IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA

ROBERT WEISENBACH, AN INDIVIDUAL, PLAINTIFF	:	CIVIL ACTION
V.	:	
PROJECT VERITAS, A FOREIGN ENTITY; JAMES O'KEEFE, III, AN INDIVIDUAL; AND RICHARD ALEXANDER HOPKINS, AN INDIVIDUAL, DEFENDANTS	:	DOCKET NO. 10819-2021

OPINION OF THE COURT

PICCININI, J. JULY 15, 2022

Project Veritas is a non-profit media organization founded by James O'Keefe, III. On November 5, 2020, just two days after the November 3, 2020, presidential election, it published a story claiming to have uncovered a voter fraud scheme orchestrated out of the United States Postal Service General Mail Facility in Erie, Pennsylvania. Specifically, the article and accompanying video alleged that Erie Postmaster, Robert Weisenbach, directed the backdating of mail-in ballots in order to sway the outcome of the presidential election in favor of candidate Joseph Biden. Amended Complaint (Am. Compl.), ¶ 1. The report relied upon an anonymous whistleblower, later revealed to be Richard Hopkins, a postal employee who claimed he overhead a conversation between Weisenbach and another supervisor. Hopkins stated that Weisenbach's motive for backdating mail-in ballots was that he was a "Trump hater," although, in reality, Weisenbach was a supporter of President Donald Trump and voted for him on election day. Am. Compl. ¶¶ 58, 70.

In the days that followed, Project Veritas posted two more video interviews with Hopkins where he repeated his false claims, the latter after it was reported by news outlets that Hopkins had

recanted his earlier allegations when confronted by postal inspectors, although Hopkins later claimed that recantation was coerced. The story soon gained traction among those amplifying claims of voter fraud, including President Trump himself. Am. Compl. ¶ 6. Weisenbach was forced to leave Erie for a time after personal details, including his address, were discovered and disseminated by readers of the Project Veritas stories. Project Veritas nonetheless maintains that the stories were investigated and published consistent with standards of "professional, ethical and responsible journalism." Oral Argument Transcript (Tr.), p. 48.

Weisenbach disagrees. He brings this lawsuit against Hopkins, Project Veritas, and O'Keefe, alleging claims of defamation and concerted tortious activity. Defendants now seek to dismiss the claims before discovery has even begun by filing Preliminary Objections to Weisenbach's First Amended Complaint. That parties frame the action in broad terms as implicating competing ideals lying at the heart of our republic. Weisenbach argues that the stories were "not investigative journalism[,]" but rather "targeted character assignation aimed at undermining faith in the United States Postal Service and the results of the 2020 Presidential election" having "no place in our country." Am. Compl. ¶¶ 10-11. Defendants contend that this case raises fundamental concerns regarding freedom of the press, and that, pursuant to the First Amendment to the United States Constitution, we rely not on judges or juries to root out pernicious speech, but on competition in an uninhibited marketplace of ideas where the truth will ultimately prevail. Tr, p. 45.

Whatever the merits of these lofty assertions, the Court's task today in reviewing Defendants' Preliminary Objections is much more modest. First, the Court must decide whether it lacks subject matter jurisdiction over the claims against Hopkins in light of the Federal Tort Claims Act, which vests federal courts with exclusive jurisdiction over actions brought against

federal employees who cause injury while acting within the scope of their employment. Second, in assessing Defendants' Objections in the nature of demurrers, the Court must simply determine "whether, on the facts averred, the law says with certainty that no recovery is possible." *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 56 (Pa. 2014). For the reasons that follow, the Court answers both of those questions in the negative and consequently overrules Defendants' Preliminary Objections to the First Amended Complaint.

I. BACKGROUND

Because this matter comes to the Court on preliminary objections in the nature of demurrers,[1] the alleged facts are recounted simply as they appear in Plaintiff's First Amended Complaint. *Connor v. Archdiocese of Philadelphia*, 975 A.2d 1084, 1085-86 (Pa. 2009). In 2019, Pennsylvania enacted legislation commonly known as Act 77, allowing, for the first time in the Commonwealth's history, no-excuse mail-in voting for all qualified voters. Am. Compl. ¶ 20. Because Democratic voters are statistically more likely to utilize mail-in voting procedures than their Republican counterparts, political analysists have identified a phenomenon dubbed the "Red Mirage", whereby early vote counts may appear inaccurately skewed toward Republican candidates before a sufficient number of mail-in ballots are counted. Am. Compl. ¶ 27. In the lead-up to the 2020 presidential election, some commentators predicted just such a "Red Mirage" would occur in those states that permit mail-in voting, like Pennsylvania, leading to a scenario in which President Trump would obtain an early lead in the polls in those states, declare victory, subsequently claim "something sinister" was afoot if votes began to inure to candidate Biden's

[1] Hopkins also raises a Preliminary Objection as to subject matter jurisdiction under Pa.R.C.P. 1028(a)(1). However, for reasons explained more fully in Part II, *infra*, his objection in this regard is the functional equivalent of a demurrer since he asks the Court to assess the Objection based solely upon the averments set forth in the Amended Complaint.

favor, and ultimately attempt to disenfranchise those voters who had utilized mail-in ballots in order to keep the White House. Am. Compl. ¶¶ 27-28 (citing Tom McCarthy, *'Red Mirage': The 'Insidious' Scenario if Trump Declares an Early Victory*, Guardian (Oct. 30, 2020)). Project Veritas was keenly aware of this possibility as well. As early as 2019, in an effort codenamed "Diamond Dog," it sought to erode confidence in mail-in voting systems by publishing stories claiming to document instances of illegal "ballot harvesting," that is, the unauthorized collection of mail-in ballots from other voters. Am. Compl. ¶¶ 24-25.[2]

As it happens, the Amended Complaint alleges that on the night of the 2020 presidential election a "Red Mirage" did manifest, with President Trump finding himself up by 700,000 votes on the evening of November 3rd, but running behind candidate Biden in the vote count as the hours and days wore on. Am. Compl. ¶ 29. As predicted, President Trump claimed that "widespread election fraud was to blame for the impossible reversal of fortune." Am. Compl. ¶ 30. In the midst of President Trump's protestations, Project Veritas pushed forward with its "Diamond Dog" initiative, including through the solicitation of potential sources willing to come forward with claims of election fraud. Am. Compl. ¶ 74. For instance, on November 4, 2020, it published a story in which a postal worker in Michigan claimed that mail carriers there were being instructed to segregate mail-in ballot envelopes received after the November 3rd election so that they could be fraudulently hand-marked as being received on election day. Am. Compl. ¶ 38.

Then, on November 5, 2020, Project Veritas published the first in a series of stories related to the claims at the center of this dispute. The piece relied on an anonymous whistleblower working at the General Mail Facility in Erie, Pennsylvania. Am. Compl. ¶ 39. In particular, it

[2] For instance, Act 77 requires that "the elector shall send [the securely sealed envelope containing a ballot] by mail, postage prepaid, except where franked, or deliver it in person to said county board of election." 25 P.S. § 3150.16.

alleged a scheme to illegally backdate mail-in ballots based upon a conversation the whistleblower overheard between the local postmaster and an office supervisor. Am. Compl. ¶¶ 39, 44. In the edited telephonic interview conducted by James O'Keefe, published across all of Project Veritas' media platforms, and accompanied by the hashtag "#MailFraud," the whistleblower explained that he was "able to hear" the postmaster tell the supervisor that they had "messed up yesterday" because they "postmarked one of the ballots the fourth instead of the third." Am. Compl. ¶¶ 40-41, 45. When asked by O'Keefe why the postmaster was upset, the whistleblower answered "because, well he's honest to God, he's actually a Trump hater." Am. Compl. ¶ 46.

During the interview, O'Keefe refers to Weisenbach as "Rob, the postmaster," at which time an image of Weisenabach appears in the video and remains for the duration of O'Keefe's exchange with the whistleblower, captioned "Robert E Weisenbach Jr". Am. Compl. ¶¶ 46-48. The video also includes a brief clip from a phone exchange between O'Keefe and Weisenbach in which Weisenbach responds to the allegations by calling them "untrue" and explaining "I don't talk to reporters like you[,]" before ending the call. Am. Compl. ¶ 48. An article accompanying the video asserts that, according to the whistleblower, "the supervisors and postmasters are coordinating with other postal facilities during their daily conference calls with the district leadership[.]" Am. Compl. ¶¶ 49, 51. The article also quotes the whistleblower as saying that the backdating was done surreptitiously "after all the carriers leave[.]" Am. Compl. ¶ 53.

The following day, November 6, 2020, O'Keefe continued to amplify the story, tweeting: "The fraud is happening as we speak … they are going to be collecting and backdating ballots in Pennsylvania tomorrow according to our whistleblower." Am. Compl. ¶ 54. That same day, Project Veritas also posted a new video with the whistleblower in which his identity is revealed as Richard Hopkins. Am. Compl. ¶¶ 79, 81. As part of the story, Project Veritas also produced an

affidavit signed by Hopkins, which it drafted, attesting to the veracity of his claims. Am. Compl. ¶¶ 83-84. On November 7, 2020, Weisenbach, issued his only public statement on the matter through a Facebook post, categorically denying the allegations. Am. Compl. ¶ 91.

Unsurprisingly, the Postal Service's Office of Inspector General was eager to speak to Hopkins about his claims too. Am. Compl. ¶ 76. In an initial interview conducted on November 6, 2020, Hopkins relayed to postal inspectors his allegations concerning an illegal backdating scheme in Erie. Am. Compl. ¶¶ 76-78. However, when interviewed a second time, on November 9, 2020, Hopkins appeared to walk back some of his earlier statements. Am. Compl. ¶ 92. Hopkins, unbeknownst to the postal inspectors for the duration, recorded the interview, a roughly 2-hour portion of which was later published by Project Veritas. Am. Compl. ¶¶ 93, 95.

In the interview, Hopkins states that the only thing he could specifically recall was that he overheard Weisenbach and the supervisor "saying something about the markings being on the third. One was the fourth. That's it." Am. Compl. ¶ 96. He further clarified that his recollection of the conversation was "based on [his] assumption of what [he] could hear[,]" and he further acknowledged that "I didn't specifically hear the whole story. I just heard a part of it. And I could have missed a lot of it." Am. Compl. ¶ 96. When it was suggested by one of the inspectors that "[t]he reality is, you've heard words and you assumed what they were saying[,]" he responded "[m]y mind probably added the rest." Am. Compl. ¶ 96. Hopkins further explained to postal inspectors that Project Veritas had told him not to speak to any other media company until Project Veritas had vetted them to assure they would not write "a bad story[,]" and that O'Keefe and Project Veritas helped him set up a GoFundMe account in case "[he] lost [his] job or something went haywire[.]" Am. Compl. ¶ 97. When asked whether he would continue to swear to certain portions of the affidavit he had previously signed with Project Veritas, he stated, "[a]t this point,

no[.]" Am. Compl. ¶ 96. With the help of postal inspectors, Hopkins then signed a revised affidavit retracting many of the assertions in his previous one on the understanding that doing so would "save [his] ass[.]" Am. Compl. ¶¶ 97-98.

The following day, November 10, 2020, new media outlets, including the Washington Post, published stories reporting that Hopkins had recanted his prior claims. Am. Compl. ¶¶ 101-02. That same day, the United States Postal Service informed Hopkins that he was being placed on unpaid administrative leave for "endangering his own personal welfare and/or the welfare of his co-workers[.]" Am. Compl. ¶ 103. Hours later, Hopkins responded by posting a YouTube video referencing the Washington Post article, denying he had recanted his previous allegations, and promising that viewers would "find out tomorrow" what really happened during his interview with postal inspectors. Am. Compl. ¶¶ 105-06.

On November 11, 2020, Project Veritas published a video interview with Hopkins and accompanying article where he claimed he was "coerced" into recanting, that postal inspectors had "grill[ed] the Hell out of [him,]" and that he "just got played." Am. Compl. ¶¶ 110-11. When asked by O'Keefe whether he stood by his original claims that the "postmaster, Rob Weisenbach, directed your co-workers to pick up ballots" and that he "heard Weisenbach tell a supervisor, they were back dating the ballots to make it appear they'd been collected on November 3[,]" Hopkins responded unequivocally "Yes." Am. Compl. ¶ 113. Hopkins also encouraged other postal workers to come forward with their stories because "Veritas has got your back." Am. Compl. ¶ 114.

Project Veritas's stories alleging voter fraud at the General Mail Facility in Erie garnered national attention. Am. Compl. ¶ 119. On November 6, 2020, the Trump Campaign obtained a copy of the affidavit Hopkins had executed with Project Veritas' help and circulated it for

publication. Am. Compl. ¶ 120. On November 7, 2020, Senator Lindsey Graham, Chairman of the Senate Judiciary Committee, called upon the Attorney General to launch an investigation. Am. Compl. ¶ 121. On November 9, 2020, Attorney General William Barr authorized the Department of Justice to investigate meritorious claims of "election irregularities." Am. Compl. ¶ 122. An ensuing lawsuits by the Trump Campaign in federal court even cited to the November 5, 2020, Project Veritas story as evidence in support of its voter fraud allegations. Am. Compl. ¶ 123.

