No. 21-

IN THE

Supreme Court of the United States

D.F. PACE, ESQUIRE,

Petitioner,

v.

EMILY BAKER-WHITE, ESQUIRE; FEDERAL COMMUNITY DEFENDER OFFICE FOR THE EASTERN DISTRICT OF PENNSYLVANIA; PLAINVIEW PROJECT; INJUSTICE WATCH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Whether the Court should revisit the "actual malice" doctrine of *New York Times Co. v. Sullivan* and its progeny in light of the advent of technological advances creating internet speech never imagined by our Founders or the Court and whether the same level of "breathing space" deemed necessary in 1964 continues to be necessary for Twenty-First Century speech.

2. Whether the District Court reversibly erred by ruling Petitioner failed to state any facially plausible claims under the law of Pennsylvania, and dismissing the same with prejudice, on the basis that the Plain View Project communications were inactionable opinions, as a matter of law, as the controlling law rather compels the conclusion that the requisite elements of Petitioner's well-pleaded claims, including as to actual malice, were and are amply stated and established to preclude such dismissal, and the Complaint must, therefore, be reinstated.

II. PARTIES TO THE PROCEEDINGS

Petitioner

- D F Pace, Esquire

Respondents

- Emily Baker-White, Esquire
- Plain View Project
- Injustice Watch

III. RELATED CASES

The proceeding in the courts whose judgment is sought to be reviewed are:

1. United States Court of Appels for the Third Circuit Nos.: 20-1308 & 20-1401
   D.F. Pace, *Appellant* v. Emily Baker-White, Esquire, Plain View Project, and Injustice Watch
   Date of Final Judgment: April 21, 2021

2. United States District Court for the Eastern District of Pennsylvania
   Civil Action No. 2:19-cv-04827-WB
   D.F. Pace, *Plaintiff* v. Emily Baker-White, Plainview Project, and Injustice Watch, *Defendants*
   Date of Final Judgment: January 13, 2020

IV. TABLE OF CONTENTS

Table of Contents

V. TABLE OF APPENDICES

VI. TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

Page

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

Cited Authorities

Page

VII. PETITION FOR WRIT OF CERTIORARI

Petitioner-Appellant D.F. Pace, Esq., respectfully petitions for a writ of certiorari to review the judgment of the 3rd Circuit Court of Appeals and District Court for the Eastern District of Pennsylvania.

VIII. OPINIONS BELOW

The Order and Opinion of the 3rd Circuit Court of Appeals for *D.F. Pace v. Emily Baker-White, et al.*, is unpublished but can be found at 2021 WL 963527. (Appendix A at 1a).

D.F. Pace v. Emily Baker-White, et al., reported at 432 F.Supp.3d 495. (Appendix B at 11a).

IX. JURISDICTION

The judgment of the 3rd Circuit Court of Appeals was entered on April 21, 2021. This Court's Order of Monday, July 19, 2021, extended the time for all petitions for writ of certiorari to 150 days. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

X. CONSTITUTIONAL PROVISIONS

> The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I

XI. STATEMENT OF THE CASE

A. Basis for Jurisdiction in the Court of First Instance

The district court had jurisdiction of the case pursuant to 28 U.S.C. §§ 1442(a)(1), 1332(a)(1), and 1441.

B. Relevant Facts

Petitioner and Plaintiff, D F Pace, is an attorney and inspector within the Philadelphia Police Department ("PPD"), who has committed his career to serving the citizens of Philadelphia.[1] (JA 042) Defendants launched the Plain View Project ("PVP") in June 2019, a database compiling Facebook posts and comments by current and former police officers which meet "PVP's criterion," revealing prejudices and biases that "could erode" and "undermine public trust and confidence in police," and "warrant an official investigation" because "these online statements about race, religion, ethnicity and the acceptability of violent policing—among other topics—inform officers' on-the-job behaviors and choices."[2] (JA 039-40)

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1. Pace's service to the PPD includes the ranks of patrol officer, sergeant, and lieutenant. In addition to this experience, Pace has held positions in the Law Department, as Judge Advocate, Police Academy Instructor, Public Information Officer, and Commanding Officer of the Court of Evidence Unit. At the time of the defamatory publication, Pace held a position of particular importance overseeing the PPD Police Board of Inquiry which is responsible for taking appropriate action against other members of the PPD when a departmental violation has occurred.

2. These descriptions are taken from the PVP website. The website is integral to and relied upon in Plaintiff's Complaint. Accordingly, the relevant pages should be considered. *See In re Burlington Coat Factory Sec. Litig.*, 114 F. 3d 1410, 1426 (3d Cir. 1997).

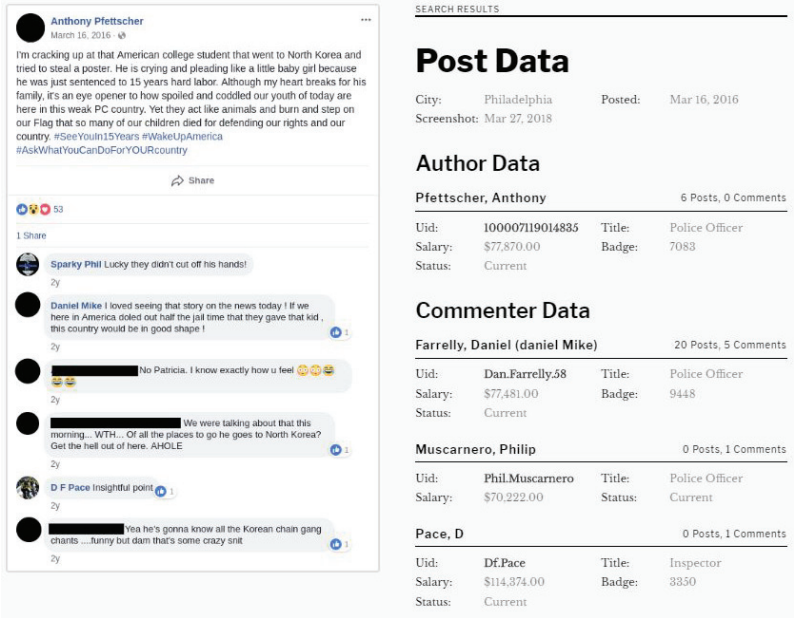
Petitioner Pace was included in the PVP database because a comment he made on another officer's post allegedly fit the publicly-undefined "criterion" of posts for PVP. Pace commented "Insightful point" in response to another police officer's post related to the international news story involving the arrest and imprisonment of college student Otto Warmbier in North Korea. (JA 043-44) It should be noted that the original post on which Plaintiff commented does not include any racially insensitive content or threats of violence, which posts meeting the PVP criteria allegedly contain.

This database is the PVP's showpiece to expose a "nationwide policing problem" by outing "local police officers" who "appeared to endorse violence, racism, and bigotry." (JA 039-40) The Defendant's inclusion of Pace in this database implicates him as one of the "local police officers" part of this "nationwide problem in policing" who harbors prejudices and biases and acts in manners consistent with those biases in his official capacity. (JA036, 044) This implication, no matter how creatively couched or hedged, **is** defamatory and places Pace in a false light.

By design, the Defendants characterize all posts and comments included in the PVP database as equally problematic for all the same reasons: (1) they are a compilation of posts by "local police officers" who "appeared to endorse violence, racism, and bigotry" towards "Muslims," "black men" and/or "women"; and (2) the selected posts reveal prejudices and biases that "could erode" and "undermine public trust and confidence in police" and "warrant an official investigation". To this point, Defendant Baker-White has stated, "[w]hen I look at those posts I don't see them as individual posts at this

point, I see them in the aggregate as a body of statements and they seem like they're part of a larger narrative that exists in American policing, one that at times encourages violence or endorses vigilantism and discriminates against minority communities." (JA 044)

On 16 March 2016 police officer Anthony Pfettscher created a Facebook post discussing the North Korean arrest of Otto Warmbier, an international news story at the time. This post was identified and included in the PVP database. (JA043)



Appellant Pace commented, "Insightful point" in response to Pfettscher's 16 March 2016 post. Apparently, Pace's comment fit the criterion of posts by "local police officers" who "appeared to endorse violence, racism and bigotry" which Defendant Baker-White admittedly views "in

the aggregate as a body of statements [that] seem like they're part of a larger narrative that exists in American policing." (JA043-044)

The PVP database was created to "start a conversation" about "the viewpoints expressed" in the officers' comments, as they "could be relevant to important public issues, such as police practices, public safety, and the fair administration of law."

D F Pace initiated this action in Philadelphia Court of Common Pleas *via* Complaint on 17 September 2019 (JA 031) asserting defamation and false light against all Defendants.[3] On 16 October 2019 removal was filed by Defendant Federal Community Defender Office for the Eastern District of Pennsylvania.[4] On 4 November 2019 Defendants filed a Motion to Dismiss Plaintiff's Complaint pursuant to Fed. R.C.P. 12(b)(6). (JA 056) Plaintiff's/Appellant's Response in Opposition was filed on 25 November 2019 (JA 090) and oral arguments were heard on 17 December 2019. An Order granting Defendant's Motion to Dismiss was entered on 13 January 2020. (JA 028)

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3. Pennsylvania courts apply the same analysis to both defamation and false light. *Hill v. Cosby*, 665 F. App'x 169, 177 (3rd Cir. 2016)(citations omitted); *see also Fraternal Order of Police Phila. Lodge No. 5 v. The Crucifucks*, 1996 WL 426709, at *4 (E.D. Pa. July 29, 1996)

4. The Federal Community Defender Office for the Eastern District of Pennsylvania has been voluntarily dismissed from this litigation.

Appellants filed Notice of Appeal to the Third Circuit Court of Appeals on 11 February 2020 (JA 029) and specifically disputed the District Court's findings that the complained of communication is inactionable opinion and that Appellant's well-pled Complaint failed to plead actual malice.

On March 15, 2021, the Circuit Court issued its opinion, finding that Appellant had not met its burden in showing "actual malice," and upholding the District Court's dismissal of Plaintiff's action. On March 29, 2021, Appellant filed a Petition for en banc Rehearing and on April 13, 2021 an Order was entered denying Appellants petition. Judgement was entered by the United States Court of Appeals for the Third Circuit on April 21, 2021.

XII. SUMMARY OF THE ARGUMENT

Petitioner here respectfully submits that the Court should grant this Petition and revisit the policy-driven decision of *New York Times v. Sullivan*, 376 U.S. 245 (1964). Given the proliferation of "fake" and "polluted" news that spreads like wild fire over the internet causing harm to our democracy, there is a dire need to reconsider and revise the "actual malice" standard. Absent action by this Court, the defeated plaintiff, like Petitioner Pace, will continue to have his reputation and professional life destroyed by falsehoods. The dramatic change in the "public square," in light of the advent of the internet and technological advances, demands this Court strike a different balance recognizing at least some ability to protect a public figure's reputational harm and deter the spread of false speech.

Respectfully, the District Court reversibly erred when it granted Defendants Motion to Dismiss Plaintiff's Complaint, ruling: (1) the statements of which Plaintiff/Appellant complains are inactionable opinions; and (2) Plaintiff/Appellant has not sufficiently pled actual malice. The Circuit Court erred when it upheld the District Court's dismissal of Plaintiff-Appellant's action by finding he had not sufficiently plead a claim of actual malice.

