, at a minimum, not materially false), and also because the article is protected by the fair report privilege. The Superior Court then correctly dismissed Page's claims regarding the ten articles on the HuffPost website because Page failed to adequately plead actual malice. Independently, it also correctly held that the articles on the HuffPost website were not actionable for the alternative reasons that seven of them are contributor articles protected under Section 230 and the other three non-contributor articles are true (or at a minimum, not materially false).

3. DENIED. All of the Superior Court's conclusions were correct. Contrary to Page's specific assertion in this paragraph, the Superior Court correctly held that Section 230 provides an independent and alternative basis for dismissal of the seven contributor articles on the HuffPost website. The fact that these

contributors "control their content" is not "nowhere in the record," as Page claims, but rather stated on the face of the articles themselves.

4. DENIED. As Page acknowledges, he must plead that the individual "persons" responsible for the challenged publications acted with actual malice. But contrary to his assertion, *Sullivan*, 376 U.S. at 254, and numerous other cases, make clear that he cannot satisfy that standard simply by pleading that Oath as an organization acted with actual malice.

5. DENIED. Page admits that he did not plead actual malice as to any individual *persons*, but rather attempted to plead actual malice only as to Oath as an organization. That does not suffice.

6. DENIED. The Yahoo Article is true (or, at a minimum, not materially false) because it accurately reported on an ongoing federal investigation. It is also protected by the fair report privilege for the same reason.

STATEMENT OF FACTS

I. The Yahoo Article

On September 23, 2016, Yahoo! News published an article by Michael Isikoff titled "U.S. intel officials probe ties between Trump adviser and Kremlin." A–76–80. The article states that intelligence agencies had "received reports" that Page had met with two Russian officials, and that those agencies were "seeking to determine" whether these "alleged" meetings could be "confirmed":

> U.S. intelligence officials are *seeking to determine* whether an American businessman identified by Donald Trump as one of his foreign policy advisers [Page] has opened up private communications with senior Russian officials . . . .
>
> . . . Senate minority leader Harry Reid . . . cit[ed] *reports of* a meeting between [Page] and "high ranking sanctioned individuals" in Moscow . . . as evidence of the "significant and disturbing ties" between the Trump campaign and the Kremlin that *needed to be investigated* by the bureau [FBI].
>
> . . .
>
> The *questions* about Page come amid mounting concerns within the U.S. intelligence community about Russian cyberattacks on the Democratic National Committee and state election databases . . . .
>
> . . .
>
> At the time, Page declined to say whether he was meeting with Russian officials during his trip, according to a Reuters report. 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 . . ., a well-placed Western intelligence source tells Yahoo News. That meeting, *if confirmed*, is viewed as especially problematic by U.S. officials . . . . At their *alleged* meeting, Sechin

> raised the issue of the lifting of sanctions with Page, the Western intelligence source said.
>
> U.S. intelligence agencies have also *received reports* that Page met with another top Putin aide while in Moscow—Igor Diveykin. . . .

Id. (emphases added).

II. The HuffPost Articles

Over the next year, ten more articles discussing Page followed on various HuffPost webpages (the "HuffPost Articles"). A–82-140. It is undisputed that seven of these articles were published "on the now-closed HuffPost Contributor platform." *See, e.g.,* A–85 (authored by "Brad Schreiber, Contributor"). *See also id.* A–90, A–100-115, A–123-140.[2]

As the Superior Court correctly acknowledged, these contributors "control their own work and post[ed] freely to the site." A–280-281. Page asserts that this fact is "nowhere in the record," Opening Br. 8, 21, but it is stated on the face of the articles attached to his complaint, *see, e.g.,* A–85 ("Contributors control their own work and posted freely to our site."). It is also evident from HuffPost's terms of service, which Page quoted in his prior federal lawsuit over these same articles.

[2] Page previously questioned whether the author of Exhibit 6 (Amica Graber) was a contributor, A–215, n.4, but he no longer argues this on appeal. As Oath pointed out below, A–247, n.13, Page admitted that this author was a "contributor" in his original lawsuit against Oath in the Southern District of New York, SDNY Compl. ¶ 82 (discussing article by "Contributor Amica Graber").

SDNY Compl. ¶ 126 ("We are not responsible for and do not necessarily hold the opinions expressed by our content contributors.").

The remaining three articles were not authored by contributors. Page previously challenged statements in these non-contributor articles as false, but he no longer does so on appeal. *See* Section III, *infra*.

III. Page's prior lawsuit.

Page first sued Oath in 2017, over these and other articles, in the U.S. District Court for the Southern District of New York. The complaint targeted various online articles discussing a federal investigation into Page's alleged contacts with Russian officials during Donald Trump's 2016 campaign, including the eleven articles at issue in this current suit.

In the prior federal suit, Page alleged two claims under state law (defamation and tortious interference), and one claim under federal law ("international terrorism"). Compl. ¶¶ 154–72, 178–84, *Page v. Oath et al.*, No. 17-cv-6990 (LGS) (S.D.N.Y. Sept. 14, 2017) ("SDNY Compl."). Oath moved to dismiss for failure to state a claim.

The district court granted Oath's motion and dismissed the case. *Page v. Oath Inc.*, No. 17 CIV. 6990 (LGS), 2018 WL 1406621 (S.D.N.Y. Mar. 20, 2018) ("*Page I*"). It first rejected Page's federal "terrorism" claim on the merits,

reasoning that, among other things, Oath had not committed fraud because the complained-of statements in the Yahoo Article were true:

> The Article does not say that Plaintiff *actually* met with the two Russians, but rather that U.S. officials had received *reports* of such meetings. The substance and even headline of the Article express uncertainty about the occurrence and substance of any such meetings. That some readers may have assumed that the meetings occurred does not constitute fraud by the Article's publisher. The Complaint also does not dispute that 'reports' were received, and instead confirms their existence . . . .

