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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,

v.

LEAD STORIES, LLC, a Colorado limited liability company, and GANNETT SATELLITE INFORMATION NETWORK, LLC d/b/a USA TODAY, a Delaware limited liability company,

Defendants-Appellees.

No. 253,2021

On Appeal from the Superior Court of the State of Delaware

C.A. No. S20C-10-016-CAK

APPELLANTS' OMNIBUS REPLY BRIEF

OF COUNSEL:

Todd V. McMurtry (*PHV* admitted)
HEMMER DEFRANK WESSELS, PLLC
250 Grandview Drive, Ste. 500
Ft. Mitchell, KY 41017
Phone: (859) 344-1188
Fax: (859) 578-3869
tmcmurtry@hemmerlaw.com

BELLEW LLC:

Sean J. Bellew (No. 4072)
2961 Centerville Rd., Suite 302
Wilmington, DE 19808
Phone: (302) 353-4951
sjbellew@bellewllc.com

Attorneys for Plaintiffs-Appellants, Candace Owens and Candace Owens, LLC

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REPLY TO BRIEF OF APPELLEE GANNETT 2

REPLY TO BRIEF OF APPELLEE LEAD STORIES 9

A. Defamation Issues: Hoax 13

B. The Rest of Lead Stories' Arguments. 19

CONCLUSION 25

TABLE OF AUTHORITIES

Cases **Page(s)**

ASDI, Inc. v. Beard Research, Inc.,
11 A.3d 749, 751 (Del. 2010) 7–8

Biro v. Conde Nast,
883 F. Supp. 2d 441, 471 (S.D. N.Y. 2012), *aff'd*, 622 Fed. App'x. 67
(2d Cir. 2015) 13, 23

Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC,
27 A.3d 531, 535 (Del. 2011) 6

In re Cadira Grp. Holdings, LLC Litig.,
2021 Del. Ch. LEXIS 151, at *31 (Del. Ch. July 12, 2021) 2

In re Crimson Exploration Inc. Stockholder Litig.,
No. 8541-VCP, 2014 Del. Ch. LEXIS 213, at *27
(Del. Ch. Oct. 24, 2014) 2

Janus v. AFSCME, Council 31,
138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) 4

Jones v. Pozner,
No. 03-18-00603-CV, 2019 Tex. App. LEXIS 9641
(Tex. App. Nov. 5, 2019) 17–18

Milkovich v. Lorain Journal Co.,
497 U.S. 1, 17-18, 21 (1990) 16

Moldea v. N.Y. Times Co.,
22 F.3d 310, 314 (D.C. Cir. 1994) 16

Montgomery v. Risen,
197 F. Supp. 3d 219, 249 (D.D.C. 2016), *aff'd*, 875 F.3d 709
(D.C. Cir. 2017) 15–16

NAACP v. Claiborne Hardware,
458 U.S. 886, 903, 911, 916-17 (1982) 4, 6–7

Nunes v. Rushton,
299 F. Supp. 3d 1216, 1224, 1230-31 (D. Utah 2018).....16–17

Snyder v. Phelps,
562 U.S. 443, 452 (2011) 4

Other Authorities **Page(s)**

Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*,
98 Tex. L. Rev. 813, 817, 851 (2020) 3–4

1 RODNEY SMOLLA, LAW OF DEFAMATION § 4:25 (2d ed. 2020) 13

INTRODUCTION

Gannett and Lead Stories combine to offer over seventy pages of briefing.[1] Mindful of the rule against needless repetition, this Reply Brief will be limited to pointing out errors in Appellees' Answering Briefs.

[1] Gannett and Lead Stories' Answering Briefs are cited herein respectively as "(Gannett Br. ____)" and "(L.S. Br. _____)."

