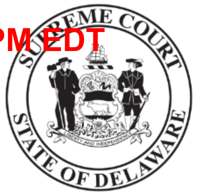
EFiled: Jun 28 2021 02:15PM EDT
Filing ID 66721226
Case Number 79,2021



IN THE SUPREME COURT OF THE STATE OF DELAWARE

CARTER PAGE, and individual,

Plaintiff-Appellant,

v.

OATH INC., a corporation,

Defendant-Appellee.

No. 79,2021

On Appeal from the Superior Court of the State of Delaware
C.A. No. S20C-07-030 CAK

APPELLANT'S CORRECTED REPLY 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-Appellant, Carter Page

Dated: June 28, 2021

TABLE OF CONTENTS

Page

INTRODUCTION 1

STANDARD OF REVIEW 4

ARGUMENT 5

I. OATH IS NOT IMMUNE UNDER SECTION 230. 5

II. THE COMPLAINT ADEQUATELY ALLEGES ACTUAL MALICE........10

A. Isikoff Acted With Actual Malice. 10

B. Oath is Legally Responsible for All of the Article 14

III. OATH'S ARTICLES ARE NOT TRUE NOR SUBSTANTIALLY TRUE 17

IV. THE FAIR REPORT PRIVILEGE DOES NOT APPLY. 22

A. The Report Was Not "Fair and Accurate." 22

B. The Alleged "Investigation" Was Not A Public Meeting. 24

C. Oath is Liable as a Republisher of Steele's Defamation. 25

CONCLUSION 27

TABLE OF CITATIONS

Cases **Pages**

Anthony v. Yahoo! Inc.,
421 F. Supp. 2d 1257, 1262–63 (N.D. Cal. 2006)..7

Barry v. Time,
584 F. Supp. 1110, 1122–23 (N.D. Cal. 1984)..14

Batzel v. Smith,
333 F.3d 1018, 1026–27 (9th Cir. 2003) 14

Central Mortgage Company v. Morgan Stanley Mortgage Capital Holdings, LLC,
27 A.3d 531, 535 (Del. 2011)...16

Crump v. P&C Food Markets, Inc.,
576 A.2d 441, 447 (Vt. 1990)...23

Fair Housing Council of San Fernando Valley v. Roommates.com, LLC,
521 F.3d 1157, 1183–1184 (9th Cir. 2008)..7

Flowers v. Carville,
310 F.3d 1118, 1128 (9th Cir. 2002)..14

Gannett Co. v. Re,
496 A.2d 553, 557 (Del. 1985)...17

Gertz v. Robert Welch,
418 U.S. 323, 328 (1974) 24

Gilmore v. Jones,
370 F. Supp. 3d 630, 661–62 (W.D. Va. 2019)..8

Giove v. Holden,
2014 WL 975135, at *5 (D. Del. Mar. 10, 2014)..17

Gonzalez v. Google, Inc.,
282 F. Supp. 3d 1150, 1157 (N.D. Cal. 2017)..14

Holbrook v. Harman Automotive,
58 F.3d 222 (6th Cir. 1995) 13-14

King Constr., Inc. v. Plaza Four Realty, LLC,
976 A.2d 145, 152 (Del. 2009)..4

Lal v. CBS, Inc.,
726 F.2d 97, 99 (3d Cir. 1984) 23

Masson v. New Yorker Magazine,
501 U.S. 496, 517 (1991) 17

New York Times Co. v. Sullivan
376 U.S. 254, 287 (1964) 10

Olinger v. American Savings and Loan Assoc.,
409 F.2d 142, 144 (D.C. Cir. 1969)...25

Perlman v. Vox Media,
2015 Del. Ch. LEXIS 248, at *43 (Del. Ch. Sept. 30, 2015) 17

Read v. News-Journal,
474 A.2d 119, 120 (Del. 1984)..22

Russell v. Del. Online,
2016 U.S. Dist. LEXIS 80216, at *10 (D. Del. June 20, 2016) 23

