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Case Number 305,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN G. PERLMAN, REARDEN LLC, and ARTEMIS NETWORKS, LLC,	)	
	)	C.A. No. 305, 2020
Appellants,	)	
	)	Courts Below:
v.	)	
	)	Superior Court of the State of
VOX MEDIA, INC., a Delaware corporation,	)	Delaware, New Castle County, C.A. No. N19C-07-235 PRW-CCLD
	)	
Appellee.	)	Court of Chancery of the State of
	)	Delaware, C.A. No. 10046-VCS

APPELLANTS' CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

Plaintiffs-below/appellants Stephen G. Perlman, Artemis Networks LLC, and Rearden LLC (together, "Plaintiffs") brought this defamation action to stop the harm resulting from three articles (the "Articles") published by Vox Media, LLC (defendant below/appellee). In the litigation below, Vox has sought to avoid any adjudication of its misconduct, instead asking two different courts to dismiss the claims as time-barred. It achieved that result earlier this year, partially by changing the arguments it made before the Court of Chancery (the first court). Vox's victory, however, should be short lived as the decision of the Superior Court (the second court) that the claims are time-barred should be reversed.

In August 2014, Plaintiffs sued Vox in the Court of Chancery seeking a permanent injunction requiring Vox to remove the defamatory Articles from Vox's website, The Verge. A85–A86; A157–A159.[1] Such relief was necessary because the Articles were (and still are) continuously accessible on The Verge website and easily found through basic internet searches related to Plaintiffs, resulting in a continuing harm to Plaintiffs remedied only though equitable relief. A85–A86; A157–A159.

When Vox first moved to dismiss Plaintiffs' claims in 2015, it did not dispute Plaintiffs' need for equitable relief or otherwise argue that the Court of Chancery

[1] An Appendix to Appellant's Opening Brief is being filed simultaneously herewith.

lacked subject matter jurisdiction over Plaintiffs' claims. A161–A195. Rather, Vox sought dismissal by arguing that: (i) the claims concerning two articles published in 2012 (as further defined herein, the "2012 Articles") are time barred, (ii) the claims concerning the article published in February 2014 (as further defined herein, the "2014 Article") fail as a matter of law because the alleged defamatory statement in the 2014 Article was "substantially true," and (iii) the Articles are not defamatory as to plaintiff Artemis. A167–A169. The Court of Chancery rejected each of these arguments and denied Vox's motion to dismiss in a 2015 Memorandum Opinion. *See* A196–A245.

Following limited discovery, in 2018 Vox raised the same arguments in a motion for summary judgment, along with a belated claim that the Court of Chancery lacked subject matter jurisdiction over Plaintiffs' suit. A430–A496. In support of that argument, Vox relied on a Court of Chancery decision (*Organovo Holdings, Inc. v. Dimitrov*, 162 A.3d 102 (Del. Ch. 2017)) issued over a year before and argued that the Court of Chancery could not exercise subject matter jurisdiction over defamation claims, regardless of the relief sought. A457–A463.

While acknowledging that *Organovo* involved different facts and requested relief, the Court of Chancery nonetheless ruled it lacked subject matter jurisdiction

over Plaintiffs' claims.[2] For the reasons explained herein, the decision was erroneous.

Following the Court of Chancery's decision, Plaintiffs elected to transfer the case to the Superior Court. A858–A860; A861–A938. There, Vox again moved for summary judgment, rehashing the same arguments the Court of Chancery had previously rejected in its 2015 Memorandum Opinion. While Vox had fought against Chancery jurisdiction by proclaiming it was entitled to a jury trial, it argued the Superior Court should not permit the claims to go to a jury, as it could resolve them as a matter of law. The Superior Court ruled in Vox's favor after misapplying the relevant law.[3] Specifically, the Superior Court erroneously held that the claims related to the 2012 Articles were time-barred after misapplying California law governing the republication exception to the single-publication rule for defamation. As recognized under California law, the republication exception resets the limitations period when prior defamation is (i) substantively altered or added to, or (ii) directed to a new audience. In its republication analysis, the Superior Court misapplied governing law and improperly disregarded record evidence that contradicted the Court's conclusion. The Superior Court also erred in concluding as

[2] *See* Court of Chancery Memorandum Opinion, dated June 27, 2019 ("Chancery Op."), attached hereto as Exhibit A, at 12.

[3] *See* Superior Court Memorandum Opinion and Order, dated June 24, 2020 ("Superior Op."), attached hereto as Exhibit B.

a matter of law that the 2014 Article was not capable of bearing the defamatory meaning alleged by Plaintiffs, thereby preventing the question from going to a jury. That decision was not only legally incorrect, it defied the Court of Chancery's earlier jurisdictional ruling that what is or is not defamatory should be decided by a jury, not a judge. Plaintiffs seek reversal of the Superior Court's judgment based on these legal errors.

SUMMARY OF ARGUMENT

1. Plaintiffs appeal the Court of Chancery's ruling that it does not have subject matter jurisdiction over Plaintiffs' claims. The Court of Chancery erred in concluding that the Court, "*in all instances*, lacks subject matter jurisdiction to adjudicate the questions of whether a defendant made a false statement about the plaintiff and whether it did so with actual malice," because of a historical preference for such questions to be directed to a jury. Chancery Op. at 2, 13–14 (emphasis added). In establishing this categorical exception to the Court of Chancery's jurisdiction, the Court disregarded the well-established rule that the Court's equitable jurisdiction is properly invoked when there is no adequate remedy at law. When this rule is applied, it is clear that the Court of Chancery has subject matter jurisdiction over Plaintiffs' claims.

2. Plaintiffs appeal the Superior Court's ruling that the 2014 Article did not republish the 2012 Articles. Under California law, republication occurs (i) when the original defamatory statement is substantively altered or added to, or (ii) when the original defamatory statement is directed to a new audience. Superior Op. at 15 (citing *Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir. 2012)). With respect to the first avenue for republication, the Superior Court erred in concluding that the 2014 Article did not add to or modify the 2012 Articles because the 2014 Article is not itself defamatory. Setting aside Plaintiffs' contention that the 2014 Article is

defamatory, applicable law does not require a later publication that adds to or modifies the prior defamatory material to be defamatory in its own right. With respect to the second avenue for republication, the Superior Court misapplied the law by analyzing whether the entire Verge website was directed to a new audience. The correct inquiry is whether the prior defamatory statements, *i.e.*, the 2012 Articles, were directed to a new audience, not the entire website on which they appear.

3. The Superior Court also erred in finding that the 2014 Article is not defamatory. An average reader of the article would understand its defamatory meaning from the express words it used and implied about Plaintiffs. Because statements made in the 2014 Article are reasonably susceptible to the alleged defamatory meaning, a fact-finder should decide whether the audience drew the defamatory meaning based on a full factual record. The Superior Court erred in concluding otherwise by misreading the key statements and the relevant record.

