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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CANDACE OWENS, in her individual capacity, and CANDACE OWENS, LLC, a Delaware limited liability company, Plaintiffs-Appellants, v. LEAD STORIES, LLC, a Colorado limited liability company, and GANNETT SATELLITE INFORMATION NETWORK, LLC d/b/a USA TODAY, a Delaware limited liability company, Defendants-Appellees.	No. 253,2021 On Appeal from the Superior Court of the State of Delaware C.A. No. S20C-10-016-CAK

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This matter consists of two lawsuits, both filed by plaintiffs/appellants Candace Owens and Candace Owens, LLC (collectively "Owens" or "plaintiff") arising out of the denigration of "posts" she added to her Facebook page and to her subsequent suspension of her advertising contract with Facebook. Against defendant/appellee Lead Stories, LLC ("Lead Stories"), Owens asserted causes of action for the torts of unfair competition, tortious interference, and defamation. Against defendant/appellee Gannett Satellite Information Network, LLC d/b/a USA TODAY ("Gannett"), Owens asserted causes of action for the torts of unfair competition and tortious interference. This appeal arises from the Memorandum Opinion and Order of the Superior Court of the State of Delaware, in and for Sussex County, the Honorable Craig A. Karsnitz presiding, granting the motions to dismiss for failure to state a Claim under Delaware Superior Court Civil Rule 12(b)(6), of defendants Lead Stories and Gannett, issued on July 20, 2021, case number S20C-10-016-CAK (the "Opinion").

SUMMARY OF ARGUMENT

The Opinion granting the motion to dismiss contains several errors. Reversal on any one provides sufficient grounds to grant the appeal and remand for further proceedings.

1. The Opinion applied a "First Amendment Defense" to dismiss the claims against both defendants for tortious interference with contract, tortious interference with business relations, and unfair competition. This application is error. It confuses free speech with tortious conduct. Because of a contractual agreement with Facebook, both defendants, with but a word, had the power and authority to shut down Owens' ability to advertise on Facebook. This exercise of the power given them in a contract was not speech: it is not as if the defendants argued against Owens and somehow "won" the debate. Instead, the fact that they disagreed with Owens and labeled her perspectives as "FALSE" and a "HOAX" resulted, as they knew it would, in actually removing a market competitor from the market itself, interfering with her contract with Facebook. The fact that tortious interference is accomplished with a word, as it most usually is, is not a reason to hold that a cause of action based on those words is constitutionally prohibited. The defendants' words did not constitute protected speech. When they pointed their finger at Owens and thereby directed Facebook to frustrate and ruin her ability to produce and promote her popular social media, they committed a tort.

2. One of the two defendants, Lead Stories, wrote an article terming Owens' posts a "HOAX," claiming she was the "originator" of a massive fabrication, and that she was "attempting to downplay the severity" of the worldwide COVID-19 pandemic. (These matters are discussed in Parts II and III of the Argument, below). For these statements, plaintiffs brought defamation counts against Lead Stories. The Opinion dismissed the first of the defamation claims against Lead Stories on the grounds that its labeling the post of Owens as a "HOAX" was merely an expression of opinion or rhetorical hyperbole, and that the other defamatory statements were either true or substantially true.

This is error. The term "hoax" denotes a purposeful fabrication devised to deceive others; in this matter, the term accuses Owens of originating and perpetuating a scheme to downplay severity that might, if it came to fruition, lead to numerous and potentially catastrophic COVID infections. "Hoax" is factual: it is completely susceptible to being proven true or false. It is tantamount to other terms, such as "fraud" or "intent" or "malice," that are proven true or not true in courts of law every day. Either Owens perpetuated this purposeful hoax or she did not. Yet the trial court dismissed the entire defamation claim on the grounds that accusing someone of committing a "hoax" is mere rhetorical hyperbole. Nothing about the context of Lead Stories' defamatory claim would suggest it is mere rhetoric: it does not appear in an editorial or other opinion piece; it is not in the sports pages or comic

section. Instead, it appears in a serious article headlined by the words "FACT CHECK." The article proceeds to make a series of assertions, every one of which is unmistakably factual, as is the central claim, appearing in boldface at the top of the offending article, that Owens is guilty of committing a "HOAX."

Likewise, the preposterous allegations that Owens originated this hoax whose purpose was to put innocent people at risk of infection and death are not "true or substantially true." They are false because their opposite, namely Owens' Facebook posts, are themselves true and convincing. In some part, the dueling contentions are in agreement, yet Lead Stories chose to label Owens' posts "false" anyway.

3. The trial court found both defendants did not commit the tort of unfair competition because their statements were protected by the First Amendment. This finding is incorrect. The defendants have abandoned their role as mere commentators. Instead, they have formed an agreement with Facebook to inhibit or banish any posts or articles of competitors whom they choose to target. With this contract, they are no longer mere journalists; they have real market power to shut down unwanted competition. At the same time, they have the means, again utilized here, to also steal away valuable customers. Both defendants have acted as voracious market competitors. When they act as businesses, not as mere commentators and publishers, they must adhere to the standards of fair competition encumbent upon all

businesses. The defendants' status as publishers does not insulate them from tort liability for their unfair acts in the internet marketplace.

STATEMENT OF FACTS

Candace Owens is a leading conservative commentator and intellectual, enjoying millions of followers to her social media account on Facebook. (Appendix [hereinafter "App'x"] at A–580-81). She is also a widely known book author, interview subject, and public speaker. (*Id.* A–580-582, A–631, A–634). Chief among her various outlets is her Facebook page, which produces, through advertising, up to tens of thousands of dollars each day. (*See id.* A–620-621). Owens has a contract with Facebook that provides her with the right to advertise her Facebook page. (*Id.* A–615-621). Defendants also have contractual relationships with Facebook. (*Id.* A–578, A–585-86, A–588). Facebook pays the defendants for their "fact-checking" services; in turn, Facebook acts to suspend advertising abilities of posters whom the fact-checkers indicate have published "false" information. (*Id.*).

On March 29, 2020, Owens published a post on her Facebook page that argued that the U.S. was attributing more deaths to COVID-19 than warranted. (*Id.* A–593). Her claim was supported by the article of Dr. John Lee, a noted British pathologist and consultant with the U.K. National Health Service. (*Id.* A–595, A–644-651). Her post provided a link to this article. (*Id.*). Owens' posts also cited to the relevant statements made by Dr. Deborah Birx, a world-renown health official who was a member of the White House Coronavirus Task Force, and Dr. Ngozi Ezike, the Director of Public Health for the State of Illinois. (*Id.* A–598-600). On April 28,

2020, Owens published a post to her Facebook page comparing the counting of deaths from COVID-19 with the tabulation of deaths from the flu during the first months of 2020. (*Id.* A–600).

