**IN THE SUPERIOR COURT OF GWINNETT COUNTY**
**STATE OF GEORGIA**

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| **MARK WALTERS,** | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | |
| **OpenAI, L.L.C.,** | ) | |
| **Defendant.** | ) | **CIVIL ACTION No. 23-A-04860-2** |

**PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Mark Walters ("Walters") opposes Defendant OpenAI, L.L.C.'s ("OAI") Motion for Summary Judgment.

**Background**

Walters commenced this action for defamation on June 5, 2023. The case arose when OAI published false and defamatory statements about Mark Walters, claiming he was the defendant in a (nonexistent) case, *Gottlieb v. Walters,* in which (OAI claimed) Alan Gottlieb was suing Walters for embezzling money from the Second Amendment Foundation ("SAF"). OAI removed the case to federal court and filed a motion to dismiss. Walters filed an amended complaint in federal court and OAI filed a second motion to dismiss. The federal court denied the second motion to dismiss and remanded the case to this court. On November 1, 2023, OAI filed a third motion to dismiss and Walters opposed that motion. This Court denied that motion on January 11, 2024. OAI now moves for summary judgment.

**Standard for Granting**

A motion for summary judgment may only be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. O.C.G.A.

§ 9-11-56(c). The facts must be viewed in the light most favorable to the non-moving party. *Howell v. Styles,* 221 Ga.App. 781 (1996).

**Statement of Facts**

On May 3, 2023, a journalist, Fred Riehl interacted with OAI using ChatGPT, an internet-based service operated by OAI. Riehl Depo. p. 73, Exh. 35. The interaction began as a request from Riehl for a summary of an ***actual*** lawsuit where SAF was suing the attorney general of the State of Washington, Robert Ferguson (*SAF v. Ferguson*) ("*Ferguson*"). *Id.* During the interaction, OAI (acting via ChatGPT) told Riehl about a ***different*** case, *Gottlieb v. Walters. Id.* OAI told Riehl that Walters was a former CFO and treasurer of SAF, an advocacy group located in the State of Washington. OAI told Riehl that the SAF's founder was suing Walters for defrauding, and embezzling funds from, SAF. OAI also said Walters misappropriated funds for personal expenses without authorization or reimbursement, manipulated financial records and bank statements to conceal his activities, and failed to provide accurate and timely financial reports and disclosures to SAF's leadership. *Id.*

Every statement described above pertaining to Walters is false. Affid. of Mark Walters, ¶ 3. Walters is not a party to a lawsuit with SAF's founder. *Id.* Walters has not been accused of defrauding or embezzling funds, misappropriating funds, manipulating records, or failing to provide reports. *Id.* Walters has never served as SAF's treasurer or CFO. *Id.* Despite OAI providing Riehl with the complete text of a complaint in *Gottlieb v. Walters,* there is no such case and no such complaint. *Id.*

As it turns out, OAI knows that its system, ChatGPT, completely fabricates facts such as the statements described above pertaining to Walters. Report of Christoper White, p. 9. In the artificial intelligence sphere, such falsehoods are sometimes referred to as "hallucinations." *Id.,* p. 5. OAI's own CEO, Sam Altman, was quoted in *Fortune* in June of 2023 as saying, "I think we will get the hallucination problem to a much, much better place. I think it will take us a year and a half, two years, something like that." Amended Complaint, ¶ 44 (admitted in the Answer). In the meantime, however, Altman says, "I probably trust the answers that come out of ChatGPT the least of anybody on Earth." Complaint, ¶ 45 (admitted in the Answer).

There was no public controversy about scandals in the Second Amendment arena generally or at SAF specifically. Walters Affid., ¶ 5.

**Argument**

Based on the interaction between OAI and Riehl, Walters commenced this action against OAI for defamation. Walters will show below that there are sufficient facts either undisputed in his favor or subject to genuine dispute that OAI is not entitled to judgment as a matter of law.

