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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S AMENDED ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Plaintiffs below/Appellants' ("Plaintiffs") arguments all arise from—but none of them cure—their failure to assert a timely claim.

In August 2012, *The Verge*, an online publication owned by Defendant below/Appellee Vox Media ("Defendant"), reported on the demise of OnLive, Inc., a California-based video game streaming company founded by Plaintiff Stephen Perlman. Perlman decided not to sue at the time, but changed his mind in 2014, filing this defamation action on behalf of himself and two of his companies, Rearden and Artemis. But Perlman had a problem: he and his companies reside in California, and that state's one-year statute of limitations had expired.

As a result, Plaintiffs sued in the Chancery Court, tacking on a prayer for injunctive relief, in the hope that Delaware's two-year limitations period or equity principles would save their claim. They also argued that a hyperlink in a 2014 *Verge* article linking back to one of the 2012 articles could revive the claim—a theory soundly rejected in courts around the country.

These efforts to circumvent the statute of limitations failed. Although the Chancery Court initially denied Defendant's motion to dismiss on the grounds that Plaintiffs' claims could survive the plaintiff-friendly "reasonably conceivable" standard, *Perlman v. Vox Media, Inc.*, 2015 WL 5724838 (Del. Ch. Sept. 30, 2015) ("*Perlman I*"), the Court later held that it lacked subject matter jurisdiction in light

of its subsequent decision in *Organovo Holdings, Inc. v. Dimitrov*, 162 A.3d 102 (Del. Ch. 2017). Exhibit A ("*Perlman II*" or "Exhibit A") to Plaintiff's Opening Brief ("O.B."). Plaintiffs then sued in Superior Court, which held that claims related to the 2012 Articles were time-barred by California's one-year statute of limitations, the hyperlink in the 2014 article was not a republication that could revive that claim, and the statements in the 2014 Article were substantially true and not "of and concerning" Plaintiffs. Exhibit B to O.B. ("*Perlman III*" or "Exhibit B").

Perlman II and *Perlman III* were correctly decided, and this Court should affirm them.

SUMMARY OF ARGUMENT

1. Defendant DENIES that the Chancery Court erred in ruling it lacked subject matter jurisdiction. Money damages are the traditional and an adequate remedy for defamation claims. While Plaintiffs may seek injunctive relief from the Chancery Court if they succeed in Superior Court, "the potential availability of permanent injunctive relief following an adjudication of falsity . . . cannot reach back to support equitable jurisdiction." *Organovo*, 162 A.3d at 124. Even if the Chancery Court had jurisdiction, laches bars Plaintiffs' claim as to the 2012 Articles.

2. Defendant ADMITS that under California law, republication occurs when the original statement is (a) substantively altered or added to, or (b) directed to a new audience. It DENIES that the Superior Court erred in ruling that the 2014 Article did neither. A hyperlink does not republish the linked article. The 2012 Articles remain unaltered since first published, and the 2014 Article does not add to, alter or direct them to a new audience.

3. Defendant DENIES the Superior Court erred in finding the 2014 Article is not defamatory. The Court correctly found the Defunct Statement was not of and concerning Plaintiffs, and was substantially true.

STATEMENT OF FACTS

A. Plaintiffs and OnLive

Entrepreneur Stephen Perlman ("Perlman") founded Rearden LLC ("Rearden") and Artemis Networks, LLC ("Artemis"). A865-A866 ¶¶ 12-14.[1] Perlman also founded non-party OnLive, Inc., which operated a video game streaming service by the same name (the "Service"). A867 ¶ 16. In August 2012, failing financially, OnLive, Inc. entered an Assignment for the Benefit of Creditors ("ABC"), transferring its assets, including the Service, to OL2, Inc. ("OL2"), an entity run by investor Gary Lauder ("Lauder"). *See* A737-A738(65:24-66:6).

B. The 2012 Articles

The Verge is an online publication of Vox Media covering technology, science, culture, and transportation. B00114-B00115, ¶¶ 1, 3.

On August 19, 2012, *The Verge* published "OnLive's bankruptcy protection filing leaves former employees in the dark," by Tracey Lien ("August 19 Article"). B00115, ¶ 4. Jane Anderson ("Anderson"), OnLive's head of public relations, contacted *The Verge*, claiming inaccuracies in the article. *See* A587(46:12-47:25); B00119-B00120, ¶ 3. After investigating, *The Verge* apologized to Anderson and assigned Sean Hollister ("Hollister"), to rewrite the article. *See* B00119-B00120, ¶ 3; A587-A588(49:1-24, 51:8-17). Within hours, *The Verge* removed the original

[1] Citations to Plaintiffs' Appendix and Defendants' Appendix are noted with the abbreviations "A__" and "B__", respectively.

and published a corrected version. B00119-B00120, ¶ 3; B00126-B00129. Perlman considered suing *The Verge* over the August 19 Article but decided against it because he did not consider the corrected version defamatory. *See* B00172-B00178 at (20(a)); A750-A751(117:17-118:4); A588-A589(52:22-53:3, 54:13-19).

On August 28, 2012, *The Verge* published another article by Hollister, "OnLive lost: how the paradise of streaming games was undone by one man's ego" ("August 28 Article," together with the August 19 Article, "2012 Articles"). B00115, ¶ 5; B00130-B00145. Perlman read the August 28 Article that day and believed it was a "complete fiction." A751 (20:5-8). He was immediately "concerned [the article] was going to harm the reputation of Rearden," that "it was going to harm [his] reputation," and that he "had to go and consider lots of potential legal consequences that were coming from this." A752(122:14-21); A593(72:18-24).

Nevertheless, Plaintiffs did not sue or seek a correction; instead they cut off ties with *The Verge* and ignored further contacts from Hollister. *See* A752 (122:20-123:1), A756(140:18-141:5), A767-A768(183:22-184:9, 185:5-7, 188:18-23); A593-A594(72:25-74:18); B00120-B00121, ¶¶ 5-7; B00122-B00125; *see also* B00258 (Perlman: "taking legal action against them for libel just would have exacerbated the situation"). Plaintiffs sued two years later.

C. Plaintiffs' Alleged "Self-Help" Efforts

Although Plaintiffs sat on their rights, in this litigation they claimed they had engaged in "self-help" to mitigate the harm the Articles allegedly caused. A759 (151:4-18); B00074-B00088; B00379-B00389. But Plaintiffs' "self-help" amounted to contacting a handful of publications to persuade them to remove references or hyperlinks to the 2012 Articles. *See* B00172-B00212 at 20. Plaintiffs only identified the following specific activities in the year after publication:

- **August 19 Article**: Other than contacting *The Verge*—which promptly corrected the article—Plaintiffs claim they spoke with one other publication on the day it was published. B00172-B00178 at 20(a). Thereafter, Plaintiffs claim to have "spoken about the content that was raised" in the article with "industry people" but cannot remember any "specifics." A591(62:1-65:13).

- **August 28 Article**: Plaintiffs claim they contacted three publications on August 28-29, 2012 to request (unsuccessfully) they remove references to the article, (B00184-B00190, at 20(d)-(f)), and "in the beginning of 2013. . . somewhere thereabouts, [or] maybe end of 2012," Perlman "researched what possible causes could result in the increasing elevation of [the Article's] search rankings" on Google. A764-A765(173:15-175:24); B00190-B00193, at 20(g). Concluding that a Wikipedia entry referencing the Article was driving up Google results, he hired a Wikipedia editor to revise the entry. B00190-B00193, at 20(g); A605(120:20-121:2).