REPLY TO BRIEF OF APPELLEE GANNETT

Gannett cannot stop defending against a suit that was not filed. Plaintiffs have sued Gannett for tortious interference with contract, tortious interference with business relations, and the tort of unfair competition. Gannett is aware of the elements of these torts under Delaware law. Yet Gannett argues that the Plaintiff must plead "actual malice" (Gannett Br. at 33-36), "falsity" (*id.* at 31-33), and that the speech was not on a "matter of public concern" (*id.* at 18-22). These are all elements or defenses to a defamation claim. Gannett has not been sued for defamation. Gannett makes the novel, unsupported and unsupportable argument that the Plaintiff must allege elements of proof for causes of action not pled in the Complaint. Delaware law requires no such thing. Delaware requires only that the plaintiff plead the elements of the causes of action contained in the complaint.[2] *See, e.g., In re Cadira Grp. Holdings, LLC Litig.*, 2021 Del. Ch. LEXIS 151, at *31 (Del. Ch. July 12, 2021); *In re Crimson Exploration Inc. Stockholder Litig.*, No. 8541-VCP, 2014 Del. Ch. LEXIS 213, at *27 (Del. Ch. Oct. 24, 2014) (discussing the "reasonable conceivability" standard and noting that failure to plead an element of a claim precludes entitlement to relief).

[2] Gannett even goes a step further in defending against a suit that was not filed. In a lengthy footnote in its brief, Gannett outlines the defenses that the Facebook company would be able to assert, were it one day to be sued by somebody. At the risk of stating the obvious, it must be pointed out that Owens has not sued Facebook.

Gannett makes one other argument. Even though the Amended Complaint adequately pleads facts supporting all the elements of the claims, Gannett's defense rests on a single proposition: that the First Amendment provides a complete defense to its tortious conduct. This claim is unsound as a matter of policy, as a matter of law, and in particular as applied to this case.

As a matter of policy, Gannett's claim goes too far. Nearly all claims of tortious interference rest on speech. *Cf.* Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 Tex. L. Rev. 813, 817, 851 (2020) ("It follows that virtually all of the torts of interference with contract and with prospective economic advantage would fall outside of First Amendment protection."). The essence of the tort is that the defendant has taken steps to interfere knowingly with the contractual relationship of a third party. Those steps typically require speech. The medium might vary, as the speech could be contained in a letter, a phone call, or some other means of communication, but it is speech. The Constitution does not preclude a claim of tortious interference merely because the instrumentality of the tort constituted speech. If it did, then the tort of intentional interference would itself be a mere footnote to history, instead of comprising an important part of the modern array of

business-related torts.[3] *See id.*; *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (weaponizing the First Amendment would "unleash[] judges, now and in the future, to intervene in economic and regulatory policy").

Gannett's argument also does not comport with the law. Not one of the cases Gannett cites addresses a comparable situation. In each, the harm suffered by the plaintiff was instigated by an independent third party. For example, in *NAACP v. Claiborne Hardware*, where protestors exercised their First Amendments rights to picket a storefront, the fact that independent third parties chose to diminish their shopping at the store was a consequence of the speech. Even though the adverse consequences to the store were foreseeable to the protestors, and one of the aims of their speech was to induce third parties not to patronize the store, it was the responsibility and decision-making of others, not the speakers, that caused the hardware store to lose customers. *Claiborne*, 458 U.S. 886, 903, 911, 916-17 (1982).

Gannett reads the Supreme Court's opinion in *Claiborne* far too aggressively. That decision did not hold that tort liability is "flatly inconsistent with the First Amendment," as Gannett concludes. (Gannett Br. 30). Instead, the Court carefully

[3] Gannett argues that the Court should concern itself with whether the tortious speech related to a "matter of public concern." (Gannett Br. 18-22). Applying the "public concern" test from defamation law to tortious interference claims would be inapposite. The tortious conduct almost always occurs in private; moreover, the defamation concept itself is amorphous. "[T]he boundaries of the public concern test are not well defined." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

separated the defendant's own conduct from the consequences brought about by the actions or decisions of others. "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *Id.* at 910. Even though, as the Court stated, the purpose of the speech was to induce others into action, it remained speech protected from tort liability. "Each of these elements of the boycott [of certain white-owned businesses] is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." *Id.* at 907.

