IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA

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| ROBERT WEISENBACH, an Individual,<br><br>Plaintiff,<br><br>v.<br><br>PROJECT VERITAS, a foreign entity; JAMES O'KEEFE III, an Individual, and RICHARD ALEXANDER HOPKINS, an Individual,<br><br>Defendants. | ) | CIVIL DIVISION<br><br>Case No. 10819-21<br><br>**MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT BY DEFENDANTS PROJECT VERITAS AND JAMES O'KEEFE III** |

Pursuant to Pa. R. Civ. P. 1028, Defendants Project Veritas and James O'Keefe III hereby offer their brief in support of their Preliminary Objections to the Amended Complaint filed by Plaintiff Robert Weisenbach as follows:

## INTRODUCTION

In his amended complaint, Weisenbach sets out to punish Defendants Project Veritas ("Veritas") and James O'Keefe III ("O'Keefe") for publishing information about one of the most newsworthy events of 2020: the presidential election. This is a herculean task, since the First Amendment protects the reporting of news stories earnestly gained from sources. That is, pursuant to *New York Times Co. v. Sullivan*, the constitutional protections of free speech and the free press purposefully make tort actions against speakers more difficult as a safeguard to protect the free flow of information. 376 U.S. 254, 279–280 (1964).

Weisenbach alleges that Veritas and O'Keefe's recitation of facts that they learned in the days immediately following the 2020 election constitutes defamation. Weisenbach further alleges

that Veritas and O'Keefe did so knowing the statements were false or with a reckless disregard of whether they were false or not. (Amend. Compl. ¶¶ 65, 75). The amended complaint now adds "substantial assistance/concerted tortious activity" as a new claim, which must be decided upon the same standards as defamation claims. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

## 1. STATEMENT OF THE QUESTIONS INVOLVED

a. Whether this Honorable Court should sustain Defendants' Preliminary Objections and dismiss Plaintiff's claim of defamation with prejudice for failure to plead that Defendants made a false statement with actual malice against Plaintiff Robert Weisenbach? **Suggested Answer: Yes.**

**b.** Whether this Honorable Court should sustain Defendants' Preliminary Objections and dismiss Plaintiff's claim of substantial assistance/concerted tortious activity with prejudice for failure to plead that Defendants made a false statement with actual malice against Plaintiff Robert Weisenbach? **Suggested Answer: Yes.**

## 2. NEWSGATHERING ON TRIAL

The core facts at issue relate to news reporting protected at the core of the First Amendment. *See Baumgartner v. United States*, 322 U.S. 665, 673–674 (1944) ("One of the prerogatives of American citizenship is the right to criticize public men and measures"). This includes protection for commentary that is caustic or "unpleasantly sharp." *Sullivan*, 376 U.S. at 270. Project Veritas published a story relating a postal worker's experience during the 2020 elections—sharing his recollection of a conversation about backdating of mail-in ballots. To punish reporters for reporting breaking news about the "political conduct of officials" reflects the

"obsolete doctrine that the governed must not criticize their governors." *Id.* at 272 (internal quotations omitted).

As with all of its efforts, Veritas's stories in this matter were duly investigated, vetted, and responsibly published: Defendant Hopkins still stands by what he heard. But even where courts have considered other less-reputable reporting that contained "half-truths" and "misinformation," government officials must be assumed to be "men of fortitude[.]". *Id.* at 273 (internal quotations omitted). Thus, special safeguards protect reports such as these, because no defamation standard can demand that one "guarantee the truth of all his factual assertions." *Id.* at 279. Were it otherwise, critics of public officials would censor themselves "because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.* If publishers of half-truths and misinformation are protected against spurious defamation claims under *Sullivan*, responsible journalists like Veritas and O'Keefe are, too.

### 3. THE FIRST AMENDMENT'S SPECIAL SOLICITUDE AGAINST DEFAMATION SUITS AIMED TO MUZZLE JOURNALISTS

*Sullivan* birthed the now-familiar test requiring "actual malice" for public figures to bring defamation suits—that is, liability only attaches with knowledge that a statement was false or with reckless disregard of whether it was false or not. *Id.* at 279–80. Precedent cited by the Court would broadly consider "public figure" to include "all officers and agents of government—municipal, state, and national." *Coleman v. MacLennan*, 78 Kan. 711, 734–35 (1908). Later, in *Gertz v. Robert Welch, Inc.* the Court recognized "limited-purpose public figures", where an individual "voluntarily assumed a prominent role in a public controversy and the attendant risk of enhanced public scrutiny that accompanies it." 418 U.S. 323, 344–45 (1974).

