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Case Number 253,2021

N THE SUPREME COURT OF THE STATE OF DELAWARE

CANDACE OWENS, in her individual capacity, and CANDACE OWENS, LLC, a Delaware limited liability company,	)	No. 253,2021
Plaintiffs-Appellants,	)	Case Below:
v.	)	Superior Court of the State of Delaware
	)	C.A. No. S20C-10-016-CAK
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.	)	

APPELLEE *USA TODAY*'S ANSWERING BRIEF ON APPEAL

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Defendant-Appellee Gannett Satellite Information Network, LLC d/b/a USA Today ("*USA Today*") respectfully submits this Answering Brief in opposition to the Opening Brief[1] filed by Plaintiffs-Appellants Candace Owens and Candace Owens, LLC ("Plaintiffs").

NATURE OF PROCEEDINGS

Contrary to what Plaintiffs would have the Court believe, this appeal is about *USA Today*'s speech — not its conduct. The theory of Plaintiffs' tort claims is that their alleged injury flows directly from what *USA Today* reported in an April 30, 2020 news article that analyzed data from the CDC and concluded that a Facebook post by Plaintiffs, which accused the federal government of undercounting annual flu deaths to exaggerate the public health threat posed by the COVID-19 pandemic, presented erroneous information. Plaintiffs do not challenge the truth of what *USA Today* published. Accordingly, their common law tort claims run headlong into the First Amendment's protection of the right to communicate truthful information on public issues.

Try as they might, and no matter how they style their claims, Plaintiffs cannot overcome this bedrock constitutional principle. Truthful news reporting is not actionable under collateral tort theories, regardless of how a would-be plaintiff might

[1] Plaintiffs' Opening Brief and Appendix are cited herein respectively as "(Op. Br.____)" and "(A-____)."

try to label them (*tortious*, *unfair*, *anticompetitive*, *etc.*). Moreover, as set forth below, this is especially so when the reporting at issue involves a public figure who challenges speech addressing a matter of public concern. *USA Today*'s challenged reporting is therefore clearly protected by the First Amendment, as the Superior Court correctly determined. It is not a close call.

Indeed, even after amending its complaint in the face of *USA Today*'s initial motion to dismiss, Plaintiffs were unable to plead facts that would overcome these First Amendment obstacles. Their pleadings offered no indication that anything in *USA Today*'s article was false, was published with actual malice, or was otherwise actionable. And their briefing in this Court offers no authority whatsoever to support their novel theories that true statements concerning a paramount public health issue amount to actionable torts so long as they come from so-called "market competitors," or that protected speech may somehow be transmogrified into proscribable "conduct." Nor is that complete absence of authority surprising, because no such authority exists. Plaintiffs' appeal therefore relies entirely on (a) platitudes without support; (b) conspiracies that defy logic; (c) outlandish comparisons to "copyright infringement," "child sexual depictions" and "treason" (Op. Br. 18-19); (d) gripes about Facebook (who they are estopped from suing) (*id.* 20-21); and (e) misguided and conclusory contentions about purported motives.

The Superior Court pointedly observed that "[t]he political aspects of this case are manifest but must be ignored in favor of application of the law" consisting of long-established First Amendment precedent. (A-931) Plaintiffs now ask this Court to do precisely the opposite, trivializing what they term the "First Amendment Defense" (Op. Br. 8) relied on by Superior Court and urging this Court to find that the truth of what *USA Today* published is "irrelevant." (*Id*. 22) This may be an unfortunate sign of the times.[2] News is fake, social media personalities cater to various political factions by touting "alternative facts," and grievances are amplified throughout the body politic. Thankfully, however, constitutional protection for true news reporting is neither as casual, marginal, or dispensable as Plaintiffs would have it. As far as the First Amendment is concerned, the truth matters.

In short, Plaintiffs' arguments have no traction in the law. Motives, whether perceived or real, do not amount to torts. Neither does truthful news reporting on a matter of public interest. The Superior Court recognized these fatal flaws in Plaintiffs' case when dismissing it for failure to state an actionable claim, and *USA Today* respectfully submits that this Court should affirm for the very same reasons.

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[2] *See, e.g., Folta v. New York Times Co.*, 2019 WL 1486776, at *9 (N.D. Fla. Feb. 27, 2019) ("Today, it seems that super-wealthy individuals — undeterred by the negative outcomes and market forces that used to prevent many defamation suits — can treat 'suing the press as an investment' and can pursue their objectives by funding cases and waiting for the right combination of issue, judge, and jury.").

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly determined that all claims asserted against *USA Today* are prohibited by the First Amendment. §§ I(A) – (C), *infra.*

2. Not applicable to *USA Today.*

3. Denied. The Superior Court correctly determined that all claims asserted against *USA Today* are prohibited by the First Amendment. §§ I(A) – (C), *infra.*

STATEMENT OF FACTS

I. BACKGROUND

For years, Plaintiff Candace Owens leveraged Facebook's platform to promote and enrich herself, boasting of her substantial pecuniary gains through use of the platform's Ads Tool. (A-621) But to participate in the platform she had to play by Facebook's rules, including accepting that:

> Facebook reserves the right to provide or restrict your access to the Ads Tool in its sole discretion at any time. During any period in which you have access to the Ads Tool, Facebook is not obligated to insert any Ads in your Content. Facebook and advertisers may block Ads in your Content for any or no reason, even if the Content otherwise complies with Facebook's terms or policies.

(A-366) Facebook exercised those reserved rights; Plaintiffs took umbrage. But because its user agreement protects Facebook from suit, Plaintiffs have turned to other avenues of continued self-enrichment, including *USA Today*.

