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Case Number 253,2021

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

APPELLEE LEAD STORIES, LLC'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This appeal arises from claims by Appellants/Plaintiffs Candace Owens and Candace Owens, LLC (together, "Owens" or "Plaintiff"), stemming from articles written by Appellees/Defendants Lead Stories, LLC ("Lead Stories") and Gannett Satellite Information Network, LLC d/b/a USA TODAY ("USA Today") (together, "Defendants"), as third party fact checking partners with Facebook. Owens has asserted claims of unfair competition and tortious interference against Defendants based on their fact checking review of her Facebook posts. Owens has also asserted a claim of defamation against Lead Stories.

The order being challenged on appeal is the Memorandum Opinion and Order entered on July 20, 2021, in the Superior Court of the State of Delaware, case number S20C-10-016-CAK, granting Lead Stories and USA Today's motions to dismiss for failure to state a Claim under Delaware Superior Court Civil Rule 12(b)(6) (the "Order").

SUMMARY OF ARGUMENT

The Superior Court properly granted Lead Stories' and USA Today's motions to dismiss Owens' claims. As explained below, Owens arguments to the contrary are denied.

1. Denied. The Superior Court properly applied the First Amendment to Owens' claims of tortious interference with contract, tortious interference with business relations, and unfair competition. The gravamen of the harm alleged in each of these claims was injurious statements made by Defendants in online articles. The Superior Court correctly found that these statements are protected by the First Amendment, despite how they are framed in the complaint. The mere fact that Facebook contracted with Defendants to fact check posts does not prevent the First Amendment from applying to Defendants' articles.

2. Denied. The Superior Court correctly rejected Owens' defamation claims against Lead Stories based on the use of a "Hoax Alert" label as rhetorical hyperbole. In arguing that Lead Stories' use of the term "Hoax Alert" is defamatory, Owens ignores the context in which the statement was made. Here, both the specific context in which Lead Stories used the term "Hoax Alert," as well as the broader social context, comports with the Superior Court's conclusion that it was rhetorical hyperbole, and therefore not actionable. Significantly, the term did not, as the Opening Brief implies, appear in the article itself, but rather as a link to the article

on the Lead Stories webpage accompanied by an image of the First Facebook Post, with the words "False" and "Hoax Alert" superimposed in text boxes over the image. This context reasonably implies that the term is being used loosely and hyperbolically, and as synonymous with the "False" label. Owens does not challenge the court's particular ruling regarding the use of a "False" label on appeal.

In this context, Lead Stories' use of the term "Hoax Alert" does not reasonably describe actual facts about Owens or her activities, apart from implying the falsehood of her posts. Indeed, courts have found that similar usages of inflammatory terms, such as "blackmail," are rhetorical hyperbole and therefore not actionable under defamation claims. At least two courts have specifically considered the word "hoax," in even more pointed contexts than here, and found it to be unactionable hyperbole. The Opening Brief ignores these cases, and implies that the word "hoax" was used liberally throughout the Lead Stories Article. It does not, however, appear anywhere in the article itself, nor does the article make any accusation akin to Owens' suggested definition of a hoax.

The Opening Brief similarly misquotes the use of the term "originated" in the Lead Stories Article. Owens has altered the statement and omitted relevant context. The use of the term "originated," when read in context, cannot reasonably be interpreted as meaning anything other than "came from." The sentence at issue is merely identifying the post the article will be fact checking. Anything more is an

unreasonable interpretation that wholly ignores the context in which the statement was made.

Given the specific context of Lead Stories' use of these words and terms, the Superior Court's ruling on the defamation claims should be affirmed.

3. Denied. The Superior Court properly dismissed Owens' claims of unfair competition against both Defendants. As discussed in paragraph 1. above, there was no "improper" or "wrongful" interference here, as Defendants' conduct was protected by the First Amendment. Further, Lead Stories is simply not a competitor with Owens. It has a contract with Facebook to fact check posts. Facebook then independently decides what to do based on the results of the fact checking, including whether to flag the post or even take any action at all. Owens appears to suggest that all fact checking should be categorically defined as unfair competition. This argument has no support in law and should be rejected, and the Superior Court's dismissal of the unfair competition claims affirmed.

STATEMENT OF FACTS[1]

As mentioned above, this case arises out of articles written by Lead Stories and USA Today, as Facebook's third party fact checking partners, regarding their review and analysis of Owens' Facebook posts about COVID-19. Owens brought this suit after Lead Stories, along with other fact checkers, established that Owens' posts contained untrue information. Owens now seeks to bring claims against Lead Stories and USA Today based solely on their fact checking of her Facebook posts.

I. Lead Stories is a Third Party Fact Checking Partner with Facebook, Working to Slow the Spread of Misinformation.

Lead Stories is a fact checking and debunking website. [A-200] Against the backdrop of the rapid spread of misinformation over the internet, Lead Stories identifies stories, images, videos, and posts to evaluate the truthfulness of each. [*Id*.] In its pursuit of truth, Lead Stories has fact checked numerous stories, images, videos, articles, and posts from across the political spectrum. [A-161, A-202] Lead Stories is a verified signatory of the Code of Principles of the International Fact-Checking Network ("IFCN"), and has served as a member of the IFCN's "#CoronaVirusFacts Alliance" to slow the spread of misinformation regarding COVID-19. [A-202, 204, 206]

[1]The Opening Brief is cited to herein as (Opening Br. __). The Appendix to Appellants' Opening Brief is cited herein as [A-__], followed by the page number.