Savor, Inc. v. FMR Corp.,
812 A.2d 894, 896–97 (Del. 2002)..16

Taj Mahal Travel v. Delta Airlines,
164 F.3d 186, 190 (3d Cir. 1998) 15

The Dow Chemical Company v. Organik Kimye Holding, A.S.,
2018 Del. Ch. LEXIS 167, at *11 (Del. Ch. May 25, 2018)...........................4

Zeran v. America Online, Inc.,
129 F.3d 327, 328 (4th Cir. 1997) 5-6

Statutes

47 U.S.C. § 230 5

47 U.S.C. § 230(f)(2) 5

47 U.S.C. § 230(f)(3) 6

Rules

Delaware Rule 8(e) 15

Other Authorities

RESTATEMENT (SECOND) OF TORTS § 578 (1977) 15

RESTATEMENT § 611 cmt. f...22

RESTATEMENT § 611 cmt. i (1977) 24

INTRODUCTION

Oath's argument "proves too much." In its efforts to wrap itself in the immunity of Section 230, Oath argues that, because some websites have been held to constitute "interactive computer services," therefore all websites qualify as interactive computer services. Answering Br. 16–22. Section 230 does not say that all websites qualify for immunity, only some of them. Oath's newspaper websites (Yahoo News and HuffPost) do not meet the statutory definition.

Similarly, Oath argues that the Appellant has not adequately alleged that the persons who wrote the several HuffPost defamatory articles were individually guilty of "actual malice." *Id.* at 23–29. But again, this proves too much: it is simply not the law that a newspaper publisher is liable only if a plaintiff can establish fault or malice on the part of individual writers. Instead, literally for generations under the common law of defamation, publishers have been held responsible in defamation for what they publish. The "person" whose actual malice is legally responsible for the publisher's defamation need not be the writer. In this matter, the writer Michael Isikoff, who first created the fabricated defamatory accusations that were spread across the Oath websites, is the person responsible.

A publisher's liability is not, as Oath asserts, based on notions of respondeat superior, where liability flows up from the acts of employees or subordinates; instead, publisher liability is direct. Publishers are responsible for their publications.

They are also directly responsible for defamatory statements they republish. This case involves both: the Yahoo article written by Isikoff originates defamatory statements; it also republishes those made by its "source," the fabricator-for-hire Christopher Steele. Oath is directly liable on both theories.

Next, in attempting to establish that the Appellant has not pled that the relevant articles are false, Oath claims that arguably "truthful" statements cannot convey a "gist" or connotation that is itself false and defamatory. *Id.* at 30–42. Oath boasts, "[n]o case holds that literally true statements can nevertheless have an actionable 'false gist.'" *Id*. at 38. In fact, there are many to that very effect; the Opening Brief cites four decisions from Delaware on this point. Opening Br. 42–43. In any event, whether or not Oath can satisfy its burden of proof on the affirmative defense of "truth or substantial truth" is a jury question, not amenable to resolution on a motion to dismiss.

Finally, Oath claims that its reportage is privileged as a "fair report" of a government proceeding. Answering Br. 43–45. This claim of privilege, even if established, is relevant only to a portion of the Yahoo article and barely at all to the several HuffPost articles. Much of Oath's reportage alludes to "sources" or other documents that were not generated by any government employee or agency. Even on its merits, no court, however, has held that an article that restates known falsehoods merits protection under this qualified privilege. The very meaning of a

qualified privilege is that the privilege is “qualified,” and is forfeited if the report was made in bad faith.

STANDARD OF REVIEW

The standard of review is *de novo*. *E.g., King Constr., Inc. v. Plaza Four Realty, LLC,* 976 A.2d 145, 152 (Del. 2009). Despite Oath's repeated assertions to the contrary, nothing alleged in the complaint is "waived" with *de novo* review, no matter how issues were presented in the motion to dismiss. Delaware law requires mere notice pleading, which means "fair notice in a general way of the cause of action asserted." *The Dow Chemical Company v. Organik Kimye Holding, A.S.*, 2018 Del. Ch. LEXIS 167, at *11 (Del. Ch. May 25, 2018).