STATEMENT OF FACTS

A. Plaintiffs.

Perlman is a successful entrepreneur and inventor responsible for several innovations in internet, entertainment, multimedia, consumer electronics, and communications technologies and services. A254–A255. Perlman is the President and Chief Executive Officer of Artemis and Rearden. *Id*. Artemis is wholly owned by Rearden, which in turn is wholly owned by Perlman. A255–A256.

B. OnLive, Inc.

Perlman, through Rearden, created OnLive, Inc. in 2003 as a California S-corporation. A199. In 2007, OnLive, Inc. became a Delaware corporation. A1057; A728; A199. OnLive, Inc. developed and operated a video game-streaming service and sold the "OnLive MicroConsole TV Adapter," a small device that allowed the OnLive game-streaming service to be used on a television (together, the "OnLive Game Service"). A258–A259. OnLive also developed and operated a remote Windows desktop service (the "OnLive Desktop Service"). *Id*.

In 2012, Hewlett-Packard offered to acquire OnLive, Inc. and provided a $15 million bridge loan to cover overhead during the acquisition. A731. However, as subsequently reported, shortly before the acquisition of OnLive, Inc. was scheduled to close, HP discovered fraud in connection with its prior acquisition of UK-based Autonomy Corp., PLC. *Id*.; A1058–A1062. Without explanation at the time, HP

backed out of its acquisition of OnLive, Inc. and would not extend repayment of the bridge loan. A731.

Efforts to secure other sources of capital and potential acquirers for OnLive, Inc. were unsuccessful (*id*.) and, on August 17, 2012, the company completed an assignment for the benefit of creditors (the "ABC"), wherein all of OnLive, Inc.'s assets were transferred to a new successor entity, OL2, Inc. ("OL2"). A260–A261.

At all times before, during, and after the ABC, the OnLive Game Service operated securely and without interruption. A746. Indeed, the OnLive Game Service operated continuously until April 2015, when OL2 sold its patents to Sony and shut down the OnLive Game Service in a secure and orderly way. A231–A232; A611; A666. The status of the game-streaming service is important from a customer perspective because customers' personal and potentially sensitive data was provided to and maintained by the OnLive Game Service and could have been compromised if the OnLive Game Service had been interrupted or abruptly shut down. A105.

OnLive, Inc. remained an active corporation for several years after the ABC, and OnLive, Inc. remained a Delaware corporation in good standing until at least March 1, 2014. A1057.

C. Vox's August 19, 2012 Article Defames Perlman And His Companies With False Tales Of Criminal Misconduct And Corporate Mismanagement.

In the wake of HP's abandonment of its OnLive acquisition and the resulting ABC, journalists connected with two online news publications associated with Vox, The Verge and Polygon, focused on OnLive as a "potentially huge story." A1066. On August 19, 2012, Vox, through its online publication, The Verge, published an article entitled "OnLive's bankruptcy protection filing leaves former employees in the dark" (the "Original August 19 Article"). A1075–A1078. The Original August 19 Article was based almost entirely on the unsubstantiated and untrue assertions of an individual, Kevin Dent, who had no connection to Perlman or OnLive. A1079–A1083; A1084–A1089. Based on this unreliable source, the article claimed that Perlman engaged in an elaborate scheme to strip OnLive, Inc. of its assets (including patents) and transfer them to a different entity, allowing him to profit from the ABC at the expense of OnLive, Inc. and its equity-holding employees. A1075–A1078. The article went so far as to indicate Perlman engaged in criminal conduct (*i.e.*, libel per se), stating: "The whole structure of this seems like a Ponzi scheme where you have your original investor, Rearden Labs, and they're getting all of their money back and Perlman has now transferred some of his IP over." A1077. Vox admittedly did not fact check the Original August 19 Article before its publication (A1090–

A1092), and discovery produced by Vox shows that Vox's editors immediately recognized the Original August 19 Article's inaccuracies. A1093–A1094; A1069.

Shortly after the Original August 19 Article was published, The Verge's Editor-In-Chief, Joshua Topolsky, emailed a group of writers and editors at Polygon and The Verge who were focused on the OnLive story saying, "So Polygon posted on this and you guys got the story wrong." A1069. Several Polygon and Verge writers, including Sean Hollister of The Verge, scrambled to "[r]ework[]" the article to address the misstatements therein. A1070. In doing so, Hollister decided to "drop[] the Dent hearsay" entirely from the article, recognizing Dent's unreliability as a source. *Id.* Senior Editor for The Verge, Scott Lowe, agreed, explaining: "we need to talk to Polygon about their sourcing of Dent. For whatever reason, they think he's some sort of industry insider but he's full of s[***]. . . . [B]asing an entire story off him is lazy and absurd." A1095–A1096.

While Vox was internally working to address the Original August 19 Article's errors, OnLive's Director of Public Relations, Jane Anderson, contacted Vox editors to address the article's inaccuracies. A607. The Verge's Topolsky advised Anderson that Vox decided to "take out all the nonsense and put a new story up (being written now by Sean Hollister) so that redirects from other sites get an accurate story, apologizing for the errors, rather than a 404 error."[4] A587. Although

[4] "404 error" means "Web Page Not Found."

the article was revised, Vox did not retract, apologize, or accept responsibility for the numerous falsehoods in the Original August 19 Article. Rather, the only indication that the August 19 Article had been changed was a brief statement below a revised version of the article, stating "Update: This story has been heavily modified from its original version, which contained inaccuracies." A997.

Vox was embarrassed and did not want to issue a retraction or acknowledge its shoddy journalism. A1097–A1102. It then went so far as to assert that it did not believe the Original August 19 Article was inaccurate, with Topolsky later attempting to defend the original article by publicly commenting that "...[t]here was much to the story that *was* accurate…." A1103–A1104 (emphasis added). With this, Vox explicitly endorsed the content of the Original August 19 Article and created the impression that Vox was standing by its defamatory allegations, despite knowing the article was false and based entirely on an unreliable source. This endorsement is still visible when viewing the rewritten article.[5]

Although the Original August 19 Article was rewritten, it spread quickly in its original form. It was widely shared and cited by websites and commentators around the world, with the original content of the article and commentary thereon. *See, e.g.*, A1105–A1137.

[5] *See* https://www.theverge.com/2012/8/19/3253029/onlive-bankruptcy-filing.