Owens has not sued Gannett because its words induced some independent third parties to take action on their own volition against Owens or her business. Gannett did not "urge action" and thereby convince independent persons to boycott Owens' web posts. Gannett triggered Facebook to act; Facebook is not independent of Gannett. Facebook and Gannett are contractual partners. According to the Amended Complaint, once Gannett or Lead Stories labels a post, Facebook follows. (A–578, A–585-86, A–588). In their briefs, both Gannett and Lead Stories argue that Facebook is independent, making its own determination about allegedly false posts. (Gannett Br. 5; L.S. Br. 21). Yet the evidence alleged does not support this assertion. By Facebook's own admission, it is Gannett and Lead Stories that make the determination as to which posts to "fact-check," what conclusions to draw, and what action to take. (A–609-614). Facebook made this point clear, directing all of Owens'

appeals for amelioration of punishment to Gannett or Lead Stories. (A–622-23). Facebook said it's not us, it's them. For the purposes of this motion, the allegations in the Amended Complaint are to be taken as true. *E.g.*, *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011). Gannett is being sued for its own conduct: specifically, Owens has sued Gannett because Gannett itself took injurious action, not in the form of speech, but in the form of triggering its private contract with Facebook. Facebook, in this context, does not constitute an independent third-party that, like the potential shoppers in *Claiborne*, can make up their own minds whether or not to patronize the store.

It is the private agreement between Gannett and Facebook, the "Fact-Check Contract," that makes all the difference. Facebook, pursuant to its User Agreement, "reserves the right to provide or restrict your access to the Ads Tool in its sole discretion at any time." (A–366). Facebook, however, entered an agreement with Gannett and Lead Stories that effectively exported this discretion. (A–578, A–586, A–588, A–609-610). This Fact-Check Contract transferred to Gannett and Lead Stories the authority to "restrict access" in "its sole discretion at any time." Facebook admitted as much, directing Owens to appeal to the third-party fact checkers to gain relief from demonetization, and informing Owens that Facebook would do as directed by its contractual partners. (A–622-23).

The problem with Facebook's delegation of discretion is not in the delegation per se. The problem is that the delegation was made to enterprises in direct competition with Owens in the ongoing, highly competitive, and immensely lucrative marketplace for internet visitors and advertisers. Unlike the protestors in *Claiborne*, Gannett and Lead Stories did not need to convince others to take coercive action against Owens based on the persuasiveness of their speech; Gannett and Lead Stories had the means of coercion in their own hands. Facebook gave them the keys to its vast platform. It gave them the ability not to urge action, but to complete the action, shutting Owens off from the valuable Facebook marketplace where ideas are traded and goods are sold.

Gannett's brief provides a long string of paeans to the First Amendment, but they do nothing to address this fundamental problem. Gannett devotes less than one page of its brief addressing the central issue in this case, namely the Fact-Check Contract that transfers Facebook's authority to Owens' direct competitor. (Gannett Br. 26). Gannett dismisses the existence of the Fact-Check Contract as merely establishing a "particular motive" for Gannett's speech, claiming that Gannett's admitted "commercial motive" does not alter constitutional protections. (*Id.*). This contention ignores the requisite elements of tortious interference, one of which is that the defendant's conduct be "wrongful." *ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749, 751 (Del. 2010). Under Delaware law, determining the "wrongfulness" of

the defendant's conduct for the purposes of tortious interference includes consideration of "the nature of the actor's conduct" and "the actor's motive." *Id.* Gannett's tepid "commercial motive" is better read as "greed," and evidences its wrongful conduct.

Gannett's dismissive discussion of its contractual relationship with Facebook also fails to recognize, or purposely ignores, the terms of that Fact-Check Contract: it accords Gannett and Lead Stories with real power, not to persuade, but to compel. Gannett could have desired to put Owens out of business for "commercial reasons," for "political reasons," or for no reason at all: Gannett had the power to interfere with the Owens-Facebook Contract and decided for its own reasons to do so. It is responsible for its conduct just as is any other business enterprise. When Gannett entered its deal with Facebook (a business Gannett should be reporting on, not partnering with), Gannett stepped outside of its traditional role as a journalistic enterprise and became a business competitor with the power to police its Facebook competition. It should have foreseen that its pursuit of its self-styled "commercial purpose" would expose it to liability for its wrongful "commercial" conduct.