Lead Stories is an active member of Facebook's third party fact checking program, under which Facebook works with many independent fact checking organizations certified by IFCN. [A-200, 210] Under this partnership, Lead Stories assists in the identification of "viral misinformation, particularly clear hoaxes that have no basis in fact." [A-208] Through this program, Lead Stories helps slow the spread of false information over the Facebook platform. [A-200]

Lead Stories receives payment from Facebook to perform its fact checking service, but Facebook has no input in or influence over the content Lead Stories ultimately decides to fact check, or Lead Stories' conclusions about the truthfulness of that content. [A-162] Rather, Lead Stories receives access to content flagged as potentially false by Facebook's systems or users and then independently decides whether to engage in the fact checking process. [A-162, 200] In considering which posts to fact check, Lead Stories prioritizes posts related to current events and does not consider political affiliation. [A-162, 200] Lead Stories also considers whether a post is capable of being checked (i.e., not pure opinion, prediction, or vague statement), whether the post is harmful, whether the post is likely to go viral or contain a statement that has gone viral in the past, and whether the post is relevant to or affecting a U.S. audience. [*Id.*]

After selecting a post to review, Lead Stories engages in a long methodology to evaluate the truthfulness or falsity of the post. [A-162] Among the many questions

Lead Stories uses to guide its investigations, Lead Stories considers the origin of the claim; evidence for the origin of the claim; evidence cited as the source of a claim; the presence of inconsistencies, leaps, or assumptions; alternate explanations for the evidence; whether the evidence is from trustworthy, official, or reputable scientific sources; whether there are experts who can confirm or disprove the claim; and whether the claim causes confusion regardless of intentionality. [A-162, 202]

At the conclusion of an investigation, Lead Stories publishes an article with a designation (such as true or false) reflecting the results of the investigation. [A-163, 202] Lead Stories notifies Facebook of its designation and provides a link to the article. [A-163] Facebook then independently decides what to do, including whether to flag the post or even take any action at all. [A-163] Facebook users who "repeatedly share or publish content that is rated False or Altered . . . will see their distribution reduced, will lose their ability to monetize and advertise, and will lose their ability to register as a news Page on Facebook." [A-208] Facebook notes that users may "restore their distribution and ability to monetize and advertise if they stop sharing misinformation." [A-210]

To dispute a post's designation, the party must appeal directly to Lead Stories within seven days. [A-163, 212] Significantly, Facebook notes that "[i]f a fact-checking partner decides to change a rating based on a correction or dispute, the demotion on the content will be lifted, associated ad disapprovals may be lifted, and

the strike toward the Page or domain becoming a repeat offender will be removed." [A-212]

II. Owens Has Alleged an Advertising Contract With Facebook.

Separately, Owens has alleged that she has an advertising contract with Facebook allowing her to buy ads on Facebook to promote her content. [A-957] Under this alleged contract, Owens pays Facebook, and, in return, was allowed to run advertisements on her Facebook page. [A-957] This alleged contract between Facebook and Owens also includes the condition that her content can be fact checked or her page demonetized, in Facebook's discretion. [A-208]

III. Lead Stories Reviewed Owens' March 29, 2020 Facebook Post and Found That it Contained False Information.

On March 29, 2020, Owens published a post on Facebook containing several misleading or false statements regarding whether COVID-19 was appropriately recorded as the cause of death for individuals who died for reasons unrelated to COVID-19 (the "First Facebook Post"). [A-165, 217]

After engaging in an extensive fact checking process, Lead Stories published a fact checking article, titled "Fact Check: COVID-19 NOT Being Blamed For Deaths Primarily Due to Unrelated Causes" (the "Lead Stories Article"), in which Owens' statements were given a "False" designation and supplemented with authoritative and truthful content substantiated by Dr. Sally Aiken, president of the National Association of Medical Examiners. [A-217]

Among other things, the Lead Stories Article included the following statements:

- "The claims originated in a post (archived here) published on Facebook by Candace Owens on March 29, 2020."
- "[The First Facebook Post] is being shared to suggest that medical officials are—in Owens' words—'trying desperately to get the numbers to justify this pandemic response.' This comment is an attempt to downplay the severity of a global infectious disease that has killed more than 42,000 people as of March 31, 2020."
- "There are several inaccuracies in [the First Facebook Post]."

[A-217] The article then detailed Dr. Aiken's explanation of the inaccuracies in the post. [*Id.*]

Additionally, a link to the article on the Lead Stories webpage was accompanied by an image of the First Facebook Post, with the words "False" and "Hoax Alert" superimposed in text boxes over the image. [A-605]

A month after the appeal window had closed, Owens contacted Lead Stories with several concerns regarding the outcome of the investigation. [A-5, 168-78] Although her appeal request was untimely, Lead Stories re-reviewed Owens' post and updated the designation from "False" to "Partly False" in Facebook's portal. [A-165, 180-81] Significantly, a "Partly False" designation does *not* count as a "strike"

potentially leading to demonetization. [A-210, 212] Lead Stories further notified Owens that the updated designation would be removed entirely if Owens issued a correction. [A-165, 180-81] Owens declined Lead Stories' invitation to edit her post. [A-183-92]

Owens' Facebook page was not demonetized based on the Lead Stories Article. Rather, it was demonetized months later based on a different Facebook post, not at issue here, that another fact checker flagged as "False." [A-223-42] Up until then, Owens had remained able to derive revenue from her page. [A-208, 210, 212]

IV. USA Today Found That Another of Owens' Facebook Posts Contained False Information.

On April 28, 2020, Owens published a post on her Facebook page questioning the relationship between the counting of COVID-19 deaths and flu deaths (the "Second Facebook Post"). [A-35] On April 30, 2020, USA TODAY published a fact check article concluding that the Second Facebook Post contained false information (the "USA TODAY Article"). [A-40, 89-92]

V. After Owens Filed Suit, The Superior Court Held That Owens Failed to State a Claim

Owens thereafter filed a Complaint against Defendants based on the First and Second Facebook Posts. [A-14] In her First Amended Complaint, Owens asserted three tort claims against both Defendants: (1) intentional interference with contractual relations, (2) tortious interference with prospective business relations,

and (3) unfair competition at common law. [A-628-34] Owens also asserted two additional tort claims solely against Lead Stories: (4) defamation with actual malice, and (5) defamation with common law malice. [A-635-38]