1. Elements of Libel

The elements of libel are 1) a false and defamatory statement concerning the plaintiff; 2) an unprivileged communication to a third party; 3) fault by the defendant amounting to at least negligence; and 4) special harm or the actionability of the statement irrespective of special harm. *Smith v. DiFrancesco,* 341 Ga.App. 786 (2017); *Mathis v. Cannon,* 276 Ga. 16 (2002); *Smith v. Stewart,* 291 Ga.App. 86 (2008). Libel *per se* includes statements that impute a crime or make charges against a person in reference to the person's

trade, office, or profession that are calculated to injure the person. *DiFrancesco; Morgan v. Mainstreet Newspapers, Inc.,* 368 Ga.App. 111 (2023); *Cottrell v. Smith,* 299 Ga. 517)2016). Libel *per se* does not require proof of special harm. *Id.* To charge falsely that one has acted deceitfully in conducting his business affairs is actionable *per se. Infinite Energy, Inc. v. Pardue,* 310 Ga.App. 355, n. 8 (2011).

2. There is Evidence of Each Element in the Record

OAI does not claim that it did not make false and defamatory statements concerning Walters, nor can it. The statements pertaining to Walters from OAI to Riehl were complete fiction and they were obviously defamatory. OAI made the statements to a third party (Riehl) and OAI was not privileged in making the statements to Riehl. OAI has not argued that it was not at least negligent, but in any event the lack of negligence is a question for the jury and ordinarily cannot be decided by this Court on summary judgment. *Jones v. Holland,* 333 Ga.App. 507 (2015). Finally, the defamatory statements clearly imputed crimes (fraud, embezzlement, falsifying accounting records). They also were in reference to Walters' (falsely reported) trade, office or profession. The statements were therefore libelous *per se* and do not require proof of any special damages.

3. Walters is not a General Purpose Public Figure

OAI claims that Walters is a public figure. A "general purpose" public figure is someone who holds a position with such pervasive fame or power that he is deemed a public figure for all purposes, but more often an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. *Cottrell,* 299 Ga. at 525.

A person is a public figure for all purposes (a "general purpose public figure") only if he is a celebrity, his name a household word whose ideas and actions the public in fact follows with great interest." *Riddle v. Golden Isles Broad., LLC,* 275 Ga.App. 701, 704 (2005). The defendant must show clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society in order for the court to deem the plaintiff a public figure for all aspects of his life. *Id.* OAI has failed to introduce such evidence. It is no doubt true that Walters has thrust himself into the limited arena of gun rights advocacy, it can hardly be argued that he has general fame or notoriety or that he has pervasive involvement in the affairs of society. OAI has not established that Walters' name is a household word whose ideas and actions the public follows with great interest.

In *Atlanta Journal-Constitution v. Jewell,* 251 Ga.App. 808 (2001), the court considered whether Richard Jewell, the famed security guard who discovered the Olympic Park bomb, was a public figure. Even though Jewell's name was perhaps a household word and whose interviews were seen by millions, the court only found him to be a limited purpose public figure for the specific controversy of the safety *vel non* of the park after the bombing attempt.

In *Infinite Energy, Inc. v. Pardue,* 310 Ga.App. 355, 359 (2011), the court found that being an "energy giant" was not sufficient to make an energy utility a general purpose public figure.

OAI cites only one binding case where a person was found to be a general purpose public figure. In *Williams v. Trust Co.,* 140 Ga.App. 49 (1976), a prominent civil rights leader, Hosea Williams, was found to be a general purpose public figure. In that case,

however, the court noted that Williams received widespread publicity for civil rights and labor activities, he had had several prominently-reported arrests, he had had a radio program, he made many press conferences and numerous public appearances, he was involved in politics and had run for public office on five different occasions and had been elected to the Georgia House of Representatives, he led well-publicized demonstrations, and sought public support. 140 Ga.App. at 53. Moreover, Williams had at least 388 news articles and editorials in prominent media outlets such as the *Atlanta Journal,* the *Atlanta Constitution,* and the *Savannah Morning News. Id.,* n. 3. Perhaps most importantly, Williams' counsel conceded at oral argument that Williams was a public figure. *Id.* Between Williams' service as a public official and his concession that he is a public figure, it is relatively easy to conclude that he is a general purpose public figure.