Closer to home, the stories had an immediate impact on Weisenbach and his family. Am. Compl. ¶ 125. By mid-afternoon on November 5, 2020, internet trolls had already discovered and released Weisenbach's personal contact information and home address. Am. Compl. ¶ 126. Within hours, Weisenbach had to close or disguise all of his social media accounts. Am. Compl. ¶ 128. He began to receive hate email and threats, in addition to numerous correspondence from Fox News, The Wall Street Journal, Reuters, the Associated Press, CNN, and the Washington Times, to which he was directed by the Postal Service not to respond. Am. Compl. ¶ 129.

On November 6, 2020, after Weisenbach was interviewed by postal inspectors himself, it was determined, for his own safety that of his family, that they should leave the area immediately and shelter-in-place at a hotel. Am. Compl. ¶¶ 130-31. He arrived home that day around 3:00 p.m., escorted by a postal inspector, but within moments of pulling into his driveway, an unknown man approached, yelling belligerently. Am. Compl. ¶¶ 131-32. When Weisenbach exited his vehicle, he noticed the assailant was carrying a cell phone in one hand and had the other inside his coat pocket. Am. Compl. ¶ 132. Weisenbach took refuge by hiding the backseat of another family vehicle where he called his supervisor. Am. Compl. ¶ 132.

Meanwhile, the postal inspector escorting Weisenbach approached the driveway with the window down and advised the assailant to leave the property immediately, which resulted in the

individual moving from the driveway onto the street behind Weisenbach's vehicle, all the while continuing to demand that Weisenbach exit the vehicle so that they could talk. Am. Compl. ¶ 134. A few minutes later, Weisenbach's neighbor, a Pennsylvania State Police Trooper, advised the unknown man to leave the area, but the assailant did not do so. Am. Compl. ¶ 135. Eventually, Millcreek Police arrived on the scene, sealed off the street, and exited their vehicles with guns drawn. Am. Compl. ¶ 136. The police searched the assailant and his vehicle, the postal inspector and his vehicle, and removed Weisenbach from his vehicle at gunpoint, where he was placed on the ground and searched. Am. Compl. ¶ 136. The unknown assailant was ultimately released and warned by police not to return. Am. Compl. ¶ 137. Weisenbach left the incident "[b]ewildered, shaken, and fearing for the safety and welfare of his life and his family[.]" Am. Compl. ¶ 138.

Although Wiesenbach and his wife hurriedly packed and left Erie, neighbors later revealed that a black Jeep SUV with two visible occupants, later determined from its New Jersey license plates to belong to Project Veritas, was surveilling the home. Am. Compl. ¶¶ 138-39. Project Veritas continued to harass Weisenbach through the winter, and published an ambush attempt at an interview with Weisenbach on February 23, 2021. Am. Compl. ¶ 140. Weisenbach remains anxious over being confronted by members of the community concerning these allegations and "is grateful that a mask worn to protect himself against COVID-19 also obscures his face" while running errands. Am. Compl. ¶ 141.

As for Hopkins, the GoFundMe page rapidly generated over $130,000.00 in proceeds, but the account was suspended and the donations returned shortly after it was reported that he had recanted. Am. Compl. ¶¶ 143-44. Hopkins subsequently set up a separate account on an alternative crowdfunding website, GiveSendGo, which amassed a value of $236,000.00 after O'Keefe encouraged Project Veritas readers to donate to the account. Am. Compl. ¶¶ 145-47. Hopkins was

ultimately let go from his position with the United States Postal Service, collected the windfall from the donations on the GiveSendGo account, and thereafter "absconded, at least temporarily, to West Virginia." Am. Compl. ¶ 148.

The United States Postal Service Office of Inspector General Report, released on February 3, 2021, concluded that "Hopkins acknowledged that he had no evidence of any backdated presidential ballots and could not recall any specific words said by the Postmaster or Supervisor." Am. Compl. ¶ 149. It further found that "[b]oth the interview of the Erie County Election Supervisor and the physical examination of ballots produced no evidence of any backdated presidential ballots at the Erie, PA Post Office." Am. Compl. ¶ 149. For his part, Weisenbach asserts that there was no scheme to illegally backdate ballots, that he did not personally backdate any ballots, nor did he instruct his employees to do so, and that neither he nor anyone in the Erie General Mail Facility were coordinating with other postal facilities to backdate ballots. Am. Compl. ¶¶ 56-57, 59-64, 87-89.[3] Neither was Weisenbach a "Trump hater" or otherwise motivated by political bias against President Trump; to the contrary, he was "a registered Republican and Trump supporter who voted for the incumbent on Election Day." Am. Compl. ¶¶ 58, 70.

Weisenbach responded by filing the instant action on April 22, 2021. Thereafter Defendants filed Preliminary Objections to the Complaint, but those Objections became moot when this Court granted Weisenbach leave to amend his pleading. On August 16, 2021,

[3] Moreover, any segregation of mail-in ballots collected after 8:00 p.m. on November 3, 2020, but before 5:00 p.m. on November 6 2020, would have been consistent with the Pennsylvania Supreme Court's recent ruling allowing such ballots to be counted, subject to United States Supreme Court's November 6, 2020, directive to keep those ballots segregated while it considered a challenge to the Pennsylvania Supreme Court's decision. Am. Compl. ¶¶ 22-23, 90; *see also Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Sept. 17, Pa. 2020); *Republican Party of Pennsylvania. v. Boockvar*, --- S.Ct.---, 2020 WL 6536912 (Mem.) (U.S. Nov. 6, 2020) (Alito, J., in chambers).

Weisenbach filed the operative First Amended Complaint containing three counts: Defamation and/or Defamation Per Se against Defendant Hopkins (Count I); Defamation and/or Defamation Per Se against Defendants Project Veritas and James O'Keefe, III (Count II); and Substantial Assistance/Concerted Tortious Activity against all three Defendants (Count III). Defendants once again filed Preliminary Objections to the Amended Complaint, along with accompanying briefs, and this Court subsequently held oral argument on the Objections. Upon careful consideration of the pleadings, briefs, and arguments of the parties, the Court now overrules the Preliminary Objections to Weisenbach's First Amended Complaint.

II. JURISDICTION OVER CLAIMS AGAINST DEFENDANT HOPKINS

The Court begins by addressing Defendant Hopkins' challenge to this Court's subject matter jurisdiction over the claims levied against him. "Subject matter jurisdiction relates to the competency of a court to hear and decide the type of controversy presented." *Turner v. Estate of Baird*, 270 A.3d 556, 560 (Pa. Super. 2022). "When preliminary objections raise a question of subject matter jurisdiction, the trial court's function is to determine whether the law will bar recovery due to a lack of subject matter jurisdiction." *Community College of Philadelphia v. Faculty and Staff Federation of Community College of Philadelphia*, 205 A.3d 425, 430 n.5 (Pa. Cmwlth. 2019) (citation, internal quotation marks, and brackets omitted).

Hopkins raises this challenge under the aegis of Pennsylvania Rule of Civil Procedure 1028(a)(1), permitting preliminary objections on the basis of "lack of jurisdiction over the subject matter of the action[.]" Pa.R.C.P. 1028(a)(1). As our Superior Court has explained:

> Pursuant to Pa.R.C.P. 1028(a), two distinct classifications of preliminary objections exist: objections that directly challenge the adequacy of the pleading, *i.e.*, subparagraphs (a)(2), (3), and (4); and objections that raise challenges that transcend the four corners of the pleading. While the former may be determined by the factual averments of record, like [a] demurrer … the latter, such as [a] jurisdictional assertion, requires discovery and evidentiary support.

Murray v. American Lafrance, LLC, 234 A.3d 782, 788 (Pa. Super. 2020) (en banc). A challenge to subject matter jurisdiction "is of the sort that cannot be determined from facts of record." *Pennsylvania Independent Oil & Gas Association v. Pennsylvania One Call System, Inc.*, 245 A.3d 362, 366 (Pa. Cmwlth. 2021) (citation and internal quotation marks omitted). "The [party raising the objection] bears the burden to demonstrate the absence of jurisdiction, and only upon the presentation of evidence supporting the jurisdictional challenge does the burden shift to the [party asserting jurisdiction]." *Id.* The Court may "consider evidence by depositions or otherwise[,]" Pa.R.C.P. 1028(c)(2), including "affidavits or other competent evidence." *Pennsylvania Independent Oil & Gas Association*, 245 A.3d at 366. The "mere allegation that the court lacks jurisdiction is insufficient to shift the burden[.]" *Id.* In considering a challenge to jurisdiction, a court "considers the evidence in the light most favorable to the non-moving party." *Murray*, 234 A.3d at 788.[4]

Here, Hopkins argues that "Plaintiff's Amended Complaint, by its very text, proves that this Court does not have jurisdiction over his claims." Hopkins's Prelim Obj., ¶ 7. He stresses that

[4] It is unclear whether, in light of Rule 1028(a)(1), a party challenging jurisdiction by preliminary objection can properly raise its objection in the form of a demurrer challenging the legal sufficiency of the pleading pursuant to subparagraph (a)(4), although there is some tacit support for this proposition. *See Mallory v. Norfolk Southern Railway Co.*, 266 A.3d 542, 560 (Pa. 2021), *cert. granted*, --- S.Ct.---, 2022 WL 1205835 (Mem) (U.S. Apr. 25, 2022) (reviewing preliminary objection as to personal jurisdiction as a challenge in the nature of a demurrer). While Hopkins' challenge may sound in demurrer, he does not formally couch his objection as a challenge to the legal sufficiency of the Amended Complaint under subparagraph (a)(4)—on the contrary, he expressly labels the challenge as an Objection under subparagraph (a)(1)— nor does he ever refer to his jurisdictional challenge as a demurrer. Accordingly, the Court treats the Objection as a challenge under subparagraph (a)(1), subject to the attendant burden-shifting evidentiary framework. As the Court observes below, however, Hopkins' challenge under subparagraph (a)(1) more or less operates as a demurrer due to that fact that he limits his argument to consideration of the four corners of the Amended Complaint.

he "is not requesting that this Court make a ruling on the merits [of his jurisdictional claim]. Rather, [he] moves this Court for a jurisdictional determination as to whether the Postmaster has alleged sufficient facts to avail [himself] of this Court's subject matter jurisdiction." Hopkins' Prelim Obj. ¶ 54; *see also* Tr., p. 12 ("at this point in the proceeding we're just simply asking for the Court to look at the pleadings[.]").[5] The upshot is that the Amended Complaint itself is the only piece of evidence proffered by Hopkins for purposes of his initial evidentiary burden to establish a lack of jurisdiction. When coupled with the fact that the Court must consider that document in the light most favorable to Weisenbach, *Murray*, 234 A.3d at 788, his Objection as to subject matter jurisdiction functions, for all intents and purposes, as a challenge in the nature of a demurrer. Although the Court arguably has the inherent authority to order additional evidence be taken by deposition or otherwise to supplement the record on the jurisdictional question, given Hopkins' emphatic, self-imposed stance that his jurisdictional argument be limited to the four

[5] Perhaps this is due to the fact that Hopkins understands the applicable standard to be that Weisenbach must make a "*prima facie* showing" of jurisdiction based upon "the face of the Amended Complaint[.]" Memorandum of Law in Supp. of Hopkins' Prelim Obj., p. 6. He derives this test from *CNA v. United States*, 535 F.3d 132 (3rd Cir. 2008), which reasoned that "when faced with a jurisdictional issue that is intertwined with the merits of a claim, district courts must demand less in the way of jurisdictional proof than would be appropriate at a trial stage." *Id.* at 144 (citation and internal quotation marks omitted). "By requiring less of a factual showing than would be required to succeed at trial, district courts ensure that they do not prematurely grant Rule 12(b)(1) motions to dismiss claims in which jurisdiction is intertwined with the merits and could be established, along with the merits, given the benefit of discovery." *Id.* at 145. But as the preceding passage reveals, the Third Circuit's analysis naturally turned on its understanding of Federal Rule of Civil Procedure 12(b)(1). It does not appear that the Third Circuit's *prima facie* rule relating to federal Rule 12(b)(1) can be fully reconciled with Pennsylvania Rule of Civil Procedure 1028(a)(1) in this regard, particularly the case law's emphasis on evidentiary burden shifting and the admonition that such challenges cannot be determined purely from facts of record. Thus, Hopkins' attempt to graft the Third Circuit's *prima facie* standard onto his present Objection proves not only unpersuasive, but untenable, in light of applicable Pennsylvania appellate jurisprudence that is binding on this Court.

corners of the Amended Complaint, the Court will hold Hopkins to his request.

With this threshold matter resolved, the Court now turns to the merits of Hopkins' jurisdictional Objection. Hopkins contends that, pursuant to the Federal Tort Claims Act, federal courts (rather than state courts, such as this one) have exclusive subject matter jurisdiction over Weisenbach's claims of defamation and tortious conspiracy against him. This is so, he says, because the Amended Complaint makes clear that he was acting within the scope of his employment when he allegedly made the defamatory statements. Memorandum of Law in Supp. of Hopkins' Prelim Obj., p. 1. Before digging deeper into Hopkins' argument, it is necessary to review the contours of the Federal Tort Claims Act.