ARGUMENT

I. OATH IS NOT IMMUNE UNDER SECTION 230.

Oath asserts that Section 230 "immunizes websites from liability" for third-party speech. This is simply not the case. Websites are not *per se* immune from liability under Section 230. Instead, Congress has defined with care and specificity which particular kind of websites and other internet services are to be accorded immunity under Section 230. Had Congress wished to grant blanket immunity to all websites, it could easily have done so, allowing every site on the internet to publish libelous statements with impunity.

The fact of the matter is quite the opposite. Section 230 limits its grant of immunity to "interactive computer services." 47 U.S.C. § 230. To qualify as an interactive computer service, a particular website or other internet location must comprise an "information service, system, or access software provider that ***provides or enables computer access by multiple user*****s** to a computer server." 47 U.S.C. § 230(f)(2) (emphasis added). To illustrate, the website must either "provide" computer access to multiple users (e.g., AOL, Verizon FIOS, and Comcast Xfinity), or must "enable" computer access by multiple users (e.g., Facebook, Twitter, Instagram, DreamHost, GoDaddy, Reddit, and Craigslist). All of the above qualify under Section 230, as has been determined by numerous judicial decisions. *See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) ("These [interactive

computer] services offer not only a connection to the Internet as a whole, but also allow their subscribers to access information communicated and stored only on each computer service's individual proprietary network….[m]uch of the information transmitted over [AOL's] network originates with the company's millions of subscribers.").

Oath's two websites do not qualify for immunity as "interactive computer services." They neither "provide" nor "enable" computer access, not to even one person and certainly not to "multiple users" required by the statute nor to the "millions" of users described in *Zeran*. Oath's websites do not provide computer access. Instead, Oath's websites are news sites. They publish content. They are called "Yahoo News" and "HuffPost" (formerly "The Huffington Post") for good reason.

Instead of comprising "interactive computer services" under Section 230, both Yahoo and HuffPost squarely fit the other statutory category: "information content providers." An "information content provider" is "any person or entity that is responsible, in whole or in part, for the ***creation or development of information*** provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3) (emphasis added). Both of Oath's news websites, Yahoo News and HuffPost, "create information" that they share over the internet. Without question, "information content providers" are fully and unquestionably liable for their

defamatory published statements. *E.g.*, *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1262–63 (N.D. Cal. 2006) (holding Yahoo not immune under Section 230 for creating fake profiles on its own dating website).

The statutory distinction between the "interactive service" and the "information content provider" is clear. Nonetheless, even "interactive service providers" can fall from grace. They can become "information content providers" for certain materials, specifically when they speak on their own behalf or they too heavily involve themselves in producing content. Plaintiff need not argue that Oath forfeited its Section 230 immunity here. Oath clearly does not qualify as an "interactive service provider" in the first place. *Cf.* A–75-140 (Exhibits to Amended Complaint).

Even if this Court concludes that Oath qualifies as an "interactive service provider" under Section 230, as Oath argues, courts have been on watch, identifying instances where otherwise immune interactive service providers forfeited their Section 230 immunity. To determine if the interactive service provider should be stripped of immunity and treated as an "information content provider," courts have examined multiple factors:

- Provider "materially contributes" to the publication (*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1183–1184 (9th Cir. 2008);

- Provider not merely "passive" but went beyond "normal editorial functions" in creating content (*Gilmore v. Jones*, 370 F. Supp. 3d 630, 661–62 (W.D. Va. 2019);

- Provider also functioned as an information content provider for portions of the statement or publication (*Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1110, 1123 (9th Cir. 2003).

Mindful of this Court's Rule against using a Reply Brief to repeat material that appears in the Opening Brief, the many involvements of Oath with the paid-for, published content that appeared on its own website will not be restated here. The short of it is obvious: both Yahoo and HuffPost publish articles they write or they procure. Oath is not being sued on account of the defamatory ramblings of an anonymous person spilling venom in the comment section. Oath is being sued for articles it published, featured, linked to, provided headlines for, and paid for.

Although the full factual extent of Oath's involvement will become clear with discovery, for the purpose of pleading a complaint, these factual contentions are more than sufficient. Yahoo and HuffPost control its published content. Even if this Court affords Oath "interactive computer service" status under Section 230, Oath's close involvement with and presentation of the defamatory articles render the defendant an "information content provider" for those articles.