REPLY TO BRIEF OF APPELLEE LEAD STORIES

The brief filed by Lead Stories is instructive for what it admits. It admits that Lead Stories has a contract with Facebook to perform fact-checking services; it admits Facebook pays Lead Stories for its fact-check services; it admits that Lead Stories has discretion over which people and posts it chooses to subject to its "fact-check" review; it admits that one of its primary motivations is to find posts that will "go viral" (meaning that it will draw a lot of readers); it admits that it is Lead Stories, not Facebook, that is the deciding entity in resolving a poster's "appeal" in reducing or eliminating the sentence imposed. (L.S. Br. 11-13). These are the very contentions that Plaintiffs have sought to establish all along.

Lead Stories admits all of this and wonders, what is wrong here? Cannot Facebook, it asks, out-source its authority to police user content to an independent third-party such as Lead Stories or Gannett? Yes, Facebook may, if the third-party is "independent"; Lead Stories and Gannett are not. They are competitors with Plaintiffs. Owens, a well-known social media commentator and "influencer," has a huge public following. (A–581). Her readers follow her posts for insights, opinions, and reportage. (A–582). In the contemporary environment, the web pages and Facebook posts of these star influencers have usurped substantially the role of information provider once filled by daily newspapers, leading traditional media companies, like Gannett, to enter side deals for "commercial purposes" with

companies like Facebook on which they are ostensibly supposed to be reporting. Owens, Gannett, and Lead Stories compete for traffic to their sites. They may take their profits through visitor donations, book sales, advertising, sponsorships, or even payments from Facebook, but they all compete for the blandishments and purchase decisions of visitors and others.

Facebook's decision to outsource its fact-checking services to Owens' competitors places those competitors in an obvious conflict of interest. They have the authority to banish their internet competitors from the marketplace. Lead Stories, like Gannett, defends this conflict by asserting that Facebook need not always follow their directions, intimating that Facebook exercises some discretion in imposing the "False" label directed by the fact checkers. That may be; discovery will tell if Facebook has, even once, gone against the wishes of its contractual partners. But the Plaintiff need not prove that Facebook has, without fail, implemented the remedy recommended by Lead Stories or Gannett. Just because a conflict of interest occasionally does not result in actual harm does not mean that the conflict of interest is of no effect. Facebook has the authority, either in whole or in part, to demonetize, suspend or even outright ban posters, and has delegated that authority to competitors of the very people the competitors purport to fact-check. Even worse, Facebook has agreed with the fact-checkers to superimpose a link over the "offending post," a link that redirects valuable internet visitors from Owens' posts over to the "fact-

checking" competitors' websites. (A–603, A–611-12). The arrangement is a recipe for conflicts of interest, abuse, and self-dealing. This private contract between Facebook and Lead Stories (and Gannett) presents a conflict of interest that no lawyer could plausibly overlook. That conflict of interest resulted in actual injury to Plaintiffs. (A–621).

Lead Stories protests that it "is simply not a competitor with Owens here" (L.S. Br. 21) because Owens has an advertising agreement with Facebook while Lead Stories does not. This argument mischaracterizes the relevant market. The relevant competitive market is not advertising space on Facebook; the relevant market is website value. The purpose of Owens' advertisements on Facebook is to direct readers to her page, where they can consume her content, visit sponsors and advertisers, and purchase products, such as her latest book. Lead Stories may not purchase advertising on Facebook, but it competes with Owens for web traffic, to show Facebook it is a good partner and is fulfilling its contractual obligations. (A–578, A–633). It is irrelevant by what method Owens or Gannett or Lead Stories drive visitors to their web sites; what is relevant is that that they all have an interest in creating traffic. It is this interest that puts these companies in competition. Both Gannett and Lead Stories profit, directly or indirectly, when particular articles generate high volumes of visitors. (*Id.*).