The bulk of Plaintiffs' "self-help" efforts consist of a wholly speculative estimate that they devoted "[o]ver 1000 hours of Mr. Perlman's, Ms. Anderson's and Rearden's, and eventually Artemis' counsel's time, continuing to this day" responding to the 2012 Articles. B00181, at 20(c)(ii). But they have not been able to specify when these 1000 hours took place, what their efforts entailed, which third

parties they contacted, or the results. Perlman's explanation of the "over 1000 hours" was:

> So -- yeah, so I looked at a week as -- as 50 hours. It's also a nice round number. And then I say, okay, 20 weeks. All right. And it wasn't just me. It was other people. This has been going on for several years. And there's -- it -- it usually kind of erupts into a series of different things. . . .

A763-A764(169:24-170:6). Anderson could not quantify her or anyone else's contributions to the "over 1000 hours." A597-A598(88:21-90:18). Perlman again came up empty when asked to estimate how many hours his attorneys contributed. A764(171:21-172:4); A598(92:11-18); A701(68:20-23).

Nor are there documents to fill these gaps. Beyond Perlman's Googling of "search engine optimization" and a few one-off conversations with investors, Plaintiffs could not offer proof of "self-help" efforts between September 4, 2012 and March 11, 2014. B00179-B00184, at 20(c); B00190-B00193, at 20(g); A760-A762(157:7-160:18, 162:3-165:5); A597-A598(88:21-90:18). Nor have they produced billing records of their U.S. or foreign counsel. B00239-B00246; B00324-B00325, ¶24.

All remaining "self-help" took place in 2014 and 2015, after the limitations period expired. B00194-B00212, at 20(h)-(q).

D. The Wind-down of OnLive, Inc.

After the August 2012 ABC, OnLive, Inc. had "no assets or operations," "no officers or employees . . . [and] no records." B00524; B00528. Perlman resigned and appointed Russell Burbank ("Burbank") as the company's liquidating agent. *See* B00535-B00537; B00531-B00534; A648(16:17-20), A651-A652(29:21-30, 32:6-18, 33:18-21); B00524-B00530. The company never restarted operations, acquired assets, generated revenue, hired employees, held board meetings or paid taxes. B00168-B00170, at 11-14; A647-A648(12:17-14:7, 16:2-16), A653(36:4-23), A658 (55:9-17); B00550-B00552. Burbank and Craig Prim, OnLive, Inc.'s counsel before and after the ABC, acknowledged OnLive, Inc. was effectively "***defunct***." B00553-B00554; A662(73:1-14).

E. The OnLive Service After the ABC

After OL2 took over the Service, it went largely dormant until it "relaunched" in March 2014 with new subscription offerings; numerous publications noted its absence. B00568; B00573; B00582-B00583.

The Service shut down one year later. B00254. OL2 announced that Sony was "acquiring important parts of OnLive, and [Sony's] plans d[id]n't include a continuation of the game service in its current form," and that "[a]fter April 30, 2015, our data centers will shut down and the service will be offline. All accounts will be closed, and all data deleted . . . ." B00254.

F. The 2014 Article

On February 19, 2014, *The Verge* published "The man behind OnLive has a plan to fix your terrible cellphone service," by Aaron Souppouris ("2014 Article"). B00146-B00150. It opened, "Steve Perlman, the creator of the defunct game-streaming service OnLive, claims he has the answer to slow wireless service" ("Defunct Statement"). B00147. The phrase "defunct game-streaming service OnLive" hyperlinked to the August 28 Article. B00116, ¶ 9; B00147.

The Verge published the 2014 Article because Perlman's launch of pCell was newsworthy, and it linked to the August 28 Article to provide context. B00115-B00116, ¶¶ 7-9. The 2014 Article was not intended to target a new audience for the August 28 Article, and there is no evidence that it did. B00115-B00116, ¶¶ 7, 10; A775(214:9-13, 216:24-217:20). Rather, all record evidence establishes that *The Verge* directed the articles to the same audience and that the 2014 Article did not increase traffic to the 2012 Articles. B00116, ¶ 10; B00584-B00586.

Plaintiffs never contacted Defendant to dispute the 2014 Article or demand a correction. A756(140:18-141:5), A767(183:22-184:9); A593-A594(72:25-74:18); B00116, ¶ 11. They merely contacted two other publications to request removal of references to the 2014 Article. B00194-B00199, at 20(h)-(k).

ARGUMENT

I. THE CHANCERY COURT CORRECTLY HELD IT LACKED SUBJECT MATTER JURISDICTION

A. Questions Presented

Should this Court affirm the Chancery Court's holding that it lacks equitable jurisdiction over Plaintiffs' defamation suit?

B. Standard and Scope of Review

The granting of a motion for summary judgment is reviewed de novo. *Telxon Corp. v. Meyerson*, 802 A.2d 257 (Del. 2002). The scope of review on questions of subject matter jurisdiction is de novo. *See Sanders v. Sanders*, 570 A.2d 1189, 1191 (Del. 1990).

C. Merits of Argument

Relying on the "scholarly and thoughtful" decision in *Organovo Holdings, Inc. v. Dimitrov*, Vice Chancellor Slights held in *Perlman II* that the Chancery Court lacked subject matter jurisdiction over this action, a stand-alone defamation claim with a request for post-judgment injunctive relief. *See* Exhibit A at 2. Both *Organovo* and *Perlman II* were grounded in the principles that (1) courts of law should decide defamation cases due to their expertise in handling defamation claims and the availability of jury trials, (2) money damages are the traditional and an adequate remedy for defamation, and (3) though Plaintiffs may seek post-judgment injunctive relief in Chancery Court if successful in Superior Court, "the potential

availability of permanent injunctive relief following an adjudication of falsity . . . cannot reach back to support equitable jurisdiction." *Organovo*, 162 A.3d at 124. Plaintiffs present no basis for overturning this ruling.

The plaintiff bears the burden of establishing subject matter jurisdiction; in deciding whether the plaintiff has met this burden, the Court goes behind the "facade of prayers" to determine "the true nature of the claim." *Christiana Town Ctr., LLC v. New Castle Cty.*, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003), *aff'd*, 841 A.2d 307 (Del. 2004).

> By this it is meant that a judge in equity will take a practical view of the complaint, and will not permit a suit to be brought in Chancery where a complete legal remedy otherwise exists but where the plaintiff has prayed for some type of traditional equitable relief as a kind of formulaic "open sesame" to the Court of Chancery. A practical analysis of the adequacy of any legal remedy, then, must be the point of departure for each matter which comes before this Court.

IBM Corp. v. Comdisco, Inc., 602 A.2d 74, 78 (Del. Ch. 1991).[2]

The "true nature" of Plaintiffs' claim here is defamation, a tort that sounds in law and is traditionally remedied through money damages. *Organovo*, 162 A.3d at 113; *see Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 23 (1990) ("[I]mperfect

[2] Whether the Chancery Court has subject matter jurisdiction over an action is non-waivable and may be raised by the parties or the Court at any time. Del. Ch. R. 12(h)(3). *Organovo* – the basis for Defendant's challenge – had not been decided at the time of *Perlman I*.

though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored."). As Vice Chancellor Slights, the *Organovo* court, and as decisions issued after *Organovo* have held,[3] the mere request for injunctive relief in a defamation case does not vest the Chancery Court with jurisdiction. *Organovo*, 162 A.3d at 114.