With all that said, ultimately the many factors and involvements that would disqualify Oath from Section 230 immunity are irrelevant. They are irrelevant because Oath does not qualify as an "interactive service provider" in the first place.

Under Oath's theory of law, all websites qualify for immunity under Section 230, and thus any news website could publish defamatory content without responsibility. That is not the law; indeed, even after Section 230, courts have made it clear that publishers remain responsible for their content. Oath's argument would render irrelevant the careful statutory language in Section 230.

II. THE COMPLAINT ADEQUATELY ALLEGES ACTUAL MALICE.

A. Isikoff Acted With Actual Malice.

Once the incorrect claim of Section 230 immunity is dispatched, Oath stands fully responsible for the defamatory content of its publications. In its next contention, Oath claims that it cannot be held liable unless the Appellant plead and prove that each of the writers involved in the publication of each defamatory article are themselves liable for defamation. Answering Br. 23–29.

This is not the law. There is no requirement that the Plaintiff necessarily identify the writer of each defamatory article as the "person responsible" who himself or herself must have acted with actual malice. Instead, the plaintiff's responsibility is to plead the "actual malice" of "the person responsible," and the plaintiff has discretion to target or pinpoint this person or persons. The "person responsible" need not be the writer of the defamatory article. *See New York Times Co. v. Sullivan* 376 U.S. 254, 287 (1964) (noting that plaintiff appropriately identified "fact checkers" as the "person responsible" within the organization who acted with actual malice).

The Amended Complaint alleges at length and with ample inclusion of facts that Michael Isikoff was the "person responsible" for inseminating these fabrications. A–38-59. Isikoff acted with actual malice; as the Amended Complaint details in numerous paragraphs that Isikoff knew the truth yet chose to state

falsehoods. *Id.* Isikoff wrote the seminal Yahoo article that first raised the false allegations against Dr. Page. A–10. Isikoff's false reporting appeared in his Yahoo article, and his false facts and innuendo directly led to the several other Oath articles that appeared in the HuffPost. A–10-14. Each article repeated or expanded upon the false claims that first appeared in the Yahoo article. *Id.* Thus Isikoff, who presented false facts to these other writers, was the "person responsible" for these HuffPost publications. Isikoff created false facts that he transmitted to Oath and to these other writers, just as the "fact checkers" at issue in *Sullivan* allowed false facts to appear in a defamatory advertisement in the New York Times. Had the plaintiff in *Sullivan* established that those fact checkers acted with actual malice, the Times would have been held liable for their defamation. Providing or creating false facts, even where the person creating the falsehoods was not the writer of the particular article, can nonetheless satisfy the "actual malice" of the defendant. A fact-checker (or here, fact-supplier) can be the "person responsible."

The Amended Complaint satisfies *Sullivan*. The Amended Complaint alleges that a particular person, Michael Isikoff, acted with actual malice, and that he did so while employed by and under the supervision of Oath. A–10, 28–29, 38–59. Appellant's allegations are thorough, factual, and completely adequate to establish Isikoff's actual malice. *Id.* Because Isikoff was part of the Oath team that produced the Yahoo article and the HuffPost articles, Isikoff's fault can be attributed to Oath,

and his false reporting, informed by actual malice, can be "responsible" for the various Oath publications. Although Isikoff's actual malice is clear, his role was likely the tip of the iceberg, with the entirety including numerous other writers, editors, and other Oath employees who together generated the several articles that individually and collectively defamed the plaintiff. Oath's conduct, in acting through Isikoff, was part of a larger plan to influence the election, a plan that involved the DNC, Perkins Coie, Fusion, and Steele, among others. This is not wild speculation about a secret cabal to influence the election. Two separate, independent federal investigations reached this very conclusion.

Despite Oath's assertion, *Sullivan* does not militate to the contrary. In *Sullivan*, on appeal after a trial on the merits, the Supreme Court stated that the plaintiff had failed to meet its burden to establish "actual malice" because "the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement." *Sullivan*, 376 U.S. at 287. This was a failure of proof, not pleading. The plaintiff failed to carry its burden to prove actual malice on the part of the defendant because it failed to succeed in the path it chose: specifically, to establish the Times' fault by focusing on the conduct of certain particular persons, specifically fact checkers, within the organization. *Id.* ("With respect to the failure of those

persons to make the [fact] check, the [trial] record shows that they relied upon their knowledge of the good reputation . . . of the sponsors of the advertisement ….”).