Enacted in 1946, the Federal Tort Claims Act, "was designed primarily to remove the sovereign immunity of the United States from suits in tort." *Levin v. United States*, 568 U.S. 503, 506 (2013) (citation and internal quotation marks omitted). "The Act gives federal district courts exclusive jurisdiction over claims against the United States for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of federal employees acting within the scope of their employment." *Id.* (quoting 28 U.S.C. § 1346(b)(1)). Additionally, the Act makes it more difficult to sue an employee individually by including a judgment bar, which precludes a plaintiff who receives a judgment against the United States government under the Act, favorable or not, from proceeding "with a suit against an individual employee based on the same underlying facts." *Simmons v. Himmelreich*, 578 U.S. 621, 625 (2016). "The Act thus opened a new path to relief (suits against the United States) while narrowing the earlier one (suits against employees)." *Brownback v. King*, 141 S.Ct. 740, 746 (2021).

Working in tandem with the Federal Tort Claims Act, "[t]he Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, accords

federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229 (2007). "Importantly, Westfall Act immunity is not self-executing, that is, a federal employee does not receive absolute immunity from torts committed within the scope of his employment until the scope of employment certification is made." *Stein v. United States*, 2021 WL 4895338, *3 (S.D. Ill. 2021) (citation and internal quotation marks omitted). To that end, "[w]hen a federal employee is sued for wrongful or negligent conduct, the [Westfall] Act empowers the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." *Osborn*, 549 U.S. at 229-230. "Upon the Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee." *Id.* at 230. "These certification and substitution procedures are measures "designed to immunize covered federal employees not simply from liability, but from suit." *Id.* at 238.

From the outset, the parties disagree about the way in which a federal court exercises jurisdiction over such a claim. Hopkins argues Section 1346(b)(1) of the Federal Tort Claims Act vests federal courts with sole authority to consider claims brought against postal employees who cause injury while acting within the scope of their employment *ab initio*, thereby stripping state courts of jurisdiction to consider the same. Memorandum of Law in Supp. of Hopkins' Prelim Obj., p. 8.[6] Weisenbach responds that the Federal Tort Claims Act merely provides a federal

[6] Hopkins relies on an unpublished case, *Holz v. Reese*, 2016 WL 2908455 (Pa. Super. 2016) (unpublished), where the Pennsylvania Superior Court held the trial court properly dismissed a case against various federal prison officials because "Congress has divested it of subject matter jurisdiction" through Section 1346(b)(1) of the Federal Tort Claims Act *Id.* at *3. Weisenbach challenges the propriety of Hopkins' reliance on the case as it was decided prior to May 2, 2019. Tr. pp. 24-25. It is true that Pennsylvania Rule of Appellate Procedure 126 only expressly allows a party to cite to "an unpublished non-precedential memorandum decision of the Superior Court

employee who has been sued the opportunity to seek to have the case converted into an action against the United States by asking the Attorney General to certify that the employee was acting within the scope of his or her employment. Pl.'s Br. in Opp. to Hopkins' Prelim. Obj., p. 17. But "[u]nless and until Hopkins obtains a certification that he was acting within the scope of his employment when he repeatedly defamed Plaintiff," the Federal Tort Claim Act "does not kick in." Pl.'s Br. in Opp. to Hopkins Prelim. Obj., p. 18 (quoting *Sullivan v. Freeman*, 944 F.2d 334, 337 (7th Cir. 1991) (Posner, J.) (internal quotation marks omitted)).

When Congress wants to deprive state courts of jurisdiction to hear certain claims, it has an "easy way to do so" by inserting an exclusive federal jurisdiction provision into the statute. *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S.Ct. 1061, 1070 (2018). That appears to be what Congress did here. Section 1346(b)(1) of the Federal Tort Claims Act directs:

> Subject to the provisions of chapter 171 of this title, **the district courts**, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, **shall have exclusive jurisdiction** of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be

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filed after May 1, 2019[,]" and the internal operating procedures of the Superior Court provides that "[a]n unpublished memorandum decision filed prior to May 2, 2019, shall not be relied upon or cited by a Court or a party in any other action or proceeding[.]" Pa.R.A.P. 126(b)(1); 210 Pa. Code § 65.37. It is doubtful, however, whether either the Rules of Appellate Procedure or the internal operating procedure of the Superior Court are binding in this Court. The Court does note that as of April 1, 2022, newly promulgated Rule of Civil Procedure 242 directs that "[c]itation of authorities in matters subject to these rules shall be in accordance with Pa.R.A.P. 126." Pa.R.C.P. 242. This mandate is undoubtedly binding on parties presenting argument before courts of common pleas, but since that Rule was not in effect, either at the time of briefing or oral argument, the Court will not preclude Hopkins from relying on *Holz* for its persuasive value. Truth be told though, *Holz* does not factor significantly into the Court's analysis. The Court ultimately agrees with its treatment of Section 1346(b)(1) as a jurisdiction stripping provision, but finds that the case is factually distinguishable as the pleading here does not establish that Hopkins was acting within the scope of his employment when the injury occurred.

> liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (emphasis added). On the other hand, a distinct, albeit related, provision of the Westfall Act, Section 2679(d), affords federal employees absolute immunity from suit for claims arising out of acts done in the course of their employment, and provides a procedure for removing a case involving such an employee to federal court, where the United States government is substituted as a party defendant. Weisenbach cites to *Thompson v. Wheeler*, 898 F.2d 406 (3rd Cir. 1990) for the proposition that, pursuant to Section 2679(d):

> [J]urisdiction lies only after the Attorney General certifies that the federal [employee] was acting within the scope of his employment. The possibility that such certification might issue does not automatically divest a state court of subject matter jurisdiction. To the contrary, in enacting section 2679, Congress anticipated that suits initially would be brought in state court.

Thompson, 898 F.2d at 409 n.2.

The Court notes that federal case law is less than clear on the interplay between the exclusive federal jurisdiction provision of Section 1346(b) of the Federal Tort Claims Act and the federal employee immunity and attendant removal provisions of Section 2679(d) of the Westfall Act. *See James v. United States Postal Service*, 484 F.Supp.3d 1, 4 (D.D.C. 2020) ("Because the FTCA endows federal district courts with exclusive jurisdiction over claims thereunder, the D.C. Superior Court could not have had subject matter jurisdiction over Plaintiff's claims."); *Kennedy v. Paul*, 2013 WL 5435183, *4 (D. Conn. 2013) ("The Superior Court did not have jurisdiction to hear HGC's apportionment complaint against the Coast Guard Defendants because section 1346(b)(1) gives exclusive jurisdiction over those claims to the federal district court.") (rejecting reliance on *Thompson* because "jurisdiction is usually determined at the time the case is filed and subsequent events cannot destroy it."); *Houston v. United States Postal Service*, 823 F.2d 896, 903

(5th Cir. 1987) ("The state courts have no jurisdiction to hear even properly exhausted tort claims against the United States."); *but see Stein*, 2021 WL 4895338, *3 ("Were the Court to accept the United States' position, the United States could avoid *all* liability in removed FTCA claims by timely invoking the doctrine of derivative jurisdiction in every case removed under the Westfall Act. Under its view, no tort suit begun in state court against an individual could survive removal under the Westfall Act, for in every one of those cases, the state court would not have had subject matter jurisdiction over what turned out to be an FTCA claim. This is inconsistent with Congress's clear desire to provide just compensation—in a federal forum—for those injured by the negligence of federal employees." (citation omitted; emphasis in original)).

In any event, this Court need not decide whether it would lack jurisdiction over such a claim from the start, as Hopkins suggests, or whether it would be deprived of jurisdiction only upon Westfall Act certification, as Weisenbach argues, for even assuming, without deciding, that Hopkins is correct that Section 1346(b) would divest this Court of jurisdiction over such a claim *ab initio*, he still fails to show that the claims alleged here fall within the parameters of Section 1346(b)(1). Under that provision, federal courts have exclusive jurisdiction not in every case, but only in a specific class of cases: those involving injury or loss caused by government employees acting *within* the scope of their office or employment. The Amended Complaint suggests that Hopkins was acting *outside* the scope of his employment when he made the alleged defamatory remarks.

Hopkins contends that a fair reading of the Amended Complaint (which, recall, is the only evidence he offers in support of his Objection) reveals a *de facto* Federal Tort Claims Act action by alleging injury stemming from Hopkins' employment as a postal worker. Hopkins's Prelim Obj., ¶ 13. In assessing whether Weisenbach's claims fall within the purview of the Federal Tort

Claims Act, Hopkins suggests that "this Court should juxtapose the pleadings with Pennsylvania's law on *respondeat superior*[,]" relying on *CNA v. United States*, 535 F.3d 132 (3rd Cir. 2008). There, the Third Circuit, itself relying on the Restatement (Second) of Agency adopted by Pennsylvania courts applied the following test to determine whether the employee acted within the scope of his employment for purposes of the Federal Tort Claims Act: "conduct is within the scope of employment if, but only if: (a) it is the kind the employee is employed to perform; (b) it occurs substantially within the authorized time and space limits; and (c) it is actuated, at least in part, by a purpose to serve the master." *Id.* at 147 (citations, internal quotation marks, brackets, and parenthetical omitted).

Hopkins also refers the Court to Comment e of Restatement (Second) of Agency, which states that "[i]t may be found to be within the scope of employment of a person managing a business to accuse another of wrongful conduct or to report to others the supposed wrongful conduct of an employee or other person." Restatement (Second) of Agency § 247, cmt e (1958). He further highlights the Restatement's observation that "[a] servant having a duty to make such reports either to his employer or to others ... may subject his employer to liability for his untruthful statements constituting defamation because made in excess of a privilege to speak, *if he speaks in connection with his employment and with a purpose to serve it*." Restatement (Second) of Agency § 247, cmt e (1958) (emphasis added). With these sources in mind, Hopkins argues that "[i]t is apparent, on the face of the Amended Complaint, that [his] alleged defamatory statements to Project Veritas and the OIG investigators are within the scope of his employment with the U.S. Postal Service." Hopkins' Prelim. Obj., ¶ 19. But this Hopkins cannot show, even applying his proposed test.

First, while his statements to postal inspectors may well fall within the scope of his

employment, none of those statements actually underlie Weisenbach's claims for defamation or concerted tortious activity.[7] Instead, it is alleged that Hopkins made defamatory statements to Project Veritas, which in turn, published and amplified his defamatory statements to the world. And while his alleged recantation on November 9th may be relevant to an actual malice inquiry, it is not a statement Weisenbach claims constitutes defamation itself. Quite the opposite; Weisenbach suggests his recantation was the closest he came to admitting the truth. In short, whether or not Hopkins' statements to investigators were within the scope of his employment are wholly irrelevant to the analysis of whether the defamation and concerted tortious activity claims lodged against Hopkins are cognizable under the Federal Tort Claims Act.

That leaves the three interviews Hopkins gave to O'Keefe that were later incorporated into the November 5, 6, and 11th stories posted by Project Veritas. Hopkins argues that his statements to the media, *i.e.* Project Veritas, fell "well within the scope of his employment" because he was "integrally involved with the mail ballot process." Hopkins Prelim. Obj. ¶¶ 24-25. But the mere fact that one speaks about his employment does not mean that speech was made "in connection with his employment" or "with a purpose to serve it." Restatement (Second) of Agency § 247, cmt e. If that were the case, a firefighter or school teacher returning home from work after a busy day and relaying to their families the events of the day would be acting within the scope of their employment simply by virtue of the fact that the content of their conversation relates to matters "integrally involved with" firefighting or teaching. As Weisenbach points out, "Hopkins wasn't hired by the postal service to speak on behalf of the postal service. He was hired to deliver the

[7] Hopkins relies on Paragraph 78 of the Amended Complaint, which avers that "HOPKINS repeated his false claims to the investigators[.]" Am. Compl. ¶ 78. But the fact that Hopkins repeated or otherwise communicated his allegedly false claims to investigators does not mean they form part of Weisenbach's case for defamation or concerted tortious activity.

mail." Tr., p. 20. It thus cannot be reasonably claimed that Hopkins' statements to Project Veritas were either "the kind the employee is employed to perform" or that it occurred "substantially within the authorized time and space limits" of his employment. *CNA*, 535 F.3d at 147.

Instead, Hopkins appears to rely on the third category, claiming that his whistleblower activity was "actuated, at least in part, by a purpose to serve the master." *Id.* He contends the U.S. Postal Service's Employee and Labor Relations Manual imposed a duty on him to report the wrongful conduct he believed was occurring, as did the oath he swore to support and defend the United States Constitution. Hopkins Prelim. Obj. ¶¶ 30-33. He asserts this duty extended not merely to internal reporting, but to reports to news media, like Project Veritas, as well. Hopkins Prelim. Obj. ¶ 36.

Setting aside the fact that the Manual was neither entered into evidence for purposes of these Objections, nor referenced in the Amended Complaint, the Manual, at most, insulates an employee who discloses information they believe evinces a violation from reprisal. Hopkins Prelim. Obj. ¶ 32 (citing Manual, Section 666.18). That hardly means the disclosure itself was made in connection with his employment or with a purpose to serve it, particularly where, as here, it is averred that the disclosure was made with knowledge of its falsity or reckless disregard for the truth. Am. Compl. ¶¶ 65, 166.[8] Nor is the Constitution of the United States, or an oath to support it, furthered by false and self-serving statements, as these are alleged to be.[9]

[8] Hopkins also cites to Section 665.3 of the Manual, requiring postal employees to cooperate in any postal investigation, but as the Court has already explained, Hopkins statements to postal inspectors do not form the basis of Weisenbach's defamation and concerted tortious activity claims.