D. Less Than Two Weeks Later, Vox Publishes A Second Defamatory Article That It Deliberately Refuses To Fact Check.

Immediately following the August 19 Article debacle, Vox began a second hit piece on Perlman via another story about OnLive, in part by reaching out to numerous former employees of OnLive who lost their jobs due to the ABC. *See, e.g.*, A1138–A1145. The writer, Sean Hollister, led this effort and, rather than objectively seeking facts about what happened at OnLive, lured in former employees by claiming he had ideas about how they could pursue legal action against OnLive and Perlman. *See, e.g.*, A1141. On August 28, 2012, Vox's The Verge published the new hit piece, another article defaming Plaintiffs entitled "OnLive lost: how the paradise of streaming games was undone by one man's ego" (the "August 28 Article," and together with the Original August 19 Article, the "2012 Articles"). A1146–A1160.

Despite its prior faulty vetting and editing process relating to Perlman and OnLive, Vox deliberately published the August 28 Article without fact checking it with Perlman or OL2. Instead, author Hollister (who had re-written the August 19 Article), contacted Anderson less than a half hour before the August 28 Article was published to vaunt that Vox was publishing it without comment or "perspective" from Perlman:

> Hey! Just wanted to give you a heads up that [Vox is] going to be running with a report that I don't think you'll like very much… I originally wanted to reach out to you

> and go through a process and maybe get some of [Perlman's] perspective (which I'd still like, honestly!) but the team decided I'd done enough interviewing already and that the story was getting away from me.
>
> I just don't want you to read this and have an aneurysm or anything! You're far too nice for that! –Sean

A1163–A1164 (sent at 1:02 PM).[6] Anderson immediately attempted to contact Hollister by phone and email to fact check the article. A1163 (sent at 1:12 PM). However, consistent with Hollister's email, Vox published the article without fact checking.

Perpetuating the Original August 19 Article's false portrayal of Perlman's character and competence, the August 28 Article contained many false statements about Perlman that accused him of fiduciary misconduct, severe corporate mismanagement, and utter incompetence. In particular, the August 28 Article continued the Original August 19 Article's narrative that Perlman abused his positions of power and control at OnLive to orchestrate a self-interested transaction that cheated OnLive's stockholder employees out of the value of their shares. The August 28 Article alleged that "Perlman had seemingly found a legal loophole to extract that value [from OnLive] and deprived [OnLive's employees] of it in the process," and that "Perlman transferred all of OnLive's assets to a brand new

[6] Pacific Time is used throughout this brief. Note that The Verge articles, however, are published showing Eastern Time.

company and took over as CEO, hiring back only a skeleton crew to keep the ship afloat." A1147, A1156. The August 28 Article summed up its allegations of Perlman's self-dealing thusly: "It didn't look like Perlman was interested in saving the firm." A1155. All of this Vox knew or, with minimal fact checking, would have discovered, was false.

E. The Fallout From The August 28 Article.

From the moment it was published, the August 28 Article received tremendous attention and was shared widely across the internet, facilitated in no small part by Vox's strategic and orchestrated promotion of the August 28 Article. *See* A328–A330; A595; A385–A391. The article was published at 1:31 PM, and, beginning at 1:35 PM, The Verge's editorial staff commenced an eight-minute coordinated barrage of social media posts highlighting the August 28 Article (s*ee* A1166–A1173), culminating with Editor Chris Welch tweeting that Vox's prior portrayal of Perlman as a "scumbag" had been vindicated by the "exhaustive proof" of the August 28 Article:

> **Chris Welch** @chriswelch 28 Aug 2012 1:43 PM
> Remember when I said "Steve Perlman sounds like the worst type of scumbag"? [Sean Hollister] has the exhaustive proof.

A1175. This tweet (and others) included a link to the August 28 Article.

Within two days, the August 28 Article had generated approximately 288 comments, many of which were derogatory toward Perlman and repeated the false

assertions against him from the Original August 19 Article. A1176–A1220. Sean Hollister responded to several comments but did nothing to correct or stop this perpetuation of the defamation from the Original August 19 Article. *See, e.g.*, A1195; A1213. The August 28 Article also quickly garnered the attention of other journalists, including several international publications. A1222; A385–A387.

Despite efforts by Plaintiffs to mitigate the impact of the article, by mid-2013, the first page of a Google Search for "Steve Perlman" listed the August 28 Article as one of three "in-depth articles" along with "**scumbag** Steve Perlman" as the second highest suggested search related to "Steve Perlman," with a direct link to Welch's August 28, 2012 tweet. A1231 (emphasis added); A1174–A1175. From mid-2013 to mid-2014, Google Search promoted the August 28 Article with increasingly higher rankings when users searched for "Steve Perlman." A391–A394; A744. The August 28 Article persisted, in part, because the article subsequently was cited by Wikipedia, which increased its search rankings. *See* A1232–A1239. The August 28 Article was cited in a Wikipedia article titled "Microconsole," which included a false allegation that the OnLive MicroConsole was not profitable, citing the August 28 Article. A391–A394. Wikipedia's policies prohibit making edits for one's own self-interest,[7] so Perlman and Anderson could

[7] A1241 ("**This page in a nutshell**: Do not edit Wikipedia in your own interests or in the interests of your external relationships.") (emphasis in original).

not remove either the false allegation or the citation to the August 28 Article. As recently as November 2019, a new article linked to the August 28 Article and repeated its false and defamatory narrative. A1225–A1229.

F. Eighteen Months Later, Vox Takes Another Shot At Perlman In The February 19, 2014 Article.

After the ABC, Perlman stepped away from OnLive and focused on Artemis, which was formed as a wholly-owned Delaware subsidiary of Rearden. A595; A1259. In February 2014, Artemis launched a new cutting-edge commercial technology (called pCell) that could be implemented in the wireless telecommunication networks of carriers like Verizon and AT&T.

The initial press about pCell technology and Artemis was favorable (A1260–A1272), with Perlman and former Apple CEO John Sculley appearing on Bloomberg TV[8] and Perlman giving a lecture and demonstration of the technology at Columbia University. A1273–A1276. Vox was not pre-briefed about the Artemis announcement, but upon seeing the New York Times break the story, Vox schemed to renew its attacks on Perlman and his businesses by reprising its prior scandalous articles, which had brought it increased page views and profits. Four hours after the story about Artemis and pCell technology broke, Vox published an article entitled, "The man behind OnLive has a plan to fix your terrible cellphone service" (the "2014

[8] *See* https://www.youtube.com/watch?v=RRUMu-qIOfk.

Article"). A1277–A1289. The first line of the 2014 Article describes Perlman as "the creator of the **defunct game-streaming service OnLive**" (in orange bold in the original), and the bold text links readers to the defamatory August 28 Article (the "Defunct Statement"). A1278. The Defunct Statement was false—as of the date the 2014 Article was published, the OnLive Game Service, as operated by OL2, had been continuously active without interruption and was not by any means "defunct." *See* A611 (following ABC, "[w]ell, OnLive continued. It didn't miss a day of service. Didn't have a down day.").