By the terms of his own amended Complaint, Plaintiff Robert Weisenbach is a public official and public figure for purposes of defamation law. A government "employee's position

must be one which would invite public scrutiny and discussion of the person holding it" to invoke this status. *Rosenblatt v. Baer*, 383 U.S. 75, 86 n.13 (1966). Nationwide, courts have had little difficulty applying this status to all varieties of government workers—school principals, *Palmer v. Bennington Sch. Dist.*, 615 A.2d 498, 502–03 (Vt. 1992), government contractors, *Hodges v. Okla. Journal Publ'g Co.*, 617 P.2d 191, 194 (Okla. 1980), and even postmasters, *Knipe v. Procher*, 75 Pa. D. & C. 420, 421 (Com. Pl. 1951) ("A postmaster is a public official and as such 'is bound to exercise his judgment for the public benefit and any contract by which this exercise of his judgment is sold for his private emolument interferes with the proper discharge of his duties as a public officer, and such contract is against public policy and void'") (citing 49 C.J. 1138); *see also Silbowitz v. Lepper*, 32 A.D.2d 520 (N.Y. App. Div. 1969) ("[T]he plaintiff, a supervisor and senior administrator of the Peck Slip Station of the City of New York Post Office Department, is to be considered a public official within the purview of the *New York Times Co. v. Sullivan* . . . ."). With such a status comes a purposefully difficult defamation standard, both substantively and procedurally, and that standard applies in the instant matter.

## 4. WEISENBACH HAS NOT PLED A PROPER DEFAMATION CLAIM UNDER COUNT II

Under Pa. R. Civ. P. 1028(a)(4), a matter may be dismissed when the contested pleading is legally insufficient. *Weiley v. Albert Einstein Medical Center*, 51 A.3d 202, 208 (Pa. Super. Ct. 2012). Courts should examine the "averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred." *Brosovic v. Nationwide Mutual Insurance Co.*, 841 A.2d 1071, 1073 (Pa. Super. Ct. 2004). The essential inquiry comes down to whether, on the facts presented and taken as true, the law provides that no recovery is possible. *Bilt–Rite Contractors, Inc. v. The Architectural Studio*, 866 A.2d 270, 274 (Pa. 2005). Weisenbach must be held to the appropriate burdens and constitutional principles.

To sustain a count sounding in defamation, the plaintiff has the burden of proving:

> (1) the defamatory character of the communication; (2) publication of the communication to a third party; (3) the communication refers to the plaintiff; (4) the third party's understanding of the communication's defamatory character; and (5) injury.

*Brown v. Blaine*, 833 A.2d 1166, 1173 n.14 (Pa. Commw. 2003) (citing 42 Pa. C.S.A. § 8343).

**a. Weisenbach Fails to Plead a Defamatory Statement**

Weisenbach fails to sustain his burden in demonstrating the defamatory character of the communications in controversy and any third party understanding of it. Instead, Weisenbach offers speculation designed to punish Veritas's reporting about the statements of a postal worker, Richard Hopkins, and his recounting of conversations about the backdating of ballots. (Amend. Compl. ¶ 45.) It remains Plaintiff's burden to prove the defamatory character of a communication. 42 Pa.C.S.A. § 8343(a). And determining a defamatory meaning is a question of law. *Gibney v. Fitzgibbon*, 547 Fed. Appx. 111, 113 (3d Cir. 2013) (citing *Kurowski v. Burroughs*, 994 A.2d 611, 617 (Pa.Super.Ct. 2010)).

**i. Conclusory Allegations of Defamation Focused on Reasoned News Judgments do not Constitute Defamation**

Plaintiff includes examples of supposedly defamatory statements such as "failing to verify the truth" related to "imputed criminal misdeeds," or promoting "false claims of an election conspiracy," or using phrases like "so much fraud," or "personally vouching for the truth and veracity of the demonstrably false claims." (Amend. Compl. ¶180.) Weisenbach includes a laundry list of terms he prefers Veritas and O'Keefe had not communicated: "backdating, directing others to backdate, conspiring to backdate, and/or turning a blind eye to others backdating. . . ." (Amend. Compl. ¶179.) Plaintiff's closest specification of an allegedly defamatory communication is found in the Amended Complaint's factual narrative—that "USPS workers were backdating ballots in

order to sway the election to former Vice President Biden." (Amend. Compl. ¶37.) But this communication—a discussion about the backdating of ballots—is precisely what Richard Hopkins overheard and then communicated to Project Veritas. Hopkins remains committed to the veracity of this statement. (Amend. Compl. ¶¶83-84). O'Keefe placed a call to Weisenbach for comment, but Weisenbach elected not to respond. (Amend. Compl. ¶48).