XIII. REASONS FOR GRANTING THE PETITION

A. *New York Times* And Its Progeny Must Be Reconsidered

The question of "actual malice" in this public figure defamation case presents the classic problem with the virtually impossible to satisfy standard this Court announced in *New York Times Co. v. Sullivan* over fifty years ago. Here, inclusion in the PVP database, which imputes conduct and character incompatible with the proper performance of plaintiff's duties as a police officer, is plainly false. The defendant performed virtually no fact-checking or investigation before including the Petitioner in the database and publishing. They did not seek to verify the meaning of the post with the defamed plaintiff. Worse, plaintiff was the highest-ranking official included in the database and his (wrongful) inclusion was intended to demonstrate a "nationwide problem in policing" that pervades even the highest ranks of police departments and renders them incapable of policing their own. The lower courts nevertheless found that the challenged statements were inactionable opinion and that plaintiff recited bare assertions of actual malice. A Motion to Dismiss was granted and affirmed.

This pattern has resulted in legal scholars calling for reform in what some call an "absolute immunity" defense created by *New York Times*' impossible legal hurdle – one that effectively strips public officials of their right to protect their reputation. Recognizing this problem, Justice Clarence Thomas recently questioned the Constitutionality of the "actual malice" doctrine, noting that *New York Times* and the Court's decisions extending it "were policy-drive decisions masquerading as constitutional law."[5] The policy objections of *New York Times* – protecting the free expression of ideas by "carving out sufficient breathing space" – are no longer relevant in this current age where "thanks to Google, such defamation becomes near-permanent,"[6] and where our society has become "awash in an unprecedented number of lies – some spewed by foreign enemies targeting our electoral processes, others promoted by our leaders, and millions upon millions spread by shadowy sources on the internet and, especially, via social media."[7]

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5. *McKee v. Cosby*, 139 S.Ct.675, 676 (2019) (Thomas, J., concurring in the denial of certiorari).

6. Glenn Harlan Reynolds, Rethinking Libel for the Twenty-First Century, 87 Tenn. L. Rev. 465, 478 (2020) ("Where once a defamatory headline on a Tuesday was wrapped around fish by Thursday, now it remains, evergreen, to be recalled whenever the defamed's name is searched."); Logan, 81 OHIO ST. L.J. 759, 760 ("Chief Justice John Roberts recently warned that '[i]n our cage . . . social media can instantly spread rumor and false information on a grand scale,' causing harm to our democracy. The internet has become our 'public square,' something beyond the imagination of the Supreme Court when it issued its groundbreaking 1964 decision in New York Times Co. v. Sullivan.") (citing John G. Roberts, Jr., 2019 Year-End Report on the Federal Judiciary 1, 2 (Dec. 2019), https://www.supremecourt.gov/publicinfor/year-end/2019year-endreport.pdf; *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017)).

7. Logan, 81 Ohio St. L.J. 759,760-61 (citations omitted).

1. Today's "Information Age" Calls for Reconsideration of the Policy Justifications Set Forth in *New York Times*

The world has changed since *New York Times* and *Gertz*[8]. There exist strong policy reasons for the Court to revisit *New York Times* and the need for the "actual malice" standard. Advances in technology and the dissemination of information have shifted the "public square" to the internet. The advancement in technology has created unlimited methods of near-permanent speech to a global audience. "*Sullivan* and *Gertz* were concerned with a world where only an exclusive few newspapers or broadcasters could publish information broadly to the public. Today, however, the media has expanded to include web logs ('blogs'), online news and opinion publications, and message boards."[9] The virtually unlimited channels of speech created through advancements in technology magnifies "[t]he potential damage inflicted by defamatory Internet speech . . . as Internet publications are open to a global audience and available for a longer, sometimes permanent duration. Whereas only 394 copies of the TIMES were circulated in Alabama at the time of *Sullivan*, access to TIMES articles is now solely limited by an individual's ability to use a computer or get to a newsstand."[10]

This Court's decision in *New York Times* and its underlying policy addressed the most pressing problems

8. *Gertz v. Welch*, 418 U.S. 323 (1974).

9. Benjamin Barron, A Proposal to Rescue New York Times v. Sullivan by Promoting a Responsible Press, 57 AM. U. L. REV. 73, 89 (2007); Glenn Harlan Reynolds, Rethinking Libel for the Twenty-First Century, 87 TENN. L. REV. 465, 480 (2020).

10. Barron, 57 AM. U. L. REV. 73, 89.

in that era – the perceived need to protect the speech of major media outlets from defamation lawsuits designed by officials to stifle and deter reporting the events occurring in the South during the Civil Rights movement.[11] This rationale must be reconsidered in light of technological advances and nearly every citizen's capability to spread news as fast as they can Tweet or post to some other form of social media. It begs the question; does speech today require the same amount of "breathing space" as this Court determined it did in 1964?

To this point, continuing the application of the *New York Times* standard – which essentially immunizes the dissemination of false facts – causes more problems than it fixes in this "fake news" era. While a public plaintiff may arguably invite scrutiny from traditional news outlets "run by professional journalists are businesses that prize their reputations for accuracy," this Court could not have envisioned a public plaintiff assuming the risk of being "defamed by an anonymous blogger"[12] or social media troll. This Court in 1964 never imagined the phenomenon of

11. Logan, 81 Ohio St. L. J. at 763-64 ("Southern anger at the media prompted another indirect strategy: filing libel lawsuits against national media organizations. Plaintiffs sought millions of dollars in damages from CBS News, the Saturday Evening Post, and Ladies Home Journal, but the primary target was the 'national paper of record,' the *New York Times*.") Justice Hugo Black, in his concurring opinion in *New York Times*, called these libel suits a "technique for harassing and punishing a free press," noting "[t]here is no reason to believe that there are not more such [suits] lurking just around the corner for the Times or any other newspaper which might dare to criticize public officials." 376 U.S. at 294-95 (Black, J., concurring).

12. Barron, 57 Am. U. L. Rev. 73, 89.

the reckless internet troll masquerading as a credible and authoritative news source. Clearly, the internet blogger or social media troll does not have an incentive to ensure accuracy the way traditional news outlets do. This begs another important question; does a public plaintiff today assume the risk of false speech by internet trolls to justify the heightened burden to prove actual malice?

Under the *New York Times* standard, a speaker has no incentive to investigate and seek out corroborative facts to a story. "The more a reporter investigates, the more likely it is that the reporter will discover some information that casts the veracity of the story into doubt, which would increase the likelihood of liability. Simply failing to fully investigate a story, however, constitutes mere negligence for which the reporter cannot be held liable."[13] Under the *New York Times* 'actual malice' rule, ignorance is bliss.

After he became a critique of the doctrine, Justice White cogently stated:

> The *New York Times* rule . . . countenances two evils: first, the stream of information about

13. *Id*. at 85-86; *see also* Logan, 81 Ohio St. L.J. 759, 777-78 ("Because 'actual malice' is a subjective standard, *New York Times* 'immunizes those who publish charges they believe to be true even if the charges turn out to be false, [as well as those] who publish charges the (subjectively) believe to be true even if a reasonable person upon reasonable investigation would (objectively) not believe those charges to be true.' Sinply stated, this standard 'incentivizes practices that increase the likelihood that the press will publish injurious falsehoods.'") (quoting Fredrick Schauer, *Slightly Guilty*, 193 U. Chi. Legal F. 83, 93 (1993); Barron, 57 Am. U.L. Rev. 73, 75).

> public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods . . . In terms of the First Amendment and reputation interests at stake, these seem grossly perverse results.[14]

Public confusion fueled by "fake" or "polluted" news and protected by the 'actual malice' heightened burden "is no-longer a democracy-enhancing doctrine and as a result it should be replaced by an alternative that better balances reputations with the need to deter false statements in our public debate."[15]

The Constitution, as written and framed by the Founders, preserved our rights to our good names. *New York Times v. Sullivan*, took those rights away. In a world where it is literally true a lie travels around the world before the truth gets out of bed, individuals like Pace, need a remedy to hold liars accountable for launching the lie in the first place. This is more important now than ever before in our history.

B. The District Court Reversibly Erred in Determining the Challenged Statements Not Capable of Defamatory Meaning and Instead Constitute Inactionable "Opinion"

In an action for defamation, the court's duty is to determine if the communication is capable of the

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14. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*, 472 U.S. 749, 769 (1985) (White, J., concurring).

15. Logan, 81 Ohio St. L.J. 759, 781/

defamatory meaning ascribed to it by the plaintiff. *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996). To make this determination, the court is required to review the communication "in context" and consider the effect it "is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." *Corabi v. Curtis Pub. Co.*, 273 A.2d 899, 907 (Pa. 1971).

The PVP unequivocally dedicates its mission to starting a dialogue about biases and bringing to light Facebook posts that would undermine public confidence and trust in policing. The necessary implications which flow from Appellant's inclusion within the database, clearly stated in his Complaint, are that as a result of his isolated comment on another officer's post – again, which did not include race, gender, sexual orientation, or other bias – he has perpetuated racist or violent conduct undermining pubic trust in policing as a whole , and casts Plaintiff's own fitness to serve the public into doubt. It is well-established that a communication which imputes to another conduct or a character which is incompatible with the proper performance of his/her business is defamatory *per se*. As stated by this Court in *Pelagatti v. Cohen*, 536 A.2d 1337, 1345 (Pa. Super. 2000):

> [I]t is well-settled law that 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.

Accord Constantino v. University of Pittsburgh, 766 A.2d 1265, 1270 (Pa. Super. 2001); *Brinich v. Jencka*, 757 A.2d

388, 397 (Pa. Super. 2000); *Maier v. Maretti*, 671 A.2d 701, 704 (Pa. Super. 1995); *Gordon v. Lancaster Osteopathic Hosp. Ass'n.*, 489 A.2d 1364, 1368 (Pa. Super. 1985). *See also* Restatement (Second) of Torts, § 573 (1977).

In *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 182 A.2d 751, 752 (Pa. 1962), the Court reversed the entry of judgment for the defendant where the plaintiff published an ad offering a free roll of film for every roll brought in for development and, the following day, its competitor the defendant published an ad stating "WE WILL NOT 1. Inflate the prices of your developing to give you a new roll free! 2. Print the blurred negatives to inflate the price of your snapshots! 3. Hurry up the developing of your valuable snapshots and ruin them! 4. Use inferior chemicals and paper on your valuable snapshots!" The Court concluded that the ad was defamatory because it "clearly imputes to the person to whom it refers,[16] characteristics and conduct which are incompatible with the proper and lawful exercise of a business." *Cosgrove*, 182 A.2d p. 753.

The defamatory fact may be implied, rather than directly stated. *McDermott v. Biddle*, 674 A.2d 665 (Pa. 1996). In *Weber v. Lancaster Newspapers, Inc.* 878 A.2d 63 (Pa. Super. 2005), the Court held that a print headline stating "Attorney named in abuse petition" was potentially defamatory because it "conveys the false impression [*i.e.,* implication] that [the attorney] was named as a defendant" in the petition. *Weber v. Lancaster Newspapers, Inc.*, 878 A.2d 63 (Pa. Super. 2005), *appeal denied*, 903 A.2d 539

16. The Court held the plaintiff was entitled to introduce evidence that it was the business to which the ad referred.

(Pa. 2006) Consistent with its ruling in *Weber*, the Court held that telling a job applicant said job "might have been 'beyond her capabilities' **implies** that [her] background or ability is somehow deficient" and was therefore defamatory, as it "could tend to undermine the community's confidence in her ability for potentially fallacious reasons." *Walker v. Grand Cent. Sanitation, Inc.*, 634 A.2d 237, 241 (Pa. Super. 1993). (Emphasis supplied.)