In the highly competitive internet marketplace, websites can drive traffic by posting their links on the pages of others, either through advertising or other means. Links parasitically steal readers from other content. Though admitting it makes money from the web, Lead Stories alleges it does not purchase advertising. Obviously, it need not: Facebook obliges Lead Stories by superimposing their links for free. The Fact-Check Contract creates an undeniable conflict of interest. Lead Stories, like Gannett, is both a competitor with Owens and the judge of her business opportunity. That conflict resulted in real harm as the defendants targeted Owens and caused a breach in her profitable relationship with Facebook and her future business relationships with book customers, among others. (A–578, A–615-621).

A. Defamation Issues: Hoax

Lead Stories is also subject to a count of defamation. Lead Stories accused Owens of committing a "Hoax," issuing a "Hoax Alert" that was superimposed over Owens' post, and directed visitors to a link connecting them to Lead Stories' website. This accusation of "hoax" is factual and defamatory.

Lead Stories argues that "Hoax" is not actionable because the term appeared in the headline or its internet equivalent, and not in the body of the article itself. This argument is puzzling: headlines are actionable, too. *E.g., Biro v. Conde Nast*, 883 F. Supp. 2d 441, 471 (S.D. N.Y. 2012), *aff'd*, 622 Fed. App'x. 67 (2d Cir. 2015) ("Plaintiff is correct that courts have found headlines to be defamatory in the context of an article."). In fact, because many "average readers" oftentimes do not read past the headline, headlines are the most damaging location for a defamatory statement. 1 RODNEY SMOLLA, LAW OF DEFAMATION § 4:25 (2d ed. 2020) ("Problems posed by headlines … will probably appear with increasing frequency, because so much of the output of modern journalism is now packaged to give quick, capsule summaries of the news, often in an attention-grabbing manner."). Moreover, as Lead Stories allows, "Hoax Alert" did not appear as just a headline in the traditional sense; as its own pleading underscores, the phrase "Hoax Alert" was superimposed in a bright red box with large white lettering. This defamatory accusation was not hidden in the recesses of a long article or buried in a footnote; it was highlighted and featured in a

way that no casual reader could possibly miss it. Even more pointedly, it was superimposed directly, and in much larger font, just above the photograph of Owens' face and over her Facebook post. Rather than exculpate Lead Stories, its placement of "Hoax Alert" in the position of a headline, even highlighted for internet publication, only makes matters worse.

Next, Lead Stories asserts the following: "Given the widespread hyperbolic use of the word "hoax" in recent years, it has lost much of the nuanced meaning of its dictionary definition." (L.S. Br. 33). Lead Stories cites no authority for this bizarre offhand observation, nor can it. This empirical assessment of "recent years" is not in the record; moreover, the observation seems dubious at best. But even if, in some place, somewhere, "hoax" has now become part of the local vernacular and is used in a non-serious, hyperbolic sense, certainly Lead Stories was not engaging in such street slang or local vernacular when it described the work of Owens. On the contrary, Lead Stories' prose was formal and its tone serious. By its own description, Lead Stories "engages in a long methodology" to evaluate posts (*id.* at 12), assessing the post's origin, evidence, assumptions, sourcing, and so forth. Before it publishes, Lead Stories consults with scientific sources, experts, and other trustworthy, official sources. (*Id.* at 13). At the conclusion of this "long methodology," Lead Stories "publishes an article with a designation . . . reflecting the results of the investigation." (*Id.*). Yet now we are to believe that Lead Stories, at the conclusion

of this supposed "scientific" process, resorts to some form of loose, hyperbolic vernacular to describe its findings? That, when Lead Stories, in its headline no less, accuses Owens of engaging in a "hoax," and that her readers need to be "alerted" to her duplicity, that Lead Stories was just summarizing its "scientific" inquiry in loose, jocular, figurative street slang?

