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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PRESTON HOLLOW CAPITAL LLC, Plaintiff Below-Appellant/ Cross-Appellee, v. NUVEEN ASSET MANAGEMENT LLC, Defendant Below-Appellee Cross-Appellant.	PUBLIC VERSION E-Filed: September 22, 2022 C.A. No. 222,2022 Court Below: Superior Court of the State of Delaware C.A. No. N19C-10-107 [MMJ] [CCLD]

APPELLANT'S CORRECTED OPENING BRIEF

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September 7, 2022

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page**

Statutes

Rules

Other

NATURE OF PROCEEDINGS

A plaintiff who establishes defamation per se and actual malice by the defendant is always entitled to damages as a matter of law, even if only nominal damages. The law presumes damages and empowers the jury to estimate their amount. While the plaintiff may offer proof, it need not do so to win.

Despite these settled rules, and despite finding that Preston Hollow established defamation per se and actual malice as part of Nuveen's deliberate campaign to destroy Preston Hollow's business, the Superior Court granted Nuveen summary judgment, because, it found, Preston Hollow failed to prove damages. This error alone requires reversal.

But there is more, much more. There is ample—even preclusive—evidence of substantial damages:

- The Court of Chancery, which tried Preston Hollow's tortious interference claim while transferring its defamation claim to the Superior Court, found that Nuveen's defamatory campaign proximately caused harm to Preston Hollow's business.
- Preston Hollow presented substantial evidence from multiple sources that—exactly as Nuveen intended—Preston Hollow's business plummeted right after Nuveen's attack and has not recovered. Broker-dealers curtailed doing business with Preston Hollow, or ceased altogether.

Yet despite ruling that the Court of Chancery's findings were preclusive, the Superior Court failed to give those findings preclusive effect. And, contrary to long-settled rules governing summary judgment motions, it credited Nuveen's evidence and failed to draw reasonable inferences in favor of Preston Hollow. These two errors led the court to the erroneous conclusion that that there were no material issues of fact. This, too, requires reversal.

Any of these errors standing alone requires reversal. But the Court should address all of them, reverse the grant of summary judgment to Nuveen, and remand with instructions to try both liability and damages.

SUMMARY OF ARGUMENT

1. The Superior Court erred in holding that in responding to Nuveen's summary judgment motion, Preston Hollow had the burden to prove that Nuveen's slander proximately caused injury to Preston Hollow's reputation. Where, as here, the defendant acted with actual malice and maligned the plaintiff in its trade, business or profession, Delaware law recognizes a presumption of injury to reputation and permits the jury to award general damages for probable as well as proven injury. That presumption cannot be rebutted even at trial, much less on summary judgment. Although a defendant can challenge the amount of damages, the amount can never be zero. [A3197-202.]

2. Even accepting the Superior Court's erroneous ruling that Preston Hollow was required to present evidence of injury and proximate cause, the Superior Court erred by finding that Preston Hollow failed to do so and failed to even raise a material issue of fact. The Superior Court: (1) disregarded preclusive findings by the Court of Chancery, made after a full trial on the merits, that Nuveen's lies proximately harmed Preston Hollow's business [A1623; A1627-28; A1702-03; A1709-12; A1728-733], which the court should have found preclusive [A1601; A1627-28; A3194; A3197] and (2) failed to give Preston Hollow, the non-movant, the benefit of all reasonable inferences from the record, which

contained ample admissible evidence that Nuveen's statements proximately caused both reputational and economic injury. [A3188-94; A3205-11.]

The case should be remanded with instructions to hold a trial as to liability and damages.

STATEMENT OF FACTS

A. The Municipal Bond Industry

Preston Hollow Capital LLC and Nuveen Asset Management LLC are competitors that seek to invest capital in the municipal bond market. *Preston Hollow Capital LLC v. Nuveen LLC*, 2020 WL 1814756, at *1 (Del. Ch. Apr. 9, 2020) (Glasscock, V.C.) ("*Nuveen I*").[1]

Municipal bonds are debt securities issued by municipal and other government entities to fund public works projects. *Id.* at *2. Approximately 10% of municipal bonds are rated lower than BBB-/Baa3 or are unrated; these are known as "high-yield" bonds. *Id.* Both Preston Hollow and Nuveen seek investments in high-yield municipal bonds.

The high-yield municipal bond market is a relatively small, close-knit community of professionals. [A0426; A1850; A3226.] Municipal bond issuances typically involve an issuer or borrower, a broker-dealer, and an investor. *Nuveen I*, 2020 WL 1814756, at *2. The issuers or borrowers are government entities seeking capital to finance public works. *Id.* The investors provide capital to finance these

[1] This is the opinion rendered after a full trial on Preston Hollow's interference claim against Nuveen. We cite it for key facts relevant to this appeal.

public works by purchasing the bonds. *Id.* Broker-dealers are intermediaries who provide services like marketing, pricing, underwriting, and closing. *Id.*

The Municipal Securities Rulemaking Board (MSRB) regulates the municipal bond industry. Under MSRB Rule G-17, a broker-dealer "shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice."

B. Preston Hollow's Innovative Strategy Of 100% Placements Drives Significant Gains In Its Market Share And Encroaches On Nuveen's Dominant Position

Preston Hollow was formed in 2014 and is dedicated to making municipal-finance investments, primarily in high-yield municipal bonds. [A1356-57; A3225; A3234-35.] Preston Hollow's unique business and finance models are relatively new in the municipal bond market. [A0148; A0240; A3225-26.]

Preston Hollow is a "bespoke solution provider" that specializes in 100% placements. [A1209; A1357-58; A1374-76; A3225; A3235.] A 100% placement occurs when a single investor buys 100% of a bond at issuance. [A3225; A3235.] Preston Hollow uses its own capital to make investments; doing so permits it to provide flexible financing solutions to municipal borrowers. [A1375; A3225; A3235.]

From 2014 to 2018, Preston Hollow's business and market share grew substantially. [A1358; A1374; A1498; A2575; A3225.] Much of this growth was

attributable to Preston Hollow's relationships with broker-dealers, particularly "bulge-bracket" broker-dealers (*i.e.*, the largest broker-dealers in terms of deal volume); they often referred clients who for whatever reason could not access the public markets to Preston Hollow for bespoke financing solutions. [A1849; A3225-26; A3236-37.]