On April 1, 2020, Lead Stories published an article claiming to "fact check" Owens' initial Facebook post. (*Id.* A–604). This article stated that Owens' post was "False" and merited a "Hoax Alert." (*Id.* A–605). The article also contended that Owens was the originator of this hoax and that she was engaged in an attempt to "downplay the severity of this global pandemic." (*Id.*). Lead Stories' publication of its article led Facebook to place a "FALSE" warning label on the post. (*Id.* A–609-614).

On April 30, 2020, Gannett (on its USA TODAY website) published a "fact-check" article that reviewed CDC data and concluded that Owens' second Facebook post was "false." (*Id.* A–607). As a result of this article, Facebook displayed a "FALSE" warning label over Owens' second Facebook post on the subject. (*Id.* A–609-614). These warning labels are superimposed over the front of Owens' posts, inhibiting the ability of viewers to read Owens' posts. (*Id.*). These labels are also transmitted along with the posts to any "forwarding" of the posts, should a reader wish to pass the posts along to other readers. (*Id.* A–613). Finally, again superimposed over Owens' posts is a "link" re-directing readers to the articles on the defendants' respective websites. (*Id.* A–603-04, A–609-610, A–633-34). This

link to the rivals' websites is hidden under a button titled "See Why." (*Id.* A–607, A–611). The fact that the reader is about to be transported to a competitor's website is not made explicit. (*Id.*). Readers who click on the link, perhaps seeking an explanation for the treatment of Owens, are redirected off of Owens' page and over to these competitors' websites. (*Id.*). When re-directed to Lead Stories' website, readers were greeted with the words "HOAX ALERT" and "FALSE" super-positioned over a screenshot of Owens' post. (*Id.* A–605).

As a result of the defendants' actions, Facebook restricted the viewability of Owens' posts. (*Id.* A–609, A–617-621). Subsequently, Facebook "demonetized" her by suspending her ability to run advertisements. (*Id.* A–585, A–634). Facebook's "FALSE" warning label, when clicked, states that "Independent fact-checkers at Lead Stories say [this post] has false information." (*Id.* A–609). In fact, defendants are not "independent" at all; they are direct competitors with Owens. (*Id.* A–578). Owens social media presence far outpaces that of Lead Stories and compares favorably with Gannett. (*Id.* A–581, A–588). The opportunity to "fact-check" Owens' posts presented these competitors with an obvious chance to obscure her message, discredit their competitor, suspend her ability to derive revenue, and parasitically steal her customers. (*Id.* A–578).

ARGUMENT

I. THIS IS NOT A "FREE SPEECH" CASE.

A. Question Presented.

Where, by virtue of a prior contractual agreement, one competitor can completely remove another competitor from the marketplace by merely labeling the other competitor a purveyor of falsehood, can the first competitor defend on the grounds of the First Amendment because it used words as the instrumentality of the tort? (*Id.* A–461-463, A–974-980).

B. Standard of Review.

The Superior Court held that, although plaintiffs' contract with Facebook constitutes "a contract with which interference may occur," the defendants' interference with that contract was not "improper" or "wrongful" because "[a] tortious interference claim cannot survive if the claim is premised solely on statements that are protected by the First Amendment because the exercise of constitutionally protected speech cannot be an 'improper' or 'wrongful' action." (*Id.* A–974). This is a question of law.

This Court's standard of review of this legal question is *de novo*. *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 936 (Del. 1982); *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011) ("We review trial court rulings granting motions to dismiss de novo…. [w]hen

reviewing a ruling on a motion to dismiss, we (1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as "well pleaded" if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) do not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." (footnotes omitted)).

C. Merits of Argument.

Candace Owens is a political commentator who is accustomed to the give and take of modern American discourse. (*Id.* A–580-582, A–631, A–634). If this matter merely involved free speech, with each side of a debate engaged in pointed dialogue, no claim would have been brought, or even considered. But this matter is different. The defendants are not merely publishers; they are market competitors with Owens. They, and many other publishers, compete for attention, readers, "clicks," and advertising revenue on the giant social media platform known as Facebook. But the defendants are not normal competitors; instead, through a private arrangement with Facebook, the defendants have gained the power to actually remove competitors from the marketplace, a power they both exercised in suspending Owens' ability to advertise on the platform. This is not free speech; it's unfair competition and tortious interference with Owens' ongoing and prospective business arrangements with and through Facebook.

There are two sets of contracts at issue in this matter: one between Facebook and the defendants Lead Stories and Gannett (the "Fact-Check Contract"), and the other between Facebook and the plaintiffs (the "Owens Contract"). The Fact-Check Contract gives the defendants the power to require Facebook to breach the Owens Contract. This is a problem because the defendants and plaintiffs are in competition with each other. These contracts together give one competitor, the defendants, the ability to eliminate the other, and even worse, facilitates the actual transfer of customers from the one to the other.

Defendants accomplish this exercise of their contractual power with but one word: "False." If the fact-checker pronounces a certain post to be "false," then by contractual obligation Facebook will take action against the poster. It does not matter if the subject post is actually false, or true, or is merely a matter of opinion. It is not the content or truth of the label "False" that matters; it is the word itself that leads to adverse consequences. But because the consequences are triggered by a word, the defendants have attempted to cloak their tortious conduct behind the protections of the First Amendment.

Some torts are produced by words.[1] When a person uses words to commit a tort, such as with libel, slander, interference, or invasion of privacy, that person

[1] *See* Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability* ["*First Amendment Imperialism"*], 98

cannot automatically immunize herself from liability by claiming her tortious words comprise protected speech. As the Supreme Court has admonished, tortious words have no constitutional value. *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."). For the same reason that words that constitute the "instrumentality of the tort" are admissible as non-hearsay, they are also not protected by a constitutional defense or other privilege: they are significant not for their content, but for the very fact that they were made.

