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Of Attorneys for Defendant
Oregon School Activities Association

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

JOHN PARKS, Plaintiff, v. **LAKE OSWEGO SCHOOL DISTRICT; LAKE OSWEGO SCHOOL BOARD; OREGON SCHOOL ACTIVITIES ASSOCIATION; PORTLAND PUBLIC SCHOOLS; and MARSHALL HASKINS, individually and *in his representative capacity for OREGON SCHOOL ACTIVITIES ASSOCIATION and PORTLAND PUBLIC SCHOOLS***, Defendants.	Case No. 3:24-cv-1198-JR **DEFENDANT OREGON SCHOOL ACTIVITIES ASSOCIATION'S OBJECTIONS TO FINDINGS AND RECOMMENDATIONS**

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Defendant Oregon School Activities Association ("OSAA") files this Objection to raise two fundamental errors in the proposed Findings and Recommendations ("F&Rs") [ECF 40]. First, the F&Rs misapply settled principles of law found in *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, L. Ed. 2d 868 (2009), *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and *Harte-Hanks Communications v. Connaughton,* 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989), in reaching the conclusion that Plaintiff John Parks ("Mr. Parks") sufficiently pleaded actual malice on the part of Defendant Marshall Haskins ("Mr. Haskins").

Second, the F&Rs make a facially inaccurate factual finding, using an incomplete and out-of-context snippet of Mr. Haskins' May 24, 2024, letter (the "Haskins Letter") [ECF 16-4], where the F&Rs conclude that Mr. Haskins was acting on behalf of OSAA because he was allegedly writing "as a member of the OSAA executive Board." [ECF 40, at 15]. In reality, Mr. Haskins' statement about his position on the OSAA's board unambiguously set forth only the context from which he was writing – he understood the issues at stake, given his board service at the OSAA and in his position as "a representative of Senior Leadership for Portland Public Schools;" Mr. Haskins articulated that, from that context, he was "appalled, disappointed and embarrassed" by Mr. Parks' conduct. He was <u>not</u> purporting to be writing as a member of the OSAA's board of directors, or on behalf of the OSAA. The Magistrate Judge's narrow selection of that snippet from Mr. Haskins' letter also failed to account for the fact that Mr. Haskins' signature identified himself not as a board member of the OSAA, but as the "Senior Director – PIL Athletics/PPS," and was sent from his PPS email address. On the face of it, it would be unreasonable to infer that Mr. Haskins was to writing on behalf of the OSAA.

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1. *Iqbal* provides the relevant pleading standard for "actual malice."

The F&Rs acknowledge that rather than alleging ultimate facts, "[Mr. Parks] merely concludes [Mr. Haskins] made false allegations against him with actual malice" and that, under the burden shifting analysis of Oregon's anti-SLAPP statute, Mr. Parks must establish a probability that he will prevail on the merits by "presenting substantial evidence to support the element of actual malice." [ECF 40, at 12]. From that undisputed view, though, the F&Rs take an unusual turn, discarding the principles embodied in *Iqbal*, in favor of *Flowers v. Carville,* 310 F.3d 1118 (9th Cir. 2002), despite affirmatively acknowledging that *Flowers* was "contradicted" by *Iqbal*:

> *Flowers* * * * is contradicted by the Supreme Court's subsequent decision in *Iqbal*, which held that malice is subject to the plausibility pleading standard. [*Iqbal*, at 686-87] (holding that "malice, intent, knowledge, and other conditions of a person's mind" must be pled under the "strictures of Rule 8" and noting that "Rule 8 does not empower [a 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").

[ECF 40, at 13].