[9] Moreover, a government employee's oath to support and defend the Constitution does not operate as a freestanding grant of authority. As such, Hopkins cannot use his oath as a basis to expand the scope of his employment beyond that which he is already authorized or obligated to do.

Hopkins argues that his public comments, particularly his third interview where he denied having recanted his earlier statements, were incidental to post office business in order to correct misinformation. Prelim. Obj. ¶ 40 (citing *Shuman v. Weber*, 419 A.2d 169, 173 (Pa. Super. 1980) (It is not necessary … that the acts be specifically authorized by the master to fall within the scope of employment; it is sufficient if they are clearly incidental to the master's business[.]")). However, the Amended Complaint refutes the assertion that Hopkins' motive was to serve the United States Postal Service. Rather, drawing all reasonable inferences in Weisenbach's favor, the Amended Complaint suggests that Hopkins was driven by financial gain and a desire to cast doubt upon the legitimacy of the election and the integrity of his employer. Am. Compl. ¶ 10. This allegation is more akin to sabotage than service.

Hopkins insists that certain images in the Amended Complaint, including one purportedly depicting him delivering mail in uniform while speaking to O'Keefe, show he was in the course of conducting his duties at the time he made the alleged defamatory statements. Hopkins' Prelim. Obj. ¶¶ 26-27. First and foremost, it is not at all clear that the pictures depict what Hopkins says they do, but even if they do, it does not follow that Hopkins was necessarily acting in performance of his duties when he made the alleged defamatory remarks simply virtue of the fact that he was on-duty at the time. To be "incidental to the master's business," as the case law cited by Hopkins uses that term, the act must be "subordinate to" or "pertinent to accomplishing the ultimate objective of his employer[.]" *Weber*, 419 A.2d at 173. A "personal expedition" that is "embarked upon" to accomplish "personal errands" is not. *Id.* Reading the Amended Complaint in the light most favorable to Weisenbach, Hopkins' communications with Project Veritas were not pertinent to accomplishing his ultimate objective of delivering the mail, but more in the nature of a personal errand. That Hopkins may have been wearing his uniform at the time he gave the interviews does

not preclude the possibility that he deviated from his postal service duties in order to speak with O'Keefe over the phone. In any event, it certainly cannot be said that Hopkins was speaking in connection with his employment and with a purpose to serve it when he gave his third interview to O'Keefe after being put on administrative leave. Am. Compl. ¶¶ 103, 109.

Taking a step back from the minutiae of Hopkins' jurisdictional argument for a moment, the conclusion that this Court has subject matter jurisdiction over the claims against Hopkins makes sense. Weisenbach is neither directly nor indirectly attempting to bring a suit against the United States government or the United States Postal Service for injury to his reputation. He brings the claims against Hopkins in his personal capacity. Recall that Hopkins is accused of assassinating the character of the Postal Service as well. Am. Compl. ¶ 10. The Postal Service and Weisenbach are thus both victims of the same tort, at least as Weisenbach sees it. And neither would it make sense to say that the Postal Service was acting in concert with O'Keefe and Project Veritas in attempting to undermine its own credibility. In this way, Hopkins' jurisdictional claim is really an effort to rewrite the narrative set forth in the Amended Complaint.

Alternatively, but relatedly, Hopkins argues that Weisenbach "cannot establish a viable claim for relief in state court against a federal employee unless he explicitly avers in the complaint that the alleged defamatory statements occurred outside the employee's federal employment." Hopkins' Prelim. Obj. ¶ 63 (emphasis deleted). That Weisenbach does not explicitly state that Hopkins was acting outside the scope of his employment is of no moment, however, where, as here, the facts allege as much. Under our fact-pleading system, there are no "magic words" carrying talismanic significance that must averred in order to plead a particular set of facts. Tr., 20; *see also Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 706 (Pa. Super. 2000) ("Our focus is not on the use of magic words rather the adequacy of the complaint must be judged by

examination of the facts pled, and not of the conclusions of law that accompany them." (citation and internal quotation marks omitted)); *DeFrancesco v. Western Pennsylvania Water Co.*, 453 A.2d 595, 597 n.5 (Pa. 1982) ("It is not to magic words, but to the essence of the underlying claims, we look in determining where jurisdiction properly lies.").

Pennsylvania Rule of Civil Procedure 1019(a) simply requires a pleading to set forth "in a concise and summary form" the "material facts on which a cause of action or defense is based[.]" Pa.R.C.P. 1019(a). To that end, "[a] complaint must apprise the defendant of the nature and extent of the plaintiff's claim so that the defendant has notice of what the plaintiff intends to prove at trial and may prepare to meet such proof with his own evidence." *Discover Bank v. Stucka*, 33 A.3d 82, 86-87 (Pa. Super. 2011) (citation and internal quotation marks omitted). While the Amended Complaint may not expressly conclude that Weisenbach was acting outside the scope of his employment when he made the defamatory statements, the voluminous facts set forth in the pleading all suggest that he was. Only a strained and unnatural reading of the facts could lead to the conclusion that he was acting within the scope of his employment when he made the allegedly defamatory statements. And while Hopkins may vigorously dispute those facts, his concern is best addressed by denial of the allegations in an answer to the Amended Complaint, not through Preliminary Objections.

Hopkins relies on *Sharpless v. Summers*, 2001 WL 118960 (E.D. Pa. 2001) and *Brown v. Wetzel*, 179 A.3d 1161 (Pa. Cmwlth. 2018), but both of those cases involved lawsuits against government officials where the facts readily suggested the defendants were acting within the scope of their employment when the alleged injury occurred. In *Sharpless*, for instance, the court found the contention that a defendant "defamed and libeled Plaintiff among his co-workers and the general public" to be "remarkable[,]" especially given the contrary averment that "[a]t all times

relevant hereto, Defendants were acting by and through their agents, employees, and representatives who were authorized and acting within the course and scope of their employment[.]" *Sharpless*, 2001 WL 118960 at *4. Here, Weisenbach never suggests, let alone expressly states, that Hopkins was acting within the scope of his employment.

Likewise, in *Brown*, "Inmates filed the Complaint alleging that, as a result of DOC's administration failing to act on the knowledge of the existence of asbestos within the facility, one or more Inmates were exposed to asbestos at some point between October 2014 and March 2016 while being confined at SCI–Rockview." *Brown*, 179 A.3d 1164. Relevant to a fraud claim, one of those inmates, Lamar Brown, alleged that certain DOC employees named as defendants "falsified allegations in their grievance and grievance appeal responses to Inmates' grievances and grievance appeals[.]" *Id.* at 1167 (internal brackets omitted). The Plaintiff maintained "that because those individuals violated the Ethics Code, they were not acting within the scope of their employment." The court concluded that because "Brown did not allege" that the DOC employees "were acting outside the scope of their employment, the trial court properly sustained the preliminary objection to Brown's fraud claim based on sovereign immunity." *Id.*

Unlike the allegedly false statements Hopkins provided to Project Veritas here, the filing of a grievance or a response to a grievance is the kind of act one would expect to be performed in the course of one's employment as a prison official. Conversely, one would not expect DOC employees to respond to grievances made by inmates when they are not working. Thus, without more (such as an express averment that the employees were acting outside the scope of their employment when they made the allegedly false statements) the complaint failed to set forth material facts from which it could be discerned that the employees were acting outside the scope of their employment.

Critically, neither *Sharpless* nor *Brown* espouses the broad rule posited by Hopkins that a plaintiff has an affirmative obligation to specifically state that a defendant was acting outside the scope of his or her employment to avoid bringing the case within the jurisdictional orbit of the Federal Tort Claims Act. In both cases, the material facts set forth in the pleading simply did not suggest that the defendants were acting outside the scope of their employment when the injury occurred. In Weisenbach's Amended Complaint the opposite is true: the material facts, especially when read in the light most favorable to Weisenbach, strongly suggest that Hopkins was acting in a capacity wholly unrelated or incidental to his employment as a postal worker when he communicated allegedly false allegations about backdated ballots to O'Keefe and Project Veritas. To require Weisenbach to conclusory state as much using particular language or a specific phraseology would be repetitive of the facts already alleged, would unnecessarily elevate form over substance, and is neither required by the Pennsylvania Rules of Civil Procedure nor our case law.

Finally, Hopkins contends that if "this Court determines that the pleadings indicate [Hopkins] was acting *within* the scope of his employment, it should also dismiss the Amended Complaint for failure to exhaust administrative remedies." Hopkins Prelim. Obj. ¶ 56. The administrative remedy to which he refers, found in Chapter 171 of Title 28, is Section 2675(a), which directs that a "[a]n action shall not be instituted upon a claim against the United States for money damages ... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). Hopkins relies on *White-Squire v. U.S. Postal Service*, 592 F.3d 453 (3rd Cir. 2010) and its holding that the sum certain requirement of 2675(b) is jurisdictional, and therefore, deprives a federal district court of subject matter jurisdiction over

a sum certain claim which is not first presented to the appropriate agency. *Id.* at 457-58.

The Court observes that *White-Squire*'s holding that Section 2675 presents a jurisdictional bar has been cast into doubt by a string of decisions from the United States Supreme Court, which has since "endeavored to bring some discipline to use of the jurisdictional label." *Boechler, P.C. v. Commissioner of Internal Revenue*, 142 S.Ct. 1493, 1497 (2022) (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (internal quotation marks omitted)); *see also United States v. Wong*, 575 U.S. 402 410 (2015) (holding Federal Tort Claims Act's time bars are non-jurisdictional and therefore subject to equitable tolling) ("we have made plain that most time bars are nonjurisdictional."). *White-Squire*'s holding that Section 2675 is jurisdictional was premised on the fact that the text of Section 1346 expressly "tethered" its grant of exclusive jurisdiction to federal district courts to the procedures set forth in Chapter 171. *White-Squire*, 592 F.3d at 457. Nevertheless, at least one federal court of appeals has disapproved of the Third Circuit's analysis. *See Copen v. United States*, 3 F.4th 875, 882 (6th Cir. 2021) ("The reference to chapter 171 in § 1346(b) is simply not clear enough to turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle." (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 147 (2012) (internal quotation marks omitted))).

In any event, this Court need not decide whether *White-Squire*'s analysis continues to carry persuasive force in light of intervening precedent, for even assuming that the administrative exhaustion requirement is jurisdictional, such that a litigant's failure to exhaust those remedies would deprive this Court of subject matter jurisdiction, the administrative remedies referenced in Section 2675 are completely inapplicable to Weisenbach's claims. Section 2675 provides in relevant part that:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful

> act or omission of any employee of the Government **while acting within the scope of his office or employment**, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. 2675(a). This verbiage directly tracks the language in the exclusive jurisdictional grant to federal courts found in Section 1346(b)(1). Because the substantive scope of these provisions are coterminous, the agency exhaustion requirement of Section 2675 will, in effect, only ever apply to an action over which federal courts properly have exclusive jurisdiction under Section 1346(b)(1). A state court considering a claim to which Section 2675(a) would apply on its face would already be deprived of subject matter jurisdiction under Section 1346(b)(1).

White-Squire thus stands for the proposition that the failure to present the claim to the appropriate federal agency under Section 2675(a) precludes *federal courts* from exercising jurisdiction where they otherwise would have statutory authority to do so under Section 1346(b)(1). Because both provisions are only applicable to actions against federal government employees acting within the scope of their employment, neither have any bearing on a case, such as this, where the employee is alleged to have acted outside the scope of his employment when he caused the injury. Put another way, a determination that an employee was acting outside the scope of his employment when he caused the alleged injury resolves the jurisdictional question under both Sections 2675(a) and 1346(b)(1). In this case, Weisenbach was not required to present the claim to the Postal Service before heading to court because it was not, in actuality, a grievance against the Postal Service, but rather, against Hopkins in his individual capacity.

In sum, the Amended Complaint does not assert claims against Hopkins for injury he allegedly caused while acting within the scope of his employment as a U.S. postal worker, and as a result, the Federal Tort Claims Act does not deprive this Court of subject matter jurisdiction to adjudicate the claims against him. Hopkins has therefore failed to meet his evidentiary burden to

demonstrate the absence of jurisdiction. *Independent Oil & Gas Association*, 245 A.3d at 366. With that, the Court proceeds to consider the Preliminary Objections in the nature of demurrers.

III. DEMURRER: DEFAMATION AND CONCERTED TORTIOUS ACTIVITY

Defendants Project Veritas and O'Keefe raise Preliminary Objections in the nature of demurrers asserting Weisenbach has not sufficiently pled the elements of a claim for defamation against them in Count II or a claim for substantial assistance, *i.e.*, concerted tortious activity, in Count III. *See* Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, pp. 4-9, 15-16. "The question presented in a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible." *Bruno*, 106 A.3d at 56. "A demurrer tests the legal sufficiency of the complaint. For the purpose of evaluating the legal sufficiency of the challenged pleading, the court must accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts." *Commonwealth by Shapiro v. UPMC*, 208 A.3d 898, 908-09 (Pa. 2019) (citations and internal quotation marks omitted).