Courts nationwide repeatedly dismiss defamation suits made in a conclusory fashion and for being legally insufficient. *See, e.g.*, *Matter of Abbitt v. Carrube*, 159 A.D.3d 408, 410, (1st Dept. N.Y. 2018) (granting motion to dismiss libel claim on pleadings because petitioner's allegation of malice was conclusory); *Zoumadakis v. Uintah Basin Medical Center, Inc.*, 122 P.3d 891, 893 (Utah. App. 2005) ("[a]n allegation of 'certain derogatory and libelous statements' is insufficient"); *Coghlan v. Black*, 984 N.E.2d 132, 150 (Ill. App. 2013) (conclusory factual assertions regarding defamation are insufficient to survive a motion to dismiss); *Darakjian v. Hanna*, 840 A.2d 959, 966 (N.J. App. 2004) (dismissal appropriate where factual support for defamation claims was lacking because otherwise "any person or entity claiming First Amendment protection would be at the mercy of a claimant's empty assertions unsupported even by any contentions regarding surrounding facts"). Although Weisenbach's complaint is lengthy and reads like a spy novel, Count II is short on alleging actionable defamatory statements in any detail and should be dismissed.

As responsible journalists, Veritas and O'Keefe may take a reasoned assessment of the facts they have collected and pronounce their opinion about it. In the heat of an election, this had to be done quickly. After learning about what Hopkins overheard, statements by O'Keefe and Veritas pondering about fraud or backdating are protected statements of conversational meaning or opinion, not codified legalese. As other courts have determined, individuals are free to

characterize the actions of others as constituting fraud, extortion, or worse. These statements could refer to their "conversational meaning as something generally coercive, such as an excessive overcharge . . . or [they] could refer to the codified criminal act." *Little v. JB Pritzker for Governor*, 2019 WL 1505408 at *8 (N.D. Ill. April 5, 2019). To allege per se defamation for imputing a criminal act the "defendant's statements must be an express accusation of a specific indictable offense, not a mere inference of illegal activity." *See Kapotas v. Better Govt. Ass'n*, 30 N.E.2d 572, 590 (Ill.App. 2015) ("the use of a term which has a broader, noncriminal meaning does not impute the commission of a crime"). The Supreme Court has reached similar conclusions. In *Old Dominion Branch No. 496 National Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 284-85 (1974), the term "'traitors' was not libelous because the word was used in a loose, figurative sense to demonstrate the union's strong disagreement" such that it was "impossible to believe any reader ... would have understood the newsletter to be charging the [workers] with committing the criminal offense of treason" (internal quotation marks and citations omitted). Similarly, the Supreme Court has also reasoned that the word "blackmail" is simple hyperbole not to be understood literally. *Greenbelt Coop. Publ'g Ass'n v. Bressler*, 398 U.S. 6, 13–14 (1970). Veritas and O'Keefe's reporting here simply made a reasoned assessment about the facts learned from Richard Hopkins. To discuss the possibility that these acts may constitute fraud or a conspiracy or may do damage to electoral integrity is well within their First Amendment rights.

It is easy to understand why protecting journalists' statements of opinion about facts they have gathered is entitled to heightened First Amendment protection. Without this protection, the news would consist of bleary, generic facts, with never a perspective or opinion uttered for fear of legal reprisal. News reports, especially contending news reports, play an important role in the truth-seeking function of the marketplace of ideas. Entertaining liability for the wrong opinion, wrong

thought, or wrong perspective about earnestly-gathered facts is a concept foreign to the First Amendment. For these reasons, Count II should be dismissed.

### ii. Weisenbach's Misunderstanding of Pennsylvania Election Law Does Not Transform Veritas's Reporting into Defamation

Weisenbach attempts to support his claim of defamation with a misrepresentation of *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). *Boockvar* is an important antecedent here because it involved questions about the legality of ballot processing in the 2020 election. Thus, it sets the baseline standard for legal rules about accepting and processing ballots. Under Plaintiff's reading of the case, ballots postmarked by November 6 were "legally cast and required to be counted," thus nothing illegal could have occurred based on the facts presented here. (Amend. Compl. ¶¶88-90.) If one reads *Boockvar* in this manner, it is easy to see how one might believe defamatory communications were at issue since backdated ballots would seemingly be permissible.