A reader of the 2014 Article need only read the first line to identify Perlman, the "Man behind OnLive," as being the "creator of the defunct game-streaming service OnLive." In the area of gaming and streaming technology, describing a service as "defunct" means a customer's personal and sensitive information might be exposed or left unprotected against potential hacks, an event that would incense customers and cause considerable reputational and commercial backlash. A241. By clicking on the Defunct Statement link, the reader further associates Perlman with all of the defamatory statements in the August 28 Article as well as with the Original August 19 Article's false and criminal assertions that Vox reviewed and left in the August 28 Article's comments.

As Vox knew, describing the OnLive service as "defunct" was a new and significant smear on Perlman and his companies because, as pled and as the Court

of Chancery recognized in its ruling on Vox's motion to dismiss, the Defunct Statement falsely conveyed to the world that "Perlman not only exploited OnLive's stockholders, but also victimized its customer base" by leaving customers' personal and financial information exposed and unsecured. *Id*.

G. Vox's Defamatory Articles Disrupt Perlman's Ability To Fund Artemis.

Artemis found significant initial interest from top-tier investors after the announcement of its pCell technology, helped by former Apple CEO John Sculley who worked with Artemis in the mobile industry to attract several major investors. A702; A777. However, Perlman discovered that when potential Artemis investors conducted basic due diligence on him, they were brought to the August 28 Article as it was the number one search result for "OnLive" and "Steve Perlman." A774; A775.

Perlman found that investors were unwilling to invest money in a company run by a person who, as the August 28 Article falsely asserted, mismanaged his companies, mistreated his employees and customers, overrode boards of directors, and supposedly engaged in Ponzi schemes and patent fraud. A741; A743. After two years, the August 28 Article was not declining in Google Search relevance. Left with no other way to overcome the falsehoods spread by the 2012 and 2014 Articles or to stop their impact on Artemis's funding efforts and business prospects, Plaintiffs initiated litigation against Vox. A742.

ARGUMENT

I. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW BY HOLDING THAT THE COURT LACKED SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS.

A. Question Presented

Does the Court of Chancery have subject matter jurisdiction to issue an injunction to prevent existing, on-going harm in a defamation action? A534–A542.

B. Standard And Scope Of Review

The granting of a motion for summary judgment is reviewed de novo. *See Telxon Corp. v. Meyerson*, 802 A.2d 257 (Del. 2002). The grant of a motion to dismiss for lack of subject matter jurisdiction is subject to plenary review. *See Sanders v. Sanders*, 570 A.2d 1189, 1191 (Del. 1990) ("On a question of subject matter jurisdiction, our standard of review is whether the trial court correctly formulated and applied legal precepts. Our scope of review is de novo.") (citations omitted).

C. Merits Of Argument

It is fundamental under Delaware law that the Court of Chancery's equitable jurisdiction may be invoked through a valid prayer for an equitable remedy that a law court lacks the power to bestow. *See* 10 *Del. C.* §§ 341, 342; *DuPont v. DuPont*, 85 A.2d 724, 727 (Del. 1951). Where equitable jurisdiction is based on the asserted need for an exclusively equitable remedy, the critical jurisdictional criterion is the presence or absence of an adequate remedy at law. *See Hillsboro Energy, LLC v.*

Secure Energy, Inc., 2008 WL 4561227 (Del. Ch. Oct. 3, 2008). Whether an adequate remedy at law exists is determined from the face of the complaint, as of the time of its filing, with all material factual allegations presumed as true. *See Int'l Bus. Machs. Corp. v. Comdisco, Inc.*, 602 A.2d 74, 78 (Del. Ch. 1991); *Diebold Comput. Leasing, Inc. v. Com. Credit Corp.*, 267 A.2d 586 (Del. 1970).

Under these principles, it is clear that the Court of Chancery has jurisdiction over Plaintiffs' claims. Plaintiffs seek an injunction requiring Vox to take down the Articles because, absent such relief, Plaintiffs are being and will continue to be harmed by the Articles. As the Complaint makes clear, such relief is necessary because the Articles remain continuously accessible on The Verge website and easily found through basic internet searches related to Plaintiffs. A85; A157–A159. Anyone who searches "Steve Perlman," "OnLive," or "pCell" can and will find the defamatory Articles, and third parties can (and do) continue to link to the Articles, further extending their reach to new audiences. Thus, as long as the Articles remain accessible, Plaintiffs continue to suffer harm.

A money damages award is incapable of providing a full, fair, and practical remedy to this continuing harm. *See Takeda Pharms. U.S.A., Inc. v. Genentech, Inc.*, 2019 WL 1377221, at *5 (Del. Ch. Mar. 26, 2019) ("The question is whether the remedy available at law will afford the plaintiffs full, fair, and complete relief.") (internal quotation marks and citation omitted). While an award of money damages

may compensate Plaintiffs for the economic harm *already* suffered, it would not address the ongoing and offending act itself, as only an equitable decree can. Absent an injunction requiring Vox to remove the defamatory Articles, Plaintiffs would be required to pursue a continuous series of retrospective damages awards, making money damages an incomplete and inadequate remedy. *See Cheese Shop Int'l, Inc. v. Steele*, 311 A.2d 870, 871 (Del. 1973) (where the legal remedy will only afford piecemeal relief and result in a multiplicity of suits, the plaintiff does not have an adequate remedy at law). Indeed, the Court of Chancery acknowledged that Plaintiffs do not have an adequate remedy at law by suggesting that, after a jury has adjudicated the merits of the defamation claims, Plaintiffs can seek the necessary injunction to require Vox to remove the Articles by transferring the case back to the Court of Chancery or having the Superior Court judge designated as a Vice Chancellor so that they may provide the required equitable relief.[9] Chancery Op. at 13–14.

[9] The Court of Chancery's hopeful suggestion (Chancery Op. at 14 n.58) that Plaintiffs may not need equitable relief after obtaining a ruling that the Articles are defamatory because "it would be foolish and wasteful for Vox to decline [a request to take down the defamatory articles] and thereby require Plaintiffs to initiate further litigation to compel that result" does not change the analysis of whether Plaintiffs have an adequate remedy at law. Whether the Court of Chancery has equitable jurisdiction is not based on speculation that the requested equitable relief may not ultimately be required. *Int'l Bus. Machs. Corp.*, 602 A.2d at 78.