"Defamation is a communication which tends to harm an individual's reputation so as to lower him or her in the estimation of the community or deter third persons from associating or dealing with him or her." *Coleman v. Ogden Newspapers, Inc.*, 142 A.3d 898, 904 (Pa. Super. 2016) (citation omitted). Pennsylvania's "Uniform Single Publication Act sets forth the elements of a *prima facie* defamation case[.]" *Castellani v. Scranton Times, L.P.*, 124 A.3d 1229, 1240-41 (Pa. 2015). Those elements include: (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; (6) special harm resulting to the plaintiff from its publication; and (7) abuse

of a conditionally privileged occasion. 42 Pa.C.S. § 8343(a).

Pennsylvania also recognizes the tort of concerted tortious conduct, which is essentially a civil aiding and abetting action. *Sovereign Bank v. Valentino*, 914 A.2d 415, 421 (Pa. Super. 2006). In this regard, "[o]ur Supreme Court adopted section 876 of the Restatement (Second) of Torts as the law of this Commonwealth." *Grimm v. Grimm*, 149 A.3d 77, 88 (Pa. Super. 2016) (citing *Skipworth by Williams v. Lead Industries Association, Inc.*, 690 A.2d 169, 174-175 (Pa. 1997)). Under Section 876 of the Restatement, one is liable for harm resulting to a third person from the tortious activity of another if he either: (1) does a tortious act in concert with the other or pursuant to a common design with him, (2) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (3) 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. Restatement (Second) of Torts § 876 (1979). "[C]oncerted tortious action requires the secondary actor to have knowledge of the primary actor's tortious actions or the primary actor's tortious act must be foreseeable to the secondary actor." *Marion v. Bryn Mawr Trust Co.*, 253 A.3d 682, 690 (Pa. Super. 2021) (citation omitted), *appeal granted in part*, 264 A.3d 336 (Pa. 2021).

Beginning with the challenge to Count II, Project Veritas and O'Keefe contend that Weisenbach has failed to adequately plead "the defamatory character of the communications in controversy and any third party understanding of it." Memorandum of Law in Supp. of Prelim. Obj. of Project Veritas and James O'Keefe, III, p. 5. "A communication may be considered defamatory if it tends to harm the reputation of another so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her." *Kuwait & Gulf Link Transport Co. v. Doe*, 216 A.3d 1074, 1085 (Pa. Super. 2019) (quoting *Bell v.*

Mayview State Hosp., 853 A.2d 1058, 1062 (Pa. Super. 2004)). "Further, in determining whether a statement is capable of defamatory meaning, a court must view the statement in context. The nature of the audience is a critical factor in determining whether a statement is capable of defamatory meaning." *Id.* (citations omitted). Finally, [i]n determining whether a statement is capable of defamatory meaning, the trial court must also ascertain whether the statement constitutes an opinion ... [as] generally, only statements of fact, rather than mere expressions of opinion, are actionable under Pennsylvania's defamation law." *Id.* at 1085-86 (citations omitted).

Neither can the procedural posture of this case be ignored. Precisely because the Court must accept as true all well-pleaded material allegations in the Amended Complaint, as well as all inferences reasonably deducible therefrom, *Commonwealth v. Monsanto Co.*, 269 A.3d 623, 635 (Pa. Cmwlth. 2021), "[w]hen ruling on preliminary objections in the nature of a demurrer, the question is whether a nondefamatory interpretation is the *only* reasonable one. 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 County Humane Society*, 482 A.2d 266, 269 (Pa. Super. 1984) (internal quotation marks, ellipsis, and brackets omitted; emphasis in original). "When the language is capable of both innocent and defamatory interpretations, it is for a jury to decide if the recipient understood the defamatory implications." *Menkowitz v. Peerless Publications, Inc.*, 211 A.3d 797, 802 (Pa. 2019).

Weisenbach points to numerous allegations in the Amended Complaint capable of defamatory meaning in paragraphs 39-75, 79-90, 108-118, and 163. Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 8. Relative to the first story published on November 5, 2020, they include the reports that Weisenbach ordered ballots received from the fourth through the sixth be backdated to the third, that Hopkins overheard Weisenbach tell another supervisor that

they "messed up" because they postmarked one of the ballots for the fourth, Hopkins' statement that Weisenbach was upset because he was a "Trump hater," and O'Keefe's assertion that they had "multiple sources" for the story. Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 6 (citing Am. Compl. ¶¶ 39-40, 45-46, & 48). Weisenbach further contends that the title of the story itself ("Nov. 3 Postmark Voter Fraud Scheme") is defamatory, as are the hashtags and tweets used to promote the story, including "#MailFraud," "BREAKING: Pennsylvania @USPS Whistleblower Exposes Anti-Trump Postmaster's Illegal Order To Back-Date Ballots," "@USPS workers are being ordered by their postmasters to ILLEGALLY 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." Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 6 (citing Am. Coml. ¶¶ 41, 54, & Exs. 6, 27-29).

As for the second story published on November 6, 2020, Weisenbach argues that the interview and accompanying affidavit drafted by Project Veritas "contain many of the same defamatory statements," including the allegations that Weisenbach and a supervisor discussed how they had backdated all but one of the ballots collected on November 4th, Hopkins' attestation that Weisenbach had ordered him and his co-workers to continue to pick up ballots through Friday, November 6, 2020, and to give those ballots to Weisenbach "presumably so they could be backdated," and O'Keefe's amplification of the story through the hashtag "#BlackDateGate." Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 6-7 (citing Am. Compl. ¶¶ 80, 82, 84). Finally, as to the third article and video published on November 11th, after Hopkins' supposed recantation, Weisenbach notes that Project Veritas and O'Keefe reprised many of the same falsehoods, including the statements made in his original defamatory affidavit and O'Keefe's

remarks during the interview denying that Hopkins had recanted and vouching for his character. Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 7 (citing Am. Compl. ¶¶ 96, 108-18, 113, 116).

On the whole, the Court agrees that the statements Weisenbach identifies are capable of defamatory meaning as a matter of law. While a few of the alleged statements, such as O'Keefe's comment during the third interview that Hopkins "did not recant his story ... despite the incredible pressure for him to call himself a liar," are arguably expressions of opinion,[10] the lion's share constitute concrete factual assertions which Weisenbach avers are simply untrue. This includes the central allegation underlying the stories: that Weisenbach illegally ordered the backdating of ballots received on November 4th, 5th, and 6th, so as to make it appear as though the ballots were received by election day. This also includes the allegation that Weisenbach was motivated to illegally backdate ballots out of a hatred for President Trump. Although an individual's political preferences may be often kept private, this does not necessarily mean it is not "provable as false" such that it is a protected expression of opinion. *Krajewski v. Gusoff*, 53 A.3d 793, 803 (Pa. Super.

[10] Whether Hopkins, in fact, recanted his earlier allegations is hotly contested by the parties. Whether O'Keefe statement is capable of defamatory meaning, in turn, depends upon whether his statement was a "subjective interpretation, or opinion, of" this provable fact, *Parano v. O'Connor*, 641 A.2d 607, 609 (Pa. Super. 1994) (holding comments that plaintiff was "adversarial, less than helpful, and uncooperative" to be expressions of opinion), or alternatively, whether his statement was an opinion based upon his subjective misunderstanding of the facts. *Kuwait*, 216 A.3d at 1087 (holding legal opinion based on misunderstanding of the facts is not itself sufficient for an action of defamation, "no matter how unjustified and unreasonable the opinion may be or how derogatory it is." (citations and internal quotation marks omitted)). Moreover, in limited circumstances, "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Id.* at 1086 (quoting Restatement (Second) of Torts § 566). Given the Court's finding that the vast majority of the allegations do not constitute expressions of opinion, it is not necessary to decide whether O'Keefe's statement is properly characterized as an expression of opinion, or if so, whether it may be reasonably inferred from the face of the pleading that O'Keefe was aware of any undisclosed facts concerning Hopkins' supposed recantation.

2012) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990)). Indeed, the Amended Complaint contains two pictures: one of Weisenbach holding a "Trump: Make America Great Again" flag and another of him wearing a "Trump 2020" face mask, evincing the provable falsity of Weisenbach's supposed animosity toward President Trump. Am. Compl. ¶ 70. Thus, by and large, the defamatory statements alleged in the Amended Complaint do not consist of editorial commentary concerning supposed mail fraud at the Erie General Mail Facility or opinion as to the courageousness of the whistleblower, but provably false accusations levied against Weisenbach that he personally directed that mail-in ballots received through November 6, 2020, be backdated to the 3rd, and that he did so because he was a "Trump hater."

Furthermore, the Amended Complaint sufficiently avers that the statements tended to harm Weisenbach's reputation so as to lower him in the estimation of the community or to deter third parties from associating or dealing with him. The Amended Complaint alleges that the false publicity brought on by the publications resulted in an unknown assailant angrily confronting Weisenbach in his driveway, he and his wife having to leave Erie for a time to ensure their safety, and his wearing a face mask while running errands in the community, not merely to protect against COVID-19, but to obscure his face. Am. Compl. ¶¶ 125-38, 141. The Amended Complaint therefore alleges that he was exposed to hatred, contempt, and ridicule by virtue of his tarnished reputation. *Tucker v. Philadelphia Daily News*, 848 A.2d 113, 125 (Pa. 2004) (quoting *Schnabel v. Meredith*, 107 A.2d 860, 862 (Pa. 1954)). That is enough to survive a demurrer as to the defamatory character of the statements underlying Count II.

Project Veritas and O'Keefe respond that the Weisenbach merely "offers speculation designed to punish Veritas' reporting about the statements of a postal worker." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 5. Similarly, they assert

Weisenbach "fails to provide this Court with identifiable, actionable defamatory communications." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 9. But as just explained, the crux of Weisenbach's case centers around the allegations that Project Veritas published (and then republished twice over) false claims that he ordered the backdating of mail-in ballots and that he did so because he was a "Trump hater." Weisenbach's vigorous averments in this regard do not waiver on the precipice of mere speculation.

They similarly contend that the "closest specification of an allegedly defamatory communication" is found in paragraph 37, which avers that beginning November 4, 2020, Project Veritas and O'Keefe "began to press a narrative" that "USPS workers were backdating ballots in order to sway the election to former Vice President Biden." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 5-6; Am. Compl. ¶ 37. But they insist that "a discussion about backdating ballots … is precisely what Richard Hopkins overheard and then communicated to Project Veritas." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 6. They argue that "[a]s responsible journalists" they were entitled to "take a reasoned assessment of the facts they have collected and pronounce their opinion about it." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 6. But as the Court has explained, while portions of the published stories may contain editorial elements, the core of Weisenbach's claim rests upon Project Veritas and O'Keefe's reporting and amplification of allegedly false facts, namely, that Weisenbach ordered the backdating of mail-in ballots and that he was a "Trump hater." Drawing all reasonable inferences from the Amended Complaint in Weisenbach's favor, that reporting was not couched as opinion, but as unadorned fact.

Likewise, Project Veritas and O'Keefe argue that the Amended Complaint fails to

sufficiently allege an action for defamation *per se* because the statements made by them concerning fraud or backdating are protected statements of conversational meaning, properly characterized as opinion or hyperbole, such as when someone identifies an excessive charge as "fraud" or "extortion." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 6-7.[11] But once again, this argument obfuscates the distinction between a journalist's reporting of facts and his or her expressions of opinion concerning those facts. And once again, Project Veritas and O'Keefe fail to draw all reasonable inferences from the Amended Complaint in Weisenbach's favor, as the Court must. When the averments are read in that light, it becomes clear that Weisenbach alleges that Project Veritas was not using figurative language when it accused Weisenbach of orchestrating a voter fraud scheme.

At oral argument, counsel for Project Veritas and O'Keefe noted that some courts in defamation cases have held that posts on social media are more likely to include hyperbolic or "loose figurative language" as opposed to literal "criminal imputation." Tr. p. 56. This is in keeping with longstanding admonitions that "in determining whether a statement is capable of defamatory meaning, a court must view the statement in context" and "[t]he nature of the audience is a critical factor in determining whether a statement is capable of defamatory meaning." *Kuwait*, 216 A.3d at 1085. That statements made on Facebook or Twitter are more likely to be exaggerated

[11] As the parties appear to use that term, "a 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, is defamatory *per se*." *Pelagatti v. Cohen*, 536 A.2d 1337, 1345 (Pa. Super. 1987); *but see Agriss v. Roadway Express, Inc.*, 483 A.2d 456, 469 (Pa. Super. 1984) (abandoning distinction for purposes of actionability between libels which are defamatory on their face and libels which are defamatory through extrinsic facts and circumstances) ("The import of 'per se' in a defamation case is a problem that has kept Pennsylvania courts going in circles for generations ... nowadays 'per se' is used so inconsistently and incoherently in the defamation context that any lawyer or judge about to use it should pause and replace it with the English words it is intended to stand for.").

than those in the New England Journal of Medicine should come as a surprise to no one, but at the risk of sounding monotonous, Project Veritas and O'Keefe's reliance on context overlooks the fact that at this stage the Court must confine its analysis to the averments in the Amended Complaint, drawing all reasonable inferences in Weisenbach's favor. Read in that context, the claims of voter fraud in the stories, and even in the social media posts, are properly characterized as literal factual allegations, not loose figurative language.