But a careful reading of *Boockvar* shows that mail-in ballots had to be postmarked by 8:00 PM on November 3, 2020. The decision merely permitted a three-day extension of the received-by deadline solely to allow for the *tabulation* of ballots. 238 A.3d at 371–72. Specifically, the Pennsylvania Supreme Court explained:

> we adopt the Secretary's informed recommendation of a three-day extension of the absentee and mail-in ballot received-by deadline to allow for the tabulation of ballots mailed by voters via the USPS and postmarked by 8:00 p.m. on Election Day to reduce voter disenfranchisement resulting from the conflict between the Election Code and the current USPS delivery standards, given the expected number of Pennsylvanians opting to use mail-in ballots during the pandemic.[1]

[1] Similarly, *Boockvar* held that ballots *without postmarks* or those with *illegible* postmarks could be counted if received on or before November 6, 2020. 238 A.3d at 399 n.26. However, ballots with postmarks still had to be postmarked by November 3, 2020 to be eligible. It is this standard which governs, not the standard for illegible or missing postmarks.

*Id.* at 371 (emphasis added). Thus, the legal standard for accepted ballots still required a postmark of November 3, 2020. *Boockvar* did not change *when* ballots had to be postmarked, nor did it embrace any *backdating* of posted ballots—and this is precisely what Defendants communicated to the American public.

By misreading *Boockvar*, Plaintiff suggests that the Pennsylvania Supreme Court permitted "count[ing] mail-in ballots until November 6, 2020, was the law in-effect and this court ruling was publicly disseminated and widely known; as such [VERITAS] and O'KEEFE knew or had reason to know that any reports of ballot segregation expressly comported with Pennsylvania law." (Amend. Compl. ¶90.) But the Pennsylvania Supreme Court did not permit the counting of all mail-in ballots until November 6, 2020. Nor did the Court permit the backdating of ballots by the Postal Service. Plaintiff's reliance on *Boockvar* cannot sustain a finding of a defamatory statement here.

**iii. No Defamatory Statements Were Made**

Plaintiff's allegations that Veritas's news reporting constituted defamation rests on two flawed approaches. First, by generically describing Veritas's publications as communications sounding off about unsupported fraud, fake conspiracies, or otherwise seeking to undermine the 2020 election results, Plaintiff misses the important speech at issue. He also fails to provide this Court with identifiable, actionable defamatory communications. News organizations regularly rely on insiders to provide important tips about news events of the day. And journalists are free to decide their own editorial stance and opinion about those facts. Richard Hopkins shared that he overheard discussions about backdating of ballots with Veritas and O'Keefe. He stands by that story to this day. (Amend. Compl. ¶¶83-84.) Any subsequent reporting by Veritas and O'Keefe, including their own judgments based on that information, are protected by the First Amendment

and do not constitute defamatory statements. Second, Plaintiff's misreading of *Boockvar* does not transmute Defendants' speech into unprotected defamation. Indeed, it is a testament to Project Veritas and James O'Keefe that they accurately reported that ballots received with a postmark after November 3, 2020 should not be counted and that backdated ballots remained illegal. Because Plaintiff's reading of *Boockvar* is inaccurate as a matter of law, his bootstrapping of that precedent to make Veritas's reporting defamatory is unsupported. For both these considerations, Count II should be dismissed.

**b. Plaintiff Fails to Show Actual Malice**

Weisenbach is the Erie County Postmaster. (Amend. Compl. ¶¶36, 40.) This is a managerial role within the United States Postal Service. Plaintiff circulated mandates regarding the "handling and coordinating the receipt of mail-in ballots[.]" (Amend. Compl. ¶31.) Moreover, "[u]nder PLAINTIFF [Weisenbach]'s direction, the ERIE GMF arranged to meet and collect incoming mail-in ballots from other local Plants, and to deliver them directly to the Erie Board of Elections[.]" (Amend. Compl. ¶33). As acknowledged in the amended complaint, the Erie County Board of Elections commended Weisenbach on November 4, 2020 for "coordinating mail pickup and extra trips with overnight ballots[.]" (Amend. Compl. ¶36.)