Rather than analyzing whether the Complaint properly invoked the Court of Chancery's equitable jurisdiction, the Court of Chancery erred by relying on and expanding the holding in *Organovo* to conclude that the Court, "*in all instances*, lacks subject matter jurisdiction to adjudicate the questions of whether a defendant made a false statement about the plaintiff and whether it did so with actual malice." Chancery Op. at 2 (emphasis added). The Court of Chancery thus created for defamation claims a categorical exception to the well-established rule that equitable jurisdiction is properly invoked when there is no adequate remedy at law.[10]

As a threshold matter, the Court erred by relying too much on *Organovo*, where the ruling on subject matter jurisdiction was driven by the specific relief requested—an injunction against *prospective* defamatory speech. *See Organovo*, 162 A.3d at 114 ("The Company's request for injunctive relief was forward-looking. Although the Company's past harm could be remedied with money, the Complaint sought an injunction against further acts of defamation. An injunction against future wrongdoing is not generally available.") (citations omitted). Unlike here, where the defamatory Articles remain available, the prior defamatory statements made by the defendant in *Organovo* had already been removed and the only equitable relief

[10] The *Organovo* Court identified two narrow exceptions where the Court of Chancery may exercise jurisdiction over defamation claims: trade libel claims and requests for "narrow injunctive relief after a final adjudication of falsity." *Organovo*, 162 A.3d at 119–20.

sought related to future speech. Because Plaintiffs seek an injunction requiring Vox to take down *existing* defamatory articles and do not seek an order against future speech, the constitutional considerations and the reluctance to enforce prior restraints on speech discussed in *Organovo* are inapplicable. *See Organovo*, 162 A.3d at 114–26 (assessing whether injunction should issue against future speech).

The Court of Chancery recognized this distinction (Chancery Op. at 12), but nonetheless found persuasive the *Organovo* Court's discussion of the historical preference for defamation claims to be resolved by a court of law and juries. But the Court offered no explanation for why this "preference" divests the Court of Chancery of equitable jurisdiction where a plaintiff lacks an adequate remedy at law, and Plaintiffs respectfully submit that it does not. This is especially so where the Court of Chancery has the statutory authority to submit the merits of a defamation claim to a jury for decision. *See* 10 *Del. C.* § 369 ("When matters of fact, proper to be tried by a jury, arise in any cause depending in Chancery, the Court of Chancery may order such facts to trial by issues at the Bar of the Superior Court."); *Saunders v. Saunders*, 71 A.2d 258, 261 (Del. 1950) (noting that the decision to direct an issue to be tried by a jury is a matter within the sound discretion of the Court of Chancery).

And, in any event, the historical preference for juries to resolve defamation claims discussed in *Organovo* arose during traditional methods of publication. Just as the internet has caused an update to the republication rule (*see infra*), the

preference for defamation claims to be heard outside courts of equity should also be reevaluated in light of internet publication. In traditional methods of publication, the publisher loses control of the publication when it is sent to a third-party, *e.g.*, a bookstore, the newsstand, or reader. The publisher's inability to control the further dissemination of its publications, coupled with the reluctance to enjoin future speech, historically meant equitable relief would not be appropriate for defamation. *See Organovo*, 162 A.3d at 119 ("Although the underlying rationale has evolved over time, the general rule continues to be that a court of equity will not issue an injunction against future defamatory speech. In courts where law and equity are separate, the rule is jurisdictional."). An internet publisher, however, maintains control of the publication and can continue to propagate it well after the initial publication date. Issuing an injunction to stop an existing, on-going harm, therefore, is not enjoining future speech and is appropriate, even in defamation actions.

For these reasons, Plaintiffs respectfully submit that the Court of Chancery misapplied the law when ruling it lacked subject matter jurisdiction over Plaintiffs' claims. That ruling should therefore be reversed.

II. THE SUPERIOR COURT ERRED IN FINDING THE 2014 ARTICLE DID NOT REPUBLISH THE 2012 ARTICLES.

A. Questions Presented

Under California law, does a hyperlink to a prior defamatory article, where the hyperlink itself substantively alters and adds to the prior defamatory statements, constitute a republication of the prior defamatory statements? A1032; A567–A570; A851–A856; A972–A978.

Under California law, for a defamatory article to be republished, must the entire website on which a defamatory article is located reach a new audience, or must only the defamatory article itself reach a new audience? A1294–A1297.

B. Standard And Scope Of Review

The granting of a motion for summary judgment is reviewed *de novo*. *See Telxon Corp.*, 802 A.2d at 262.

C. Merits Of Argument

The Superior Court acknowledged that, under California law, republication occurs in either of two circumstances: (i) when the original defamatory statement is substantively altered or added to, or (ii) when the original defamatory statement is directed to a new audience. Superior Op. at 15 (citing *Yeager*, 693 F.3d at 1082). If either circumstance applies, then the republication resets the statute of limitations. *See Yeager*, 693 F.3d at 1082 ("[T]he statute of limitations is reset when a statement is republished."). The Superior Court erred in finding as a matter of law that neither

republication exception applies here and therefore the claims relating to the 2012 Articles are time-barred.

"Applying the single-integrated-publication test to nontraditional publications can be tricky." *Id*. "A useful distinction lies in earlier cases' criterion of a republication decision that is conscious [and] independent or conscious and deliberate." *Christoff v. Nestle USA, Inc.*, 47 Cal. 4th 468, 485 (Cal. 2009) (concurrence) (internal quotation marks and citations omitted); *see also Alberghetti v. Corbis Corp.,* 713 F. Supp. 2d 971, 979 (C.D. Cal. 2010) ("Accordingly, whenever a defendant makes a "conscious, deliberate choice to continue, renew or expand [its] use of infringing material, the statute of limitations starts anew.") (quoting *Christoff*, 47 Cal. 4th at 485), *aff'd in part, rev'd in part and remanded on other grounds*, 476 Fed. App'x 154 (9th Cir. 2012).

In *Christoff*, the California Supreme Court declined to resolve whether republication had occurred without the benefit of a factual record. As explained in the concurrence:

> where a publication has been out of print or unavailable in digital form for some time and the publisher makes a conscious decision to reissue it or again make it available for download, no reason appears in the text or purposes of section 3425.3[, which codifies the single-publication rule in California,] why the publisher should not be separately responsible for any tort committed in republishing.

Christoff, 47 Cal. 4th at 485; *see also Alberghetti*, 713 F. Supp. 2d at 980 (identifying the *Christoff* concurrence as "[t]he best available prediction as to how the California Supreme Court would ultimately rule on this issue" of republication) (footnote omitted).

Here, the limited record shows that Vox made a "conscious decision" to insert a hyperlink to the 2012 Articles in the first line of the 2014 Article in order to provide readers background information and context about Plaintiffs. *See* A992 (affidavit of The Verge Editor-in-Chief Nilay Patel explaining, "[t]he 2014 Article included a link to the August 28 Article. As a general practice, when *The Verge* adds a hyperlink to an article, it does so to provide readers background information and additional context on the subject matter of the article."). Including a link to the 2012 Articles in the first line of the 2014 Article reflects Vox's "conscious decision to reissue [the 2012 Articles] or again make [them] available" to new readers, constituting republication under California law. *Christoff*, 47 Cal. 4th at 485.

