COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA

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

PLAINTIFF'S BRIEF IN OPPOSITION TO PRELIMINARY OBJECTIONS OF DEFENDANTS PROJECT VERITAS AND JAMES O'KEEFE III

AND NOW, comes Plaintiff, ROBERT WEISENBACH, by and through undersigned counsel, and files the within Response and Brief in Opposition to the Preliminary Objections of Defendants, PROJECT VERITAS and JAMES O'KEEFE III, a statement of which is as follows:

INTRODUCTION

In the immediate aftermath of the 2020 presidential election, Defendants Project Veritas ("PV"), and James O'Keefe III repeatedly published the lie that Plaintiff Robert Weisenbach directed and personally carried out a scheme to illegally backdate mailed ballots to help then-presidential candidate Joe Biden. And they added to it, calling it "Voter Fraud" and "#MailFraud." The sole source for this lie is Defendant Richard Hopkins. Yet even after Hopkins acknowledged to United States Postal Service ("USPS") investigators that he had invented the core of the story, recorded that acknowledgment, and provided it to PV and O'Keefe, PV and O'Keefe continued to republish the lie. To this day, roughly eight months after USPS investigators released their final report finding "no evidence" to support Hopkins's claims, PV and O'Keefe refuse to retract or correct any of their defamatory articles.

At no point did PV or O'Keefe corroborate Hopkins's claims in any fashion. Instead, PV and O'Keefe propped Hopkins and his claims up. They drafted, notarized, and published an affidavit for Hopkins fleshing out the lie—an affidavit Hopkins disclaimed in his interview with USPS investigators and admitted he did not even "think too much" about when reading. They also advised Hopkins to set up a crowdfunding site, used their social media platforms to solicit donations for him, and told Hopkins they had lawyers on retainer for him if he got in trouble. After he admitted the fabrication to USPS investigators, PV and O'Keefe flew him to New York and had him reiterate the lie in an interview they then published. His false claims helped buttress a broader narrative they had been pushing—that mail-in ballots would lead to widespread election fraud.

These allegations, clear on the face of the Amended Complaint, are more than sufficient to make out a defamation claim clearly and convincingly, even under the actual malice standard. *E.g.*, *Castellani v. Scranton Times, L.P.*, 124 A.3d 1229, 1241–45 (Pa. 2015); *Harte-Hanks Comm'ns, Inc. v. Connaughton*, 491 U.S. 657, 688–89, 692 (1989). The First Amendment's actual malice standard is not, and has never been, a license to intentionally assassinate a civil servant's character in order to undermine our democracy. Perhaps recognizing the weakness of their position on actual malice, PV and O'Keefe have taken the odd position that Weisenbach's detailed, forty-page Amended Complaint has failed to allege any defamatory statements at all. That is, to put it mildly, not true. Nor do PV and O'Keefe seriously grapple with Weisenbach's substantial assistance claim, choosing instead to reprise their first two unpersuasive points.

Even under the actual malice standard, Plaintiff's burden at this stage is to allege facts that, assumed true and coupled with all reasonable inferences therefrom, show that PV and O'Keefe either knew that the statements they published were false or recklessly disregarded the

truth. The Amended Complaint easily clears that threshold, and there are clearly jury questions here: did PV and O'Keefe publish lies about Weisenbach knowingly or with reckless disregard for the truth? And did PV and O'Keefe substantially assist Hopkins in publishing his lies about Weisenbach? As such, the Court should overrule PV and O'Keefe's preliminary objections and move this case forward.

STATEMENT OF THE ISSUES

I. WHETHER PLAINTIFF SUFFICIENTLY PLED HIS CLAIM FOR DEFAMATION? Suggested answer: Yes.

II. WHETHER PLAINTIFF SUFFICIENTLY PLED HIS CLAIM FOR CONCERTED TORTIOUS ACTION/SUBSTANTIAL ASSISTANCE? Suggested answer: Yes.

STANDARD OF REVIEW

In evaluating preliminary objections in the nature of a demurrer, the Court must accept as true all material facts as set forth in Plaintiff's Amended Complaint and exhibits, as well as all reasonable inferences from those facts. *DeMary v. Latrobe Printing and Publishing Company*, 762 A.2d 758, 761 (Pa. Super. Ct. 2000). Plaintiff's First Amended Complaint is therefore incorporated herein in its entirety. The question is whether, on the facts averred in the Amended Complaint and exhibits, "the law says with certainty that no recovery is possible." *Id.*; *accord Clausi v. Stuck*, 74 A.3d 242, 246 (Pa. Super. Ct. 2013). "Any doubts must be resolved in favor of overruling the demurrer." *Petula v. Mellody*, 588 A.2d 103, 106 (Pa. Commw. Ct. 1991).

ARGUMENT

I. PLAINTIFF SUFFICIENTLY ALLEGED HIS DEFAMATION CLAIM

In general, an action for defamation *per se* requires a plaintiff to prove (1) the defamatory character of the communication, (2) its publication by the defendant, (3) its application to the plaintiff, (4) the understanding by the recipient of its defamatory meaning, (5) the understanding

by the recipient of it as intended to be applied to the plaintiff, and (6) abuse of a conditionally privileged occasion, if any privilege pertains. *Walker v. Grand Cent. Sanitation, Inc.*, 634 A.2d 237, 242 (Pa. Super. Ct. 1993). Where a plaintiff is a "public official" or "public figure," the First Amendment requires that they also prove that a defendant acted with "actual malice"—*i.e.*, with knowledge that their statements were false or with reckless disregard of whether they were false. *E.g.*, *Castellani v. Scranton Times, L.P.*, 124 A.3d 1229, 1241 (Pa. 2015).

PV and O'Keefe argue that Plaintiff failed to allege any defamatory statements or to properly plead actual malice. PV's Br. at 4–15. They are wrong.

A. Plaintiff Alleges Dozens of Actionable Defamatory Statements Attributable to PV and O'Keefe

Contrary to PV and O'Keefe's bizarre contention, *see* PV's Br. at 5–10, the Amended Complaint plainly alleges dozens of defamatory statements attributable to PV and O'Keefe.