Nuveen manages a family of mutual funds, and is a market leader in the municipal bond market, including high-yield bonds. *Nuveen I*, 2020 WL 1814756, at *4. "Nuveen has approximately $150 billion in municipal assets, with $27 billion in high-yield municipal bond funds" and manages "the largest high-yield [municipal] fund in the world." *Id.* John Miller is Nuveen's head of municipal finance and runs Nuveen's municipal bond department. *Id.* at *2, *5. He manages a team of employees, including Karen Davern and Steve Hlavin. *Id.*

Preston Hollow and Nuveen compete to provide financing for municipal borrowers. When Nuveen's funds have net "inflows" of cash—that is, when there are more buyers than sellers of fund shares—Nuveen must buy bonds to fully invest the cash. *Id.* at *4. This requires access to new bond issuances. *Id.* But Nuveen is shut out of Preston Hollow's 100% placements, because Preston Hollow purchases the entire issuance. *Id.*

C. Through A Campaign Of Slander And Threats, Nuveen Seeks To Eliminate Preston Hollow As A Competitor

Between December 2018 and February 2019, Nuveen initiated "an aggressive and widely dispersed campaign to use almost any pressure necessary to cut off a competitor from its chief source of business as well as its financing." *Id.* at *19. "Nuveen was not simply attempting to achieve a competitive edge; it meant to use the leverage resulting from its size in the market to destroy Preston Hollow." *Id.*

"Nuveen used threats and lies in a successful attempt to damage the Plaintiff in its business relationships." *Id.* at *1. Nuveen employees, led by Miller, held phone calls and meetings about Preston Hollow with numerous broker-dealers, including Goldman Sachs, Deutsche Bank, Bank of America Merrill Lynch ("BAML"), JPMorgan Chase, Citigroup, KeyBanc, Morgan Stanley, RBC Capital Markets, and Wells Fargo. *Id.* at *5.

Some of Nuveen's calls to broker-dealers, including those quoted next, were recorded and later transcribed. *Nuveen I*, 2020 WL 1814756, at *5. Nuveen explicitly stated its goal in these communications: to force broker-dealers to choose between doing business with Nuveen or doing what Nuveen called "dirty deals" with Preston Hollow. [*See* A0204-05 (Miller to Goldman: "They ['the street,' meaning broker-dealers] have to choose who and what type of business they're going to do because they're not going to do both. At least not with Nuveen they're

not going to do both . . . I think I've got like five dealers so far. Karen [Davern]: Yeah. John: And I'm going to try and get more."); A0248 (Miller to Deutsche Bank: "some of these dirty deals are going to become less financeable, in my opinion. That's my effort. That's my goal, one of my goals, just so you know."); A0246 (Miller to Deutsche Bank: "[W]ho else are they going to get financing from when Wells Fargo, Goldman, JPMorgan, BAML, and Citi have—have agreed to—to not do this business anymore? I don't know where they're going to get the financing from."); A0247 (Miller to Deutsche Bank: "But where are they getting the money to do the predatory lending?").]

On recorded calls, Miller and his associates tried to persuade Goldman and Deutsche Bank to stop doing business with Preston Hollow by falsely accusing Preston Hollow of dishonesty in the marketplace, illegal and unethical business practices, and unfair treatment of municipal issuers. For example, Nuveen said that Preston Hollow was "lying" to municipal bond issuers [A0289; *see also* A0189]; that Preston Hollow would "rush the issuer into" unfair or suspect transactions [A0189-90; A0215]; that Preston Hollow "fleeced" Roosevelt University [A0244]; that issuers fell for Preston Hollow's "predatory practices" after hearing its "predatory sales pitch" [A0187, A0201-02]; and that Nuveen had "a lot of evidence" to support its allegations, including copies of "nastygrams" from multiple state

attorneys general concerning Preston Hollow's "unethical practices" "saying [d]on't come into my town again [interruption] because you're bad for my town's reputation and—and we don't want you—we don't want you talking to any of our issuers" [A0190]. *See also generally Nuveen I*, 2020 WL 1814756, at *5-16 (detailing Nuveen's recorded statements).

Nuveen admits, and the record confirms, that its employees "used similar language" in unrecorded calls with BAML, Citi, RBC, and Wells Fargo. [A3101-02; *see also* A2278 (Miller "mention[ed] predatory practices" to Citi), A2280-81 (Miller told Wells Fargo that Preston Hollow told Howard University something untrue).] The Court of Chancery found, and a rational jury could infer, that Nuveen's statements that were not caught on tape were "cut from the same cloth" as the recorded calls and "were part of the same pattern of conduct intended to end these broker-dealers' relationships with Preston Hollow." *Nuveen I*, 2020 WL 1814756, at *15.

Preston Hollow's industry expert, Thomas Metzold, explained that Nuveen's false accusations appealed to the sensitivity of bulge-bracket banks about their own reputations, and to their reluctance to associate with market participants perceived to be predatory or unethical. [A2670-71; A2844; A2887-88.] Nuveen's statements

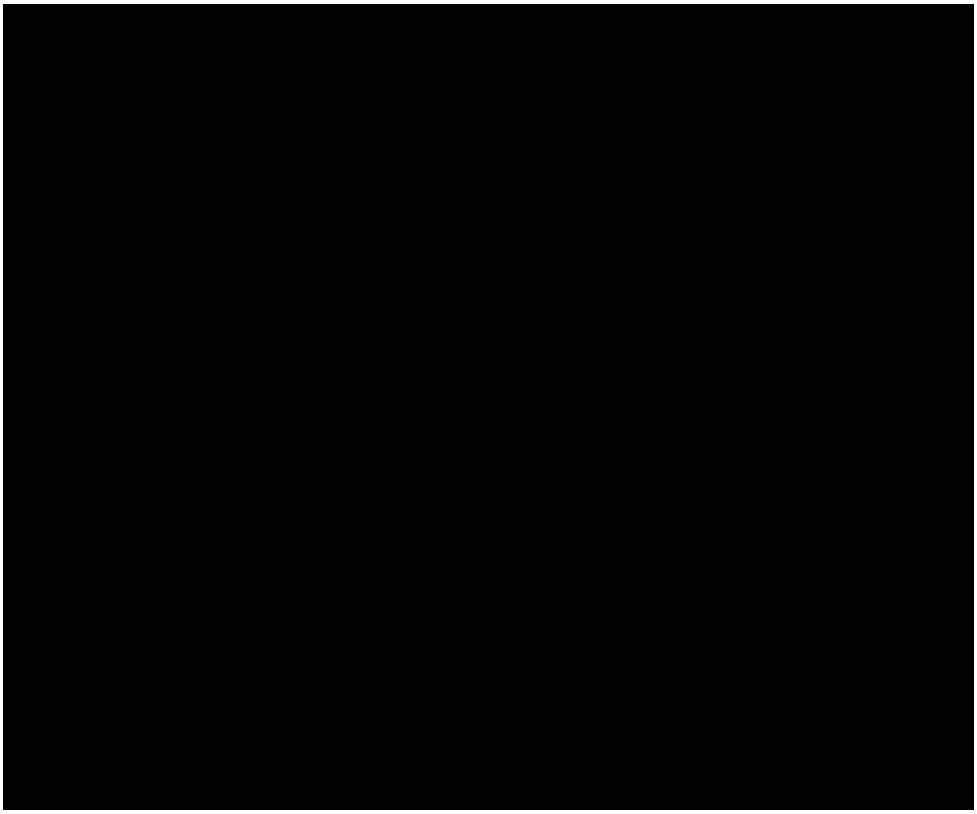
[redacted] [A2042; A2044-45; A2734-35.] Nuveen's statements were [redacted]

[redacted]

[A2424-25; *see also* A0426; A0912-14.]

