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Case Number 222,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PRESTON HOLLOW CAPITAL LLC,

Plaintiff Below,
Appellant,

v.

NUVEEN ASSET MANAGEMENT, LLC,

Defendant Below,
Appellee.

No. 222, 2022

Court Below: Superior Court of the State of Delaware

C.A. No. N19C-10-107 [MMJ] [CCLD]

REDACTED PUBLIC VERSION
E-filed: October 7, 2022

APPELLEE NUVEEN ASSET MANAGEMENT, LLC'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

Plaintiff-Appellant Preston Hollow Capital LLC ("PHC") brought a slander action against Defendant-Appellee Nuveen Asset Management LLC ("Nuveen") based on a handful of brief statements by Nuveen to certain municipal bond broker-dealers. The Superior Court properly granted summary judgment to Nuveen because, despite 81 depositions and 412,847 documents exchanged in discovery, PHC failed to proffer any competent evidence that it suffered reputational loss from any of the statements.

In fact, the voluminous evidence in this case demonstrates precisely the opposite: none of the allegedly defamatory statements had any effect on PHC's reputation. Out of the 35 broker-dealer representatives deposed, not one testified that their personal or their company's opinion of PHC changed as a result of Nuveen's statements. Even PHC admits (Appellant's Opening Br. 12) that "witnesses for the major broker-dealers denied that Nuveen's statements changed their opinion about Preston Hollow."

PHC asks this Court to ignore this evidence and apply an irrebuttable presumption of injury in slander *per se* cases that would overcome its burdens both at summary judgment and at trial—effectively transforming a complaint capable of surviving a motion to dismiss into a damages award for a slander *per se* plaintiff.

PHC's turbo-charged presumption would apply even where a court properly finds that the undisputed record proves the plaintiff suffered no reputational harm *at all*. PHC's approach serves no conceivable public purpose and is completely at odds with Delaware policy that a plaintiff should not receive a windfall when it has suffered no harm.

Indeed, the possibility of the kind of pie-in-the-sky damages that PHC seeks—$629 million, per Appellant's Opening Br. 42—would provide an unhealthy incentive for plaintiffs like PHC to misuse lawsuits as business weapons. PHC has already pursued litigation in three separate courts—Delaware Superior Court, the Delaware Court of Chancery, and the U.S. District Court for the Southern District of New York ("SDNY")—based on the same conversations. It does not need additional incentives to pursue further litigation.

PHC's fallback position is to try to manufacture a genuine issue regarding reputational harm by invoking: (1) Vice Chancellor Glasscock's opinion in the separate tortious interference Court of Chancery case, which did not decide a defamation claim, (2) the opinion of PHC's proffered expert who has admitted that he assumed causation *at the direction of PHC's counsel*, and (3) a variety of self-serving statements by PHC and hearsay from others. The Superior Court properly

determined that none of these arguments satisfied PHC's burden on summary judgment.

The gravamen of a slander claim is reputational harm. PHC has not, and cannot, overcome the undisputed record evidence that Nuveen's allegedly defamatory statements caused no reputational harm. The Superior Court's grant of summary judgment should therefore be affirmed.

If the Court reverses the summary judgment ruling, Nuveen cross-appeals two additional issues. First, the Court should find that PHC, a corporate entity for whom any defamation "harm" is quantifiable in economic terms, is not entitled to invoke any presumptions or benefits of the slander *per se* doctrine. Second, if the Court remands, it should reverse the Superior Court's holding that certain findings by the Court of Chancery in the separate tortious interference proceeding are subject to law of the case and collateral estoppel in *this* case, which involves only PHC's slander claim.

SUMMARY OF ARGUMENT

A. Answer to PHC's Summary of Argument

1. Denied. The Superior Court correctly held that PHC, in responding to Nuveen's summary judgment motion, had the burden to prove that Nuveen's alleged slander caused injury to PHC's reputation. If any presumption of harm exists in a case involving slander *per se*, such presumption must be rebuttable and has, in fact, been rebutted here.

2. Denied. The Superior Court correctly held that PHC failed to raise a genuine issue of material fact regarding injury caused by slander. The Court of Chancery made no findings concerning defamation injury, and even if it had, such findings would not be preclusive in this case. Moreover, not only is the record devoid of evidence that PHC was harmed, but there is abundant affirmative evidence that PHC was *not* harmed by Nuveen's alleged slander.

B. Summary of Argument on Cross-Appeal

1. The Superior Court erred in holding that the slander *per se* doctrine applies to this case. Where the record is clear that a corporate plaintiff did not suffer any reputational harm, and the effects of the alleged slander upon the listeners can be readily ascertained, a corporate plaintiff is not entitled to any benefits of the slander *per se* doctrine and should be required to prove any compensatory damages it seeks.

2. The Superior Court erred in applying law of the case and collateral estoppel to the Court of Chancery's factual findings regarding statements made to Goldman Sachs, including whether the statements were false and made with knowledge of their falsity or reckless disregard for their truth.

a. Law of the case does not apply to the Court of Chancery case because it was a separate proceeding. Moreover, law of the case does not apply to factual findings.

b. Collateral estoppel does not apply to the pertinent Court of Chancery findings because they were not necessary or essential to that court's final judgment. Further, granting preclusive effect would deprive Nuveen of its jury trial right on the defamation claim.

STATEMENT OF FACTS

I. NUVEEN AND PHC IN THE MUNICIPAL BOND INDUSTRY

Nuveen purchases, trades, and holds assets, including municipal bonds, for investors ranging from pension funds to individuals.[1] PHC is a finance company that purchases tranches of municipal bonds directly from issuers—*e.g.*, cities, universities, and assisted care facilities—wishing to undertake capital improvements.[2] [redacted][3]

A "public offering" (or "competitive sale") occurs when a bond is sold through a competitive auction, usually involving multiple bidders. A "limited public offering" involves only a small number of potential buyers, and a "private placement" is a purchase negotiated directly between the bond issuer and one or more buyers.[4] A "100% placement" occurs when an initial offering of a bond is purchased in its entirety by a single buyer, and can happen through any type of offering mechanism.[5]

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[1] B328.

[2] B720-25.

[3] B45.

[4] B1487-89.

[5] B1487-88.

PHC frequently has purchased entire issuances through ostensible limited-public offerings that were, in reality, open only to PHC—no competitive bidding, much less a price set by the open market.[6] These deals are presented to broker-dealers as [redacted] As a third-party witness testified, [redacted]

II. COMMUNICATIONS BETWEEN NUVEEN AND BROKER-DEALERS

PHC's slander claim arises from a handful of statements made by Nuveen employees John Miller, Karen Davern, and Steve Hlavin. The statements were made during telephone calls to certain broker-dealers, almost entirely in December 2018 and January 2019.

In its Response to Nuveen's Interrogatory No. 1 in the Superior Court, PHC listed the specific statements ("At-Issue Statements" or "Statements") upon which its slander claim was based,[9] and never supplemented that list:

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[6] B1037, B1043-45; B1260-61, B1285.

[7] [redacted]

[8] [redacted]

[9] B749-51. This response does not include any of the statements in Appellant's Opening Br. 8-9, but does include the statements on pp. 9-10.

1. PHC used "unethical" or "predatory lending practices" that "fleeced" issuers or are "harmful to the issuers over the long term";
2. PHC was "lying" to issuers, speaking "untruths," or that "issuers are being told things that are not true";
3. PHC "rushed" deals that were "covenant-light"; and
4. There are "nastygrams" from "states' attorney generals" about PHC.

The At-Issue Statements are reflected in three telephone recordings: one between Nuveen personnel and Goldman Sachs, and two with Deutsche Bank.[10] Nuveen personnel used similar language regarding categories 1-3 in non-recorded calls to four other broker-dealers: BAML, Citigroup, RBC, and Wells Fargo. There is no evidence that Nuveen (or anyone else) communicated the At-Issue Statements to other broker-dealers.[11] And it is undisputed that no At-Issue Statements were ever made to any *issuers*, PHC's ultimate customers.

PHC has contended that "market chatter" spread the At-Issue Statements throughout the municipal bond industry, but the record is clear that the only "chatter"

[10] B77-78; A242-52; A170-228.

[11] A3114-15.

in the marketplace was about the fact that [redacted][12]

The so-called "chatter" itself did not include the At-Issue Statements.[13]

III. PHC'S RESPONSE TO THE AT-ISSUE STATEMENTS

Following the phone calls, PHC "vigorously defended PHC's business practices" by directly refuting the At-Issue Statements with all or nearly all of the "bulge bracket" firms,[14] despite the fact that several of those firms had not heard the At-Issue Statements from Nuveen. The "bulge bracket" consists of prominent firms in the municipal bond industry as defined by PHC, including Goldman Sachs, Deutsche Bank, Piper Jaffray/Piper Sandler, RBC, Citigroup, Wells Fargo, Raymond James, Barclays, Jeffries, Morgan Stanley, JPMorgan, D.A. Davidson, FMS, Stifel, BAML, KeyBanc, and Mesirow.[15]

A PHC executive testified that, immediately after the calls in December 2018, he had "people calling [him] or—or talking to [him]" about them.[16] He then "confronted each one" of the firms that received a call from Nuveen.[17] PHC also

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[12] A244; *see also* A2045.

[13] PHC cites the opinion of its "industry" expert, Thomas Metzold, as evidence of chatter, but Metzold's speculation is inadmissible. *See* A3262-63.

[14] A2198; A2197.

[15] A2576-07.

[16] A830.