Postmasters are public officials, which is equivalent to a public figure for defamation purposes. *Rosenblatt*, 383 U.S. at 85 ("It is clear . . . that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."); (*cf.* Amend. Compl. ¶¶31, 33)*; see also Knipe*, 75 Pa. D. & C. at 421 ("A postmaster is a public official and as such 'is bound to exercise his judgment for the public benefit and any contract by which this exercise of his judgment is sold for his private emolument interferes with

the proper discharge of his duties as a public officer, and such contract is against public policy and void.'" (emphasis added)) (citing 49 C.J. 1138); *Silbowitz*, 32 A.D.2d 520 ("[T]he plaintiff, a supervisor and senior administrator of the Peck Slip Station of the City of New York Post Office Department, is to be considered a public official within the purview of the *New York Times Co. v. Sullivan* . . . .").

Weisenbach is, at a minimum, a "limited purpose public figure" for purposes of mail-in voting because he "voluntarily inject[ed] himself . . . into a particular public controversy[.]" *Am. Future Sys., Inc. v. Better Business Bureau of Eastern Pa.*, 592 Pa. 66, 86–87 (2007) (citing *Gertz*, 418 U.S. at 352). Weisenbach oversaw mail-in voting in the election on November 3, 2020. This was a controversial and closely-watched presidential election. Since the activities at issue here date to November 5, 2020 and thereafter, it regards a pre-existing controversy and makes Plaintiff at least a limited purpose public figure. (Amend. Compl. ¶¶27-30.)

As a public figure and public official, Weisenbach must not only assert a defamatory action, but establish that it was done with actual malice—that is, knowledge of falsity or reckless disregard for the truth. *Sullivan*, 376 U.S. at 279–80. "[T]he requirement that the plaintiff be able to show actual malice by clear and convincing evidence is initially a matter of law." *Tucker v. Philadelphia Daily News*, 577 Pa. 598, 626 (2004) (emphasis added). The facts alleged here demonstrate that actual malice is lacking.

Project Veritas and O'Keefe's reporting, as detailed in the amended complaint, illustrates due care and responsibility, not actual malice. The amended complaint concedes that Veritas and O'Keefe reached out to Weisenbach by phone on the afternoon of November 5, 2020 to get his

input about this story. (Amend. Compl. ¶48[2]; *cf.* Amend. Compl. ¶66 (alleging "[VERITAS] and O'KEEFE . . . made little and/or no attempt to discern the truth and veracity of the claims made by the 'whistleblower.'")) It further concedes that Veritas attempted to interview Plaintiff in person again as the events unfolded. (Amend. Compl. ¶139.) The amended complaint details that on November 6, 2020, Defendant Hopkins identified himself publicly in a follow-up video by Veritas and O'Keefe. (Amend. Compl. ¶79.) It notes that on November 6, 2020 Defendant Hopkins signed a sworn affidavit attesting to what he observed on or around November 5, 2020. (Amend. Compl. ¶83; Amend. Compl. Exh. 9.) Accepting as true all of these well-pleaded material facts, the complaint—far from showing actual malice by Veritas or O'Keefe—details the careful reporting of breaking news of what Hopkins stated that he heard and the fallout of his allegations. Veritas and O'Keefe had every right to publish the words of a postal worker who presented serious concerns as to the collection and submission of mail-in votes. Scrupulous, responsible reporting in the heat of an election is not actual malice. National precedent concerning actual malice supports this conclusion.

The Supreme Court has long held that even a "showing of extreme departure from normal journalistic standards and the duty to investigation are insufficient; there must be evidence, direct or circumstantial, that the defendant published with a high degree of awareness of probable falsity or entertained serious doubts as to the truth of the publication" for actual malice to be met. *Foretich v. Advance Magazine Publishers, Inc.*, 765 F.Supp. 1099, 1108–09 (D.D.C. 1991) (citing *Harte–Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989)). No such showing has been

[2] *See Pennsylvania USPS Whistleblower Exposes Anti-Trump Postmaster's Illegal Order to Back-Date Ballots*, YOUTUBE, Nov. 5, 2020, https://youtu.be/AR_XpJ287Iw?t=118 (Timestamp 01:59-02:18. In response to an inquiry about Hopkins's allegations, Weisenbach comments: "That's untrue and I don't talk to reporters like you" and hangs up).

made here. Imparting some enhanced duty to investigate the background behind every source's story about items of public concern would impart a "chilling effect on the free flow of ideas as First Amendment jurisprudence has sought to avoid." *Geiger v. Dell Publishing Co.*, 719 F.2d 515, 518 (1st Cir. 1983).