"Under Pennsylvania law '(a) communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Thomas Merton Ctr. v. Rockwell Int'l Corp.*, 442 A.2d 213, 215 (Pa. 1981) (quoting *Birl v. Phila. Elec. Co.*, 167 A.2d 472, 475 (Pa. 1960)); *Diah-Kpodo v. Wawa, Inc.*, No. 1100 EDA 2015, 2016 WL 732767, at *3 (Pa. Super. Ct. Feb. 24, 2016) (same). In addition, "a publication in which the speaker imputes to another conduct, characteristics, or a condition that would adversely affect her in her lawful business or trade is termed a 'slander *per se*,'" *Walker v. Grand Cent. Sanitation, Inc.*, 634 A.2d 237, 241 (Pa. Super Ct. 1993), as is "a libelous imputation of crime . . . [or] unfitness for business or calling," *Agriss v. Roadway Exp., Inc.*, 483 A.2d 456, 471 (Pa. Super. Ct. 1993). *See also infra* at pp. 9–10.

In reviewing the "defamatory character" and "defamatory meaning" elements, the trial court at the pleading stage asks simply whether the plaintiff has identified a communication that

is "capable of" or "*reasonably susceptible of* a defamatory meaning." *Pace v. Baker-White*, 432 F. Supp. 3d 495, 510 (E.D. Pa. 2020) (emphasis added); *accord Thomas Merton Center v. Rockwell Int'l Corp.*, 442 A.2d 213, 215–16 (Pa. 1981). The court focuses on "the effect [the communication] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." *Baker v. Lafayette Coll.*, 532 A.2d 399, 402 (Pa. 1987). "Unless the court is certain the communication is incapable of bearing a defamatory meaning a demurrer challenging the sufficiency of the complaint should be overruled." *Zartman v. Lehigh Cnty. Humane Soc.*, 482 A.2d 266, 269 (Pa. Super. Ct. 1984).

Importantly, PV and O'Keefe are liable *both* for republishing Hopkins's defamatory remarks and publishing their own defamatory remarks. Under Pennsylvania law (as elsewhere), each time an outlet republishes a source's defamatory statements, it engages in new, actionable defamation. *Castellani v. The Scranton Times, L.P.*, No. 2005CIV00069, 2011 WL 13210770, at *4 n.2 (Pa. Ct. C.P. June 08, 2011), *overruled on other grounds*, 124 A.3d 1229, 1232 (Pa. 2015); *see Flaxman v. Burnett*, 574 A.2d 1061, 1066 (Pa. Super. Ct. 1990); *see also Castellani v. Scranton Times, L.P.*, 124 A.3d 1229, 1244 (Pa. 2015); *see generally* Restatement (Second) of Torts § 578 (1977).[1] Relatedly, anyone who "participate[s] in the publication of the defamatory publication by another" is liable for defamation. *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1043 (Pa. 1996); *Martin v. Finley*, 349 F. Supp. 3d 391, 425 (M.D. Pa. 2018), *on reconsideration*, No. 3:15-CV-1620, 2019 WL 1473421 (M.D. Pa. Apr. 3, 2019).

Applying these principles, there is no question that the Amended Complaint sufficiently alleges dozens of defamatory statements attributable to PV and O'Keefe. What is less clear is how PV and O'Keefe failed to notice them. The title of the very first article PV and O'Keefe

[1] *Accord Graham v. Today's Spirit*, 468 A.2d 454, 457–58 (Pa. 1983).

published with Hopkins is itself defamatory, accusing Plaintiff of orchestrating a "'Nov. 3' Postmark Voter Fraud Scheme." Am. Compl. ¶ 39 & Ex. 5. PV and O'Keefe promoted that story with defamatory tweets that used the hashtag, "#MailFraud." *Id.* ¶ 41 & Exs. 6, 27. That included tweets stating, "BREAKING: Pennsylvania @USPS Whistleblower Exposes Anti-Trump Postmaster's Illegal Order To Back-Date Ballots," "@USPS workers are being ordered by their postmasters to ILLEGALY BACK DATE ballots to November 3rd . . . THIS IS CORRUPTION," and "The fraud is happening as we speak…they are going to be collecting and backdating ballots in Pennsylvania tomorrow according to our whistleblower." *Id.* ¶¶ 41, 54 & Exs. 6, 27–29. The story and interview themselves contain numerous defamatory statements that PV and O'Keefe published or republished. Examples include:

- Hopkins suggesting that Plaintiff was illegally ordering carriers to pick up mail-in ballots and requiring the November 4, 5, and 6 ballots "be postmarked the third." *Id.* ¶¶ 39–40 & Ex. 5.

- Hopkins saying, "I heard [Plaintiff] say to the supervisor that they messed up yesterday" because they supposedly "postmarked one of the ballots the fourth instead of the third, 'cause they were supposed to put them for the third," and that Plaintiff was supposedly "upset" "because, well he's honest to God, he's actually a Trump hater" and because he "wanted [the ballot] 'cause, uh, it may have came [sic] from Pittsburgh." *Id.* ¶¶ 45–46.

- O'Keefe saying he and PV had "multiple sources" for the story. *Id.* ¶ 48.

On November 6, PV and O'Keefe published a second story and an affidavit—which PV and O'Keefe drafted for Hopkins—that contained many of the same defamatory statements, exhaustively quoted in the Amended Complaint. *Id.* ¶¶ 79–90. Highlights include:

- Hopkins attesting, "Weisenbach and [USPS supervisor Darrell] Locke discussed how on November 4, 2020, they had back-dated the postmark on all but one of the ballots collected on November 4, 2020 to make it appear as though the ballots had instead been collected on November 3, 2020." *Id.* ¶ 84; *see also id.* ¶ 82.

- Hopkins attesting, "I heard Weisenbach tell a supervisor at my office that Weisenbach was back-dating the postmarks on the ballots to make it appear as though

the ballots had been collected on November 3, 2020 despite them in fact being collected on November 4 and possibly later." *Id.* ¶ 84.

- Hopkins attesting, "Importantly, Weisenbach and his assistant had ordered my co-workers and I to continue picking up ballots after November 3 despite the requirement that ballots be mailed by then. Weisenbach directed that ballots be picked up through Friday, November 6, 2020. Moreover, Weisenbach directed that all ballots picked up through November 6, 2020 were to be given to him, presumably so they could be backdated by him and/or Locke." *Id.*

- O'Keefe and PV amplifying the second story using the hashtag, "#BackDateGate." *Id.* ¶ 80 & Ex. 30.