A. The Parties

Candace Owens touts herself as a "prominent social media star" (A-581) who "offers her opinion on a variety of political issues."[3] (A-580) Owens recently authored a book, started the "Blexit" movement in 2018, and has her own

[3] The trial court held that Owens "is a public figure" for purposes of the First Amendment. (A-955) She has not challenged that finding on appeal and has thus accepted that designation and its legal consequences. *Morgan v. State*, 968 A.2d 248, 250 (Del. 2008) ("Because this argument is not briefed [on appeal], it is waived.") (citing *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997)).

eponymous podcast program. (A-580-581) Plaintiff Candace Owens, LLC is a "pass-through entity" that is "solely controlled and managed" by Owens. (A-583) Plaintiffs maintain a "popular Facebook page, which has approximately five (5) million active followers[.]" (A-581) Owens "herself writes the content that is published on the social media accounts managed by Candace Owens, LLC." (A-584) Plaintiffs contend that Candace Owens, LLC has a contract with Facebook pursuant to which it would be compensated for advertising appearing on Plaintiffs' Facebook page. (A-585)

As Plaintiffs acknowledge, *USA Today* "publishes a popular online and print newspaper throughout the United States that is viewed by millions of people every day." (A-588) *USA Today* "has its own website at www.usatoday.com, which is where it publishes its 'fact check' articles, as well as its other articles." (*Id*.) *USA Today* "is a member and 'partner' of Facebook's Third-Party Fact-Checking Program . . . [and] has an agreement with Facebook to publish fact-check articles on various Facebook and other internet posts." (*Id*.)

B. The First Facebook Post Concerning COVID-19 and Defendant Lead Stories' Article

On March 29, 2020, Owens published a post on her Facebook page that "outlined facts and her opinion surrounding the method U.S. government officials were using to count the COVID-19 pandemic death toll (the 'First Facebook Post')." (A-593) On April 1, 2020, Defendant Lead Stories published an article

entitled "*Fact Check: COVID-19 NOT Being Blamed For Deaths Primarily Due to Unrelated Causes*[.]" (A-604, 656-662) As a result of the Lead Stories article, Facebook placed a false information warning label on the First Facebook Post. (A-609) Plaintiffs allege that certain statements in the Lead Stories article are false and defamatory. (A-605-606)

C. The Second Facebook Post Concerning COVID-19

On April 28, 2020, Owens published a post on her Facebook page "that questioned the relationship between the counting of flu deaths and COVID-19 deaths in early 2020 (the 'Second Facebook Post')." (A-600-601) The Second Facebook Post stated:

> According to CDC reports—2020 is working out to be the lowest flu death season of the decade. 20,000 flu deaths took place before Covid-19 in January, and then only 4,000 deaths thereafter. To give you context: 80,000 Americans died of the flu in 2019.

(A-600) The Second Facebook Post incorporated the text of a tweet published by Owens on her Twitter account:

> Possibly the greatest trade deal ever inked was between the flu virus and #coronavirus. So glad nobody is dying of the flu anymore, and therefore the CDC has abruptly decided to stop calculating flu deaths altogether. Agreements between viruses are the way of the future.

(*Id.*)

According to Plaintiffs, the Second Facebook Post set forth Owens's "opinion" and stated that its purpose was "not to republish actual statistics but to raise an issue in an ongoing debate surrounding Covid-19." (A-601-602)

D. *USA Today*'s April 30, 2020, News Article

On April 30, 2020, *USA Today* published an article entitled "Fact Check: CDC has not stopped reporting flu deaths, and this season's numbers are typical." (A-607, 664-667) (the "Article")). The Article addressed two factual assertions in the Second Facebook Post: (1) that "the CDC has abruptly decided to stop calculating flu deaths"; and (2) that "2020 is working out to be the lowest flu death season of the decade." (A-600)

The Article quoted from the Second Facebook Post and indicated what other users had said about it: "Some Facebook and Twitter users questioned the validity of Owens' statistics. Others read between the lines of her sarcasm[4] to comment on what she may be implying." (A-664) It quoted a Facebook user's comment suggesting that other causes of death in addition to the flu were also classified as caused by COVID-19. (*Id.*)

Citing multiple research sources, the Article stated that "[a]ccording to CDC data, none of Owens's statistics is correct." (A-664) The Article then explained how the CDC tracks flu deaths and defines the flu season, and why Owens's claim that "80,000 Americans died of the flu in 2019" was incorrect. (A-665) The Article further explained that CDC was continuing to report flu deaths, and why Owens's

[4] At issue below was whether the Article "fact-checked" Plaintiffs' hyperbole. The trial court found it did not, A-978-980, and Plaintiffs have not challenged that determination on appeal, waiving the point. *Morgan v. State*, 968 A.2d at 250.

assertion that "20,000 flu deaths took place before Covid-19 in January, and then only 4,000 deaths thereafter" was wrong based on CDC data. (A-666) The Article then compared this flu season to those in the recent past based on CDC data, concluding that "this 2019-2020 flu season isn't shaping up to be the decade's most or least deadly." (A-667)

The Article concluded that "the claim that the CDC has stopped reporting flu deaths because the death rates are so low is FALSE because it is not supported by [*USA Today*'s] research," and provided a summary of the data. (A-667) The Article identified eleven "fact-check sources," including several CDC reports. (*Id*.) The Article did not suggest that Owens intentionally misrepresented CDC data or question Owens's motives behind her Facebook post. (*See generally id*.) The Article noted that *USA Today* reached out to Owens for comment, but she did not respond. (A-664)

As a result of the Article, say Plaintiffs, Facebook placed a "false information warning label" on the Second Facebook Post. (A-607-608)