Id. at *3 (emphases in original). The court also rejected Page's argument that the Yahoo Article "created a 'deceitful implication that the documents referred to were actual U.S. Government reports,'" explaining that "the Article merely states that 'U.S. officials have . . . received intelligence reports." *Id.* The court then dismissed Page's state-law claims on jurisdictional grounds. *Id.* at *4.

The Second Circuit affirmed in a summary order. *Page v. United States Agency for Glob. Media*, 797 F. App'x 550, 554 (2d Cir. 2019).

IV. Page's current lawsuit.

In July 2020, Page refiled his state-law claims in the Delaware Superior Court below, again asserting defamation and tortious interference. He later amended his complaint, making minor revisions and deleting references to a (now dismissed) lawsuit he had brought against the Democratic National Committee. Oath again moved to dismiss, and during briefing, Page abandoned his tortious interference claim. A–220. On the remaining defamation claim, the Superior

Court granted Oath's motion, holding that Page failed to state a claim with respect to either the Yahoo Article or the ten HuffPost Articles. The Superior Court dismissed the case, and this appeal followed.[3]

A. The Superior Court's reasoning as to the Yahoo Article

Regarding the Yahoo Article, the Superior Court agreed with Oath that it was both true and protected by the "fair reporting" privilege. A–269-272. Like the Southern District of New York, the Superior Court held that the article "simply says that U.S. intelligence agencies were investigating reports of [Page's] meeting with Russian officials, which [Page] admits is true." *Id.* at 270. "The article does not claim that [Page] actually met with those officials." *Id*.

In addition, the Superior Court held that the Yahoo Article truthfully states that U.S. officials had received "intelligence reports" of such meetings. *Id*. Page had argued that this term was false because U.S. officials had in fact only received "opposition research" funded by Donald Trump's political opponent, and no intelligence agency had issued the supposed reports. *Id.* But the Superior Court explained that "[a]n intelligence report is simply a report of information potentially relevant to an investigation," which could include "opposition research." *Id*. The

[3] Separately, one of Page's attorneys—Lin Wood—has appealed from the Superior Court's order revoking his *pro hac vice* authorization. Because Oath took no position on this issue below, this other appeal is being litigated by Mr. Wood and an amicus specially appointed by this Court.

Superior Court also held that the article described the reports as received by intelligence agencies, not issued by them. *Id.*

The Superior Court further held that the article truthfully stated that the fact of the investigation had been confirmed by a "well-placed Western intelligence source." *Id.* It rejected Page's argument that this term gave unfair "credence" to the statements in the Yahoo Article. *Id.*

But at a minimum, the Superior Court explained, any inaccuracy in the Yahoo Article was not material. *Id.* at 271. It explained that "the gist" of this article "is that the U.S. government was investigating possible meetings between [Page] and Russian officials" and "[w]hether 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." *Id.*

Finally, the Superior Court held that the Yahoo Article was protected under the privilege for "fair and accurate" reports of "governmental" proceedings. *Id.* (quoting *Read v. News-Journal Co.*, 474 A.2d 119, 120 (Del. 1984)). It explained that this privilege applies because the Yahoo Article was "fair and accurate," and because the federal investigations into Page were "official government proceedings," as previously recognized by a federal court in Florida. *Id.* at 272; *see also 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).

B. The Superior Court's reasoning as to the HuffPost Articles

As to the HuffPost Articles, the Superior Court held that Page also failed to state a claim for several independent reasons.

First, as to all ten articles, the Superior Court held that Page had failed to adequately plead "actual malice." It held that Page was at least a limited-purpose public figure, and that he was required to plead that the *individuals* responsible for these articles acted with actual malice, because actual malice must be "brought home to the persons . . . having responsibility for the [challenged] publication." *Id.* at 274 (quoting *Sullivan*, 376 U.S. at 287). It then explained that Page did "not allege facts about any of the individual authors of the HuffPost Articles" and instead focused all his attention on the author of the Yahoo Article. *Id*. The court also rejected Page's argument that certain statements in the articles "could easily be exposed as false if fact-checked," explaining that "it is well established that 'failure to investigate before publishing,'" even assuming there was such a failure, does not constitute actual malice as a matter of law. *Id.* at 275 (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989)).

Second, the Superior Court held that even setting aside Page's failure to plead actual malice, his claim against the ten HuffPost Articles failed for two alternative reasons: one applicable to seven of the articles, and the other applicable to the remaining three.

To begin with, seven of these articles were authored by "third-party 'contributors,'" and therefore HuffPost was protected by Section 230. A–278-81. The Superior Court held that HuffPost was an "interactive computer service" because it was a website that "publish[ed] third party content." *Id.* at 279-80. And HuffPost was not the "information content provider" of these articles because the contributors "control their own work and post freely to the site." *Id.* at 280-81. Lastly, even if HuffPost had exercised "traditional editorial functions," such as deciding whether to publish the articles, that would not make HuffPost the "information content provider." *Id.* at 280. The Superior Court noted that this was "not a controversial application of Section 230" because HuffPost was merely "allowing third parties to comment on an issue of immense political concern." *Id.* at 281. So even if Page had adequately pleaded actual malice as to these seven articles, which he had not, he had nevertheless failed to state a claim.

The Superior Court then held that the three remaining articles (authored by HuffPost employees) were, like the Yahoo Article, all true. *Id.* at 276-78. Again, even if Page had adequately pleaded actual malice as to these articles, which he had not, he had failed to state a claim.

ARGUMENT

I. SETTING ASIDE ACTUAL MALICE, SECTION 230 PROVIDES AN ALTERNATIVE GROUND FOR DISMISSAL WITH RESPECT TO THE SEVEN HUFFPOST CONTRIBUTOR ARTICLES.

A. Question presented.

Whether the Superior Court correctly ruled that even if Page had adequately alleged actual malice, Section 230 of the Communications Decency Act provides an alternative ground for dismissal as to seven of the HuffPost Articles. A–173-176, A–246-248, A–278-281.