D. Preston Hollow's Business Plummets Immediately After Nuveen's Attack, As Major Broker-Dealers Reduce Or Cease Their Business With Preston Hollow

Just as Nuveen intended, Preston Hollow's fast-growing business witnessed a sudden and sustained drop immediately after Nuveen's campaign in December 2018 and January 2019. Preston Hollow's damages expert, Dr. Michael Goldstein, prepared this graph of Preston Hollow's municipal bond deal volume by year:



[A2579.] Dr. Goldstein's expert report shows that what drove this drop in business was that the major broker-dealers—those in the "bulge-bracket"—significantly curtailed or ceased referrals to Preston Hollow:

[A2576; *see also* A3236-37 (detailing drop in referrals and the effect on Preston Hollow's business).]

While witnesses for the major broker-dealers denied that Nuveen's statements changed their opinion about Preston Hollow, their actions and motivations showed otherwise. The following examples demonstrate that broker-dealers harbored reputational and compliance concerns over participating in 100% placements with Preston Hollow that they did not have before Nuveen's campaign:

1. Goldman Sachs puts Preston Hollow business on hold

Preston Hollow met with Goldman in August 2018 to discuss potential business opportunities. [A1316-17.] By late September, [redacted] that Goldman was doing its first transaction with Preston Hollow for Howard University. [redacted] testified that as of December 2018 Goldman was discussing twelve potential transactions with Preston Hollow. [redacted]

At the end of November 2018, Goldman made a joint proposal with Preston Hollow to the University of Virginia for the issuance of bonds to finance a hotel. [A2505.] Before submitting that proposal, no one within Goldman had raised any concern that Preston Hollow's business model might involve a risk of violating MSRB Rule G-17 [*id.*], which as noted above requires that broker-dealers "deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice."

On December 20, 2018, Nuveen's Miller called [redacted], a Goldman representative, and accused Preston Hollow of improper conduct. [redacted] reported on the call internally by email. [redacted] Reacting to the report, [redacted] knew that Nuveen's accusations were not merely academic to

Goldman, telling his supervisor that Preston Hollow "represent[s] a portion of our continued business plan." [ ]

met with Nuveen's Miller on January 22, 2019 in Chicago. Miller told that he did not like the way Preston Hollow did business and that Preston Hollow was bad for the market. [A2508.] Miller's statements made concerned that Goldman might violate MSRB Rule G-17 if it participated in Preston Hollow transactions, leading to seek guidance from a Goldman in-house expert on MSRB rules. [ ] The result: Goldman put all business with Preston Hollow on hold until it could develop guidelines for doing business with Preston Hollow. [*See* A0814-15.]

Goldman took six months to prepare the guidelines. [*See* A1588.] Although Goldman claims the guidelines apply to all "single purchaser limited public offering" transactions—a species of 100% placements—they were not applied to such deals with Nuveen. [A2526-27; A2532-33.] And Goldman has not participated with Preston Hollow in any transactions since Miller's December 2018 call to Goldman's [A3237-38; *see also generally* A2825-28.]

2. Deutsche Bank

Deutsche Bank was [A0901; A0925.] Deutsche Bank understood that

[A0910.] Deutsche Bank felt [A1820.] It [A0900.] [A1816]; [A0908-09.] [A1816-17.] While Deutsche Bank concluded [*Id.*; A0908.]

3. JPMorgan Chase withdraws its expressed interest in a Preston Hollow transaction

In November 2018, of JPMorgan contacted a Preston Hollow employee to express JPMorgan's desire to underwrite a transaction Preston Hollow was designing for Howard University. [A0169.] On December 20, 2018, Miller contacted JPMorgan's , and told him that Preston

Hollow's practices were damaging the municipal bond market. [A2238-9; A2278.] Miller sought, and received, assurance from JPMorgan that it would not work with Preston Hollow. [A0244.]

In February 2019, Preston Hollow contacted JPMorgan to follow up on its expression of interest in underwriting the Howard University transaction. [A0299-302.] Preston Hollow emailed JPMorgan representatives repeatedly to engage them in dialogue; each time, the JPMorgan representative [redacted] [A1778-82.] JPMorgan eventually informed Preston Hollow that it would not be able to obtain internal approval quickly enough to participate in the transaction. [A0299.] Preston Hollow offered to extend the schedule to allow JPMorgan to obtain approval. JPMorgan responded, [redacted] [*Id.*]

Despite prior interest in working with Preston Hollow, JPMorgan has not underwritten a Preston Hollow transaction since December 2018. [A2825-28.]

4. Wells Fargo [redacted]

When Wells Fargo referred a re-financing for Roosevelt University to Preston Hollow in the fall of 2018, [redacted] [A1391-92] and [redacted] [A0524-25]—meaning Nuveen "stopped doing business with Wells Fargo

for about six weeks." [A1424-25].[2] Miller also told Wells Fargo's [redacted] that Preston Hollow lied to borrowers, particularly Howard University. [A2280.] [redacted] [A2430; [redacted]] [redacted] [A2405.]

Although Wells Fargo ultimately concluded [redacted] [[redacted]], it became [redacted] [A2409] and [redacted] [A0523-25; A1059-60; A1494; A2404; A2412-13.] While Wells Fargo closed a transaction with Preston Hollow shortly after Roosevelt University, [redacted] [A2393; A22412-13.]

[2] The phrase "in the box" is a bond-trader colloquialism with range of meanings. It generally expresses "displeasure" and can involve "a temporary cessation of business." *Nuveen I*, 2020 WL 1814756, at *3.

5. Citigroup, in response to Nuveen's demand that it do no business with Preston Hollow, [redacted]

In 2017 Preston Hollow worked with Citi on a large transaction for the City of Irving, Texas for the construction of a convention center. [A2835.] Preston Hollow later worked with Citi on other transactions, including one that Citi originated and referred to Preston Hollow. [A2830.]

On December 20, 2018, Miller called [redacted] conferenced in his supervisor, [redacted] [redacted] Miller told them much the same things he told Goldman: that Preston Hollow was engaged in predatory lending, that it lied to issuers, and that its practices were bad for the market. [A2238-39; [redacted]] Miller demanded that Citi stop doing business with Preston Hollow. [[redacted]][3]

[redacted] assured Miller that Citi wanted to be one of Miller's "trusted partners," and later admitted implying that Citi would not do transactions with Preston Hollow. [[redacted]] Internally, the Citi representatives agreed that they

[3] In deposition, [redacted] testified that Miller had not asked Citi to stop doing business with Preston Hollow. [[redacted]] But Citi later produced recordings of internal calls, including one immediately following Miller's call, in which [redacted] made clear that Miller had indeed made that demand. [[redacted]]

would only engage in "responsible finance" [redacted] and would [redacted] [redacted].

Since December 20, 2018, Citi has done no underwriting work with Preston Hollow. [A2825-831.]

6. BAML stops doing 100% placements with Preston Hollow

In 2018 Preston Hollow worked with BAML on a transaction for Howard University involving student housing. [A2828.] It closed on November 29, 2018. [A2345.]

On December 20, 2018, Miller spoke with [redacted]. Miller told [redacted] much the same things he told Goldman: that Preston Hollow was engaged in predatory lending, that it lied to issuers, and that its practices were bad for the market. [redacted] told [redacted] about the call with Miller and they agreed that BAML would no longer underwrite 100% placements. [redacted] And in a call with representatives of Deutsche Bank on December 21, 2018, Miller stated that BAML firmly committed to stop doing business with Preston Hollow. [A0244.]