E. Facebook's Demonetization of Plaintiffs' Account in May (or August) 2020

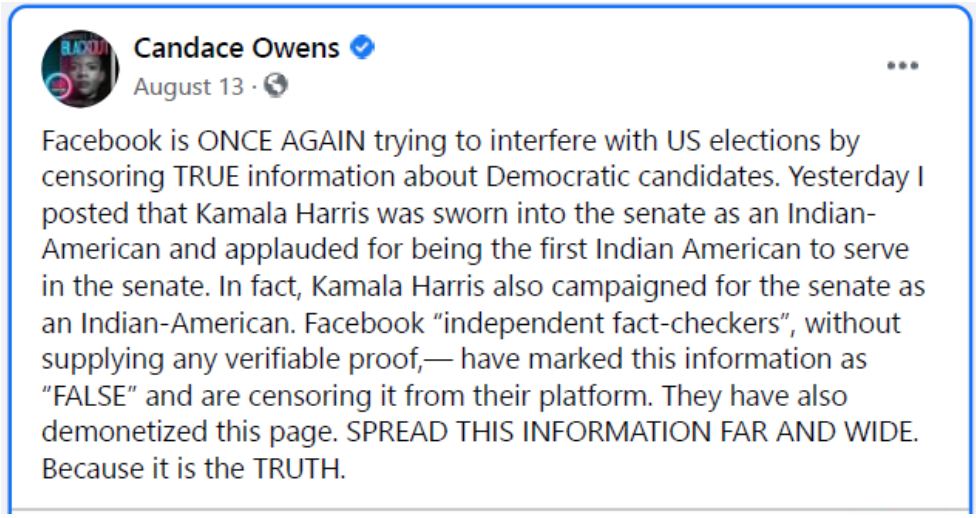
Plaintiffs allege that, in May 2020, Facebook sent an email warning them that their account and page were "at risk of being suspended or outright eliminated" for spreading misinformation about the COVID-19 pandemic. (A-614) Plaintiffs appealed directly to Lead Stories about the false information warning label applied

to the First Facebook Post. (A-622, 669-672) Plaintiffs thereafter communicated directly with Facebook concerning the warning label applied to the First Facebook Post. (A-623, 674-676) Plaintiffs do not allege any communications with *USA Today* or Facebook concerning the Article or the false information warning label applied to the Second Facebook Post.

By letter dated May 18, 2020, sent to Lead Stories and Facebook (but not *USA Today*), Plaintiffs' counsel demanded a retraction of the Lead Stories article and the false information warning label affixed to the First Facebook Post, threatening legal action for defamation and related causes of action. (A-623, 678-681) The May 18, 2020 retraction demand did not mention *USA Today* or the Article. (*Id*.)

Plaintiffs alleged that "[s]hortly after" the May 2020 email communication from Facebook (A-47), Owens's Facebook page was demonetized, which they explain means the page's revenue from third-party advertisers was suspended. (A-47-48) Plaintiffs indicated this was a breach of Facebook's terms and conditions, declaring them an enforceable contract.

As noted in *USA Today*'s initial dispositive motion, however, Owens admitted her page was not "demonetized" until she used the platform to attack then-Vice Presidential candidate Kamala Harris (questioning Ms. Harris's use of "the I'm black card" to garner support):



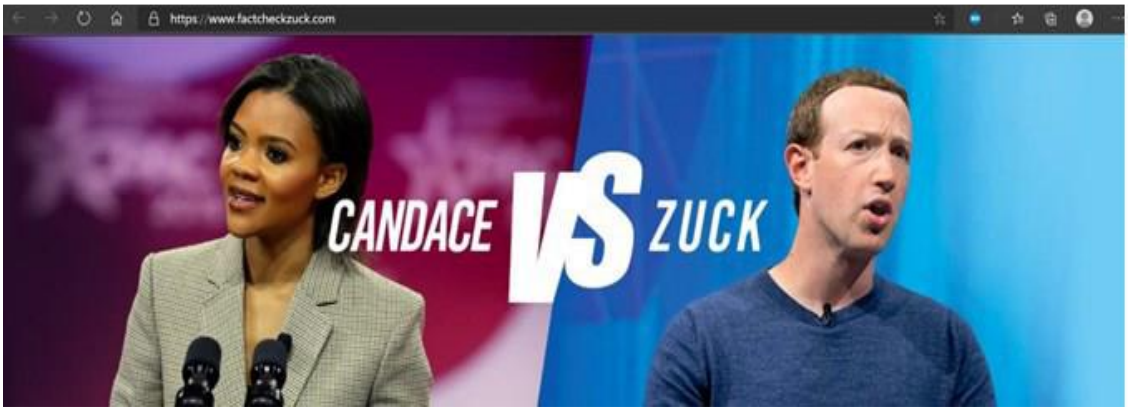
(A-338, 371)

Plaintiffs attempted to mask this inconsistency in an Amended Complaint by conjuring up a different theory based on a different contractual relationship, "clarifying" that Owens was "demonetized" when she was no longer able to pay for and post her own ads — not because she was unable to derive revenue from third parties advertising on her page, as alleged in the original Complaint. (A-585)

F. Plaintiffs' "Big Announcement" – Litigation as a Crowd-Funding Opportunity

On November 5, 2020, Plaintiffs posted a "Big Announcement" on Facebook, including a video of Owens talking about this lawsuit's objective: "It is time to fact-check the fact-checkers. I'm going to put these suckers through discovery and figure out what the relationship is that they have with Facebook." (A-338-339) Owens

promoted this action as "*Candace v. Zuck*," portraying herself as battling "the overlords of big tech" rather than a newspaper. (A-373, 374) The splash-page graphic speaks for itself:



(A-373)

In the video and a Facebook post dated November 10, 2020, Plaintiffs encouraged followers to donate to Candace Owens LLC, via the website www.factcheckzuck.com. The website noted that "A portion of the total funds raised will be used to cover legal costs incurred by Candace Owens LLC in relation to the aforementioned case. All excess funds will be used for other purposes by the LLC." (A-332-333) Solicitations were suspended only after Defendants' motions to dismiss were filed in Superior Court.

G. The Superior Court's Opinion Dismissing the Amended Complaint

In a thoughtful, detailed, and well-reasoned ruling premised on the recognition that "[e]lements of free speech [ ] pervade this case," the Superior Court faithfully applied longstanding constitutional principles in dismissing the Amended Complaint. (A-931) That opinion agreed that Owens's pervasive social media activities render her a public figure (A-955) and, as such, the First Amendment immunized *USA Today*'s reporting from tort liability "unless Plaintiffs' Amended Complaint supports reasonably conceivable inferences that (1) Defendant['s] article[ ] contain[s] false statements, and (2) Defendant[ ] made the statements with actual malice." (A-975) (*citing New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *Blatty v. New York Times Co*., 728 P.2d 117, 1182-84 (Cal. 1986) (*en banc*)).