B. Scope of review.

This Court reviews "the Superior Court's grant of a motion to dismiss *de novo*." *Difebo v. Bd. of Adjustment of New Castle Cnty*., 132 A.3d 1154 (Del. 2016). Under Rule 12(b)(6), "a trial court must accept as true all of the well-pleaded allegations of fact." *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006). "A trial court is not, however, required to accept as true conclusory allegations 'without specific supporting factual allegations.'" *Id.* (citation omitted). 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.'" *Id.* (citation omitted).

C. Merits of Argument.

Page focuses mainly on Section 230, Opening Br. 16–25, but given his clear failure to adequately plead actual malice, this Court need not even address it. As discussed below, Page admits that he failed to plead facts suggesting that any individual *person* responsible for publishing the HuffPost Articles acted with actual malice, which is fatal for all ten articles. *See* Section II, *infra*. His claim that he was excused from pleading such facts is squarely foreclosed by precedent. *Id.* Nevertheless, even if Page could somehow overcome his failure to adequately plead actual malice, the Superior Court correctly held that Section 230 provides an independent ground for dismissal with respect to the seven HuffPost Articles authored by third-party contributors.

Section 230 immunizes websites from liability for the unlawful speech of third parties—*i.e.*, "information content providers." 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."). This immunity "prevent[s] lawsuits from shutting down websites," *Batzel v. Smith*, 333 F.3d 1018, 1027–28 (9th Cir. 2003), *reh'g denied by* 351 F.3d 904, (9th Cir. 2003), because "[t]he specter of tort liability in an area of such prolific speech would have an obvious chilling effect," *Zeran v. Am. Online, Inc.*, 129 F.3d 327,

331 (4th Cir. 1997). Section 230 expressly preempts State law. 47 U.S.C. § 230(e)(3).

Importantly, Section 230 grants "immunity from suit rather than a mere defense to liability." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009). Courts therefore apply Section 230 "at the earliest possible stage of the case," often on a motion to dismiss, because such immunity would be "effectively lost" if defendants were subject to costly litigation. *Id*. at 254.[4]

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." *Gibson*, 2009 WL 1704355, at *3. Here, Page challenges only the first two requirements, *see* Opening Br. 17–25, and the Superior Court correctly held that both were satisfied, A–279-280.

First, an "interactive computer service" is an "information service . . . that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). Courts have "adopt[ed] a relatively expansive definition of

[4] *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).

'interactive computer service.'" *Carafano v. Metrosplash.com, Inc.*, 339 F. 3d 1119, 1123 (11th Cir. 2003); *see also Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 n.6 (E.D. Pa. 2006) (same). "[T]he most common interactive computer services are websites." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016) (citation omitted).

The Superior Court correctly held that HuffPost is an "interactive computer service." A–279-280. Although Page did not dispute this point in his briefing below, *see* A–215-220,[5] he now claims that HuffPost is not an "interactive computer service" because it is "just an online newspaper website," Opening Br. 24. But websites *are* interactive computer services. *See, e.g., Kimzey*, 836 F.3d at 1268; *Collins v. Purdue Univ.*, 703 F. Supp. 2d 862, 878 (N.D. Ind. 2010) (collecting cases). It does not matter whether, as Page argues (Opening Br. at 24), HuffPost is a social media platform or internet service provider. *Collins*, 703 F. Supp. 2d at 878 ("Although much of the initial CDA immunity was granted to internet service providers like AOL, [Plaintiff] incorrectly asserts that the immunity ends with such providers."). And to the extent Page is suggesting that HuffPost was not an interactive website, that is belied by his own pleading and the

[5] Page first challenged whether HuffPost is an "interactive computer service" at the hearing on Oath's motion to dismiss.

attachments to it. At the time of the challenged articles, HuffPost allowed third parties to "post freely" to the website as contributors. *See, e.g.,* A–76.

Second, the Superior Court also correctly held that HuffPost was not the "information content provider" for these "contributor" articles. A–280. Websites are deemed "information content providers" only if they are "responsible, in whole or in part, for the creation or development" of the allegedly defamatory content. 47 U.S.C. § 230(f)(3). Page does not, and cannot, allege that HuffPost "created" this content. Instead, he argues, without any basis, that HuffPost developed this content, *see* Opening Br. 22–23, but that is not the case.

As Page acknowledges, a defendant only "develops" allegedly illegal content if it "contributes materially to the alleged illegality." Opening Br. 19-21 (quoting *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008)). Courts draw a "crucial distinction between, on the one hand, taking actions to display actionable content, and on the other hand, responsibility for what makes the displayed content itself illegal or actionable." *Force v. Facebook, Inc.*, 934 F.3d 53, 68 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020) (cleaned up). *See also Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 410 (6th Cir. 2014) (same).

Here, Page's complaint includes no allegations that, if true, could render HuffPost responsible for the allegedly defamatory statements in the seven

contributor articles. His complaint is devoid of any allegations about HuffPost's involvement in these articles. *See generally* Am. Compl. Instead, he simply asserts for the first time in his appellate briefing that HuffPost engaged in certain conduct. Opening Br. 18 (asserting, *inter alia*, that HuffPost "solicited" the challenged articles). *See also* A–217 ("[O]ne could infer that HuffPost solicited the defamatory articles, or at least selectively encouraged their submission."). That is not a permissible way to amend deficiencies in his (already once-amended) complaint. *See DiMeo v. Max,* 248 F. App'x 280, 282 (3d Cir. 2007) (rejecting assertions in appellate briefing that the defendant "solicited and encouraged" defamatory content because "the complaint is devoid of any such allegations").

In any event, the conduct Page asserts in his briefing is not sufficient. First, it would not matter whether HuffPost "solicited" these articles. Opening Br. 18. Courts have rejected an "encouragement test of development" and "declined to hold that websites were not entitled to [Section 230 immunity] because they selected and edited content." *Jones*, 755 F.3d 398 at 415. *See also id*. (recognizing that websites do not lose Section 230 protection even if they "actively invite and encourage users to post particular types of content").