Many defendants have tried to cloak their unlawful words in the banner of the First Amendment: they have argued that their libelous statements are protected speech;[2] that their copyright infringement is protected speech;[3] that their statements that create an offensive work environment are protected speech;[4] that their treasonous statements are protected speech;[5] that their transmission of child sexual

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Tex. L Rev. 813, 817 (2020) ("Many torts involve speech. Even the most familiar and most common tort, simple negligence, sometimes causes harm through speech. For example, if a ladder owner tells someone that it is safe to use a ladder when the owner should know that the ladder has a weak rung, the owner can be held liable for negligence if the user is injured after stepping on the rung.").

[2] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[3] *E.g.*, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555-56, 569 (1985).

[4] *E.g.*, *Baty v. Willamette Indus.*, *Inc.*, No. 96-2181-JWL, 1997 U.S. Dist. LEXIS 8031 (D. Kan. May 1, 1997) ("[S]imilar to blackmail or threats of violence, discriminatory conduct in the form of a hostile work environment are not protected speech…."); *see also R. A. V. v. St. Paul*, 505 U.S. 377, 389 (1992).

[5] *See, e.g., Scales v. United States*, 367 U.S. 203, 228 (1961).

depictions is protected speech;[6] that writings that explain how a crime can be committed is protected speech;[7] and that their statements comprising tortious interference is protected speech.[8] *See First Amendment Imperialism*, 98 Tex. L. Rev. 813, 819 (2020) (arguing that it would make little sense, as a matter of tort or constitutional law, to restrict liability for certain torts, including tortious interference, on First Amendment grounds). If this Court were to apply a "free speech" defense to tortious interference claims as the defendants request, it would "weaponize the First Amendment" in a way that "unleashes judges, now and in the future, to intervene in economic and regulatory policy." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

Commentators have searched for an explanation of these failed attempts to cloak unlawful, tortious behavior as "free speech." The most common description is that the words in these cases constitute "conduct," not "speech." Put another way, these tortious words are, obviously, "speech" as a matter of form and expression; but because they are used to trigger or create something unlawful, they are not the type of speech protected by the First Amendment.

The defendants argued below that the claim for tortious interference is based on the content of their speech, specifically that they published articles disagreeing

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[6] *See, e.g., New York v. Ferber*, 458 U.S. 747 (1982).
[7] *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).
[8] *Blatty v. New York Times Co.*, 728 P.2d 1177, 1181 (Cal. 1986).

with Owens' perspectives on the method of tabulating COVID-related deaths and that this disagreement, like any such exchange of views, is protected by the First Amendment. (*Id.* A–340-345, A–974). Most emphatically, that is not an accurate description of this case. Many people disagree over all aspects of the COVID pandemic, from its seriousness to its prevention, to the role of government, and to the effectiveness of remedies. All such disagreements lie in the very center of protected speech. Were these articles just one more perspective on this huge, international catastrophe, no lawsuit would have been brought, just as Owens has sued not one of the many other publications that disagreed with her views. The suit against Gannett is particularly illustrative: plaintiffs did not allege defamation against Gannett, brought no "sister" count, such as false light or trade libel, against Gannett for its speech, and have not complained about the content of Gannett's speech nor its right to publish it. The case has nothing to do with the content of Gannett's speech.

The difference here is that the words used by defendants triggered an adverse response from Facebook, as each defendant knew it would. (*E.g.*, *id.* A–610). By their Fact-Check Contracts with Facebook, when one of these two third-party "fact checkers" signals to Facebook that a particular post is "false," then Facebook, pursuant to its contract, will take adverse steps against the poster. (*Id.* A–609-614). It will threaten adverse consequences if the post is not removed; it will affix a

superimposed label of "FALSE" over the Facebook page and over each page of the targeted material; it will attach a warning to any emails that forward the targeted post to other users. (*Id.*). Most significantly, it will add, again over the top of the post, a link to the "fact-checking article" that appears on the Gannett or Lead Stories website. (*Id.* A–603-04, A–609-610, A–633-34). If compliance is not reached, Facebook will "demonetize" the poster, stripping the offending Facebook contributor of the ability to advertise, thus ending the poster's ability to profit. (*Id.* A–609-614). Facebook will even threaten to ban the user outright. (*Id.*).

Notably, Facebook will take all these steps not on its own volition, but on the word of the fact-checker Lead Stories or Gannett. The proof is in the pudding. When Owens complained repeatedly to Facebook about its mistreatment of her contributions, Facebook replied to Owens that she had to protest or appeal her Facebook punishment to the fact-checker defendants, not to Facebook. (*Id.* A–622-23, A–669-676, A–698-702). Facebook stated that, if the fact-checker would allow a reduction in sentence or change in outcome, then Facebook would go along accordingly. (*Id.*). In fact, after Owens appealed her punishment to Lead Stories, Lead Stories decided to reduce her sentence, agreeing to change the "False" label to the somewhat more lenient "Partly False" category. (*Id.* A–622).

These are no small matters. Owens' followers number is in the millions; her revenue from her Facebook page totals hundreds of thousands of dollars. (*Id.* A–

580-81, A–620-621). Her readership presents a lucrative target. The superimposition over her Facebook posts of links to competing stories that appear on the defendants' web pages has the effect of redirecting valuable users and visitors away from her page and over to the competing web pages of the defendants. In the internet world, visitors mean advertising revenue and percentage shares of referred purchases. Visitors are the coin of that realm. By signaling Facebook to take action against Owens, the defendants enriched themselves, parasitically stealing away her revenue source.

It is important to note that the Fact-Check Contract between Facebook and the defendants lies at the heart of the matter. It was not that the defendants called Owens' post "false," or that they disagreed with her substantively. Many published articles do likewise. The tortious interference claims are not, as the court below stated, "based on defendants' injurious *false* statements." (*Id.* A–953 (emphasis added)). The truth or falsity of the defendants' statements is irrelevant. The tort of interference is present because the defendants have an agreement with Facebook to cancel Owens on their say-so. The trigger word or signal for Facebook to cancel a competitor is "false," but it could have been any word, communicated publicly or privately. By uttering that word, the defendants can and did temporarily force their competitor out of business by causing Facebook to breach its contract with Owens.