1. The 2014 Article Added To And Enhanced The 2012 Articles.

Under California law, where later published material adds to or updates prior defamatory material, that subsequent enhancement of the earlier defamation constitutes a republication of the original defamation. In the online context, this occurs when an article on a website references (or links to) a prior defamatory article on that website and updates it or adds information. *See Yeager*, 693 F.3d at 1082–

83 (applying California law); *id*. (citing with approval *In re Davis,* 334 B.R. 874 (Bankr. W.D. Ky. 2005), which held that the defendant republished defamatory material on its website by updating the website to include new sections with additional, substantive information about the plaintiff that related to the prior defamation).

That is what occurred here. The 2014 Article, about Perlman's and Artemis's new pCell technology, included a purported update about Perlman's prior work; specifically, that the OnLive game-streaming service he created was now defunct. While the 2012 Articles told tales of the demise of OnLive at the hands of Perlman, the 2012 Articles did not refer to the OnLive game-streaming service as "defunct." Rather, the 2012 Articles made clear the OnLive game-streaming service continued to operate through and after the ABC. The Defunct Statement in the 2014 Article reads: "Steve Perlman, the creator of the **defunct game-streaming service OnLive**…" (bold text is an orange bold hyperlink in the article). A1278. Stating that the Perlman-created OnLive game-streaming service was "defunct" was additional, new substantive information about Plaintiffs that directly related to, and in fact hyperlinked to, the defamatory August 28 Article. The fact that Vox added this new statement about the status of the Perlman-created OnLive game-streaming service in the 2014 Article and used the text of that new information to refer readers

back to the 2012 Articles demonstrates an update and enhancement sufficient to republish the prior defamatory articles.

The addition of this new, substantive information about Plaintiffs is more than a "merely technical" modification to the prior articles. *See Yeager*, 693 F.3d at 1082; *Oja v. U.S. Army Corps of Engineers*, 440 F.3d 1122, 1132 & n.14 (9th Cir. 2006) ("Of course, substantive changes or updates to previously hosted content that are not 'merely technical' may sufficiently modify the content such that it is properly considered a new publication….") (citation omitted).

The cases cited by Vox in its summary judgment briefing are inapposite. The main case cited by Vox, *Clark v. Viacom International Inc.*, expressly endorsed the view that if the republication was a conscious and deliberate decision, then it restarts the statute of limitations. 617 Fed. App'x 495, 505 (6th Cir. 2015) ("[T]he traditional touchstone of the republication doctrine . . . is if the speaker has affirmatively reiterated it in an attempt to reach a new audience that the statement's prior dissemination did not encompass.") (citation omitted). While Vox's action clearly meets this republication standard, in *Clark*, the defendant did not, because it took no action beyond keeping the statements on its website and passively allowing automatic updating of surrounding advertisements. *Id.* at 506–07. Vox's other cases are similarly distinguishable, where the defendant also did nothing to "affirmatively reiterate [the defamatory statement] in an attempt to reach a new audience that the

statement's prior dissemination did not encompass." *Id*. at 505 (citing *Firth v. State*, 775 N.E.2d 463, 466 (N.Y. 2002)); *see Martin v. Daily News L.P.*, 121 A.D.3d 90, 103 (N.Y. 1st Dep't 2014) (restoring an article to a website after accidental deletion during change in computer systems was not republication); *Penaherrera v. N.Y. Times Co.*, 2013 WL 4013487, at *6 (N.Y. Sup. Ct. Aug. 8, 2013) (finding that merely attaching a list of links to the end of an article was not republication).

Rather than applying the relevant law on republication to analyze whether the Defunct Statement and related link in the 2014 Article was used to add to or update the 2012 Articles, the Superior Court concluded that the Defunct Statement did not republish the 2012 Articles because the Defunct Statement was not by itself false or defamatory. *See* Superior Op. at 22. This was a misapplication of relevant law; the Defunct Statement itself did not have to be false or defamatory for it to republish the defamatory 2012 Articles. As discussed below, Plaintiffs believe the Defunct Statement *is* false and defamatory to Plaintiffs. But even if it was not, it still constitutes a republication of the 2012 Articles. Plaintiffs only had to show that the Defunct Statement substantively added to or modified the prior defamatory articles, which it did. *See In re Davis,* 334 B.R. 874 (Bankr. W.D. Ky. 2005).

Indeed, the Court of Chancery's legal rulings on Vox's motion to dismiss—which the Superior Court held (Superior Op. at 3–4) are "law of the case"—are instructive in this regard. The Court of Chancery ruled that it was reasonably

inferable that the Defunct Statement "modified and enhanced the earlier and separate defamatory information referenced by the hyperlink," thus constituting a republication:

> I conclude Plaintiffs adequately have pled that the 2014 Article enhanced or modified the purportedly defamatory statements in the 2012 Articles. The 2012 Articles accused Perlman, as the CEO and principal shareholder of OnLive, Inc., of scheming to profit from the ABC, mistreating OnLive employees following the ABC, mishandling business transactions and potential offers to acquire OnLive, and otherwise operating and governing OnLive poorly. The Complaint asserts that the 2014 Article goes further by suggesting that Perlman not only exploited OnLive's stockholders, but also victimized its customer base. Thus, given Perlman's and Rearden's close association with Artemis and the frequency with which both were mentioned in the 2012 Articles, I cannot say on a motion to dismiss that the statement in the 2014 Article, considered in context provided by the content referenced by the hyperlink, could not conceivably have gone beyond merely restating defamatory allegations, and also enhanced and modified those statements.

A241 (internal citation omitted).

The Superior Court erred by ruling otherwise, finding that Plaintiffs argued that to be a substantive alteration, the alteration must be "independently defamatory as to the same subject matter." Superior Op. at 21 (citation omitted).[11] The Superior Court misconstrued Plaintiffs' argument. Rather, Plaintiffs argued that their "position is, consistent with Vice Chancellor Parsons's analysis and ruling, that a

[11] The section of Plaintiffs' summary judgment brief cited by the Superior Court was in rebuttal to the submissions of the *Amici*. In any event, Plaintiffs never stated that the addition or update itself had to be defamatory.

hyperlink constitutes republication of a prior article when the subsequent article containing the hyperlink substantively adds to or updates the defamatory content of the article it references." A1033 (citations omitted). The fact that the additions or updates are themselves defamatory is evidence that the addition or update is substantive but not necessary to show republication.