[17] A830. *See, e.g.,* A2178-79, A2182, A2194.

directed a public relations firm to refute Nuveen's accusations and to publicize widely the litigation, including both PHC's professed innocence and, ironically, the At-Issue Statements.[18]

On January 15, 2019, PHC wrote to Nuveen demanding that Miller and Nuveen cease and desist from what it characterized as unlawful and tortious communication.[19]

IV. NUVEEN'S RESPONSE TO THE AT-ISSUE STATEMENTS

Nuveen's legal department addressed the At-Issue Statements both internally[20] and externally, including a February 22, 2019 letter to the legal departments at each of the firms PHC had identified as having discussed PHC with Miller.[21] There is no evidence of any subsequent communications in any way similar to the At-Issue Statements.[22]

V. THE RECORD SHOWS NO IMPACT ON PHC FROM THE AT-ISSUE STATEMENTS

Not a single one of the 35 broker-dealer representatives deposed testified that their or their company's opinion of PHC changed as a result of the At-Issue

[18] *See* B775.

[19] B460.

[20] B963.

[21] B461.

[22] B749-51.

Statements. Rather, they uniformly denied that the Statements changed their opinion of PHC. For example, a Citigroup witness agreed that nothing [redacted][23] Similarly, an RBC witness testified: [redacted][24] *See also infra* at 31-42. PHC's own CEO could not name a single broker-dealer that changed its opinion about PHC engaging in predatory lending because of the At-Issue Statements.[25]

PHC cannot identify any deal it lost, for any reason, let alone as a result of the Statements. Not a single broker-dealer ceased doing business with PHC as a result of the Statements. Indeed, there is no evidence that the At-Issue Statements were ever communicated to individuals within broker-dealers who had influence over business with PHC; when the calls were discussed internally within broker-dealers, the At-Issue Statements were not repeated.[26] Nor is there any evidence that the Statements, regardless of who heard them, impacted broker-dealers' willingness to do business with PHC.[27]

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[23] A2761.

[24] B1437.

[25] B1213.

[26] A720-21; B1264, B1265; A955; B1423; B103; A1761-62.

[27] A2353-54; A2761; B1368; A1989-90; B1625, B1627.

The same "bulge bracket" firms that did business with PHC before the calls continued to do so, and several are still doing 100% placements with PHC. *See infra* at 31-42. PHC has even declined business with some of the very broker-dealers it alleges will not do business with it, including KeyBanc, Wells Fargo, and nine of the twelve deals with Goldman Sachs that PHC complains about losing.[28]

VI. PHC COMMENCES SERIAL LITIGATION

Rather than suing all the defendants that it believes are responsible in one court competent to adjudicate all its claims, PHC has pursued a three-court serial litigation campaign. First, in February 2019, PHC brought suit against Nuveen in the Court of Chancery, seeking solely injunctive relief for tortious interference with contract, tortious interference with prospective business relations, violation of New York's antitrust statute (the Donnelly Act), and defamation. PHC disclaimed damages entirely and stated that "[t]he dollar amount of the damages to PHC as a result of Nuveen's misconduct is not susceptible to reasonable calculation."[29] It described money damages as "speculative."[30] During discovery, the Court of Chancery dismissed PHC's defamation claim with leave to transfer to the Superior Court

[28] A2438; B1687; B1091-92, B1102-04, B1112, B1122-23, B1126-28; B1178-80; B898-99.

[29] B652.

[30] B218.

(under 10 *Del. C.* § 1902), as well as its tortious interference with contract claim. The Court of Chancery held a trial in July 2019 *solely* on PHC's tortious interference with prospective business relations and New York state antitrust claims.

On April 9, 2020, Vice Chancellor Glasscock found Nuveen liable for tortious interference with prospective business relations,[31] denied all injunctive relief because PHC failed to show ongoing or future harm, and declined to rule on the New York state antitrust claim.[32] Significantly, the Vice Chancellor made no findings that the At-Issue Statements caused reputational harm.[33] He observed in a footnote, with respect to the defamation claim, that "damages, *if appropriate*, are available" in Superior Court.[34] At no point did the Vice Chancellor "hold" or "find" that PHC was entitled to damages.

On May 1, 2020, PHC commenced a new action in Superior Court based on a single claim against Nuveen[35] for slander—the claim at bar. And on July 20, 2020, PHC filed yet a third action arising from the very same calls—this time in SDNY—

[31] *PHC LLC v. Nuveen LLC*, 2020 WL 1814756, at *19 (Del. Ch. Apr. 9, 2020) ("Chancery Opinion").

[32] *Id.* at *19-21.

[33] *Id.* at *15.

[34] *Id.* at *22 n.298.

[35] On November 15, 2021, PHC voluntarily dismissed Nuveen LLC, Nuveen Investments, Inc., and Nuveen Securities LLC. A76.

alleging federal and state antitrust claims against Nuveen and tortious interference against Miller individually.

On June 29, 2020, PHC filed a motion for partial summary judgment in the Superior Court, asserting that it was entitled to summary judgment on liability because Vice Chancellor Glasscock's ruling collaterally estopped Nuveen from contesting the elements of PHC's slander claim regarding the recorded statements to Goldman Sachs and Deutsche Bank, as well as the unrecorded statements made to other broker-dealers.[36] Nuveen opposed that motion.[37]

On December 15, 2020, the Superior Court granted in part and denied in part PHC's motion for partial summary judgment.[38] The Superior Court found that collateral estoppel prevented Nuveen from challenging "the existence, falsity, and malicious nature of either of these statements: (1) that PHC lied to its issuers and that Nuveen had evidence of such lies; and (2) that PHC's 'unethical practices' had 'caught the attention of the states attorneys general' who sent 'nastygrams.'"[39] The Superior Court denied summary judgment on liability, however, holding that "a

[36] A1594-630.

[37] A1631-75.

[38] *PHC LLC v. Nuveen LLC*, 2020 WL 7365808 (Del. Super. Ct. Dec. 15, 2020) ("Collateral Estoppel Opinion").

[39] *Id.* at *11.

number of additional factual disputes" rendered summary judgment "inappropriate," including: "first, how the statements made by Nuveen were understood by Goldman; second, whether PHC suffered any reputational loss; third, whether the statements made by Nuveen constitute defamation *per se*; and fourth, whether PHC is a limited purpose public figure."[40] The Superior Court also ruled that the law of the case would apply as well, but that "applying law of the case to the Court of Chancery's prior rulings is not the same as this Court finding that those evidentiary conclusions are defamation… This Court must determine the legal impact and consequences of conduct found by the Court of Chancery to be a 'lie' or 'wrongful' or 'unethical.'"[41]

After discovery, including 81 depositions and the exchange of 412,847 documents, Nuveen moved for summary judgment, and PHC moved for partial summary judgment as to several of Nuveen's affirmative defenses.

On June 14, 2022, the Superior Court granted summary judgment to Nuveen on PHC's slander claim.[42] The Superior Court held that defamation *per se* could apply to corporate plaintiffs,[43] but that "in order for a plaintiff to proceed on

[40] *Id.* at *11, 13.

[41] *Id.* at *12.

[42] *PHC LLC v. Nuveen LLC*, 2022 WL 2276599, at *7-8 (Del. Super. Ct. June 14, 2022).

[43] *Id.* at *4, 7.

defamation *per se* without proof of special damages, plaintiff still must provide evidence of diminution in reputation."[44] The Superior Court further held that "Plaintiff must prove that Defendant's defamatory statements were a substantial factor in bringing about injury to Plaintiff's business reputation."[45]

As to reputational loss, the Superior Court found that "the record evidence does not include the testimony of any witnesses that their opinions were changed as a result of Defendant's Statements. There are no documents in the summary judgment record that support a finding of reputational loss. There are no: third-party witnesses; witnesses not affiliated with Plaintiff; or documents reflecting reputational loss to Plaintiff—demonstrating that the opinion about Plaintiff was changed in the community as a result of the defamatory statements."[46] The Superior Court additionally held that "[s]peculation and amorphous industry 'chatter' is not sufficient to create a reasonable inference that Plaintiff's reputation was grievously fractured in the community."[47]

[44] *Id.* at *4.

[45] *Id.* at *4.

[46] *Id.* at *6.

[47] *Id.* at *6.

On June 16, 2022, the Superior Court asked counsel for the parties, "what issues and claims remain in the case, and whether any of those issues or claims involved pending motions." Nuveen responded that it believed "no issues remain to be adjudicated…. If the Court did not intend to dispose of the entire defamation claim, we will work with Plaintiff's counsel on a schedule for submitting our positions on what issues remain open." The Court then dismissed the defamation claim, and PHC responded, "Since the Court has dismissed the defamation claim, Plaintiff agrees that there are no issues or claims remaining for the Court to resolve."[48] PHC did not attempt to raise the issue of nominal damages with the court, nor did it move for reconsideration with respect to nominal damages.

PHC filed its Notice of Appeal on June 29, 2022,[49] and Nuveen filed a Notice of Cross-Appeal on July 13, 2022.[50]

[48] B1824-26.

[49] A136.

[50] D.I. 8.

ANSWERING ARGUMENT ON APPEAL

I. THE SUPERIOR COURT CORRECTLY DECLINED TO APPLY A PRESUMPTION OF REPUTATIONAL INJURY IN THIS CASE

A. Counterstatement of the Questions Presented (Response to PHC's Brief Point I)

Did the Superior Court correctly conclude that PHC must prove the alleged slander caused injury, notwithstanding the slander *per se* doctrine? Yes. (Preserved at A3125-27, A3252-65.)

B. Scope of Review

"Any claim that the trial court erred in formulating or applying the law is reviewed *de novo*." *Stevens v. State*, 129 A.3d 206, 210 (Del. 2015).