Nor would it matter if, as Page now baldly asserts for the first time, HuffPost provided "'headline' treatment, added author bylines and 'about the author' descriptions . . ., and provided room for comment sections at the foot of the

articles." Opening Br. 18. Page has never claimed that any of *that* content is defamatory. Rather, he points to specific statements in the body of the articles, which he does not (and cannot) allege that HuffPost wrote. A–30, 31, 33-38 (¶¶ 50, 52, 56-58, 60-63). "A website operator who edits user-created content" does not lose immunity if "the edits are unrelated to the illegality." *Roommates.Com,* 521 F.3d at 1169. *See also Jones* F.3d 398 at 410 (granting Section 230 immunity where the defendant was the "information content provider" for content that the plaintiff "did not allege [was] defamatory"). And in any event, such conduct would constitute precisely the type of "traditional editorial functions" that Section 230 is designed to protect. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

Page speculates that discovery will furnish the evidence he needs, Opening Br. 22–23 ("Discovery will investigate the selection and editorial process . . . and inquire concerning [the contributors'] compensation . . . ."), but that is not enough to survive a motion to dismiss. To subject defendants to the burdens of discovery, plaintiffs must provide "specific supporting factual allegations," *Hughes*, 897 A.2d at 162, under penalty of Rule 11 sanctions. This requirement is especially important in cases involving Section 230, which grants "immunity from suit" and thus requires courts to enforce the provision "at the earliest possible stage of the

case." *Nemet*, 591 F.3d at 254–55. Page cannot end-run Section 230 immunity with the mere hope that more facts may come to light.

II. PAGE FAILED TO ADEQUATELY PLEAD ACTUAL MALICE FOR ALL TEN HUFFPOST ARTICLES.

A. Questions presented.

Whether the Superior Court correctly ruled Page failed to properly plead actual malice. A–170-173, A–242-246, A–274-276.

B. Scope of review.

Oath incorporates by reference the standard of review previously set forth in Section I.B of this Argument.

C. Merits of Argument.

Page admits he failed to plead facts suggesting that any individual *person* responsible for the HuffPost Articles acted with actual malice. The Superior Court's dismissal of Page's defamation claim as to all ten HuffPost Articles can, and should, be affirmed on this basis alone.

As a public figure,[6] Page was required to plead and prove that the allegedly defamatory statements were made with "actual malice"—meaning the speakers "knew [each] statement was false or acted with reckless disregard for the truth." *Agar v. Judy*, 151 A.3d 456, 477 (Del. Ch. Jan. 19, 2017) (citing *Doe No. 1 v.*

[6] Page no longer contests that he was a public figure at the time of the alleged defamatory publications. Opening Br. 26 & n.6 (noting that he "need not address" the Superior Court's ruling that he was a public figure). Nor could he—as a foreign policy advisor to Trump's presidential campaign who had given a 2-hour interview to Bloomberg, he clearly qualified. A–273-274.

Cahill, 884 A.2d 451, 463 (Del. 2005)); *Liberman v. Gelstein*, 80 N.Y.2d 429, 438 (N.Y. 1992) (same).[7] This is a "subjective" standard requiring "a high degree of… awareness of probable falsity." *Harte-Hanks Commc'ns, Inc. v. Connaughton,* 491 U.S. 657, 688 (1989) (citation omitted).

As the Superior Court recognized, Page had to plead that the individual *person or persons* responsible for the HuffPost Articles—*i.e.*, the author or editor of these articles—acted with actual malice. A–274-275. Organizations cannot have institutional knowledge of falsity—actual malice must be "brought home to the persons . . . having responsibility for the [allegedly defamatory] publication." *Sullivan*, 376 U.S. at 287. Further, Page must plead *facts* that permit that conclusion. *Hughes*, 897 A.2d at 168 ("A trial court is not . . . required to accept as true conclusory allegations 'without specific supporting factual allegations.'").

On appeal, Page acknowledges that he failed to plead facts suggesting that any of the individual authors or editors of the HuffPost Articles "themselves acted with actual malice." Opening Br. 29. He argues instead that he was excused from doing so, because he alleged that "Oath, as the publisher, is the 'person responsible for the publication'" under *Sullivan*. *Id.* at 27.

[7] The parties did not dispute choice of law for purposes of Oath's motion to dismiss Page's defamation claim. A–269. As the Superior Court correctly explained, the result is the same under either Delaware or New York law. *Id.*

Page plainly misreads *Sullivan*. There, the U.S. Supreme Court specifically rejected an argument that the New York Times, as an organization, "knew" that the challenged content was false because it contradicted prior articles "in the Times' own files." *Sullivan*, 376 U.S. at 287. It held that the "mere presence" of these articles did not "establish that the Times 'knew' the [challenged statement] was false, since the state of mind required for actual malice *must be brought home to the persons in the . . . organization having responsibility for the publication*." *Id.* (emphasis added).

Following *Sullivan*, courts have repeatedly recognized that "where . . . the defendant is an institution rather than an individual, the question is whether *the individual* responsible for the statement's publication acted with the requisite culpable state of mind." *Holbrook v. Harman Auto., Inc.*, 58 F.3d 222, 225 (6th Cir. 1995) (citing *Sullivan*) (emphasis added). *See also, e.g., Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 123 (2d Cir. 2013) ("[T]he plaintiff must identify the individual responsible for publication of a statement, and it is that individual the plaintiff must prove acted with actual malice." (citing *Sullivan*)); *Mimms v. CVS Pharmacy, Inc.*, 889 F.3d 865, 868 (7th Cir. 2018) ("It is the state of mind of the speaker that is relevant." (citing *Sullivan*)). It is that individual who the plaintiff must allege (and ultimately prove) acted with actual malice.