Such statements are not protected merely by labeling them "opinion." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). In *Milkovich*, this Court rejected the notion that there is "a wholesale defamation exemption for anything that might be labeled 'opinion,'" because that "ignores the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Milkovich*, 497 U.S p. 18. Where a statement does so, liability may be imposed "if those facts are incorrect or incomplete, **or if [the maker's/ author's] assessment of them is erroneous**," as "the statement may still imply a false assertion of fact." *Id.* (Emphasis supplied.)

Indeed, even prior to *Milkovich*, Courts held that a so-called expression of opinion based on disclosed facts may be actionable unless (a) the "disclosed facts are **correct**" and (b) the communication does not imply the existence of undisclosed defamatory facts. *Braig v. Field Communications*, 456 A.2d 1366, 1372-73 (Pa. Super. 1983). (Emphasis supplied.) In *Braig*, the court found the Plaintiff entitled to relief after a prosecutor made statements that "Judge Braig is not friend of the police brutality unit" and "I don't care who we sent in to try that case, in my opinion, that case was going to get blown out" because they could reasonably be understood

to imply defamatory falsehoods about Plaintiff. *Braig*, 456 A.2d p. 1369.

Applying the foregoing standards, Appellee's statements that the database comments and posts "about race, religion, ethnicity and the acceptability of violent policing - among other topics - inform officers' on-the-job behaviors and choices" which "should be part of a national dialogue about police" because "fairness, equal treatment, and integrity are essential to the legitimacy of policing," and "we hope police departments will investigate and address them immediately" support the implication that the PVP website is fairly calculated to impute criminality on the officers included. The PVP website states that the content is "verified," subject to selection criterion, and after due consideration by a "team of attorneys", included because it was deemed problematic, "could erode civilian trust and confidence in police" and should be "investigate[d] and address[ed] immediately." These statements impugned Appellant's fitness and ability to serve and protect the citizens of Philadelphia in his capacity as a Police Inspector. Such statements are defamatory *per se*. *Pelagatti*; *Constantino*.

Framing a statement as an opinion to simply enjoy constitutional protection while defaming others cannot be tolerated. This Honorable Court must consider the totality of circumstances surrounding the PVP database, discrediting the tactful hedging language, and affording due weight to the *objectively* defamatory message the Defendants intended to deliver: a nationwide problem in policing exists and Plaintiff's comment "insightful comment" warrants official investigation into his fitness to perform his sworn duties.

Appellee's argue "Plaintiff's interpretation of the PVP website is 'explicitly refuted' by the Disclaimer." (JA080) While disclaimers are not a bad practice, the non-defamatory character of a statement will rarely depend solely on the presence or absence of one. *Stanton v. Metro Corp.*, 438 F.3d 119, 126 (1st Cir. 2006). Although the position of an item can bear on the question of defamatory import, courts have held that one cannot assume that placing a disclaimer on the first page of an article itself ensures that a reasonable reader will see it. *Stanton* at 13. Instead, it must be examined in its totality in the context in which it was uttered or published. *Id*. However, since a reasonable reader may overlook he disclaimer or fail to give it credence, it ***cannot negate*** the defamatory meaning of the PVP Defendants' statements.

A visitor to the PVP website is greeted by a page split vertically: the left side of the page features a continuous (and distracting) scroll of images from the database depicting the most incriminating and offensive posts; the right side of the page features a brief description of the site stating "[t]he Plain View Project is a database of posts and comments made by **current and former police officers**" that "we believe [ ] **undermine public trust and confidence in our police**" and "question whether these online statements about race, religion, ethnicity and the acceptability of violent policing—among other topics—**inform officers' on-the-job behaviors and choices**." (Emphases supplied.)

Significantly, the disclaimer occupies the space between the "home" page described above, and the database itself. Only after interest is piqued and expectations set is a viewer expected to proceed with

caution and carefully read the disclaimer prompt prior to entering the database. The (likely) perfunctory review of the disclaimer fails to inform reasonable reader that the posts are subject to "Multiple Meanings" which the District Court heavily relies on in their analysis. *See* District Court Opinion (JA 020-021)

Additionally, due to common web browser settings, the disclaimer only appears the first time one visits the PVP site. Thus, contrary to the District Court finding the disclaimer "prominent and robust," a visitor is expected to recall the PVP's feeble attempt reframing the purpose of its site days, months, or even years after their first visit. This is of course, assuming that the visitor read the disclaimer to begin with.

Other courts have recognized "given the placement of the disclaimer in [an] article and the nature of the publication in general, a reasonable reader could fail to notice it." *Stanton*, 438 F. 3d at 128. In *Stanton*, the defendants' general interest publication ran an article, "Fast Times at Silver Lake High: Teen Sex in the Suburbs." The plaintiff was one of five young people pictured in a photograph accompanying the article, which reports on teenagers in the Boston area becoming more sexually promiscuous over the last decade. *Id*. at 123. A disclaimer to the photograph and article "occupies the field between the body of the story and the byline, making it easy enough to overlook between the larger fonts of both." Ultimately, the court held despite the disclaimer that the article was susceptible to defamatory meaning. *Id*. at 130.

The Appellees in their Motion to Dismiss erroneously relied on *Spilfogel v. Fox Broad. Co.*, 2009 U.S. Dist.

LEXIS 139784 (S.D. FL. 2009), a case about an episode of COPS featuring disclaimers before and after the episode. *See* Def. MTD (JA 079) However, this Court has rejected the notion that there is "a wholesale defamation exemption for anything that might be labeled 'opinion'" and explained that such a notion "ignore[s] the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Milkovich*, 497 U.S. 1, 18 (1990). Where a statement does imply an assertion of fact, liability may be imposed "if those facts are incorrect or incomplete, or if [the maker's/author's] assessment of them is erroneous," as "the statement may still imply a false assertion of fact." *Id.*

Assuming *arguendo* the disclaimer is carefully read and comprehended by visitors, PVP still fails to disclose the criterion it uses in selecting posts to publish. By keeping that criterion secret, the database "opinions" rely on undisclosed facts about their selection process, the supporting basis for their "opinion", and, more specifically, the basis for Appellants inclusion. This is all while their "About" and "Methodology" tabs project credibility to the interpretations they ascribe to this database.

The District Court's opinion relied on the disclaimer and its acknowledgement that posts or comments could be subject to multiple interpretations. However, just because a disclaimer notes a post may be subject to multiple interpretations, does not mean that each post is, in fact, subject to multiple interpretations. The Appellant's innocuous, non-racist, non-violent, non-misogynistic, and non-bigoted post is not reasonably subject to multiple interpretations. (JA021) Thus, by virtue of including Appellant in the database, Appellees are injecting a reading into the post that would not have otherwise been

ascribed to it. The Appellees assessment of the facts evidenced by their interpretation of Appellant's comment "Insightful point" is plainly incorrect.

C. Appellant Has Sufficiently Pled Actual Malice[17]

Actual malice is established where the defendant made the [false] statement with knowledge that it was false or with reckless disregard of whether it was false or not. Milkovich 497 U.S. at 14. "Reckless disregard" requires a showing that the defendant either "in fact entertained serious doubts as to the truth of [the] publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), or had a "high degree of awareness of … probable falsity[.]" *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). This subjective inquiry requires "sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of … probable falsity." *Harte-Hanks Communications, Inc.*, 491 U.S. 657, 688 (1989) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

PVP's own disclaimer states that it redacted the identities of police officers whose comments or posts did **not** promote violence, racism, etc. in furtherance of its mission; the fact that PVP did not redact Appellant's identity speaks to the fact that PVP believed his comment fit one of these categories.

The Third Circuit observed that "objective circumstantial evidence can suffice to demonstrate actual malice" and can "override defendants' protestations of

17. It is not in dispute that as an inspector the Appellant is a public official who must plead actual malice.

good faith and honest belief that the report was true." *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1090 (3rd Cir. 1988) (citing *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)). A court may infer actual malice from objective facts that provide evidence of "negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice." Id. at 1090 n.35 (citations omitted). Actual malice can be shown "[t]hrough the defendant's own actions or statements, the dubious nature of his sources, [and] **the inherent improbability of the story** [among] other circumstantial evidence[.]" *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 183 (2d Cir. 2000) (quoting *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1293 (D.C. Cir. 1988)).

In the case at bar, Appellant maintains an important position within the PPD – a position which requires Appellant to advocate for discipline, suspension, and/or termination of police officers when they violate departmental policy – including, but not limited to, officers who endorse and act in manners consistent with prejudice and biases towards women, Muslims, and/or other minorities. Appellee's inclusion of Appellant in the PVP database was calculated to serve their broad motives and purpose: these public Facebook posts and comments demonstrate that a "nationwide problem in policing" pervades even the highest ranks of police departments and renders them incapable of policing their own. Appellee's journalistic misconduct demonstrate the reckless disregard and willful avoidance of truth. Given his position and responsibilities within the PPD, it is reasonable to surmise the Defendants overreached to include Appellant in the database to create the impression

that a racist, bigoted, and/or misogynistic officer is tasked with supervising and disciplining other racist, bigoted, and/or misogynistic officers.

The forced construction of the PVP Defendants to ascribe a meaning to Appellant's comment that simply does not exist is precisely the "calculated falsehoods" which public officials must prove, and Appellant can prove in this case. *Garrison* 379 U.S. at 74. For this reason, Appellant has sufficiently pled actual malice.

XIV. CONCLUSION

For the reasons heretofore given, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED APRIL 21, 2021

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 20-1308 & 20-1401

DF PACE, ESQUIRE,

Appellant in No. 20-1308,

v.

EMILY BAKER-WHITE, ESQUIRE; FEDERAL COMMUNITY DEFENDER OFFICE FOR THE EASTERN DISTRICT OF PENNSYLVANIA; PLAINVIEW PROJECT; INJUSTICE WATCH,

EMILY BAKER-WHITE; PLAINVIEW PROJECT; INJUSTICE WATCH,

Appellants in No. 20-1401.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-19-cv-04827)
District Judge: Honorable Wendy Beetlestone

Submitted under Third Circuit LAR 34.1(a)
On September 25, 2020

Before: AMBRO, PORTER and ROTH,
Circuit Judges

Appendix A

(Opinion filed March 15, 2021)

OPINION*

ROTH, *Circuit Judge*

D F Pace appeals the District Court's dismissal of his state-law tort action, alleging that Emily Baker-White, the Plain View Project, and Injustice Watch (the PVP defendants) published statements on the Plain View Project website that implicitly defamed him. The District Court held that the PVP defendants' statements were nondefamatory opinions and that Pace failed to plead actual malice. We will affirm.

I[1]

The Plain View Project is a website operated by the PVP defendants. On the site's homepage, they state, in relevant part, that the website

> is a database of public Facebook posts and comments made by current and former police officers from several jurisdictions across the United States. We present these posts and comments because we believe that they could undermine public trust and confidence in our police. In our view, people who are subject to decisions made by law enforcement may fairly

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1. We discuss the facts and proceedings only to the extent necessary for resolution of this case.