After a painstaking analysis, the Superior Court: (a) concluded that neither element had been satisfied (A-975-980), and (b) rejected Plaintiffs' argument that *USA Today* impermissibly fact-checked Plaintiffs' hyperbole that "nobody is dying of the flu anymore," because Plaintiffs' "statement was presented with statistical facts that are objectively verifiable." (A-978-979) ("*USA Today* fact-checked the statistics Owens offered in the Second Facebook Post"). Plaintiffs challenge none of these determinations on appeal.

The Superior Court then unpacked the claims Plaintiffs had styled as tortious interference with contractual relations and prospective business relations, correctly recognizing that each count against *USA Today* was subject to the same constitutional restrictions that govern defamation claims:

> If [the First Amendment's] limitations applied only to actions denominated 'defamation,' they would furnish little if any protection to free-speech and free-press values: plaintiffs suing press defendants might simply affix a label other than 'defamation' to their injurious-falsehood claims—a task that appears easy to accomplish as a general matter . . . and thereby avoid the operation of the limitations and frustrate their underlying purpose.

(A-976) (*quoting Blatty*, 728 P.2d at 1184). Having so found, the Superior Court concluded that each count failed because none alleged a false statement, and thus none alleged legally wrongful conduct. (A-980) ("speech protected by the First Amendment is not enough to constitute an essential element of improper interference"); (A-981) "Plaintiffs fail to plead that Defendants' alleged interference was improper, because the alleged interference was protected by the First Amendment"); (A-982) ("it is not wrongful if a defendant's interference is protected by the First Amendment").

Plaintiffs' appeal followed.

ARGUMENT

I. THE TORT CLAIMS ASSERTED AGAINST *USA TODAY* ARE PROHIBITED BY THE FIRST AMENDMENT

A. Question Presented

Whether decades of constitutional precedent should be casually "put to the side" (Op. Br. 25) — as Plaintiffs now ask in appealing the Superior Court's determination that "First Amendment limitations are applicable to all of the plaintiff[s'] claims" (A-982) — so that Plaintiffs can proceed with tortious interference and unfair competition claims that are otherwise barred by the First Amendment.

B. Scope of Review

A trial court's legal conclusions are reviewed *de novo*. *Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

C. Merits of Argument

1. The First Amendment Precludes Civil Liability Based on *USA Today*'s Publication of the Article.

The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The right to speak on matters of public concern "is more than self-expression; it is the essence of self-government." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (quotation marks and citations omitted). "Accordingly, 'speech on

public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Meyers*, 461 U.S. 138, 145 (1983)). Courts protect this type of speech because "freedom to discuss public affairs . . . is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion." *Sullivan*, 376 U.S. at 296-97; *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (First Amendment promotes the "free flow of ideas and opinions on matters of public interest").

Moreover, while the State has an interest in protecting its citizens' commercial relationships through tort law, "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916-17 (1982); *see also Coplin v. Pub. Access Television*, 111 F.3d 1395, 1401 n.2 (8th Cir. 1987) ("As the Supreme Court has made clear, states may not regulate speech merely because the speech is defined as a state-law tort."); *Higgins v. Ky. Sports Radio, LLC*, 2019 WL 1290870, at *10 (E.D. Ky. Mar. 20, 2019) ("As a general legal maxim, individuals may not use tort actions to abridge and chill the freedom of speech protected by the First Amendment."), *aff'd*, 951 F.3d 728 (6th Cir. 2020).

Plaintiffs' attempt to impose liability on *USA Today* for protected speech on a matter of significant public concern is precluded by both the First Amendment and the Delaware Constitution of 1897.[5] Tort claims cannot be used to abridge press freedom, nor can they be used to punish protected speech.[6] Thus, because Plaintiffs are constitutionally disabled from suing Facebook for their demonetization, they have opted for what they regard as the next best thing: the assertion of ancillary tort claims against its fact checkers. As elaborated below, however, the First

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[5] The Delaware Supreme Court has stated that Article I, Section 5 of the Delaware Constitution "has the same scope as the federal [F]irst [A]mendment." *Gannett Co., Inc. v. State*, 571 A.2d 735, 740 n.9 (Del. 1989).

[6] This lawsuit represents an attempt to circumvent free speech requirements in an even broader sense. The First Amendment also protects Facebook's decisions to remove or reduce the distribution of certain content or to restrict access to certain features by those who spread misinformation on its platform. As to content moderation, the First Amendment protects the "exercise [of] editorial control and judgment," including the "choice of material" allowed on the Facebook platform. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Accordingly, filtering or demoting content is protected speech activity. *See Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014) (First Amendment protects decision to block content from search results); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007) (similar); *Search King Inc. v. Google Tech., Inc.*, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (similar), as is removing content, *see Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (First Amendment protects "the choice of what not to say"). So are Facebook's decisions to restrict or deny access to advertising or fundraising tools. Advertisements and fundraising solicitations carry messages — even if not always "narrow [and] succinctly articulable" — and private actors cannot be compelled to carry others' messages. *See Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569-70 (1995).

Amendment prohibits Plaintiffs from doing indirectly what they could not do directly.

(a) The Article Merits "Special Protection."

The threshold question is whether *USA Today*'s reporting expressed views on a matter of public concern. *Higgins v. Ky. Sports Radio*, 951 F.2d at 734. The U.S. Supreme Court has broadly defined such matters as those that "can be fairly considered as relating to any matter of political, social, or other concern to the community, . . . or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder*, 562 U.S. at 453 (quotation marks and citations omitted); *see also City of San Diego v. Roe*, 543 U.S. 77, 84 (2004). In analyzing whether speech addresses a matter of public interest, courts "examine the content, form, and context of that speech, as revealed by the whole record," including "what was said, where it was said and how it was said." *Snyder*, 562 U.S. at 453-54 (quotation marks omitted).