Page complains that it is difficult for him to allege facts about the ten authors of the HuffPost Articles, Opening Br. 27–28, and promises that "[t]here will be more" evidence "at trial," *id.* at 33, but that is not sufficient to survive a motion to dismiss. To be sure, "[t]he burden of putting forward articulable facts of actual malice is a difficult one to meet, especially when discovery is not yet available." *Arpaio v. Zucker*, 414 F. Supp. 3d 84, 93 (D.D.C. 2019). But "without that safeguard, the threat of lawsuits would chill our precious First Amendment rights to freely engage in political discourse." *Id*. *See also Ryan v. Brooks*, 634 F.2d 726, 733 (4th Cir. 1980) (recognizing that the actual malice standard is "a difficult one for libel plaintiffs to meet" and sometimes produces "harsh results," but is needed to protect the "First Amendment right[] . . . to print information on matters of interest to the public").

Nor can Page satisfy this burden by pointing to *other* individuals who have no alleged responsibility for publishing the HuffPost Articles. Opening Br. 31–33 (discussing allegations against the author of the *Yahoo* Article and Yahoo's former CEO). Actual malice cannot be imputed from another employee, just as it cannot be imputed from the organization as a whole. *Holbrook*, 58 F.3d at 225 (refusing to "impute" knowledge from "subordinates" of the individual responsible for the statement); *Mimms*, 889 F.3d at 868 (refusing to "imput[e] corporate knowledge to the speakers"). Rather, the focus is solely on the state of mind of the individual

actually responsible for the publication, such as an author or editor. *See Palin v. New York Times Co.*, 940 F.3d 804, 810 (2d Cir. 2019) ("Because the Times identified Bennet as the author of the editorial, it was his state of mind that was relevant to the actual malice determination."); *Solano v. Playgirl, Inc.,* 292 F.3d 1078, 1084 (9th Cir. 2002) (examining whether the defendant's editors acted with actual malice).

Page's cases do not hold otherwise, as they do not address the question of actual malice at all. Opening Br. 29 (citing *Secord v. Cockburn*, 747 F. Supp. 779 (D.D.C. 1990); *D.A.R.E. Am. v. Rolling Stone Mag.*, 101 F. Supp. 2d 1270 (C.D. Cal. 2000), *aff'd sub nom. D.A.R.E. Am. v. Rolling Stone Mag.*, 270 F.3d 793 (9th Cir. 2001); *Chaiken v. VV Pub. Corp*., 119 F.3d 1018 (2d Cir. 1997). Rather, they merely recognize that *in addition* to alleging (and ultimately proving) actual malice at the individual level, plaintiffs must *also* allege (and ultimately prove) that the conduct of that individual is attributable to the corporate defendant. So, for example, even if an individual was adequately alleged to have acted with actual malice, the corporate defendant might still not be liable if the individual is not also alleged to have acted as an employee (rather than an independent contractor). *Secord*, 747 F. Supp. at 787 (holding that actual malice "cannot be imputed from one defendant to another absent an employer-employee relationship"); *D.A.R.E.*, 101 F. Supp. 2d at 1278 ("Because Glass [an individual] admits his fabrications, if

the Court determines he is an employee of Rolling Stone, his knowledge of falsehoods . . . will be imputed to Defendants."); *Chaiken*, 119 F.3d at 1033–34 (refusing to impute liability for actions of "independent contractor"). None of Page's cases excused the plaintiff from pleading and proving that the "person" who was "responsible for the publication" acted with actual malice, as is clearly required under *Sullivan*.

Page has no other argument for actual malice, abandoning every argument he made below, all of which the Superior Court rejected. For example, he previously argued that the Steele Dossier was "inherently improbable," and therefore the authors of the HuffPost Articles plainly acted with knowledge of likely falsity. *Compare* A–213, 225-28 *with* Opening Br. 31–33. But as the Superior Court explained in rejecting this argument, A–275, Page himself admits that the Steele Dossier "contained potential leads to pursue," A–42 (¶ 75), and that U.S. intelligence agencies took it seriously enough to surveil him for over a year, A–13 (¶ 11). Page also argued below, but does not now argue, that the authors of the HuffPost Articles should have "investigat[ed] or fact-check[ed]" more thoroughly. A–213 (citation omitted). As the Superior Court correctly observed, it has been long established that "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." A–275 (quoting *Harte-Hanks*, 491 U.S. at 688).

Because Page failed to allege that any individual person responsible for publication of the HuffPost Articles acted with actual malice, his defamation claim fails with respect to all ten HuffPost Articles. The Superior Court's decision on these articles can, and should, be affirmed on this basis alone. This Court need not reach either of the Superior Court's alternative grounds for the HuffPost Articles—*i.e.*, Section 230 for the seven contributor HuffPost Articles, *see supra* I, and truth for the three non-contributor HuffPost Articles, *see infra* III.

III. THE YAHOO ARTICLE IS TRUE, AS ARE THE THREE HUFFPOST ARTICLES NOT AUTHORED BY CONTRIBUTORS

A. Questions presented.

Whether the Superior Court correctly held that the Yahoo Article is true—or, at a minimum, not materially false. A–164-168, A–236-241, A–269-271.

Whether the Superior Court correctly held that the three HuffPost Articles not authored by contributors are true—or, at a minimum, not materially false. A-176-178, A-249-251, A-276-278.

B. Scope of review.

Oath incorporates by reference the standard of review previously set forth in Section I.B, of this Argument.

C. Merits of Argument.

The Superior Court correctly held that both the Yahoo Article and the three non-contributor HuffPost Articles are true (or, at a minimum, not materially false).

Although Page groups these four articles together in his brief, the Superior Court treated them differently in its opinion. The Superior Court dismissed Page's claim against the Yahoo Article because that article is true (or, at a minimum, not materially false), and also covered by the fair report privilege. As to the three non-contributor HuffPost Articles, the Superior Court found them true only as an alternative ground for dismissal: As discussed above, the primary basis for

dismissing all ten HuffPost Articles was Page's failure to adequately allege actual malice.