The Opinion cites to the decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) for the proposition that plaintiffs could not recover for the tort of interference with business relations stemming from defendant's civil rights boycotts, an exercise in free speech. (App'x at A-975). But the Opinion reads *Claiborne* incorrectly; the opinion by the Supreme Court is drawn more narrowly. As the *Claiborne* court explained, "[w]hile the State may legitimately impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity [under the First Amendment]; only those losses proximately caused by the unlawful conduct may be recovered." *Claiborne*, 458 U.S. at 913. In other words, the *Claiborne* court was drawing a distinction between direct and consequential damages; the defendant would be liable for damages it directly caused (should the protests turn unlawful and cause damage, such as to property), but not for the indirect or consequential injuries. In this matter, the bulk of Owens' injuries are a direct result of the unlawful conduct of defendants and are not consequential. As was explicitly agreed to in the Fact-Check Contract between the defendants and Facebook, upon defendants' notification, Facebook would proceed to impose restrictions and banishment upon those competitors targeted by the defendants. This result was a direct and foreseeable consequence of defendants labeling of Owens' posts as false, and the defendants knew it, as the Amended Complaint alleges. (*E.g.,* App'x at A-610). Once again, it is not the

protected exercise of their First Amendment rights that caused injury; it was their Fact-Check Contract with Facebook that did. That agreement gave defendants the ability to inhibit and even remove a competitor from the marketplace for internet readers and advertisers. When the publishers agreed to those Fact-Check Contracts with Facebook, they no longer were mere participants in the world of online debate. They gained real market power to shut down their competition.

The fact that one of the defendants, Lead Stories, is also being sued for defamation does not mean, as the trial court held, that the "gravamen" of this lawsuit is an allegation of a false statement. Unlike the several decisions cited in the Opinion that decline, properly, to impose tort liability for protected speech, *see Blatty v. New York Times Co.*, 728 P.2d 1177 (Cal. 1986) (en banc) (defendant failed to list plaintiff's book as a "best seller"); *Jefferson City School District No. R-1 v. Moody's Investor's Services, Inc.,* 175 F.3d 848 (10th Cir. 1999) (defendant published an article negatively evaluating a bond issue), the truth or falsity of defendants' statements is entirely irrelevant to the tortious interference claims. Owens is not arguing that the defendants used a series of false statements that consequentially caused interference with her contract and business relations. The gravamen of the interference claims is that the defendants used their Fact-Check Contract with Facebook to assert market power directly over a competitor. This is unfair competition. The Fact-Check Contracts effectively barred Owens from her most

"cost-efficient" "means of distribution." *United States v. Microsoft Corp.*, 253 F.3d 34, 64 (D.C. Cir. 2001) (en banc) (per curiam). Indeed, "[t]he essential element separating unfair competition from legitimate market participation . . . is an unfair action on the part of the defendant by which he prevents plaintiff from legitimately earning revenue." *EDIX Media Group, Inc., v. Mahani*, 2006 WL 3742595, at *11 (Del. Ch. Dec. 12, 2006).

The Opinion repeatedly refers to the proposition that "speech protected by the First Amendment is not enough to constitute an essential element of improper interference." (App'x at A-980). This is true; protected speech is "not enough." Here, Owens has more: the agreement between the defendants and Facebook to preclude the distribution of Owens' competing articles.

The Superior Court found that the defendants' conduct was not wrongful or tortious because it was protected by the First Amendment. Once the inapposite First Amendment defense is put to the side, the Amended Complaint clearly satisfies all the elements for a tortious interference claim, as was argued fully below. Delaware has adopted the RESTATEMENT (SECOND) OF TORTS ("RESTATEMENT (SECOND)") §766 (1979), which defines tortious interference with contract as:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary

> loss resulting to the other from the failure of the third person to perform the contract.

Irwin & Leighton, Inc. v. W.M. Anderson Co., 532 A.2d 983, 992 (Del. Ch. 1987); *Grand Ventures v. Paoli's Restaurant*, 1996 Del. Super. LEXIS 3, *8 (Del. Super. Ct. Jan. 4, 1996) (discussing RESTATEMENT (SECOND) §766 (1979)); *Kt4 v. Palantir Technologies, Inc.*, Super. Ct. No.: N17C-12-212 EMD CCLD, 2018 Del. Super. LEXIS 365, at *14–15 (Aug. 22, 2018).

The elements of this claim are: (1) a valid and enforceable contract; (2) defendant's knowledge of a contract; (3) an intentional act that is a significant factor in causing the breach of contract, (4) lack of justification, and (5) injury. *Thomas v. Hartford Mut. Ins. Co.*, 2004 Del. Super. LEXIS 151, at *13 (Del. Super. Ct. Apr. 7, 2004). To be liable for tortious interference, the defendant must have committed "wrongful conduct." *Id.*

Delaware follows the RESTATEMENT (SECOND) approach, which defines "wrongfulness" with a list of seven factors, including "the nature of the actor's conduct" and "the actor's motive." *ASDI, Inc. v. Beard Research, Inc*., 11 A.3d 749, 751 (Del. 2010). The new Restatement, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM ("RESTATEMENT (THIRD)") §§ 16–17 (2018 Draft), clarifies those factors, grouping them into three categories that are "wrongful": (A) where the defendant acted for the purpose of appropriating the benefits of plaintiff's contract; or (B) where the defendant's conduct constituted an independent and intentional

legal wrong; or (C) where the defendant engaged in conduct for the sole purpose of injuring the plaintiff. RESTATEMENT (THIRD) §§ 16–17 (2018 Draft).

The defendants wrongfully and intentionally interfered with plaintiffs' contract with Facebook both to "appropriate the benefits" of that contract, and "for the sole purpose of injuring" a journalistic competitor. Defendants caused Facebook, at the instigation of their fact-check articles, to impair and ultimately suspend Owens' ability to derive revenue from this valuable social media platform. The Amended Complaint satisfies each element of the claim. (App'x at A–628-29). The Superior Court duly found that each element was properly pled and withstood the motion to dismiss, except for the conclusion that the defendants' speech was protected by the First Amendment. (*Id.* A–979-980).

Owens' other tortious interference claim, for interference with prospective business relations, received similar resolution on the motion to dismiss. The trial court found that the elements of the claim had been met, but that the First Amendment again provided an absolute defense. (*Id.* A–981). Once this inapplicable defense is removed, the claim is well-pled.

One additional consideration with respect to the trial court's conclusion on "wrongfulness" bears mention. Under well-settled law, a motion to dismiss is not the appropriate avenue to challenge this highly factual determination. *WaveDivision Holdings, LLC v. Highland Capital Mgmt. L.P.*, No. 08C-11-132-JOH, 2010 Del.