C. Merits of Argument

Assuming, *arguendo*, that PHC is entitled to assert a slander *per se* claim, the Superior Court's grant of summary judgment to Nuveen should be affirmed. PHC advances the extreme and unsupportable position that, regardless of what the evidence actually shows, Delaware law recognizes a "presumption of injury" in slander *per se* cases that "cannot be rebutted even at trial, much less on summary judgment," and "permits the jury to award general damages for probable as well as proven injury." Appellant's Opening Br. 3. PHC's position fails as a matter of law and policy.

1. Application of a presumption of harm in *per se* slander cases contravenes Delaware law and policy

a. Delaware law requires slander *per se* plaintiffs to plead and prove reputational injury

No Delaware case has held that a plaintiff alleging slander *per se* is entitled to a conclusive presumption of reputational injury that automatically overcomes summary judgment and relieves it of any burden to prove injury at trial. In fact, this Court indicated the opposite in *Spence v. Funk*, 396 A.2d 967 (Del. 1978), where this Court confined slander *per se* to excusing only the requirement of showing "special damages," *i.e.*, specific economic or pecuniary losses flowing from the alleged defamation, in contrast to "general damages" from reputational harm, such as humiliation and emotional distress. *See Marcus v. Funk*, 1993 WL 141864, at *1 (Del. Super. Ct. Apr. 21, 1993) (discussing difference between special and general damages).

In *Spence*, this Court described slander *per se* as "actionable without proof of special damages"—not as actionable without proof of *any kind of injury*. 396 A.2d at 970. This Court explained that "[t]he precise reason why the law presumes damages in these four [*per se*] categories is unclear, but each seems to involve circumstances [in] which it would be difficult to trace *specific financial loss*." *Id.* (emphasis added).

Nowhere did *Spence* suggest that a slander *per se* plaintiff need not prove some form of reputational injury, much less that a court adjudicating a slander *per se* case must disregard undisputed affirmative evidence that the plaintiff suffered no reputational harm. Del. P.J.I. Civ. § 11.3 (2000) ("Slander *per se*"), which cites to *Spence*, states that slander *per se* plaintiffs are relieved only from "show[ing] that the defamation caused actual monetary loss" (*i.e.*, proving special damages)—not from showing reputational injury of some kind. *See also* Restatement (Second) of Torts § 621 (1977) ("One who is liable for a defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed.").

Numerous Delaware courts in the wake of *Spence* have required slander *per se* plaintiffs to plead and prove reputational injury. *See, e.g.*, *Schweitzer v. LCR Capital Partners, LLC*, 2020 WL 1131716, at *9-10 (Del. Super. Ct. Mar. 9, 2020) (listing injury as an element in a *per se* case and dismissing claim that failed to allege "the impact" of the statement on the counter-plaintiff); *Read v. Carpenter*, 1995 WL 945544, at *5 (Del. Super. Ct. June 8, 1995) (granting motion to dismiss because, among other things, slander *per se* plaintiff's allegations of reputational injury consisted of "bare allegation that plaintiff suffered personal injuries proximately caused by defendants 'with hate, malice and ill will'"), *aff'd*, 670 A.2d 1340 (Del. 1995); *Bloss v. Kershner*, 2000 WL 303342, at *6 (Del. Super. Ct. Mar. 9, 2000)

(listing "injury" as requirement in slander *per se* case and describing slander *per se* as only excusing requirement to plead special damages), *aff'd*, 793 A.2d 1249 (Del. 2001).

Thus, courts have repeatedly held that a plaintiff's failure to prove reputational loss warrants summary judgment, even in slander *per se* cases. *See, e.g.*, *Igwe v. E.I. Du Pont De Nemours & Co.*, 2005 WL 196577, at *4-5 (D. Del. Jan. 26, 2005) (granting summary judgment because plaintiff offered only "conclusory" allegations of reputational harm), *aff'd*, 180 F. App'x 353 (3d Cir. 2006); *FJW Inv., Inc. v. Luxury Bath of Pittsburgh, Inc.*, 2019 WL 1782190, at *6 (Pa. Super. Ct. Apr. 23, 2019) (affirming summary judgment because plaintiff "failed to produce any evidence tying its $1,000,000.00 decline in sales to the allegedly defamatory video or a single instance of a person stating that they thought less of [the plaintiff] after viewing the video"); *Synygy, Inc. v. ZS Associates, Inc.*, 110 F. Supp. 3d 602, 616 (E.D. Pa. 2015) (granting summary judgment because corporate plaintiff did not adduce sufficient evidence to demonstrate reputational loss).

PHC relies on *Spence*'s discussion of libel and asserts that "slander *per se* enjoys the same presumption of damages as libel." Appellant's Opening Br. 28 (citing *Spence*, 396 A.2d at 970-71). But *Spence* says just the opposite. It sharply distinguishes between libel and slander:

> [T]he protection against libel is usually broader than it is against slander: (1) the written word leaves a more permanent blot on one's reputation; (2) the written word is capable of wider circulation than that which is communicated orally; (3) reducing a defamation to writing evidences greater deliberation and intention on the part of one who records it. … The general rule is that any publication which is libelous on its face is actionable without pleading or proof of special damages. That is a basic way in which *libel differs from slander*. In other words, proof of damage proximately caused by a publication deemed to be libelous need not be shown in order for a defamed plaintiff to recover nominal or compensatory damages.

Id. at 970 (emphasis added; citations omitted). *Herrmann v. Newark Morning Ledger Co.*, 138 A.2d 61, 74 (N.J. 1958), another libel case cited by PHC, also explained that "[t]he very basis for the original distinction between written and spoken defamatory words… was the greater capacity for permanent and widespread harm of language which is written or printed." PHC's additional authorities (Appellant's Opening Br. 27-28) all address libel rather than slander and are thus inapposite. *See Sheeran v. Colpo*, 460 A.2d 522 (Del. 1983); *Kanaga v. Gannett Co.*, 687 A.2d 173 (Del. 1996) ("*Kanaga I*"); *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174 (Del. 2000) ("*Kanaga II*"); and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

Moreover, *Kanaga II* undermines PHC's argument. *Kanaga II* confirms that there is no presumption of reputational harm under Delaware law. When the defendants in *Kanaga II* contended that the jury improperly awarded the plaintiff

general damages, this Court did not respond that injury is presumed in a *per se* libel case. 750 A.2d at 1184. Instead, the Court described "*Spence's* presumption" as relieving a *per se* plaintiff only of the burden of proving "special damages." *Id.* It was on that limited basis that the Court explained that the *Spence* presumption "would sustain a separate humiliation award in this case had one been rendered." *Id*. Indeed, the Court cited (with implicit approval) the Superior Court's jury instruction that the plaintiff "must prove actual damages," *id.* at 1184 n.3, and then affirmed the jury's award because the plaintiff had sufficiently established her injury. *Id*. at 1184. If the plaintiff had been entitled to a presumptive injury, the Court would not have needed to perform any such analysis.

b. PHC's position violates Delaware public policy

According to PHC, the mere filing of a slander *per se* complaint, if it survives a motion to dismiss, automatically gets a plaintiff to a jury, which is then bound to find that harm occurred (even if, as here, the evidence shows the opposite) and award damages. *See* Appellant's Opening Br. 3 ("[T]he amount [of damages] can never be zero."). But "the gravamen of a defamation action is injury to reputation." *Battista v. Chrysler Corp.*, 454 A.2d 286, 289 (Del. Super. Ct. 1982). PHC's position would relieve a *per se* slander plaintiff of the need to prove the very thing—reputational harm or loss—that is the "gravamen" of its case.

The Superior Court held that no rational jury could find reputational harm in this case. Yet PHC contends that a presumption of harm should apply both on summary judgment and at trial and "cannot be rebutted even at trial." Appellant's Opening Br. 3. Nuveen has found no other context where Delaware (or any other state) has applied a conclusive presumption contrary to what a court has found to be the undisputed facts. PHC seeks a conclusive presumption not merely where there is no evidence ***either way*** as to reputational harm, but where undisputed facts prove no such harm occurred.

In such circumstances, a defendant should not be forced to trial, and a jury should not be asked to award reputational damages, let alone to presume such damages. "The object and purpose of an award of compensatory damages in a civil case is to impose satisfaction for an injury done… with the size of the award directly related to the harm caused by the defendant." *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 528 (Del. 1987) (citation omitted). PHC's approach violates that principle. PHC seeks windfall damages where no harm has occurred, even though "actions for slander are viewed with disfavor by the courts in Delaware." *Read*, 1995 WL 945544, at *5.

Applying a conclusive presumption contrary to fact also would violate due process. *See Western & Atl. R.R. v. Henderson*, 279 U.S. 639, 642 (1929) ("a

presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause").

PHC's position will harm the corporate community in the State. Allowing defendants to be held liable for reputational harm, despite undisputed evidence refuting such harm, would open the floodgates to baseless litigation that would inevitably chill free speech and invite frivolous and commercially disruptive litigation. PHC has already pursued litigation in three separate courtrooms based on the same alleged statements. It does not need additional incentives to pursue further litigation.

2. Even if a presumption applies, it has been rebutted here

Even if this Court holds that a presumption of injury applies in *per se* slander cases, it should hold that it was rebutted here because, *inter alia*, all relevant recipients of the At-Issue Statements have provided testimony that the statements did not affect PHC's reputation, and PHC lost no business as a result thereof. *See supra* at 10-12 and *infra* at 31-42.

Apparently recognizing the implausibility of its extreme position, PHC concedes that "the defendant may seek to mitigate the damages through evidence tending to show the plaintiff's reputation was not harmed," including evidence of "[d]isbelief by hearers." Appellant's Opening Br. 29 (internal quotation marks and

citation omitted; brackets in original). But PHC's concession demonstrates why a slander *per se* plaintiff should not be permitted to invoke the extreme presumption it advocates. Here, the evidence does more than simply "mitigate" damages; it conclusively shows that PHC has suffered *no reputational harm at all*. Whatever logic underlies PHC's concession also demands that the presumption be treated as completely rebutted where the evidence so demonstrates.