Nevertheless, Plaintiffs argue on appeal that money damages – a remedy they seek[4] – is an inadequate remedy and thus the Chancery Court should have jurisdiction. Plaintiffs' argument fails for multiple reasons.

First, though Plaintiffs argue *Organovo* held that the Chancery Court only lacks jurisdiction to issue an injunction against *future* defamation – not to order the removal of a past defamation – Vice Chancellor Slights correctly observed that the

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[3] *See, e.g.*, *Preston Hollow Capital LLC v. Nuveen LLC*, 216 A.3d 1, 16 (Del. Ch. 2019) (no jurisdiction over stand-alone slander claim even where plaintiff sought only injunctive relief); *Dunn v. FastMed Urgent Care, P.C.*, 2019 WL 4131010, at *18 (Del. Ch. Aug. 30, 2019) (same); *Law Offices of Sean M. Lynn, PA v. John Doe No. 1*, 2020 WL 5763904, at *2 (Del. Ch. Sep. 25, 2020) (ordering plaintiff to show cause why defamation and false light claims should not be dismissed for lack of subject matter jurisdiction); *Lynn v. Edwards*, 2020 WL 6037165, at *1 (Del. Ch. Oct. 09, 2020) (ordering defamation claim dismissed for lack of subject matter jurisdiction with leave to refile in Superior Court).

[4] *See* A94 ¶ 11 (seeking damages). Further, among the "irreparable harms" Plaintiffs claim are "lost business opportunities and lost investments," both compensable by damages. A151-A153 ¶¶ 108-10; *Danias v. Fakis*, 261 A.2d 529, 531-32 (Del. Super. 1969) (special damages include "material loss capable of being measured in money with approximate exactness"); ROBERT D. SACK, SACK ON DEFAMATION, § 10.5.1 (2008) ("Where the plaintiff loses money as a result of the defamation, that loss, when proved, can of course be the basis for an award.").

nature of the relief sought in *Organovo* "did not animate or alter the court's thorough discussion of defamation as a claim uniquely suited for adjudication by a law court, and specifically, if either party demands, by a jury." Exhibit A at 12. Indeed, the *Organovo* court held that with just two exceptions—trade libel and adjudicated falsehoods—"a court of equity generally cannot issue an injunction in a defamation case." 162 A.3d at 119. *Organovo* had general applicability to libel claims.[5]

Second, Plaintiffs claim that this case is unique and the harm inflicted so profound that they have no adequate remedy at law. They are mistaken. Defamation is a legal cause of action, and courts have long held that absent extraordinary circumstances – such as intimidation or coercion – money damages are an adequate remedy. *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees and Rest. Employees Int'l Union*, 239 F.3d 172, 177 (2d Cir. 2001); *Kramer v. Thompson*, 947 F.2d 666, 677-78 (3d Cir. 1991) (citing cases). There are no extraordinary circumstances here.

Third, Plaintiffs argue they cannot get a "full, fair, and practical remedy" with a money damages award because of the continued accessibility of the Articles on *The Verge*, and cite irrelevant "evidence" that the internet as a medium has allowed

[5] The Chancery Court may also exercise original jurisdiction over a defamation claim under the clean-up doctrine, which is not at issue here. *Organovo*, 162 A.3d at 125-26.

the Articles to persist.[6] The continued availability of the Articles has no bearing on the adequacy of money damages as a *remedy*. Critically, Defendant has not been found liable for defamation; it has vigorously (and successfully) defended against Plaintiffs' claim for over six years, and has every right to keep the Articles posted. Should Plaintiffs succeed on their claim, the Articles' continued availability pre-judgment may factor into damages – but it does not render damages an inadequate remedy.

Fourth, Plaintiffs argue money damages are inadequate because if the Articles remain online *after* an adjudication of falsity, Plaintiffs would need to file repetitive lawsuits to pursue a series of retrospective damages awards. But this risk is illusory. As Plaintiffs acknowledge, "[t]he *Organovo* Court identified two narrow exceptions where the Court of Chancery may exercise jurisdiction over defamation claims: trade libel claims and *requests for 'narrow relief after a final adjudication*

[6] Plaintiffs claim that other publications' links to the August 28 Article perpetuated the Articles and rendered money damages an inadequate remedy. But Plaintiffs cite a single November 2019 email exchange about an article that allegedly linked to the August 28 Article in support of this theory, and the link was removed within days of publication. *See* O.B. at 16 (citing A1225-29). Further, Plaintiffs rely on a now-seven-year-old Google search to claim that the August 28 Article remains a top hit when searching "Steve Perlman." O.B. at 15 (citing A1231). But as of January 2019, that same search would not yield the Articles in at least the first **16** pages of results. B00416-B00430. As Perlman himself opined months before filing suit, "[N]o one Googles OnLive (it doesn't appear if you Google "Steve Perlman" or "pCell"), and even Wikipedia's citizen editors recognize [the August 28 Article] as crap and never reference it." B00256-B00260.

of falsity.'" O.B. at 22, n.10 (emphasis added). Should a Superior Court jury hold Defendant liable, Plaintiffs could "seek equity's intervention" to compel removal. Ex. A at 12. This could be accomplished by transferring to Chancery, or "the assigned Superior Court judge can be designated as a Vice Chancellor to provide the suitable equitable remedy." Ex. A at 14. But the Chancery Court does not have equitable jurisdiction in the first instance. Ex. A at 12, n. 54 (citing *Organovo,* 163 A.3d at 124).

Fifth, Plaintiffs ask this Court to disregard the longstanding preference for juries to resolve defamation claims.[7] O.B. at 23-24. They claim the internet has so fundamentally changed how news is distributed – i.e., articles remain continuously accessible and in the control of the publishers – that equity courts should take the extraordinary step of removing defamation cases from juries and install judges as their sole arbiters.

However, they do not explain why the last twenty-plus years of news distribution via the internet has made juries obsolete for defamation cases—nor why the procedures outlined in *Perlman I* or *Organovo* for trying the case in Superior Court and seeking post-judgment injunctive relief (if necessary) are suddenly inadequate. The Superior Court is uniquely suited to adjudicate defamation claims

[7] *See* Exhibit A at 11, n.50 (collecting cases); *see also* Del. Const. art. I, § 5 ("[I]n all indictments for libels the jury may determine the facts and the law, as in other cases").

because jury trials are available, and has long been the "primary forum for adjudicating defamation claims" in Delaware. *Organovo*, 162 A.3d at 125.

Lastly, Plaintiffs' argument that they have no adequate remedy at law is simply a pretext for avoiding the time-bar. The law permits Plaintiffs to obtain money damages in Superior Court and, if necessary, pursue post-judgment injunctive relief in Chancery Court, the exact remedies they seek here. It is plain they seek to return to Chancery Court because it gives them the best chance of skirting the California limitations period and keeping their claims alive.[8] In sum, they are forum shopping. Vice Chancellor Slights understood this, instructing "[e]quity and law courts should not be placed in the position of competing for litigation nor should [a] [p]laintiff be afforded a choice of forums." Exhibit A at 11, n.11 (quoting *Organovo*, 162 A.3d at 125).

For all of these reasons, the Court should affirm the Chancery Court's ruling that it lacks jurisdiction over this case.

[8] California substantive law applies to this case. A222; Ex. B at 8.

II. EVEN IF THE CHANCERY COURT HAS JURISDICTION, PLAINTIFFS' CLAIMS REGARDING THE 2012 ARTICLES ARE BARRED BY LACHES

A. Questions Presented

Are Plaintiffs' claims regarding the 2012 Articles barred by laches?