Defendants moved to dismiss the Complaint for failure to state a claim. [A-115, 320]

Following argument, the Superior Court entered a lengthy order granting dismissal of Owens' claims for failure to state a claim under Rule 12(b)(6). [A-929] As to the defamation claims against Lead Stories, the Superior Court found that Lead Stories had used the term "Hoax Alert" as rhetorical hyperbole, and it was therefore not defamatory. [A-960-66] As for the other statements cited by Owens as defamatory, the Superior Court found that there were no facts alleged in the Amended Complaint supporting Owens' claim that they were false under the reasonable conceivability standard. [A-961-66] The Superior Court found that the articles cited by Owens as supporting the First Facebook Post, by Dr. John Lee and Dr. Deborah Birx, did not actually support the proposition for which she was citing them. [A-966-70]

As for Owens' tortious interference with contractual relations claims against both Defendants, the Superior Court found that there was a contract between Owens and Facebook with which tortious interference may occur. [A-970] The Superior Court dismissed Owens' claims, however, as being premised solely on statements

that are protected by the First Amendment, reasoning that the exercise of constitutionally protected speech cannot be an "improper" or "wrongful" action. [A-974-80] The Superior Court dismissed Owens' tortious interference claims against Lead Stories because Owens' allegations against Lead Stories did not show that the Lead Stories Article contained any false statements under the reasonable conceivability standard. [A-980]

As for Owens' tortious interference with prospective business relations claims against both Defendants, the Superior Court found that Owens had failed to plead that Defendants' alleged interference was improper, because the alleged interference was protected by the First Amendment. [A-981] The Superior Court also rejected Owens' unfair competition claim for the same reason. [A-982-83]

ARGUMENT

I. THE FIRST AMENDMENT APPLIES TO OWENS' CLAIMS AGAINST DEFENDANTS.

A. Question Presented

Whether the First Amendment applies to Owens' claims of tortious interference with contract, tortious interference with business relations, and unfair competition, where the gravamen of the harm alleged was injurious statements made by Defendants in online articles fact checking Owens' Facebook posts. [A-461-63]

B. Standard of Review

The decision to grant a motion to dismiss for failure to state a claim is reviewed de novo "to determine whether the judge erred as a matter of law in formulating or applying legal precepts." *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 871-72 (Del. 2020) (quoting *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010)).

A motion to dismiss will be granted "where the plaintiff cannot recover 'under any reasonably conceivable set of circumstances susceptible of proof.'" *Khushaim v. Tullow Inc.*, 2016 WL 3594752 (Del. Super. Ct. June 27, 2016) (quoting *Begum v. Singh*, 2013 WL 5274408, at *3 (Del. Super. Ct. Sept. 18, 2013). This Court "view[s] the complaint in the light most favorable to the nonmoving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations." *Windsor I*, 238 A.3d at 871-72 (quoting *Deuley*, 8 A.3d

at 1160). The Court does not accept "conclusory allegations unsupported by specific facts, nor [does it] draw unreasonable inferences in the plaintiff's favor." *Id.*

C. Merits of Argument

1. The First Amendment Applies.

The Superior Court properly applied the First Amendment to Owens' claims of tortious interference with contract, tortious interference with business relations, and unfair competition. [*See* A-974-83] Despite Owens' efforts to argue otherwise, she cannot avoid the reality that the gravamen of the harm alleged in each of her claims is injurious statements by Defendants in online articles. This Court should not, as Owens appears to suggest, create an exception to the application of the First Amendment where a fact checker has a fact checking contract with Facebook.

In her Opening Brief, Owens appears to argue that the First Amendment categorically cannot apply to fact checking articles written pursuant to a contract with Facebook because the fact checkers must necessarily be in competition with the poster. (Opening Br. 17) Indeed, Owens even appears to concede that without Facebook's fact checking contracts with Defendants, Defendants' articles would be protected by the First Amendment. (Opening Br. 25) Rather, Owens is attempting to sidestep the First Amendment by reframing the relationships between herself, Defendants, and Facebook. Her argument is contrary to the facts alleged here and should be rejected.

Lead Stories is simply not a competitor with Owens here. Owens has, according to her own allegations, an advertising agreement with Facebook. [A-957] Lead Stories does not, and there is no allegation that it does. Rather, as even the First Amended Complaint recognizes, Lead Stories has a contract with Facebook to fact check posts, and not monetize or benefit from diverting visitors from Owens' Facebook page. [A-200, 202, 204, 586]; (Opening Br. 22) Lead Stories simply receives payment from Facebook for performing its fact checking service, regardless of Lead Stories' conclusions about the truthfulness of that content. [A-162, 586]

Additionally, once Lead Stories designates a post as false, it has no input on Facebook's actions. Facebook decides what to do independently, including whether to flag the post or even take any action at all. [A-163] Lead Stories certainly does not force Facebook to do anything, much less breach its agreement with Owens. Owens' alleged agreement even specifically contemplates the possibility of her posts being reviewed for falsity and the potential consequences thereof. [A-208, 957] Facebook's fact checking contracts with Defendants are consistent with this—there is no conflict between those contracts and Facebook's contract with Owens. Even if there was, that would be a matter for Owens to take up with Facebook, not in the guise of the claims asserted here.

Lead Stories, furthermore, actually took actions here to avoid Facebook penalizing Owens. It reduced the rating on the First Facebook Post from "False" to

"Partly False" on an appeal. [A-165, 180-81] A "Partly False" rating does not carry any of the penalties described by Owens. [A-210, 212] While Owens' Facebook page was apparently demonetized at a later date, this was the result of a different fact check review, not at issue here. [A-223-242] Owens' assertions of injury are therefore not well pled.