On November 11, after Hopkins acknowledged his claims were fabricated and PV and O'Keefe were made aware of his recantation, PV and O'Keefe published a third article reprising many of the same specific defamatory remarks. *Id.* ¶¶ 96, 108–18; *see also* Pl.'s Opp'n to Hopkins Prelim. Objs. at pp. 7–9. Highlights include:

- O'Keefe showing Hopkins his defamatory affidavit, and asking him, "So, you still stand by what you signed here in this affidavit that postmaster, Rob Weisenbach, directed your co-workers to pick up ballots. And in fact you heard Weisenbach tell a supervisor, they were back[dating] the ballots to make it appear they'd been collected on November 3. You still stand by that?" Hopkins replies, "Yes." Am. Compl. ¶ 113.

- O'Keefe's own statement denying Hopkins's recantation and vouching for his account: "No one should be treated the way Hopkins was treated by people claiming they wanted to protect him. . . . He did not recant his story. He affirmed it and stands by it—despite the incredible pressure for him to call himself a liar." *Id.* ¶ 116.

PV and O'Keefe do not deny that they published, republished, or participated in publishing each of these statements; that that they still have not retracted these stories; that the statements are of and concerning Plaintiff; or that the recipients understood them to apply to Plaintiff. *See* PV's Br. at 5–8. Nor do they invoke any conditional privilege. *See id.*[2] PV and

[2] PV and O'Keefe do not assert, nor could they assert, any applicable privileges. There is no "neutral reportage privilege" in Pennsylvania. *Norton v. Glenn*, 860 A.2d 48, 58–59 (Pa. 2004). Pennsylvania does recognize a narrower "fair report privilege," but this privilege is unavailable, as it only covers "precisely accurate retelling[s]" of "official governmental proceedings." *Weber v. Lancaster Newspapers, Inc.*, 878 A.2d 63, 72 (Pa. Super. Ct. 2005).

O'Keefe argue only that Plaintiff fails to allege specific, defamatory statements attributable to them and that Plaintiff's purported misreading of *Boockvar* does not render their statements defamatory *per se*. PV's Br. at 8–10. Neither argument holds up.

1. Plaintiff Alleges Specific, Defamatory Language

As the above statements make clear, PV and O'Keefe's suggestion that Plaintiff fails to allege defamatory statements with specificity is a strawman argument, premised on a somewhat baffling misreading of Plaintiff's Amended Complaint. Citing paragraph 179 of the Amended Complaint, PV and O'Keefe suggest that the heart of Plaintiff's claim is "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.'" PV's Br. at 5. But paragraph 179 in fact alleges that PV and O'Keefe "republished each of HOPKINS's slanderous and defamatory statements." Those defamatory statements are laid out with specificity in paragraphs 39–75, 79–90, 108–18, 163, and the exhibits thereto, and they are explicitly incorporated in the defamation claim against PV and O'Keefe, *see* Am. Compl. ¶ 178. Similarly, PV and O'Keefe misconstrue paragraph 180 as containing only generic descriptions of supposed defamation. PV's Br. at 5. In fact, that paragraph includes multiple quotations from PV and O'Keefe's articles and social media posts, each of which are straightforwardly defamatory. Am. Compl. ¶ 180. It also summarizes other defamatory statements attributable to PV and O'Keefe, which are quoted elsewhere in the Amended Complaint. *Id.*

2. Plaintiff Alleges Defamation *Per Se*

PV and O'Keefe's suggestion that their statements are insufficiently specific to constitute defamation *per se* fares no better. *See* PV. Br. at 6–7. As noted above, a communication is defamatory *per se* if the communication imputes to the plaintiff either "business misconduct" or

a "criminal offense," punishable by imprisonment. *Clemente v. Espinosa*, 749 F. Supp. 672, 677 (E.D. Pa. 1990) (citing the Restatement (Second) of Torts § 570); *accord Brinich v. Jencka*, 757 A.2d 388, 397 (Pa. Super. Ct. 2000). The category of "business misconduct" is broad, covering any "communication which ascribes to another conduct, character, or a condition that would adversely affect his fitness for the proper conduct of his business, trade, or profession." *Pelagatti v. Cohen*, 536 A.2d 1337, 1345 (Pa. Super. Ct. 1987) (internal citations omitted). Thus, to qualify as defamatory *per se* for imputing "business misconduct," a communication need not "explicitly charge the subject with a failure of business or professional performance." *Clemente*, 749 F. Supp. at 678. Rather, it is enough for the communication to indicate an "unfitness for business" or to disparage a "quality . . . [that] is peculiarly valuable in the plaintiff's business or profession." *Id.*; *accord. McGovern v. Chilson*, 47 Pa. D. & C. 4th 449, 455–56 (Pa. Ct. C.P. 2000). Similarly, the "criminal offense" category of defamation *per se* does not require that the defendant actually "name the offense charged"; simply "imply[ing] some crime" or "indirectly" charging the commission of an offense is sufficient. *Clemente*, 749 F. Supp. at 679 (quoting the Restatement (Second) of Torts § 571)); *see id.* at 676 (defamatory *per se* to connect someone, in general terms, with mafia "dealings"). Accordingly, in Pennsylvania, accusing a professional of "fraud" or "possible illegal" conduct constitutes defamation *per se. Pelagatti*, 536 A.2d at 1345; *Klehr v. JPA Development, Inc.*, No. 425, 2004 WL 5175146 (Pa. Ct. C.P. Aug. 27, 2004); *see also, e.g.*, *Clemente*, 749 F. Supp. at 679–80.

In addition, contrary to the Illinois rule cited by PV and O'Keefe, PV's Br. at 7, Pennsylvania courts have held that any doubts about defamatory "meaning" or "character" with respect to defamation *per se* must be resolved in favor of the plaintiff at this stage. *E.g.*, *Pelagatti*, 536 A.2d at 1345; *see id.* ("[E]ven where a plausible innocent interpretation of the

communication exists, if there is an alternative defamatory interpretation, it is for the jury to determine if the defamatory meaning was understood by the recipient."). For example, after a trial court held that accusing a truck driver of "opening company mail" in violation of company policy did not convey a defamatory meaning, the Superior Court reversed. *Agriss v. Roadway Exp., Inc.*, 483 A.2d 456, 471 (Pa. Super. Ct. 1984). Not only were these words "capable of a defamatory meaning," they constituted defamation *per se* "because the charge imputed to appellant unfitness for business or calling and, arguably, criminal activity." *Id.* at 463, 471.