B. Standard and Scope of Review

Review of a grant of a motion for summary judgment is *de novo*. *Telxon Corp.*, 802 A.2d at 262. This Court may rule on an issue fairly presented to the trial court, even if not addressed by that court. *Id.* at 263; A463-478.

C. Merits of Argument

Even if this Court finds that the Chancery Court *does* have equitable jurisdiction over Plaintiffs' claim, the Court should affirm summary judgment in favor of Defendant because Plaintiffs' claims arising out of the 2012 Articles are barred by laches.

Laches requires (1) knowledge by the claimant, (2) unreasonable delay in bringing the claim; and (3) resulting prejudice to the defendant. *See CMS Inv. Holdings, LLC v. Castle*, 2016 WL 4411328, at *2 (Del. Ch. Aug. 19, 2016). There is no dispute that Plaintiffs immediately knew of the 2012 Articles and were aware of their purported harm. A750-A752 (114:10-115:24, 122:14-21); A588 (53:19-25),

A593(72:18-24).[9] And as set forth below, it is uncontroverted that Plaintiffs unreasonably delayed bringing their claim and that delay prejudiced Defendant.

1. Plaintiffs Unreasonably Delayed Bringing Their Claim

When legal claims are brought in Chancery, the Court gives "great weight" to the analogous statute of limitations at law. *CMS*, 2016 WL 4411328 at *2 (quoting *Whittington v. Dragon Gr.*, LLC, 991 A.2d 1, 9 (Del. 2009)). "A filing after the expiration of the analogous limitations period is presumptively an unreasonable delay for purposes of laches." *Levey v. Brownstone Asset Mgmt, LP*, 76 A.3d 764, 769 (Del. 2013). This follows from the rationale of laches: "equity aids the vigilant, not those who slumber on their rights." *Whittington*, 991 A.2d at 8.

There are "few cases" where the applicable limitations period should *not* bar late claims, because of "unusual conditions or extraordinary circumstances." *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009). *IAC/Interactive Corp. v. O'Brien*, 26 A.3d 174 (Del. 2011), set out five situations that may make a case sufficiently extraordinary to deviate from the limitations period:

[9] To the extent Plaintiffs argue that they didn't understand the full extent of the harm until certain deals failed, "defamation claims accrue on the date the alleged defamatory statement is communicated to a third party," *not* when the plaintiff recognizes the full extent of the harm. *Naples v. New Castle Cty.*, 2015 WL 1478206, at *11 (Del. Super. Mar. 20, 2015). *See also Kraft v. Wisdom Tree Invest., Inc.*, 145 A.3d 969, 989 (Del. Ch. 2016) (limitation period "begins to run from the time of the wrongful act, without regard for whether the plaintiff became aware of the wrongdoing at that time").

> 1) whether the plaintiff had been pursuing his claim, through litigation or otherwise, before the statute of limitations expired; 2) whether the delay in filing suit was attributable to a material and unforeseeable change in the parties' personal or financial circumstances; 3) whether the delay in filing suit was attributable to a legal determination in another jurisdiction; 4) the extent to which the defendant was aware of, or participated in, any prior proceedings; and 5) whether, at the time this litigation was filed, there was a bona fide dispute as to the validity of the claim.

Id. at 178. In Chancery Court, Plaintiffs claimed that they had pursued their claim under *O'Brien* factor one through extra-judicial "self-help," justifying an extension of the limitations period.[10]

However, this Court has framed the factor one inquiry as "whether the plaintiff had been pursuing his claim, through litigation or otherwise, *before the statute of limitations expired*," *O'Brien*, 26 A.3d at 178, and as whether plaintiff "asserted his claim" through litigation or otherwise. *Levey*, 76 A.3d at 771. "Pursuing" or "asserting" one's claim may mean litigating it in court, arbitrating, mediating or otherwise disputing or attempting to resolve the claim with the

[10] Plaintiffs' counsel expressly waived factor 2. A703(76:6-22). As for Factors 3 and 4, there were *no* relevant prior proceedings or legal determinations, and Plaintiffs indicated that *no* documents exist concerning any investigations, complaints, judgments, or liens against Plaintiffs. B00169-B00171, at 12-17; B00231, at 7-8. Plaintiffs never invoked Factor 5, nor have they produced any evidence of a bona fide dispute as to the validity of the claim, and they testified that they believed the articles were defamatory and false immediately when they were published. A588-A589(53:4-54:19), A593(71:21-72:24); A752(122:14-21).

opposing party—but not trying to correct the record with third parties *without ever reaching out to the defendant*.

Each time this Court has addressed what sort of self-help could reach the "extraordinary" threshold under *O'Brien*, it has focused on plaintiffs' efforts to vindicate their claim through litigation or arbitration in other fora or, at the very least, directly engaging with defendants regarding the claim. *See Reid*, 970 A.2d at 184 (plaintiff filed federal lawsuit in Texas, refiled in Texas state court, litigated to state supreme court, petitioned U.S. Supreme Court, and finally filed in Chancery Court; claim not barred by laches because plaintiff "promptly and vigorously pursued" his claims, acted in good faith, and put his adversaries on notice); *O'Brien*, 26 A.3d at 175-178 (plaintiff litigated claim against employer in Florida, employer went bankrupt, plaintiff filed in Chancery Court seeking indemnification from employer's parent company; claim not barred by laches because parent, which was ultimately responsible for any monetary award, controlled the Florida litigation, and described itself as "the real party in interest."); *Levey*, 76 A.3d at 766-67 (claim not barred by laches because plaintiff timely asserted a counterclaim in New York suit, was compelled to arbitration on his counterclaim, but FINRA declined jurisdiction;

plaintiff also wrote defendants, demanding payment on his claims and threatening to pursue "the full range of available legal remedies").[11]

By contrast, where plaintiffs make negligible or unsubstantiated efforts to pursue their claims during the limitations period, courts hold their claims time-barred. *See, e.g.*, *Akrout v. Jarkoy*, 2018 WL 3361401, at *10 (Del. Ch. July 10, 2018) (plaintiff could offer no "details about when he reached out to [the employer] and with whom he spoke, both of which . . . would be at the heart of any tolling doctrine [he] might seek to invoke."); *BioVeris Corp. v. Meso Scale Diagnostics, LLC*, 2017 WL 5035530, at *12 (Del. Ch. Nov. 2, 2017) (plaintiff "merely sent two letters" to defendant before limitations period expired).

Here, noting that affirmative defenses "are not ordinarily well-suited for disposition on [a motion to dismiss]," A224, Vice Chancellor Parsons found it "reasonably conceivable" based on the pleadings that (1) Plaintiffs diligently

[11] In *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1162–63 (Del. Super. 2010), the Court did not evaluate the issue under *O'Brien*, but held that plaintiff had not unreasonably delayed in bringing a claim by demanding specific performance of a real property contract, four months after the expiration of the limitations period. During the limitations period, the plaintiff completed his own performance, informed plaintiff of her obligation to transfer the deed, provided plaintiff's heir with the contract, and "asserted that he had a property interest" in the house; the heir initiated litigation against defendant over the dispute; and defendant answered that suit but did not file his counterclaim until four months after the limitations period. Further, the Court emphasized the parties' "close personal relationship and course of dealing over twenty years," based on which plaintiff "had no reason to believe that he would not receive the deed at some point." *Id.* at 1163.

pursued their claim and (2) Defendant "was aware of Plaintiffs' extra-judicial efforts to remedy the harm to their reputations." A226. But Plaintiffs established neither element through discovery.