Finally, Project Veritas and O'Keefe maintain that Wiesenbach misunderstands the Pennsylvania Supreme Court's decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Sept. 17, Pa. 2020) to mean that ballots postmarked by November 6, 2020, "were legally cast and required to be counted" when in reality that decision "merely permitted a three-day extension of the received-by deadline solely to allow for the tabulation of ballots" postmarked by 8:00 p.m. on November 3, 2020. Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 8 (quoting Am. Compl. ¶¶ 88-90; citing *Boockvar*, 238 A.3d at 371-72). This fact, they claim, refutes Weisenbach's assertion in Paragraph 90 of the Amended Complaint that they "knew or had reason to know that any reports of ballot segregation expressly comported with Pennsylvania law." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 9 (quoting Am. Compl. ¶ 90). Rather, they assert that precisely because the *Boockvar* decision did not allow for the backdating of ballots, O'Keefe could reasonably reach the conclusion that "something illegal" or "something shady" was afoot that warranted further discussion. Tr., p. 70.

While it is true that the Amended Complaint appears to misconstrue the holding in *Boockvar*, and while the *Boockvar* decision certainly did not condone mail-in ballot backdating, subsequent guidance issued by the Pennsylvania Department of State did require the segregation

of ballots as the United States Supreme Court's November 6, 2020, Order in the then-pending appeal made clear. *See Republican Party of Pennsylvania. v. Boockvar*, --- S.Ct.---, 2020 WL 6536912 (Mem.) (U.S. Nov. 6, 2020) (Alito, J., in chambers) ("All county boards of election [are] hereby ordered, pending further order of the Court, to comply with the following guidance provided by the Secretary of the Commonwealth on October 28 and November 1, namely, (1) that all ballots received by mail after 8:00 p.m. on November 3 be segregated and kept in a secure, safe and sealed container separate from other voted ballots, and (2) that all such ballots, if counted, be counted separately." (citation and internal quotation marks omitted)).

Thus, by virtue of the *Boockvar* case and the resulting guidance from the Pennsylvania Department of State, the central thrust of the averment in Paragraph 90 remains plausible: that O'Keefe knew or had reason to know that the ballot segregation procedures described by Hopkins complied with Pennsylvania law. And while a factfinder may ultimately conclude that, these legal developments notwithstanding, O'Keefe legitimately believed something nefarious was happening at the Erie General Mail Facility based on Hopkins' statements, a factfinder may just as easily reach the opposite conclusion.

We are not at the factfinding stage yet however. "When ruling on a demurrer, a court must confine its analysis to the complaint." *Monsanto*, 269 A.3d at 635 (emphasis omitted). Drawing all reasonable inferences in Weisenbach's favor, the publicly-known ballot segregation procedures should have given pause to O'Keefe before publishing the stories. On the other hand, any claim that O'Keefe was not aware of the ballot segregation procedures does not necessarily help him either as it could tend to show that he and the Project Veritas team failed to do their due diligence in investigating mail-in ballot collection procedures. Moreover, (and perhaps most importantly) even if the Court were to disregard Paragraphs 88 through 90 in light of Weisenbach's

misunderstanding concerning the *Boockvar* decision, there is still ample factual averments to support his claims of defamation in the remaining 204 paragraphs of the Amended Complaint. As such, Project Veritas and O'Keefe's reliance on Weisenbach's misstatement of the *Boockvar* decision is not enough to sustain their demurrer. Likewise, the Court rejects Project Veritas and O'Keefe's suggestion that the misstatement impacts the sufficiency of the Amended Complaint. Tr., pp. 70-71.

That leaves Project Veritas and O'keefe's demurrer as to Count III, relating to concerted tortious activity. In large part, their demurrer rests on the same arguments as in Count II. *See* Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 16 ("For the same reasons that Weisenbach's claim of defamation fails, so too does his claim of substantial assistance."). In turn, for the same reasons that Project Veritas and O'Keefe's challenge to Count II fails, so too does their challenge to Count III. The Court briefly pauses to address a challenge to Count III not addressed elsewhere in this Opinion. Project Veritas and O'Keefe argue 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." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 16 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001)). They contend that the Amended Complaint merely "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." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 16.

This is simply not an accurate description of the factual allegations in the Amended Complaint. Weisenbach ardently avers that Project Veritas and O'Keefe defamed him by

publishing the November 5th, November 6th, and November 11th stories. They further allege, as part of its Diamond Dog initiative, that Project Veritas "solicited" Hopkins' account. Am. Compl. ¶ 74. While Project Veritas may dispute this averment, the Court must accept it as true at this juncture. Furthermore, Count III indicates a laundry list of ways in which Project Veritas and O'Keefe substantially assisted Hopkins, including through encouragement to come forward, the drafting of the affidavit, instructions on how to profit from the crowdfunding account, keeping lawyers on retainer to defend Hopkins, and consulting with Hopkins on a daily basis, all with the common goal of defaming Weisenbach. Am. Compl. ¶ 202. In short, Count III sufficiently alleges that all three Defendants aided or abetted each other in a tortious scheme to defame Weisenbach, *Valentino*, 914 A.2d at 421, and that they did so with knowledge of each other's tortious conduct, or at the very least, that the other Defendants' tortious acts were reasonably foreseeable. *Bryn Mawr Trust Co.*, 253 A.3d at 690.

As such, this is not an inside source case. *See Bartnicki*, 532 U.S. at 525. ("First, respondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else."). Here, it is not alleged that Project Veritas published information that was illegally intercepted by an inside source. Rather, Weisenbach alleges that both Project Veritas and Hopkins engaged in concerted "character assassination" against him with the larger aim of "undermining public faith in the United States Postal Service and the results of the 2020 Presidential election." Am. Compl. ¶ 10. Project Veritas and O'Keefe's reliance on this line of cases is therefore misguided.

Accordingly, the demurrer as to Count III is overruled. As to Project Veritas and O'Keefe's

demurrer as to Count II (as well as Hopkins' demurrer as to Count I), all that remains to be adjudicated is the Defendants' claims that the First Amendment bars recovery under the facts alleged pursuant to the "rigorous, if not impossible," to satisfy actual malice standard, applicable to defamation actions brought by public officials. *Manning v. WPXI*, 886 A.2d 1137, 1144 (Pa. Super. 2005). This presents a closer question than the challenges considered thus far.

IV. DEMURRER: ACTUAL MALICE

The First Amendment to the United States Constitution, applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides, in relevant part, that "Congress shall make no law … abridging the freedom of speech, or of the press[.]" U.S. CONST. amend. 1. "At the founding, the freedom of the press generally meant the government could not impose prior restraints preventing individuals from publishing what they wished. But none of that meant publishers could defame people, ruining careers or lives, without consequence. Rather, those exercising the freedom of the press had a responsibility to try to get the facts right—or, like anyone else, answer in tort for the injuries they caused." *Berisha v. Lawson*, 141 S.Ct. 2424, 2426 (2021) (Gorsuch, J., dissenting from denial of certiorari). "This was the accepted view in this Nation for more than two centuries." *Id.* (quoting *Herbert v. Lando*, 441 U.S. 153 (1979) (internal quotation marks and brackets omitted).

The legal landscape changed dramatically in the 1960s when the United States Supreme Court decided *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). There, the Court held that the First Amendment to the United States Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80 (internal quotation marks omitted). The

Court reasoned that a tort regime "compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable self-censorship." *Id.* at 279 (internal quotation marks omitted). "Under such a rule," the Court continued, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.* Such a standard "dampens the vigor and limits the variety of public debate" and therefore "is inconsistent with the First and Fourteenth Amendments." *Id.*

The decision rests upon "the principle that debate on public issues should be uninhibited, robust, and wide-open," *Id.* at 270, and that "[o]ur profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of breathing space so that protected speech is not discouraged." *Harte-Hanks Communications Inc., v. Connaughton*, 491 U.S. 657, 686 (1989) (citations and internal quotation marks omitted). In order to prevent a chilling effect on protected speech, it is consequently necessary to tolerate "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S. at 270. The upshot is that *New York Times* and its progeny extends "a measure of strategic protection to defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

Here, the parties contest whether Weisenbach is a public official for purposes of the *New York Times* actual malice standard.[12] Defendants can identify only two relevant cases, neither of

[12] Even if he is not a public official, Project Veritas and O'Keefe alternatively claim Weisenbach is a limited purpose public figure—another category of plaintiff subject to the actual malice standard—because he voluntarily injected himself into the controversy by accepting the job of postmaster. Prelim. Obj. of Def.s' Project Veritas and James O'Keefe, III, ¶ 19 (citing *American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania*, 923 A.2d 389 (Pa. 2007));

which are binding on this Court, and one of which predates *New York Times* itself. *See Knipe v. Procher*, 75 Pa. D. & C. 420, 421 (Montgomery Co. 1950) (Forrest, J.) ("A postmaster is a public official and as such is bound to exercise his judgment for the public benefit[.]"); *Silbowitz v. Lepper*, 32 A.D.2d 520, 299 N.Y.S.2d 564 (N.Y. App. Div. 1969) ("the 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*[.]"). In any event, the Court need not decide today whether Weisenbach is a public official for purposes of *New York Times v. Sullivan* because even assuming, without deciding, that he is, the Court holds that Weisenbach has sufficiently plead actual malice on the part of all Defendants.[13]

Actual malice, and in particular, its reckless disregard component, "cannot be fully encompassed in one infallible definition." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968). It does not mean "ill will or malice in the ordinary sense of the term," and so, cannot be shown simply "by virtue of the fact the media defendant published the material to increase its profits, or the

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Memorandum of Law in Supp. of Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 11; Tr., pp. 75-76. The Court does not reach this argument.

[13] Weisenbach argues that he is not required to aver facts in support of his allegation that the Defendants acted with actual malice because actual malice is a state of mind, which under Pa.R.C.P. 1019(b), may be pled generally. Tr., p. 90. Because the Court nonetheless finds that Weisenbach has pled sufficient facts to support his contention of actual malice as to all Defendants, the Court need not address this argument. The Court observes, however, that appellate courts in the federal system, another fact-pleading jurisdiction, appear to have overwhelmingly rejected Weisenbach's position. *See Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013) ("States of mind may be pleaded generally, but a plaintiff still must point to details sufficient to render a claim plausible."); *Biro v. Conde Nast*, 807 F.3d 541 (2nd Cir. 2015) ("a public-figure plaintiff must plead plausible grounds to infer actual malice by alleging enough facts to raise a reasonable expectation that discovery will reveal evidence of" actual malice.") (citation, internal quotation marks, and brackets omitted); *Michel v. NYP Holdings, Inc.*, 816 F.3d 686 (11th Cir. 2016) (noting "after *Iqbal* and *Twombly*, every circuit that has considered the matter has applied the *Iqbal/Twombly* standard and held that a defamation suit may be dismissed for failure to state a claim where the plaintiff has not pled facts sufficient to give rise to a reasonable inference of actual malice.").

failure to investigate before publishing, even when a reasonably prudent person would have done so, although the purposeful avoidance of the truth is in a different category." *Joseph v. Scranton Times, L.P.*, 129 A.3d 404, 436-37 (Pa. 2015) (citing *Harte-Hanks*, 491 U.S. at 666-92). "Rather, actual malice requires at a minimum that statements were made with a reckless disregard for the truth. That is, the defendant must have made the false publication with a high degree of awareness of probable falsity, or must have entertained serious doubts as to the truth of his publication." *Id.* at 437 (citations, internal quotation marks, brackets, and ellipsis omitted).

In this case, Weisenbach points to three categories of averments in the Amended Complaint which he argues lead to the conclusion that Project Veritas and O'Keefe acted with actual malice: (1) fabrication and serious doubts as to the truth, (2) intentional avoidance of the truth and inherent improbability, and (3) preconceived narrative and ulterior motive. Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, pp. 12-22. In a similar vein, Weisenbach offers three categories of averments which he suggests lead to the conclusion that Hopkins acted with actual malice: (1) fabrication and serious doubts as to the truth, (2) intentional avoidance of the truth, and (3) financial motive. Pl.'s Br. in Opp. to Prelim. Obj. of Def. Hopkins, pp. 5-13. Weisenbach submits that even if none of these factors, standing alone, would be sufficient to establish actual malice by clear and convincing evidence,[14] the totality of these factors would be. Tr., pp. 118-19. The Court agrees.