The mere fact that Facebook contracted with Defendants to fact check posts does not mean that the First Amendment does not apply to anything written pursuant to those contracts. (Opening Br. 23-24) This argument ignores the facts involved here. Accordingly, the Superior Court's application of the First Amendment should be affirmed.

2. Owens Fails to State a Claim Regardless of the First Amendment.

Even without the First Amendment, Owens still fails to properly plead her claims against Lead Stories. *First*, the First Amended Complaint does not, as Owens claims, satisfy all of the elements for tortious interference with contract. (Opening Br. 25) To survive a motion to dismiss a claim for tortious interference with contract, a plaintiff must allege: (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. Harford Mut. Ins. Co.*, 2004 WL 1102362, at *4 (Del. Super. Ct. Apr. 7, 2004). Thus, to state a claim for intentional interference with contractual relations, there must be, among

other things, an actual breach of contract. *See, e.g.*, *World Energy Ventures, LLC v. Northwind Gulf Coast LLC*, 2015 WL 6772638 (Del. Super. Ct. Nov. 2, 2015) (dismissing a claim when there were no allegations of whether or how an existing contract was breached). Yet Owens identifies no actual breach, no failure to perform, and no termination of the contract with Facebook. Owens does not even allege any *intentional* interfering act by Lead Stories. *See Air Products & Chemicals, Inc. v. Roberts Oxygen Co., Inc.*, 2011 WL 7063681, at *4 (Del. Super. Ct. Nov. 30, 2011) (noting that "interference must be intentional, not an independent action's consequence"). At most, the alleged interference by Lead Stories is a minor incidental consequence of having content flagged as false by Facebook.

Owens' claims also fail to satisfy the "lack of justification" requirement. *See WaveDivision Holdings, LLC v. Highland Capital Mgmt., L.P.*, 49 A.3d 1168, 1174 (Del. 2012) (discussing factors to consider in determining if intentional interference with another's contract is "improper" or "without justification"). As the Superior Court properly found,[2] Owens failed to plead that Lead Stories engaged in improper interference because none of the allegations against Lead Stories show that its article contains any false statements under the reasonable conceivability standard. *See also*

[2] The Superior Court did *not*, as Owens claims, find that all of the elements of tortious interference with a contract and with business relations were met but for the First Amendment. (Opening Br. 27) Rather, the Superior Court simply found that the First Amendment applied to these claims, and, significantly, that Lead Stories did not engage in "improper," and therefore "unjustified" interference. [A-980]

infra Sections II.C.2. and III.C; [A-980] Based on the complaint and its attachments, Lead Stories was not without justification in fact checking Owens' post, *see infra* Sections II.C.2. and III.C, and its fact checking activities do not constitute the type of "improper" interference necessary to sustain a claim for tortious interference with a contract.

Second, Owens also fails to properly allege all of the elements of tortious interference with business relations. To survive a motion to dismiss a claim for tortious interference with business relations, a plaintiff must allege facts to support: (1) the reasonable probability of a business opportunity; (2) intentional interference by defendant with that opportunity; (3) proximate causation; and (4) damages. *DeBonaventura v. Nationwide Mut. Ins. Co.*, 428 A.2d 1151, 1153 (Del. 1981). Here as well, Owens fails to plead that Lead Stories engaged in improper interference. She further fails to sufficiently plead the requisite "business opportunity." To allege a reasonable probability of a business opportunity, Plaintiffs must "identify a specific party who was prepared to enter into a business relationship but was dissuaded from doing so by the defendant." *GWO Litig. Tr. v. Sprint Sols., Inc.*, 2018 WL 5309477, at *12 (Del. Super. Ct. Oct. 25, 2018). A "mere perception of the prospect of a business relation or reliance on generalized allegations of harm will not suffice." *Id.* Owens identifies no party prepared to or dissuaded from entering

into a business relationship, or anything more than her alleged perceptions of prospects. [A-631]

The Superior Court was, furthermore, entitled the evaluate whether Owens properly alleged each of the foregoing elements. Owens broadly argues that any "resolution of the wrongfulness of the defendants' conduct requires jury deliberation." (Opening Br. 28) This is plainly inaccurate. *See, e.g.*, *World Energy Ventures, LLC v. Northwind Gulf Coast LLC*, 2015 WL 6772638, at *8–9 (Del. Super. Ct. Nov. 2, 2015) (considering, on a motion to dismiss, whether the pleadings alleged wrongful interference under the factors listed in § 767 of the Second Restatement); *Elder v. El Di, Inc.*, 1997 WL 364049, at *14 (Del. Super. Ct. Apr. 24, 1997) (same); *Int'l Bus. Machines Corp. v. Comdisco, Inc.*, 1991 WL 269965, at *25 (Del. Super. Ct. Dec. 4, 1991) (same). The Superior Court was therefore entitled to evaluate, on a motion to dismiss, whether the allegations in Owens' complaint, along with its exhibits, properly alleged improper interference. Owens' arguments to the contrary should be rejected.

II. THE SUPERIOR COURT PROPERLY FOUND THAT LEAD STORIES' USE OF THE TERM "HOAX ALERT" WAS RHETORICAL HYPERBOLE.

A. Question Presented

Whether the Superior Court properly dismissed Owens' defamation claim on the basis that the label "Hoax Alert" was rhetorical hyperbole, where that label is reasonably read as simply denoting the presence of false information, and nothing in the article itself suggests otherwise. [A423-24]

B. Standard of Review

See *supra* Section I(B).

C. Merits of Argument

In arguing that Lead Stories' use of the term "Hoax Alert" is defamatory, Owens ignores her own argument—that "[t]he context in which the statement is made . . . matters." (Opening Br. 31) Here, both the specific context in which Lead Stories used the term "Hoax Alert," as well as the broader social context, comports with the Superior Court's conclusion that it was rhetorical hyperbole, and therefore not actionable.