Initially, Plaintiffs never notified Defendant that they disputed any aspect of the August 28 Article during the limitations period. A767(183:22-184:9); A593-A594(72:25-74:18); B00120-B00121, ¶¶ 5-8, B00123-B00125. Plaintiffs cut off ties with *The Verge* after August 28, 2012, not filing a complaint until two years later. B00116, ¶¶ 11-12; B00121, ¶¶ 6-8; A767(183:22-184:9); A593-A594(72:25-74:18). Yet the record shows that contacting Defendant about the August 28 Article would have yielded swift results. When *The Verge* receives complaints concerning the accuracy of its publications, it promptly investigates those claims, and issues retractions or corrections when appropriate. B00117, ¶ 13. Thus, when Anderson contacted *The Verge* on the day the August 19 Article was published, *The Verge* editors immediately investigated her concerns, removed the article, issued a retraction, and published a revised article that Plaintiffs agree is not defamatory. B00115, ¶ 4; A587-A589(46:12-54:18); B00119-B00120, ¶ 3. Plaintiffs cannot satisfy *O'Brien* factor one because they did not engage with Defendant.

In any event, Plaintiffs' minimal "self-help" efforts do not merit "extraordinary" treatment. The only actions relevant here are those during the one-year limitations period – before August 28, 2013. *O'Brien*, 26 A.3d at 178; *see*

Akrout, 2018 WL 3361401, at *10. Plaintiffs did *not* actively pursue their claim during that period. They identify only a handful of instances during the first few days of the period where they reached out to other publications to request they remove references to the 2012 Articles. B00173-B00178, at 20(a), B00184-B00190, at 20(d)-(f). They cannot identify a single self-help activity between September 4, 2012 and March 11, 2014. Their only attempt to fill that gap was to allege, without support, that they engaged in "over 1000 hours" of "self-help" and that Perlman conducted research on search engine optimization "in the beginning of 2013. . . somewhere thereabouts, [or] maybe end of 2012." *See supra* at 6-7; A764-A765(173:24-174:5). All remaining instances of "self-help" occurred in 2014 and 2015, long after the one-year limitations period expired. B00194-B00212, 20(h)-(q).

Upholding Plaintiffs' novel laches theory would set a dangerous precedent. A plaintiff that engages in routine public relations efforts would be able to circumvent the limitations period without even hinting at the possibility of a claim during the limitations period, opening the floodgates to late claims and denying defendants the certainty and repose that statutes of limitations provide.

2. Plaintiffs' Delay Prejudiced Defendant

The Chancery Court has repeatedly held that it "may presume prejudice if the claim is brought after the analogous limitations period has expired"—as here. *Kraft*,

145 A.3d at 979. *See also Akrout*, 2018 WL 3361401, at *10; *CMS*, 2016 WL 4411328, at *2; *In re Sirius XM S'holder Litig*., 2013 WL 5411268, at *4 (Del. Ch. Sept. 27, 2013). Even without that presumption, the record demonstrates Defendant's prejudice here.

First, few records, if any, concerning OnLive's operations before the ABC—the subject of almost all statements at issue—still appear to exist. When OnLive, Inc. ceased operations in August 2012, it purportedly transferred its data to OL2. It remains unclear how much data was transferred, whether the data still exists, and where it is. Perlman does not recall any specifics. A747-A748(105:17-107:25). Defendant could obtain no discovery from Lauder or OL2 about the data's whereabouts. B00328-B00333; B00261- B00317. And OL2 announced in April 2015 that its "data centers will shut down and the service will be offline [and] [a]ll accounts will be closed, and all data deleted . . . ." B00254. If litigation proceeds, Defendant will have no access to documents concerning OnLive's operations—information critical to establishing the truth of the challenged statements.

Second, the loss or erosion of memory in the years since the 2012 Articles were published has prejudiced and will prejudice Defendant. Even Perlman struggled to recall relevant information during his deposition. A747-A748(105:17-107:25), A764(171:21-172:4). Obtaining testimony from other witnesses will be equally or more difficult.

Third, Plaintiffs failed to produce billing records for the law firm that purportedly helped in their "self-help" efforts, because the firm dissolved in November 2014—making it impossible to probe Plaintiffs' purported "self-help" efforts. B00239- B00248.

Altogether, substantial evidence has been lost since the publication of the 2012 Articles, to Defendant's great prejudice. For all of these reasons, Plaintiffs' claim as to the 2012 Articles are barred by laches.

III. THE 2014 ARTICLE DID NOT REPUBLISH THE 2012 ARTICLES

A. Questions Presented

Should this Court affirm the Superior Court's holding that the hyperlink in the 2014 Article did not republish the August 28 Article?

B. Standard and Scope of Review

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

C. Merits of Argument

Recognizing their claim as to the 2012 Articles was time-barred, Plaintiffs argued that a hyperlink in the 2014 Article republished the August 28 Article, restarting the statute of limitations. The Superior Court correctly rejected Plaintiffs' theory. Exhibit B at 20-21. Hyperlinking – an essential feature of the internet and modern journalism – is *not* a republication that restarts the limitations period on time-barred articles.

A bedrock principle of defamation law is that plaintiffs may not recover more than once based on a single publication. *See* Cal. Code Civ. Pro. § 3425.3. The sole exception is that a *republication* gives rise to a new claim and restarts the limitations period. *Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir. 2012), *aff'd*, 495 F. App'x 780 (2012). Under California law, a statement on a website is only republished when "[1] the statement itself is substantively altered or added to, or [2] the website is directed to a new audience." *Id*. at 1082; *see also Christoff v. Nestle USA*, 62 Cal.

Rptr. 3d 122, 139 (Cal. Ct. App. 2007), *rev'd in part on other grounds*, 47 Cal.4th 468 (Cal. 2009).

A hyperlink to a time-barred article in a later article does not satisfy either of these elements. Courts around the country, including the Superior Court here, have held that linking is not republication. *Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 506-07 (6th Cir. 2015) ("[A]n online statement is not republished every time that its window dressing is altered."); *In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012) ("[T]hough a link and reference may bring readers' attention to the existence of an article, they do not republish the article."); *Martin v. Daily News L.P.*, 121 A.D.3d 90, 103 (N.Y. App. 1st Dep't 2014) ("[C]ontinuous access to an article posted via hyperlinks to a website is not a republication."); *Penaherrera v N.Y. Times Co.*, 2013 WL 4013487, at *6 (Sup. Ct. N.Y. Cty. Aug. 08, 2013) ("The inclusion of hyperlinks in an internet publication . . . is not a republication.") (citation omitted); *Shepard v. TheHuffingtonPost.com, Inc.*, 2012 WL 5584615, at *2 (D. Minn. Nov. 15, 2012), *aff'd*, 509 F. App'x. 556 (Mem.) (8th Cir. 2013); *U.S. ex rel. Klein v. Omeros Corp.*, 897 F. Supp. 2d 1058, 1074 (W.D. Wash. 2012); *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, 2007 WL 935703, at *7 (S.D. Cal. Mar. 7, 2007).

Notwithstanding this precedent, and Plaintiffs' concession that "mere hyperlinks" do not pose a republication issue (B00636, 33:15-16; B00652, 49:2-8),

Plaintiffs' entire republication argument rests on a hyperlink. Plaintiffs try to shoehorn its claim into the republication test – they claim their hyperlink is a "substantive hyperlink" (a concept they invented out of whole cloth), and parse *The Verge*'s audience in a feeble attempt to show the hyperlink directed the 2012 Articles to a new audience – and they even propose a new rule, which no court has adopted, that a "conscious decision" to include a hyperlink somehow republishes the linked-to article. None of this refutes the clear precedent above.