Thus, *Sullivan* stands for the opposite proposition Oath proposes: the plaintiff failed to prove his theory about the fact checkers, but it was not wrong or impermissible in any sense that the plaintiff chose to identify the fact checkers as the persons responsible for the defendant’s defamatory statements. *Sullivan* does not require the plaintiff to allege that it was the authors of the defamatory materials to have acted with actual malice.

Another case Oath cites makes the point explicitly and at length. In *Holbrook v. Harman Automotive*, 58 F.3d 222 (6th Cir. 1995), the defendant was an auto parts manufacturer. It was sued for a defamatory memorandum written by its employee Loepp. The plaintiff had to show that Loepp, and not others, had acted with actual malice because as “Loepp was the . . . employee responsible for the publication of the allegedly defamatory statements, we focus solely on his state of mind.” *Id.* at 225. But, as the Court explains, the plaintiff was under no obligation to identify Loepp in particular as the “person responsible.” *Id.* at 225–26 (“We stress that Holbrook’s theory throughout has been that [the defendant] is liable due to Loepp’s publication of the memo. Had Holbrook instead argued that [the defendant] is liable due to the communications from Loepp’s subordinates to Loepp, we would focus on the state of mind of those subordinates.” *Id.* at 225–26. In short, the plaintiff can

advance the theory of liability at the plaintiff's discretion. No rule of law requires that the "person responsible" for the defamation be the writer of the defamation. A fact checker acting with actual malice can be the person responsible (*Sullivan*); a subordinate of the writer can be the person responsible (*Holbrook*).

Here, Isikoff can be the person responsible for all of Oath's defamatory statements. It was his seminal article that incited and informed the others. A–8-14. As the court explained in *Holbrook*, one agent acting with actual malice can infect the entire organization, and can be the "person responsible" even for publications he himself did not write. *Holbrook*, 58 F.3d at 226 ("If a plaintiff could prove that the agent of the organization who supplied the information to the ultimate publisher acted with actual malice, he could maintain an action against the organization based on the communication to the ultimate publisher.").

B. Oath is Legally Responsible for All of the Articles.

Publishers are directly liable for any defamatory statements they publish. *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1157 (N.D. Cal. 2017) (quoting *Batzel v. Smith*, 333 F.3d 1018, 1026–27 (9th Cir. 2003). Publishers are liable for republishing defamatory statements made by others. *See, e.g., Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) ("[T]ale bearers are as bad as tale makers."); *Barry v. Time*, 584 F. Supp. 1110, 1122–23 (N.D. Cal. 1984) (noting a republisher is "as liable" as the originator of the statement) (citing RESTATEMENT (SECOND) OF

TORTS (hereinafter "RESTATEMENT") § 578 (1977)); *see also* RESTATEMENT § 581A cmt e. (1977) ("When one person repeats a defamatory statement that he attributes to some other person, it is not enough for the person who repeats it to show that the statement was made by the other person. The truth of the defamatory charges that he has thus repeated is what is to be established."); *Taj Mahal Travel v. Delta Airlines*, 164 F.3d 186, 190 (3d Cir. 1998).

Consequently, whether the "contributors" who wrote articles at Oath's request are technically employed by Oath or not is not relevant: Oath is responsible for its publication. Whether the writer is employed by Oath or is a freelancer, a plaintiff is not required to prove that the individual writers or editors or others involved, either together or separately, acted with actual malice. The Amended Complaint alleges that the reporter, Isikoff, acted with malice and with actual malice, and that his actual malice can properly be attributed to Oath. A–10, 28–29, 38–59.