1. Legal Standard

To state a claim for defamation under Delaware law, Owens was, as a public figure, required the plead all of the following: (1) that the defendant made a defamatory statement; (2) concerning the plaintiff; (3) that the statement was

published; (4) that a third party would understand the character of the statement as defamatory; (5) that the statement is false; and (6) that the statement was made with actual malice. *See John Doe No. 1 v. Cahill*, 884 A.2d 451, 463 (Del. 2005). The first of these requirements "is perhaps the most important." *Id.* "In answering this question, Delaware courts must determine: 'first, whether alleged defamatory statements are expressions of fact or protected expressions of opinion; and [second], whether the challenged statements are capable of a defamatory meaning.'" *Id.* (alteration in original) (emphasis omitted) (quoting *Riley v. Moyed*, 529 A.2d 248, 251 (Del. 1987)).

"Pure expressions of opinion are protected under the First Amendment." *Riley*, 529 A.2d at 251. "A pure opinion is one that is based on stated facts or facts that are known to the parties or assumed by them to exist. In contrast, a 'mixed' opinion is one that is not based on facts that are stated or assumed by the parties to exist." *Id.* "[A] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Id.*

Riley applied a four-part test "to determine whether the average reader would view a statement as one of fact or one of opinion":

> First, the Court should analyze the common usage or meaning of the challenged language. Second, the Court should determine whether the statement can be objectively verified as true or false. Third, the Court

> should consider the full context of the statement. Fourth, the Court should consider the broader social context into which the statement fits.

Id. at 251-52 (citations omitted). Under this, a claim must be dismissed if the "allegedly defamatory statements cannot be interpreted as stating actual facts, but instead are either 'subjective speculation' or 'merely rhetorical hyperbole.'" *Cousins v. Goodier*, 2021 WL 3355471, at *3 (Del. Super. Ct. July 30, 2021); *see also Beverly Enterprises, Inc. v. Trump*, 182 F.3d 183, 187 (3d Cir. 1999) ("statements which are merely annoying or embarrassing or no more than rhetorical hyperbole or a vigorous epithet are not defamatory"); *Greenbelt Cooperative Publishing Assoc. v. Bresler*, 398 U.S. 6, 14 (1970) (same).

The United States Supreme Court has used various phrases to describe "rhetorical hyperbole," including "imaginative expression" and "loose, figurative, or hyperbolic language." *See, e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990) ("imaginative expression"; "loose, figurative, or hyperbolic language"); *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 285-86 (1974) ("lusty and imaginative expression"). Although rhetorically hyperbolic statements may "at first blush appear to be factual[,] . . . they cannot reasonably be interpreted as stating actual facts about their target." *Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995); *accord Milkovich*, 497 U.S. at 20 (noting protection accorded "statements that cannot 'reasonably [be] interpreted as stating actual facts'

about an individual"). The distinction between fact and pure opinion/rhetorical hyperbole is critical, as to be actionable, a defamatory publication must convey to a reasonable reader the impression that it describes actual facts about the plaintiff or the activities in which he participated. *See Ford v. Rowland*, 562 So.2d 731, 735 (Fla. 5th DCA 1990).

2. *The Superior Court Correctly Held That the "Hoax Alert" Label was Rhetorical Hyperbole.*

Lead Stories' use of the term "Hoax Alert," given the specific context in which it was used, does not reasonably describe actual facts about Owens or her activities, apart from implying the falsehood of her posts. Significantly, the term did not, as the Opening Brief implies, appear in the article itself, but rather in a link to the article on the Lead Stories webpage accompanied by an image of the First Facebook Post, with the words "False" and "Hoax Alert" superimposed in text boxes over the image:

Apr 1, 2020 by: Ryan Cooper

Fact Check: COVID-19 NOT Being Blamed For Deaths Primarily Due To Unrelated Causes

Is it true that asymptomatic carriers of COVID-19 who die of other medical problems will be added to the coronavirus death toll? No, that's not true: Many asymptomatic carriers of COVID-19 are not getting tested in the first place, so that assertion doesn't hold up. Lead Stories reached out to the president of the National Association of Medical Examiners (NAME),...

[A-605]

In this context, the term "Hoax Alert" reasonably implies that it is being used loosely and hyperbolically, and as synonymous with the "False" label. Significantly,

the Superior Court also found that Owens failed to demonstrate that the use of "False" here was an untrue statement under the reasonable conceivability standard, as the articles Owens cited as supporting her post did not support the accuracy of her assertions. [A-961-66] Although Owens does challenge the Superior Court's general conclusions as to the falsity of her post, she does not challenge the court's particular ruling regarding this use of a "False" label. *See Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) (noting that "any argument that is not raised in the body of the opening brief [is] deemed waived and will not be considered by the Court on appeal") (alteration in original).

The Opening Brief ascribes a detailed definition to the word "hoax," but ignores the specific context in which the word was used here. (Opening Br. 32) Lead Stories did not use the word in its article, but rather as a hyperbolic label on its webpage, something even less than a headline. This use cannot reasonably be interpreted as stating verifiable facts about Owens. *See Riley*, 529 A.2d at 251-52; *Milkovich*, 497 U.S. at 20. At most, the "Hoax Alert" label underlines the "False" label, which Owens does not challenge on appeal.

Greenbelt, 398 U.S. at 6, is indeed instructive here. [*See* A-968] In that case, a newspaper published a written article stating that people at a public hearing had described a developer's position in his negotiations with a city as "blackmail." *Greenbelt*, 398 U.S. at 7. The newspaper repeated the word several times and used

it as a subheading within a news story. *Id.* at 7-8. The United States Supreme Court rejected defamation claims premised on this use, stating the "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." *Id.* at 14. The Court did not limit this ruling to the statements made by the people at the public hearing—it found that the use of the term "blackmail" in the article itself was rhetorical hyperbole.