The two cases cited by Lead Stories certainly do not hold, as Lead Stories claims, that the use of the term "hoax" is, as a matter of law, non-actionable hyperbolic language. In one, *Montgomery v. Risen*, the defendant described the plaintiff's bogus software, that was purported to detect secret hidden messages in otherwise benign video clips and television programs, as "what many current and former U.S. officials and others familiar with the case now believe was one of the most elaborate and dangerous hoaxes in American history, a ruse that was so successful that it nearly convinced the Bush administration to order fighter jets to start shooting down commercial airliners filled with passengers over the Atlantic." *Montgomery*, 197 F. Supp. 3d 219, 249 (D.D.C. 2016), *aff'd*, 875 F.3d 709 (D.C. Cir. 2017). The plaintiff argued that this description was defamatory. The trial court disagreed, holding that "[t]here is simply no method to objectively verify where an event ranks among the greatest hoaxes in American history – or whether a particular event even makes the list." *Id.* Thus, the key debate in *Montgomery* is not over whether or not the bogus software was indeed a "hoax," but where it ranked among

hoaxes in American history. This decision can hardly support Lead Stories' claim that the term "hoax" is hyperbolic as a matter of law.

The key is the context; nearly any word can be factual or hyperbolic, depending on the context of its use. For example, the term "liar" would provide a paramount illustration of a statement of fact, were it being used to allude to a person who failed to testify honestly in court. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-18, 21 (1990). One might think it could alternatively be construed as hyperbole if it were uttered in a less serious context. As the trial judge was careful to note in *Montgomery*, in resolving the "opinion [hyperbole] vs. fact" issue, "a court must consider the statement's context, 'because it is in part the *settings* of the speech in question that make [its] hyperbolic nature apparent.'" *Montgomery*, 197 F. Supp. 3d at 248 (citing *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 314 (D.C. Cir. 1994)) (emphasis in original). Lead Stories' "fact check" articles without question constitute a serious, factual, formal context. By its own admission, Lead Stories engages in a detailed research and publication process. (L.S. Br. 12-13). Lead Stories published the results of a "long methodology" of "scientific" dimension. (*Id.*). It was a serious work of journalism. That it chose to term Owens' post a "hoax" was no hyperbolic word choice.

The other case cited by Lead Stories, *Nunes v. Rushton*, is equally unhelpful. That matter involved anonymous statements made in the "comments" section by an

admitted plagiarist against a well-established author, calling her efforts to raise funds for litigation a "scam," "fraud," "harassment," "hoax," and similar personal invective. *Nunes*, 299 F. Supp. 3d 1216, 1224, 1230-31 (D. Utah 2018). Again, it was the context that mattered. Statements made in the comments section are not tantamount to more formal settings. As *Nunes* explained, the key is "the difference between non-actionable exaggerated language used to express an opinion . . . and a factual accusation . . . [of wrongdoing]." *Id.* In the context of the serious Lead Stories article, the accusation of "hoax" was not mere hyperbole. "Hoax" can reasonably be understood to impute wrongful acts. Certainly, neither decision identified by Lead Stories declares that "hoax" is, in all circumstances and contexts, hyperbolic.

A more instructive decision is *Jones v. Pozner*, No. 03-18-00603-CV, 2019 Tex. App. LEXIS 9641 (Tex. App. Nov. 5, 2019). There, during an InfoWars broadcast by Alex Jones, he asserted, among other things, that the Sandy Hook mass shooting was faked, and suggested that the victims' parents "participated in an abhorrent hoax." In deciding whether or not the term "hoax" was actionable, the court considered the context: on his broadcast, Jones "presents all of this information as 'trustworthy' news; claims his news was 'documented' based on 'in-depth research.'" *Id.* at *12. Citing to this serious, journalistic context, the court in *Jones* held that these statements were sufficiently factual to be actionable as defamation. "Because of the broadcast's overall impression that the shooting at Sandy Hook was

faked, a reasonable viewer could conclude that the broadcast mischaracterizes the parents' role, suggesting that they participated in an abhorrent hoax." *Id.* at *18. The court concluded that "the parents have produced the minimum quantum of clear and specific evidence necessary to support a rational inference that the statements were false …." *Id.* at *19.