2. The 2014 Article Directed The 2012 Articles To A New Audience.

The Superior Court also erred in holding the 2014 Article did not republish the defamatory 2012 Articles because the 2014 Article did not cause The Verge website—as a whole—to reach a new audience (*i.e.*, expand The Verge's *entire* website audience). Superior Op. at 19–20. The relevant inquiry is whether the 2014 Article caused *the original defamatory content* (here, the 2012 Articles) to reach a new audience, not whether *the entire Verge website* reached a new audience. *See, e.g.*, *Firth*, 775 N.E.2d at 466 ("The justification for the republication exception has no application at all to the addition of unrelated material on a Web site, for it is not reasonably inferable that the addition was made either with the intent or the result of communicating *the earlier and separate defamatory information to a new audience*.") (emphasis added); *Hebrew Academy of San Francisco v. Goldman*, 70 Cal. Rptr. 3d 178, 182 (Cal. 2007) ("[A] new cause of action for defamation arises each time the defamer *repeats or recirculates his or her original remarks* to a new audience.") (emphasis added; internal quotation marks and citations omitted); *see*

also Shively v. Bozanich, 31 Cal. 4th 1230, 1243–44 (Cal. 2008) (discussing the genesis of the single publication rule and noting, "[u]nder the common law as it existed in the 19th century and early part of the 20th century, the principle that each communication of *a defamatory remark* to a new audience constitutes a separate 'publication,' giving rise to a separate cause of action, led to the conclusion that each sale or delivery of a copy of a newspaper or book containing a defamation also constitutes a separate publication *of the defamation* to a new audience, giving rise to a separate cause of action for defamation") (emphases added; citations omitted).

Again, the Court of Chancery's legal rulings, which are law of the case, are instructive. Applying California law on republication, the Court of Chancery considered whether, based on the well-pled allegations in the Complaint, it was reasonably inferable that the 2014 Article directed *the 2012 Articles* to a new audience:

> I also find sufficiently persuasive to survive a motion to dismiss Plaintiffs' argument that the 2014 Article directed *the defamation published in the 2012 Articles* to a new audience because the Complaint alleges facts sufficient to support a reasonable inference that the 2014 Article was intended to and actually did reach a new audience. Plaintiffs allege that the analysts, investors, academic researchers, and operators interested in commercial wireless technology—*i.e.*, Artemis's pCell technology featured in the 2014 Article—are unlikely to be familiar with, much less interested in, the details of the consumer video game industry as described in the 2012 Articles. Plaintiffs also allege, and I consider it reasonable to infer, that Defendant knew an article about pCell would generate high traffic on its website because pCell had received news coverage by the New York Times, Bloomberg Television, and Wired Magazine, and *intentionally directed readers to*

> *the sensationalistic August 28 Article* by including a hyperlink in the 2014 Article's very first sentence, which Plaintiffs allege is itself false and defamatory.

A243 (emphases added; citation omitted). This was the correct analysis.

The Superior Court, by contrast, engaged in an incorrect analysis by focusing on whether The Verge website, as a whole, rather than the defamatory 2012 Articles, reached a new audience. In doing so, the Superior Court misapplied the law and misinterpreted the use of the term "website" in *Yaeger v. Bowlin*. Superior Op. at 19–20 (citing *Yaeger* for the rule that republication requires "*the website* [to be] directed to a new audience" and explaining, "[i]f the Verge is 'the website,' then directing one segment of the Verge's readership to an article on the site is by definition only reshuffling its existing audience, not directing itself to a new one") (emphasis in original). Contrary to the Superior Court's holding, the *Yeager* decision makes clear that the term "website" as used therein meant a website at a specific URL, that is, a specific article or section on a website, rather than all of the websites within the entire domain name.[12] *See Yeager,* 693 F.3d at 1083 (considering if there was a modification of "other information on the URL"); *see also Hebrew Academy of San Francisco*, 42 Cal. 4th at 891 ("Under the general rule,

[12] Domain names typically identify a controlling entity, *e.g.*, theverge.com (The Verge), nbc.com (NBC Universal), google.com (Google), harvard.edu (Harvard University).

a new cause of action for defamation arises each time the defamer "repeats or recirculates his or her original remarks to a new audience.") (citations omitted).

The Superior Court's ruling disregards the fact that today's news websites include highly diverse content, *consciously* directed at different audiences with unique interests.[13] *But regardless of the domain name*, if a defamatory statement is "affirmatively reiterate[d] . . . in an attempt to reach a new audience that the statement's prior dissemination did not encompass," then *it is a republication*. *Clark*, 617 Fed. App'x at 505 (citation omitted). If not, this aspect of the republication rule would be eliminated, creating a license for perpetual defamation to new audiences by simply using the same domain name as the first publication.

Because statutes of limitation for defamation claims are generally short, ending one or two years after a statement is first published,[14] the republication

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[13] For example, nbc.com includes several news (and other) sections, each *consciously* directed to diverse audiences interested in different topics, such as: MSNBC for "Breaking News & Analysis" (nbc.com/networks/msnbc); CNBC for business news (nbc.com/networks/cnbc); local NBC TV news (nbc.com/networks/scheduled); Telemundo for Spanish language news (nbc.com/networks/telemundo); E! for "Pop Culture" news (nbc.com/networks/e); and many more. Likewise, news on theverge.com is also *consciously* directed to diverse audiences interested in different topics, such as "Environment" (theverge.com/environment); "Cars" (www.theverge.com/cars); "Music" (theverge.com/music); "Mobile" (theverge.com/mobile); "Gaming" (theverge.com/games), and other categories.

[14] For example, here, the statute of limitations under California law is one year. *See* Superior Op. at 7, 9.

exception to the single-publication rule is an important check on a defendant's ability to repeat and recirculate defamation after the limitations period ends. This check is especially important when it comes to defamation published on the internet, where,

> [f]rom the publisher's point of view, [the World Wide Web] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Communications posted on Web sites may be viewed by thousands, if not millions, over an expansive geographic area for an indefinite period of time.

Firth, 775 N.E.2d at 466 (discussing rationale for applying the single-publication rule and republication exception to defamation on the internet) (internal quotation marks and citation omitted; alterations in original). Adopting the Superior Court's interpretation of the law of republication as applied to the internet would eliminate this check on the republication of defamation, allowing any website operator simply to wait for the limitations period to expire before reposting the earlier defamation with impunity on any URL within its domain.

When properly focused on the republication of the 2012 Articles to a new audience, and not the entire website, Vox's motion for summary judgement should have been denied because, at the very least, there are disputed facts concerning the highly factual question of whether the 2014 Article directed the 2012 Articles to a new audience. *See Williams v. Geier*, 671 A.2d 1368, 1389 (Del. 1996) ("[T]he granting of summary judgment must be cautiously invoked so that the parties may

always be afforded an evidentiary hearing where there is a bona fide dispute as to the facts.").