OAI also cites two non-binding cases.[1] In *Celle v. Filipino Reporter Enterprises,* 209 F.3d 163 (2d Cir. 2000), the court found a radio commentator to be a public figure in a case where the commentator was sued for defamatory statements he made on the air about the plaintiff in an underlying defamation action against him. In a one-paragraph discussion of public figure status, the court made no mention of general purpose versus limited purpose public figure status, finding merely that the commentator was a public figure because he described himself as "a well-known radio commentator." It is not clear from the opinion whether there was a finding of general purpose or public figure status, and indeed from the context it appears that the finding was only of limited purpose status. *Celle* is neither binding nor helpful to the present case.

[1] Georgia courts are not bound by decisions of other state's courts or federal courts other than the Supreme Court of the United States. *Gresham v. Harris,* 329 Ga.App. 465 (2014); *Level v. State,* 273 Ga.App. 601 (2005).

The other non-binding case relied upon by OAI is *Chapman v. J.Concepts, Inc.* 528 F.Supp.2d 1081 (D.Haw. 2007)[2]. In *Chapman,* the court concluded that there were other categories of public figure status than general purpose and limited purpose. *Id.* at 1090. That proposition has not been adopted in Georgia or by the Supreme Court of the United States. It is thus inapplicable here. The *Chapman* court then blurred the categories together by concluding, "Plaintiff is a ***general*** public figure in the ***limited*** context of the surfing community." *Id.* at 1095 [emphasis supplied]. The court's use of both "general" and "limited" in the same sentence leaves the reader unclear whether this is even a general purpose public figure case as OAI claims it to be.

Walters has never been a public official and does not concede that he is a general purpose public figure. Walters is not known outside the Second Amendment advocacy arena. OAI has failed to show that Walters is a general purpose public figure.

3. Walters is not a Limited Purpose Public Figure

Whether a person is a limited purpose public figure is a question of law that requires the court to review the nature and extent of the individual's participation ***in the specific controversy that gave rise to the alleged defamation.*** *Cottrell,* 299 Ga. at 525. A three-part test is used to determine whether an individual is a limited-purpose public figure. The court must 1) isolate the public controversy; 2) examine the plaintiff's involvement in the controversy; and 3) determine whether the alleged defamation was germane to the plaintiff's participation in the controversy. *Cottrell, Id.* Limited purpose public figures must be involved in a particular public controversy. *Id.*

[2] As a federal district court case, *Chapman* is not even binding in its own jurisdiction.

Unlike general purpose public figure hood, which courts rarely find, it is fairly common for a person to be deemed a limited purpose public figure. *Ladner v. New World Communs. Of Atlanta,* 343 Ga.App. 449 (2017) (veteran who sought public recognition for his miliary service was a limited purpose public figure); *Mathis* (plaintiff who became involved in recycling facility controversy was limited purpose public figure); *Jewell* (guard who appeared in interviews to millions of people regarding park safety was limited purpose public figure); *Sparks v. Peaster,* 260 Ga.App. 232 (2003) (Activist who participated extensively in city affairs with intent to influence their outcome was limited purpose public figure); *Rosser v. Clyatt,* 348 Ga.App. 40 (2018) (EMC general manager in controversy surrounding the management of the EMC was limited purpose public figure); *Byers v. Southeastern Newspapers Corp.,* 161 Ga.App. 717 (1982) (college dean was limited purpose public figure in controversy surrounding his tenure).

On the other hand, case law makes it clear that a person is not even a limited purpose public figure if the topic of the defamatory statements is not a public controversy. *Sewell v. Trib. Publi'ns. Inc.,* 276 Ga.App. 250 2005) (College professor not a limited purpose public figure when the topic of his classroom discussion was not a public controversy); *Riddle* (renowned musician not a limited purpose public figure when the alleged investigation described in the defamatory statements was not a public controversy); *Infinite Energy, Inc.,* 310 Ga.App. at 360 (energy utility not a limited public figure just because there is an official investigation about it).