To survive Oath's motion to dismiss on the basis of truth, Page had to clear two hurdles. *First,* he had to allege facts showing that the article is false. *Albright v. Harris*, No. CV S18C-11-020 RFS, 2019 WL 6711549, at *1 (Del. Super. Dec. 9, 2019) (requiring defamation plaintiffs to plead "a false and defamatory communication"); *Brian v. Richardson*, 87 N.Y.2d 46, 51, (N.Y. 1995) ("[F]alsity is a sine qua non of a libel claim . . . ."). *Second*, he had to allege facts showing that this falsity was "material." *Pazuniak Law Office, LLC v. Pi-Net Int'l, Inc.*, No. CV N14C-12-259 EMD, 2016 WL 3742772, at *6 (Del. Super. July 7, 2016) ("Immaterial errors do not render a statement defamatory so long as the 'gist' or 'sting' of the statement is true.") (citing *Gannett Co. v. Re*, 496 A.2d 553, 557 (Del. 1985)); *see also Fulani v. New York Times Co.*, 260 A.D.2d 215, 216, 686 N.Y.S.2d 703 (1st Dep't 1999) (requiring the "'gist' or 'sting'" of the statement to be false); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991) (same).

Page failed to clear either hurdle. The arguments he raised below about the Yahoo Article lack merit, as two courts have now confirmed. And the new arguments he raises on appeal about that article are waived and, in any event, no more persuasive. As for the three non-contributor HuffPost Articles, Page

essentially gives up. He now no longer claims that any statements in those three articles are false, much less materially false.

1. Contrary to Page's arguments below, two courts have correctly held that the Yahoo Article is true (or, at a minimum, not materially false).

Two courts have now correctly held that Page failed to adequately plead falsity or material falsity. Page has now twice argued that: (1) the Yahoo Article falsely stated, or implied, that he had actually met with Russian officials; and (2) that certain terms in the article—"intelligence report" and "well-placed Western Intelligence source"—were false. Both the Superior Court, below, and the Southern District of New York, in Page's prior case, properly rejected these arguments after considering the allegations in the complaint and the plain text of the Yahoo Article. *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995) (allowing consideration on a motion to dismiss of documents that are "integral to a plaintiff's claim and incorporated in the complaint" such as "the relevant publication in libel cases"). And Page now offers no meaningful response to any of these arguments.

First, as both courts have held, the Yahoo Article "does not claim that Plaintiff actually met" with Russian officials. A–270; *Page I*, 2018 WL 1406621 at *3 ("The Article does not say that Plaintiff *actually* met with the two Russians . . . ."). Indeed, the "substance and even headline of the Article express uncertainty

about the occurrence and substance of any such meetings." *Page I*, 2018 WL 1406621 at *3. *See also* A–80 ("That meeting, *if confirmed*, is viewed as especially problematic . . . ." (emphasis added)); *id.* ("At their *alleged* meeting . . . ." (emphasis added)).

The Yahoo Article says only that "U.S. officials had received *reports* of such meetings." *Page I*, 2018 WL 1406621 at *3; A–270 ("[T]he article simply says that U.S. intelligence agencies were investigating reports . . . ."). And Page concedes that this is true—that officials *did* receive reports that he had met with the Russians. A–23, ¶ 34 (describing "reports submitted by Steele"); Opening Br. 36 (admitting that the Steele Dossier was sent to the FBI); *id.* at 39 (admitting that the Steele Dossier was "transmitted . . . to Democratic leaders in Congress"). *See also Page I*, 2018 WL 1406621 at *3 ("The Complaint also does not dispute that 'reports' were received, and instead confirms their existence . . . .").

Second, the terms "intelligence report" and "well-placed Western Intelligence source" were not false. Just like the Southern District of New York, the Superior Court correctly recognized that the term "intelligence report," as used in the Yahoo Article, refers to reports that were *received* by intelligence agencies, not *issued* by them. A–270 (holding that "intelligence report" did not refer to a report "from a governmental agency"); *Page I*, 2018 WL 1406621 at *3 (holding that "intelligence report" did not refer to "actual U.S. Government reports"). As

the Superior Court explained, "[a]n intelligence report is simply a report of information potentially relevant to an investigation." A–270. Page makes no serious attempt to challenge this reasoning on appeal. *See* Opening Br. 12 (merely asserting that "Page was not the subject of an 'intelligence report'"); *id.* at 41 (same).

The Superior Court's ruling on the term "Western intelligence" source is also correct. A–270.[8] Below, Page argued that the article told readers that a "Western intelligence source" had confirmed the *accuracy* of the reports about Page. *See* A–200-201 (arguing that "attributing the information to a 'well-placed Western intelligence source" gave undue "credibility" to the Steele Dossier). The Superior Court correctly rejected this argument, A–270, because the article says only that this "source" confirmed that "U.S. officials have . . . *received* intelligence reports," not that the reports were accurate. A–79-80. *See also id.* at 80 ("That meeting, *if confirmed*, is viewed as especially problematic . . . .") (emphasis added). And it does not matter who confirmed that these reports were *received*, because Page admits that they were. *E.g.*, A–23, ¶ 34 (describing "reports submitted by Steele"). On appeal, Page does not challenge this reasoning, and instead continues to simply assert that this source confirmed the *accuracy* of the reports. *See, e.g.,* Opening Br. 35–36, 39-40.

[8] Page did not raise this argument in the Southern District of New York.

The Superior Court also correctly held that even if some portion of the Yahoo Article were somehow literally false, such falsity would not be material. It recognized that "the gist" of the Yahoo Article "is that the U.S. government was investigating possible meetings between Plaintiff and Russian officials." A–271. And "[w]hether 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." *Id*. On appeal, Page does not—and cannot—explain why any inaccuracy in these terms would change the "gist" of the article and its impact on the average reader.

2. Page's new arguments on appeal are waived and lack merit anyway.

Unable to refute the Superior Court's reasoning, Page pivots to several new arguments on appeal. As an initial matter, because he raised none of these arguments below, they are waived. *Cahall v. Thomas*, 906 A.2d 24, 27 n.12 (Del. 2006) (holding that if an "argument was not fairly presented to the trial court, it has been waived"). Regardless, each new argument fails on the merits.