Indeed, the limited record shows that the 2012 Articles were directed to consumers interested in videogames (entertainment products sold largely to children and young adults), while the 2014 Article was directed to scientists, engineers, and businesspeople interested in commercial wireless communication systems—industrial products sold largely to major corporations for millions of dollars. Recognizing the different focus of the article, The Verge itself tagged the articles differently for purposes of its landing pages; the August 28 Article is tagged "Gaming," whereas the 2014 Article is tagged "Mobile" and "Tech." It is a disputed question of fact whether The Verge designed these internal tags and article headlines to reach the different audiences that The Verge services. Finally, Vox's own Google Analytics data demonstrates that the readers of the 2014 Article caused a resurgence of interest in the 2012 Articles (as Vox intended), a further showing that the 2014 Article reached a new audience and republished the 2012 Articles. *See* A998–A1000 (graph reporting daily pageviews of the August 28 Article).[15]

[15] Because of the high number of pageviews on the day of publication (about 40,000) the vertical scale of the pageviews graph skews the pageviews on subsequent days to appear to be zero, but close examination shows steadily continuing pageviews, with the largest spike in pageviews after 2012 occurring the day the 2014 Article was published. *See* A1291 (indicating pageview spike on February 19, 2014 with red arrow).

* * *

For these reasons, Plaintiffs respectfully submit that the Superior Court misapplied the law when ruling that neither republication exception applies here and that ruling should be reversed.

III. THE SUPERIOR COURT ERRED IN FINDING THE 2014 ARTICLE WAS NOT DEFAMATORY.

A. Questions Presented

Did the Superior Court err by concluding that the Defunct Statement is not capable of bearing the meaning alleged by Plaintiffs? A1293–A1294.

Did the Superior Court err when concluding that the Defunct Statement is not defamatory as to Plaintiffs? A1046–A1055; A559–A567; A978–A987; A847–A851.

B. Standard And Scope Of Review

The granting of a motion for summary judgment is reviewed *de novo*. *See Telxon Corp.*, 802 A.2d at 262.

C. Merits Of Argument

The Superior Court explained that, "only if the Court finds that the disputed statement can reasonably bear the defamatory meaning does the question of whether the audience drew the defamatory understanding from it reach the jury." Superior Op. at 11 (citation omitted); *see also Strong v. Wells Fargo Bank*, 2012 WL 3549730, at *2 (Del. Super. Ct. July 20, 2012) ("It is the function of the court to determine: whether a communication is capable of bearing a particular meaning, and whether that meaning is defamatory. The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.") (internal quotation marks and citation omitted). To determine whether a statement is

reasonably susceptible to a defamatory interpretation under California law, courts assess whether the "average reader" would interpret material in a way that would render it defamatory. *See Alszeh v. Home Box Office*, 80 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1998). "The 'average reader' is a reasonable member of the audience to which the material was originally addressed." *Id.* (internal quotation marks omitted) (quoting *Couch v. San Juan Unified Sch. Dist.*, 39 Cal. Rptr. 2d 848, 854 (Cal. Ct. App. 1995)). In considering how the average reader would interpret the material, California courts look at both the specific language used and its implied meaning. *See MacLoed v. Tribune Pub. Co.*, 343 P.2d 36, 42 (Cal. 1959) ("A defendant is liable for what is insinuated, as well as for what is stated explicitly.") (citation omitted).

Under these standards, the Superior Court erred in concluding that the Defunct Statement could not reasonably bear the meaning alleged by Plaintiffs or be defamatory to Plaintiffs. The title of the 2014 Article is "The man behind OnLive has a plan to fix your terrible cellphone service." A1277–A1289. The first line of the article opens with the Defunct Statement, "Steve Perlman, the creator of the **defunct game-streaming service OnLive**" (in orange bold in the original), and the bold text links readers to the August 28 Article. On its face, the Defunct Statement ties the "game-streaming service OnLive," to Perlman (as both its creator and the "man behind" OnLive), and then falsely reports that the service created by Perlman

is now defunct. A1278. The record is clear that the game-streaming service was not defunct then, or at any time before or in the year thereafter. A611; A746; A1277–A1289. The Defunct Statement was plainly false.

Falsely stating in 2014 that the game-streaming service was "defunct" was a new and significant smear on Perlman and his companies because it falsely conveyed that OnLive customers' personal and financial information was potentially exposed and unsecured. As the Court of Chancery recognized on this very issue when considering Vox's motion to dismiss, in the area of gaming and streaming technology, describing a service as "defunct" means customers' personal and sensitive information might be exposed or left unprotected against potential hacks, an event that would incense customers and cause considerable commercial and reputational backlash. A241. Accordingly, the Court of Chancery acknowledged that the alleged defamatory meaning of the Defunct Statement was reasonable because it falsely conveyed to the world that "Perlman not only exploited OnLive's stockholders, but also victimized its customer base" by leaving customers' personal and financial information exposed and unsecured. *Id.*

The Superior Court came to a different and, Plaintiffs submit, incorrect conclusion. Ignoring the express words of the Defunct Statement, which concern the status of the game-streaming *service*, the Superior Court focused on the status of OnLive, Inc. and OL2 and whether describing *those entities* as "defunct" was

defamatory to Plaintiffs. Superior Op. at 10–12. Through that lens, the Superior Court concluded that (i) describing OnLive, Inc. as "defunct" was substantially true and (ii) describing OL2 as "defunct" did not concern Plaintiffs, and therefore the Defunct Statement could not reasonably bear Plaintiffs' alleged defamatory meaning. *Id*. at 12.

However, as explained above, when focused on the express subject of the Defunct Statement—the game-streaming service created by Perlman—which was operational and *not* defunct, "'the false portion' of the publication is capable of bearing the defamatory meaning." *Id.* at 11 (citation omitted). No reader would interpret "the game-streaming service OnLive" as meaning the entire company, OnLive, Inc., which, for example, offered non-game services such as the OnLive Desktop Service, a remote Windows desktop service. Because the Defunct Statement can reasonably be read as having a disparaging and pejorative meaning to Plaintiffs, the question of whether the audience drew the defamatory understanding from the Defunct Statement should be determined after a full factual record is developed. *See Re v. Hortsmann*, 1987 WL 16710, at *4 (Del. Super. Ct. Aug. 11, 1987) (noting that a jury should determine whether allegedly defamatory language was understood by its recipient to be defamatory where the language was "capable of being construed as having both non-pejorative and pejorative meanings, including the imputation of fraud"); *MacLoed*, 343 P.2d at 42 (reversing dismissal of

defamation claim because, while other interpretations were possible, defendant's article could reasonably be interpreted as charging that plaintiff was a communist sympathizer).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court (i) reverse the Court of Chancery's decision that it lacks subject matter jurisdiction over Plaintiffs' claims, (ii) reverse the Superior Court's decision that the 2014 Article did not republish the 2012 Articles, and (iii) reverse the Superior Court's decision that the 2014 Article is not capable of bearing the defamatory meaning alleged.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2020, a copy of the foregoing document was served via *File & Serve*Xpress upon the following attorney of record:

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