> question whether these online statements about race, religion, ethnicity and the acceptability of violent policing—among other topics—inform officers' on-the-job behaviors and choices.[2]

After viewing this prefatory text and a subsequent "disclaimer,"[3] website users can view "screenshots" of thousands of posts and comments searchable by city, keyword, or an officer's information. In the "Methodology" section of the site, the PVP defendants state that they "verified" that each post or comment on the site meets their criteria for inclusion and was in fact made by a police officer on a publicly available Facebook page.[4]

Pace has served in the Philadelphia Police Department (PPD) for approximately eighteen years. He is currently an Inspector and member of the PPD's Board of Inquiry, "responsible for taking appropriate action against other members of the PPD when a departmental violation has occurred."[5] On the website, the PVP defendants published the following post by PPD Officer Anthony Pfettscher about

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2. THE PLAIN VIEW PROJECT, https://www.plainviewproject.org/ (last visited October 26, 2020).

3. The disclaimer apparently must be viewed the first time a user visits the site. It is unclear whether a user's browser settings can enable them to avoid the disclaimer during subsequent visits to the site. Because our ruling does not depend on the contents or existence of the disclaimer, we need not address this issue.

4. *Methodology*, THE PLAIN VIEW PROJECT, https://www.plainviewproject.org/about (last visited October 26, 2020).

5. App'x 042.

the North Korean arrest of Otto Warmbier, an American tourist. The arrest made international headlines in March 2016. Pfettscher's post was accompanied by comments by others, including Pace:

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6. App'x 043. When Warmbier was released by the North Koreans in 2017, he was in a vegetative state. He died 6 days later in a hospital after his parents requested that his feeding tube be removed.

On September 17, 2019, Pace brought this action against the PVP defendants for defamation by implication and false light.[7] Pace does not allege that the comment is itself defamatory or falsely attributed to him. Rather, he alleges that the prefatory text on the PVP website's homepage "impl[ies] that the officers [whose comments are included on the site] endorse and display violence, bigotry and racism towards the citizens they have sworn to serve" and are "unfit for the proper conduct of [their] profession."[8] In other words, the issue is not that the PVP defendants republished his comment, but that they published it on the PVP website. Pace further alleges that he "detests . . . attitudes" that "denigrate[] persons on the basis of race, color, religion, ethnicity, sex or sexual orientation."[9] The District Court granted the PVP defendants' Motion to Dismiss, holding that (1) any implied statements about Pace's beliefs are non-actionable opinions, (2) any defamatory meaning was negated by the disclaimer, and (3) Pace failed to allege actual malice.

II

We exercise plenary review over the District Court's opinion.[10] We will affirm it but only on the ground that Pace

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7. Pennsylvania's substantive law governs Pace's claims. *See McCafferty v. Newsweek Media Grp., Ltd.*, 955 F.3d 352, 356 (3d Cir. 2020).

8. App'x 044–45.

9. *Id.* at 036.

10. *Remick v. Manfredy*, 238 F.3d 248, 261 (3d Cir. 2001).

has failed to allege that the PVP defendants acted with actual malice, as Pace concedes that he must.[11] In doing so, we will assume, without deciding, that by including Pace's comment, "Insightful point," on the PVP website, the PVP defendants implied that Pace's views "about race, religion, ethnicity," "the acceptability of violent policing," or "other topics" could "undermine public trust and confidence in our police"[12] and make him "unfit for . . . his profession."[13] We will also assume, without deciding, that that implication is false and defamatory and is not an "opinion" under Pennsylvania law. Finally, we will assume, without deciding, that that implication was not negated by the website's "disclaimer." Even making these assumptions in his favor, however, Pace has failed to allege actual malice. Accordingly, his claims fail.

"'Actual malice' . . . does not connote ill will or improper motivation. Rather, it requires that the [defendant] either know that its [statement] was false or publish it with 'reckless disregard' for its truth."[14] A defendant acts with reckless disregard if it "in fact entertained serious doubts

11. Because Pace failed to allege actual malice, we need not address the other grounds for the District Court's decision or the PVP defendants' cross appeal.

12. The Plain View Project, https://www.plainviewproject.org/ (last visited October 26, 2020).

13. App'x 045.

14. *McCafferty*, 955 F.3d at 359 (quoting *Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa.*, 923 A.2d 389, 399 n.12 (Pa. 2007)).

as to the truth of his publication."[15] At the pleading stage, a public figure, like Pace, must allege *facts* to support an inference of actual malice.[16] Yet, Pace merely labels the PVP defendants' conduct as "malicious" and alleges that they "had knowledge of, or acted in reckless disregard as to the falsity of the matter [they] communicated."[17] These conclusory allegations are insufficient.

Pace argues that his allegations are not conclusory because two "objective" circumstances show that it is "inherently improbable" that he holds beliefs "consistent with the prejudice and biases the [PVP defendants] ascribe to" him.[18] Although a plaintiff may rely on objective circumstances—including the "inherent improbability" of a defendant's statement[19]—to show that the defendant "seriously doubted" the truth of its statement,[20] Pace's allegations are insufficient to show that the PVP

15. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

16. *McCafferty*, 955 F.3d at 359; *accord Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016); *Biro v. Conde Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013); *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 56 (1st Cir. 2012).

17. App'x 036, 050, 051, 052, 053.

18. Appellant's Reply at 5.

19. *See Celle v. Filipino Rep. Enter. Inc.*, 209 F.3d 163, 183 (2d Cir. 2000) (internal citation and quotation marks omitted).

20. *See McCafferty*, 955 F.3d at 359.

defendants "seriously doubted" that Pace held the beliefs allegedly ascribed to him by the website's prefatory text.

First, Pace argues that no "reasonable journalist" could conclude that he held such beliefs based solely on his comment; rather, the PVP defendants reached a "forced construction" of a comment by a member of the Board of Inquiry to "create the impression that . . . a fox is guarding the hen house" at the PPD.[21] According to Pace, his comment is subject to *only* "innocuous" and "non-violent" interpretations.[22] We disagree. In the post, Pfettscher "cracked up" about a dictatorial regime sentencing a twenty-one-year-old American to fifteen years of hard labor for attempting to steal a propaganda poster. He then stated that the sentence should be an "eye opener" for "spoiled and coddled youth" in "this weak PC country" who "act like animals" and engage in conduct such as "burn[ing] and step[ping] on" the American flag. Other commenters stated that Warmbier was "lucky" that North Korea "didn't cut off his hands" and that America "would be in good shape" if it "doled out" harsh penalties. Pace then commented that Pfettscher's "point" was "insightful." Although we express no opinion about how Pace's comment *should* be interpreted (let alone what he actually intended it to mean), a journalist *could* interpret his comment as expressing support for harsh criminal penalties in response to protected speech, which might "undermine public trust and confidence in" police. Thus, without more information about Pace, it is not "inherently improbable"

21. Appellant's Br. at 24-26.

22. *Id.* at 13.

that the PVP defendants found that his comment fit the description in the prefatory text.[23]

Moreover, it is irrelevant whether a "reasonable" journalist would publish this interpretation of the comment without further investigating Pace's intent. "[T]he beliefs or actions of a reasonable person are irrelevant."[24] "[E]ven an extreme departure from professional standards, without more, will not support a finding of actual malice."[25] Nor will an improper motive.[26] Unless the PVP defendants *in fact* seriously doubted that their permissible interpretation of the comment were true,[27] they could include the prefatory text and Pace's comment on the website without further investigation. In these circumstances, the wording of Pace's comment, without more, does not create an inference that the PVP defendants had such doubts.

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23. *See Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1090 (3d Cir. 1988) ("Obviously, actual malice cannot be imputed merely because the information turns out to be false. An erroneous interpretation of the facts does not meet the standard.").

24. *Michel*, 816 F.3d at 702–03.

25. *McCafferty*, 955 F.3d at 359; *accord Lemelson v. Bloomberg L.P.*, 903 F.3d 19, 24 (1st Cir. 2018) ("Actual malice is a 'wholly subjective' standard. . . . [S]howing a departure from industry standards, alone, is insufficient to allege actual malice, even if that departure is 'extreme.'" (citations omitted)).

26. *See McCafferty*, 955 F.3d at 360 ("And Newsweek's desire 'to increase its profits' and sluggish sales does not make out actual malice either." (citation omitted)); *Mayfield*, 674 F.3d at 378.

27. *McCafferty*, 955 F.3d at 359–60; *Pippen*, 734 F.3d at 614; *Tucker v. Phila. Daily News*, 848 A.2d 113, 135–36 (Pa. 2004).

Second, Pace argues that the PVP defendants must have had serious doubts about their interpretation of his comment because Pace is "a high ranking member of the PPD 'with a previously outstanding personal and professional reputation in the community he serves.'"[28] But he does not allege that the PVP Defendants had any reason to know about that reputation. And Pace's position as a "high-ranking" member of the PPD does not support an inference of actual malice. To the contrary, his position in the PPD is why he must allege actual malice in the first place.

Because Pace has not alleged facts supporting the inference that the PVP defendants "seriously doubted" the appropriateness of publishing his comment along with the prefatory text on the PVP website, he has failed to allege actual malice. Accordingly, his claims fail.

III

For the reasons set forth above, we will affirm the judgment of the District Court, dismissing Pace's claims with prejudice.

28. Appellant's Reply at 5 (quoting App'x 036).

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED JANUARY 13, 2020

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 19-4827

D. F. PACE, ESQUIRE,

Plaintiff,

v.

EMILY BAKER-WHITE, PLAINVIEW PROJECT, AND INJUSTICE WATCH,

Defendants.

January 13, 2020, Decided
January 13, 2020, Filed

OPINION

In the summer of 2016, a team of attorneys in Philadelphia learned that numerous local police officers had posted content on Facebook that appeared to endorse violence, racism and bigotry. In some of these posts, officers commented that apprehended suspects—often black men—"should be dead" or "should have more lumps on his head." In other Facebook conversations, officers advocated shooting looters on sight and using cars to run

over protestors. Numerous posts deemed Islam "a cult, not a religion" and referred to Muslims as "savages" and "goat-humpers." And, in still others, officers appeared to joke about beating and raping women. This discovery inspired the creation of the Plain View Project ("the PVP"), a research project that has identified thousands of Facebook posts and comments by current and former police officers.[1] Defendants published these posts and comments, including one by Plaintiff D.F. Pace, on the PVP website.

Pace, an attorney and inspector within the Philadelphia Police Department ("the PPD"), has sued Injustice Watch, an investigative journalism non-profit which runs the PVP, and Emily Baker-White, its former employee for defamation-by-implication and for putting him in a false light.[2] Plaintiff's published comment—"Insightful point" —is not the problem here. Plaintiff's contention broadly is that, when viewed in the context of the PVP's prefatory statements regarding their criteria for inclusion on the website, Defendants' publication of his name and comment implied that he is an officer who endorses violence, racism, and bigotry and who undermines public trust in the police by acting on those biases. Defendants now move to dismiss the Complaint pursuant to Federal Rule of Civil Procedure

1. This description is taken verbatim from the "About" tab of the PVP website.

2. Although Plaintiff has sued the "Plain View Project", according to Defendants it is not a separate legal entity. It is the name of the website run by Defendant Injustice Watch and on which the post and comments were published.

12(b)(6). For the reasons set forth below, their motion will be granted.

I. FACTS[3]

The PVP is a website run by Defendant Injustice Watch which compiled comments posted publicly by police officers on their personal Facebook pages. As set forth above, the "About" tab of the site explains how the PVP came about.[4] Having described the posts and comments published on the website, verbiage on the "About" tab continues: "We believe that these statements could erode civilian trust and confidence in police, and we hope police departments will investigate and address them immediately."