Super. LEXIS 126, at *23 (Super. Ct. Mar.31, 2010). Specifically, following the RESTATEMENT (SECOND) approach, Delaware requires consideration of multiple factors to assess the wrongfulness of defendant's conduct. *See International Business Machines Corp. v. Comdisco, Inc.*, Super. Ct. NON-ARBITRATION C.A. NO. 91C-07-199, 1993 Del. Super. LEXIS 183, at *64 (June 30, 1993) (discussing RESTATEMENT (SECOND) § 767 (1979)) (identifying seven factors focusing on the nature of and intent behind defendant's conduct). Resolution of the wrongfulness of the defendants' conduct requires jury deliberation. A motion to dismiss, as the court in *WaveDivision* stated, "is not the appropriate avenue to challenge this highly factual determination." *WaveDivison*, No. 08C-11-132-JOH, 2010 Del. Super. LEXIS 126, at *23.

II. IN THIS CONTEXT, THE ACCUSATION OF "HOAX" IS NOT "RHETORICAL HYPERBOLE."

A. Question Presented.

In the context of an article titled "Fact Check," which purports to examine the factual evidence for every one of the factual claims made in the article or post it reviews, is the statement that the writer of an article is guilty of a "hoax" merely an expression of rhetorical hyperbole? (App'x at A–970).

B. Standard of Review.

The standards governing a motion to dismiss for failure to state a claim are well-settled. First, all well-pleaded factual allegations are to be accepted as true. Second, even vague allegations are to be considered "well-pleaded" if they give the opposing party notice of the claim. Third, the court must draw all reasonable inferences in favor of the non-moving party. Fourth, dismissal is inappropriate unless the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof." *Savor, Inc. v. FMR Corp*., 812 A.2d 894, 896–897 (Del. 2002). Delaware is a "notice pleading jurisdiction and the complaint need only give general notice as to the nature of the claim asserted against the defendant in order to avoid dismissal for failure to state a claim." *E.g.*, *Dolan v. Altice USA, Inc.*, 2019 Del. Ch. LEXIS 242, at *6 (Del. Ch. June 27, 2019) ("Delaware follows a simple notice pleading standard.") (internal quotations omitted)). Under Delaware's judicial system of notice pleading, a plaintiff need not

"plead evidence." *VLIW Technology, L.L.C. v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003). Therefore, on a motion to dismiss for failure to state a claim, the "plaintiff's burden to survive dismissal is low." *E.g.*, *Pandora Jewelry, Inc. v. Stephen's Jewelers, LLC*, 2012 Del. C.P. LEXIS 86, *16 (Del. C.P. June 22, 2012) (internal citations omitted). The Court must merely determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof." *Id.* (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

This Court is to review a trial court's grant or denial of a dispositive motion *de novo*, permitting a review of the entire record, including the pleadings and any issues such pleadings may raise, as well as the trial court's order and opinion. *Pike Creek Chiropractic Center v. Robinson*, 637 A.2d 418, 420–21 (Del. 1994); *In Re Kraft-Murphy Co., Inc.*, 82 A.3d 696, 702 (Del. 2013). From this review, the Supreme Court may draw its own conclusions with respect to the facts if the findings below are wrong and if justice so requires, particularly where the findings arise from deductions, processes or reasoning, or logical inferences. *Dutra de Amorim v. Norment*, 460 A.2d 511, 514 (Del. 1983).

C. Merits of Argument.

To be actionable, the statement must not constitute mere "rhetorical hyperbole." "Rhetorical hyperbole" is not, as is sometimes misunderstood, the semantical equivalent to the so-called "opinion" defense: "rhetorical hyperbole" is

significantly narrower than the broad category of opinion statements. As the Supreme Court made clear in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990), statements of opinion are actionable as defamation when they imply false statements of fact. Thus, the abstract distinction between "opinion" and "fact" is a false choice; legally speaking, there is no distinction between statements of fact and statements of opinion that imply underlying facts. *Milkovich*, 497 U.S. at 18 (holding that "expressions of 'opinion' may often imply an assertion of objective fact."). A statement of fact or a fact implied in an opinion is actionable if it is susceptible of being proved true or false. *Id.* at 21. The context in which the statement is made also matters. Statements appearing in a place or format that usually contains opinions, such as an editorial, on the sports page, or in the comment section of a website, can all comprise statements of hyperbole because the context or location of the statement adds to that conclusion.

In this case, the boundaries of the "fact vs. opinion" issue are not even in consideration. First, the context in which the claim of "hoax" appears is the opposite of a location for opinion, satire, or comedy. Under its own terms, the Lead Stories article solemnly promises that it will "fact check" the Owens' post, subjecting the claims she makes on her Facebook entry to scientific and investigative scrutiny, and even providing "updated" versions as additional information become known. The text of the article also evidences its seriousness: it reviews relevant academic and

scientific literature, quotes from interviews with experts in the field, and weighs in on the merits of every factual proposition made in the Owens' post. It is in this unquestionably serious, heavily researched context that Lead Stories concludes that Owens' post constitutes a "HOAX," requiring a "HOAX ALERT" warning to be superimposed over Owens' post. No reasonable reader would have understood any part of Lead Stories' article to be mere opinion, satire, comedy, or rhetorical hyperbole.

Even apart from the context, the term "hoax" itself is factual claim: it is fully capable of being proved true or false. It is a noun, not an adjective, and denotes specific behavior or conduct. One who commits a hoax knows the truth, but purposely deceives the listener. The word denotes a scheme or plan to deceive by fraudulent misrepresentations. In the context of an international pandemic, a perpetrator of a "hoax" about the cause or effect of that pandemic would be engaged in inhumane and profoundly malicious conduct. Owens either did or did not commit this malicious, inhumane conduct; it is an objective matter, and an examination of her conduct can show the claim of "hoax" to be true or false. In level of abstraction, "hoax" differs little from the term "fraudulent" that is proved or disproved in courts regularly. Even if one argues that "hoax" has aspects of opinion, nonetheless this particular opinion, especially in the serious context in which it was uttered, connotes

or implies assertions of fact about Owens' knowledge and her purposes that themselves are capable of being proved true or false.

To be actionable, a statement of fact must also be capable of a defamatory meaning. To accuse someone of committing a hoax is capable of such a meaning. Indeed, it is so defamatory as to constitute defamation per se under Delaware law: it accuses Owens, a professional writer and speaker, of occupational misconduct. *Optical Air Data Systems, LLC v. L-3 Communications Corp.,* 2019 WL 328429, at *7 (Del. Super. Ct. Jan. 23, 2019). It immediately subjects her to public ridicule, shame, and disrepute. In fact, as a direct result of the "fact check" allegations and Facebook's subsequent public discipline of Owens, she did suffer public ridicule and shaming.