On the matter of actual malice, the Complaint is sufficient and the facts alleged are specific. But to be clear, Delaware's Rule 8(a) requires only "a short and plain statement of the claim;" Delaware Rule 8(e) admonishes that "[e]ach averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required." In Delaware, the facts pled in the Complaint must establish

the "reasonable conceivability" of defendant's liability.[1] This standard is a "minimal" one. *E.g.*, *Central Mortgage*, 27 A.3d at 535. On a motion to dismiss, 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 reasonable 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 Complaint meets and exceeds this minimal standard, alleging Isikoff's actual malice with reasonable conceivability sufficient to hold the publisher Oath liable for its publications.

[1] Even under federal pleading standards, which have been affirmatively rejected by Delaware (*Central Mortgage Company v. Morgan Stanley Mortgage Capital Holdings, LLC*, 27 A.3d 531, 535 (Del. 2011)), the requirement is merely that the factual allegations "plausibly suggest an entitlement to relief." This Complaint more than satisfies the plausibility standard.

III. OATH'S ARTICLES ARE NOT TRUE NOR SUBSTANTIALLY TRUE

The Superior Court found, and Oath asserts in its brief, the affirmative defense of "truth or substantial truth." Under Delaware law, substantial truth is an affirmative defense to defamation. *Giove v. Holden*, 2014 WL 975135, at *5 (D. Del. Mar. 10, 2014). The test in deciding whether an article is substantially true involves a consideration of whether the alleged libel was more damaging to plaintiff's reputation, in the mind of the average reader, than a truthful statement would have been. As part of this evaluation, courts will consider whether the 'gist' or 'sting' of the article was true. *Gannett Co. v. Re*, 496 A.2d 553, 557 (Del. 1985); *see also Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991).

The Defendant, not Plaintiff, bears the burden of proving that the plaintiff "cannot recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint." *Perlman v. Vox Media*, 2015 Del. Ch. LEXIS 248, at *43 (Del. Ch. Sept. 30, 2015) ("[U]nless it is clear from the face of the complaint that an affirmative defense exists and that the plaintiff can prove no set of facts to avoid it, dismissal of the complaint based upon an affirmative defense is inappropriate."). In Delaware, whether a communication is false is a question of fact that cannot be decided by a judge on a motion to dismiss. *Id.* at *43–45. The rule of law on this point is clear: the affirmative defense of "substantial truth" means that

publishers can be held liable for defamation for publishing articles that convey a false factual gist. Oath published numerous false statements of fact and its articles, read as a whole, convey a false gist.

The false statements of fact are egregious and permeate the Amended Complaint: in the article that started this chain of defamatory statements, Isikoff refers to Steele as a "well-placed western intelligence source" and the Steele Dossier as a "well-placed intelligence report." A–21-26. These statements are demonstrably false. Steele was not an "intelligence source," never mind an exalted "well-placed" one: instead he was a political "opposition researcher" paid for by the Clinton campaign, as Isikoff knew. A–23, 40, 45, 53-54. This is not theory; this is fact, confirmed by two independent government reports, and now emerging in the mainstream media. A–26-27, 30-31, 52. Isikoff knew that Steele was a political opposition researcher and knew of Steele's sketchy background and disreputable past. A–38-59. Other reporters, acting responsibly, declined to write articles defaming Page based on Steele's contrived representations. *Id.* They knew them to be false; Isikoff knew as well, but chose to repeat these false allegations and Oath chose to publish them anyway. *Id.*

These statements are false, factual, and defamatory, as the Opening Brief argues in full. These false statements describe a level of seriousness and veracity to Appellant's alleged "Russian ties," and of course that of the candidate Donald

Trump, that the ordinary reader would credit. Isikoff knew the truth. *Id.* Had he published what he knew to be the truth, specifically that "a paid opposition researcher for the Clinton campaign has alleged, without any supporting information, that Trump has secret ties with Russia," that story would never had passed muster at any reputable newspaper. But Isikoff did not report what he knew was the truth; instead he acted with actual malice. *Id.* Through clever misstatements, adjectival exaggerations, suggestive innuendo, and outright fabrications, Isikoff made something out of nothing, crediting "well-placed" sources, identifying them as "Western" to imply authority, and terming them an "intelligence report" to hide the fact that they were election-year paid-for "opposition research" assembled by a known fabricator-for-hire.