As noted above, the Amended Complaint documents numerous communications in which PV and O'Keefe expressly labeled Plaintiff's conduct "fraud[ulent]" and "illegal." Am. Compl. ¶¶ 39, 41; *see also id.* ¶ 84. These are textbook examples of defamation *per se*, alleging that Plaintiff committed a litany of specific criminal offenses,[3] and simultaneously "ascrib[ing] to [Plaintiff] conduct . . . that would adversely affect his fitness" to serve as postmaster by claiming he misused his position to fraudulently tip the election scales. *Pelagatti*, 536 A.2d at 1345.[4]

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[3] *See, e.g.*, 18 U.S.C. § 1341 (mail fraud); 52 U.S.C. § 20511 (federal election fraud); 52 U.S.C. § 10307(c) (false information in voting); 18 U.S.C. §§ 241–42 (state and federal election fraud, including ballot-stuffing); *id.* § 1693 (carriage of mail contrary to law); 18 Pa. Stat. and Cons. Stat. Ann. § 4911 (tampering with public records); 25 Pa. Stat. Ann. §§ 3525, 3527 (interference with elections and fraud by election officers).

[4] In their Preliminary Objections, PV and O'Keefe make much of Plaintiff's supposed misreading of *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), which extended by three days the received-by deadline for mail-in ballots without a postmark. *See* PV's Br. at 8–9. That is a red herring. Plaintiff's Amended Complaint erred in one narrow respect. Plaintiff alleged that "PLAINTIFF and his assistant did not order employees to pick up ballots in contravention of the law—indeed, per the Pennsylvania Supreme Court's injunction, ballots postmarked by November 6 were legally cast and required to be counted." Am. Compl. ¶ 88. The word "postmarked" should have read "received without a postmark." *See Boockvar*, 238 A.3d at 386. The Amended Complaint subsequently corrected this error, alleging that Hopkins, PV, and O'Keefe defamed Plaintiff by "insinuating that PLAINTIFF *illegally* directed HOPKINS 'to continue picking up ballots after November 3,' even though picking up ballots after November 3 was not only not against the law, but required by the Pennsylvania Supreme Court's injunction." Am. Compl. ¶¶ 163, 179; *see also id.* ¶ 23. In any event, Plaintiff's one-word error does not alter in any way the material facts: (1) there was nothing illegal about post office workers continuing

B. Plaintiff Sufficiently Alleges Actual Malice

Assuming Plaintiff is required to plead actual malice, the allegations in the Amended Complaint are more than sufficient. A public official's burden at this stage is to allege facts that, assumed true and coupled with all reasonable inferences therefrom, show that the defendant knew the statements he published were false or published them with reckless disregard for their truth. *See, e.g.*, *Castellani v. Scranton Times, L.P.*, 124 A.3d 1229, 1241 (Pa. 2015). While a public official must demonstrate actual malice with "clear and convincing proof" at trial, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974), the First Amendment "doesn't require him to prove that state of mind in the complaint," *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir. 2002).[5]

At trial, "[t]he existence of actual malice may be shown in many ways," including by "direct or circumstantial" evidence. *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 906 (Pa. 2007) (quoting *Herbert v. Lando*, 441 U.S. 153, 164 n.12 (1979)); *see also Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989). As both the United States and Pennsylvania Supreme Courts have noted, public official defamation cases "do[] not readily lend

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to *collect* ballots after November 3, and some ballots collected after November 3 were required to be counted; and (2) it would have been illegal for USPS employees to backdate *any* ballots. PV and O'Keefe make these very points in their brief. PV's Br. at 8–9. Yet, PV and O'Keefe accused Plaintiff of *illegally* ordering USPS workers to continue picking up mail-in ballots after November 3 and *illegally* backdating those ballots. Am. Compl. ¶¶ 39–75, 79–90, 92–100, 108–18. PV and O'Keefe's arguments about *Boockvar* only underscore the extent to which they knowingly engaged in defamation *per se*.

[5] *See also Palin v. New York Times Co.*, 940 F.3d 804, 817 (2d Cir. 2019) (same). Actual malice, like all conditions of mind, may be generally averred along with sufficient facts that could show or give rise to a reasonable inference that a defendant either knew that the statements he published were false or in fact had serious doubts about the statements' veracity. *See* Pa. R.C.P. 1019(b); *see Archibald v. Kemble*, 971 A.2d 513, 519 (Pa. Super. Ct. 2009), *app. denied*, 989 A.2d 914 (Pa. 2010); *Smith v. Wagner*, 588 A.2d 1308, 1311 (Pa. Super. Ct. 1991). In any event, Plaintiff's Amended Complaint clearly and convincingly shows actual malice.

[themselves] to summary disposition" because "'actual malice' calls a defendant's state of mind into question." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979); *Weaver*, 926 A.2d at 907.

Throughout their brief, PV and O'Keefe suggest they cannot be found to have acted with actual malice because they relied on Hopkins's statements and affidavit. PV Br. at 3, 14–15. Courts have never condoned such a head-in-the-sand approach to journalism. Actual malice lies where a publisher participates in a story's fabrication or where "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)). Similarly, as a federal district court recently noted, "there is no rule that a defendant cannot act in reckless disregard of the truth when relying on sworn affidavits—especially sworn affidavits that the defendant had a role in creating." *US Dominion, Inc. v. Powell*, No. 1:21-CV-00040 (CJN), 2021 WL 3550974, at *10 (D.D.C. Aug. 11, 2021). Just as the First Amendment is not "a license to fabricate damaging allegations and falsely attribute them to official sources," *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1318 (3d Cir. 1994), it is not a license to blindly trumpet a source's lies without any meaningful investigation, *especially* after the source admits to lying.

1. <u>Fabrication and Serious Doubts as to Truth</u>

The Amended Complaint makes clear that PV and O'Keefe knew that Hopkins's and their own claims were fabricated—or, at a minimum, that they had serious doubts about their veracity—and thereafter republished those statements. A defendant acts with reckless disregard of the truth and, therefore, actual malice when a story "is fabricated by the defendant" or "the product of his imagination." *St. Amant*, 390 U.S. at 732; *see also Curran v. Phila. Newspapers, Inc.*, 546 A.2d 639, 642 (Pa. Super. Ct. 1988). And once a defendant is on notice of the falsity of

their statements, "republications, retractions, and refusals to retract" are also evidence of "actual malice" with respect to *both* prior and subsequent defamations, *Castellani,* 124 A.3d at 1242; *Weaver*, 926 A.2d at 906; *Herbert*, 441 U.S. at 164 n.12.