The methodology used to compile the posts is also described in detail on the PVP website. In the fall of 2017, Defendants obtained published rosters of police officers employed by eight jurisdictions across the United States. They then searched Facebook for the officers' names and made a list of Facebook pages or profiles that appeared to

3. These facts are drawn from the Complaint and, for the purposes of the motion to dismiss, will be taken as true. *See Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993).

4. The parties agree that the statements of which Plaintiff complains are found on the PVP website and that the website is relied upon in the Complaint. Accordingly, the relevant pages of the website will be considered in deciding this motion to dismiss. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) ("a document integral to or explicitly relied upon in the complaint may be considered") (internal quotations omitted).

belong to them. Next, they searched within each profile for verification that the user was in fact the officer named on the rosters and to confirm that the profile was maintained by an identified police officer. Some users reported specific police departments as their employers; others posted pictures of themselves in uniform. Some discussed making arrests or performing other police duties. When a PVP researcher obtained verification and confirmation for a profile, the researcher captured the screen with the verifying information and added it to the PVP's files.

Having compiled a list of more than 3,500 verified accounts, Defendants then reviewed each public post or comment to assess whether they "could undermine public trust and confidence in police." Ultimately, they included 5,000 posts and comments which they believed "meet this criterion." Screenshots of each of these posts and comments were placed on the PVP website, the homepage of which states:

> We present these posts and comments because we believe that they could undermine public trust and confidence in our police. In our view, people who are subject to decisions made by law enforcement may fairly question whether these online statements about race, religion, ethnicity and the acceptability of violent policing—among other topics—inform officers' on-the-job behaviors and choices.
>
> To be clear, our concern is not whether these posts and comments are protected by the First

> Amendment. Rather, we believe that because fairness, equal treatment, and integrity are essential to the legitimacy of policing, these posts and comments should be part of a national dialogue about police.

Visitors to the site can find particular posts and comments through a searchable database organized by officer name, rank, badge number, and jurisdiction. But, before conducting a search, they are presented with a disclaimer to which they must click "I Understand," or else they cannot proceed. The disclaimer, which is prominently displayed—centered in the middle of and blocking a significant portion of the viewer's screen—contains the following language:

> The Facebook posts and comments in this database concern a variety of topics and express a variety of viewpoints, many of them controversial. These posts were selected because the viewpoints expressed could be relevant to important public issues, such as police practices, public safety, and the fair administration of the law. The posts and comments are open to various interpretations. We do not know what a poster meant when he or she typed them; we only know that when we saw them, they concerned us. We have shared these posts because we believe they should start a conversation, not because we believe they should end one.

Appendix B

. . .

> Inclusion of a particular post or comment in this database is not intended to suggest that the particular poster or commenter shares any particular belief or viewpoint with any other poster or commenters in the database. . . .

The disclaimer also explains that the names and faces of non-officers were redacted from the posts as well as the names and faces of officers in comment threads "where their comments could not reasonably affect public trust in policing." Once a visitor has clicked on the "I Understand" link, they are free to search the database and, at least if the search is made on the same computer, the disclaimer does not come up again.

Defendants included in the database Plaintiff's comment posted on Facebook in response to another police officer's post. More specifically, on March 16, 2016, Philadelphia police officer Anthony Pfettscher created a Facebook post discussing the arrest of American Otto Warmbier in North Korea, an international news story at the time.[5] Pfettscher wrote: "I'm cracking up at that America college student that [*sic*] went to North Korea and tried to steal a poster. He is crying and pleading like a little baby girl because he was just sentenced to 15 years hard labor. Although my heart breaks for his family, it's an eye opener to how spoiled and coddled our

5. Figure 1, presented at the end of this opinion, is a screenshot of Plaintiff's comment as it appears on the PVP website.

youth of today are here in this weak PC country. Yet they act like animals and burn and step on our Flag that [*sic*] so many of our children died for defending our rights and our country. #SeeYouIn15Years #WakeUpAmerica #AskWhatYouCanDoForYOURcountry." The PVP website includes six comments to the post, including Plaintiff's, which reads, "Insightful point."[6] Three of the names of the commenters were redacted, three were not. Plaintiff's name was one of the ones that was not.

Plaintiff claims that the inclusion of his comment on the PVP website defamed him and put him in a false light. At oral argument on this motion, upon being asked to specify what exact statements formed the premise of his lawsuit, Plaintiff stated that it was the inclusion of his words "Insightful point" in the context of the PVP's own description of the project on the homepage and the "About" page, as well as statements made in the disclaimer language, that—by implication—defamed and put him in a false light. More specifically, he argues that the website as a whole suggests he belongs "in a set of current and former police officers who endorse violence, racism and bigotry and act[] in manners consistent with these biases in their official capacity"; that he endorses violence, racism

6. Plaintiff's Facebook comment of "Insightful point" could be read to be referring to any number of Pfettscher's statements, *i.e.* Otto Warmbier ("a little baby girl"); America's youth ("spoiled," "coddled," "like animals" who disrespect the flag); America ("weak" and "PC"). Or the comment could be suggesting that the use by the posting officer of any or all of the three hashtags—#SeeYouIn15Years #WakeUpAmerica #AskWhatYouCanDoForYOURcountry—was insightful.

and bigotry; that he acts in a manner that undermines public trust in the police; that he is not carrying out his oath of office with integrity; and that he does not treat people equally.[7]

II. LEGAL STANDARDS

On a motion to dismiss made pursuant to Federal Rule of Civil Procedure 12(b)(6), factual allegations are scrutinized to determine if the allegations and inferences proposed from those allegations are plausible. *See Ashcroft v. Iqbal*, 556 U.S. 662, 683, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *See id.* at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The Court is required to "disregard rote recitals of the elements of a cause of action, legal conclusions, and mere conclusory statements." *James v. City of Wilkes-Barre*, 700 F.3d 675, 679 (3d Cir. 2012). The relevant question is not whether the claimant "will ultimately prevail . . . but whether [the] complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer*, 562 U.S. 521, 531, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (2011).

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7. "Pennsylvania courts apply the same analysis to both defamation and false light." *Hill v. Cosby*, 665 F. App'x 169, 177 (3d Cir. 2016) (citations omitted); *see also Fraternal Order of Police Phila. Lodge No. 5 v. The Crucifucks*, 1996 U.S. Dist. LEXIS 10897, 1996 WL 426709, at *4 (E.D. Pa. July 29, 1996). Defendants raise the same arguments for the false light claims as for the defamation claims, and they will therefore be analyzed together.

III. ANALYSIS[8]

Defendants argue that Plaintiff's claims must be dismissed because: they are barred by the Communications Decency Act; the inclusion of Plaintiff's comment on the PVP website is not capable of defamatory meaning; Plaintiff's claims are based on Defendants' opinions and therefore are not actionable as a matter of law; and, Plaintiff has failed to plead actual malice.

A. Communications Decency Act

Defendants assert they are immune from this lawsuit under Section 230 of the Communications Decency Act ("the CDA" or "the Act"), 47 U.S.C. § 230,[9] which bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content." *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Section 230(c)(1) specifically provides that: "No provider or user of an interactive computer shall be treated as the publisher or speaker of

8. Federal courts sitting in diversity must apply the substantive law of the forum state. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Pennsylvania law therefore governs this case.

9. There is some dispute as to whether Section 230 is an immunity or not. For example, the Seventh Circuit, reads "§ 230(c)(1) as a definitional clause rather than as an immunity from liability." *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003). The Third Circuit has determined that it is an immunity. *See Green v. America Online*, 318 F.3d 465, 470 (3d Cir. 2003).

any information provided by another information content provider." 47 U.S.C. § 230(c)(1).[10] The term "interactive computer service" is defined in relevant part as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server. . . . " *Id.* at § 230(f)(2). The term "information content provider" means "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* at § 230(f)(3). Thus, CDA immunity applies where: (1) the defendant is a user or provider of an "interactive computer service"; (2) the asserted claim seeks to treat the defendant as publisher of the challenged communication; and (3) the challenged communication is "information provided by another information content provider." *Dimeo v. Max*, 433 F. Supp.2d 523, 529 (E.D. Pa. 2006), *aff'd*, 248 F. App'x 280 (3d Cir. 2007).

The battle here is over the third element—whether the challenged communications are "information provided by *another* information content provider." While it is uncontroverted that Plaintiff wrote the words "Insightful point," the parties diverge as to how the prefatory language included by Defendants on the PVP website should inform the Section 230 analysis.

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10. The CDA's preemption clause establishes that Section 230(c)(1) overrides traditional treatment of publishers under statutory and common law. "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

Defendants argue that because they were not the author of the words "Insightful point" (Pace was), and because the publication of someone else's content even if the publisher selected and edited the content does not transform such publisher into the creator or developer of the content, *i.e.* into an information content provider, their decision to publish Pace's words is protected by Section 230. And, in support of this proposition, they cite to a long line of cases. *See Obado v. Magedson*, 612 F. App'x 90, 93 (3d Cir. 2015); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1120-24 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980, 985 (10th Cir. 2000); *DiMeo*, 433 F. Supp.2d at 530; *Blumenthal v. Drudge*, 992 F. Supp. 44, 49-53 (D.D.C. 1998).

Plaintiff, to the contrary, maintains that this matter is different from the run-of-the-mill Section 230 case. Here, he argues, Defendants were both service and content providers in that they did much more than simply package and publish his words: Rather, they published them with prefatory content they created which necessarily informed readers' understanding of his words. In support of this position, he cites to *Fair Housing Council v. Roommates.com, LLC*, in which the Ninth Circuit found that "[a] website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is responsible, in whole or in part for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject

to liability for other content." 521 F.3d 1157, 1162-63 (9th Cir. 2008) (en banc) (internal quotations omitted).

Distilled to its essence, Plaintiff's argument is that because Defendants contextualized his comment with content of their own—thus by implication suggesting that he endorsed violence, racism, and bigotry and acted in a manner consistent with those biases in carrying out his duties as a police officer—Defendants cannot find protection (at least on the facts alleged here) under the aegis of Section 230.

Certainly, while courts construe Section 230 broadly, *see Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (collecting cases), the immunity it bestows is not unlimited. Section 230 cases exist along a continuum, with "internet service providers" being immunized while "content providers" are not. Along that continuum are various levels of editorial control, ranging from merely hosting, curating, or positioning content; through editing, to framing, and creating content. The question here is where along that continuum Defendants' commentary lie.

One end of the continuum is populated by cases in which an interactive computer provider merely hosts or republishes defamatory content. In such cases, the provider is protected by Section 230. *See Cubby, Inc. v. Compuserve*, 776 F. Supp. 135, 137-40 (S.D.N.Y. 1991) (immunizing webpage known as "Rumorville" for being merely an electronic library with "no more editorial control over . . . a publication than does a public library,

book store, or newsstand"). Most Section 230 cases fall into this category. *See, e.g.*, *Green*, 318 F.3d at 471 (immunizing America Online from liability for defamatory statements John Does made in chatrooms); *Obado*, 612 F. App'x at 93 (immunizing defendants, including Yahoo!, Inc. and Google, Inc., where the "allegedly actionable content originated from" two bloggers and defendants merely reposted); *Zeran*, 129 F.3d at 331-32 (immunizing America Online from liability for anonymous Internet poster who created fake ads about plaintiff in online forum); *Chicago Lawyers' Comm. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008) (immunizing Craigslist from liability for hosting offensive and racist housing ads); *Carafano*, 339 F.3d at 1120-24 (immunizing online dating website from claim over allegedly false content on a user's dating profile because "Matchmaker did not play a significant role in creating, developing or 'transforming' the relevant information"); *Novins v. Cannon*, 2010 U.S. Dist. LEXIS 41147, 2010 WL 1688695, at *2 (D.N.J. Apr. 27, 2010) (immunizing website against claim for republishing allegedly defamatory content); *Mitan v. Neumann & Assocs.*, 2010 U.S. Dist. LEXIS 121568, 2010 WL 4782771, at *4-*5 (D.N.J. Nov. 17, 2010) (immunizing email alert provider for same).