The Supreme Court of Pennsylvania has summarized how the actual malice standard should operate:

> The actual malice standard of *Times v. Sullivan* permits no recovery for the publication of information, obtained from a reliable source, which directly relates to a public official's conduct in office. Indeed, publication of such information in justified reliance on a source is wholly the antithesis of publication with knowledge that the information is false. Nor can it be said that publication in justified reliance on a source displays reckless disregard of whether such information is true or false. . . . Thus, while "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports," . . . it simply cannot be concluded that a defendant entertained the requisite doubt as to the veracity of the challenged publication where the publication was based on information a defendant could reasonably believe to be accurate.

*Curran v. Philadelphia Newspapers, Inc.*, 497 Pa. 163, 179–80 (1981) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)).

Courts have routinely held that failure to investigate, without more, does not demonstrate actual malice. *See Harte–Hanks Commc'ns, Inc.*, 491 U.S. at 688–89 (finding that a newspaper's failure to investigate does not support a finding of actual malice, but purposeful avoidance of the truth may); *see also Gertz*, 418 U.S. at 332 (1974) ("Mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth."); *Tucker v. Fischbein*, 237 F.3d 275, 286 (3d Cir. 2001) ("failure to investigate, standing alone, does not constitute actual malice."); *McDowell v. Paiewonsky*, 769 F.2d 942, 951 (3d Cir. 1985) (finding that "[w]hile it may have been negligent" for the defendant "not to have checked independently the veracity" of certain statements, the defendant's fault did not rise to the level of actual malice where the defendant had

relied on official reports and news accounts); *Coughlin v. Westinghouse Broad. and Cable, Inc.*, 603 F.Supp. 377, 387 (E.D. Pa. 1985) ("Evidence of failure to investigate, ... is also insufficient to show that [the] defendant acted with malice."); *Tucker*, 577 Pa. at 634 ("Failure to check sources, or negligence alone, is simply insufficient to maintain a cause of action for defamation").

Nationally, courts have followed the *Harte-Hanks* line of reasoning in defamation cases to preserve free speech interests, denying relief on a duty to investigate theory. *See, e.g.*, *Maether v. Someplace Safe, Inc.,* 929 N.W.2d 868, 883 (Minn. 2019) (domestic abuse non-profit had no duty to investigate claims it published about a survivor of abuse where non-profit believed the statements of the individual and had no reason to question her honesty); *Jackson v. Hartig*, 645 S.E. 2d 303, 309 (Va. 2007) (no duty to investigate unless defendant had a "high degree of awareness" of "probable falsity"); *Geiger v. Dell Publishing Co.*, 719 F.2d 515, 518 (1st Cir. 1983) (imposing a duty to investigate would chill the free flow of ideas); *Velle Transcendental Research Ass'n v. Sanders*, 518 F.Supp. 512, 518–519 (C.D. Cal. 1981) (even relying on sources of doubtful reputation that corroborated each other was sufficient to avoid defamation claims). This approach is in accord with the Third Circuit's approach. Public figure plaintiffs cannot sustain defamation claims when a reporter relies on a source's description of events. *Fischbein*, 237 F.3d at 286–87. As with Pennsylvania state courts, it is generally agreed that where a journalist relies on a source to report information about a newsworthy event, any additional failure to investigate does not constitute actual malice. *Tucker*, 577 Pa. at 634.

The facts pled in the amended complaint show news reporting done with heightened professionalism and due care. The Plaintiff alleges that Veritas reached out to him not once, but twice, for comment and that it had Hopkins sign an affidavit in support of his statement to attest to its veracity. (Amend. Compl. ¶¶48, 83, 139.) Veritas obtained critical, unique information from

a one-of-a-kind Postal Service insider in the wake of one of the most controversial elections of this country. Veritas quickly put together a story, checked the underlying facts, and reached out for comment—the stuff responsible journalism is made of. Rather than support a showing of actual malice, the facts pled in the amended complaint illustrate trustworthy and professional reporting.