Consider *Castellani v. Scranton Times, L.P.*, 124 A.3d 1229 (Pa. 2015). There, *The Scranton Times* published three articles accusing two former county commissioners of "stonewall[ing]" a grand jury investigating corruption at a local prison by providing testimony that was evasive. *Id.* at 1232–33. After the first article, the judge in the case ordered an investigation into whether there had been a breach of grand jury secrecy. *Id.* at 1232. That investigation led the judge to issue an opinion that dismantled the first article's account, noting that "the report of the testimony of the witnesses was totally at variance and not borne out by the record of the witness' testimony," and that "none of [the things the newspaper reported] happened." *Id.* Nevertheless, the newspaper republished the claims in a second article by noting that "[t]he newspaper's source has been contacted and says he absolutely stands by his account of the grand jury testimony." *Id.* at 1233. The newspaper republished its initial claims a third time, after a second judge issued an opinion contradicting its account. *Id.*

On those facts, the Pennsylvania Supreme Court observed that "[t]he judicial opinions . . . put the Newspaper on notice that it should question the veracity of its initial publication," *id.* at 1243, and held that the newspaper's "republication after receiving notice of the potential falsity of the initial publication [wa]s relevant to a determination of actual malice in the initial publication as well as the republication," *id.* at 1244. In other words, such evidence gives rise to a jury question on actual malice because it makes it "more or less probable that the [publisher] either knew the information its source had provided was false or that it acted in reckless disregard for the truth." *Id.* at 1243. The Court rejected the newspaper's argument that the

judicial opinions did not sufficiently place the newspaper on notice of falsity because they were not verifiable. *Id.* at 1243. Instead, "[e]vidence may put a publisher on notice of potential falsity even where it is not verifiable or indisputable," *id.*, and any argument about sufficient notice "goes to the weight the jury gives to the [notice] as evidence of actual malice," *id.* at 1244.

The facts of *Castellani* are on all fours with Plaintiff's allegations here. On November 5 and 6, 2020, PV and O'Keefe published two articles and an affidavit accusing Plaintiff of orchestrating, directing, and personally carrying out a scheme to illegally backdate ballots, and amplified those claims on social media. Am. Compl. ¶¶ 39–75, 79–90 & Exs. 5, 8–9. Although in the first article O'Keefe falsely said that PV and O'Keefe had multiple sources for those claims, *id.* ¶ 48, the *only* source for PV and O'Keefe's claims was Hopkins, *see id.* ¶¶ 39–75, ¶¶ 79–90 & Exs. 5, 8–9. Moreover, PV and O'Keefe (or their agent) *drafted* Hopkins's defamatory affidavit for him, encouraged Hopkins to solicit donations, and helped him set up his crowdsourcing accounts. *Id.* ¶¶ 83, 97, 100.

On November 9, Hopkins was interviewed by USPS Office of Inspector General (OIG) investigators. *Id.* ¶¶ 92–100. Hopkins revealed that his sensational account was fabricated: "I heard, specifically, what I heard was, 'fourth ballots picked up.' And then I heard them saying something about the markings being on the third. One was the fourth. That's it." *Id.* ¶ 96. Hopkins acknowledged that the rest of the account was "based on my assumption of what I could hear," and that "I didn't specifically hear the whole story. I just heard a part of it. And I could of missed a lot of it." *Id.* Hopkins ultimately admitted that, "My mind probably added the rest. I understand that." *Id.*; *see also* Pl.'s Opp'n to Hopkins Prelim. Objs. at pp. 7–8. Hopkins surreptitiously recorded this interview and provided the recording to PV and O'Keefe, who published it online. Am. Compl. ¶¶ 93–95. They were plainly on notice of Hopkins's recantation.

Yet, rather than retract their initial stories, PV and O'Keefe flew Hopkins to New York for another interview and ran a third article based on the interview, republishing the initial defamatory claims. *Id.* ¶¶ 108–18. O'Keefe also personally vouched for Hopkins, noting that Hopkins "did not recant his story. He affirmed it and stands by it—despite the incredible pressure for him to call himself a liar." *Id.* ¶ 116. And even after the USPS OIG issued its final report concluding that there is "no evidence" to support PV and O'Keefe's claims, and despite Plaintiff's repeated demands that PV and O'Keefe retract their defamatory claims, PV and O'Keefe have refused to retract. *Id.* ¶¶ 149, 154, 192 & Exs. 1, 19.

In sum, Hopkins's recantation put PV and O'Keefe on notice that their defamatory claims were fabricated or, at a minimum, would have given PV and O'Keefe serious doubts as to Hopkins's veracity and the accuracy of their reports. The fact that they nevertheless republished the defamatory claims about Plaintiff is direct evidence that PV and O'Keefe published their third article with actual malice. *St. Amant*, 390 U.S. at 732; *Norton v. Glenn*, 860 A.2d 48, 55 (Pa. 2004) (quoting *St. Amant*, 390 U.S. at 732). In addition, PV and O'Keefe's republication of those defamatory remarks after Hopkins had acknowledged their falsity and refusing to retract those claims, even without more, is circumstantial evidence that both their republication on November 11 *and the initial publications* on November 5 and 6 were made with actual malice. *Castellani*, 124 A.3d at 1242; *Weaver*, 926 A.2d at 906; *Herbert*, 441 U.S. at 164 n.12.

But Plaintiff has alleged even more evidence of actual malice than existed in *Castellani*. *Cf. Castellani*, 124 A.3d at 1244. In addition to their obstinate reliance on an unreliable source, PV and O'Keefe (or their agents) were intimately involved in propping up Hopkins's story; they *also* (a) drafted Hopkins's affidavit for him; (b) asked Hopkins to direct media inquiries to them so that they could "vet them for [him] to see if they were going to write a bad story about him";

(c) possibly disseminated Hopkins's affidavit directly to the Trump Campaign; (d) talked to Hopkins "[a]bout once a day" to offer him "guidance"; (e) encouraged him to open his crowdsourcing accounts, helped him set them up, and encouraged others to donate to those efforts; (f) told Hopkins they had lawyers retained for him; and (g) arranged for Hopkins to fly to New York City for the final interview and article. Am. Compl. ¶¶ 83, 97, 100, 109, 120, 180. Further, when confronted with the disconnect between Hopkins's defamatory November 6 affidavit that PV and O'Keefe (or their agents) drafted for Hopkins and Hopkins's actual recollection, Hopkins told USPS investigators, "I didn't even really, I didn't even think too much on it when I was reading [the affidavit]." *Id.* ¶ 97. From these facts, it is reasonable to infer that, beyond publishing lies about Plaintiff with actual malice, PV and O'Keefe further participated directly in fabricating Hopkins's initial defamatory claims, encouraged Hopkins to deny recanting those claims by providing him with a financial incentive through the crowdfunding platforms, and worked with Hopkins to craft a narrative to explain his recantation.