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[14] Hopkins and Weisenbach dispute whether a plaintiff must plead actual malice by clear and convincing evidence at this stage. Hopkins cites to *Tucker*, which considered in the context of a demurrer on motion for judgment on the pleadings "whether a reasonable jury could conclude by clear and convincing evidence that Appellant-newspapers printed statements they knew were false or printed them with reckless disregard of their falsity." *Tucker*, 848 A.2d at 131. Our intermediate appellate courts, relying on *Tucker*, have arrived at the same conclusion as Hopkins. *See Jones v. City of Philadelphia*, 893 A.2d 837, 844 (Pa. Cmwlth. 2006) ("A plaintiff must plead sufficient facts such that a jury could eventually conclude, by clear and convincing evidence, that the statements at issue were false."). Weisenbach argues that a later case, *Weaver v. Lancaster*

Beginning with Project Veritas and O'Keefe, Weisenbach avers that the media Defendants took a tendentious approach with Hopkins, drafting his affidavit, encouraging him to solicit donations, helping him set up crowdsourcing accounts, flying him to New York for an interview, and retaining legal counsel on his behalf. Am. Coml. ¶¶ 83, 97, 100, 202; *see also US Dominion, Inc., v. Powell*, 554 F.Supp.3d 42, 60 (D.D.C. 2021) ("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."). They falsely stated in their first story that they had "multiple sources" to corroborate Hopkins' claims. Am. Coml. ¶ 48. Later, after reviewing the recording where Hopkins stated "I didn't specifically hear the whole story. I just heard part of it. And I could have missed a lot of it. … My mind probably added the rest[,]" Am. Coml. ¶ 96, they doubled down and republished the allegedly defamatory statements. Am. Coml. ¶¶ 108-18. Even

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Newspapers, Inc., 926 A.2d 899, 905 (Pa. 2007), "disavow[s] th[e] notion that this heightened clear and convincing standard should apply before a jury trial." Tr. pp. 147-48. *Weaver*, however, merely clarified that an "independent review of evidence," as required under United States Supreme Court precedent, is "an assessment made by appellate courts only *after* the jury has made findings of fact," and so, was inapplicable in the context of a motion for summary judgment. *Weaver*, 926 A.2d at 908 (emphasis in original). It did not address a pleading standard, as the Court did in *Tucker*.

To be sure, a party opposing demurrer need not present any evidence; he or she simply must point to sufficient factual allegations in the pleading. But because a plaintiff must ultimately prove actual malice by clear and convincing evidence at trial, it naturally follows that a plaintiff must plead sufficient facts in a complaint, which, if credited by a factfinder, could ultimately satisfy that heightened evidentiary standard. *See Biro v. Conde Nast*, 963 F.Supp.2d 255, 288 (S.D. N.Y. 2013) ("missing from the complaint are any factual allegations suggesting that Biro could plausibly demonstrate by clear and convincing evidence that the New Yorker Defendants published the four allegedly defamatory statements with actual malice[.]"). This is of particular importance in the actual malice context where some evidence, standing alone, (such as the failure to investigate or an ulterior motive to publish) may not be sufficient, yet, may nonetheless be relevant to determining whether a defendant purposely avoided the truth. *Harte-Hanks*, 491 U.S. at 692. Thus, in order to survive demurrer, Weisenbach must show that he has pled sufficient facts such that a jury could eventually conclude, by clear and convincing evidence, that the statements at issue were made or published with actual malice. *Jones*, 893 A.2d at 844.

after the Postal Service Inspector General issued a final report on February 3, 2021, concluding there was "no evidence" to support Hopkins claims, Project Veritas refused to retract their story. Am. Coml. ¶¶ 149, 154; *see also Castellani*, 124 A.3d at 1242 ("the existence of actual malice may be shown in many ways, including [by] direct or circumstantial competent evidence of prior or subsequent defamations, and subsequent statements of the defendant" and "republications, retractions, and refusals to retract are similar in that they are subsequent acts which can be relevant to the determination of previous states of mind." (quoting *Herbert*, 441 U.S. at 164 n. 12 and *Weaver*, 926 A.2d at 906)). Taken together, these facts, if ultimately proven, could be credited as circumstantial evidence that Project Veritas and O'Keefe fabricated evidence to bolster their story, or at least harbored serious doubts as to the truth of Hopkins' claims.

Similarly, there are facts in the Amended Complaint tending to show that Project Veritas and O'Keefe may have intentionally avoided the truth in light of the inherent improbability of the claims, particularly after it appeared that Hopkins backed down from some of his earlier allegations in his November 9th interview with postal inspectors. Weisenbach maintains that "[a]t that point, there were indisputably obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 18 (quoting *Norton v. Glenn*, 860 A.2d 48, 55 (Pa. 2004) (internal quotation marks omitted)). Drawing all reasonable inferences in Weisenbach's favor, the Court cannot say that this averment does not support Weisenbach's claim that Project Veritas and O'Keefe's decision to publish the third story was the "product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [Hopkins'] charges." *Harte-Hanks*, 491 U.S. at 692.

Additionally, the Court agrees that Weisenbach provides sufficient averments in his Amended Complaint to show that Project Veritas and O'Keefe had an ulterior motive for

publishing the stories. Specifically, it is alleged that Project Veritas was engaged in an initiative codenamed "Diamond Dog" to "erode confidence in the security of mail-in voting[.]" Am. Coml. ¶ 24. This included the publishing of stories purporting to document instances of illegal "ballot harvesting." Am. Coml. ¶ 25. It is suggested in the Amended Complaint that the aspersions cast upon mail-in voting systems by these stories would ultimately lend credibility to later allegations of voter fraud in the event of a "Red-Mirage" during the 2020 presidential election. Am. Compl. ¶¶ 27-28. Even more telling, Weisenbach avers that Project Veritas and O'Keefe specifically solicited Hopkins and others to come forward with claims of voter fraud. Am. Compl. ¶ 74. And while Project Veritas and O'Keefe vehemently dispute these allegations, the Court must accept all well-pleaded facts as true for purposes of this demurrer. *Monsanto*, 269 A.3d at 635. Such "evidence 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 Fed. App'x. 565, 568 (9th Cir. 2005) (unpublished) (quoting RODNEY A. SMOLLA, 1 LAW OF DEFAMATION, § 3:71 (2005)).

Accepting all of these averments as true—the specific allegations pertaining to fabrication and the doubts Project Veritas and O'Keefe entertained as to the veracity of Hopkins' claims; the averments suggesting they deliberately avoided the truth by failing to further investigate Hopkins' claims, especially after he admitted to postal inspectors his claims were largely the product of his imagination; and the averments suggesting an ulterior motive for publishing the story—Weisenbach has pled sufficient facts such that a jury could eventually conclude by clear and convincing evidence that the alleged defamatory statements were published with actual malice.

Project Veritas and O'Keefe stress that the failure to investigate alone is not enough to show actual malice, Tr., pp. 48, 60, 78, and on this point they are correct. *See McCafferty v. Newsweek Media Group, Ltd.*, 955 F.3d 352, 359 (3rd Cir. 2020) ("even an extreme departure from professional standards, without more, will not support a finding of actual malice." (quoting *Tucker v. Fischbein*, 237 F.3d 275, 286 (3d Cir. 2001) (Alito, J.))). But precisely because "[a]ctual malice focuses on the defendant's attitude towards the truth," *DeMary v. Latrobe Printing and Publishing Co.*, 762 A.2d 758, 764 (Pa. Super. 2000), "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." *Harte-Hanks*, 491 U.S. at 668 (citations omitted). Thus, it cannot be said that the averments concerning the care exercised by Project Veritas in investigating the claims are irrelevant to the actual malice inquiry.

As Project Veritas and O'Keefe concede, the case law they reference merely stands for the proposition that the "failure to investigate doesn't meet the actual malice standard … [b]y itself." Tr. p. 78. Here, Weisenbach avers far more than the mere failure to adequately investigate. He alleges that Project Veritas and O'Keefe fabricated evidence, that they must have harbored serious doubts as to the veracity of Hopkins' claims in light of their inherent improbability, and that they had an ulterior motive for publishing the stories. Weisenbach's additional allegation that Project Veritas and O'Keefe deliberately avoided the truth by failing to further investigate Hopkins' claims is but one piece in a mosaic of averments, which together, constitute his case for actual malice. *See Gilmore v. Jones*, 370 F.Supp.3d 630, 673 (W.D. Va. 2019) ("Although neither the pursuit of a preconceived narrative nor a failure to observe journalistic standards is alone ultimately enough to establish actual malice, Gilmore's factual allegations, taken together, are sufficiently plausible to support an inference that Creighton published statements about him with actual malice.").

Taken together, the totality of the averments in Weisenbach's Amended Complaint support the conclusion that Project Veritas and O'Keefe acted with actual malice. Project Veritas and O'Keefe would read the averments in piecemeal to determine if they individually constitute evidence of actual malice, but such a myopic approach to analyzing a pleading on demurrer is inconsistent with Pennsylvania case law, which confirms that complaints must be read "as a whole[.]" *Village of Camelback Property Owners Association, Inc. v. Carr*, 538 A.2d 528, 464, 465 (Pa. Super. 1988).

Project Veritas and O'Keefe also assert that Weisenbach's theory of actual malice is contradicted by some of its other averments, including the fact that they attempted to interview Weisenbach as the events unfolded and the fact that they candidly published Hopkins' recording of his interview with postal inspectors where he allegedly recanted. Prelim. Obj. of Defs. Project Veritas and James O'Keefe, III, ¶¶ 27-28. It is true that while the Court must draw all reasonable inferences in Weisenbach's favor, it must nonetheless evaluate the entire pleading, including those averments which are not necessarily favorable to Weisenbach. *See Commonwealth v. Chambers*, 188 A.3d 400, 412 n.7 (Pa. 2018) ("Although our standard of review requires us to view the evidence in the light most favorable to the Commonwealth as verdict winner, we are required as well to consider and evaluate the entire record, including those facts at trial that do not fall in the Commonwealth's favor."). But in this case, whether the supposed contradictions identified by Project Veritas and O'Keefe actually do contradict other averments largely depends upon one's perspective.

Weisenbach's perspective is that those contradictory events are not as Project Veritas and O'Keefe would make them out to be. For instance, as to the recording posted by Project Veritas, Weisenbach alleges that roughly one hour of audio is missing, begging the question "what

happened to the other sixty-plus (60+) minutes of audio?" Am. Compl., ¶ 95. Likewise, Weisenbach does not view the fact that his brief denial of the claims was included in the first video as a saving grace for the media Defendants since he was simultaneously being portrayed as the perpetrator of an "invidious election fraud scheme[,]" Am. Compl. ¶ 40, suggesting to viewers that his denial was not credible. Because the supposedly conflicting averments are susceptible to an interpretation that comports with Weisenbach's other averments, the Court must accept this version of events on demurrer.

Project Veritas and O'Keefe also emphasize that "in the heat of an election" their reporting "had to be done quickly." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 6. They contend that these facts present something of a "unique situation" where trying to find sources wiling to corroborate Hopkins' testimony in a 12 to 16-hour period would have been extremely difficult. Tr. pp. 50-51. While this narrative, if credited, may be sufficient to show that Project Veritas and O'Keefe did not act with reckless disregard for the truth, it is not the narrative detailed in the Amended Complaint, which is the only one that matters for present purposes.

The case against Hopkins is more straightforward. His decision to come forward to Project Veritas with claims of an illegal backdating scheme when he later admitted that he "could have missed a lot" of the conversation and that his "mind probably added the rest[,]" itself, is enough to suggest he entertained serious doubts as to the truth of his claims. Am. Coml. ¶ 96. Moreover, nowhere in the Amended Complaint is it alleged that Hopkins attempted to corroborate or verify whether Weisenbach had ordered the backdating of mail-in ballots either with coworkers or his supervisors, from which it could be reasonably inferred that he was intentionally avoiding the truth. Finally, Weisenbach has pled the existence of a financial motive to becoming a "whistleblower"

based upon the significant windfall he stood to gain from crowdfunding sources set up with the help of Project Veritas. Am. Compl. ¶¶ 143-48. These are sufficient facts from which a reasonable factfinder could conclude by clear and convincing evidence that Hopkins acted with actual malice when he made the allegedly defamatory statements.

Hopkins argues that certain averments in the Amended Complaint—in particular the allegation that Hopkins recanted his earlier claims during his November 9, 2020, interview with postal inspectors and the allegation that he never confided what he believed he had heard to another coworker—are belied by the attachments and links referenced in the Amended Complaint. Hopkins' Reply Br., pp. 4-11. Most notably, Hopkins argues that the link to the recording Hopkins made of his interview with postal inspectors reveals that he was "putting two and two together" based on directions he received to continue collecting mail-in ballots, which he honestly believed was illegal. Hopkins' Reply Br., p. 6 (citing Am. Compl. ¶95, n.25, at 46:45-47:04). This good-faith mistake, he asserts, does not amount to actual malice. Hopkins' Reply Br., p. 6. He also points to portions of the interview where he states that he communicated what he heard to a coworker named Zonya, who referred him to "a different person to contact," although he was "already thinking Project Veritas because [he had] heard about them." Hopkins Reply Br., p. 9 (citing Am. Compl. ¶ 95 n. 25 at 1:00:52-1:01:25). Based on these comments made during the course of the interview, Hopkins argues that "[w]hile it is true that in considering a demurrer to preliminary objections, all well-pleaded allegations must be accepted as true, a court is not bound to accept as true any averments in a complaint which are in conflict with exhibits attached to it." Tr., p. 32 (quoting *Baravordeh v. Borough Council of Prospect Park*, 699 A.2d 789, 791 (Pa. Cmwlth. 1997)).