Plaintiffs' analysis is also flawed because it relies on the Chancery Court's motion to dismiss decision as binding precedent while ignoring the different standard for such a motion. Plaintiffs claim Vice Chancellor Parsons held "as a matter of law" that the hyperlink in the 2014 Article republished the 2012 Articles. *See* O.B. at 30-32. But *Perlman I* was based on the "familiar, plaintiff-friendly standard of review on a motion to dismiss." Exhibit A at 45. It "allowed for the possibility" that through discovery Plaintiffs may be able to prove republication. Exhibit B at 21. It concluded: "[i]t may be that the 2014 Article did not enhance or modify the allegedly defamatory statements in the 2012 Articles or direct those statements to a new audience, but those questions will have to await further development of the record in this case." Exhibit A at 49.

For the following reasons, the Court should affirm the Superior Court's dismissal of Plaintiffs' republication argument.

1. The 2012 Articles Were Not Altered

The Superior Court below properly rejected Plaintiffs' claim that the 2014 Article altered or added to the 2012 Articles. Overwhelming authority holds that an online article is "altered or added to" only if the publisher altered the *original text* of the allegedly defamatory publication or restated the specific defamatory statements in a separate publication. *See Canatella v. Van De Kamp*, 486 F.3d 1128, 1135 (9th Cir. 2007) (no republication where disciplinary summary published on different page of same website "since a verbatim copy of that summary had appeared on the exact same website since February 2000"); *Kinney v. Barnes*, 2014 WL 2811832, at *7 (Cal. Ct. App. June 23, 2014) (no republication where article moved to different section of same website); *Allen v. Bander*, 2015 WL 7180732, at *9 (Cal. Ct. App. Nov. 16, 2015) (no republication where "[plaintiff] vaguely alleges that the articles were altered and republished, [but] provides no evidence that they were changed in any way"); *see also Churchill v. State of New Jersey*, 876 A.2d 311, 316-17 (N.J. Super. 2005) (press release on website referencing and hyperlinking to report elsewhere on website not republication because report itself was unaltered); *Penaherrera*, 2013 WL 4013487, at *6 (no republication by linking to earlier articles without modifying or updating).

Here, although the 2014 Article links to the August 28 Article (not the corrected August 19 Article[12]), it is undisputed that the 2012 Articles have remained unchanged since they were first published and have not been modified or augmented in any way. B00126-B00145. Nor does the 2014 Article restate a single statement in the 2012 Articles. B00146-B00150.

Recognizing this, Plaintiffs ask the Court to create a new rule under California law. They argue the hyperlink to the August 28 Article, coupled with the statement that OnLive was "defunct" in the 2014 Article, constitutes a republication of *both* 2012 Articles because that hyperlink and reference "substantively adds to or updates the defamatory content of the article it references." O.B. at 31-32. Plaintiffs rely on *Yeager*, which expressly repudiates a similar argument and expressly held that, "under California law, a statement on a website is not republished unless the *statement itself* is substantively altered or added to[.]" 693 F.3d at 1082-83 (emphasis added).[13]

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[12] Plaintiffs' republication argument for the August 19 Article is more attenuated: the Corrected August 19 Article remained unchanged since August 2012, and the 2014 Article does *not* link to it. B00126-B00129. Plaintiffs claim Defendant "republished" the August 19 Article because there is a hyperlink to the Article in the comments of the August 28 Article. O.B. at 17. Linking is not republication. But even if it were, Defendant has broad immunity from liability for content posted by third-party users. 47 U.S.C. § 230.

[13] Plaintiffs also rely on *In re Davis*, 334 B.R. 874, 884 (Bankr. W.D. Ky. 2005) (O.B. at 27-28). There, the plaintiff alleged that defendants' website defamed plaintiff, and defendants' changes to that website republished it. 334 B.R. at 884.

Plaintiffs misconstrue what it means to "alter" an article. For a republication, the change must be to the text of the *original* article, e.g., by re-writing and re-posting it. The law – and common sense – dictates that statements not in the actual publication cannot "update," "alter," or "enhance" it. If that *were* the law, the exception would swallow the rule: nearly every hyperlink would republish the article to which it links because the linking article could likely be said to have made a substantive addition or update to the original.

The Superior Court rejected Plaintiffs' argument. ***First***, Plaintiffs could not even satisfy their own test. As discussed *infra* § IV, the Defunct Statement was non-actionable. ***Second***, judicial modesty prevented the Superior Court from indulging Plaintiffs' "substantive hyperlink" theory and creating a new rule of decision under a sister state's laws unneeded for the case before it. Exhibit B at 22. For these reasons, the Court should affirm.

2. The 2014 Article Did Not Direct the 2012 Articles to a New Audience

Relying on *Yeager*, the Superior Court observed that this prong of the test for republication requires that "*the website* [be] directed to a new audience." Ex. B at

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The court agreed, because defendants made substantive changes to the original publication (the website) itself, including adding entirely new sections providing links to numerous documents concerning plaintiff's arrest records and bankruptcy filing. *Id.* This decision is entirely consistent with the principle Defendant advances here but plainly distinguishable, as the 2012 Articles have not been so altered.

20. In evaluating what constitutes "the website," Judge Wallace ruled that "[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." Ex. B at 20.

> Conversely, if "the website" is each article individually, then the print analogy for the subsequent articles is not a new edition but to a sequel. A sequel may attract a new audience to the original by motivating them to seek out the earlier publication. But, this does not thereby republish those earlier publications, because neither the time nor the circumstances in which a copy of a book or other publication finds its way to a particular consumer is, in and of itself, to militate against the operation of the unitary, integrated publication concept.

Id. Accordingly, the February 2014 Article did not direct the 2012 Articles to a new audience.

Plaintiffs' argument on appeal hinges on three defects.

First, Plaintiffs discount Judge Wallace's analysis of "the website" as each article individually and pretend the Court held only that *The Verge* as a whole is "the website" under *Yeager*. But this deliberately misconstrues Judge Wallace's holding. The Court analyzed both interpretations and simply rejected Plaintiffs' argument. Exhibit B at 20 (likening 2014 Article to sequel rather than new edition).

Second, hyperlinking to a prior article is not a publication at all, regardless of whether new readers click on it. A hyperlink is the digital equivalent of a footnote, which by its nature, merely "alert[s] a new audience to the existence of a preexisting

statement." *Clark*, 617 F. App'x at 506-07. Even where an article has been directed to a far larger audience via hyperlink on an entirely *different* website, courts are reluctant to find a republication.[14]

Third, the record evidence contradicts Plaintiffs' argument that the hyperlink in the 2014 Article published the 2012 Articles to a new audience because the articles report on different technologies and are tagged with different metadata tags (O.B. at 35). It is undisputed that since *The Verge* was founded, its audience has remained the same and all three articles were published to *The Verge*'s consistent audience. B00116, ¶ 10. And the law is clear that regardless of whether *The Verge* (like most digital media publications) tags its content by topic, the hyperlink in the 2014 Article did not publish the 2012 Articles to a new audience. "[R]un-of-the-mill hyperlinks" like the link in the 2014 Article "typically demonstrate neither the intent nor the ability to garner a wider audience than the initial iteration of the online statement could reach." *Giuffre v. Dershowitz*, 410 F. Supp. 3d 564, 572 (S.D.N.Y. 2019)

[14] In *Mirage Entm't, Inc. v. FEG Entretenimientos S.A.*, 2018 WL 4103583 (S.D.N.Y. Aug. 29, 2018), a concert promoter sued Mariah Carey after she tweeted a link to an *E! News* article reporting she cancelled her tour due to "promoter negligence." *Id.* at *31. Although Carey's tweet contained additional content and broadcasted the *E! News* link to her 16.8 million followers, the court held the tweet was not a republication because a hyperlink "does not duplicate the content of a prior publication; rather it identifies the location of an existing publication." *Id.* at *39 (internal quotation marks omitted); *see also Penrose Hill, Ltd. v. Mabray*, 2020 WL 4804965 at *8 (N.D. Cal. Aug. 18, 2020); *Nunes v. Lizza*, 2020 WL 5504005, at *20 (N.D. Iowa Sept. 11, 2020).