Since December 20, 2018, BAML has done no underwriting work with Preston Hollow. [A2825-31.] BAML has, however, underwritten 100% placements for other municipal bond investors. [redacted]

7. KeyBanc [redacted] [A1967-68.] [redacted] [A1968.] [redacted] [A1970.]

[redacted] [A1970-71.] Thereafter, although KeyBanc would underwrite 100% placements that Preston Hollow originates, it has not originated any 100% placements for Preston Hollow. [A0319; A1498; A3229.] KeyBanc also declined to work on a deal known as [redacted] because of concerns about working with Preston Hollow. [A2196; A3228-29.]

E. The Litigation

1. After a full trial, the Court of Chancery finds Nuveen liable for interfering with Preston Hollow's business relationships, specifically finding that Nuveen's defamatory campaign harmed Preston Hollow's business

Preston Hollow sued Nuveen in the Court of Chancery, alleging claims for tortious interference with contract, tortious interference with prospective business relations, defamation, and violation of New York's Donnelly Act.

Nuveen moved to dismiss the defamation claim on the ground that it belonged in Superior Court. The Court of Chancery transferred the defamation claim—that is, the present action—to the Superior Court, which stayed it pending the outcome of the Court of Chancery action. [A1589-93.]

A full trial on the merits in the Chancery action occurred before Vice Chancellor Glasscock. In his Memorandum Opinion following that trial, Vice Chancellor Glasscock concluded that Nuveen tortiously interfered with Preston Hollow's business relations; that "Nuveen used threats and lies in a successful attempt to damage [Preston Hollow] in its business relationships"; and that Nuveen's statements to broker-dealers proximately caused harm to Preston Hollow's business. *Nuveen I*, 2020 WL 1814756, at *1, *15.

Although various broker-dealers denied that Nuveen's statements changed their opinion of Preston Hollow, the Court of Chancery concluded that those denials

"do not rebut causation because Nuveen motivated these changes in policy and business behavior." *Id.* at *15; *see id*. at *16-17 (identifying some of the changes described in §D, *supra*). The court found that "Nuveen went to the broker-dealers and gave them a clear message, and in response the broker-dealers took actions that curtailed the business expectancies of Preston Hollow." *Id.* at *16.

While the Court of Chancery found that Nuveen's "threats and lies" harmed Preston Hollow (*id.* at *1, *16-17), it did not award damages or consider their amount because Preston Hollow sought only injunctive relief in that court. *Id.* at *20. The court did, however, find that "damages would be available here, had Preston Hollow sought to demonstrate them." *Id.*

2. The Superior Court partially grants Preston Hollow's motion for partial summary judgment on liability

After the Court of Chancery's judgment became final, Preston Hollow moved in the present action for summary judgment on liability, based on collateral estoppel and law of the case.

In December 2020, the Superior Court granted the motion in part. *See* Ex-A ("Liability Decision") 1. It held that the Court of Chancery's legal and factual findings were law of the case. *Id.* 15. It also held that Nuveen was collaterally estopped "from relitigating the 'existence, falsity, and malicious nature' of either of these statements: (1) that [Preston Hollow] lied to its issuers and that Nuveen had

evidence of such lies; and (2) that [Preston Hollow's] 'unethical practices' had 'caught the attention of the states' attorneys general' who sent 'nastygrams.'" *Id.* 29. It was thus established for purposes of the Superior Court trial that Nuveen acted "with either knowledge of [its statements'] falsity or reckless indifference to the truth"—*i.e.*, with actual malice. *Id.* 35. In addition, the Superior Court ruled that "Preston Hollow meets the first three elements of the defamation claim," *id.* 30, but that the Court of Chancery's findings did not establish the fourth element, whether "a third party would understand the character of the communication as defamatory." *Id.* 30-31.[4] The court also held that the question of "whether Preston Hollow suffered any reputational loss" was unsuitable for summary judgment, and it left open whether Nuveen's statements qualified as defamation per se. *Id.* 31-32.

3. Contradicting the Court of Chancery, the Superior Court finds no evidence of injury and grants Nuveen's motion for summary judgment

After discovery closed, Nuveen moved for summary judgment; as relevant here, it sought a determination that "there is no genuine issue of material fact that the At-Issue Statements [*i.e.*, Nuveen's defamatory statements] did not proximately

[4] The court listed four elements of Preston Hollow's claim for defamation per se: "(1) the defendant made a defamatory statement; (2) concerning the plaintiff; (3) the statement was published; and (4) a third party would understand the character of the communication as defamatory." Ex-A 29.

cause any harm to Plaintiff's reputation." [A3088-89.] Preston Hollow opposed the motion and cross-moved for partial summary judgment, seeking to strike certain affirmative defenses.

The Superior Court granted both motions. *See* Ex-B ("Damages Decision") 1. As to Nuveen's motion, the court held that Preston Hollow "must prove injury." *Id.* 7. While it found "that defamation per se applies in this case" and that Preston Hollow need not "prove special damages," *id.* 10, it ruled that Preston Hollow "must prove injury to reputation in lieu of special damages," *id.*, and "must demonstrate proximate cause" as to its reputational injury, *id.* 11. At the same time, however, the court recognized that "[i]n the absence of proof of general damages, nominal damages may be awarded." *Id.* 10.[5]

[5] "'General damages' are compensatory damages for a harm so frequently resulting from the tort that is the basis of the action that the existence of the damages is normally to be anticipated and hence need not be alleged in order to be proved." Restatement (Second) of Torts §904. "In defamation actions general damages are imposed for the purpose of compensating the plaintiff for the harm that the publication has caused to his reputation." *Id.* §621 cmt. a.

"Special damages" (or the Restatement's term, "special harm") is "the loss of something having economic or pecuniary value" or, stated differently, "material loss capable of being measured in money." *Id.* §575 cmt. b. Special damages "must result from the conduct of a person other than the defamer or the one defamed and must be legally caused by the defamation." *Id.*

Applying these standards, the Superior Court held that Preston Hollow "failed to present evidence demonstrating a genuine issue of material fact concerning reputational loss." *Id.* 19. The court did not address whether Preston Hollow's evidence of special damages created a triable issue of fact, nor did it explain why it did not find sufficient the evidence that broker-dealers changed their business practices vis-à-vis Preston Hollow (summarized in block quote on page 12 of the Damages Decision). *See* Ex-B 12.

This appeal followed.

ARGUMENT

I. The Superior Court Erred By Failing To Apply The Presumption Of Injury That Attaches To Defamation Per Se, Even Though Nuveen Acted With Actual Malice

A. Question Presented

Given the Superior Court's rulings that (a) Nuveen maligned Preston Hollow in its trade, business, or profession and acted with actual malice, (b) Nuveen's conduct constituted defamation per se, and (c) there is a presumption of damages from defamation per se, did the court err in granting summary judgment for Nuveen on the basis that Preston Hollow failed to present evidence demonstrating a genuine issue of material fact concerning reputational injury? [A3197-204.]