The rule referenced by Hopkins has its origins in the area of contract disputes, but even the

earliest cases espousing the principle recognized it applies only in a particular subset of cases, namely those "where the contention arises solely upon the meaning of the indenture in its bearing upon the contract, and that must be ascertained by applying to its language the ordinary rules of interpretation." *Kaufmann v. Kaufmann*, 70 A. 956, 958 (Pa. 1909) (quoting *Dillon v. Barnard*, 88 U.S. 430, 437 (1874)). This is in contrast, for example, to cases involving "a bill to set aside or reform the contract as not expressing the actual intention of the parties." *Id.*[15] The question of whether a particular statement is probative of actual malice is more analogous to this latter scenario dealing with the intent of the parties because an evaluation of actual malice necessarily involves an inquiry into an individual's "subjective awareness of probable falsity[.]" *Gertz*, 418 U.S. at 335 n. 6.

The precedents cited by Hopkins in support of the rule's application in this case all appear related to written documents, which on their face, directly refuted averments in a pleading, as do the other cases encountered by the Court during the course of its own research. *See Baravordeh*, 699 A.2d at 79 ("the Resolution, on its face, states otherwise."); *Framlau Corp. v. Delaware County*, 299 A.2d 335, 338 (Pa. Super. 1972) ("Where any inconsistency exists between the allegations of a complaint and a written instrument, to-wit, the contract documents in this case, the latter will prevail[.]"); *Schuylkill Products, Inc., v. H. Rupert & Sons, Inc.*, 451 A.2d 229, 233 (Pa. Super. 1982) (performance bond); *see also Lawrence v. Pennsylvania Department of Corrections*, 941 A.2d 70, 73 (Pa. Cmwlth. 2007) (sentencing order); *Philmar Mid-Atlantic, Inc., v York Street Associates II*, 566 A.2d 1253, 1254 (Pa. Super. 1989) (letter of intent); *Cohen v. Carol*, 35 A.2d

[15] By definition, such a claim cannot be resolved without reference to evidence from beyond the four corners of the written agreement. *See Voracek v. Crown Castle USA Inc.*, 907 A.2d 1105, 1107 (Pa. Super. 2006) ("extrinsic evidence is admissible for the purpose of showing that by reason of mistake, fraud or accident, the written instrument does not express the actual intention of the parties.").

92, 93 (Pa. Super. 1943) (letter in lieu of formal agreement of sale).

The linked attachment here is of a different ilk. It consists not of a written legal instrument or formal declaration, but a lengthy interview, sometimes adversarial in nature, concerning a contested series of events. It is thus more akin to testimony than a typical documentary exhibit. Accepting Hopkins' invitation to consider the recording, which more resembles testimony given at a deposition, would imbue these Preliminary Objections with the flavor of summary judgment. In that distinct procedural context, however, it is well-established in this Commonwealth that "[t]estimonial affidavits of the moving party or his witnesses, not documentary, even if uncontradicted, will not afford sufficient basis for the entry of summary judgment, since the credibility of the testimony is still a matter for the factfinder." *DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 595 (Pa. Super. 2013) (quoting *Penn Center House, Inc. v. Hoffman*, 553 A.2d 900, 903 (Pa. 1989) (internal quotation marks and brackets omitted)); *see also Woodford v. Insurance Department*, 243 A.3d 60, 69 (Pa. 2020) ("We have consistently adhered to the *Nanty-Glo* rule since 1932." (internal quotation marks and brackets omitted)); *Borough of Nanty-Glo v. American Surety Co. of New York*, 163 A. 523 (Pa. 1932) ("However clear and indisputable may be the proof when it depends on oral testimony, it is nevertheless the province of the jury to decide … as to the law applicable to the facts[.]").

As the case law concerning the *Nanty-Glo* rule makes clear, Pennsylvania draws a distinction between evidence which is documentary, on the one hand, and evidence which is testimonial, on the other. *Penn Center House*, 553 A.2d at 903. The *Nanty-Glo rule*, which only applies to testimonial evidence, is premised on two concerns, the first being "that the determination of whether a witness is credible is a matter properly left to the finder of fact" and the second a "belief in the efficacy of cross-examination as a means of attacking the credibility of a witness."

Woodford, 243 A.3d at 69 (quoting J. PALMER LOCKHARD, *Summary Judgment in Pennsylvania: Time for Another Look at Credibility Issues*, 35 DUQ. L. REV. 625, 629 (1997)).

Those same concerns which animate *Nanty-Glo* are equally applicable to testimonial attachments or exhibits, including the recording at issue here. At trial, a factfinder would be free to believe or disbelieve any of the statements made by Hopkins during the interview. Similarly, future cross-examination of Hopkins or others may ultimately impact the credibility of those statements. Notably, Weisenbach suggests that the recording may have been spliced, and that roughly an hour of audio is missing, Am. Compl. ¶ 95, yet without cross-examination on this point, or at the very least, further discovery, the Court could effectively be granting demurrer based upon unreliable conflicting evidence. That is not to say the rule has no application in the defamation context, *see Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 704 (11th Cir. 2016) (averment that defendants conducted no investigation prior to reporting allegedly defamatory statements contradicted by article, attached as an exhibit, indicating "that the reporters spoke with, consulted, or otherwise reached out to a Foundation insider, event organizers, the founder of the Foundation, the venue, the Foundation's website, and state charity records."), but its application must be limited to exhibits or attachments which are truly documentary in nature, in other words, those exhibits whose meaning may "be ascertained by applying to its language the ordinary rules of interpretation." *Kaufmann*, 70 A. at 958.[16]

Hopkins further protests that he was never put on notice that Weisenbach contended his claims were false, and as such, the republication of his defamatory statements cannot be treated as evidence of reckless disregard for the truth, relying on *Weaver*. Tr., pp. 151-53. In *Weaver*, our

[16] Moreover, even if the Court were required to consider the recording (which it has reviewed), this interview simply represents Hopkins' then-explanation of the allegations. It is not extrinsic evidence that proves an absence of actual malice for purposes of preliminary objections.

Supreme Court cited the Restatement (Second) of Torts for the proposition that "[r]epublication of a statement *after the defendant has been notified that the plaintiff contends that it is false and defamatory* may be treated as evidence of reckless disregard." *Weaver*, 926 A.2d at 905 (quoting he Restatement (Second) of Torts § 580A, cmt. d (2006)) (emphasis added). *Weaver* accordingly went on to hold "that where a publisher is on notice that the statement may be false, republication of an alleged defamatory comment may be used as evidence of the defendant's state of mind and actual malice in regard to the prior publication because the second publication tends to indicate a disregard for the truth that may have been present at the time of the initial publication." *Castellani*, 124 A.3d at 1235.

In Hopkins' case, we are not faced with a publisher who proceeds to republish a story after being confronted with evidence undermining its veracity, but with the source for the story itself, who would be in a position to know whether he had reason to seriously doubt the veracity of his own claims from the beginning. The thrust of Weisenbach's claim is that Hopkins harmed him when he participated in the initial story, although his ongoing concerted activity with Project Veritas and O'Keefe in republishing those claims may have further tarnished his reputation. But even ignoring the republication of subsequent stories and his involvement in those interviews, there is still sufficient evidence that Hopkins acted with actual malice stemming from the averments related to the first story, which suggest Hopkins intentionally avoided the truth in coming forward with his claims in the first place and had an incentivizing financial motive for doing so. Hopkins' reliance on *Weaver* is therefore inapposite.[17]

[17] In any event, drawing all reasonable inferences in Weisenbach's favor, the Amended Complaint suggests that all Defendants would have been put on notice that the accusations were false by virtue of Weisenbach's comment to Project Veritas that the allegations were untrue, presented as part of the original story. Am Compl. ¶ 48.

More fundamentally, Defendants argue that where the substance of the alleged defamatory statements pertain to issues of self-governance and election integrity, "where First Amendment protection is at its zenith[,]" allowing this case to go forward would have a chilling effect on publishers fearing similar lawsuits. Tr., p. 46. Project Veritas and O'Keefe invoke the United States Supreme Court's decision in *Gertz*, which began its discussion by observing that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339-40. They omit the following, equally significant, passage located a few lines below: "The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Id.* at 341. The constitutional deck is not all stacked to one side. "Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury." *Id.* at 342. In this way, *New York Times* and its progeny strike a careful balance between the standards of journalistic integrity that a pluralistic society dedicated to the free exchange of ideas must tolerate, and that which it need not.[18] Weisenbach sufficiently avers that this case falls within the latter category. The difficulty may come in eventually proving

[18] Some have questioned whether the *New York Times* standard strikes a correct balance in today's technology-driven world, but this criticism does not inure to the Defendants' benefit. *See Berisha*, 141 S.Ct. at 2427, 2428 (Gorsuch, J., dissenting from denial of certiorari) ("In 1964, the Court may have seen the actual malice standard as necessary to ensure that dissenting or critical voices are not crowded out of public debate. But if that justification had force in a world with comparatively few platforms for speech, it's less obvious what force it has in a world in which everyone carries a soapbox in their hands … What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable.").

subjective knowledge of falsity or probable falsity by clear and convincing evidence, but our concern on demurrer is simply whether or not they have properly pled actual malice.

To be sure, even at this early stage in litigation, "courts must ensure that only truly meritorious defamation lawsuits are allowed to proceed, lest exposure to monetary liability chill the exercise of political debate that is the foundation of our constitutional republic." *Rogers v. Mroz*, 502 P.3d 986, 989 (Ariz. 2022). But this Court must also be mindful of the deferential standard of review through which it must assess whether a particular claim appears meritorious on demurrer. Discovery has not officially begun, and the Defendants have yet to even file answers to the accusation lodged against them. The Court's review of the Amended Complaint today is necessarily one-sided; it looks only to the narrative presented in the pleading, and the Court assumes, as it must, that every material fact alleged therein is true. There will be time to test the mettle of these claims through the presentation of evidence and adversarial inquiry, but that day is not today. Ever mindful of the chill that lawsuits such as this may have on our press freedoms, the Court nonetheless holds that Weisenbach has pled sufficient facts as to all three Defendants to withstand their demurrers. For now, "the balance between the needs of the press and the individual's claim to compensation for wrongful injury" weighs in favor of the Plaintiff. *Gertz*, 418 U.S. at 343. Defendants' demurrers to Counts I and II are consequently overruled.

V. CONCLUSION

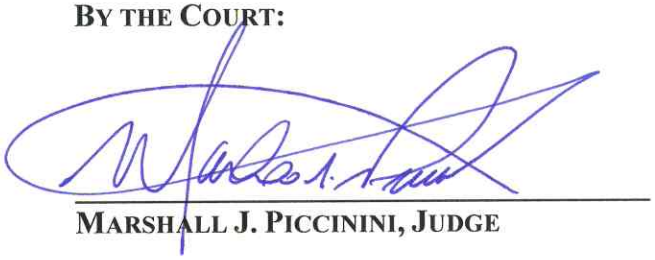
It is apparent that the parties perceive the events of the days following the 2020 presidential election through wildly different lenses. Today's Opinion recounts those days through the eyes of Robert Weisenbach. As he sees it, Richard Hopkins was acting well outside the scope of his employment when he supplied false claims of mail-in ballot backdating to Project Veritas, and so, jurisdiction over the claims now levied against him does not lie exclusively in federal court

pursuant to the Federal Tort Claims Act. Likewise, Weisenbach's averments are legally sufficient to make out claims of defamation and concerted tortious activity against all Defendants, even under the demanding actual malice standard. Whether Weisenbach will be able to offer adequate evidence to support his claims, and whether a jury would ultimately be willing to credit such evidence after hearing both sides of the story, remains to be seen. For now, it is enough to hold that the averments set forth in the Amended Complaint are sufficient as a matter of law to permit the action to proceed to discovery, where the truth of these claims can begin to be tested in the crucible of our adversarial system.

Accordingly, and for the foregoing reasons, Defendants' Preliminary Objections to Plaintiff's First Amended Complaint are overruled.

It is so ordered.

BY THE COURT:



MARSHALL J. PICCININI, JUDGE

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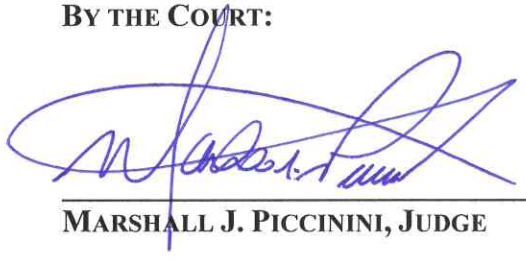
IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA

ROBERT WEISENBACH, AN INDIVIDUAL, PLAINTIFF	:	CIVIL ACTION
V.	:	
PROJECT VERITAS, A FOREIGN ENTITY; JAMES O'KEEFE III, AN INDIVIDUAL; AND RICHARD ALEXANDER HOPKINS, AN INDIVIDUAL, DEFENDANTS	:	DOCKET NO. 10819-2021

ORDER

AND NOW, to-wit, this 15th day of July, 2022, upon consideration of the Preliminary Objections to Plaintiff's First Amended Complaint of Defendants, Project Veritas and James O'Keefe, III, the Preliminary Objections to Plaintiff's First Amended Complaint of Defendant, Richard Alexander Hopkins, and their briefs in support thereof, as well as Plaintiff's responses thereto and briefs in opposition thereto, and after oral argument on the Preliminary Objections, for the reasons stated in the Opinion accompanying this Order, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that Defendants' Preliminary Objections to Plaintiff's First Amended Complaint are **OVERRULED**.

BY THE COURT:



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