In short, "hoax" can be factual; it depends on the context, and in the serious context of researched journalism, it is indeed factual. If the "InfoWars" broadcast of Alex Jones, a notorious purveyor of invective, is considered sufficiently "trustworthy" and "documented" by "in-depth research," then all the more is the proclaimed scientific carefulness of Lead Stories. The irony of Lead Stories now arguing that its "fact-check" publication is not to be taken seriously is apparent.

B. The Rest of Lead Stories' Arguments.

Lead Stories asserts numerous additional errors and omissions:

- L.S. Br. 9, 30: "Owens does not challenge the court's particular ruling regarding the use of a "False" label on appeal." False, Owens does so challenge. (Opening Br. 17, 20-21).
- L.S. Br. 9: "The Opening Brief . . . implies that the word "hoax" was used liberally throughout the Lead Stories Article." False; Plaintiffs made no such implication. Plaintiff cited specifically to the term and its location in the Amended Complaint. (A–605, A–656-662).
- L.S. Br. 9, 37-8: "The Opening Brief . . . misquotes the use of the term "originated" in the Lead Stories Article. Owens has altered the statement and omitted relevant context." False. The article in its entirety is included in the Amended Complaint (A–656-662) and is referred to by exact and full quotation, not by inaccurate description. (Opening Br. 38-40).
- L.S. Br. 9: "The use of the term 'originated,' when read in context, cannot reasonably be interpreted as meaning anything other than 'came from.'" False. The proper test of meaning is that of the reasonable, average reader, not a lawyer's post-fact re-interpretation. The Lead Stories article says "the claims originated," and by "claims," it meant clearly the "claims" that the United States was mis-tabulating Covid-19 deaths. The article says that

"the claims originated" with Owens' post; the average reader would likely understand this statement to mean that Owens was the first mover on these claims. If Lead Stories merely wanted to refer the reader to the post it would review, it had many, more simple and direct choices of vocabulary available; indeed, it could have employed its lawyer's suggestion of "came from." Lead Stories had the pen in its hand and is responsible for the words it published.

- L.S. Br. 10: "Owens appears to suggest that all fact checking should be categorically defined as unfair competition." False. Not all fact checking should be so defined; only where the fact checkers are competitors of the websites they choose to fact-check and can by contract put them out of business is unfair competition present.
- L.S. Br. 16, 44: "Owens' Facebook page was not demonetized based on the Lead Stories Article." False. It was. Just because the ax fell months later does not mean that the defendant's defamatory article was not the cause of the demonetization. The Amended Complaint pleads this point directly. (A–609-614, A–634).
- L.S. Br. 17: "[T]he Superior Court found that there was a contract between Owens and Facebook with which tortious interference may occur." True. This is an important point. Although both Gannett and Lead Stories

repeatedly claim Facebook has discretion in dealing with its users, that is of no moment: it is well-established that even "at-will" contracts can be the subject of tortious interference. The trial court's decision on this point was correct.

- L.S. Br. 20: "Owens appears to argue that the First Amendment categorially 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." False. Fact checkers need not "necessarily" be in competition with the poster: they need not have web sites to which they seek to drive traffic and from which they gain revenue. The defendant fact-check companies do, and they are in competition with Plaintiffs for valuable internet traffic.
- L.S. Br. 21, 44: "Lead Stories has a contract with Facebook to fact check posts, and not monetize or benefit from diverting visitors from Owens' Facebook page." False. As the Amended Complaint alleges, Lead Stories derives benefit, directly and indirectly, from traffic at its website. (A–578, A–633). Traffic increases Lead Stories' internet profile, brings its writers to greater prominence, enhances its stature as Facebook's partner, and furthers its political mission to counter "false facts." If Lead Stories' only goal were to fulfill its contract with Facebook, it would not publish on a

website, nor use colorful presentations and links to drive visitors to its pages. (A–605, A–656-662).