There can be no real doubt as to the answer here. The Article was addressed to "the most significant ongoing national crisis in decades" (A- 594), and analyzed the CDC's reporting of influenza deaths both before and during the pandemic. (A-664-667) It accurately provided the reader with Plaintiffs' statements, explained how the CDC tracks flu deaths and defines the flu season, stated that the CDC was continuing to report flu deaths, and compared the current flu season to

others. (*Id*.) The Article concluded that "the claim that the CDC has stopped reporting flu deaths because the death rates are so low [i]s FALSE because it is not supported by [*USA Today*'s] research." *(*A-667) Like the Second Facebook Post itself, the Article was intended to "raise an issue in [the] ongoing debate surrounding Covid-19" and "to highlight an issue in the public perception of the Covid-19 pandemic." (A-602)

As to the context and form of the speech, the Article responded to specific statements asserted in the Second Facebook Post by Owens on her Facebook page, which "has approximately five (5) million active followers." (A-581) The Article was published only two days after the Second Facebook Post, and was available on the website of *USA Today*, "a popular online and print newspaper" viewed by "millions of people every day" across a worldwide audience. (A-588)

USA Today's speech unquestionably addressed "a matter of public concern, [and is therefore] entitled to 'special protection' under the First Amendment." *Snyder*, 562 U.S. at 458; *Washington League for Increased Transparency & Ethics v. Fox News*, 2021 WL 391057, at *4 (Wash. Ct. App. Aug. 30, 2021) ("[T]he pandemic, COVID-19, and government responses to this health threat represent legitimate news interests and are a matter of social and political concern to all

Americans."). As the Superior Court correctly ruled, this "special protection" required the dismissal of Plaintiffs' tort claims.[7]

Plaintiffs try to circumvent those protections by arguing (again in conclusory fashion) that "the words used by defendants triggered an adverse response from Facebook, as each defendant [purportedly] knew it would" (Op. Br. 20). That is not how the law works, however. Indeed, a case involving

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[7] A careful reading of the law review article cited at pages 17-18 n.1, 19 of Plaintiffs' Opening Brief confirms that it actually discredits their argument. Plaintiffs either misrepresent or misapprehend the authors' position, which expressly acknowledges that certain torts with communicative dimensions -- in particular, tortious interference claims -- are prohibited by the First Amendment where, as here, the words at issue involve matters of public concern:

> ***A second area in which First Amendment protection may legitimately be afforded involves interferences with prospective advantage (and perhaps contract as well) that occur because of matters of public concern.*** Those rare cases merit First Amendment protection under current doctrine. In *Missouri v. National Organization for Women, Inc.*, for example, the state of Missouri sued an organization that discouraged groups from holding conventions in the state because it had not ratified the Equal Rights Amendment. The court held, on common law grounds, that this "interference" was not an improper interference. And in *NAACP v. Claiborne Hardware Co.*, a civil rights organization encouraged a boycott of white merchants, but the Supreme Court held that the boycott constituted constitutionally protected activity. ***The communications in both settings deserve First Amendment protection because they involve statements—apparently true statements—that pertained to matters of public concern.***

Kenneth S. Abraham and G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 TEXAS LAW REV. 813, 853 (2020) (emphasis supplied; footnotes omitted).

circumstances far more egregious than those alleged here underscores the First Amendment's strict limitations on non-defamation tort claims premised on speech concerning public matters.

In *Higgins v. Ky. Sports Radio*, a radio show relentlessly criticized a referee (Higgins) for his game-ending call during a college basketball game and encouraged listeners to leave bad reviews on the webpage of Higgins's roofing business. 951 F.3d at 731-33. Higgins received thousands of angry calls, tweets, and online reviews, which dramatically impacted his business and required a bodyguard to accompany him at the next game he refereed. *Id*. at 733. Statements repeated on the air included allegations that Higgins had propositioned a 13-year-old boy, "takes money under the table from the mafia in Vegas," and employed "illegal labor, substandard materials, and shady accounting practices." *Id*. Though the host expressed disagreement with "attacking Higgins," he also afforded the reviews substantial airtime, while a guest on the program commented that he "love[d]" them. *Id*.

Higgins — who, like Plaintiffs here, disavowed a defamation claim (951 F.3d at 739) — brought multiple tort claims stemming from that on-air commentary and the adverse response it encouraged, including a claim for tortious interference. The trial court dismissed those claims in their entirety, and the Sixth Circuit affirmed, holding that the challenged statements addressed a matter of

public concern and were protected by the First Amendment regardless of how the claims were styled:

> Higgins raises seven causes of action, but they all reduce to a single theory of liability. No matter the label, Higgins claims that Kentucky Sports Radio owes him money damages for its unfavorable statements about him and his roofing business after the North Carolina-Kentucky game. The First Amendment bars the theory and the claims on this record.

Id. at 733.

So too here. Higgins had no actionable claim for the reputational harm, lost revenues or physical threats[8] the radio host indisputably "triggered" on his say-so, and Plaintiffs have none, either.

2. *USA Today*'s Truthful News Reporting Cannot, as a Matter of Law, Be an Actionable "Wrong"

Because Plaintiffs' tortious interference and unfair competition claims failed to plead necessary elements, the trial court did not err in dismissing them. "A claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law." (A-959) (quoting *Tigani v. C.I.P. Associates, LLC*, 228 A.3d 409 (Del. 2020) (internal quotations omitted).

[8] "At least a dozen" of the "over 800 threatening calls" received at Higgins's business and the "over 30 calls" directed to his home phone "provide[d] the basis for a criminal investigation." *Higgins*, 951 F.3d at 733.