It also should be noted that limited public figure status only applies to the actual controversy that is the topic of the allegedly defamatory language. *Jewell,* 251 Ga.App. at 817. In *Infinite Energy, Inc.,* the court found that a public controversy is an issue that

generates discussion, debate, and dissent in the relevant community, but it must be more than merely newsworthy. It must be debated publicly and have foreseeable and substantial ramifications for nonparticipants. 310 Ga.App. at 360. There also must be evidence in the record that the plaintiff thrust himself into the controversy. *Id.* Moreover, the defendant cannot manufacture a defense by making the plaintiff a public figure regarding a controversy of the defendant's invention. *Id.*

In the present case, the topic of the defamatory statements was Walters' alleged malfeasance regarding SAF's funds, and related fraud. There is nothing in the record indicating that this was a public controversy. OAI points to nothing showing that there was public discussion, debate, and dissent about Walters' (nonexistent) involvement in the (nonexistent) controversy. Instead, the "controversy" was of OAI's own making. OAI completely manufactured the entire premise (that Walters embezzled money and fraudulently concealed it). Were it not for the defamatory statements, there would have been no discussion at all about Walters' alleged embezzlement. That is, the defamatory statements were solely responsible for generating any public discussion about the fake embezzlement (if indeed that was any such discussion at all). In addition, OAI points to nothing in the record indicating that Walters thrust himself into the (fake) embezzlement scheme.

Thus, while it is possible to conjure up a set of facts where Walters ***was*** involved in a public controversy and in which he was defamed, so that he was a limited purpose public figure because of his status as a radio host, he was not even a limited purpose public figure for the purpose of the present case.

OAI makes the mistake of defining the public controversy in this case as "the ongoing advocacy efforts of Second Amendment rights organizations." Brief, p. 19. While some of the players in this case work in that arena, this case is about embezzlement and fraud at one such organization. The fact that the organization involved (SAF) is a gun rights organization is immaterial.

Consider the Enron Scandal. That was certainly a public controversy, involving fraud and corruption at a large corporation. But it was not a public controversy about energy commodities, even though Enron was an energy commodities company. Likewise, if SAF's headquarters building had burned, reports of the fire would not be about "ongoing advocacy efforts of Second Amendment rights organizations."

Instead, the court must isolate the controversy into something that it really was. In the present case, the "controversy," although manufactured by OAI, was about fraud an embezzlement, or even generically corruption, in the Second Amendment advocacy arena. As it turns out, there was no public controversy on that topic. Walters Affid., ¶ 5. Because there was no public controversy on that topic, Walters cannot be a limited purpose public figure for that (nonexistent) controversy. OAI erroneously equates generic notoriety with being a public figure (whether limited or general purpose). Walters status as having some fame in Second Amendment circles does not make him a limited purpose public figure in a (nonexistent) controversy about fraud and embezzlement.

OAI also tries to support its theory that the defamation relates to a public controversy by pointing out that Walters mentioned *SAF v. Ferguson* on his radio program. Brief, p. 19. But *SAF v. Ferguson* is a (real) case about SAF suing the attorney general of the State of Washington. The defamation did not relate to that. Instead, it was about a

(nonexistent) case of *Gottlieb v. Walters,* in which OAI claimed that Alan Gottlieb is suing Walters for fraud and embezzlement.

The public controversy that is the subject of the defamatory statements must already exist at the time of the defamation. *Jewell,* 251 Ga.App. at 817. No public controversy over Walters' (fictitious) embezzlement and fraud at SAF existed at the time of OAI's defamation because Walters did not work at SAF, was never the treasurer and CEO of SAF, and was not being sued by SAF. Walters Depo., ¶ 3. OAI completely fabricated a malicious story about Walters that had nothing to do with Walters' gun rights advocacy and then said, "Oh, it's about gun rights, so it's okay." The only tangential relationship between the defamatory statement and gun rights is that OAI selecting a setting for its defamation at a gun rights organization, an organization with which Walters has no direct affiliation. But there was no public controversy about Walters' embezzlement and fraud at SAF before the defamation because there was no allegation of embezzlement and fraud until OAI invented one.