- L.S. Br. 23: "Owens identifies no actual breach, no failure to perform, and no termination of the contract with Facebook." False. (A–615-621, A–628-629).
- L.S. Br. 23: "Owens does not even allege any intentional interfering act by Lead Stories." False. (A–604-06).
- L.S. Br. 23: "Owens failed to plead that Lead Stories engaged in improper interference . . .." False. (A–604-06, A–611, A–628-29).
- L.S. Br. 24: "Owens fails to plead that Lead Stories engaged in improper interference [with business relations]." False. (A–624-627, A–628-629).
- L.S. Br. 24: "[Owens] further fails to sufficiently plead the requisite 'business opportunity.'" False. (A–615-621, A–630-32).
- L.S. Br. 24-5: "Owens identifies no party prepared to or dissuaded from entering into a business relationship, or anything more than her alleged perceptions of prospects." False. (A–615-621, A–630-32).
- L.S. Br. 26: "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.'" False, and decisively so. Owens spends a good deal of the Amended Complaint and the Opening Brief

alleging and arguing this precise point: that the particular context of the Lead Stories' article lends it an unmistakable tone of seriousness. (Opening Br. 9-10, 29-36; A–604-06, A–635, A–637). Indeed, from the opening bell, Owens has repeatedly and emphatically made this very contention. This assertion by Lead Stories is beyond reasonable argument.

- L.S. Br. 32: "[T]he '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,' . . . nor does Owens allege that it does." False; confusing. A defamation plaintiff is under no obligation to prove that the "content of the article" repeats or explains the content of the headline. Thus, Lead Stories oft-repeated conclusion that Owens has therefore "waived" something here is nonsensical. Lead Stories appears to contend that, if the "content" of the article does not repeat or expand on the "content" of the headline, then defamation plaintiffs have waived their claims. This is not the law. A defamation plaintiff need not allege that the "content" of the article repeats the "content" of a headline. *See Biro*, 883 F. Supp. 2d at 471.

- L.S. Br. 34: "Providing an alert of falsehoods in Owens' Facebook post is not maligning her in a profession." False. Owens makes a living from her Facebook posts. The Amended Complaint makes this clear. (A–580-85).
- L.S. Br. 34: Owens' "allegations of actual malice are insufficient." False. Actual malice is pled factually and with specificity. (A–624-27).
- L.S. Br. 44-5: "Owens appears to suggest that all fact checking should be categorically defined as unfair competition. … This is an extreme argument, with no support in law (and indeed, Owens cites nothing in support)." False, and patently absurd. Lead Stories creates a straw man argument, stating that Owens "appears to suggest" something, and then criticizes her for failing to provide support in law for a contention she did not make. This is not Owens' argument. Not "all fact checking" can constitute unfair competition. As the Amended Complaint, the Opening Brief, and this Reply Brief try to explain, repeatedly and in detail, it is the empowerment of fact checkers who stand to gain from the demise of their market competitor that creates the grounds for the tort of unfair competition. Indeed, that is exactly what has happened here.

CONCLUSION

For the reasons stated in Appellants' Opening Brief and this Reply Brief, the decision of the Superior Court should be reversed and remanded for trial.

Respectfully submitted,

BELLEW LLC

/s/ Sean J. Bellew
Sean J. Bellew (No. 4072)
2961 Centerville Rd., Suite 302
Wilmington, DE 19808
Phone: (302) 353-4951
sjbellew@bellewllc.com

Attorneys for Plaintiff-Appellants, Candace Owens and Candace Owens, LLC

OF COUNSEL:

Todd V. McMurtry (*PHV* admitted)
HEMMER DEFRANK WESSELS, PLLC
250 Grandview Drive, Ste. 500
Ft. Mitchell, KY 41017
Phone: (859) 344-1188
Fax: (859) 578-3869
tmcmurtry@hemmerlaw.com

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