3. Any remand should be limited to nominal damages

PHC has not identified a single slander *per se* case in Delaware in which compensatory damages have been awarded in the face of unequivocal evidence that the plaintiff suffered no reputational harm. Instead, at various points in its brief, PHC alludes to nominal damages, without developing a full legal argument on the point. Appellant's Opening Br. 1 ("even if only nominal damages"); *id.* at 27 ("One who is liable for a slander actionable *per se* or for a libel is liable for at least nominal damages.") (quoting Restatement (Second) of Torts § 620 (1977)). Although PHC does not expressly seek a remand for proceedings in which it would seek nominal damages, and precedent does not require such a result, Nuveen acknowledges that this Court has the authority to order such relief. Alternatively, this Court could affirm the Superior Court's judgment without addressing nominal damages.

The Superior Court did not foreclose the possibility of nominal damages in slander *per se* cases where no reputational harm is proven. Indeed, the Superior Court recognized that "in the absence of proof of general damages, nominal damages *may* be awarded." 2022 WL 2276599, at *4 (emphasis added). In granting summary judgment, the court apparently did not construe PHC as seeking nominal damages, which was understandable where PHC said nothing about nominal damages when the Superior Court asked it whether the court's summary judgment ruling resolved all the issues in the case. PHC did not move for reconsideration, tell the court that it had misconstrued PHC's position, or otherwise advise the court that it would seek to proceed to trial on the basis of nominal damages. *See supra* at 16-17.

Because it appears that PHC has not pursued nominal damages in this case, this Court should affirm the Superior Court's summary judgment ruling. Alternatively, the Court may remand for proceedings on nominal damages.

II. THE SUPERIOR COURT CORRECTLY HELD THAT PHC FAILED TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT CONCERNING INJURY

A. Counterstatement of the Questions Presented (Response to PHC's Brief Point II)

Did the Superior Court correctly grant summary judgment to Nuveen in light of PHC's failure to present evidence demonstrating a genuine issue of material fact concerning reputational injury? Yes. (Preserved at A3106-19, A3252-65.)

B. Scope of Review

A trial court's grant of summary judgment is reviewed *de novo*. *Croda Inc. v. New Castle Cty.*, __ A.3d __, 2022 WL 2898848, at *3 (Del. July 22, 2022).

C. Merits of Argument

1. PHC's assertions fail to establish that any reputational harm was caused by slander

PHC contends that Nuveen engaged in a "campaign of threats and lies" (Appellant's Opening Br. 42)—*i.e.*, economic pressure as well as slander—and points to alleged harms resulting therefrom as evidence of injury in this case. The supposed economic pressure provides the ostensible basis for PHC's tortious interference and antitrust lawsuits in SDNY and the Court of Chancery.

But this case involves only ***slander***, by PHC's deliberate choice and design. Therefore, PHC must calibrate its injury and damages specifically to the alleged ***slander***—not alleged tortious interference or antitrust violations. A party must "tie"

its liability theory to "a calculation of damages." *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (internal quotation marks omitted). PHC improperly seeks to create a causation Cuisinart where it blends together all of Nuveen's conduct, rather than isolating any reputational harm attributable specifically to slander. In *Kanaga II*, this Court remanded a compensatory damages award because it failed to distinguish between humiliation (general) damages and pecuniary (special) damages brought in the same action. 750 A.2d at 1184. PHC not only fails to distinguish between general and special defamation damages, but among defamation, antitrust, and tortious interference damages.

Moreover, to survive summary judgment, PHC must adduce sufficient admissible evidence to establish a reasonable probability—not a mere possibility—that slander caused injury. "[A] plaintiff seeking recovery of damages in a tort action must establish causation and consequential damage" with "'reasonable probability.'" *Kanaga II*, 750 A.2d at 1188. "Mere possibility" of "proximate cause is not enough; there must be probability." *McGuire v. McCollum*, 116 A.2d 897, 900 (Del. Super. Ct. 1955).

Thus, this Court affirmed the grant of summary judgment in *Phillips v. Delaware Power & Light Co.*, 216 A.2d 281 (Del. 1966), where there was a possibility that plaintiff's injury had been caused by the defendant's wrongdoing that

was the subject of the claim, but "was just as likely to have been caused by" other factors. *Id.* at 284. This Court opined that "a plaintiff may not recover when he shows nothing more than mere possibility of causal connection between alleged wrongdoing and an injury." *Id*.

PHC's sole response is a legal one: it insists that it is Nuveen's burden to "segregate the harms caused by" the alleged defamation, tortious interference, and antitrust violations. Appellant's Opening Br. 41, n.7 (citing Restatement (Second) of Torts § 433A (1965)). But PHC is wrong. The principle it cites applies only where multiple causes of an injury have already been established, as where "two defendants independently shoot the plaintiff at the same time." Restatement (Second) of Torts § 433A cmt. b (1965). Here, PHC has failed its predicate burden of showing a reasonable probability that the ***alleged slander*** caused injury in the first place. The relevant Restatement section is 433B ("Burden of Proof"), which provides: "the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff." "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." Restatement (Second) of Torts § 433B cmt. a (1965).

2. The third-party evidence uniformly demonstrates that PHC did not suffer reputational harm

PHC claims that, after Nuveen's communications, [redacted] (Appellant's Opening Br. 14), [redacted] *id.* at 18, or took similar steps falling far short of proving reputational harm. But not a single broker-dealer ceased doing business with PHC as a result of Nuveen's communications. And PHC cannot quote ***any*** statement from ***any*** broker expressly attesting to reputational harm.

Thus, PHC's argument fails for the separate reason that the undisputed evidence refutes any assertion of reputational harm. "It is not enough that a plaintiff is merely annoyed or embarrassed; plaintiff's standing in the community must be 'grievously fractured.'" *Q-Tone Broad., Co. v. Musicradio of Maryland, Inc.*, 1994 WL 555391, at *4 (Del. Super. Ct. August 22, 1994) (citation omitted)). Moreover, "a defamed corporate plaintiff must show that the defamatory statements tend to prejudice the corporation in its business or to deter others from dealing with it." *Id.* PHC's argument fails this test.

a. Goldman Sachs

John Miller spoke with [redacted] at Goldman Sachs,[51] but the undisputed facts show [redacted] worked on the equivalent of a trading desk—he was not one of the bankers who could have presented PHC with a deal.[52] When [redacted] communicated with Goldman bankers about his call with John Miller, he did not mention any of the At-Issue Statements.[53] No injury to PHC was even possible.

PHC contends that Goldman "put [] Preston Hollow business on hold." Appellant's Opening Br. 13. But PHC has the sequence backwards. ***Before*** the Miller-[redacted] call, Goldman had never closed a no-bid 100% placement with PHC.[54] In contrast, ***after*** the call, Goldman—according to PHC's Head of Originations, Ramiro Albarran—"was trying to work out a way that Goldman Sachs would, in fact, be able to work with [PHC]" and was frequently in touch with him about potential deals.[55]

[51] B104-70.

[52] [redacted]

[53] [redacted]

[54] [redacted]

[55] B1109.

PHC has pointed to twelve potential opportunities it allegedly was discussing with Goldman in December 2018.[56] However, Mr. Albarran testified that he first discussed with Goldman at least eight of these twelve opportunities during a meeting in January 2019—***after*** the At-Issue Statements were made.[57]

After the January 2019 meeting,[58] Goldman began work on its internal guidelines regarding no-bid 100% placements.[59] Goldman's [redacted] and developed Goldman's guidelines, testified that [redacted][61]

[56] Appellant's Opening Br. 13.

[57] B1114, B1123, B1125-27.

[58] B1114.

[59] B1269-71.

[60] [redacted]

[61] [redacted]

Goldman's guidelines applied to all firms seeking 100% placements, not just PHC, and did not preclude PHC from working with Goldman.[62] Both Goldman and PHC submitted proposals for the Port of Greater Cincinnati Development Authority in November 2019.[63] [redacted][64] Neither Goldman nor PHC was selected.[65]

[redacted][66]

[67]

[62] [redacted]

[63] B687.

[64] B687.

[65] B1177-78.

[66] B1179.

[67] B1127.

PHC independently chose not to pursue seven of the other opportunities, and the remaining two failed to materialize into transactions.[68]

PHC also refers to a meeting between Miller and Goldman in January 2019. Appellant's Opening Br. 14. There is no evidence, and PHC has never claimed, that Miller made any defamatory statements during that meeting.

b. Deutsche Bank

PHC claims the At-Issue Statements caused Deutsche Bank to [redacted] PHC. Appellant's Opening Br. 14. But PHC cannot identify a single person at Deutsche Bank whose opinion of PHC changed as a result of the Statements.[69] The Court of Chancery found that "Deutsche did not reduce its business with [PHC]. … The record demonstrates a firm dedication by Deutsche to continue working with [PHC]." Chancery Opinion, at *16.

The undisputed testimony from Deutsche Bank's designated corporate representative is that Deutsche Bank heard Nuveen's accusations, [redacted]

[68] B1178-80.

[69] B1217.

[redacted][70] Ron Van Den Handel, the former Deutsche Bank employee who spoke with Nuveen, testified unequivocally that [redacted][71]

c. JPMorgan

PHC contends that Nuveen caused JPMorgan to "withdraw[] its expressed interest" in a PHC deal. Appellant's Opening Br. 15. But there is no evidence that Miller even uttered the At-Issue Statements to anyone at JPMorgan. The JPMorgan employee [redacted] who spoke to Miller could not recall Miller's using any of the At-Issue Statements[72] and could not even recall whether PHC was mentioned by name.[73] Another JPMorgan witness testified that [redacted] did not repeat any of the At-Issue Statements and never told him to curtail any business with PHC.[74]

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[70] A1814, A1818, A1820-21; B805-06. The testimony PHC quotes stating that "Deutsche Bank was [redacted] (Appellant's Opening Br. 14) came from Mr. Van Den Handel, a Deutsche Bank employee *who now works for PHC*. PHC mischaracterizes the testimony as coming from a Deutsche Bank corporate representative speaking for the company.