"[T]he elements of a claim for tortious interference with a contract are: '(1) a contract, (2) about which defendant knew, and (3) an intentional act that is a significant factor in causing the breach of such contract, (4) without justification, (5) which causes injury.'" *Bhole, Inc. v. Shore Inves., Inc.*, 67 A.3d 444, 453 (Del. 2013) (citation omitted). The elements of tortious interference with prospective business relations and unfair competition are similar; in all cases, the interference or anti-competitive conduct alleged must be "wrongful or improper." *See Orthopaedic Assocs. of S. Del., P.A. v. Pfaff*, 2018 WL 822020, at *2 (Del. Super. Ct. Feb. 9, 2018); *Malpiede v. Townson*, 780 A.2d 1075, 1099 (Del. 2001); *Del. Solid Waste Auth. v. E. Shore Envtl., Inc.*, 2002 WL 537691, at *6 (Del. Ch. Mar. 28, 2002) ("Only wrongful interferences will satisfy the tort"); *see also Accenture Glob. Serv. GMBH v. Guidewire Software, Inc.*, 581 F. Supp. 2d 654, 666 (D. Del. 2008) (dismissing claim for unfair competition based on same allegations as defective tortious interference claim).

(a) *USA Today*'s Exercise of First Amendment Rights Is Not "Wrongful" for Purposes of Plaintiffs' Tort Claims.

The Superior Court dismissed each count of the Amended Complaint against *USA Today* because a tort 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." (A-974) (*citing Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 973 (3d Cir. 1985) and *TMJ*

Implants, Inc. v. Aetna, Inc., 498 F.3d 1175, 1201 (10th Cir. 2007)); (A-980) ("conduct or speech protected by the First Amendment is not enough to constitute an essential element of improper interference" with a contract); (A-981) (same for tortious interference with a business relationship); (A-982) (same for unfair competition).

Nowhere in their Opening Brief do Plaintiffs muster any authority that calls into question the First Amendment's protection of *USA Today*'s speech here. Instead, they attempt to divert the Court's attention with two red herrings.

First, Plaintiffs advocate for a seven-factor test not suited to resolve constitutional free speech issues like those posed here. They argue, abstractly, that at least *some* of those factors might *tend* to suggest that truthful reporting can be "wrongful conduct." (Op. Br. 26-27) (referencing "a list of seven factors, including 'the nature of the actor's conduct' and 'the actor's motive,'" but omitting the other five). According to Plaintiffs, a motion to dismiss "is not the appropriate avenue" to undertake this "highly factual determination;" rather, "jury deliberation" is necessary. (*Id*.-28) (citing *WaveDivision Holdings, LLC v. Highland Capital Mgmt. L.P.*, 2010 WL 1267126, at *7 (Del. Super. Ct. Mar. 31, 2010) (internal quotations omitted)). The language Plaintiffs pluck from *WaveDivision* is misleading, however, and the case itself is inapposite here. *WaveDivision* considered whether defendant investment funds sabotaged a deal by transacting in the target's debt. *See*

id. at *3. The "highly factual" determination the Superior Court declined to undertake was whether the defendants' transactional acts were "unjustified," or were instead lawful measures by interested creditors. *Id.*at *3, *7. That says nothing about the First Amendment's protection for truthful news reporting about a global pandemic.

Moreover, contrary to Plaintiffs' contention, courts have repeatedly invoked the First Amendment to dismiss tortious interference claims based on protected speech because "such lawful activity is insufficient to establish the required element of improper conduct." *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 858 (10th Cir. 1999). None consulted a seven-factor test. *See also Redco Corp. v. CBS*, 758 F.2d at 973 ("Since neither [defendant] can be found liable for defamation, the intentional interference with contract relations count is not actionable because there is no basis for finding that their actions were 'improper'"); *Huggins v. Povitch*, 1996 WL 515498, at *9 (N.Y. Supr. Ct. Apr. 10, 1996) (dismissing tortious interference claim based on talk show segment because "broadcaster's first amendment right to broadcast an issue of public importance, its lack of any motive to harm the plaintiff, and the obvious societal interest in encouraging freedom of the press, negate essential elements of the tort"). As far as true news coverage goes, "the exercise of constitutionally protected speech cannot be an 'improper 'or 'wrongful' action." *Seminole Tribe of Fla. v. Times Publ'g Co.,*

780 So. 2d 310, 318 (Fla. Dist. Ct. App. 2001) (expressing doubt that tortious interference claims "could ever be stretched to cover a case involving news gathering and publication").

Second, Plaintiffs speculate about ill motives — supposedly evinced by *USA Today*'s "Fact-Check Contract with Facebook to assert market power directly over a competitor." (Op. Br. 24) But that tactic does not advance Plaintiffs' argument. Even if accepted as true, Plaintiffs' conclusory averments that *USA Today* sought to capitalize on Owens' fame and thereby increase advertising revenue by redirecting clicks to its website are unavailing. "To allow a plaintiff to establish a tort claim by proving merely that a particular motive accompanied protected speech . . . might well inhibit the robust debate that the First Amendment seeks to protect." *Jefferson Cnty. Sch. Dist.*, 175 F.3d at 858. Thus, Plaintiffs' speculative attribution of a commercial motive to *USA Today*'s publication fails to divest the Article of constitutional protection. *See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 378, 385 (1973) ("If a newspaper's profit motive were determinative, all aspects of its operations . . . would be subject to regulation if it could be established that they were conducted with a view toward increased sales," and "[s]uch a basis for regulation clearly would be incompatible with the First Amendment").

(b) Plaintiffs' Contention That Their Tort Claims Target "Conduct" Rather than "Speech" Misses the Constitutional Mark.