(citations omitted). Readers of a business article and a national politics article in the *Wall Street Journal* are both *Journal* readers. Likewise, readers of the August 28 and 2014 Articles are both readers of *The Verge*. Both were published to the same audience.

Fourth, Plaintiffs do not cite *any* admissible evidence to support their claim that the 2014 Article directed the 2012 Articles to a new audience. Again, they rely on *Perlman I* as though it were a finding of fact. O.B. at 17 (citing A241). However, that decision observes only that it was "reasonably conceivable" that Plaintiffs could prove the 2014 Article directed the 2012 Articles to a new audience, and that question "will have to await further development of the record in this case." A245. Plaintiffs also cite *The Verge*'s analytics data as evidence of a "spike" in the August 28 Article's readership after publication of the February 2014 Article. But that data shows almost no traffic to the 2012 Articles after August 2012, even when the 2014 Article was published. B00584-B00586.[15] Finally, Plaintiffs claim several investors refused to invest in Artemis after reading the allegations in the August 28 Article, but in the cited examples, the investors all discovered the August 28 Article independently and not *through the link in the 2014 Article*. *See* B00487; B00508-

[15] *See* O.B. at 37 (citing A998-A1000, A1291). Plaintiffs do not offer expert or even lay testimony establishing that the purported "spike in page views" occurred on February 19, 2014 as they claim or – to the extent there even was any rise, that it resulted from the February 2014 Article.

B00508. Importantly, each example relies wholly on their own employees' testimony for the purported motivations of third party investors – this is impermissible hearsay.

3. Plaintiffs' "Conscious Disregard" Argument is Legally and Factually Deficient

In a last-ditch effort to salvage their republication argument, Plaintiffs propose a rule not adopted by any Court, from a concurrence in *Christoff*—that including hyperlinks in the 2012 Articles "reflects Vox's 'conscious decision to reissue [the 2012 Articles] or again make [them] available' to new readers, constituting republication under California law." O.B. at 27. This fails for multiple reasons.

First, this standard is not the law in California, or elsewhere.

Second, hyperlinks are not republications. *See supra* § III.C.

Third, *Christoff* did not involve a hyperlink *or* a defamation case. It involved a photograph of a model used in Canada, then reissued in the United States without his consent on millions of jars of Taster's Choice coffee – a far cry from a mere hyperlink. 47 Cal.4th at 471.

Fourth, the record is devoid of evidence suggesting that inclusion of the hyperlink was a "conscious decision" to "reissue" anything. Plaintiffs cite a statement from *The Verge* Editor-in–Chief explaining that "[a]s 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."

O.B. at 27. That does not support Plaintiffs' theory. As Mr. Patel makes clear, hyperlinks to previously published content in subsequent articles are provided to give context to those later articles, not to reissue the original linked publication.

For all of these reasons, the 2014 Article did not republish the 2012 Articles.

IV. PLAINTIFFS' CLAIM AS TO THE 2014 ARTICLE FAILS

A. Questions Presented

Should this Court affirm the Superior Court's holdings that the Defunct Statement in the 2014 Article is (i) not "of or concerning" Plaintiffs, and (ii) substantially true?

B. Standard and Scope of Review

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

C. Merits of Argument

Having included the 2014 Article in this lawsuit to revive their stale claim as to the 2012 Articles via republication, Plaintiffs have also concocted an argument that the Defunct Statement in the 2014 Article independently defames them. Plaintiffs claim that because Perlman was the founder and one-time owner of the OnLive streaming service, the 2014 Article's reference to the company as "defunct" a year and half after he ceased affiliation with the service defames him. This is meritless. Plaintiffs misrepresent the record, mischaracterize Vice Chancellor Parsons' non-binding decision, and repeatedly lump all three Articles together, to read the allegedly defamatory statements of the 2012 Articles (the true focus of Plaintiffs' claim) into the 2014 Article. The Court should look past Plaintiffs' efforts to distort the analysis, evaluate the 2014 Article on its own merits, and hold, like the Superior Court, that Plaintiffs' claim as to the 2014 Article is non-actionable.

1. The Defunct Statement Is Not "Of or Concerning" Plaintiffs

Plaintiffs claim that the statement that "OnLive" is defunct—published long after Perlman and Rearden publicly ceased involvement with either OnLive, Inc. or OL2—is "of or concerning" *them* because the sentence notes that Perlman was the creator of OnLive.[16] This cannot be.

Under California law, Plaintiffs who sue for defamation must show that the allegedly libelous statements "specifically refer to, or [are] 'of or concerning,' the plaintiff." *Jackson v. Mayweather*, 10 Cal. App. 5th 1240, 1259-60 (Cal. Ct. App. 2017), *as modified* (Apr. 19, 2017) (quoting *Blatty v. N.Y. Times Co.*, 42 Cal.3d 1033, 1043 (Cal. 1986)). A "defamatory statement that is ambiguous as to its target not only must be capable of being understood to refer to the plaintiff, but also must be shown actually to have been so understood by a third party." *SDV/ACCI, Inc. v. AT & T Corp.*, 522 F.3d 955, 960 (9th Cir. 2008). Here, there is no such ambiguity. The Defunct Statement clearly refers to "OnLive." And regardless of whether the Defunct Statement refers to OnLive the company and/or the Service, it is not "of or concerning" Plaintiffs. If the Defunct Statement refers to *OnLive, Inc*., it is not of or concerning Perlman or Rearden because both ceased association with OnLive,

[16] While Plaintiffs Opening Brief fails to address this, neither the Defunct Statement nor the 2012 Articles mention Artemis, let alone defames it. Indeed, Artemis did not exist at the time of the 2012 Articles, (A704-A705(81:1-82:10)), and the Defunct Statement plainly refers to OnLive, a different company. On their face, neither could possibly be of or concerning Artemis.

Inc. in September 2012. A735(54:19-55:23). If it refers to the *Service*, then it is a statement about OL2, a company owned solely by Lauder and which had been the sole operator of the Service for a year and a half before publication of the 2014 Article. A98-99 ¶¶ 21-22. Perlman admits he never held a position with OL2 and did not even follow what OL2 was doing after the ABC. A747(103:12-104:2); B00159, at 1.[17]

Critically, Plaintiffs *acknowledge* that the Defunct Statement is not "of or concerning" them and did not cause them any injury.[18] Perlman admitted he knew that the 2014 Article "was going to cause harm to OnLive. But OnLive, again, you know, Gary [Lauder]'s bailiwick, right. I didn't like that, but, you know, again it's his company." A753(129:7-13). Perlman also admitted that absent the link to the 2012 Article, the Defunct Statement "wouldn't be so much of a problem." A757(144:11-145:16). Indeed, Artemis posted a *PC Magazine* article on the press page of its *own* website stating "Perlman is known for creating the *now-defunct game-streaming service, OnLive*, which suffered massive layoffs in August 2012." B00452; B00462-B00479; A582(28:5-7), A613-A614(151:23-154:7).