B. Scope of Review

This Court "review[s] *de novo* the grant of summary judgment on the facts and the law to determine if disputed issues of material facts exist, thus precluding summary judgment." *Kanaga v. Gannett Co.*, 687 A.2d 173, 176 (Del. 1996) ("*Kanaga I*").

C. Merits of Argument

1. Under Delaware law, injury to reputation is conclusively presumed when statements malign the plaintiff in its trade, business, or profession, and the presumption is not rebuttable

In its seminal decision in *Spence v. Funk*, 396 A.2d 967 (Del. 1978), this Court explained that, while "oral defamation is not actionable without special

damages," "there are four categories of defamation, commonly called slander per se, which are actionable without proof of special damages." *Id.* at 970. These four categories include statements that "malign one in a trade, business or profession." *Id.* Because "the law presumes damages" for slander per se, from a damages perspective it is equivalent to written libel, where "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.*; *see also* Restatement (Second) of Torts ("Restatement") §620 ("One who is liable for a slander actionable per se or for a libel is liable for at least nominal damages.").

This Court has repeatedly reaffirmed *Spence*'s presumption of damages. In *Sheeran v. Colpo*, 460 A.2d 522 (Del. 1983), the Court held that the jury was "properly instructed" to "take into account probable as well as proven injury to plaintiff's reputation. In the case of a deliberate or reckless libel, damage to reputation is presumed and you may award such funds as you judge will adequately compensate in light of the nature of the libel, the extent of its distribution and the probable effect on the persons who may have read it." *Id*. at 524-25. In *Kanaga I*, 687 A.2d at 182-183, the Court reaffirmed that "the law of Delaware" is that "as long as the jury finds that [plaintiff] is the victim of libel, she can recover actual damages. The amount, of course, is for the jury." In *Gannett Co. Inc. v. Kanaga*,

750 A.2d 1174, 1184 (Del. 2000) ("*Kanaga II*"), the Court noted that "*Spence's* presumption" would have supported a separate award of non-economic damages, if the jury had rendered one. And in *Doe v. Cahill*, 884 A.2d 451, 463 (Del. 2005), the Court specifically rejected arguments by the defendant and *amici curiae* to "change" the "settled law of libel" to require plaintiffs to "plead and prove damages." 884 A.2d at 463 n.55. These decisions are controlling here because slander per se enjoys the same presumption of damages as libel. *See Spence*, 396 A.2d at 970-71.[6]

Nuveen argued before the Superior Court, which effectively (albeit tacitly) agreed, that it could rebut *Spence*'s presumption and shift the burden to Preston Hollow to adduce evidence of reputational or economic injury. [A3253.] The Court need not reach this argument, because Preston Hollow did, in fact, adduce ample evidence. *See* Point II below. But regardless, the argument contradicts the settled law of Delaware. *Doe*, 884 A.2d at 463 ("[P]roof of damages proximately caused by a publication deemed libelous need not be shown in order for a defamed plaintiff

[6] Citing *Sheeran* and other cases, the Delaware Pattern Jury Instructions list the following factors that the jury should take into account in assessing damages: "(1) the nature and character of the statements in [__describe medium of defamation__]; (2) the language used; (3) the occasion when the statements were published; (4) the extent of their circulation; (5) the probable effect on those to whose attention they came; and (6) the probable and natural effect of the defamatory statements on [plaintiff's name]'s business, personal feelings, and standing in the community." Del. P.J.I. Civ. §22.13 (2000) (original bracketed material).

to recover nominal or compensatory damages") (quoting *Spence*, 396 A.2d at 970); *see also Kanaga I*, 687 A.2d at 182-183 ("[A]s long as the jury finds that [plaintiff] is the victim of libel, she can recover actual damages"). Nuveen's argument would also undermine the rationale behind the presumption—that it is "difficult to trace specific financial loss," and that a defamed person "might never know the extent of a lost opportunity." *Spence*, 396 A.2d at 970.

True, the defendant may seek to mitigate the damages through evidence tending to show the plaintiff's reputation was not harmed. Prosser & Keeton, Law of Torts §112, p. 788 n.35 (5th ed. 1984) ("Prosser") ("Even evidence that no actual damage was suffered goes only to mitigate the damages recovered."). But that is not a defense to liability and cannot rebut the presumption that there was *some* injury. *See* Restatement §620; *id.* §621, Reporter's Note (matters that "may be shown in mitigation of damages" include "[d]isbelief by hearers" and "[b]ad reputation of plaintiff"). The jury must determine what damages will compensate for the "probable as well as proven injury to plaintiff's reputation." *Sheeran*, 460 A.2d at 524-25.

2. This case presents no exception to the presumption: It does not involve a matter of public concern, and Nuveen acted with actual malice

Spence's presumption fully applies here because Nuveen's slander of its competitor Preston Hollow did not involve a matter of public concern and, in any event, Nuveen acted with actual malice.

The presumption of injury stems from the common law and was formerly available regardless of whether the defendant acted with malice. *See* Restatement §621 cmt. a ("At common law general damages have traditionally been awarded not only for harm to reputation that is proved to have occurred, but also, in the absence of this proof, for harm to reputation that would normally be assumed to flow from a defamatory publication of the nature involved."); Prosser, §112, p. 788 ("Otherwise stated, proof of the defamation itself is considered to establish the existence of some damages, and the jury is permitted, without other evidence, to estimate their amount."). "The rationale of the common-law rules has been the experience and judgment of history that 'proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.'" *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 760 (1985) (quoting W. Prosser, Law of Torts §112, p. 765 (4th ed. 1971)).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the U.S. Supreme Court limited the common law presumption of injury. It 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. However, the U.S. Supreme Court has since clarified that "permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." *Dun & Bradstreet*, 472 U.S. at 763.

Gertz does not apply:

- Nuveen's oral statements in private calls and meetings with broker-dealers do not implicate matters of public concern that the First Amendment protects. *See id.* at 760-61 (holding that *Gertz*'s rule did not apply to statements by subscription-based credit reporting service).
- Nuveen acted with actual malice. Even where matters of public concern are involved, this Court has reaffirmed that a plaintiff in a defamation per se case must only "demonstrate 'actual injury,' absent a showing of knowledge of falsity or reckless disregard for the truth."

Kanaga II, 750 A.2d at 1183 (libelous news article; Court distinguished *Gertz* and limited its holding to cases where there is no malice).

The Superior Court correctly found that Nuveen was bound by the Court of Chancery's findings of fact, made after a full trial on the merits, that Nuveen acted with both knowledge of falsity and reckless disregard for the truth—*i.e.*, with actual malice. Ex-A 29 (barring Nuveen "from relitigating the 'existence, falsity, and malicious nature' of either of these statements: (1) that [Preston Hollow] lied to its issuers and that Nuveen had evidence of such lies; and (2) that [Preston Hollow's] 'unethical practices' had 'caught the attention of the states' attorneys general' who sent 'nastygrams'"); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (defining actual malice).

Accordingly, under decades of this Court's jurisprudence, reputational injury is presumed, and Preston Hollow need not prove actual injury to its reputation.