[71] A0919-20.

[72] [redacted]

[73] [redacted]

[74] A1761-62.

Moreover, the evidence shows that Nuveen did not affect PHC's relationship with JPMorgan. In February 2019, PHC approached JPMorgan to underwrite the Howard Quad deal, saying the deal was "baked" and conveying a sense of urgency to proceed.[75] JPMorgan declined due to [redacted][76] JPMorgan's [redacted] testified [redacted][77]

Howard Quad was not the first time JPMorgan expressed concerns about underwriting non-competitive deals, nor the first time it passed on a PHC deal. In fact, JPMorgan had never done any 100% placements with PHC, or anyone else, ***before*** December 2018, and it had not closed ***any*** new-issue transactions with PHC.[78] That JPMorgan has not underwritten a PHC deal in recent years is unsurprising—PHC did not bring any proposed deals to JPMorgan after Howard Quad.[79]

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[75] [redacted]

[76] [redacted]

[77] *Id.*

[78] A1755; Chancery Opinion, at *8, n.136; A1757 ("we haven't done underwritings to single purchasers.").

[79] A1785-86.

d. Wells Fargo

[redacted] the Wells Fargo employee with whom Miller discussed PHC, testified that [redacted][80]

PHC contends that Wells Fargo gave Nuveen a [redacted] on 100% placements. Appellant's Opening Br. 16. But such a [redacted] appears nowhere in the evidentiary record. In fact, [redacted][81] At most, Wells Fargo [redacted][82] which is a far cry from a [redacted] for Nuveen.

Regardless, PHC cannot show any injury to its relationship with Wells Fargo. PHC admits that Wells Fargo "concluded that PHC's deals were appropriate" and closed a transaction with PHC shortly after completing a transaction involving PHC and Roosevelt University.[83] Wells Fargo's [redacted] testified: [redacted]

[redacted]

[80] [redacted]

[81] A2421.

[82] A1059.

[83] Appellant's Opening Br. 17.

[redacted][84]

Indeed, [redacted][85] Since 2019, Wells Fargo also [redacted][86]

e. Citigroup

PHC asserts that, after a call with Miller, Citi vowed not to participate in "irresponsible deals." Appellant's Opening Br. 18. But Citi's [redacted] who spoke with Miller, testified that [redacted][87] Another Citi witness agreed.[88] [redacted] further testified that [redacted] Soon after the call with Miller, [redacted] spoke directly with a PHC executive and reassured

[84] [redacted]

[85] A2826.

[86] A2421.

[87] A2761.

[88] [redacted]

[89] [redacted]

him that "we want to do business with him and we are going to continue to do business with him."[90]

[redacted] also [redacted][91] And from January 2019 onward, [redacted][92] Citi continued to work with PHC and show PHC deals, with PHC being [redacted][93]

PHC asserts with no support that Citi's [redacted] was untruthful when he testified that Miller did not ask Citi to stop doing business with PHC. Appellant's Opening Br. 18 n.3. [redacted] testified consistent with [redacted][94] Contemporaneous call recordings further confirm [redacted] and [redacted] testimony.[95]

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90 [redacted]

91 [redacted]

92 [redacted]

93 [redacted]

94 [redacted]

95 [redacted] B183-84 ("I don't think anybody asked us…not to do business with [PHC]," "I think other people are misrepresenting [Miller's] frustration," and "[Miller] wants fair competition…yeah, that's all he wants.").

f. BAML

[redacted] of BAML received a call from Miller in December 2018. He testified that [redacted] deal. [redacted] specifically did not recall [redacted][96] He testified that [redacted][97]

PHC asserts that BAML "stop[ped] doing 100% placements with" PHC after the At-Issue Statements. Appellant's Opening Br. 19. But BAML underwrote no PHC transactions in 2017[98] and just a single PHC transaction in 2018—Howard Center.[99] BAML's [redacted] testified that [redacted][100] [redacted] made that decision a month *before* Miller's December 2018 call to [redacted][101] Undisputed testimony confirms that nothing

[96] [redacted]

[97] [redacted]

[98] A2832-35.

[99] A2828-31.

[100] [redacted]

[101] *Id.*

[redacted] later told [redacted] about Miller's call changed [redacted] earlier decision about [redacted][102] If anything, the record shows [redacted] came away from talking with [redacted] with a *higher* opinion of PHC.[103]

PHC wrongly asserts that since 2018 BAML has underwritten 100% placement deals for investors other than PHC.[104] PHC's description of the evidence is exactly *backwards.* [redacted] testified that [redacted][105] and PHC has not adduced any evidence to the contrary.

g. KeyBanc

PHC argues that KeyBanc became "concerned" about "reputational risk" after speaking with Miller. Appellant's Opening Br. 20. But there is no evidence that Miller's June 2018 call with KeyBanc involved any At-Issue statements, much less caused any harm to PHC's KeyBanc relationship.[106] The single deal KeyBanc allegedly declined, [redacted] fell apart *in 2017*, long before the June 2018 call.[107]

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[102] *Id.*

[103] [redacted]

[104] Appellant's Opening Br. 20.

[105] [redacted]

[106] B837-39.

[107] B1129.

Since Miller's June 2018 call, KeyBanc has remained interested in, pursued, and done business with PHC, including 100% placements.[108] KeyBanc brought opportunities to PHC, certain of which PHC turned down.[109] PHC's relationship with KeyBanc remains undiminished—KeyBanc's [redacted] who was on the June 2018 call with Miller, testified [redacted][110]

3. The Court of Chancery's opinion does not create a genuine issue of material fact

a. The Court of Chancery did not make any findings regarding injury, reputational harm, or damages from defamation

PHC tries to establish injury by pointing to the Court of Chancery's findings. Appellant's Opening Br. 38-41. But the Court of Chancery did not resolve issues of injury, reputational loss, or damages (let alone damages from defamation). PHC sought only injunctive relief and disclaimed damages as "speculative." *See supra* at 12. To the extent that Vice Chancellor Glasscock referenced harm or damage to

[108] A1990; A1498; A1981; A1983; A1985.

[109] B1103.

[110] [redacted]

PHC, he did so in the context of a tortious interference claim, not a defamation claim, and he analyzed the impact of economic pressure, not defamation. *Infra* at 60, 63-64. Although he referenced two Nuveen statements to Goldman Sachs in the context of analyzing Nuveen's defense that its conduct was privileged, *see* Chancery Opinion, at *17, Vice Chancellor Glasscock did not analyze whether PHC suffered any reputational loss as a result of those statements. Indeed, he had already dismissed the defamation claim.

PHC's four selective excerpts (Appellant's Opening Br. 39) about the "harm" found by Vice Chancellor Glasscock, when taken in context, demonstrate that he was not referring to reputational harm caused by defamatory statements, but rather was analyzing the elements of tortious interference. Two of PHC's examples—broker-dealer changes in policy and actions curtailing the business expectancies of PHC—were referenced under the heading "Nuveen's *[i]nterference* [p]roximately caused PHC [h]arm" (emphasis added) (*i.e.*, the third element of *tortious interference*). Chancery Opinion, at *12, *15. And the other two examples cited by PHC—that PHC was shut out and prevented access to exclusivity—were listed under the general heading of whether PHC had demonstrated the fourth element of *tortious interference*. *Id.* at *12, *16. There were no findings of reputational harm from slander.

Judge Johnston reviewed Vice Chancellor Glasscock's opinion and correctly found that he did not address damages, much less harm *from defamation*. In her December 15, 2020 order, she recognized that "whether PHC suffered any reputational loss" was a factual issue that the Court of Chancery had not decided. Collateral Estoppel Opinion, at *13. And in her June 14, 2022 order, she recognized that, in the Court of Chancery, "Defendant[s] did not present any evidence of damage." 2022 WL 2276599, at *2. The Superior Court concluded that Nuveen was entitled to elicit evidence on these issues. Collateral Estoppel Opinion, at *12. Nuveen has adduced that evidence, and it uniformly shows PHC suffered no reputational harm.

b. Collateral estoppel and law of the case do not apply

Even if Vice Chancellor Glasscock had decided the issue of reputational harm (and he did not), collateral estoppel and law of the case would not apply, as explained in Nuveen's Argument on Cross-Appeal, Part II, *infra*.

4. PHC's self-serving testimony does not create a genuine issue of material fact

a. The third-party testimony is undisputed

PHC also points to testimony from its own executives of supposed harm. Appellant's Opening Br. 45-46. But self-serving testimony does not satisfy a non-movant's summary judgment burden. *See Laymon v. Lobby House, Inc.*, 2008 WL

1733354, at *5-6 (D. Del. April 14, 2008) (granting summary judgment for defendant in slander case where "the only two exhibits on which plaintiff relie[d] as evidence of slander [were] her deposition testimony and her self-serving diary"); *Synygy*, 110 F. Supp. 3d at 616-17 (describing testimony from defamation plaintiff's own employees as insufficient to survive summary judgment).