2. <u>Intentional Avoidance of Truth and Inherent Improbability</u>

The Amended Complaint also alleges that PV and O'Keefe acted with actual malice by purposefully avoiding the truth. "Although failure to investigate will not alone support a finding of actual malice, . . . the purposeful avoidance of the truth is in a different category." *Harte-Hanks Comm'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989); *Joseph v. Scranton Times L.P.*, 129 A.3d 404, 437 (Pa. 2015) (same). Accordingly, actual malice may be inferred where an outlet publishes a defamatory article on the basis of an informant "where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Norton*, 860 A.2d at 55 (quoting *St. Amant*, 390 U.S. at 732). Similarly, actual malice may be inferred from the publication of "a statement in the face of verifiable denials, . . . and without further investigation

or corroboration, where allegations were clearly serious enough to warrant some attempt at substantiation" *Curran v. Phila. Newspapers, Inc.*, 546 A.2d 639, 642 (Pa. Super. Ct. 1988).[6] So, too, does actual malice lie where a "publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." *St. Amant*, 390 U.S. at 732.

In *Stickney v. Chester County Communications, Ltd.*, for example, a newspaper published a series of articles accusing two police officers of engaging in acts of brutality based on the accounts of individuals who claimed to be victims. 522 A.2d 66, 67 (Pa. Super. Ct. 1987). For most of the articles, it made no attempt to contact the other officers allegedly involved. *Id.* at 68. It also published some articles despite the fact that the source "had reportedly apologized to officers at the hospital and admitted that he was wrong." *Id.* The newspaper also added allegations of its own, including allegations of a police cover-up. *Id.* On those facts, the Court held that there was actual malice, concluding that the newspaper and reporter's "failure to investigate where they had such obvious reasons to doubt [the source]'s veracity and the accuracy of his allegations manifests a reckless disregard for the truth." *Id.* at 69.

Similarly, in *Godwin v. Daily Local News Co.*, a newspaper published a former police officer's accusation that a current officer stole his property. 47 Pa. D. & C.3d 639, 641, 644 (Pa. C.P. 1987). Although the newspaper had two different reporters unsuccessfully attempt to contact the local police, state police, district justice, and district attorney to verify those claims before publishing, the Court held that "[t]he actions of the defendant in speedily publishing such

[6] *See also Harte-Hanks*, 491 U.S. at 682–93 (holding that a newspaper acted with actual malice when it failed to interview a key witness or listen to a recording in its possession which could have corroborated or refuted its allegations); *Costello v. Ocean Cnty. Observer*, 643 A.2d 1012, 1023 (N.J. 1994); Rodney A. Smolla, *Law of Defamation* § 3:44 (2d ed.); *accord Kuhn v. Trib.-Republican Pub. Co.*, 637 P.2d 315, 319 (Colo. 1981) (holding that the "failure to pursue the most obvious available sources of possible corroboration or refutation may clearly and convincingly evidence a reckless disregard for the truth").

serious accusations from such an unreliable source without any meaningful attempt at substantiation provided the jury with sufficient evidence from which they could infer that the publisher was motivated by actual malice." *Id.* at 652–53.[7]

PV and O'Keefe clearly understand that a publisher's failure to investigate can evidence actual malice. In their own pending defamation lawsuit against Stanford and the University of Washington, PV and O'Keefe argue that researchers published a report with actual malice because they "fail[ed] to sufficiently investigate the truth or falsity of the statements before publishing them," failed to contact sources named in a video, "recklessly disregarded contradictory information in their possession," and "failed to retract or correct these false and defamatory statements despite multiple requests that they do so." Compl. ¶¶ 166, 168–70, *Project Veritas v. The Leland Stanford Junior Univ.*, No. 2:21-cv-01326-TSZ (W.D. Wash. Sep. 29, 2021), ECF No. 1 (a true and correct copy is attached as Exhibit A to Plaintiff's response).

Here, the Amended Complaint alleges that PV and O'Keefe intentionally avoided the truth and continue to do so. Most straightforwardly, PV and O'Keefe were made aware of the fact that Hopkins admitted to USPS investigators that Hopkins had no basis for his claims. *See* Am. Compl. ¶¶ 92–96, 108–18. At that point, there were indisputably "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Norton v. Glenn*, 860 A.2d 48, 55 (Pa. 2004) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)). Yet, PV and O'Keefe

[7] *See also Frisk v. News Co.*, 523 A.2d 347, 351 (Pa. Super. Ct. 1986) (holding that a plaintiff demonstrated actual malice by showing "(1) the utter lack of adequate pre-publication investigation; (2) the use of wholly speculative accusations and accusatory inferences; and (3) the failure to utilize or employ effective editorial review"); *accord Straub v. CBS Broad., Inc.*, No. CV 14-5634, 2016 WL 943954, at *10 (E.D. Pa. Mar. 11, 2016) (holding that a jury issue existed on a reporter's actual malice where a source "demonstrably lied" to the reporter because "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports").

republished Hopkins's lies without taking any steps to verify Hopkins's claims. *See id.* ¶¶ 92–118. Months after USPS investigators released their final report finding "no evidence" to support Hopkins's claims, PV and O'Keefe still refuse to retract their lies. *Id.* ¶¶ 9, 78, 154, 180, 192 & Ex. 21. PV and O'Keefe's republication of Hopkins's lies after he admitted they were lies, and their refusal to retract those lies, "is likely . . . a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [Hopkins]'s charges." *Harte-Hanks*, 491 U.S. at 692.[8] At a minimum, after Hopkins recanted, Hopkins's claims were "so inherently improbable that only a reckless man would have put them in circulation." *St. Amant*, 390 U.S. at 732.

Even before Hopkins recanted, PV and O'Keefe purposefully avoided the truth. PV and O'Keefe undertook only the most cursory attempt to verify Hopkins's claims. On November 5, O'Keefe called Plaintiff, who denied the alleged scheme. Am. Compl. ¶ 48. The same day, PV and O'Keefe contacted USPS Supervisor Darrell Locke, who denied the existence of any voter fraud scheme—a denial they never reported. *Id.* ¶ 68. That was it. PV and O'Keefe never attempted to contact other members of the Erie General Mail Facility, other USPS personnel, or others alleged to be involved in the scheme. *Id.* ¶¶ 67, 69. That includes Stephanie Hetrick and district leadership, despite the fact that Hopkins named both as integral to the alleged scheme. *Id.* ¶ 69. Nor did PV and O'Keefe check Plaintiff's political affiliation or ask him whom he had voted for before calling Plaintiff "Anti-Trump," and republishing Hopkins's claims that Plaintiff was a "Trump Hater" who was attempting to skew the election for then-presidential candidate

[8] Any argument that Hopkins's recantation did not provide PV and O'Keefe with sufficient proof that their defamatory statements were false "goes to the weight the jury gives to the [recantation] as evidence of actual malice." *Castellani v. Scranton Times, L.P.*, 124 A.3d 1229, 1244 (Pa. 2015).