OAI relies on *Silvester v. American Broadcasting Companies,* 839 F.2d 1491 (11th Cir. 1988). *Silvester* involved alleged defamation of several people by ABC on its "20/20" television show. The show aired allegations that plaintiffs were involved in corruption in the jai alai industry. Importantly, though, at the time of the show's airing, there already ***was*** a public controversy about such corruption, including allegations of arson associated with a fire that ***actually*** had occurred. *Id.* at 1495 ("It is clear that the public controversy preexisted the "20/20" broadcast and that the issues addressed in the broadcast were being discussed in a public forum prior to the "20/20" show.") That is, the public controversy of

jai alai corruption already existed and the plaintiffs were already involved in that public controversy when ABC aired a show that allegedly defamed the plaintiffs as being corrupt.

OAI cannot make the same claim in the present case. There was not, and still is not, a public controversy about fraud and embezzlement at SAF specifically, or even about corruption at gun rights organizations generally.[3] Walters Affid., ¶ 5. OAI has not introduced any evidence of any kind of such corruption or Walters' involvement in any public controversy about such corruption. The only thing OAI mentions is that Riehl stated in his deposition, "We [i.e., Riehl] have a long history of reporting on corruption within 2A advocate foundations." Riehl Depo., 120:13-15. OAI did not ask Riehl to elaborate on that statement, did not elicit any examples, and cites no evidence of a public controversy on that topic. *Silvester* is inapposite and does not bolster OAI's argument. At best, there is a dispute of fact over whether there was such a controversy and that dispute prevents a grant of summary judgment to OAI.

4. OAI Acted with Actual Malice

The significance of being a public figure (general or limited purpose) is that the third element of libel (fault of the defendant) is heightened from negligence to "actual malice." *Cottrell, Id.* Actual malice requires a showing by clear and convincing evidence that the defendant acted with actual knowledge that the statement was false or reckless disregard as to its truth or falsity. *Id.* Reckless disregard requires proof that the defendant was aware of the likelihood that he was circulating false information. *Id.*

[3] Walters is aware that there have been allegations of mismanagement of funds at the National Rifle Association. Walters Affid., ¶ 6. Walters has no affiliation with that organization. *Id.;* Walters Depo., 78:18.

It is hard to imagine a case where the defendant showed more awareness that it was circulating false information than the present case. OAI goes to great lengths to emphasize that it tells its users repeatedly that its statements are not reliable. For example, OAI's own "expert" points out how thoroughly OAI made that fact known. Report of Christopher White, p. 8 ("At all times that ChatGPT has been available to the public, OAI has included multiple warnings directly to ChatGPT users regarding the possibility that ChatGPT may generate factually inaccurate output.") And OAI's CEO has stated publicly, "I probably trust the answers that come out of ChatGPT the least of anybody on Earth." Amended Complaint, ¶ 45 (admitted in Answer).

Despite the fact that OAI ***actually knows*** that it randomly spits out lies of every kind imaginable, to the point that it constantly reminds its users of this fact, it continues to do so through its ChatGPT product. OAI is operating the high-tech equivalent of the neighborhood gossip, who says, "I don't know if this is true or not, but…." If all that it takes to avoid defamation liability is a liberal sprinkling of disclaimers, the law of libel would be very different indeed.

The test on summary judgment is whether a reasonable jury could believe that the defamatory statements were statements of fact about the plaintiff. *Smith v. Stewart,* 291 Ga.App. 86, 94 (2008). False statements of fact can be protected where, because of the context, they would have been understood as part of a satire or fiction. *Id.* But that protection requires that the statements could not be reasonably understood as describing actual facts about the plaintiff or actual events in which the plaintiff participated. *Id.* It does not matter if the statements are accompanied by a disclaimer or labeled as "fiction" or a "novel." *Id.* "[T]he test for libel is not whether the story is or is not characterized as

fiction or humor, but whether the charged portions, in context, could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated." *Id.* at 95. If a statement could be reasonably understood as describing actual facts or events about the plaintiff, the defendant is not entitled to summary judgment. *Id.*

In the present case, OAI provides its ChatGPT product to the public as a research tool. White Report, p. 9. Clearly, research tools are not works of fiction, and the user would reasonably believe the output of the research tool is intended to be factual and not fiction or satire. At the very least this is a question for the jury that cannot be resolved on summary judgment.