PHC assails *Synygy*'s correctness as "questionable" and "out of step with Delaware law," and tries to cabin its relevance to publication (Appellant's Opening Br. 47 n.8) because a case two steps removed from *Synygy* cited to authorities that addressed publication. But PHC's criticisms are unfounded. The quoted section of the Restatement of Torts § 577 (1938)—"[U]nless the defamatory matter is communicated to a third person there has been no loss of reputation, since reputation is the estimation in which one's character is held by his neighbors or associates"—merely reinforces the unremarkable proposition that the gravamen of defamation is reputational harm *in the minds of third parties*; were it otherwise, a defendant could be held liable for a slander lobbed into the ether but never heard by a third party and thus incapable of producing reputational harm. This is entirely consistent with Delaware law, and PHC has not pointed to a single Delaware case stating that self-serving testimony by plaintiffs is sufficient to create a genuine issue of fact as to

others' perception of them—especially where, as here, third-party testimony is universally to the contrary.

A rule allowing plaintiffs to overcome contrary evidence through self-serving testimony on topics for which they have no personal knowledge would render the summary judgment procedure (and D.R.E. 602) a nullity. The Court should therefore affirm the Superior Court's determination that PHC's self-serving, "sheer speculation" is "insufficient to create a genuine issue of fact." *See* 2022 WL 2276599, at *5-6.

PHC's reliance on *Kanaga II* supports Nuveen's position, not PHC's. The quoted portion of that case relates to an individual plaintiff's testimony as to her personal experience of "daily humiliation and embarrassment," 750 A.2d at 1184, which is an issue on which a plaintiff would have a foundation of personal knowledge. Moreover, humiliation and embarrassment are not at issue vis-a-vis a corporate plaintiff like PHC.

Regardless, the Court need not adopt a categorical rule that the *only* way to prove reputational harm is through third-party testimony, although such testimony is the most common and logical way of proving reputational harm. Nuveen's point is simply that the evidence from broker-dealers is uniform and undisputed, and PHC has not overcome it.

b. Self-serving hearsay is inadmissible

The specific statements made by PHC executives do not fit into any hearsay exception that would make them admissible and would not create a material issue of fact even if they did. Here, too, the Superior Court's rejection of this evidence should be affirmed. *See* 2022 WL 2276599, at *6.

PHC's *sole* evidence regarding reputational harm in its declaration concerns a transaction called [redacted][111] First and foremost, [redacted] long before any of the At-Issue statements, so the allegation is not relevant to the slander claim. Second, PHC's witness is reporting *his impression* of what [redacted] *implied*, not reporting *what* [redacted] *said*. This removes the testimony from all of the hearsay exceptions concerning reputation (D.R.E. 803(21)), intention (D.R.E. 803(3)), and the residual exception in D.R.E. 807—because the testimony is not about *what was said*: there was no statement from [redacted] stopped doing business with PHC for reputational reasons. Further, the declaration has none of the indicia of trustworthiness required by the residual exception in D.R.E. 807: there are no "circumstantial guarantees of trustworthiness" such as a corroborative witness.

[111] A3230 ("I understood from [redacted] that those concerns were reputational concerns.").

Further, PHC's executive's "impressions" are not a material fact in this defamation suit, the evidence is not and cannot be more probative than *actual testimony to the contrary from* [redacted] and admitting it will serve no interest of fairness. PHC's executive declarations are inadmissible and irrelevant, and therefore cannot create a material issue of fact regarding reputational harm. *See Eaton v. Raven Transp., Inc.*, 2010 WL 4703397, at *4 (Del. Super. Ct. Nov. 15, 2010) (granting summary judgment where the plaintiff could not "make a *prima facie case* of slander because he offer[ed] only inadmissible hearsay to support his allegation"); *Williams v. United Parcel Serv. of Am., Inc.*, 2017 WL 10620619, at *2 (Del. Super. Ct. Nov. 9, 2017) ("The Court will not consider inadmissible hearsay when deciding a Motion for Summary Judgment …."); *Laymon*, 2008 WL 1733354, at *5 (declining to consider at summary judgment the plaintiff's "'evidence' regarding any comments attributed to" the defendant because they were "pure hearsay").

c. PHC's executives' testimony about the mental state of third parties is unduly speculative

PHC executives also testified concerning the mental states of third parties, about which they lack personal knowledge. *See* D.R.E. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Independent of any hearsay

concerns, their testimony regarding the mental state of others is rank speculation and thus inadmissible under D.R.E. 701, as well.

5. PHC's proffered experts do not create a genuine issue of material fact

PHC insists that its expert Goldstein's estimate of $629 million in losses due to reduced market share is sufficient to create an issue of material fact as to special damages. Appellant's Opening Br. 41-43. But Goldstein, who is the subject of a pending *Daubert* motion, did not analyze or opine upon *injury caused by defamation*.[112] Therefore, his analysis does not satisfy PHC's burden.

a. Goldstein assumed, without any evidence, that Nuveen caused PHC injury

At the "instruct[ion]" of PHC's attorneys, Goldstein "assume[d]" that a combination of Nuveen's alleged defamation, tortious interference, and antitrust violations—what he lumps together as "business interference"—"cause[d]" PHC's purported lost market share.[113] Indeed, his report expressly "does not address any issues of causation,"[114] and "do[es] not attempt to segregate" the damages caused by PHC's defamation claim from its tortious interference and antitrust claims.[115]

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[112] B1775-803.

[113] *See* A2566-67.

[114] A2566.

[115] *Id*.

PHC suggests that the timing of "[t]he dramatic decline" in PHC's business, alone, suffices to establish causation, and that a rational jury can infer that it "was not a coincidence" and that "Nuveen's statements caused it." Appellant's Opening Br. 42-43. But "[t]he case law is legion that an expert may not rely upon temporal proximity alone as a basis to reach a specific causation opinion." *Hopkins v. Astrazeneca Pharms., LP*, 2010 WL 1267219, at *10 (Del. Super. Ct. Mar. 31, 2010). In *Kanaga II*, for example, this Court held that a "'before/after' calculation of income" was impermissible. 750 A.2d at 1186. The plaintiff's expert "noted that she experienced a significant decrease in income in 1992 and 1993 and assumed that the reduction was attributable to the disputed article and to no other cause." *Id.* at 1186. This Court opined that "[t]he nature and extent of future consequences must be established with 'reasonable probability' or 'there can be no recovery for that item of damages.'" *Id.* at 1188 (citation omitted). The authority on which PHC relies (Appellant's Opening Br. 42-43 (citing Prosser & Keeton, Law of Torts, § 112 (5th ed. 1984))) requires the elimination of other causes, which the undisputed evidence shows PHC did not do.

PHC's assertion that Goldstein "considered and ruled out other causes" (*id.* at 42) is demonstrably false. Nuveen proffered evidence that PHC's business decline was due to other non-tortious potential causes, but Goldstein did not exclude any of

them, much less disclose a reliable methodology for doing so. For example, he never addressed the historic inflows into the municipal bond market at the end of 2018 and beginning of 2019 that made PHC's "product" highly unattractive to its primary customers, the bond issuers—who could get better deals (lower yields) on the public market.[116] Instead, Goldstein asserted that he conducted an alternative causes analysis by "eyeballing, but not by calculating."[117] But "eyeballing" does not "satisfy the dictates of *Daubert*." *Sanner v. Bd. of Trade of City of Chicago*, 2001 WL 1155277, at *7 (N.D. Ill. Sept. 28, 2001) (excluding expert opinion).

b. Lost market share is not a proper measure of special damages

Even if Goldstein's causation assumption had a reasonable basis (it does not), his $629 million estimate of damages from lost market share still would not suffice as proof of special damages. Special damages must be "specific" economic losses caused by the defamation. *See supra* at 19. Goldstein's damages figure, in contrast, is decidedly non-specific and untethered to defamation. Among other things, Goldstein's "lost market share" analysis is not limited to the universe of broker-dealers who heard the At-Issue Statements, did not take into account that PHC-

[116] A1880; B660; B706; A86, B1793-94.

[117] A3015. *See also* B1816-17 (noting Goldstein's reference to his so-called "eyeballing" methodology 8 separate times during his deposition).

initiated deals fell by a similar or greater percentage than those initiated by broker-dealers, and ignored the fact that PHC passed on many of the deals that were brought to it.[118]

PHC argues that its reliance on generalized market share is permissible because it is "impossible" for it to know which specific deals it lost because of the alleged defamation. Appellant's Opening Br. 42-43; *see also id.* citing Prosser & Keeton, Law of Torts, § 112, p. 794 n.16 (5th ed. 1984). But the parties have thoroughly analyzed the record of the six broker-dealers who heard the At-Issue Statements, and, without exception, the evidence shows that the Statements had no bearing on whether the broker-dealers engaged PHC. PHC tries to argue otherwise, but as shown above, *supra* at 31-42, the record refutes every one of PHC's examples.

[118] B1775-803.

NUVEEN'S ARGUMENT ON CROSS-APPEAL[119]

I. THE SUPERIOR COURT ERRED IN APPLYING DEFAMATION *PER SE* TO PHC'S CLAIMS

A. Question Presented

Did the Superior Court correctly determine that the defamation *per se* doctrine applies to this case, where the corporate plaintiff has failed to prove that the alleged defamation caused any actual harm whatsoever? No. (Preserved at A3122.)

B. Scope of Review

A trial court's determination of questions of law, such as the contours of the defamation *per se* doctrine as applied to a corporate plaintiff, is reviewed *de novo*. *Bay City, Inc. v. Williams*, 2 A.3d 1060, 1061 (Del. 2010). To the extent "[t]he issues before this Court involve the application of legal principles to undisputed facts," *Council of Unit Owners of Breakwater House Condominium v. Simpler*, 603 A.2d 792, 794 (Del. 1992), the "scope of review is whether the Superior Court erred as a matter of law in formulating or applying legal precepts," which warrants plenary review. *Delaware Alcoholic Beverage Wholesalers v. Ayers*, 504 A.2d 1077, 1081 (Del. 1986).