Further along the continuum are those cases which feature defendants curating information, including selecting what gets posted or excluded. For example, in *Reit v. Yelp! Inc.*, the court immunized Yelp! against a dentist's defamation claims, where the site had selectively removed positive reviews of his practice but left negative ones. *See* 29 Misc. 3d 713, 907 N.Y.S.2d 411, 412-13 (N.Y. Sup. Ct. 2010). The court found that "Yelp's selection of

the posts it maintained on Yelp.com was the selection of material for publication, an action 'quintessentially related to a publisher's role.'" *Id.* at 414 (citing *Green*, 318 F.3d at 471).

Still other cases address positioning or increasing the prominence of allegedly defamatory content. The court in *Asia Economic Institute v. Xcentric Ventures, LLC* held that Section 230 immunity applied where the defendant added indexing tags to increase the prominence of web pages in Google searches. 2011 U.S. Dist. LEXIS 145380, 2011 WL 2469822, at *6 (C.D. Cal. May 4, 2011). "[I]ncreasing the visibility of a statement is not tantamount to altering its message .... At best, increasing the visibility of a website in internet searches amounts to 'enhancement by implication,' which is insufficient to remove Defendants from the ambit of the CDA. Absent a changing of the disputed reports' substantive content that is visible to consumers, liability cannot be found." *Id.*; *see also Small Justice LLC v. Xcentric Ventures, LLC*, 2014 U.S. Dist. LEXIS 38602, 2014 WL 1214828, at *7-*8 (D. Mass. Mar. 24, 2014) ("[M]erely endeavoring to increase the prominence of Xcentric's site among Google's search results does not make Xcentric an information content provider under the CDA.").

In some cases, defendants engage in editing or make editorial judgments, which triggers arguments about what constitutes content editing versus content creation. In *Dimeo*, the defendant ran a website with message boards on which third parties posted allegedly defamatory comments about the plaintiff. The defendant "[did] not

dispute that he select[ed], remove[d], and alter[ed] posts on the message boards," and the plaintiff argued that in doing so, the defendant developed defamatory content. 433 F. Supp.2d at 527. Nevertheless, the court held that "development of information must mean something more than merely editing portions of [content] and selecting material for publication." *Id.* at 530 (internal quotations omitted). In *Blumenthal*, another district court found that interactive service providers are not liable for content prepared by others—even if the provider solicits that content and retains some control over it. 992 F. Supp. at 52. A gossip columnist had entered into a written licensing agreement with America Online, which made his column available to all of America Online's members for a year. The plaintiff argued that because America Online paid the defendant $3,000 a month to create the allegedly defamatory content and reserved the right in its agreement to remove content or require reasonable changes, it therefore exercised editorial control and should not be immunized by the CDA. *Id.* at 51. The court disagreed, holding that while "it would seem only fair" to make America Online liable for the defendant's allegedly defamatory statements, "Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others." *Id.* at 51-52.

Other cases involve defendants who added their own commentary to third-party statements, but the plaintiffs only alleged the third-party statements were defamatory, *not* the defendants' commentary. *See Jones v. Dirty World*

Entm't Recordings, LLC, 755 F.3d 398, 416 (6th Cir. 2014) (granting Section 230 immunity to gossip website where it reposted allegedly defamatory third-party statements and plaintiff "did not allege that [defendant's] comments were defamatory"); *Marfione v. Kai U.S.A., Ltd.*, 2018 U.S. Dist. LEXIS 51066, 2018 WL 1519042, at *6-*8 (W.D. Pa. Mar. 28, 2018) (granting Section 230 immunity where the action was "not [for] any statements made by [defendants] on the [Instagram] posts themselves" and the allegations about the defendants contributing to the allegedly defamatory article were insufficiently pled); *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 952 N.E.2d 1011, 1019, 929 N.Y.S.2d 19 (N.Y. June 14, 2011) (granting Section 230 immunity where defendants added a headline to objectionable third-party posts, but defendants' additions were not alleged to be defamatory).

At the far end of the continuum, content creators and developers are not entitled to Section 230 immunity. *See Roommates*, 521 F.3d at 1166; *see also Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016); *Fed. Trade Comm'n v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009). In *Roommates*, the Ninth Circuit *en banc* declined Roommates.com immunity where the roommate-matching website had solicited user preferences and provided selective content based on those choices. *See* 521 F.3d at 1166. The website required subscribers to answer certain questions and supplied a limited set of pre-populated answers, including about the subscriber's sex, family status, and sexual orientation. *Id.* at 1161. The website then assembled the answers into a profile page, which made the website "much more than a passive transmitter"

and resulted in a "collaborative effort between Roommate and the subscriber" and, therefore, made Roommates.com ineligible for Section 230 immunity. *Id.* at 1166-67. In its analysis, the Ninth Circuit set out a test, which has been adopted by other Circuits, for analyzing a defendant's "material contribution" to the creation or development of defamatory content. The court drew a "crucial distinction between, on the one hand, taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or objectionable." *Jones*, 755 F.3d at 414; *see also Roommates*, 521 F.3d at 1172 (providing "neutral tools" that a third-party used to create offensive content is not "development" under Section 230); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358, 410 U.S. App. D.C. 187 (D.C. Cir. 2014) (same).

In *Huon*, the Seventh Circuit found the *Roommates* line had been crossed where Gawker, an online tabloid operator, allowed its employees to author comments on the Gawker site about a person who had been acquitted of a criminal sexual assault in order to drive online traffic to its article about the acquittee. 841 F.3d at 742. The court found that the added comments by Gawker employees made Gawker a "content provider," and thus the site was not entitled to CDA protection. *Id.* at 743.

This case does not fall neatly into any of the aforementioned categories along the continuum. It presents the reverse of the scenarios in *Jones* and *Marfione*. There, the plaintiffs sought to hold the defendants liable for

reposting allegedly defamatory third-party statements—*not* for commentary that the defendants made regarding those statements. Here, by contrast, Plaintiff is seeking to hold Defendants liable for what the *Defendants' own words*—when read in conjunction with a non-defamatory statement he made on Facebook—imply about him. The third-party statement here is the Plaintiff's Facebook comment which is not, by itself, defamatory. Give the distinctive nature of this case, the Court returns to the text of the statute to analyze the facts here.

The CDA states: "No provider or user of an interactive computer shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Thus, an information provider may claim Section 230 immunity only with respect to information provided by a content provider other than itself. *Accusearch*, 570 F.3d at 1196. However, if an entity is "responsible, in whole or in part, for the creation or development of information" that forms the subject matter of the lawsuit, it is *itself* a content provider and is not protected. 47 U.S.C. § 230(f)(3).

The key terms in Section 230(f)(3) are not defined in the CDA. Thus, they must be construed "in accordance with [their] ordinary meaning," *Sebelius v. Cloer*, 569 U.S. 369, 376, 133 S. Ct. 1886, 185 L. Ed. 2d 1003 (2013), as determined by dictionary definitions as well as reference to "the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *See United States v. Geiser*, 527 F.3d 288, 294 (3d Cir. 2008) (citing *Dolan v.*

U.S. Postal Serv., 546 U.S. 481, 486, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006)).

"A key limitation in Section 230 . . . is that immunity only applies when the information that forms the basis for the state law claim has been provided by '*another* information content provider.' . . . Thus, an interactive computer service provider remains liable for its own speech." *Universal Comm. Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); *see also Blumenthal*, 992 F. Supp. at 50 (recognizing that Section 230 would not immunize a defendant with respect to any information it developed or created "entirely by itself"); *Huon*, 841 F.3d at 742 (noting that a company is liable for "creating and posting . . . a defamatory statement in a forum that company maintains"). Here, although Defendants published Plaintiff's words on the PVP, they readily acknowledge that they provided the words on the introductory pages of the PVP website—a framing narrative through the website's homepage, disclaimer, and "About" tab. Defendants here do not deny that they authored these words. Instead they argue that their selection of which posts to publish on the website does not equate to the "creation" of these posts.

But, this lawsuit does not arise from the selection of Plaintiff's comments to publish on the PVP website. It is premised on the inclusion of his and other officer's comments and posts on the website *as prefaced by* statements explaining why those posts and comments were included. Defendant's citations in support of their position are, accordingly, inapposite. In adding the

framing narrative, Defendants did much more than merely "packaging and contextualizing[,]" structuring a website layout, increasing content's prominence, or selecting what to publish. *See Green*, 318 F.3d at 471; *Obado*, 613 F. App'x at 93; *Nemet*, 591 F.3d at 257-58; *Small Justice*, 2014 U.S. Dist. LEXIS 38602, 2014 WL 1214828, at *7. Nor does the content Defendants added constitute mere "editorial parameters" or selection criteria. *Evans v. Hewlett-Packard Co.*, 2013 U.S. Dist. LEXIS 146989, 2013 WL 5594717, at *4 (N.D. Cal. Oct. 10, 2013). Unlike in *Jones*, 755 F.3d at 416, where the defendant's added commentary was not itself tortious and did not contribute to the allegedly defamatory nature of the third-party statements, here it is Defendants' added commentary that is being challenged.

Dictionary definitions of the word "creation" lead to the conclusion that the prefatory commentary was "created" by the Defendants. The word has many meanings, but as relevant here, The Oxford English Dictionary defines it is as "[a]n original production of human intelligence, power, skill or art," and "[t]he action or process of bringing something into existence from nothing, . . . the fact of being so created." *See Oxford English Dictionary Online*, www.oed.com/view/Entry/44061 (last visited Jan. 10, 2020). The Merriam-Webster Dictionary defines it as "something that is created." *See The Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/create (last visited Jan. 10, 2020). Here the words Defendants included on the PVP website were original, having had no existence prior to their being authored by Defendants and, as such, they were created by Defendants.

The fact that Plaintiff's claims necessarily involve evaluating his statement in the context of the statements made by Defendants does not undermine this conclusion. Section 230 does not only cover the creation of content that is created in its entirety by a party, it also covers those who are responsible "in part" for the creation of content. *Accusearch*, 570 F.3d at 1197 (citing *Lycos*, 478 F.3d at 419). "Accordingly, there may be several information content providers with respect to a single item of information (each being 'responsible,' at least 'in part,' for its 'creation or development')." *Id.* at 1187; *see also Blumenthal*, 992 F. Supp. at 50 ("Section 230 does not preclude joint liability for the joint development of content"). Here, Plaintiff's words—"Insightful point"—are not in and of themselves defamatory. The defamatory implication arises, according to Plaintiff, from its framing by the introductory text created by Defendants. One could conclude from that Defendants created that content "in whole." Even so, to extent that one could conclude that, absent Plaintiff's words, there could be no defamation by implication, and that as such Defendants were not the sole author of the allegedly defamatory statements, they nevertheless are responsible for it in part.