Joe Biden (Plaintiff is neither). *Id.* ¶¶ 1, 70, 180. PV and O'Keefe's suggestion that this "show[s] news reporting done with heightened professionalism and due care," PV's Br. at 14–15, only reflects their profound misunderstanding of how responsible news organizations operate.

3. <u>Preconceived Narrative and Ulterior Motive</u>

The Amended Complaint further makes out actual malice with allegations concerning PV and O'Keefe's adherence to a preconceived narrative aimed at undermining faith in the election results. "[E]vidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice, and may often prove to be quite powerful evidence." *Harris v. City of Seattle*, 152 F. App'x 565, 568 (9th Cir. 2005).[9] Similarly, a publisher's tendency to prioritize publishing sensational stories over truthful stories supports a finding of actual malice. *Tavoulareas v. Piro*, 759 F.2d 90, 121 (D.C. Cir.), *vacated in part on reh'g*, 763 F.2d 1472 (D.C. Cir. 1985), *and on reh'g*, 817 F.2d 762 (D.C. Cir. 1987); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 158 (1967).

In addition, evidence of motive can support a finding of actual malice. *See Harte-Hanks Comm'ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989) (holding that financial motive was supportive of the Court's ultimate conclusion of actual malice); *Sprague v. Walter*, 656 A.2d 890, 907 (Pa. Super. Ct. 1995) (evidence of motive may be admitted on a case-by-case basis where its probative value to establish "actual malice" outweighs the risk that admitting the

[9] *See also, e.g.*, *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982) *cert. denied*, 103 S. Ct. 1233 (1983); *accord Gilmore v. Jones*, 370 F. Supp. 3d 630, 673 (W.D. Va. 2019), *motion to certify appeal granted*, No. 3:18-CV-00017, 2019 WL 4417490 (W.D. Va. Sept. 16, 2019);); Rodney A. Smolla, *Law of Defamation* § 3:71 (2d ed.). PV and O'Keefe are also aware of this principle, as they argue that the defendants in their own defamation suit acted with actual malice by "publishing a preconceived narrative." Compl. ¶ 171, *Project Veritas v. The Leland Stanford Junior Univ.*, No. 2:21-cv-01326-TSZ (W.D. Wash. Sep. 29, 2021), ECF No. 1.

evidence will chill honestly believed speech); *see also US Dominion, Inc. v. Powell*, No. 1:21-CV-00040 (CJN), 2021 WL 3550974, at *11, 13 (D.D.C. Aug. 11, 2021) (finding actual malice allegations sufficient in part because Mike Lindell sought to profit from lies about Dominion).

Here, the Amended Complaint alleges that PV and O'Keefe preconceived and pressed the story line of voter fraud in order to help undermine public trust in an electoral victory by then-presidential candidate Joe Biden. As early as 2019, PV and O'Keefe began to call into question the security of mail-in voting. Am. Compl. ¶ 24 & Ex. 24. In 2019 and 2020, PV and O'Keefe "secretly produc[ed] undercover stings designed to undermine the integrity of absentee and mail-in ballot counts—an endeavor codenamed 'Diamond Dog.'" *Id.* Ex. 24 at 2. According to one report, the purpose of Diamond Dog was "literally to get Trump reelected.'" *Id.* In accordance with their preconceived narrative, PV and O'Keefe began to run stories suggesting that there was ongoing and illegal ballot harvesting that would undermine the election. Am. Compl. ¶¶ 25–26. Immediately after the election, PV and O'Keefe continued to press their narrative, focusing on USPS employees. The same day PV and O'Keefe began to defame Plaintiff, they published a nearly identical false story of post office ballot fraud in Michigan. *Id.* ¶ 38. That story, like PV and O'Keefe's story targeting Plaintiff, was almost immediately debunked.[10] Yet, PV and O'Keefe continued to push the narrative of ballot fraud here, even after Hopkins recanted. *Id.* ¶¶ 104–18. PV and O'Keefe have never published retractions, and they even tried to give the story additional legs by attempting to spring an impromptu interview on Plaintiff in February 2021. *Id.* ¶¶ 140, 154, 192.

[10] Bill McCarthy, *Allegations of USPS Election Fraud in Michigan Don't Hold Up*, PolitiFact (Nov. 5, 2020), https://www.politifact.com/article/2020/nov/05/allegations-usps-election-fraud-michigan-dont-hold/.

In sum, the Amended Complaint alleges that, in defaming Plaintiff, PV and O'Keefe "conceived of a story line" and "made virtually no effort to check the validity of statements that were defamatory *per se* of [Plaintiff], and in fact added further defamatory material based on [Hopkins]'s 'facts.'" *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982). And PV and O'Keefe did so in an effort to sow mistrust in mailed ballots and thus the results of the presidential election. That is more than enough to give rise to a reasonable inference of actual malice.

II. PLAINTIFF SUFFIENTLY ALLEGED HIS SUBSTANTIAL ASSISTANCE AND CONCERTED TORTIOUS ACTION CLAIM

Plaintiff also properly pleads his substantial assistance claim. The Pennsylvania Supreme Court has recognized "substantial assistance" (also known as "concerted tortious action") as a viable cause of action in the Commonwealth. *Skipworth by Williams v. Lead Indus. Ass'n, Inc.*, 690 A.2d 169 (Pa. 1997).[11] In doing so, Pennsylvania has effectively adopted § 876 of the *Restatement (Second) of Torts*, under which a claim for substantial assistance lies where a defendant: (a) does a tortious act in concert with the other or pursuant to a common design with him, (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person. *See, e.g.*, *Sovereign Bank v. Valentino*, 914 A.2d 415, 422 (Pa. Super. Ct. 2006); *Marion v. Bryn Mawr Tr. Co.*, 253 A.3d 682, 688 (Pa. Super. Ct.