While not binding on this Court, in *Peterson v. Gannett Co.*, Case No. CV-20-00106, 2020 U.S. Dist. LEXIS 70720, *18-20 (D. Az. 2020), the court explained why *Flowers* has been rejected as the standard of pleading for "actual malice," in light of *Iqbal*:

> The Ninth Circuit previously held that a plaintiff need only allege "the required state of mind generally" because "the issue of actual malice ... cannot be properly disposed of by a motion to dismiss, where the plaintiff has had no opportunity to present evidence in support of his allegations." *Flowers v. Carville*, 310 F.3d 1118, 1131 (9th Cir. 2002) (citation and quotations marks omitted). The Supreme Court's subsequent *Iqbal* decision contradicted *Flowers*, however, in holding that actual malice is subject to a heightened

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> pleading standard. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("[m]alice, intent, knowledge, and other conditions of a person's mind" must be pled under the "strictures of Rule 8"). While the Ninth Circuit has not specifically addressed whether *Flowers* remains good law, "the circuits that have considered the question have uniformly held that a claim may be dismissed for failing plausibly to allege actual malice without permitting discovery." *Resolute Forest Prods*., 302 F. Supp. 3d at 1027-28; *see also Michel v. NYP Holdings, Inc*., 816 F.3d 686, 702 (11th Cir. 2016) ("[E]very circuit that has considered the matter has applied the Iqbal/Twombly standard and held that a defamation suit may be dismissed for failure to state a claim where the plaintiff has not pled facts sufficient to give rise to a reasonable inference of actual malice.").
>
> This Court will, "consistent with the overwhelming weight of post-Iqbal authority," address whether Plaintiff has plausibly alleged that Defendants acted with actual malice at the pleading stage. *Miller v. Watson*, No. 3:18-CV-00562-SB, 2019 U.S. Dist. LEXIS 70930, 2019 WL 1871011, at *6 (D. Or. Feb. 12, 2019), report and recommendation adopted, No. 3:18-CV-00562-SB, 2019 U.S. Dist. LEXIS 70592, 2019 WL 1867922 (D. Or. Apr. 25, 2019); *see also Resolute Forest Prods., Inc. v. Greenpeace Int'l,* No. 17-cv-02824-JST, 2019 U.S. Dist. LEXIS 10263, 2019 WL 281370, at *8 (N.D. Cal. Jan. 22, 2019) ("it is proper to dismiss a complaint when the Court concludes the plaintiff fails to plead actual malice as a matter of law" under the Rule 12(b)(6) standard); *Wynn v. Chanos*, 75 F. Supp. 3d 1228, 1238-40 (N.D. Cal. 2014) (dismissing defamation claim under Rule 12(b)(6) for failure to allege actual malice).

And in Miller v. Sawant, 18 F.4th 328, 339 (9th Cir. 2021), while the court did not explicitly state that *Iqbal* overruled *Flowers* with respect to the extent a plaintiff must allege facts, instead of a mere conclusion about "actual malice," the court looked to *Iqbal*, not *Flowers*, in its analysis:

> These allegations are neither conclusory nor implausible. Hence, they are entitled to a presumption of truth at this stage of the proceedings. *Iqbal*, 556 U.S. at 678-79. Indeed, they are precisely the kind of allegations that we previously said Plaintiffs could rely on plausibly to plead the of-and-concerning element. *See*

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> *Miller*, 811 F. App'x at 411 ("Because Plaintiffs may be able to plead additional facts to show that Sawant's remarks can reasonably be understood as referring to them, such as who heard the remarks, and whether anyone identified Plaintiffs as the subject of them, we cannot say that amendment would be futile." (emphasis added)). Like Sawant's own words, these allegations support the inference that Sawant's remarks can reasonably be understood to refer to Plaintiffs.

Rather than focus on binding precedent from the Supreme Court, the F&Rs rely on the "minimal merit" standard, *Manzari v. Associated Newspapers Ltd.,* 830 F.3d 881, 892 (9th Cir. 2016), contrasting Peter Weber's July 2, 2024, letter to Fox News (the "Weber Letter") [ECF 7-2], with the earlier Haskins Letter stating that Mr. Parks "should be following * * * OSAA policy" with respect to all of Mr. Parks' conduct surrounding the State Championship to suggest that Mr. Parks somehow met *Iqbal*'s plausibility standard. The comparison is of apples to oranges – Mr. Parks failed to allege sufficient facts from which one could reasonably conclude that Mr. Haskins' statements were made with actual malice.

2. Contrasting the earlier Haskins Letter with the later Weber Letter does not provide a reasonable inference of actual malice.