Here, similar to *Greenbelt*, "Hoax Alert" cannot be reasonably read as anything more than alerting readers of false information in Owens' post. *Greenbelt* furthermore, is consistent with current law on treatment of hyperbole, and remains good law. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010) (generally citing *Greenbelt* with regard to the parameters of First Amendment protections); *Cousins*, 2021 WL 3355471 at *3 n.11 (citing for the proposition that "blackmail" accusations were rhetorical hyperbole); *Agar v. Judy*, 151 A.3d 456, 481 n.7 (Del. Ch. 2017) (similar). Owens' suggestion that the Court should disregard *Greenbelt* because it is "antiquated" is not reflected in the case law. (Opening Br. 34)

Milkovich, 471 U.S. at 1, is not only consistent with *Greenbelt*, it supports the Superior Court's ruling. In *Milkovich,* the Supreme Court considered use of the word "liar" and rejected a constitutionally required "opinion" exception to state

defamation laws. It held that, in addition to existing constitutional protections, no additional separate constitutional privilege for "opinion" is required to ensure the freedom of speech guaranteed by the First Amendment. *Id.* at 21. The Court did not change the principle that "loose, figurative, or hyperbolic language" is generally not actionable. *Id.*

Lead Stories' use of "Hoax Alert" is distinguishable from the use of "liar" in *Milkovich*. There, the Court looked at the entire context in which the statement was made and found, "[T]he clear impact . . . is that [Milkovich] lied at the hearing after . . . having given his solemn oath to tell the truth. This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury." *Id.* (alterations in original) (citation and internal quotation marks omitted). Here, in contrast, the "Hoax Alert" label merely creates the impression that the term is being used loosely to denote false information in the article. Nothing in the content of the article changes this—it does not contain any allegation of "a scheme or plan to deceive by fraudulent misrepresentations," (Opening Br. 32), nor does Owens allege that it does. *See Roca*, 842 A.2d at 1242 ("[A]ny argument that is not raised in the body of the opening brief [is] deemed waived[.]") (alteration in original).

This is also supported by "the common usage or meaning" of terms such as "Hoax Alert," as well as "the broader social context into which" the term fits. *See*

Riley, 529 A.2d at 251-52. Given the widespread hyperbolic use of the word "hoax" in recent years, it has lost much of the nuanced meaning of its dictionary definition. Indeed, at least two courts have recently found that, even where the word "hoax" is used in a more pointed context than here, it is unactionable hyperbole. The Opening Brief ignores these cases.

For example, in *Montgomery v. Risen*, 875 F.3d 709 (D.C. Cir. 2017), which the Superior Court specifically relied upon, [A-969], the United States Court of Appeals for the D.C. Circuit held that a book author's statement that a developer's software was an "elaborate and dangerous hoax" was loose, figurative, or hyperbolic commentary that could not serve as a basis for liability in the developer's defamation action against the author and his publisher. Similarly, in *Nunes v. Rushton*, 299 F. Supp. 3d 1216 (D. Utah 2018), a district court held that online comments posted by an author's competitor, referring to the author's online fundraising campaign as a "fraud," "hoax," and "scam" did not constitute defamation, as such comments would be reasonably understood by rational readers as exaggerated language expressing strong disapproval of author's behavior.[3]

While the "Hoax Alert" label was made on a fact checking website, not in a book (as in *Montgomery*) or as an online comment (as in *Nunes*), this does not render

[3] *See also* [A-969 n.143] (collecting numerous cases holding that language such as "fraud," "scam," and "sham" were hyperbolic and therefore not defamatory).

these cases distinguishable. Like in those cases, the "Hoax Alert" label was used loosely, figuratively, and hyperbolically. As the Superior Court correctly found, "[i]t is not reasonably conceivable that readers who read the Lead Stories' Article would have understood 'Hoax Alert' to mean that [Owens was] intentionally spreading a lie." [A-970] Rather, a reasonable reader would understand it as "rhetorical hyperbole implying that the Owens' Post carries inaccurate information and that the readers should proceed cautiously when reading the post." [A-970]

Owens' argument that the "Hoax Alert" label constitutes defamation per se also lacks merit. (Opening Br. 33) *Optical Air Data Sys., LLC v. L-3 Commc'ns Corp.*, 2019 WL 328429, at *7 (Del. Super. Ct. Jan. 23, 2019), the case cited by Owens, simply identifies "malign[ing] one in a trade, business or profession" as one type of defamation. Providing an alert of falsehoods in Owens' Facebook post is not maligning her in a profession. Even if it were, the "Hoax Alert" label, indicating that there is false information in the post, is "substantially true," and therefore incapable of defamatory meaning. *Id.* ("The Court must consider whether the 'gist' or 'sting' of the statement is true in order to determine whether it is substantially true.").

Even if rhetorical hyperbole does not apply here, Owens' defamation claim based on the "Hoax Alert" label still fails, as she has failed to plead sufficient facts to support a claim. In particular, her allegations of actual malice are insufficient. A party makes a statement with actual malice when it is made with knowledge of falsity

or with reckless disregard of whether the statement is false. *Martin v. Widener Univ. Sch. of Law*, 1992 WL 153540, at *7 (Del. Super. Ct. June 4, 1992); *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1317 (3d Cir. 1994) (noting that negligence, failure to investigate, ill will, bias, spite, or prejudice, alone are sufficient to establish actual malice); *News-Journal Co. v. Gallagher*, 233 A.2d 166, 168 (Del. 1967) (stating that ill will, evil motive, and intention to cause injury do not amount to actual malice).