[119] If this Court affirms the Superior Court's award of summary judgment to Nuveen, and does not remand for further proceedings, it need not reach the issues raised in Nuveen's cross-appeal. If, however, the Court remands this matter for additional proceedings, Nuveen respectfully requests that it address all of Nuveen's cross-appeal arguments.

C. Merits of Argument

The Superior Court erred in allowing PHC to invoke slander *per se* as it applies to natural persons, for multiple reasons.

1. *Gertz* makes clear that a presumption of injury in defamation cases violates the First Amendment absent a showing of actual malice

In *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974), the U.S. Supreme Court held that the First Amendment precludes "recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id*. at 348-49. PHC cannot meet this standard.

PHC contends that *Gertz* does not apply because Nuveen's statements do not implicate matters of public concern. Appellant's Opening Br. 32-33. Neither the Superior Court nor Vice Chancellor Glasscock made any such finding. Indeed, Vice Chancellor Glasscock noted the public importance of the municipal bond market. Chancery Opinion, at *2. Municipal taxpayers have a strong financial interest in not overpaying for bonds and in ensuring that all entities, including PHC, comply with applicable regulations.

PHC's sole basis for contending that Nuveen acted with actual malice is to point to Vice Chancellor Glasscock's findings and to argue they are preclusive. Appellant's Opening Br. 32-33. But they are not, as shown in Part II, *infra*. Per *Gertz*, unless and until PHC makes a showing of actual malice, the First Amendment

precludes the application of any presumption. The Superior Court's contrary holding was in error and should be reversed.

2. Case law, the Restatement, and common sense support treating corporations and natural persons differently under the slander *per se* doctrine

This Court should hold that PHC is not entitled to invoke slander *per se* because that doctrine was designed with the dignitary needs of natural persons in mind, not corporations like PHC. The case at bar serves none of the policy justifications for slander *per se.* Prior Delaware cases have not addressed the question whether a corporation should be able to assert slander *per se* under Delaware law in the same manner a natural person could.[120]

This Court has explained the purposes of the *per se* doctrine in terms that apply to natural rather than corporate persons: it is "difficult to trace specific financial loss" where an individual's reputation is harmed and that "[o]ne who is defamed in one of

[120] *See, e.g., US Dominion, Inc. v. Fox News Network, LLC*, 2021 WL 5984265, at *28 (Del. Super. Ct. Dec. 16, 2021) (applying New York law); *Dasso Int'l, Inc. v. MOSO N. Am., Inc.*, 2020 WL 6287673, at *3 (D. Del. Oct. 27, 2020); *Optical Air Data Sys., LLC v. L-3 Commc'ns Corp.*, 2019 WL 328429, at *8 (Del. Super. Ct. Jan. 23, 2019); *Prof'l Investigating & Consulting Agency, Inc. v. Hewlett-Packard Co.*, 2015 WL 1417329, at *4 (Del. Super. Ct. Mar. 23, 2015); *Prof'l Investigating & Consulting Agency, Inc. v. Hewlett-Packard Co.*, 2014 WL 4627141, at *11 (Del. Super. Ct. Sept. 3, 2014); *Spanish Tiles, Ltd. v. Hensey*, 2005 WL 3981740, at *6 (Del. Super. Ct. Mar. 30, 2005); *Del. Exp. Shuttle, Inc. v. Older*, 2002 WL 31458243, at *22 (Del. Ch. Oct. 23, 2002); *Q-Tone*, 1994 WL 555391, at *5, *7-8.

these ways might never know the extent of a lost opportunity to relate to and associate with others." *Spence*, 396 A.2d at 970. Unlike a natural person, however, a corporation "cannot be embarrassed or humiliated. A corporation's analogue to humiliation would be damage to reputation—an injury that should translate into a pecuniary loss." *Synygy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp. 2d 570, 581 n.9 (E.D. Pa. 1999). The foundations for presuming harm articulated by *Spence* make no sense in the context of a corporation that has balance sheets and revenue statements.

For natural persons, loss of social relationships can have psychological harms. But corporations have no "feelings." For corporations, any lost business relationships are compensable in monetary terms. "The doctrine of defamation *per se* grew out of a need to provide individuals a remedy …. Businesses do not have personalities that are hurt so intangibly. If a business is damaged, the damage is usually reflected in the loss of revenues or profits." *CMI, Inc. v. Intoximeters, Inc.*, 918 F. Supp. 1068, 1084 (W.D. Ky. 1995). "The rationale behind defamation *per se* loses its force, however, when the victim is a corporation rather than an individual…. The rule of defamation *per se* as it applies to corporations has outrun its reason." *Synygy*, 51 F. Supp. 2d at 581 n.9.

3. Defamation *per se* should not apply to PHC in particular

Even if corporations might in *some cases* be entitled to assert claims of defamation *per se*, PHC should not be allowed to do so here. In this case, it is *not* "difficult to trace specific financial loss," if such loss had actually occurred. *Spence*, 396 A.2d at 970. PHC's own witness testified that it would be best "to ground that assessment" of "PHC's market reputation" "in a review of the transactions were completed in that period."[121] Here, such a review shows no harm to PHC's reputation.

Moreover, the record reflects a handful of oral statements made to six broker-dealers, not an article on the front page of the *Wall Street Journal*. PHC concedes that "[t]he high-yield municipal bond market is a relatively small, close-knit community of professionals." Appellant's Opening Br. 5. All relevant recipients of the Statements have provided testimony that the Statements did not affect PHC's reputation. In fact, *no* broker-dealer stopped doing business with PHC as a result of the Statements. Far from having no "chance to rebut the defamation," *Read*, 1995 WL 945544, at *3, PHC has many "channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements." *Agar v. Judy*, 151 A.3d 456, 478 (Del. Ch. 2017)

[121] A1850.

(internal citation omitted). Indeed, PHC "vigorously defended PHC's business practices" by directly refuting the Statements with all or nearly all of the "bulge bracket" firms, and directed a public relations firm to refute Nuveen's accusations. *Supra* at 9. In no sense is PHC in the same position as a natural-person defamation *per se* plaintiff.

II. THE TRIAL COURT ERRED IN APPLYING COLLATERAL ESTOPPEL AND LAW OF THE CASE TO CERTAIN COURT OF CHANCERY'S FINDINGS

A. Questions Presented

1. Did the Superior Court correctly determine that collateral estoppel precludes Nuveen from relitigating actual malice or falsity with respect to statements it made to Goldman Sachs? No. (Preserved at A1649-62).

2. Did the Superior Court correctly determine that the law of the case doctrine precludes Nuveen from relitigating actual malice or falsity with respect to statements it made to Goldman Sachs? No. (Preserved at A1735-42.)

B. Scope of Review

A trial court's application of both collateral estoppel and law of the case doctrine is reviewed *de novo*. *Rogers v. Morgan*, 208 A.3d 342, 346 (Del. 2019) (collateral estoppel); *Frederick-Conaway v. Baird*, 159 A.3d 285, 296 (Del. 2017) (law of the case).

C. Merits of Argument

1. The Superior Court erred as a matter of law in holding that collateral estoppel and law of the case apply to the Court of Chancery's findings

The Chancery Opinion focused on whether PHC was entitled to a permanent injunction for tortious interference with business relationships. Although the Court

of Chancery concluded that PHC had satisfied the elements of tortious interference, it denied injunctive relief because it found no ongoing threat of continuing harm.

The Chancery Opinion did not mention the word "defamation," "defame," "defamatory," or "slander" (except in the procedural history discussing the dismissed defamation claim). Nor did it include defamation-specific terms like "substantial truth" or "actual malice." Rather, the Court of Chancery referred to "misrepresentations" and "fraudulent misrepresentations" in the context of evaluating whether Nuveen had used wrongful means in competing with PHC and could avail itself of the business competition affirmative defense to tortious interference. Chancery Opinion, at *17. Under Delaware law, misrepresentation is not an element of tortious interference. *Agilent Techs. v. Kirkland*, 2009 WL 119865, at *5 (Del. Ch. Jan. 20, 2009).

Although Vice Chancellor Glasscock assiduously avoided any reference to "defamation" in the Chancery Opinion, the Superior Court nonetheless held that both collateral estoppel and the law of the case doctrine preclude Nuveen from litigating whether the two statements made to Goldman Sachs were false and were made with either knowledge of their falsity or reckless indifference to their truth. Because neither collateral estoppel nor law of the case applies, this Court should reverse the Superior Court's preclusion ruling.

a. The elements of collateral estoppel are not met

Delaware law imposes four requirements for application of collateral estoppel: "(1) the issue in the instant case must be identical to the issue concluded in the earlier action; (2) the issue must have been actually raised and fully litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination of the issue in the prior action must have been necessary and essential to the resulting judgment." *Elder v. El Di, Inc.*, 1997 WL 364049, at *8 (Del. Super. Ct. Apr. 24, 1997). The requirements for collateral estoppel are not met here.

"A determination ranks as necessary or essential only when the final outcome hinges on it." *Bobby v. Bies*, 556 U.S. 825, 835 (2009) (emphasis added). "If a judgment does not depend on a given determination, relitigation of that determination is not precluded." *Id.* at 834; *see also* 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4421 (2d ed. 2002).

The judgment (*i.e.*, "final outcome") in the Court of Chancery case was the denial of PHC's request for an injunction because it could not prove ongoing harm, and any subsidiary findings relating to Miller's statements to Goldman Sachs were thus not essential to that judgment. The Superior Court held, however, that the "judgment" consisted of three parts, including a holding that Nuveen committed

tortious interference, and that the findings relating to the Goldman Sachs statements were essential to that judgment. Collateral Estoppel Opinion, at *8.