[17] Tellingly, neither OnLive, Inc. nor OL2 is a plaintiff below.

[18] *See Burnett v. Nat'l Enquirer, Inc.*, 144 Cal. App.3d 991, 1013 (Cal. Ct. App. 1983) (plaintiff must establish the actual damage suffered as a result of the publication); *Williams v. Howe*, 2004 WL 2828058, at *4 (Del Super. 2004) (citing *Bloss v. Kershner*, 2000 WL 303342, at *6 n.12 (Del. Super. Mar. 9, 2000)).

Simply put, a statement about the continued viability of OnLive a year and a half after Perlman and Rearden publicly ceased their relationship with it is not "of or concerning" any of the Plaintiffs.

2. The Defunct Statement Is Substantially True

The Defunct Statement is also substantially true, regardless of whether the statement refers to OnLive, Inc. or the Service. The First Amendment requires plaintiffs to prove an allegedly defamatory statement is false. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Indeed, courts recognize that a statement is constitutionally protected as long as it is *substantially true*, i.e., the challenged statements would have no "different effect on the mind of the reader" than if the truth were published. *Masson v. New Yorker*, 501 U.S. 496, 517 (1991); *Morningstar, Inc. v. Superior Court*, 23 Cal. App. 4th 676, 686 (Cal. Ct. App. 1994); *see also Gannett Co. v. Re*, 496 A.2d 553, 557 (Del. Super. 1985). "Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" *Masson*, 501 U.S. at 517 (citation omitted).

The language at issue must be read reasonably. *See Images Hair Sols. Med. Ctr. v. Fox News Network, LLC*, 2013 WL 6917138, at *3 (Del. Super. Dec. 20, 2013) (citations omitted) ("'[T]he Court must look to the 'fair and natural meaning which will be given it by reasonable persons of ordinary intelligence.'"); *Morningstar, Inc.*, 23 Cal. App. 4th at 687-88 (courts must place themselves "in the

situation of the hearer or reader" and evaluate meaning based upon "natural and popular construction"). Considering the full context of the statement is paramount. *See, e.g.*, *Carver v. Bonds*, 135 Cal. App. 4th 328, 343-44 (Cal. Ct. App. 2005); *Ramada Inns, Inc. v. Dow Jones & Co., Inc.*, 543 A.2d 313, 325 (Del. Super. 1987). That context includes content to which the publication at issue links. *See, e.g.*, *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 732 (Tex. App. – Houston [14th Dist.] 2013, pet. denied) ("gist" of publication containing accusation that plaintiff bribed government official not false because hyperlinks in text disclosed additional facts as "part of the context that must be taken into consideration when assessing what the website actually conveyed . . ."); *Adelson v. Harris*, 973 F. Supp. 2d 467, 483-84 (S.D.N.Y. 2013); *Jankovic v. Int'l Crisis Grp.*, 429 F. Supp. 2d 165, 177 n.8 (D.D.C. 2006), *aff'd in relevant part*, 494 F.3d 1080 (D.C. Cir. 2007).

Plaintiffs claim that describing OnLive as "defunct" conveys customers' personal information might be exposed, causing them commercial and reputational backlash. In support, Plaintiffs again misrepresent *Perlman I*, and rely on language discussing defamatory meaning – not substantial truth. O.B. at 41 (quoting Exhibit A at 46). As to that issue, the Court held that the question of "whether the 'defunct' statement was defamatory cannot be resolved on a motion to dismiss." *Id*. at 36.

Seen reasonably and in context, the Defunct Statement's link to the August 28 Article indicates that the author's use of "defunct" was a reference to OnLive, Inc.,

the *company*. The August 28 Article recounts the downfall of OnLive, Inc., the events that led to its insolvency, and its choice to pursue the ABC. It states, "[t]he new OnLive says it hired nearly half the staff back and intends to continue the business as if nothing happened," and closes, "[w]e're curious to see how OnLive will proceed without its all-powerful founder at the helm." B00144-B00145. In other words, the August 28 Article refers to the demise of the OnLive *company*, and clarifies that the OnLive *Service* would continue under OL2.

With the benefit of extensive discovery, without question, the gist of the Defunct Statement—that OnLive, Inc. was defunct at the time of publication—was substantially true. The undisputed facts are: (1) OnLive, Inc. carried out an ABC on August 17, 2012 because it "was unable to raise enough capital to cover its operations overhead" (A868-A869 ¶¶ 20-21); (2) it transferred all of its assets to an assignee, "who then transferred those assets to a new successor entity, OL2, Inc." (*Id.* ¶ 21); (3) OnLive was left without assets, operations, officers, employees, or records (B00526; B00539; B00552); (4) Burbank was hired as sole director and liquidating trustee, "wind[ing] up the affairs of the company and . . . dissolv[ing] it" (A648 (16:17-20), A651-A652 (29:21-30:13); B00526-B00527); and (5) the company never restarted operations, acquired assets, generated revenues, or held any board meetings at any point after the ABC, and its only expenses in the year preceding the 2014 Article were fees paid to Burbank (B00168-B00170, at 11-14;

A647-A648 (12:17-14:7, 16:2-16), A653 (36:4-23), A658 (55:9-17); B00550-B00552). The two people responsible for OnLive, Inc. after the ABC—Burbank and Prim—both agreed it was "defunct." B00555; A662 (73:1-14). Burbank testified that as of January 30, 2014, OnLive, Inc. was "in the coffin" and a formal dissolution would only "put a nail in the coffin." A663 (75:19-77:13) (most companies "die and nobody files for dissolution, you know, they just die informally").

Even if the Defunct Statement is understood to refer to the *Service*, it remains substantially true because it would not cause a "different effect on the mind of the reader" than had the 2014 Article explicitly referenced OnLive, Inc. *Morningstar*, 23 Cal. App. 4th at 686-87. As of August 17, 2012, OnLive, Inc. had failed under Perlman's stewardship, with the Service as its primary product. Although the Service survived in some capacity, it had starkly reduced market presence after the ABC. Indeed, Artemis prominently featured a *PC Magazine* article published the same day as the 2014 Article which noted that "Perlman is known for creating the *now-defunct game-streaming service, OnLive*, which suffered massive layoffs in August 2012." B00451; B00465 (emphasis added); A582 (28:5-7), A613-A614 (151:23-154:7). Other publications also called OnLive "defunct" well before the 2014 Article. B00462-B00479. When OL2 "relaunched" the Service in March 2014, numerous publications remarked on the Service's absence after the ABC, characterizing it as "under the radar, to say the least," "dorman[t]" and "incredibly

quiet." B00568- B00583. These facts reveal a dying service—not the thriving service Plaintiffs depicted in their Complaint. Even understanding the Defunct Statement as referring to the Service, its inaccuracy is minor and would have no different effect on the mind of the reader than the literal truth.

The Court should affirm the Superior Court's dismissal as to the 2014 Article.

CONCLUSION

For the foregoing reasons, Defendant respectfully submits that the Court should affirm the rulings of both the Chancery Court and Superior Court, granting summary judgment in its favor.

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Respectfully submitted,

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