OAI cites several nonbinding opinions that disclaimers negate believability. In addition to being nonbinding, they do not support OAI's position. In *Information Control v. Genesis One Comp. Corp.,* 611 F.2d 781 (9th Cir. 1980), the court ruled that a defendant's statement that it was the defendant's "opinion" that the plaintiff's lawsuit was "a device" to avoid payment was not reasonably believed to be a statement of fact. The court observed that litigants often make statements characterizing their opponents' litigation positions that are not reasonably believed as statements of fact. OAI did not say its statements about Walters were "opinion." *Information Control* obviously is of no help to OAI in the present case.

In *Pace v. Baker-White,* 432 F.Supp. 3d 495, 512 (E.D. Pa. 2020), the court found that opinions expressed by the defendant about statements made by the plaintiff were "inactionable opinions." By way of example, the court said a statement that someone who looked like an accused child molester was opinion and not a statement of fact. Once again, *Pace* bears no similarity to the facts of the present case and does not help OAI's arguments.

Next, in *Eros Int'l, PLC v. Mangrove Partners,* 191 A.D.3d 465, 520 (N.Y. App. Div. 2021), the court ruled that defendant's statement that an adverse accounting audit "should prove" fraud on the company's part was not actionable because it did not state a false fact. In that case, the company actually received an adverse accounting audit and the defendant's prediction that the audit "should" prove a fraud was not intended as a statement of fact, but a prediction. Again, this case does not support OAI. In the present case, OAI only provided generic disclaimers. It presented the defamatory statements about Walters as statements of fact.

Finally, in *Others First, Inc. v. Better Bus. Bureau of Greater St. Louis, Inc.,* 829 F.3d 576 (8th Cir. 2016), the defendant "advised caution" when dealing with the plaintiff. While advising "caution" may imply there are facts in defendant's possession, truthful or not, that would reflect poorly on the plaintiff, the advice itself is not a statement of fact and is not actionable. Once again, this case is not helpful to OAI. OAI has not cited a single authority, binding or otherwise, that a generic disclaimer ("This might be a lie, but here goes….") can insulate a defendant from a defamation action.

OAI also argues that a defamation plaintiff is required to identify specific individuals who acted with actual malice. Brief, p. 23. Although OAI cites *New York Times Co. v. Sullivan,* 376 U.S. 254, 287 (1964), that case does not actually say that. Instead, it says, "the state of mind required for actual malice would have to be brough home to the persons in the Times' organization having responsibility for the publication…." The *New York Times* case was about an advertisement published in the newspaper. Obviously at the time, everything printed in a newspaper, including advertisements, was touched by human hands. In the present case, however, OAI concedes, "human review of all outputs

for accuracy before they are displayed to users is not even feasible." Brief, p. 23. In other words, OAI's untenable position is, "We can't be sued because you can't identify the person who published it because we have a machine that creates lies without human intervention. We are free to unleash this machine on the public with impunity because no person is involved, no matter how severe the defamation."

5. Walters is not Precluded from Recovering Damages

OAI next argues that Walters cannot recover damages because 1) he is not claiming any special damages; 2) he must show actual malice even if damages are presumed; and 3) he is precluded from recovering punitive damages because he did not ask for a retraction. Walters will show why each of these contentions is misplaced.

It is true that Walters is not claiming any special damages, at least not damages other than presumed damages. He has not pointed to any special damages he incurred on account of the defamation. To be sure, he may very well have suffered such damages (he has no way of knowing if he, for example, lost business as a result of the defamation), but he has no evidence of such damages. Nevertheless, for the reasons discussed earlier, he is entitled to "presumed" damages because the defamation in this case was defamation *per se,* which requires no showing of actual damages.