3. The Superior Court erroneously failed to apply the presumption of injury, despite finding defamation per se and actual malice

The Superior Court correctly ruled that "defamation *per se* applies in this case," Ex-B 10, because Nuveen's statements "malign[ed] Preston Hollow in its business as an investor in municipal bonds," *id.* 17 (quoting *Preston Hollow Capital LLC v. Nuveen LLC*, 216 A.3d 1, 10 (Del. Ch. 2019)). It also correctly found actual malice by according preclusive effect to the Court of Chancery's findings.

But instead of applying the presumption of injury as settled law requires, the Superior Court erroneously ruled that to avoid summary judgment, Preston Hollow had to submit evidence that Nuveen's statements proximately caused injury to its reputation. Ex-B 7, 10-11.

The Superior Court's holding contravenes this Court's holdings that "damage to reputation is presumed" and the jury's damages award should compensate the plaintiff for "the *probable* effect [of the libel] on the persons who may have read it," *Sheeran*, 460 A.2d at 524-25 (emphasis added), and that "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," *Spence*, 396 A.2d at 970.

The Superior Court appears to have fallen into this error by misconstruing *Kanaga II*. It wrote, "The *Kanaga* plaintiff was required to, and did, present evidence of reputational injury." Ex-B 10. That is wrong. The Court did not *require* proof of reputational injury to sustain an award of general damages; it merely rejected the defendant's argument that the plaintiff had not submitted such proof. 750 A.2d at 1184. More relevant is that the Court clarified that "*Spence's* presumption [of injury] would sustain a separate humiliation award in this case had

one been rendered" based solely on the nature of the malicious, per se defamation. *Id*.

The Superior Court erroneously relied on lower court cases as support for a requirement to prove injury, citing *Los v. Davis*, 1991 WL 53458, at *1 (Del. Super. Ct. Apr. 9, 1991), *aff'd*, 602 A.2d 1081 (Del. 1991), and *Delaware Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *22 (Del. Ch. Oct. 23, 2002). Ex-B 7, 10. But *Los* involved neither slander per se nor actual malice. 1991 WL 53458, at *1-2. And in *Delaware Express Shuttle*, which did involve slander per se, the Court of Chancery acknowledged the presumption of injury and recognized that it had to award at least nominal damages *despite finding no actual harm.* 2002 WL 31458243, at *22 & n.132. And this was after a trial on the merits, at which point the trier of fact may certainly decline to award general compensatory damages and award nominal damages instead. *See Sheeran*, 460 A.2d at 524-525.

Indeed, *Delaware Express Shuttle* expressly contradicts the Superior Court's holding. It states that, even if no recipient believes or is affected by the defamatory statement, that "does not mean an element of the tort of defamation has not been established or no damages are to be awarded." 2002 WL 31458243, at *22. Rather, those facts are only relevant to the quantum of damages, which here would lie entirely within the province of the jury. *See id.*

Because injury to reputation is presumed, it was error to rule that Preston Hollow bore the burden of adducing evidence of injury to its reputation or proximate cause. Because that error was central to the grant of summary judgment, the judgment must be reversed.

II. The Superior Court Further Erred By Finding That Preston Hollow Failed To Create A Genuine Issue Of Fact Concerning Its Injury

A. Question Presented

Having erroneously concluded that Preston Hollow must prove injury and proximate cause, did the Superior Court further err in concluding that Preston Hollow had failed to adduce evidence sufficient to create a triable issue as to whether Nuveen's statements caused reputational injury, general damages, or special damages? [A1601; A1623; A1627-29; A1702-03; A1709-12; A1728-733; A3188-94; A3197; A3205-11.]

B. Scope of Review

Summary judgment. This Court "review[s] *de novo* the grant of summary judgment on the facts and the law to determine if disputed issues of material facts exist, thus precluding summary judgment." *Kanaga I*, 687 A.2d at 176. "The facts of record, including any reasonable hypotheses or inferences to be drawn therefrom, must be viewed in the light most favorable to the non-moving party." *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 502 (Del. 2001) (quotations omitted). The non-movant is thus "not required to provide uncontradicted evidence" in support of its claim. *Green v. Weiner*, 766 A.2d 492, 495 (Del. 2001).

Collateral estoppel. Whether the Court of Chancery's findings are preclusive under the doctrine of collateral estoppel "raises a question of law that this Court reviews *de novo*." *Betts v. Townsends, Inc*., 765 A.2d 531, 533 (Del. 2000).

Law of the case. "This Court reviews a court's application of the law of the case doctrine *de novo*." *Frederick-Conaway v. Baird*, 159 A.3d 285, 296 (Del. 2017) (citing *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 36 (Del. 2005)).

Evidence. Questions on the "admissibility of evidence" are reviewed "for an abuse of discretion." *Wong v. Broughton*, 204 A.3d 105, 108 (Del. 2019).

C. Merits of Argument

If this Court reverses the judgment on the law (*see* Point I), it remains necessary to review the Superior Court's erroneous ruling that Preston Hollow failed to adduce evidence of reputational injury or special damages. That is because the Superior Court will need clear direction on the scope of the damages trial, and a reversal under Point I alone will not provide that clarity. This Court's remand should direct a trial on (i) liability, (ii) the quantum of Preston Hollow's probable and proven general compensatory damages, and (iii) special damages. And it should include an explicit direction that Preston Hollow is not limited to nominal damages.

This section supports that result by demonstrating that Preston Hollow adduced ample evidence of both reputational injury and special damages. This is so

for two distinct reasons: The preclusive effect of the Court of Chancery's findings, and the evidence Preston Hollow offered in opposition to Nuveen's summary judgment motion. The Superior Court erred in its treatment of both.

1. The Court of Chancery conclusively found Nuveen's statements proximately caused harm to Preston Hollow's business

a) Collateral estoppel bars Nuveen from relitigating whether its statements injured Preston Hollow

The test for applying collateral estoppel (issue preclusion) is that "(1) a question of fact essential to the judgment (2) be litigated and (3) determined (4) by a valid and final judgment." *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 520 (Del. 1999). As shown below, collateral estoppel applies here because the Court of Chancery entered a valid and final judgment on Preston Hollow's tortious interference claim, after a full trial that decided factual issues identical to key issues before the Superior Court.

Proximate causation and injury are necessary elements of tortious interference with business relations. *Malpiede v. Townson*, 780 A.2d 1075, 1099 (Del. 2001). After a full trial, the Court of Chancery found these elements proven. *Nuveen I*, 2020 WL 1814756, at *15-16 ("Nuveen's interference proximately caused Preston Hollow harm . . . Preston Hollow has demonstrated harm" (capitalization normalized)). Nuveen did not appeal, so that judgment is final.

The Court of Chancery also noted that "damages would be available here, had Preston Hollow sought to demonstrate them." *Id.* at *20. While the Court of Chancery did not quantify Preston Hollow's damages because Preston Hollow sought only injunctive relief, it made detailed factual findings in support of its judgment about the harm Preston Hollow suffered. These included: (i) "Nuveen motivated [the broker-dealers'] changes in policy and business behavior"; (ii) "in response [to Nuveen's message] the broker-dealers took actions that curtailed the business expectancies of Preston Hollow"; (iii) Preston Hollow was "shut out from selecting previously interested bulge-bracket underwriters"; and (iv) Preston Hollow was "prevent[ed] access to the exclusivity that makes 100% placements valuable to its business model." *Id.* at *15-17.