Plaintiffs also protest that the Superior Court "confuse[d] free speech with tortious conduct." (Op. Br. 8) At the same time, however, they acknowledge that the Article's publication was the "sole" "but-for cause" of the injuries alleged. (A-614) And this reality — that their tortious interference and unfair competition claims arise directly from the Article's publication of a counter-narrative to the Second Facebook Post — cannot be obscured by the simple assertion that Plaintiffs are challenging *USA Today*'s *conduct* rather than its *speech*. Their attempt to characterize speech-based tort claims as targeting "conduct" has long been discredited as a matter of First Amendment doctrine,[9] and was correctly

[9] More than half a century ago, a prominent commentator criticized as "specious" the distinction embraced by Plaintiffs -- noting that "[s]peech *is* conduct and actions speak," and asserting that "[t]he meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct." Louis Henkin, *The Supreme Court, 1967 Term—Forward: On Drawing Lines*, 82 HARV. L. REV. 63, 79-80 (1968) (emphasis in original). Indeed, the law review article cited by Plaintiffs' Opening Brief similarly disavows the distinction as "inconsistent with the [Supreme] Court's . . . recognition that some forms of expressive conduct amount[ ] to speech." Abraham and White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 TEXAS LAW REV. at 824; *see also id*. at 842 ("The distinction between speech and conduct — once tentatively proposed as a way of excluding picketing, marching, or demanding service in a restaurant from the [First] Amendment's coverage — was abandoned in the Court's symbolic-conduct cases beginning in the 1960s."). Plaintiffs' argument that *USA Today*'s publication of the Article is regulable conduct rather than protected speech dissolves upon recognition that even entirely nonverbal activities may convey a message protected by the First Amendment: *e.g.*, a salute, the raising of a clenched fist, the wearing of a black armband in public school (*Tinker*

rejected by Superior Court as "not consistent with [ ] First Amendment principles." (A-977)

The decision in *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.* is instructive in this regard. There, the plaintiff school district brought tortious interference and other claims against Moody's based on an allegedly false article that evaluated bonds issued by the district. 175 F.3d at 850. The trial court granted Moody's motion to dismiss, finding that the challenged statements were opinions relating to matters of public concern immunized from liability by the First Amendment. *Id*. at 851. The Tenth Circuit affirmed, observing that courts routinely "reject[] a variety of tort claims based on speech protected by the First Amendment." *Id*. at 857 (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) and other authority).

The school district's attempts to couch its tortious interference claims as "directed at conduct rather than speech" were of no moment. *Id*. Specifically, it argued that the article was part of a "pattern" of retaliation intended to harm bond issuers, like the district, that had chosen not to hire Moody's to rate their bonds. *Id*. Noting that the school district's position was not supported by any authority, the

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v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)), and the public burning of an American flag (*Street v. New York*, 394 U.S. 576 (1969); *Texas v. Johnson*, 491 U.S. 397 (1989)).

Tenth Circuit rejected its argument as "inconsistent with applicable First Amendment principles," including the rule that the First Amendment protects speech "'even when a speaker is motivated by hatred or illwill [sic].'" *Id*. (quoting *Hustler Magazine*, 485 U.S. at 53). After all, First Amendment protections cannot be made to depend — as Plaintiffs would have it here — on whether the publisher of an article "was motivated by a legitimate desire to express his or her view or by a desire to interfere with a contract." *Id*. at 858.

The constitutional infirmity of Plaintiffs' tort claims is further reinforced by *N.A.A.C.P. v. Claiborne Hardware Co.* That case centered on a boycott of certain "white merchants" in Port Gipson, Mississippi, by members of the National Association for the Advancement of Colored People. 458 U.S. at 889. The purpose of the boycott was to bring political, social, and economic change to the community. *Id*. at 911. The actions of the boycott's participants consisted mainly of speeches and peaceful protests. *Id*. at 903. However, the boycotters would also read aloud the names of boycott violators at the First Baptist Church, and publish their names in a local newspaper. *Id*. at 909-10. The purpose of publicizing the names was to place the threat of social ostracism on community members who violated the boycott. *Id*. Writing for the Court, Justice Stevens stated that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action. The Court recognizes that 'offensive' and 'coercive' speech is

protected by the First Amendment." *Id*. at 910. Surely chastising private citizens or printing their names in a newspaper would be considered a form of "malicious publication" (A-578) or a "malicious decision" (A-603) that "leveraged [the boycotters'] power" (A-578)) — the very type of speech Plaintiffs' theory of recovery would render actionable. However, as established by the ruling in *Claiborne Hardware*, punishment of such expression for that reason is "flatly inconsistent with the First Amendment." *Id*. at 921.

As the principles animating the above decisions make clear, Plaintiffs cannot evade controlling constitutional requirements by recasting a nonviable defamation claim as different theories of tort, including tortious interference and unfair business practices. The cases prohibiting such a result are legion. *Bove v. Goldenberg*, 2007 WL 446014, at *4 (Del. Super. Ct. Feb. 7, 2007) (tortious interference claim which "served as the functional equivalent of defamation" barred by absolute privilege); *Farah v. Esquire Magazine*, 736 F.3d 528, 540 (D.C. Cir. 2013) (First Amendment considerations that apply to defamation also apply to tortious interference claim); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990) (claim for tortious interference with business relationships based on *60 Minutes* broadcasts was "subject to the same first amendment requirements that govern actions for defamation"); *Mullane v. Breaking Media, Inc.*, 433 F. Supp. 3d 102, 113 (D. Mass. 2020) (plaintiff's "tortious interference claims are simply recycled versions of his

defamation claim and cannot succeed"); *Thompson v. Armstrong*, 134 A.3d 305, 310 (D.C. 2016) ("[C]ourts have regularly held that First Amendment restrictions apply to suits for intentional interference with contractual relations.").

To find otherwise would not, as Plaintiffs hyperbolically contend, "weaponize the First Amendment." (Op. Br. 19) As elsewhere, Plaintiffs' exercise in cherry-picking quotations from their context betrays them. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), addressed whether non-union government workers may be required to pay agency fees to unions that bargain on their behalf. Plaintiffs' preference for Justice Kagan's dissent, which recognized a heightened showing to limit speech "on a public matter," is self-defeating. And the majority's controlling opinion, embracing First Amendment rights even in the government employment context, is even more hostile to Plaintiffs' assault on a newspaper's truthful reporting. *Janus* certainly says nothing about "failed attempts to cloak unlawful, tortious behavior as 'free speech.'" (Op. Br. 19)

3. Plaintiffs Failed to Identify Any False Statements in the Article

Plaintiffs' theories of recovery are defective for yet another fundamental reason: tortious interference and unfair competition claims must adequately allege falsity. *See Others First, Inc. v. Better Bus. Bureau of Greater St. Louis, Inc.*, 829 F.3d 576, 579-80 (8th Cir. 2016) (without alleged falsity, a "tortious interference claim must [ ] fail because the plaintiff cannot establish an absence of justification

as a matter of law"); *Agilent Techns. Inc. v. Kirkland*, 2009 WL 119865, at *7 (Del. Ch. Jan. 20, 2009) (holding truthful opinions cannot constitute wrongful conduct for tortious interference claims); *Restatement (Second) of Torts* § 772, cmt. b. ("there is of course no liability for interference with a contract or with a prospective contractual relation on the part of one who merely gives truthful information to another").