Factually, contrasting the Weber Letter, stating OSAA's position with respect to Mr. Parks' letter to OSAA (the "Parks Letter"), and the Haskins Letter, stating that Mr. Parks should follow OSAA policy with respect to all of his conduct during and surrounding the State Championship, does not provide a reasonable inference of actual malice. Actual malice requires "knowledge that [what was said] was false or [was said] with a reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan,* 376 U.S. 254*,* 280. Actual malice requires, at a minimum, a reckless disregard for the truth. *Harte-Hanks Communications v. Connaughton,* 491 U.S. 657*,* 667. Furthermore,

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> although the concept of "reckless disregard" "cannot be fully encompassed in one infallible definition," [*St. Amant v. Thompson,* 390 U.S. 727, 730, 88 S. Ct. 1323, 20 L. Ed. 2d 262] (1968), we have made clear that the defendant must have made the false publication with a "high degree of awareness of * * * probable falsity," *[Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S. Ct. 209, 12 L. Ed. 2d 125] (1964), or must have "entertained serious doubts as to the truth of his publication," *St. Amant, supra,* at 731.
>
> * * *
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> A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant,* 390 U.S., at 731. The standard is a subjective one – there must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana,* 379 U.S. 64, at 74. As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard.

Id, at 667, 688*; see also Makaeff v. Trump Univ., LLC,* 715 F.3d 254, 270 (9th Cir. 2013) ("To demonstrate reckless disregard for the truth, Trump University must show by clear and convincing evidence that Makeaff 'entertained serious doubts as to the truth' of her statements."); *Fender v. City of Oregon City,* 1994 U.S. App. LEXIS 27750, at *13 (9th Cir. 1994) (citing the standard in *St. Amant, supra*); *FLIR Sys. v. Sierra Media, Inc.,* 903 F. Supp. 2d 1120 (D. Or. 2012) ("In a defamation action under Oregon law, malice may be established by evidence that a statement was published: (1) 'with knowledge that it was false or with reckless disregard of whether it was false or not,' (2) 'with [a] high degree of awareness of [its] probable falsity;' or (3) when 'defendant in fact entertained serious doubts as to the truth of [its] publication.' *McNabb v. Oregonian Pub. Co.,* 69 Or. App. 136, 140, 685 P.2d 458 (1984);

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Fodor v. Leeman, 179 Or. App. 697, 41 P.3d 446, *rev. den.,* 334 Or. 631 (2002)."); *Fodor v. Leeman, supra,* at 701 ("To establish that defendants acted with actual malice, plaintiff must present evidence sufficient to support a finding that defendants knew that the allegedly defamatory statements that they made about plaintiff were false or that they made them with reckless disregard to their truth or falsity. To establish that defendants made the statements with reckless disregard to their truth or falsity, plaintiff must present evidence sufficient to support a finding that defendants seriously doubted that the statements were true.") (internal citations omitted).

There is no factual basis from which one could infer that when Mr. Haskins wrote his email on May 24, 2024, that he knew or should have known that the OSAA was going to send a response on July 2, 2024, that Mr. Parks's Letter had not violated OSAA's policy. Instead, Mr. Haskins' letter, as measured by the facts he set forth, cannot reasonably be said to reflect actual malice, if the inference is dependent upon a later letter from the OSAA.

Furthermore, the pleadings are devoid of any allegation that Mr. Haskins entertained serious doubts with respect to his statement, nor any allegations that Mr. Haskins had a high degree of awareness of their probable falsity. This absence from Mr. Parks' allegations, thus, fails to meet even the "minimal merit" standard that the F&Rs rely on and renders Mr. Parks' allegations as to actual malice plainly insufficient.

In light of the above, it was incorrect for the F&Rs to conclude that Mr. Parks sufficiently pleaded actual malice. With respect to this portion of the F&Rs, this Court should decline to adopt this portion and grant OSAA's Motion, dismissing Mr. Parks's claim against the OSAA.

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3. Obvious alternative explanations are available and render Mr. Parks's allegations implausible and thus, insufficient under *Iqbal*.