In support of its conclusion that "hoax" is mere rhetorical hyperbole, the Opinion cites to a fifty-year old decision. (App'x at A–968). That case involved the oral description of the plaintiff's negotiating tactics as "blackmail," and the description was uttered by a member of the public participating in a governmental hearing. *Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler*, 398 U.S. 6, 7 (1970). At bottom, that defamation case involved libel in the form of slander. Unlike written libel, defamation in the form of slander has always been accorded wider protection from liability; written libel is more likely to be actionable. *Spence v. Funk*, 396 A.2d 967, 970 (Del. 1978) ("the scope of liability for libel is generally broader

than for slander . . .. This general rule of greater liability is almost universally followed."). As the Supreme Court later stated about its decision in *Greenbelt*, "the word 'blackmail' in these circumstances [a disputatious public meeting] was not slander when spoken, and not libel when [the words spoken at the meeting were subsequently] reported . . ., as the words reported were 'accurate and full.'" *Milkovich*, 497 U.S. at 17 (quoting *Greenbelt*, 398 U.S. at 13).

Second, in citing to this particular decision, the Opinion fails to take proper account of significant developments in the law with respect to the "opinion" issue over the last fifty years. The chief development since 1970 is that the old "fact vs. opinion" discussion is antiquated and no longer legally relevant; as the Supreme Court stated in *Milkovich*, despite what it termed "dictum" in previous opinions, there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Id.* at 18. To the contrary, held the Court, expressions of "opinion" are actionable if they "imply an assertion of objective fact." *See Agilent Technologies, Inc. v. Kirkland*, 2009 WL 119865 (Del. Ch. Jan. 20, 2009) (unreported) ("At this stage in the proceedings [on a motion to dismiss], I cannot rule out the reasonable possibility that Agilent's alleged statement, in the context it was made, implied [an assertion of objective fact]."). For its example of an "opinion that implies an assertion of objective fact," the Court in *Milkovich* said that liability would attach for the statement "[i]n my opinion John Jones is a liar." *Milkovich*, 497 U.S. at 18.

As the Court stated, simply prefacing the statement with "in my opinion" does not dispel the implication of the statement and is just as injurious as the statement "Jones is a liar." *Id.* As far as the noun "liar," the Court reasoned that, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if assessment of them is erroneous, the statement may still imply a false assertion of fact." *Id.* at 18-19. The *Milkovich* court distinguished *Greenbelt*, reasoning that the term "blackmail" made by an unnamed audience member in the context of a public hearing "cannot 'reasonably [be] interpreted as stating actual facts" about an individual. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (involving ad parody).

The statement that Owens is guilty of a "hoax" is not a parody, and it is not fanciful hyperbole. It arises in the context of an article that claims it is providing a "fact check" to Owens' Facebook posts; the article is written in a serious tone, examining each of Owens' contentions separately and comparing them to the opinions of experts; experts were consulted in writing the article and were quoted extensively within it. (App'x at A–605, A–656-662). For Lead Stories then to conclude that Owens is guilty of a "hoax," sufficient to paste a "HOAX ALERT" image superimposed over every page of Owens' articles, is clearly a statement that is factual, that "implies an assertion of objective fact," and that is actionable. By comparison, where a publication accused a public figure of telling a "lie," and even

did so in an editorial appearing on the sports page, the statement was held to be actionable as defamation. *Milkovich*, 497 U.S. at 21-22.

As the Court has made clear in the fifty years since *Greenbelt*, the proper test for actionable defamation is not "fact vs. opinion." Rather, any statement, no matter if one might classify it as fact or opinion, can be actionable as defamation if its "connotation . . . is sufficiently factual to be susceptible of being proved true or false." *Milkovich*, 497 U.S. at 21. In reference to the accusation of "liar" in *Milkovich*, the court wrote, "[a] determination whether petitioner lied in this instance can be made on a core of objective evidence by comparing, *inter alia*, petitioner's testimony before the OHSAA board and his subsequent testimony before the trial court." *Id.* The *Milkovich* opinion analogized the determination of whether or not the plaintiff was a "liar" to a perjury action, citing *Scott v. News-Herald*, 496 N.E.2d 699 (Ohio 1986), in which the truth or falsity of the accusation would be resolved. *Id.* at 8. Similarly, whether or not Owens is in fact guilty of committing a "hoax" can be decided in this defamation action. If allowed, she will provide objective evidence that will show the jury her research, the academic scholarship which she read and to which she cited, and other evidence of the sincerity of her intentions. She did not commit a hoax.

III. LEAD STORIES MADE OTHER DEFAMATORY STATEMENTS.

A. Question Presented.

Apart from the allegation of "hoax," which the court below held to constitute mere "hyperbole," did Lead Stories' article contain other defamatory statements? (App'x at A–961-970).

B. Standard of Review.

See above, Section II.B.

C. Merits of Argument.

The Superior Court dismissed three other instances of defamation cited in the Amended Complaint. Lead Stories accused Owens (1) of being the person who had "originated" the claims that Lead Stories identified as a hoax; (2) of "attempt[ing] to downplay the severity" of the COVID-19 pandemic; and (3) of other blatant inaccuracies. (*Id.* A–970). With respect to the first instance, where Lead Stories accused Owens of "originating" this hoax, the trial court held that the statement "does not convey any facts that are untrue or capable of defamatory meaning as it does not injure Owens' reputation in any sense." (*Id.* A–962). With respect to statements two and three, the trial court found that, despite plaintiff's allegations that the statements are false, "these allegations are negated by the Exhibits . . . to the Amended Complaint." (*Id.*). The trial court erred in assessing the evidence pled in the Complaint. This Court should rule otherwise.

1. Owens as the "Originator" of a Hoax.

The first statement, that Owens was the "originator" of false claims about COVID, is actionable: it is false, defamatory, and injurious.

False. It is false because, as the Amended Complaint pleads, many other commentators and experts have been questioning the methods of counting COVID-caused deaths since the virus first appeared and transformed into an international pandemic. (*Id.* A–593-600). Owens cited to existing, published statements by reputable authorities in her Facebook posts. (*Id.* A–595, A–598-99). She was not the "originator" of this perspective; her contentions were not the first ones made along similar lines.