As explained below, the judgment in this case—whether characterized as the denial of injunctive relief, as urged by Nuveen, or as a liability determination on tortious interference, as held by the Superior Court—did not depend on either the falsity of the Goldman Sachs statements or Mr. Miller's state of mind when making them. The Superior Court thus erred as a matter of law in holding that the requirements of collateral estoppel were met in this case.

(1) The misrepresentations are not "necessary and essential" to the denial of the injunctive relief

In the Court of Chancery, the "judgment" consisted of the denial of injunctive relief, which in turn depended on that court's finding that there was no ongoing threat of continuing harm. The court's determination that Miller made certain false statements to Goldman Sachs, and that those statements were made with knowledge that they were false, or with reckless indifference to their truth, had no bearing on whether there was a risk of continuing harm and thus was not essential to the judgment.

The collateral estoppel doctrine "bars relitigation of determinations necessary to the ultimate outcome of a prior proceeding…. [It] does not transform final judgment losers, in civil or criminal proceedings, into partially prevailing parties."

Bobby, 556 U.S. at 829. In *Hewitt v. Helms*, the Supreme Court explained that a plaintiff is a prevailing party only when he has "receive[d] at least some relief on the merits of his claim," *i.e.*, relief that "affects the behavior of the defendant towards the plaintiff." 482 U.S. 755, 760-61 (1987). In that case, where the plaintiff obtained a finding that his conviction was unconstitutional, but did not receive declaratory, monetary, or injunctive relief, the Court determined that he was not a prevailing party. The same reasoning applies here.

King Drug. Co. of Florence, Inc. v. Abbott Labs., 2022 WL 866681 (E.D. Pa. Mar. 23, 2022), is on all fours. There, the Eastern District of Pennsylvania denied a motion for issue preclusion where, as here, the party seeking preclusion had obtained a favorable finding in the earlier action but did not ultimately prevail. Relying on *Bobby* and *Hewitt*, the *King Drug* court denied the plaintiffs' preclusion motion "because the FTC was not the prevailing party" in the underlying lawsuit. *Id.* at *4. *See also U.S. v. Arpaio*, 951 F.3d 1001, 1007 (9th Cir. 2020) (guilty verdict followed by Presidential pardon would not have preclusive effect in future litigation because it "was not a determination essential to the actual, final judgment entered in [the] case," which was dismissal) (citing *Bobby*, 556 U.S. at 835); *Lane v. Bayview Loan Servicing, LLC*, 297 Va. 645, 658 (2019) (reversing trial court's application of

collateral estoppel where previous court ruled in defendant's favor on issue that was not essential to the denial of injunctive relief).

The Court of Chancery's determinations regarding the Goldman Sachs statements are ineligible for collateral estoppel.

(2) The "misrepresentations" are not "necessary and essential" to the tortious liability finding

Even if the final judgment in the Chancery case were construed as a liability determination as to tortious interference, the falsity and actual malice findings would still not be "necessary and essential." The Court of Chancery treated "economic pressure," which it set off in a separate sub-section of its opinion, as an independent reason for concluding that Nuveen could invoke the business competition affirmative defense to tortious interference. Chancery Opinion, at *17-18. PHC told the Court of Chancery that economic pressure, standing alone, was an "independent" basis for defeating that defense.[122]

That economic pressure, alone, sufficed to support the tortious interference finding is made plain by the fact that the Court of Chancery found tortious interference liability with respect to not only Goldman Sachs (to whom the misrepresentations were allegedly made), but also JPMorgan, Wells Fargo, Mesirow,

[122] B529, B533, B537.

Stifel, and KeyBanc, even though it did not find that Nuveen made any misstatements to those other entities. Chancery Opinion, at *15-16. Thus, any finding of tortious interference could stand without any reliance on misrepresentations.

Accordingly, the findings regarding misrepresentations were not "necessary and essential" and thus do not have preclusive effect. According to Restatement (Second) of Judgments § 27 (1982), which is followed by Delaware, where "a judgment of a court of first instance is based on determination of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." *See also Caravel Academy, Inc. v. Campbell*, 1987 WL 16720, at *2-3 (Del. Super. Ct. Aug. 6, 1987) (prior denial of unemployment benefits not preclusive where it rested on multiple grounds); *Hills Stores Co. v. Bozic*, 1997 WL 153823, at *5 and n.10 (Del. Ch. Mar. 25, 1997) (prior NY judgment interpreting settlement agreement not preclusive because it rested on alternative ground that claim was barred by letter); *Venetsanos v. Pappas*, 184 A. 489, 491 (Del. Ch. 1936) (prior court decision that partnership never existed was not preclusive because it rested on alternative ground that written partnership agreement was not validly delivered).

Although the Superior Court acknowledged this rule, it held that the Court of Chancery was viewing "different factors of Nuveen's actions *cumulatively* to

determine whether they were 'wrongful.'" Collateral Estoppel Opinion, at *8 (emphasis in original). But the Court of Chancery's opinion belies that characterization. In Vice Chancellor Glasscock's own words: "I find that Nuveen exerted improper economic pressure on [PHC], and so its actions regarding Goldman, JPMorgan, KeyBanc, Mesirow, Stifel, and Wells Fargo were not privileged by its right to lawfully compete." Chancery Opinion, at *18-19.

Thus, the Court of Chancery's misrepresentation findings lack preclusive effect. The Superior Court's holding to the contrary should be reversed.

b. Nuveen's right to a jury trial precludes the application of collateral estoppel

Even if the elements of collateral estoppel were met, fairness concerns would require denying preclusive effect to the Court of Chancery's misrepresentation findings. *See Ingram v. 1101 Stone Assocs., LLC*, 2004 WL 691770, at *8 (Del. Super. Ct. Mar. 18, 2004) ("Collateral estoppel will not apply if … its application causes an injustice to the precluded party"). In dismissing the defamation claim, the Court of Chancery observed that such claims "are subject to the findings made [in Superior Court] by juries regarding the speech of their peers." *PHC LLC v. Nuveen LLC*, 216 A.3d 1, 2 (Del. Ch. 2019).

Under Delaware law, "charges of slander are peculiarly adapted to and require trial by jury." *Organovo Holdings, Inc. v. Dimitrov*, 2017 WL 2417917, at *12 (Del.

Ch. June 5, 2017). Thus, "courts adhering to a common law tradition historically have reserved determinations of falsity and malice for the collective wisdom of a jury rather than cast a judge as the sole arbiter of defamation and libel." *Perlman v. Vox Media, Inc.*, 2019 WL 2647520, at *5 and n.50 (Del. Ch. June 27, 2019), *aff'd*, 249 A.3d 375 (Del. 2021) (collecting cases). Allowing collateral estoppel with respect to actual malice and falsity would frustrate Nuveen's right to a jury trial and work a significant injustice.

c. Law of the case does not apply

The Superior Court also erred in applying law of the case in this matter. The law of the case doctrine provides that "'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Musacchio v. U.S.*, 577 U.S. 237, 244-45 (2016) (quoting *Pepper v. U.S.*, 562 U.S. 476, 506 (2011)) (emphasis added). Law of the case does not apply to the Court of Chancery's misrepresentation findings.

First, law of the case is inapplicable here because this case is not the same as the proceeding before the Court of Chancery. Indeed, the "same proceeding" or "same case" requirement is what definitionally distinguishes law of the case from collateral estoppel. *See* 46 Am. Jur. 2d Judgments § 448 (2022) ("[T]he law of the case doctrine is distinct from issue preclusion, insofar as the latter applies to rulings

in different proceedings, and not simply different stages within the same proceeding.").

Thus, in contrast to collateral estoppel, law of the case applies to "the subsequent course of the same litigation." *Washington v. Delaware Transit Corp.*, 226 A.3d 202, 212 (Del. 2020) (quoting *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990)); *see also Frederick–Conaway*, 159 A.3d at 296 (doctrine applies "to decisions rendered by a court that arise again later in the same court, in the same proceedings—*i.e.*, a ruling at the summary judgment stage that also applies at the post-trial stage") (citation omitted); *Kanaga II*, 750 A.2d at 1181 ("same litigation"); *Frank G.W. v. Carol M.W.*, 457 A.2d 715, 718 (Del. 1983) ("same court"). Because the Court of Chancery case has concluded with a final judgment, the instant matter cannot fairly be characterized as a subsequent stage of the same "proceeding" as that case.

Notably, PHC had discretion whether to pursue this case in Superior Court. Had PHC taken no action after the Court of Chancery's dismissal, this case would not exist. The transfer statute PHC invoked (10 *Del. C.* § 1902) applies where the transferring court is "without jurisdiction." It requires a new filing fee, provides for a new docket number, and authorizes the transferee court, not the transferring court, to "entertain such applications in the proceeding as conform to law." The procedural rules confirm that this case is a separate action. Thus, law of the case does not apply.

Second, "[t]he law of the case only applies to reconsideration of *legal* issues. Hence, it does not apply to factual questions." *Advanced Litigation, LLC v. Herzka*, 2006 WL 2338044, at *5 (Del. Ch. Aug. 10, 2006) (emphasis in original). *See also Carlyle Investment Management L.L.C. v. Moonmouth Company S.A.*, 2015 WL 5278913, at *7 (Del. Ch. Sept. 10, 2015) ("law of the case doctrine applies only to questions of law"). The Superior Court thus erred in applying law of the case to the Court of Chancery's factual findings relating to misrepresentations made to Goldman Sachs.

CONCLUSION

The judgment of the Superior Court awarding summary judgment to Nuveen should be affirmed. If the Court reverses the summary judgment ruling, the Court should reach Nuveen's cross-appeal and: (i) hold PHC is not entitled to invoke any presumptions or benefits of the slander *per se* doctrine, and (ii) reverse the Superior Court's holding that the Court of Chancery's findings in the tortious interference case are subject to law of the case and collateral estoppel in this case.

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