Owens claims that Lead Stories knew *her post* could not be false simply because there were competing expert opinions. [A-52, 625-26]. As a matter of logic, the presence of competing expert opinions does not demonstrate that Lead Stories knew *its article* was false. If anything, it actually shows that Lead Stories' assertions in its article were not, as Owens alleges, made with knowledge of their falsity. Rather, Owens' claims acknowledge that there were expert opinions *supporting* Lead Stories' assertions in the article, namely, as relates to her argument here, the "False" and "Hoax Alert" labels. Further, as discussed *infra* at Section III.C.2., the Superior Court properly found that the attachments to the complaint effectively negated Owens' claims here, as the articles she cites for support do not actually support the propositions she cites them for.

Accordingly, the Superior Court correctly rejected Owens' defamation claims based on the "Hoax Alert" label, and her challenge on this ground should be rejected.

III. THE OTHER STATEMENTS IN THE LEAD STORIES ARTICLE WERE SUBSTANTIALLY TRUE AND THEREFORE INCAPABLE OF DEFAMATORY MEANING.

A. Question Presented

Whether Lead Stories' statements that (1) Owens' claims "originated in" the First Facebook Post, (2) the First Facebook Post "downplay[ed]" the pandemic, and (3) the First Facebook Post contained "several inaccuracies" constitute defamatory statements. [A425-26]

B. Standard of Review

See *supra* Section I(B).

C. Merits of Argument

Owens challenges the Superior Court's ruling on three other statements in the Lead Stories Article. The Lead Stories Article included the following allegedly defamatory statements:

- "The claims originated in a post (archived here) published on Facebook by Candace Owens on March 29, 2020."
- "[The First Facebook Post] is being shared to suggest that medical officials are—in Owens' words—'trying desperately to get the numbers to justify this pandemic response.' This comment is an attempt to downplay the severity of a global infectious disease that has killed more than 42,000 people as of March 31, 2020."

- "There are several inaccuracies in [the First Facebook Post]."

[A-217, 606, 656-60]

These statements, however, are substantially true and therefore incapable of defamatory meaning. *See Martin*, 1992 WL 153540, at *7. If the alleged defamatory statement "was no more damaging to plaintiff's reputation in the mind of the average reader than a truthful statement would have been, the statement is substantially true." *Id*. In making such an evaluation, this Court must consider whether the "gist" or "sting" of the article was true. *See id*. This gist or sting is true "if it produces the same effect on the mind of the recipient which the precise truth would have produced." *Id*.

Owens argues that the three above statements are false and defamatory. But each of these claims is substantially, if not completely, true. Accordingly, as explained further below, the Superior Court correctly found that Owens failed to plead any fact supporting her claim that these statement were false under the reasonable conceivability standard.

1. Owens Ascribes an Unreasonable Meaning to the Statement that the Claims "Originated in" the First Facebook Post.

Owens first takes issue with "[t]he statement[] that Owens was the 'originator' of false claims about COVID" on the basis that "[s]he was not the 'originator' of this perspective; her contentions were not the first ones made along similar lines." (Opening Br. 38)

Not only does this misquote the Lead Stories Article, Owens has altered the statement and omitted relevant context. *Id.*; [A-217, 606, 656-60]; The article actually states, as part of the introduction, that "[t]he claims originated in a post (archived here) published on Facebook by Candace Owens on March 29, 2020." [A-217] (hyperlinks omitted from underlined text); [A-656-60] (article attached as an exhibit to the First Amended Complaint). The use of the term "originated" here, when read in context, cannot reasonably be interpreted as meaning anything other than "came from." The sentence at issue is merely identifying the post the article will be fact checking. Anything more is an unreasonable interpretation, and ignores the context in which the statement was made. *See Windsor I*, 238 A.3d at 871-72 (the court does not "draw unreasonable inferences in the plaintiff's favor") (quoting *Deuley*, 8 A.3d at 1160).

This statement, furthermore, is true and cannot serve as the basis for a defamation claim. Owens admitted in her complaint that she authored the First Facebook post. [A-593] She does not dispute this on appeal. Accordingly, this statement contains no defamatory content.

2. The First Facebook Post Contained Statements that Were False or Substantially False.

Lead Stories' statements in the article that Owens was attempting to "downplay the severity" of the pandemic, and that the First Facebook Post contained "inaccuracies," are also not defamatory. As the Superior Court properly found,

Owens' assertion that her claims were true is effectively negated by the exhibits to her complaint.

Where the alleged defamatory statement is not false or is substantially true, there can be no liability and it is unnecessary to address any of the remaining factors. *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)). Additionally, "[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." *Tigani v. C.I.P. Associates, LLC*, 228 A.3d 409 (Del. 2020) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001)).

First, Owens takes issue with the statement in the Lead Stories Article that "[the First Facebook Post] is being shared to suggest that medical officials are – in Owens' words – 'trying desperately to get the numbers to justify this pandemic response.' This comment is an attempt to downplay the severity of a global infectious disease that has killed more than 42,000 people as of March 31, 2020." [A-217, 606]; This statement is true or substantially true. Owens does not dispute that she made the comment cited here, or the purposes for which others had shared her post. There can also be no dispute that the gist of the First Facebook Post as a whole was that the number of COVID deaths in the United States was likely overstated. [*See* A-642] The entire post is therefore reasonably read as "an attempt

to downplay the severity of" the pandemic. [A-217, 606]; The comment cited by Lead Stories is no exception to this.

Although this alone defeats Owens' claim that this statement is defamatory, this statement is also not capable of defamatory meaning when viewed in context. This statement was expressed together in the context of and alongside the medical opinions of Dr. Aiken, president of the National Association of Medical Examiners. [A-217] It was qualified by Dr. Aiken's excerpted opinions, which dilute any negative connotation the phrase "[t]his comment is an attempt to downplay" carries with it. [A-217]; *see Images Hair Sols. Med. Ctr. v. Fox News Network, LLC*, 2013 WL 6917138, at *14 (Super. Ct. Dec. 20, 2013) (finding a phrase not defamatory when the statement was qualified to dilute any negative connotation). Dr. Aiken proceeds to opine on and correct each of Owens' stated inaccuracies. [A-217] Accordingly, not only is this statement true or substantially true, it is contextually not defamatory.