Defamatory. Lead Stories' allegation is defamatory: it tends to subject Owens to public ridicule and contempt. As blameworthy as someone who knowingly repeats a false tale might be, even more reprehensible is the person who starts the falsehood. Tale bearers can be relatively blameless, merely dupes in a wider scheme. But the tale maker is the real culprit, and to accuse Owens of being the "originator" of this fabulous and nefarious "hoax" is to level a serious charge that would to the reasonable person cast Owens in a light that is particularly odious.

Injurious. Finally, as the Amended Complaint alleges, the claim that Owens originated this lie is clearly hurtful to her reputation and standing as a political

commentator and public intellectual who comments widely and authors serious books discussing current events.

All of these contentions are alleged in the Amended Complaint; all are supported by factual allegations. Yet without further explanation, the trial court stated with reference to the "origination" statement that, "I find no facts alleged . . . supporting Plaintiff's claim that [this] statement is defamatory or false." (*Id.* A–961). Instead of "no facts alleged," the Amended Complaint is full of such facts alleged. It alleges that the defendant accused Owens of originating this hoax (*Id.* A–606) and that such claim is false (*Id.* A–605). The Amended Complaint also cites to some of the existing literature supporting the proposition that other commentators and experts had espoused the same or a similar theory (*Id.* A–593-604). The Amended Complaint even cites to expert commentary *within Owens' Facebook posts* that refer to some of this existing literature (*Id.*); all of this other commentary exists, it exists in the real world as a matter of fact; yet the trial court states that it can see "no facts alleged" in the Amended Complaint in support of this claim.

The defendant Lead Stories claimed that Owens originated a hoax about COVID-19. (*Id.* A–606). That is a statement of fact; the trial court did not dispute that point. The Amended Complaint pleads that this statement of fact is untrue, and that its opposite is true. (*Id.* A–605-606). That allegation by itself is a factual allegation. It provides clear notice to the defendant of the issue at hand, well beyond

the minimal "reasonable conceivability" standard required under Delaware law. If needed, other factual allegations in the Amended Complaint support it. This finding should be reversed.

2. Owens Did Not "Downplay" or Otherwise Misrepresent the Reality of COVID-19.

In addition to accusing Owens of originating this hoax, Lead Stories also defamed her by stating that her posts were an "attempt to downplay the severity of a global infectious disease . . .." (*Id.* A–606). In granting the motion to dismiss this claim, the Superior Court held that Owens' posts cited expert opinions that did not support her conclusions, and thus Lead Stories' claims were true or substantially true because Owens' posts were false. (*Id.* A–962). In other words, respecting statements in categories two and three, the Superior Court stated that the reason these statements made by Lead Stories were not false is because Owens' Facebook posts were themselves false. (*Id.*).

Owens' posts were true or substantially true. One of Owens' posts states that deaths from COVID were being over-counted because, where a patient dies from other causes but has COVID, it is listed as the cause of death. (*Id.* A–593-600). The experts to whom she cites, namely Drs. Birx and Ezike, stated that "when a person who has a preexisting condition and COVID-19 dies, medical authorities in the United States count it as a COVID-19 death." (*Id.* A–598-599, A–964). Thus, despite the trial court's conclusions, the statement of the experts on the matter aligns exactly

with the statement made by Owens. Instead of "negating" the claims in the Facebook post, as the Superior Court held, the exhibits to the Amended Complaint support it. The Opinion appears to agree with this point, stating that the Lead Stories' article is in accord with the view expressed by the doctors and thus impliedly by Owens. Nonetheless, despite this apparent agreement on this fundamental point about the method of counting COVID deaths, Lead Stories pronounced Owens' point on this issue "false" and stated Owens is "attempting to downplay the severity" of the pandemic. (*Id.* A–606).

The Opinion also refers to Owens' Facebook post where she complains about the difficulty of determining precise figures for non-COVID-19 deaths, and states, "They are reporting ONLY on coronavirus deaths." (*Id.* A–964). But Owens' statement here is clearly hyperbole, making an exaggerated point about the immense public health focus on COVID deaths to the exclusion of everything else. Yet here both Lead Stories and, in review, the Opinion purport to "fact-check" this statement, reporting that, according to their research, medical authorities in the United States have not stopped counting deaths from other causes. By fact checking a statement that was obviously meant as argumentative hyperbole, Lead Stories, according to the trial court, had unearthed a "factual contradiction" sufficient to justify its damning accusation that Owens was attempting "to downplay the severity of a global infectious disease." The fact that the Opinion subsequently states that Owens'

argument on this point is clearly hyperbolic (*Id.* A–979) does not alter the fact that the Court relied on this statement, and Lead Stories' "fact check" of it, to find Owens' posts untruthful.

In addition, the Opinion reviews the article by Dr. John Lee, cited by Owens in her researched Facebook post. (*Id.* A–955, A–962-96, A–967). Because Dr. Lee is a British medical authority and NHS consulting pathologist, he references U.K. standards of reporting COVID deaths. Dr. Lee concludes that deaths from COVID will be overcounted in assessing the cause of death because COVID, unlike other respiratory diseases, has been listed as a "notifiable disease," specifically one of diseases available on the checklist of "causes of death." (*Id.* A–646-47). Importantly, this list of "notifiable diseases" is a shared standard,[9] not a local one, and therefore Dr. Lee's conclusion is relevant for the U.S., for which Owens cites it. (*Id.*). In short, because of the truncated list of notifiable diseases, the actual cause of death and the reported cause of death often differ, and especially so, according to Dr. Lee, with respect to deaths attributed to COVID-19.

[9] *See* CENTERS FOR DISEASE CONTROL, *Frequently Asked Questions About Estimated Flu Burden*, https://www.cdc.gov/flu/about/burden/faq.htm (last visited Sep. 27, 2021) (noting that the CDC doesn't count flu deaths; it uses a formula to estimate them).

Dr. Lee's article provides compelling support to Owens' stated perspective, and she cited it accordingly. Yet the Opinion inexplicably dismissed this evidence, stating that because Dr. Lee is from the U.K., and because the U.K. uses a different method for tabulating disease-related deaths (which was not the point for which Owens cited to his work), then his article "does not mean that he argued that the U.S. method overstates COVID-19 deaths." (*Id.* A–963-964). This is true; his article does not necessarily offer an opinion on the particular U.S. method for counting deaths. But this is not the standard for the admissibility of relevant evidence, nor is it the proposition for which Owens cites his work. His article does make the comment, a comment made widely in the popular press, that listing COVID-19 as a "notifiable disease" will ineluctably lead to overcounting, especially when other respiratory diseases, most notably the common flu, are not listed. (*Id.* A–646-47). This is the case in the U.K. and the U.S. (*Id.* A–648). It is a real issue of which the public should be aware. Owens helped to bring this information to the public. To dismiss Dr. Lee's important contribution to the issue on the irrelevant grounds that the U.K. and U.S. count deaths differently is error; for the trial court to step into this intensely factual issue over the truth of COVID reporting and resolve it, contrary to the factual pleadings that the court was bound to accept as true, and in applying the flexible "reasonable conceivability" requirement for pleading in Delaware, is error again.