Iqbal provides that where there is an "obvious alternative explanation" for alleged misconduct, then that allegation fails to meet the plausibility standard. *Ashcroft v. Iqbal, supra*, 556 U.S. at 682. In the present case, there are numerous obvious alternative explanations for Mr. Haskins' comment that Mr. Parks should follow OSAA policy other than being a reckless disregard for truth or falsity.

The most obvious alternative explanation of the reason for Mr. Haskins's letter, and his comment concerning Mr. Parks following OSAA policy, is with respect to all of Mr. Parks's conduct surrounding and during the State Championship, not just Mr. Parks's letter to OSAA. By contrast, Mr. Weber's email to Fox News is concerned only with Mr. Parks's letter to OSAA and whether it violated OSAA policy. Contrary to what the F&Rs suggest, the difference between Mr. Haskins' earlier comment that Mr. Parks' conduct writ large may violate OSAA policy, and Mr. Weber's later acknowledgment that Mr. Parks' letter alone, irrespective of his other conduct at the State Championship, did not violate OSAA, does not plausibly allege actual malice.

With an obvious alternative explanations available, it was erroneous for the F&Rs to conclude that Mr. Parks sufficiently pleaded actual malice. With respect to this portion of the F&Rs, this Court should decline to adopt this portion and grant OSAA's Motion, dismissing Mr. Parks's claim against OSAA.

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4. There is only one reasonable and obvious explanation for why Mr. Haskins mentioned the OSAA in his Letter.

The "obvious alternative explanation" standard of *Iqbal* also demonstrates why it was error for the F&Rs to conclude that Mr. Parks was writing as a representative of the OSAA. That is because the F&Rs relied upon an out-of-context reading of only a portion of a single sentence, which sentence prefaced why Plaintiff's letter caused Mr. Haskins to write a letter of complaint: he was motivated by his experiences in senior leadership at PPS and as a member of the OSAA Executive Board. [ECF 40, at 15].

A complete reading of the full sentence relied upon by the F&Rs demonstrate that there was a clear and obvious alternative explanation for Mr. Haskins' statement that is not suggestive of Mr. Haskins' writing on behalf of the OSAA. That is, Mr. Haskins' statement concerning Mr. Parks' behavior comes from the context of Mr. Haskins' knowledge of high school athletics and teenagers – that knowledge arises from his experience as a Senior PPS employee and a board member of the OSAA. The entire sentence, of which Mr. Parks and the F&Rs rely on only one small segment of, reads as follows:

> As a representative of Senior leadership for Portland Public Schools and as a member of the OSAA Executive Board, who has been appointed as the state representative for Equity, Diversity and Inclusion, I was appalled, disappointed and embarrassed for Lake Oswego and Salem Keizer School districts because of the behavior of one of your employees.

[ECF 16-4, at 1] (emphasis added). A complete reading of the entire sentence makes clear that Mr. Haskins wrote of his positions with PPS and OSAA as a qualifer, to provide context for his disgust with Mr. Parks's conduct. In fact, Mr. Haskins' Letter does not specify at any point on whose behalf, other than his own, he wrote, other than the fact that his email is written from a

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PPS email address, and that his digital signature identifies only his position with PPS. Frankly, it is the opposite of what Mr. Parks did when, in his Letter to OSAA, he began by saying he wrote "first as the Lake Oswego HS head track coach[.]" [ECF 7-1, at 1].

Conclusion

While the OSAA does not object to the bulk of the findings and analysis in the F&Rs, the ultimate conclusion of the F&Rs is erroneous, because Plaintiff failed to adequately allege "actual malice," and there are alternative explanations for why Mr. Haskins mentioned the OSAA in his letter, explanations that are more reasonable and plausible than those suggested by Plaintiff. For the reasoning specified herein, this Court should decline to adopt the final conclusion of the F&Rs, and instead dismiss Plaintiff's claim against the OSAA. Pursuant to ORS 31.150, the OSAA should be awarded its attorney fees incurred herein.

Dated this 4th day of March, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2025, served the within DEFENDANT OREGON SCHOOL ACTIVITIES ASSOCIATION'S OBJECTIONS TO FINDINGS AND RECOMMENDATIONS on the persons listed below by the methods indicated below.

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