OAI argues that presumed damages are subject to an actual malice standard. In support, it cites *ACLU v. Zeh,* 312 Ga. 647, 661 (2021). Walters cannot find any discussion of that topic on p. 661 of *Zeh,* but it does appear to be mentioned in Footnote 19 on p. 664 of that opinion. In any event, *Zeh* does not control for two reasons. First, as the Court observed in the footnote, "it appears undisputed that the constitutional actual malice test applies." In the present case, Walters ***does*** dispute that the actual malice test applies.

Second, even the legal principle in *Zeh* does not apply to the present case. The concept mentioned in Footnote 19 of *Zeh* is that presumed damages are subject to an actual malice test ***for defamation that is a matter of public concern.*** The defamation in the present case is not a matter of public concern. Whether *defamatory* language is a matter of public concern "must be determined by the expression's content, form, and context as revealed by the whole record." *Dun & Bradstreet, Inc. v. Greenmoss Buildings, Inc.,* 472 U.S. 749, 762 (1985). Speech that is wholly in the interest of the speaker and the specific audience, which is "wholly false", and which is made available only to five subscribers is not entitled to actual malice protection. *Id.*

In the present case, the defamatory language was wholly false. OAI has never attempted to argue that there was any grain of truth to its statements about Walters. The defamation was a complete fabrication, not related to any existing public controversy. It used the names of real people (including Walters) to make the defamation seem real, and even plausible, but it was not tethered to any real events or facts. Moreover, the defamation was not made available to the public. It was wholly in the interest of the speaker (OAI) and the audience (Riehl). It was only made available to one subscriber (Riehl) (as opposed to the five subscribers in *Dun & Bradstreet*). Under these circumstances, the defamation was not a matter of public concern and the actual malice standard is not required for presumed damages.

This case would be different if OAI had widely published defamatory statements about real facts and events concerning Walters or SAF (even if not completely true), and if those facts and events were a matter of public concern. But under the context of the

statements in this case, the actual malice standard does not apply to the defamatory statements.

Even if the actual malice standard ***did*** apply, Walters showed above that he meets that standard. OAI showed a reckless disregard for the falsity of its statements because it ***knew*** that ChatGPT had a proclivity to invent lies but left the system online and operational. It admits it has no way to monitor the lies. And even after it became aware that it demonstrably published lies about Walters, it refuses to say that if it took any measures specifically to prevent repeating the lies about Walters. Depo. of Derek Chen, 23:14-25:15.

Lastly, OAI says Walters cannot recover punitive damages because he did not ask for a retraction. The law, however, does not require performance of a futile or meaningless act. *Coffee v. Ragsdale,* 112 Ga. 705, 710 (1901); *Loftis Plumbing & Heating Co. v. Quarles,* 188 Ga. 404, 408 (1939); *Powell v. City of Snellville,* 266 Ga. 315, 316 (1996); *Jackson v. S. Pan & Shoring Co.,* 260 Ga. 150, 151 (1990); *Tendler v. Thompson,* 256 Ga. 633, 634 (1987) ("[I]nsistence on compliance with [a statutory provision] would constitute a useless act. The law does not require a useless act.")

In the context of the present case, a retraction would have been a useless and meaningless gesture. By the time Walters became aware of the defamation, Riehl (the party to whom the defamation was published) had learned that there was no validity to it. Riehl Depo. 191:8-17 (Riehl learned the statements were false after speaking with Alan Gottlieb). OAI itself insists that it made no statements and there was nothing to retract. OAI response to Walters' Interrogatory # 8.

In addition, given the context of this case, it is unclear what a retraction would look like or if one were possible. The publication of the defamation to Riehl took place during

a chat session on ChatGPT. OAI admits that there is no human intervention in a given chat session. There are, it seems, no personalized statements from OAI to a given subscriber in a chat session and OAI would not be able to "retract" in a later session a statement made in an earlier session.

It would therefore have been futile to request a retraction and such a request was not required under these circumstances.