First, Page's new argument that Oath cannot be shielded by "qualifying words" such as "in my opinion" is irrelevant. Opening Br. 37-38. The Yahoo Article does not use the qualifier "in my opinion" to describe Page's alleged meetings with the Russians. In fact, it does the opposite—it specifically disclaims any opinion on this matter by describing the meetings as "alleged" and not

"confirmed." *See also Page I*, 2018 WL 1406621 at *3 ("The substance and even headline of the Article express uncertainty about the occurrence and substance of any such meetings."). *Those* qualifiers do indeed shield Oath from liability. *See, e.g., Orr v. Lynch*, 60 A.D.2d 949, 950, 401 N.Y.S.2d 897, *aff'd*, 45 N.Y.2d 903, 383 N.E.2d 562 (1978) (affirming dismissal of complaint where the allegedly defamatory statements "were qualified by" terms such as "'told,' 'claims,' 'alleges,' 'said,' 'asserted'" and "[n]o attempt was made to represent those quotations as . . . true facts").

Second, the Yahoo Article was not an actionable "republication" of Steele's allegations against Page. Opening Br. 37–38. Merely reporting on the fact of a government investigation is not actionable as defamation. *See, e.g., Glob. Relief Found., Inc. v. New York Times Co.*, 390 F.3d 973, 987 (7th Cir. 2004) ("We reject [plaintiff's] argument that these media defendants must be able to prove the truth of the government's charges before reporting on the investigation itself."); *Streips v. LTV Corp.*, 216 A.D.2d 923, 924, 629 N.Y.S.2d 132, 132 (1995) (not defamatory to report that plaintiff was under investigation); *Dangerfield v. WAVY Broad., LLC*, 228 F. Supp. 3d 696 (E.D. Va. 2017) (report that plaintiff was "accused of rape" did not convey that plaintiff "*was* a rapist"). If it were, the media could not report on ongoing investigations—they would have to wait until these investigations finished before reporting anything to the public. Such a rule

would seriously interfere with the freedom of the press under the First Amendment and also conflict with the Fair Report Privilege. *See* Section IV, *infra*.

Neither of Page's cases hold otherwise. *Id.* (discussing *Cianci v. New Times Pub. Co.*, 639 F.2d 54 (2d Cir. 1980) and *Olinger v. American Savings and Loan Assoc.*, 409 F.2d 142, 144 (D.C. Cir. 1969)). The first held that a report on the plaintiff's criminal charges was defamatory, but only because it conveyed that the plaintiff was "*in fact* a rapist and an obstructor of justice" and "not simply a person who had *been accused* of being such." *Cianci*, 639 F.2d at 60 (emphases added). *See also id.* (reasoning that the article made "direct statement[s] of fact" about the plaintiff, "not just the repetition of a statement by another"). And the second did not involve reporting on a government investigation, but rather republication of an informal accusation by the plaintiff's ex-wife. *Olinger*, 409 F.2d at 144.

Lastly, Page claims that even if the Yahoo Article is literally true, it "connotes a 'false gist,'" Opening Br. 36, that Page was subject to an "an ongoing and serious federal investigation," *id.* at 36, 38, 39, 42–43. Page's new argument fails on multiple levels. As an initial matter, it has no basis in law. Page complains that certain words in the Yahoo Article portrayed the investigation as too "serious," but courts "will not make editorial judgments about specific word choice in order to portray a plaintiff in the best possible light." *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1305 (8th Cir. 1986). *See also Read v. News-J.*,

474 A.2d at 120 ("An action for defamation cannot be premised solely on defendant's style or utilization of vivid words . . . .").

No case holds that literally true statements can nevertheless have an actionable "false gist." Page's lead case, *Masson*, actually holds the opposite—that literally false statements are substantially *true*, and therefore not actionable, if the "gist" is justified. 501 U.S. at 517. In other words, *Masson* provides additional breathing room to the press by protecting "[m]inor inaccuracies." *Id.* By invoking *Masson* to *expand* defamation liability to statements that are literally true, Page turns it on its head.

Page's other authorities are equally inapposite, as they do not speak to the question of falsity at all. Opening Br. 37, 42 (citing *Cahill*, 884 A.2d at 463), *Martin v. Widener Univ. Sch. of L.*, No. CIV. A. 91C-03-255, 1992 WL 153540, at *18 (Del. Super. June 4, 1992); and *Spence v. Funk*, 396 A.2d 967, 972 (Del. 1978)). Each addressed whether a statement was defamatory in character, not whether the statement was false. As explained in *Cahill*, these are separate and distinct elements of Page's claim:

> Under Delaware law, a public figure defamation plaintiff in a libel case must plead and ultimately prove that: . . . 4) *a third party would understand the character of the communication as defamatory*. In addition, the public figure defamation plaintiff must plead and prove that 5) *the statement is false* . . . .

884 A.2d at 463 (emphases added). So, for example, when *Spence* explained that a statement should be judged "by the effect it produce[s] on the mind," it was referring to whether the character of that statement would cause the plaintiff "to be ridiculed and scorned by his community." *Spence*, 396 A.2d at 973. The same is true for *Martin*. 1992 WL 15340, at *18 (addressing whether a statement "conveys a degrading imputation" and subjects the plaintiff to "contempt or ridicule"). None of Page's cases excuse him from proving the fundamental element of falsity. *Barker v. Huang*, 610 A.2d 1341, 1350 (Del. 1992) ("[T]ruth is an absolute defense to a defamation action."); *Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 34, 987 N.Y.S.2d 37 (2014) ("Because the falsity of the statement is an element of the defamation claim, the statement's truth or substantial truth is an absolute defense.").