In focusing on whether Defendants are "responsible" for the framing content on the PVP website, dictionary definitions once again lead to the conclusion that they are. To be responsible for a harm is to be "accountable for one's actions" or to be "the cause or originator of something; deserving of credit or blame *for* something." *See Oxford English Dictionary Online*, www.oed.com/view/Entry/163863 (last visited Jan. 8, 2020). Thus, to be

responsible for offensive content, "one must be more than a neutral conduit." *Accusearch*, 570 F.3d at 1199. "That is, one is not 'responsible' for the development of offensive content if one's conduct was neutral with respect to the offensiveness of the content (as would be the case with the typical Internet bulletin board). We would not ordinarily say that one who builds a highway is 'responsible' for the use of that highway by a fleeing bank robber, even though the culprit's escape was facilitated by the availability of the highway." *Id.* Thus, "a service provider is 'responsible' for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content." *Id.* Such a construction of the term "responsible"—requiring more than neutral conduct or the mere providing of a platform—satisfies the CDA's purpose, which is to encourage the flow of information online by protecting Internet services from liability when third-parties use the services to post harmful content. *See* 47 U.S.C. § 230(a)-(c).

Here, the PVP website was not a "typical Internet bulletin board[,]" neutrally facilitating the sharing of harmful content. *See Accusearch*, 570 F.3d at 1199. It was "much more than a passive transmitter." *See Roommates*, 521 F.3d at 1166. Defendants created the introductory narrative on the PVP website thereby making a material contribution to the creation of the allegedly defamatory content, and are therefore "responsible . . . for the creation or development of information" at the core of this lawsuit. *See* 47 U.S.C. § 230(f)(3). Accordingly, they are not entitled to Section 230 immunity.

Appendix B

B. Defamation

Because Defendants are not protected by Section 230 of the CDA, the Court turns to evaluating Plaintiff's defamation claims. In Pennsylvania, the plaintiff in a defamation action bears the burden of proving: (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.A. § 8343(a).

In addition, in a suit alleging the defamation of a public official, the First Amendment requires the plaintiff to establish that in publishing the statement the defendant acted with "actual malice—that is, with the knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *see also Bartlett v. Bradford Publ'g, Inc.*, 2005 PA Super 350, 885 A.2d 562 (Pa. Super. 2005). The parties agree that Plaintiff is a public official who, as such, must plead and prove actual malice.[11] *Id.* at 567; *Stickney v. Chester Co. Comms., Ltd.*, 361 Pa. Super. 166, 522 A.2d 66, 69 (Pa. Super. 1987).

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11. During his eighteen years at the PPD, Plaintiff has served as a patrol officer, sergeant, and lieutenant, and he now oversees the PPD Police Board of Inquiry, which is responsible for disciplining PPD members when a departmental violation occurs.

Appendix B

Defendants argue that the inclusion of Plaintiff's Facebook comment on the PVP website is not capable of a defamatory meaning, that Plaintiff's claims are based on Defendants' opinions and are therefore not actionable as a matter of law, and that Plaintiff has not and cannot plead actual malice.[12]

i. Defamatory Meaning/Opinion[13]

As an initial matter, the Court must determine whether the communications complained of are capable

12. After oral argument, the Court permitted focused supplemental briefing on one of Defendants' Section 230 arguments. In their supplemental briefing, Defendants went beyond their permit and included a new argument, not included in their motion to dismiss, to the effect that the PVP website is not sufficiently "of and concerning" Plaintiff to be defamatory to him. As such, the Court disregards it. *See United States v. Medco Health Solutions, Inc.*, 2017 U.S. Dist. LEXIS 1357, 2017 WL 63006, at *6 n.6 (disregarding new arguments raised in supplemental briefing that were not responsive to the court's request for limited supplemental briefing); *see also McWreath v. Range Resources-Appalachia, LLC*, 645 F. App'x 190, 197 (3d Cir. 2016) (Jordan, J., concurring) (noting "new arguments made in a supplemental filing" are the "functional equivalent of an extra reply brief"); *United States v. Cruz*, 757 F.3d 372, 387-88 (3d Cir. 2014) (arguments raised for the first time in a reply brief are waived).

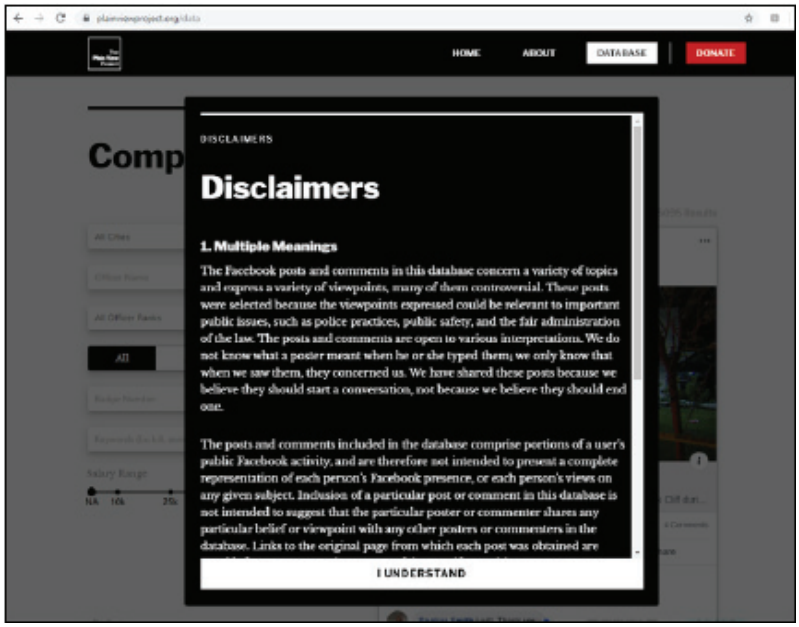
13. Although Plaintiff advances a claim of defamation-by-implication, he sometimes refers to defamation-by-innuendo. Courts often analyze defamation-by-implication and-innuendo interchangeably. *See, e.g.*, *Mzamane v. Winfrey*, 693 F. Supp.2d 442, 477 (E.D. Pa. 2010) ("Pennsylvania courts recognize that a claim for defamation may exist where the words utilized themselves are not defamatory in nature, however, the context in which these statements are issued creates a defamatory implication, i.e., defamation by innuendo.") (collecting cases). Regardless, at oral argument, Plaintiff clarified that he is proceeding on a defamation-by-implication theory.

of a defamatory meaning. *See U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 923 (3d Cir. 1990); *City of Rome v. Glanton*, 958 F. Supp. 1026, 1041 (E.D. Pa. 1997). "A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Maier v. Maretti*, 448 Pa. Super. 276, 671 A.2d 701, 704 (Pa. Super. 1995); *see also* Restatement (Second) of Torts § 559. The determination of whether the communication is defamatory focuses on "the effect [the statement] is fairly calculated to produce, the impression it would naturally engender in the minds of the average persons among whom it is intended to circulate." *Baker v. Lafayette Coll.*, 516 Pa. 291, 532 A.2d 399, 402 (Pa. 1987). Even where there is a plausible innocent interpretation, if there is an alternative defamatory interpretation, the issue must proceed to a jury to determine if the defamatory meaning was understood by the recipient. *Pelagatti v. Cohen*, 370 Pa. Super. 422, 536 A.2d 1337, 1345 (Pa. Super. 1987), *app. denied*, 519 Pa. 667, 548 A.2d 256 (Pa. 1988); *see also Kendall v. Daily News Publ. Co.*, 716 F.3d 82, 90 (3d Cir. 2013).

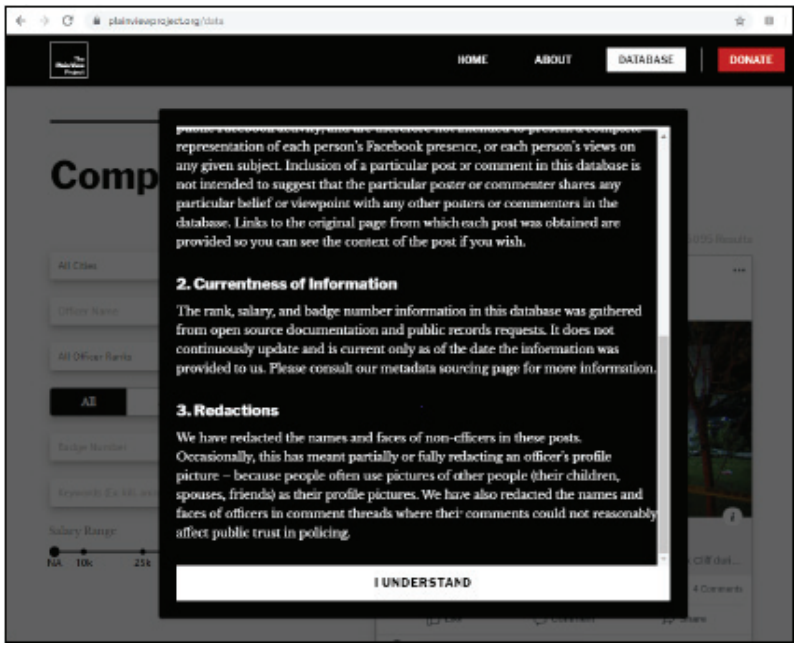
"In making this determination, the Court must address two questions: (1) whether the communication was reasonably capable of conveying the particular meaning ascribed to it by the plaintiff; and (2) whether that meaning is defamatory in character." *Fraternal Order*, 1996 U.S. Dist. LEXIS 10897, 1996 WL 426709, at *4. When the implication alleged by the plaintiff is not "reasonably susceptible of a defamatory meaning," the plaintiff has

failed to state a claim. *See Beverly Enters., Inc. v. Trump*, 182 F.3d 183, 191 (3d Cir. 1999); *Thomas Merton Center v. Rockwell Int'l Corp.*, 497 Pa. 460, 442 A.2d 213, 215-16 (Pa. 1981).

Defendants argue that the disclaimer on the PVP website renders the statements of which Plaintiff complains not reasonably capable of conveying the meaning he ascribes to them. Plaintiff seeks to minimize the import of the disclaimer, arguing that it is presented only after the home page piques the visitor's interest; it may easily be overlooked; its positioning and length make it likely that a viewer would fail to read it; and it is only presented to the viewer the first time he or she enters the site. These arguments are not supported by screenshots of the disclaimer from the website:



Appendix B



As the screenshots show, the disclaimer is prominent, robust, and presented in easily readable font. Reading just the first two paragraphs would suffice to explain to a viewer that the content on the PVP website is open to debate. Indeed, the first heading, "Multiple Meanings," suggests the PVP website content is open to many interpretations.[14]

14. None of the cases cited by the parties in their arguments regarding the disclaimer are sufficiently analogous to inform the Court's opinion here. *Stanton v. Metro Corporation*, 438 F.3d 119, 126 (1st Cir. 2016), was about a disclaimer published in small font next to an article and photograph about teenage sexual behavior. *Spilfogel v. Fox Broad. Co.*, 2009 U.S. Dist. LEXIS 139784, at *1-*2 (S.D. Fl. Dec. 1, 2009), was about an episode of COPS, which featured

Appendix B

Turning now to the statements of which Plaintiff complains, for the reasons set forth below, the Court finds that they are inactionable opinions.

"Only statements of fact, not expressions of opinion, can support an action for defamation." *Moore v. Cobb-Nettleton*, 2005 PA Super 426, 889 A.2d 1262, 1267 (Pa. Super. 2005). Despite this general rule, an opinion that could reasonably be understood to imply undisclosed defamatory facts may support a cause of action based upon those unenumerated facts. *See Remick v. Manfredy*, 238 F.3d 248, 261 (3d Cir. 2001). An opinion that could not reasonably be construed as implying such facts will not substantiate a defamation claim. *See Cornerstone Sys. v. Knichel Logistics, L.P.*, 255 F. App'x 660, 665 (3d Cir. 2007). Whether a statement is a fact or an opinion is a question of law. *Kerrigan v. Otsuka Am. Pharm, Inc.*, 560 F. App'x 162, 168 (3d Cir. 2014).