[11] *See Koken v. Steinberg*, 825 A.2d 723, 731 (Pa. Commw. Ct. 2003); *see also Marion v. Bryn Mawr Tr. Co.*, 2021 PA Super 18 at *3–4 (Feb. 16, 2021), *reargument denied* (Apr. 28, 2021); *Sovereign Bank v. Valentino*, 914 A.2d 415, 422 (2006).

2021), *reargument denied* (Apr. 28, 2021), *appeal granted in part*, No. 311 MAL 2021, 2021 WL 4540443 (Pa. Oct. 5, 2021).

The Amended Complaint alleges that PV and O'Keefe engaged in concerted tortious action with Hopkins under each theory. *First*, the Amended Complaint alleges that PV and O'Keefe defamed Plaintiff in concert with Hopkins and pursuant to a common design with him. PV and O'Keefe conducted, published, and promoted all three interviews with Hopkins; drafted, witnessed, and notarized his defamatory affidavit; offered him daily guidance; offered to retain counsel for him; and helped him set up his crowdfunding accounts and promoted those crowdfunding efforts. Am. Compl. ¶¶ 39–75, 79–90, 92–100, 108–18.

Second, the Amended Complaint sufficiently pleads that PV and O'Keefe knew that Hopkins's claims were defamatory and substantially assisted and encouraged his defamation. In *Black v. Wrigley*, for example, the Court held that a plaintiff sufficiently alleged that two defendants substantially assisted defamation when one drafted and shared a letter knowing that the second would use it to defame a plaintiff, and the second publicized that letter despite knowing it was false. 2019 WL 2433740, at *8, *10 (N.D. Ill. June 11, 2019). Similarly, in *Patriot Group, LLC v. Edmands*, the Court held that a plaintiff sufficiently pled a substantial assistance claim where a lawyer knew that their client was defaming the plaintiff yet republished those claims in a letter and vouched for their veracity anyway. 136 N.E.3d 386, 396 (Mass. App. Ct. 2019). Like the plaintiffs in *Black* and *Patriot Group, LLC*, Plaintiff has sufficiently alleged that PV and O'Keefe knew that Hopkins's claims were defamatory and yet substantially assisted Hopkins in defaming Plaintiff. Am. Compl. ¶¶ 39–75, 79–90, 92–100, 108–18. At a minimum, PV and O'Keefe substantially assisted Hopkins's defamation when they flew him to New York, encouraged him—in an interview filmed by PV featuring O'Keefe, no less—to repeat his known

lies, and then published those lies *after* Hopkins recanted. *Id.* ¶¶ 108–18. Even before Hopkins recanted, the Amended Complaint alleges that Project Veritas and O'Keefe knew Hopkins's claims were false, but they still walked him through defaming Plaintiff by drafting his affidavit, filming his interviews, and publicizing his claims. *Id.* ¶¶ 39–90, 97, 143–48.

Third, the Amended Complaint alleges that PV and O'Keefe provided Hopkins substantial assistance in accomplishing a tortious result (i.e., defaming Plaintiff) and their own conduct, separately considered, constituted a breach of duty to Plaintiff. As noted above, anyone who "participate[s] in the publication of the defamatory publication by another" is liable for defamation. *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1043 (Pa. 1996). In other words, PV and O'Keefe owed Plaintiff a duty not to participate in Hopkins's defamation of Plaintiff. Yet, PV and O'Keefe substantially assisted Hopkins's defamation of Plaintiff and, in doing so, participated in the defamation of Plaintiff, repeatedly. Am. Compl. ¶¶ 39–75, 79–90, 92–100, 108–18.

PV and O'Keefe do not meaningfully dispute that they provided Hopkins substantial assistance. *See* PV's Br. at 15–17. Instead, they reprise their argument that Plaintiff fails to allege actionable defamation, but that is a nonstarter for the reasons laid out above. *See supra* at pp. 4–10. They also suggest Plaintiff seeks to evade the actual malice standard by disguising a defamation claim as another tort. *See* PV's Br. at 15 (citing *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988)). But, as the Amended Complaint alleges, "[i]n acting in concert with one another and/or providing substantial assistance to one another, HOPKINS, PV, [and] O'KEEFE *acted with actual malice*." Am. Compl. ¶ 203 (emphasis added); *see also id.* ¶ 202; *see supra* at pp. 11–22 (explaining all of the ways in which the Amended Complaint alleges actual malice).

Finally, PV and O'Keefe cite three Supreme Court cases for the proposition that "[w]here 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." PV's Br. at 16. No such rule has ever existed. Instead, PV and O'Keefe seem to have confused the proposition in each of those cases that the government generally cannot use *laws intended to prevent the disclosure of information* to (1) prevent publishers who lawfully obtain that information from a third party from publishing that information, or (2) punish such publishers after publication. *See Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (government cannot use wiretap acts to punish publishers who lawfully obtain private communications); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (government cannot restrain publishers who lawfully obtain classified information from publishing that information absent clear and present danger); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (government cannot restrain publishers who lawfully obtain juvenile delinquents names from publishing those names absent overriding state interest). Of course, those who lawfully obtain and print information may still be liable for publishing, or assisting in the publication, of defamatory statements. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1043 (Pa. 1996).

CONCLUSION

WHEREFORE, PLAINTIFF respectfully requests this Honorable Court overrule the Preliminary Objections of Defendants, PROJECT VERITAS and JAMES O'KEEFE III, and enter an Order directing them to file an Answer to Plaintiff's Amended Complaint.

Dated: November 3, 2021

Respectfully submitted,

Ogg, Murphy & Perkosky, PC

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[12] Harvard Law School student Daniel Elkind, '23, helped prepare this memorandum under supervision of Plaintiff's counsel. The memorandum does not purport to represent the institutional views, if any, of Harvard Law School.

CERTIFICATE OF SERVICE

I hereby certify that the within Plaintiff's Response and Brief in Opposition to Preliminary Objections of Defendants, PROJECT VERITAS and JAMES O'KEEFE, III, was served upon the following this 3rd day of November, 2021, *via* First Class US Mail and electronic mail addressed as follows:

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COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA

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

PROPOSED ORDER OF COURT

AND NOW, to wit, this ____ day of _____ 2021, it is hereby **ADJUDGED, ORDERED,** and **DECREED** that based upon the foregoing response and brief in opposition filed on behalf of Plaintiff, ROBERT WEISENBACH, the Preliminary Objections of Defendants, PROJECT VERITAS and JAMES O'KEEFE, III are **OVERRULED**. It is further **ORDERED** that Defendants are to provide an Answer to Plaintiff's Amended Complaint within twenty (20) days of this signed Order.

BY THE COURT:

_____ **J.**