These false statements of fact, along with others alleged in the Amended Complaint, are defamatory, imputing criminal corruption and treasonous motivations to the Appellant. In addition, cumulatively, the several false factual statements taken together convey a false gist, implying a reality that does not exist: no "well-placed Western intelligence source" had ever questioned Appellant's actions or motivations, no "meeting with Russian operatives" had ever taken place, and no untoward or treasonous activity of any kind had ever in fact occurred or been commented on by U.S. officials. A–21-28. The Yahoo article, and the subsequent HuffPost articles that relied on it and cited to it, created a false narrative about

Appellant in an attempt to derail the Trump campaign. A–8-14. Appellant was a victim here, a stalking horse who formed a convenient means for Isikoff and Oath to do their part in the greater service of the Clinton campaign. *Id.* The shame of it is that Isikoff and Oath knew what they were doing. A–38-59. This lawsuit will hold them accountable.

Finally, Oath argues that the Steele Dossier must have been credible, that indeed it reflected "well-placed" sources, because it formed the basis for a federal investigation, the implication being that federal investigators would not get involved in something invented. Answering Br. 30–42. This is not the case. The charge made in the Oath articles was utterly serious. They insinuated that someone who could become the President of the United States, acting through an intermediary, was part of a massive global conspiracy to steal the most important free election in the world in exchange for betraying American interests. Of course, the FBI opened an investigation; of course, the full attention of U.S. law enforcement, including FISA surveillance, was brought to bear on such a momentous charge. A–26-27, 30-31, 52. The FBI, however, had been misled. It was led to believe, as it stated in its eventual report that concluded that the entire matter had been a hoax, that there were "two sources" of this momentous allegation: the Steele Dossier, and the other the "well-placed Western intelligence sources" alluded to in the Yahoo article. What the FBI did not realize at the time, but Isikoff knew, was that these "two sources" were just

one: that Isikoff's source was the Steele Dossier. Had the FBI known the truth, and been able to properly discredit and discount the "oppo research" contained in the Steele Dossier, no such investigation would likely have occurred. Isikoff's article put in motion a chain of events that led to the ruination of Appellant's hard-earned reputation as a patriot and businessman, and nearly changed the result of an historic presidential election.

IV. THE FAIR REPORT PRIVILEGE DOES NOT APPLY.

A. The Report Was Not "Fair and Accurate."

Like all qualified privileges, the "fair report" privilege requires good faith: that the report present a "fair and accurate" depiction of what transpired at the public meeting or event. *Read v. News-Journal*, 474 A.2d 119, 120 (Del. 1984). As alleged extensively in the Amended Complaint and raised on appeal, Isikoff and Oath did not report on the government investigation in a manner that represented a "fair and accurate" description of the matter. A–38-59. In point of fact, they knew that: (1) Steele was not a reliable source; (2) Steele did not qualify as a "well-placed" source; (3) Steele was not an "intelligence" source; (4) Steele was a paid opposition researcher for the Clinton campaign; (5) no U.S. officials ever commented on the fictional meeting; and that (6) Steele, along with Fusion, had engineered to present this "Steele Dossier" to the FBI in order to generate this spurious investigation. *Id.* Isikoff knew that the story was a hoax, yet he reported on the story as if the investigations were based on real and accurate information. *Id.*

Oath argues that its report was fair and accurate "for the same reasons" it claims its report was true or substantially true. Answering Br. 43. But here, Oath mixes two different issues. "Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading." RESTATEMENT § 611 cmt. f ("[I]t is necessary that nothing be omitted or misplaced

in such a manner as to convey an erroneous impression … [t]he reporter is not privileged … to make additions of his own that would convey a defamatory impression … nor to indict expressly or by innuendo the veracity or integrity of any of the parties."); *see also Lal v. CBS, Inc.*, 726 F.2d 97, 99 (3d Cir. 1984).