Cases in which challenged statements feature equivocal or cautionary language are routinely dismissed because the statements are non-actionable opinion. *See, e.g.*, *Purcell v. Ewing*, 560 F. Supp.2d 337, 340 (M.D. Pa. 2008) (finding statements that alumnus looked like "someone accused of child molestation" was non-

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disclaimers before and during the episode. Other cases do not feature a disclaimer. *See MacElree v. Philadelphia Newspapers, Inc.*, 544 Pa. 117, 674 A.2d 1050, 1054 (Pa. 1996); *Davis v. Resources for Human Dev., Inc.*, 2001 PA Super 73, 770 A.2d 353, 357 (Pa. Super. 2001); *City of Rome*, 958 F. Supp. at 1041; *Clemente v. Espinosa*, 749 F. Supp. 672, 679 (E.D. Pa. 1990); *Frederick v. Reed Smith Shaw & McClay*, 1994 U.S. Dist. LEXIS 1809 (E.D. Pa. 1994).

actionable opinion); *In re Maze*, 1999 U.S. Dist. LEXIS 11433, 1999 WL 554600, at *2 (E.D. Pa. July 16, 1999) (finding statement in letter that plaintiff failed to pay taxes, "which money he seemingly misappropriated from his employees[,]" was non-actionable opinion); *see also Reardon v. Allegheny College*, 2007 PA Super 160, 926 A.2d 477, 484 (Pa. Super. 2007) (finding use of the phrase "might have" rendered statement non-actionable because it was "a strong indication that this statement [was] merely one outlining possibilities").

The disclaimer includes crucial contextual language, including that the Facebook posts in the database "could be relevant to important public issues" and "are open to various interpretations. We do not know what a poster meant when he or she typed them. . . ." The disclaimer next states:

> The posts and comments included in the database comprise portions of a user's public Facebook activity, and *are therefore not intended* to present a complete representation of each person's Facebook presence, or each person's views on any given subject. Inclusion of a particular post or comment in this database *is not intended to suggest that the particular poster or commenter shares any particular belief or viewpoint with any other posts or commenters in the database.*

(all emphasis added).

As the language of the disclaimer shows, Defendants were "merely . . . outlining possibilities." *See Reardon*, 926 A.2d at 484. The disclaimer is replete with "hedging language" such as "could", "[w]e do not know", "we believe," *etc.* indicating that Defendants are suggesting possibilities, not expressing certainties. *See Alaskasland.com, LLC v. Cross*, 357 P.3d 805, 821 (Alaska 2015); *see also Others First, Inc. v. Better Business Bureau of Greater St. Louis, Inc.*, 829 F.3d 576, 582 (8th Cir. 2016) (finding statements couched in "equivocal language" such as "appears" and "may" to be non-actionable opinion). "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (Posner, J.). The statements of which Plaintiff complains fall into that bucket and are accordingly non-actionable opinion.

In sum, the implications that Plaintiff belongs to a set of current and former police officers who endorse violence, racism, and bigotry and act in manners consistent with these biases in their official capacity; that Plaintiff endorses violence, racism, and bigotry; that Plaintiff is not carrying out his oath of office with integrity; that Plaintiff acts in a manner that undermines trust in police; and that he does not treat people equally are not capable of defamatory meaning. They are statements of opinion by Defendants that readers *could* view Plaintiff in that way—leaving open the possibility that they also *could not*.

ii. Actual Malice

Plaintiff's claims fail for the additional reason that he has not sufficiently pled actual malice.

The parties do not dispute that as an inspector with a leadership role within the PPD, Plaintiff is a public official who must properly plead actual malice for his defamation claim to progress. *See St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1317, 30 V.I. 373 (3d Cir. 1994). "Actual malice" in constitutional law is "a term of art denoting deliberate or reckless falsification." *Masson v. New Yorker Magazine*, 501 U.S. 496, 499, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991); *see also Harte-Hanks Comms., Inc. v. Connaughton*, 491 U.S. 657, 666, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989) ("emphasizing that the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term"). For actual malice, "neither negligence nor failure to investigate, on the one hand, nor ill will, bias, spite, nor prejudice, on the other, standing alone, [are] sufficient to establish either a knowledge of the falsity of, or a reckless disregard of, the truth or falsity of the materials used." *St. Surin*, 21 F.3d at 1317 (quoting *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969)). "Reckless disregard" requires a showing that the defendant either "in fact entertained serious doubts as to truth of [the] publication," *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968), or had a "high degree of awareness of . . . probable falsity[,]" *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). The Third Circuit has also held that the actual malice standard is

higher in defamation-by-implication cases, requiring a showing beyond knowledge of or recklessness regarding the falsity of the statement's defamatory meaning:

> [I]n defamation-by-implication cases, showing known falsity alone is inadequate to establish an intent to defame. In these cases, we may no longer presume with certainty that the defendants knew they were making a defamatory statement because the statement has defamatory and nondefamatory meanings. Therefore, in such cases, plaintiffs must show something that establishes defendants' *intent* to communicate the defamatory meaning.

Kendall, 716 F.3d at 90 (emphasis added).

In the wake of *Iqbal* and *Twombly*, "adequately pleading actual malice is an onerous task[.]" *Earley v. Gatehouse Media Pennsylvania Holdings, Inc.*, 2015 U.S. Dist. LEXIS 31065, 2015 WL 1163787, at *2 (M.D. Pa. Mar. 13, 2015); *see, e.g.*, *Iqbal*, 556 U.S. at 687 ("Rule 8 does not empower [plaintiff] to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.").[15] And it is

15. The Eleventh Circuit has eloquently articulated why meeting the *Iqbal* and *Twombly* standard is especially crucial in defamation suits against public officials:

> In these cases, there is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless

one that regularly results in early dismissal of an action. *See, e.g.*, *McCafferty v. Newsweek Media Grp., Ltd.*, 2019 U.S. Dist. LEXIS 36543, 2019 WL 1078355, at *6 (E.D. Pa. Mar. 7, 2019) (dismissing complaint with prejudice, in part because plaintiffs "failed to sufficiently allege actual malice"); *Earley*, 2015 U.S. Dist. LEXIS 31065, 2015 WL 1163787, at *3 (dismissing complaint with prejudice for "fail[ing] to provide any facts that could plausibly demonstrate that defendant acted with actual malice"); *Biro v. Condé Nast*, 807 F.3d 541, 546-47 (2d Cir. 2015) (affirming dismissal of defamation action where plaintiff's nonconclusory allegations against defendants fell "short of raising a plausible inference of actual malice"); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 57-58 (1st Cir. 2012) (affirming dismissal of complaint where none of plaintiff's pleadings "plausibly suggested that defendant acted with actual malice"); *Mayfield v. NASCAR, Inc.*, 674 F.3d 369, 378 (4th Cir. 2012) (affirming dismissal of defamation action on the pleadings for failure to plausibly suggest actual malice); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013) (same).

> litigation. Indeed, the actual malice standard was designed to allow publishers the 'breathing space' needed to ensure robust reporting on public figures and events. Forcing publishers to defend inappropriate suits through expensive discovery proceedings in all cases would constrict that breathing space in exactly the manner the actual malice standard was intended to prevent. The costs and efforts required to defend a lawsuit through that stage of litigation could chill free speech nearly as effectively as the absence of the actual malice standard altogether.

Michel v. NYP Holdings, Inc., 816 F.3d 686, 702 (11th Cir. 2016).

Appendix B

A review of Plaintiff's Complaint reveals that he has failed to plead actual malice. The Complaint makes no reference to key actual malice terms like "knowledge of falsity" and does not contain any factual allegations that suggest such knowledge. It merely recites that Defendants acted in a "malicious, intentional and reckless" manner. Although in his brief Plaintiff asserts that Defendants engaged in "obvious and apparent journalistic misconduct[,]" such "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice[,]" and the Court must disregard them. *See Iqbal*, 556 U.S. at 678.

Further, at oral argument, Plaintiff pointed to two paragraphs of the Complaint in support of his actual malice argument—but neither of them do. The first one states: "Plaintiff D F Pace has ***never*** made any type of post which denigrates persons on the basis of race, color, religion, ethnicity, sex or sexual orientation. He detests such attitudes." (emphasis in original). Plaintiff used this allegation to suggest that if Defendants had investigated Plaintiff, they would have found he does not meet the PVP website's criteria and would not have included his post. But "[f]ailure to investigate, without more, does not demonstrate actual malice." *Marcone v. Penthouse Int'l Magazine*, 754 F.2d 1072, 1083 (3d Cir. 1985) (citing *St. Amant*, 390 U.S. at 731). Plaintiff would have to plead facts that Defendants "purposefully avoided further investigation with the intent to avoid the truth." *Michel*, 816 F.3d at 703.

The second paragraph of the Complaint to which Plaintiff refers as evidence of actual malice contains the

following quote published in *The Guardian* newspaper on June 25, 2019 and attributed to Defendant Baker-White: "When I look at those posts I don't see them as individual posts at this point. . . . I see them in the aggregate as a body of statements and they seem like they're part of a larger narrative that exists in American policing, one that at times encourages violence or endorses vigilantism and discriminates against minority communities." But Defendant Baker-White's perspective on the Facebook posts, as stated to a newspaper after the PVP website launched, does not plausibly suggest actual malice in selecting Plaintiff's comment for reposting on the site. The statement does not reveal that Defendant Baker-White "entertained serious doubts as to truth of [the] publication," *St. Amant*, 390 U.S. at 731, or had a "high degree of awareness of . . . probable falsity." *Garrison*, 379 U.S. at 74.

Plaintiff has not pled actual malice, and for this additional reason, the Complaint must be dismissed.[16] An appropriate order follows.

January 13, 2020

16. The Complaint is dismissed with prejudice. Although leave to amend should be freely granted "when justice so requires . . . a court may deny leave to amend when such amendment would be futile." *Budhun v. Reading Hosp. and Medical Ctr.*, 765 F.3d 245, 259 (3d Cir. 2014) (internal quotations omitted). "Amendment would be futile if the amended complaint would not survive a motion to dismiss for failure to state a claim." *Id.* Plaintiff offers no facts—nor can he—to plausibly support Defendants' knowledge of falsity of any of the challenged statements, and he therefore cannot sufficiently plead actual malice to state a defamation claim.

Appendix B

BY THE COURT:

/s/ Wendy Beetlestone, J.

WENDY BEETLESTONE, J.

Figure 1 (Plaintiff's comment).

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED APRIL 13, 2021

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 20-1308 & 20-1401

D F PACE, ESQUIRE,

Appellant,

v.

EMILY BAKER-WHITE, ESQUIRE; FEDERAL COMMUNITY DEFENDER OFFICE FOR THE EASTERN DISTRICT OF PENNSYLVANIA; PLAINVIEW PROJECT; INJUSTICE WATCH.

(D.C. No. 2-19-cv-04827)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS and *ROTH, *Circuit Judges*

The petition for rehearing filed by **Appellant** in the above-entitled case having been submitted to the judges

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* Judge Roth's vote is limited to panel rehearing.

who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is **DENIED**.

BY THE COURT,

s/ Jane R. Roth
Circuit Judge

Dated: April 13, 2021