In dodging this requirement, and in a tacit concession of the Article's truthfulness, Plaintiffs resort to claiming that the "truth or falsity" of *USA Today*'s statements "is entirely irrelevant to the tortious interference claims." (Op. Br. 24) This astonishing assertion cannot be reconciled with the First Amendment and was correctly rejected by the Superior Court: "As Plaintiffs do not claim that *USA Today*'s article is factually false, Plaintiffs fail to plead that the alleged interference is improper as *USA Today*'s article is protected by the First Amendment." (A-980)

Plaintiffs demonstrated their awareness of this pleading burden; the Amended Complaint identifies with particularity three allegedly false statements published by Lead Stories. (A-605-606) But there are no such facts pled in connection with *USA Today*'s Article, which is simply characterized as "false." (A-607) With no identification of the statements themselves, such conclusory allegations fail as a matter of law. *E.g., Malachi v. Sosa*, 2011 WL 2178626, at *2 (Del. Super. May 25, 2011) ("Conclusory allegations will not be accepted as true without specific

supporting factual allegations."); *Marder v. TEGNA Inc.*, 2020 WL 3496447, at *2 (S.D. Fla. June 29, 2020) (falsity analysis does not credit characterization of statements "in a vacuum").

Plaintiffs were constitutionally required to support their allegation of falsity with supporting facts. Because they failed to do so, their tort claims were properly dismissed.

4. The Constitutional "Actual Malice" Standard Precludes Plaintiffs' Tort Claims

To ensure that public figures do not misuse state tort law to punish those who report about legitimate matters of public concern, the U.S. Supreme Court recognized five decades ago that "erroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Sullivan*, 376 U.S. at 271-72. To carve out the "breathing space" needed to ensure that "protected speech is not discouraged," *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989), the *Sullivan* Court established the "actual malice" standard, 376 U.S. at 279-80; *see also Grzelak v. Calumet Publ'g Co.*, 543 F.2d 579, 582 (7th Cir. 1975) (actual malice standard exists "to prevent persons from being discouraged in the full and free exercise of their First Amendment rights") (citation omitted). This standard, which protects "uninhibited, robust, and wide-open" debate on public issues, requires proof that the defendant published a false statement with knowledge that it was false, or

with reckless disregard as to its truth or falsity (the "constitutional malice" standard).[10] *Sullivan*, 376 U.S. at 270.

"The standard of actual malice is a daunting one." *Howard v. Antilla*, 294 F.3d 244, 252 (1st Cir. 2002). It is provable only by evidence that the defendant "realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 n.30 (1984); *see also Doe v. Cahill*, 884 A.2d 451, 463 (Del. 2005). Constitutional malice therefore requires clear and convincing proof of *USA Today's* state of mind at the time of the Article's publication. *St. Amant v. Thompson*, 390 U.S. at 731. The test is entirely a subjective one, and proof of negligence alone is insufficient. *Sullivan*, 376 U.S. at 279-80.

Plaintiffs ignore that *USA Today* relied on information from multiple reliable sources, including several official CDC reports, in rebutting Plaintiffs' contention that the government had "stop[ped] calculating" influenza deaths during the pandemic. (A-600) *USA Today*'s reliance on this information precludes an actual malice allegation as a matter of law. *Klayman v. City Pages*, 2016 WL 3033141, at

[10] "Reckless disregard" has been defined as publishing while actually entertaining "serious doubts as to the truth of publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), or publishing while subjectively possessing a "high degree of awareness of the probable falsity of the publication," *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

*5 (11th Cir. May 27, 2016) ("Evidence that an article contains information that readers can use to verify its content tends to undermine claims of actual malice."); *Hatfill v. New York Times*, 532 F.3d 312, 325 (4th Cir. 2008) (no actual malice where author of newspaper article reviewed numerous documents, including various government reports).

Plaintiffs cannot shift critical evaluation of "the relationship between and the counting of flu deaths and Covid-19 deaths in early 2020" (A-600) out of the marketplace of public discourse and into the courtroom. "The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality op.) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). Accordingly, individuals like Owens — who stake out positions on controversial public policy issues such as the accuracy of the CDC's statistical reporting of annual flu deaths and whether the government was "giving undue attention to the Covid-19 pandemic and not to other diseases, such as the flu" (A-601) — must and do rebut criticism and compete for public acceptance of their ideas. *See, e.g.*, *Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996) ("[J]udges are not well equipped to resolve academic controversies . . . and scholars have their own remedies for unfair criticisms of their work — the publication of a rebuttal."); *Arthur v. Offit*, 2010 WL 883745, at *6 (E.D. Va. Mar. 10, 2010)

("[c]ourts have a justifiable reticence about venturing into the thicket of scientific debate"); *see also Reuber v. Food Chemical News*, 925 F.2d at 717-18 (recognizing that "[i]n the hurly burly of political and scientific debate, some false (or arguably false) allegations fly," but "We reject the attempt to silence one's adversaries in a public controversy by suing organizations attempting to inform the public about questions raised as to the research of every putative defamation plaintiff.").

Here, Plaintiffs never even attempted to allege that *USA Today* published the Article knowing it was false or with reckless disregard as to its truthfulness. But "actual malice must be pled with specificity," *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1108 (N.D. Cal. 1999), and the failure to do so is fatal here.

CONCLUSION

The trial court's Memorandum Opinion and Order (A-929-983) dismissing Plaintiffs' tort claims with prejudice should be affirmed.

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