6. Riehl Subjectively Believed the Defamatory Statements Could be True

OAI argues that Riehl did not subjectively believe the defamatory statements were true. This is clearly incorrect. OAI tried in vain, even desperately, to get Riehl to say during Riehl's deposition that he did not believe the defamatory statements. OAI resorted to extensive use of argumentative questions to try to elicit such a response (after a few initial attempts, virtually every question on the topic, of which there were many, began with "but" and attempted to convince Riehl that he did not believe what he instead testified that he did. For example, Riehl described the statements as "very convincing" (Riehl Depo. 140:25) and said, "I'm clearly suspecting Mark Walters at this point" (Riehl Depo. 141:8-15) and "I'm clearly now suspecting Mr. Walters of doing something wrong" (Riehl Depo. 147:22-148:3) and Riehl said he was "severely doubting what I know about individuals (Riehl Depo. 187:23-25.)

Moreover, Riehl asked his business partner, Brian Johnson, what Johnson thought Riehl should do about the defamatory statements. Johnson suggested Riehl verify the statements with Alan Gottlieb, the alleged plaintiff in the embezzlement case against Walters. Riehl Depo. 187:12-19. Johnson agreed with Riehl that the defamatory

statements could be true. Riehl Depo. 188:18-189:6. Riehl testified that he did not know the defamatory were false until he spoke with Alan Gottlieb. Riehl Depo. 191:8-17.[4]

OAI also argues that it was unreasonable for Riehl to believe the defamatory statements because the version of ChatGPT that Riehl was using did not have access to the internet and had a "knowledge cutoff that pre-dated the filing of the *Ferguson* complaint. Brief, p. 15. There are multiple flaws in this argument.

First, OAI does not demonstrate that Riehl knew what the extent of ChatGPT's capabilities were. He acknowledged in his deposition that ChatGPT ***said*** it did not have access to the internet. Riehl Depo., 162:4. Riehl testified, however, that he did not believe that statement because ChatGPT made convincing statements that it ***did*** have internet access. *Id.,* 162:10-13. OAI has not even acknowledged Riehl's disbelief, let alone demonstrated that the disbelief was unreasonable.

Second, OAI has not shown any evidence that Riehl had knowledge of any "cutoff date" related to ChatGPT. If Riehl had no knowledge of an alleged cutoff date, he cannot reasonably be expected to have taken such a cutoff date into account. Even if ChatGPT had "told" Riehl that it had a knowledge cutoff date, for the same reasons that Riehl disbelieved the non-internet-access statement, he very well may have disbelieved an absolute knowledge cutoff date.

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[4] Riehl's deposition is so full of denials that Riehl did not believe the defamatory statements that it is incredible that OAI asserts otherwise. A lengthy but not necessarily exhaustive list of places where Riehl expressed plausibility of the defamatory statements in his deposition is 89:8, 98:2-15, 124:12-14, 125:23, 127:15-24, 128:3-129:1, 129:6-13, 129:17-20, 129:24, 130:2-8, 130:16-22, 131:1-5, 131:12-132:7, 131:13-19, 134:18-23, 136:16-21, 137:10-17, 137:24-138:7, 138:12-20, 140:25, 141:3-5, 141:8-15, 141:18-142:5, 146:2-9, 146:13-20, 147:10-14, 147:22-148:3, 148:9-18, 151:12-17, 152:17-20, 162:20-163:4, 165:19-166:2, 166:14-167:4, 181:19-20, 182:12-14, 182:19-24, 183:15-17, 183:21-24, 184:5-6, 184:8-15, 184:17-185:1, 187:23-25, 188:18-189:6, and 191:8-17.

Third, the date of the *Ferguson* complaint is immaterial. Although Riehl initially asked ChatGPT about the *Ferguson* case, Riehl abandoned that inquiry after ChatGPT responded with the (fake) *Gottlieb v. Walters* case. For that reason, the date of the *Ferguson* complaint is insignificant in the present case. The defamatory statements had nothing to do with *Ferguson.* They were in the (nonexistent) complaint in *Gottlieb v. Walters.*

**Conclusion**

For the reasons stated above, OAI's motion to for summary judgment should be denied.

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**CERTIFICATE OF SERVICE**

I certify that on January 6, 2025, I served a copy of the foregoing via statutory electronic service upon all counsel of record.

/s/ John R. Monroe