Second, Owens claims that the statement that "[t]here are several inaccuracies in [the First Facebook Post]" is defamatory because the post was true and contained no inaccuracies. This statement is not actionable. A statement must explicitly or impliedly rest on falsehoods that damage an individual's reputation to be actionable as defamation. *See Images Hair Sols.*, 2013 WL 6917138 at *6. This statement and the inaccuracies it refers to rest on the medical opinion of Dr. Aiken. The article

actually quotes Dr. Aiken's assessment of each of Owens' comments. [A-217] Owens' paraphrasing of Lead Stories' statement ignores this context. Additionally, the statement that there were inaccuracies is qualified by the fact that Lead Stories consulted with Dr. Aiken. *See Images Hair Sols. Med. Ctr.*, 2013 Del. Super. LEXIS 593, at *14 (finding a phrase not defamatory when the statement was qualified to dilute any negative connotation).

Regardless, the Superior Court properly found that the attachments to the complaint effectively negate Owens' claims here. [*See* A-966-70] Owens cited to three sources as supporting the First Facebook Post: an article by renowned U.K. pathologist Dr. John Lee and statements from two U.S. health officials, Dr. Deborah Birx and Dr. Ngozi Ezike. [A-642] All three sources are attached to the complaint. [A-598, 644-51, 675]

Owens cites Dr. Lee's article for the proposition that it explains "precisely why COVID-19 would be potentially overstated as the cause of death." [A-596] But in his article, Dr. Lee states that his argument is specific to the United Kingdom's counting methods, and that counting methods vary wildly from country to country. [A-644-51] He does not weigh in on United States reporting criteria, much less state that the United States could potentially be overreporting.

Additionally, in the First Facebook Post, Owens states, "I spent all day today trying to look up daily death rates for any other diseases. You can't get it anywhere.

They are reporting ONLY on coronavirus deaths." [A-642] The quoted statements from Dr. Birx and Dr. Ezike, however, did not say that medical authorities in the United States were only counting COVID-19 deaths and not other causes of death. Rather, they simply say that when a person with a preexisting condition and COVID-19 dies, medical authorities in the United States count it as a COVID-19 death. [A-598, 675] While this may be a nuanced point, it does not support Owens' statements. Accordingly, the attachments to the complaint effectively negate Owens' claims that the First Facebook Post does not contain any false statements.

Furthermore, Owens' defamation claims still fail, as she has failed to plead sufficient facts to support the requisite showing of actual malice. As discussed *supra* in Section II.C.2., Owens' claims actually acknowledge that there were expert opinions *supporting* Lead Stories' assertions in the article, which goes against her claim that Lead Stories knew its article was false.

For this and the other reasons stated above, the Superior Court correctly dismissed Owens' defamation claims regarding the three statements in the Lead Stories Article.

IV. THE SUPERIOR COURT PROPERLY FOUND THAT LEAD STORIES' CONDUCT DID NOT AMOUNT TO UNFAIR COMPETITION.

A. Question Presented

Whether Lead Stories, which had a contract with Facebook to fact check posts, engaged in unfair competition with Owens by fact checking her post, where Owens' ad agreement with Facebook contemplated the possibility of her posts being reviewed, and where Owens' page was later demonetized based on a different organization's fact check review of a different post. [A432-33]

B. Standard of Review

See *supra* Section I(B).

C. Merits of Argument

For an unfair competition claim to survive a motion to dismiss, a plaintiff must allege facts to support (1) a reasonable expectation of entering a valid business relationship; (2) with which the defendant wrongfully interferes; (3) elimination of plaintiffs legitimate expectation of earning revenue; and (4) injury. *GWO Litig. Trust*, 2018 Del. Super. LEXIS 1141, at *27; *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1057 (Del. Super. 2001).

The Superior Court properly dismissed Owens' unfair competition claim for failure to state a claim. As discussed above in Section I.C., there was no "improper"

or "wrongful" interference here, as Defendants' conduct was protected by the First Amendment.

Further, as was also discussed above in Section I.C.1., Lead Stories is simply not a competitor with Owens. Owens has an ad agreement with Facebook, while Lead Stories has a contract with Facebook to fact check posts, and does not otherwise monetize or benefit from providing this service. [A-200, 202, 204, 586] Once Lead Stories designates a post as false, Facebook independently decides what to do. [A-163] Lead Stories certainly does not force Facebook to do anything, much less breach its agreement with Owens. Owens' agreement even specifically contemplates the possibility of her posts being fact checked. [A-208, 957] Indeed, Owens fails to allege any legitimate expectancy in generating revenue from false or misleading statements.

Lead Stories, furthermore, reduced the rating on the First Facebook Post from "False" to "Partly False" on an appeal, which does not carry any of the penalties described by Owens. [A-165, 180-81, 210, 212] While Owens' Facebook page was apparently demonetized at a later date, this was the result of a different fact check review, not at issue here. [A-223-42] Regardless, Owens is still in contract with Facebook, and cannot allege the requisite harm.

Owens appears to suggest that all fact checking should be categorically defined as unfair competition. (Opening Br. 46-47) This is an extreme argument,

with no support in law (and indeed, Owens cites nothing in support). It should be rejected, and the Superior Court's dismissal of the unfair competition claims affirmed.

CONCLUSION

The arguments raised in the Opening Brief lack merit. The Superior Court correctly concluded that Owens' claims of unfair competition and tortious interference against Defendants, and her claim of defamation against Lead Stories, based on their fact checking review of her Facebook posts, failed to state a claim under Rule 12(b)(6). The Superior Court's grant of dismissal was therefore correct and should be affirmed.

Respectfully submitted,

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