When his report of the investigation is coupled with the spurious nature of the Steele Dossier, Isikoff's report on the investigation "conveyed a defamatory impression," in effect indicting "by innuendo the veracity or integrity" of Carter Page. Isikoff knew that the entire subject of the investigation was contrived, knew of the unreliable reputation of the person who had concocted it, knew that the dossier was sent to the FBI so that Isikoff could "report" on it, and then used the claim of a governmental investigation to lend credence to this otherwise incredible tale. Taken as a whole, Isikoff's report creates an impression and imparts innuendo that fails to present a "fair and accurate" portrayal of the events in question.

If the defendant acted with actual malice, the privilege does not apply. *See Russell v. Del. Online*, 2016 U.S. Dist. LEXIS 80216, at *10 (D. Del. June 20, 2016). The "fair report privilege" is a "qualified privilege." *Read*, 474 A.2d at 120. It is forfeited if the speaker abuses it by a report that is not fair, not fully accurate, or was motivated by actual malice.[2] Subjective malice or ill-will does not forfeit the fair

[2] Although courts use the terms "malice" and "actual malice" interchangeably, *see Crump v. P&C Food Markets, Inc.*, 576 A.2d 441, 447 (Vt. 1990), it is "actual malice" that is the correct

report privilege. *Id.* at 121. But reporting a falsehood with actual malice does. "Actual malice" refers to the idea that the defendant knew the truth, or recklessly disregarded it, yet published a falsehood anyway. *Gertz v. Robert Welch*, 418 U.S. 323, 328 (1974). Isikoff knew the truth, yet chose to publish falsehoods, thus forfeiting any claim to a privilege. A–38-59.

B. The Alleged "Investigation" Was Not A Public Meeting.

Quite apart from the question over the fairness and accuracy of Isikoff's report is the question of whether or not the privilege should apply to a non-public government investigation. The better answer is that this Court should not view the nascent investigation and the lack of a statement from a public official as qualifying for the fair report privilege. The fair report privilege shields the media from liability only for publishing an accurate and fair account of a judicial proceeding or the governmental acts of executive officials of government. *Read*, 474 A.2d at 120. Specifically, the privilege should apply only to proceedings that are open to the public. *See, e.g.*, RESTATEMENT § 611 cmt. i (1977) ("As in the case of the report of official proceedings, the purpose of the privilege is to protect those who make available to the public information concerning *public events* that concern or affect the public interest and that any member of the public could have acquired for himself

---

phrase, referring to the claim that the defendant knew the truth yet published a falsehood. A defendant who acts with actual malice forfeits the privilege protecting fair reports.

by attending them.") (emphasis added). "The privilege does not extend to a report of a private meeting, not open to the general public . …" *Id.*

Although the RESTATEMENT takes no ultimate position on whether or not a mere investigation is sufficient to trigger the fair report privilege, the policy behind the privilege militates in favor of limiting its scope to public proceedings. The reporter who relays the terms of those proceedings is performing a task and providing information that the reader "could have acquired for himself." In addition, the privilege requires that the report be fair and accurate: it is only with respect to a public meeting that a reviewing court could determine whether or not these standards were satisfied. Both the policy and the common-law origins of the fair report privilege militate in favor of limiting its scope to public proceedings. Delaware has not extended the privilege to include non-public government investigations.

C. Oath is Liable as a Republisher of Steele's Defamation.

To a significant extent, the Yahoo and HuffPost articles do not report on a "government proceeding" or other action of a government employee or agency. Instead, the articles at several junctures quote from "sources," and that single source appears to be the Steele Dossier. Under no circumstances can the nefarious "Steele Dossier" be considered a governmental report.

For any defamatory content derived from the Dossier, and not from a government source, Oath would be directly liable for republishing it. *Olinger v.*

American Savings and Loan Assoc., 409 F.2d 142, 144 (D.C. Cir. 1969) ("The law affords no protection to those who couch their libel in the form of reports or repetition … [R]epetition of a defamatory statement is a publication in itself, regardless whether the repeater names the source.").

CONCLUSION

In light of the Opening Brief and the above, this Court should reverse the decision of the Superior Court.

Respectfully submitted this 28th day of June, 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-Appellant,
Carter Page

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2021, a copy of the foregoing document was served electronically by File and ServeXpress on the following attorneys:

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

/s/ Sean J. Bellew
Sean J. Bellew (No. 4072)