Whatever proof the Superior Court mistakenly thought was needed, these findings more than supplied it.

b) Alternatively, law of the case bars Nuveen from relitigating whether its statements injured Preston Hollow

In addition, or alternatively, the doctrine of law of the case applies because the Court of Chancery transferred the defamation claim to the Superior Court pursuant to 10 *Del. C.* § 1902. The law of the case doctrine "normally requires that matters previously ruled upon by the same court be put to rest" and "exceptions should be entertained only in extraordinary circumstances." *Frank G.W. v. Carol*

M.W., 457 A.2d 715, 718-19 (Del. 1983) (second Family Court judge abused discretion in overruling first Family Court judge). It has particular importance where, as here, "a successor judge enters onto the scene." *Id.*

The Superior Court recognized in the Damages Decision that the Court of Chancery found Nuveen's statements to the broker-dealers to be "wrongful, damaging, malicious, and false." Ex-B 4-5 (footnotes omitted). It reaffirmed that "the prior rulings of the Court of Chancery were—and still are—treated as if they were made by a Superior Court judge." *Id.* 5. Yet, in finding no evidence of injury or proximate cause the Superior Court directly contradicted explicit Court of Chancery findings.

No "extraordinary circumstances" permitted this result. Quite the opposite: The Court of Chancery held a full trial, in which it was empowered to weigh evidence and find facts, whereas the Superior Court had no power to "weigh qualitatively or quantitatively the evidence adduced on the summary judgment record." *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002); *see also Frank G.W.*, 457 A.2d at 719-20 (reversing decision by successor judge to overrule prior judge's determination).

Nuveen has had its day in court. Under either doctrine—collateral estoppel or law of the case—the Superior Court erred by permitting Nuveen to relitigate

whether its statements proximately caused injury to Preston Hollow. And that is true even if the Superior Court were correct in requiring Preston Hollow to show Nuveen's statements proximately caused injury. The *extent* of the injury—*i.e.*, the general or special damages to be awarded—will be a question for the jury.[7]

2. Even if the Court of Chancery's findings are not preclusive, Preston Hollow adduced ample evidence to create an issue of fact

a) The Superior Court ignored Preston Hollow's proof of special damages

Although the Superior Court correctly acknowledged that Preston Hollow need not plead or prove special damages, it erroneously either assumed that Preston Hollow had no evidence of special damages, or ignored Preston Hollow's evidence. *See* Ex-B 10. In fact, Preston Hollow adduced evidence from which a rational jury could conclude Nuveen's statements caused special damages.

Nuveen openly declared that its goal in contacting the broker-dealers was to prevent Preston Hollow from doing business. [A0205-06.] And that is what

[7] Nuveen may argue that Preston Hollow did not prove this injury arose from Nuveen's lies, as distinct from its threats. That is incorrect. Nuveen used "threats and lies" in the same conversations to achieve the same end: to persuade broker-dealers to stop doing business with Preston Hollow. *See Nuveen I*, 2020 WL 1814756, at *1. Where there are multiple tortious causes of an injury, the defendant has the burden to segregate the harms caused by each tort. Restatement §433A; *Comdyne I, Inc. v. Corbin*, 908 F.2d 1142, 1152 (3d Cir. 1990). Nuveen has not done so.

happened. As Preston Hollow's expert, Dr. Goldstein, demonstrated, Preston Hollow's business witnessed an immediate, severe, and sustained drop. [A2575-76; A2579-80.] Referrals from bulge-bracket broker-dealers—once a driver of Preston Hollow's growing business—dried up right after Nuveen's campaign. [A2576.] Broker-dealers curtailed doing business with Preston Hollow, or stopped altogether, citing reputational and compliance risks. [A3226-30; A3236-39; Statement of Facts, §D.] It has been recognized for a century that "[a]n act which in fact produces a result intended by the actor is a proximate cause of such result." James Angell McLaughlin, *Proximate Cause*, 39 Harv. L. Rev. 149, 198 (1925).

Preston Hollow's losses can be quantified. Using standard methodologies endorsed by Delaware courts, Dr. Goldstein put a dollar figure on them: $629 million. [A2570.] While Dr. Goldstein did not opine that Nuveen's statements were the cause of Preston Hollow's economic losses, he considered and ruled out other potential causes. [A2971-72; A2993; A3013-14; *see also* A3239-40.] This suffices not just for summary judgment but also for trial: The dramatic decline in Preston Hollow's business happened (i) just as all the major broker-dealers began making significant changes in their business practices vis-à-vis Preston Hollow, (ii) immediately after Nuveen's slanderous statements to the broker-dealers, and (iii) as the expressly intended result of Nuveen's campaign of lies and threats. [Statement

of Facts, §C-D.] A rational jury could infer that it was not a coincidence, and that Nuveen's statements caused it. *See* Prosser, §112, p. 794 n.16 (observing the "prevailing rule today" that "proof of a general decline in business and the elimination of other causes" suffices to show special damages "where it is impossible to be more specific"); A3227 ("It is impossible for Preston Hollow to know the specific transactions broker-dealers decided not to show Preston Hollow or the number of deals that Preston Hollow would have closed but for Nuveen's threats and lies.").

b) The Superior Court ignored third-party evidence of reputational injury

There is ample evidence from which a rational jury could infer that Preston Hollow's reputation was diminished and, on that basis, award general compensatory damages.

Broker-dealers suddenly became concerned that working with Preston Hollow could violate MSRB Rule G-17. [A0297; A2510-11.] They started internal investigations and consulted with counsel about Preston Hollow [A0908-9; A1778-82], selectively applied new compliance procedures to Preston Hollow (but not to others) [A2523-24; A2529-2300], or stopped working on 100% placements with Preston Hollow [Statement of Facts, §D; A2825-35].

The Superior Court evidently accepted the testimony of broker-dealers that Nuveen's statements did not change their opinions about Preston Hollow. It dismissed as "speculation" the possibility that the jury would not credit the broker-dealers' explanations for why they have changed their business practices vis-à-vis Preston Hollow. Ex-B 14-15.

Speculation? Hardly.

Irrefutable evidence emerged that at least one witness was not truthful. *Compare* [[redacted]] ([redacted] denies that Miller told Citi to stop doing business with Preston Hollow), *with* [[redacted]] ([redacted] makes clear that Miller told Citi to stop doing business with Preston Hollow).

And there was ample evidence of witness bias, given that Nuveen is one of the biggest players in the municipal bond market and among the broker-dealers' largest sources of business. [*See, e.g.*, A0352 [redacted]; A0420 [redacted]; A0670 [redacted]; A0716 [redacted]; A0953 [redacted]; A1111 [redacted].]