Even if the statement is both factual and defamatory, no liability for defamation obtains where a statement is determined to be true or substantially true. *Preston Hollow Capital LLC v. Nuveen LLC*, 216 A.3d 1, 9 (Del. Ch. 2019) (citing *Riley v. Moyed*, 529 A.2d 248, 253 (Del. 1987)). Lead Stories' accusation about Owens' motives in writing her posts is false, and it is false because Owens' statements are not false. They are true or substantially true, supported by ample research and citation to relevant, important medical authorities. Her statements provide no evidence or suggestion of an "attempt to downplay the severity" of COVID-19, and thus Lead Stories' statements are not protected by the defense of truth.

IV. THE SUPERIOR COURT ERRED IN HOLDING THAT NO CONDUCT AMOUNTED TO "UNFAIR" COMPETITION.

A. Question Presented.

Where one internet competitor enters an agreement with a social media platform to direct that social media platform to inhibit or remove another internet competitor from the marketplace, does this conduct amount to unfair competition? (App'x at A–982).

B. Standard of Review.

See above Section II.B.

C. Merits of Argument.

The Superior Court in its Opinion struck the claims against both defendants for unfair competition on the grounds that neither defendant conducted itself in a way that would be "unfair." (*Id.*). Their conduct was not "unfair," according to the trial court, because, again, the defendants' conduct was protected by the First Amendment. (*Id.*).

Were both defendants merely ordinary competitors in the marketplace of ideas, and both had published articles in opposition to Owens' posts, then there would be no claim of unfair competition. Commentators and publications differ on such important matters all the time; indeed, Owens is quite accustomed to confronting competing or contradictory perspectives in political discourse. But obviously such was not the case. Rather than merely acting as a participant in the

ongoing battle in the marketplace of ideas, both defendants have a unique market advantage: they can "win" that battle, and decisively, not by proving with fact and argument the superiority of their position, but by silencing their opposition. Because of their Fact-Check Contracts, both defendants can, with a mere verbal signal to Facebook, direct it to hinder or even banish altogether the contributions of their competitors. (*Id.* A–609-614). Even worse, they can, as they did here, actually cause a link to their websites to be superimposed over every page of the targeted post. (*Id.* A–611-12). Their Fact-Check Contracts give them the authority to remove their competitors from the marketplace and have their competitor's customers sent to their own store.

This is not fair competition; this is its opposite, and egregiously so. Most claims of unfair competition involve product disparagement, where one competitor makes false claims about a competitor, or involve the theft of trade secrets or use of ill-gotten confidential information. Here, the defendants did not have to steal Owens' customers through such indirect means. They did not have to disparage her product nor sneak away with her customer lists. Instead, they accomplished the same purpose, but now directly, quite literally causing her storefront to be closed and her front-window sign replaced with an arrow pointing to their doors, just a click away.

By entering a private agreement with Facebook, a publisher like Gannett or Lead Stories gains real market power. When Gannett, for example, selects a

Facebook post for "fact checking" and concludes that the post is in Gannett's estimation "false," then Facebook is now triggered to act on Gannett's advisement, proceeding to limit or ban the post as it sees fit. By entering into this contractual partnership with Facebook, Gannett abandoned the usual journalistic role of publishing newsworthy articles protected by the First Amendment. Instead, Gannett now has the power to exercise real authority in the lucrative business marketplace for website visitors and advertising revenue, choosing which commentators delivering which messages to single out for its review and possible banishment. Gannett was not writing an article to merely counter "bad information," as it now claims; instead, Gannett was taking real and predatory steps to eliminate the authors of that information from continued participation in the huge internet marketplace for political commentary.

This is a new role for a media company, one from which both defendants profit financially. They have stepped out of their journalistic role. No longer merely a disinterested reporter or discussant of world affairs publishing its reportage, each defendant now has real market power, and has a direct say in how the proceeds of internet traffic are distributed. Defendants have shown themselves to be voracious business competitors; they cannot hide behind the freedom of the press when called out for their voraciousness. Defendants are competitors with Owens in the marketplace for clicks. Like all competitors, they must adhere to legal competition

ethics in conducting their business affairs. Like any other business, if they tortiously interfere with the business opportunities of others or otherwise engage in unlawful unfair competition, then they must answer for their conduct.

CONCLUSION

The Superior Court took great pains to determine "which side" of this ongoing debate about the severity and impact of COVID on illness and death is "correct." That issue is quite beside the point. First, Gannett is not being sued for defamation. Owens does not allege that Gannett made a false and defamatory statement of fact. Instead, the Amended Complaint against Gannett alleges tortious interference and unfair competition: that Gannett used its unique market position, created by virtue of its contract with Facebook, to cause Facebook to breach its contract with Owens and drive Owens out of the marketplace for clicks and the competition for website visitors and advertising revenue. Pursuant to their agreement, Gannett signaled to Facebook by posting a negative fact-check review of Owens' post, terming it "false." It does not matter whether Gannett's description was true of false, or opinion or factual. It was not protected speech. It was conduct, specifically the tortious conduct that triggered the interference with contract and with business relations.

With respect to Lead Stories, Owens did bring one count of defamation along with the claims for tortious interference and unfair competition. But that count of defamation is specific: it refers to Lead Stories charging Owens with committing a hoax, with originating this hoax, and with attempting to mislead her readers by downplaying the severity of the disease. These allegations by Lead Stories are factual and defamatory. Just because the rest of Lead Stories' fact-check article

might be considered fair debate does not color the proper characterization of these particular charges. As the Complaint makes clear, Lead Stories' article contains several defamatory statements, and the jury in this matter will eventually address their character and injuriousness. Nonetheless, the most glaring example of defamation, the allegation of "hoax," is by itself sufficient to reverse the decision of the Superior Court on the defamation claim and remand this matter for trial.

Respectfully submitted,

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