Because Plaintiff relied upon direct quotations of statements made by Hopkins that were published by Veritas and O'Keefe, this forecloses the possibility that Plaintiff can meet the high standard required of actual malice. (*See* Amend. Compl. ¶¶78, 82, 83, 96, 97, 106, 111, 113.) Plaintiff has failed as a matter of law to satisfy the standard set forth in *Harte-Hanks Communications*, *Tucker*, and *Curran*—as Veritas and O'Keefe relied on first-hand sources in support of their story, conducted their own investigation into relevant facts, and published an item of public interest. Whether, how, or how deeply they investigated any underlying facts in the hours between receiving information and publishing are irrelevant under controlling precedent and fails to establish actual malice. Consequently, this Court should dismiss Count II.

### 5. COUNT III FAILS TO STATE A PROPER CLAIM FOR SUBSTANTIAL ASSISTANCE

Weisenbach's claim of substantial assistance is based on alleged "publication of falsehoods and half-truths[.]" (Amend. Compl. ¶ 198.) Public figures and public officials such as Weisenbach cannot recover for substantial assistance related torts "without showing . . . that the publication contains a false statement of fact which was made with 'actual malice[.]'" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). The First Amendment axiomatically requires that tort law protects against overreaching, nebulous causes of action that may impair speech or newsgathering. Thus, to protect the free flow of ideas, investigations, and opinions, reputational torts like substantial assistance require a showing of actual malice. As with Count II, Plaintiffs have not identified a single defamatory action made by either Veritas or O'Keefe, let alone activity rising

to the level of actual malice. For the same reasons that Weisenbach's claim of defamation fails, so too does his claim of substantial assistance.

It remains apparent that Richard Hopkins acted as an insider who independently came forward to Project Veritas to share his story. (Amend. Compl. ¶202(b).) Where news publishers publish the accounts of an insider and play no part in any illegal interception of material, they are immune from claims raised against the inside source. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Smith v. Daily Mail*, 443 U.S. 97 (1979). In short, Plaintiff's amended complaint suggests a loose conspiracy between Hopkins, Veritas, and O'Keefe to defame him, but nowhere alleges any facts to show that Veritas or O'Keefe defamed Weisenbach or induced Hopkins to defame him. The independent acts of Hopkins are insufficient to remove First Amendment protection for Veritas's publishing of a newsworthy story. *See, e.g.*, *Democratic Nat'l Cmte. v. Russian Federation*, 392 F.Supp.3d 410, 433–34 (S.D.N.Y. 2019).

Weisenbach's claim of substantial assistance is entirely based on alleged "half-truths and accusations" and alleged "misrepresentations" about himself. (Amend. Compl. ¶198.) As with intentional infliction of emotional distress, public figures and public officials such as Weisenbach cannot recover for substantial assistance "without showing . . . that the publication contains a false statement of fact which was made with 'actual malice[.]'" *Falwell*, 485 U.S. at 56. This standard is a century old. *See Jaillet v. Cashman*, 189 N.Y.S. 743, 744 (Sup. Ct. 1921), *aff'd,* 194 N.Y.S. 947 (App. Div. 1922), *aff'd,* 235 N.Y. 511 (1923) ("There is moral obligation upon everyone to say nothing that is not true, but the law does not attempt to impose liability for a violation of that duty unless it constitutes a breach of contract obligation or trust, or amounts to a deceit, libel, or

slander."); *see also Smith v. Linn*, 48 Pa. D. & C.3d 339, 341 (Pa. Com. Pl. 1988), *aff'd,* 386 Pa. Super. 392 (1989), *aff'd,* 526 Pa. 447 (1991).

For all these reasons, Count III should be dismissed.

**6. Conclusion**

For the foregoing reasons, Defendants Veritas and O'Keefe respectfully request that this Honorable Court sustain these preliminary objections and dismiss Plaintiff's claims with prejudice.

Respectfully submitted,

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Dated: October 4, 2021

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| ROBERT WEISENBACH, an Individual;<br><br>Plaintiff,<br><br>v.<br><br>PROJECT VERITAS, a foreign entity; JAMES O'KEEFE III, an Individual, and RICHARD ALEXANDER HOPKINS, an Individual,<br><br>Defendants. | ) | CIVIL DIVISION<br><br>Case No. 10819-21 |

**CERTIFICATE OF COMPLIANCE**

I certify this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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Date: October 4, 2021

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**CERTIFICATE OF SERVICE**

I certify that on October 4, 2021, a true and correct copy of MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS TO FIRST AMENDED COMPLAINT by PROJECT VERITAS and JAMES O'KEEFE III were served via Electronic Mail and First Class Mail:

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