Second, and in any event, the federal investigation into Page *was* both "ongoing" and "serious," the gist that Page now claims is false. This is confirmed by statements in the Yahoo Article that Page does not dispute anywhere in his complaint. A–77 (stating that Page's alleged meetings were being "actively monitored and investigated"); *id*. (quoting a "senior U.S. law enforcement official" who said Page's contacts were "on our radar screen" and "being looked at"). And it is also confirmed by Page's own pleadings in his case against the federal government, where he admits that the FBI "opened a counterintelligence

investigation named Operation Crossfire Hurricane," which specifically "targeted" him, on "July 31, 2016." *Page v. Comey*, 1:20-cv-03450, Dkt. 1 (D.D.C. Nov. 27, 2020) at ¶ 5. Indeed, by the time the Yahoo Article was published almost two months later on September 23, 2016, the CIA and DOJ were also involved. *Id.* ¶ 9 ("On August 17, 2016, . . . the Central Intelligence Agency provided information regarding Dr. Page to members of the Crossfire Hurricane team."); ¶ 61 ("In August 2016, then-Associate Attorney General Bruce Ohr . . . briefed Steele's accusations regarding Dr. Page to [the FBI]."). [9] U.S. intelligence agencies ultimately surveilled Page under a FISA warrant for over a year. A–13, ¶ 11. Even if Page's "false gist" theory were viable, the gist here was not false.

Page's real gripe seems to be that the investigation *shouldn't* have been serious, but that is an issue to be resolved in his case against the federal government. Page has no claim against Oath for accurately reporting on the fact that this investigation occurred, "an issue of immense political concern." A–281.

[9] As explained in the Inspector General's report, which Page cites liberally in his complaint, the FBI opened an "individual case[]" into Page "under the Crossfire Hurricane Umbrella" on July 31, 2016. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION 106, 114, 364 (rev. Dec. 20, 2019), https://www.justice.gov/storage/120919-examination.pdf. Indeed, the FBI's New York Field Office had actually begun investigating Page's contacts with "suspected Russian intelligence officers" on April 4, 2016. *Id.*

3. The remaining three HuffPost Articles are true.

Finally, the Superior Court correctly held in the alternative that Page failed to state a claim with respect to the three non-contributor HuffPost Articles—*i.e.*, the HuffPost original content—because they are true. A–276-277. Even if Page adequately alleged actual malice, *contra* Section II, *supra*, this alternative holding is an independent ground to affirm the dismissal with respect to the three non-contributor HuffPost Articles. Page quibbled below with the truth of specific statements in these articles, but the Superior Court correctly rejected each of these arguments, A–276-277, and Page does not raise them on appeal, *see generally* Opening Br. These arguments are now waived. *Murphy v. State*, 632 A.2d 1150 (Del. 1993) ("The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal.") (citation omitted).

Page's only argument on appeal is that if the Yahoo Article is materially false, these three HuffPost Articles must be as well. *See* Opening Br. 35 ("[T]he Superior Court incorrectly held that the [Yahoo] Article is 'true or substantially true,' thus also protecting the other articles that refer to it."). But the Yahoo Article is not materially false, *see* Section III, so Page's argument with respect to these other three articles fails as well. It is also worth noting that with respect to two of these articles, the statements with which Page has taken issue are wholly distinct from those in the Yahoo Article: One noted that Page was "so far refusing

to cooperate" with the Congressional investigation, A–32, ¶ 54 (quoting Ex. 5), and the other that President Trump "denounc[ed] his ties" to Page, A–35, ¶ 59 (quoting Ex. 9). As already noted, the Superior Court correctly rejected Page's arguments that these statements were materially false and Page has now waived them by not raising them on appeal.

IV. THE FAIR REPORTING PRIVILEGE APPLIES

A. Questions presented.

Whether the Superior Court correctly held that the Yahoo Article was protected under the fair reporting privilege. A–168-169, A–241, A–271-272.

B. Scope of review.

Oath incorporates by reference the standard of review set forth in Section I.B, of this Argument.

C. Merits of Argument.

The Yahoo Article is also protected by the "fair report" privilege, which immunizes "fair and accurate" reports of "governmental" or "official" proceedings. *Read v. News-J.*, 474 A.2d at 120; N.Y. Civ. Rights Law § 74 (protecting "fair and true report[s]" of "official proceeding[s]"). As the Superior Court correctly found, Oath's reporting was "fair and accurate" for the same reasons it is true (or substantially true). A–275. And the federal investigation into Page's contacts with Russian officials was a "governmental" or "official" proceeding that qualified for the fair report privilege, as both the Superior Court and a federal court in Florida have now confirmed. A–271-72; *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).

Page does not dispute that the federal investigation was a proceeding covered by the fair report privilege. Indeed, he admitted below that "governmental acts of executive officials" qualify as "official proceeding[s]," A–204, and the investigation here was undisputedly conducted by "U.S. intelligence officials" in the executive branch, A–76. Instead, Page now claims that this investigation was not yet underway at the time the Yahoo Article was published. Opening Br. 44–45. But as explained above, that claim is spurious—the investigation into Page was well underway, as confirmed by undisputed statements in the article and Page's admissions in his case against the federal government. *See* Section III, *supra*.

Page also asserts that the fair report privilege does not apply because he alleged that the author of the Yahoo Article acted with actual malice. Opening Br. 13 n.4, 45. This is another misstatement of the law—the fair report privilege applies to accurate reporting of judicial (and other governmental) proceedings "*notwithstanding* allegations of malice or ill will." *Read v. News-J. Co.*, 474 A.2d at 120 (emphasis added). *See also id.* ("The accurate reporting of judicial proceedings results in complete immunity rendering the motive of a publisher irrelevant."); *Orr*, 60 A.D.2d at 950, 401 N.Y.S.2d at 897 ("Further, in reporting a newsworthy event, the belief or doubt of the reporter is not important since he is

reporting the news event, not assuming responsibility for the veracity of the quoted remark.").[10]

[10] Page is incorrect that the Superior Court "implied" that he adequately pleaded "actual malice" with respect to the author of the Yahoo Article. Opening Br. 26–27. Because the Yahoo Article is literally true, *see* Section III, *infra*, Oath did not need to raise this issue at the motion to dismiss stage, and the Superior Court therefore did not address it.

CONCLUSION

For the reasons explained above, the decision of the Superior Court should be affirmed.

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