It is uniquely the province of the jury, not the court on summary judgment, to decide whether to credit testimony, and how much weight to give it. *Cerberus Int'l*, 794 A.2d at 1150. Vice Chancellor Glasscock, sitting as finder of fact, heard the same testimony by the broker-dealers' witnesses. He allowed that their explanations "may be true" but found they "do not rebut causation because Nuveen motivated these changes in policy and business behavior." *Nuveen I*, 2020 WL 1814756, at *15.

The Superior Court erred in failing to recognize that, just like the Vice Chancellor, the jury should be able to hear the broker-dealers' explanations and compare those explanations to their actions and motivations in order to assess the weight and credibility of their evidence.

c) The Superior Court erroneously excluded or disregarded evidence by Preston Hollow's witnesses concerning its reputational injury

The Superior Court abused its discretion by excluding evidence from Preston Hollow's executives concerning its reputational injury. Those witnesses testified about their interactions with broker-dealers before and after Nuveen's slander, and the change in market perception. [A1211; A1280-81; A1837; A3226-27; A3236-7.]

The Superior Court cited two primary justifications for refusing to consider or discounting the evidence. Both are erroneous. First, it suggested that the testimony

of Preston Hollow's executives was not probative of reputational injury because it was "ipse dixit evidence"—a term we cannot find anywhere else in Delaware law in this context. Second, it implied that the proffered testimony about Preston Hollow's communications with broker-dealers (or unspecified portions thereof) was inadmissible hearsay.

"Ipse dixit evidence." While the court below did not expressly exclude the testimony of Preston Hollow's executives as inadmissible, it dismissed the testimony as "ipse dixit evidence" that could not "create a genuine issue of fact." Ex-B 14, 19. It reasoned that, "[w]hen determining whether a Plaintiff has demonstrated any loss to reputation, 'it must be measured by the perception of others, rather than that of the plaintiff because reputation is the estimation in which one's character is held by neighbors or associates.'" Ex-B 11 (quoting *Synygy, Inc. v. ZS Assocs.*, 110 F. Supp. 3d 602, 616 (E.D. Pa. 2015)) (alterations omitted). While of course reputation is a function of what third parties think, that does not mean that a plaintiff's own testimony about that subject is irrelevant or inadmissible.

In *Kanaga II*, this Court rejected the argument that reputational harm must be proven by third-party evidence. There, the defendant argued that the plaintiff had "produced no evidence of reputational injury through testimony of patients or other physicians." 750 A.2d at 1184. The Court responded that the defendant had failed

"to credit [the plaintiff's] own testimony that she suffered daily humiliation and embarrassment" and that "while she did not directly hear conversations in supermarkets, beauty parlors and elsewhere, she was told about them." *Id.* (cleaned up). The Court also noted evidence that the defamatory statements circulated widely as showing reputational injury. *Id.*; *accord* Del. P.J.I. §22.13 (instructing jurors in assessing damages to consider "the extent of [the statements'] circulation" as well as the "probable effect on those to whose attention they came" and "the probable and natural effect of the defamatory statements on [the plaintiff's] business").

By contrast, the court below relied entirely on *Synygy,* a federal district court case applying Pennsylvania law that has never been cited in any other reported Delaware decision. Ex-B 11. Even assuming that *Synygy* correctly applied Pennsylvania law, it is out of step with Delaware law and the Superior Court should not have followed it.[8]

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[8] *Synygy*'s correctness is questionable. The Superior Court quoted this statement from *Synygy*: loss to reputation "must be measured by the perception of others, rather than that of the plaintiff [] because reputation is the estimation in which one's character is held by [] neighbors or associates" (*id.*, alterations by Superior Court). But the ultimate support for that statement in *Synygy* is about publication, not harm to reputation. *Synygy* cited *Pennoyer v. Marriott Hotel Servs, Inc.*, 324 F. Supp. 2d 614, 619 (E.D. Pa. 2004), which cited *Sprague v. ABA*, 276 F. Supp. 2d 365, 370 (E.D. Pa. 2003), which cited two authorities: Comment b from a section titled "What Constitutes Publication" in the Restatement of Torts §577 (1938) ("[U]nless

Hearsay. While the Superior Court did not rule that any particular testimony was hearsay or expressly exclude any evidence, it implied that it was disregarding testimony by Preston Hollow's executives on hearsay grounds. Ex-B 14.[9] But this Court and courts around the country have recognized the admissibility of testimony concerning what a third party reported about a defamatory statement and the effect it had upon that third party's opinions of the defamed party. *See Kanaga II*, 750 A.2d at 1184-85.[10]

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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."); and *Gaetano v. Sharon Herald Co.*, 231 A.2d 753, 755 (Pa. 1967), which quoted the Restatement in analyzing where the "publication" of a libelous newspaper article occurred. This rationale for the element of publication has nothing to do with the plaintiff's competence to testify about injury to its own reputation.

[9] Preston Hollow's summary judgment opposition brief did not address the admissibility of this evidence because Nuveen's hearsay objection was raised for the first time on reply. *See* A3260-61.

[10] *See also, e.g.*, *Herrmann v. Newark Morning Ledger Co.*, 138 A.2d 61, 76 (N.J. Super. Ct. App. Div. 1958), *adhered to on reh'g*, 140 A.2d 529 (N.J. Super. Ct. App. Div. 1958) ("[S]o far as the questioned evidence in the present case constituted testimony by witnesses . . . as to what third persons told witnesses concerning the effect which [the defamatory statement] had upon declarants' opinions of plaintiff, it was admissible."); *Mattox v. News Syndicate Co.*, 176 F.2d 897, 904 (2d Cir. 1949); *Macy v. N.Y. World-Telegram Corp.*, 141 N.E.2d 566, 573 (N.Y. 1957); *Hanlon v. Davis*, 545 A.2d 72, 77 (Md. Ct. Spec. App. 1988) (finding reversable error where trial court precluded testimony of what third parties said to witness about the defamatory article and the impressions it gave them); *Ardash v. Karp*, 170 N.W.2d

Moreover, multiple exceptions to the hearsay rule would apply in the context of proving injury to reputation. Delaware Rule of Evidence 803(21) permits hearsay to prove "reputation among a person's associates or in the community concerning the person's character."[11] A statement by a broker-dealer that he or she intended or planned to stop doing business with Preston Hollow is admissible under Rule 803(3), which creates a hearsay exception for statements of a "then-existing state of mind" including an "intent" or "plan" concerning the declarant's future conduct. *See Capano v. State*, 781 A.2d 556, 608-09 (Del. 2001) ("Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory pointing backwards to the past.") (quoting *Shepard v. United States*, 290 U.S. 96, 105-06 (1933)). The residual hearsay exception, Rule 807, would also cover statements by broker-dealers to Preston Hollow about what Miller and his

854, 856 (Mich. Ct. App. 1969); *Poleski v. Polish Am. Publ'g Co.*, 235 N.W. 841, 842-3 (Mich. 1931).

[11] *See also Raintree Homes, Inc. v. Birkbeck*, 2013 WL 5234255, at *15 (Pa. Super. Ct. Aug. 7, 2013) (defendant allowed to admit news video of third-party statements under Pennsylvania Rule of Evidence 803(21) because "the statements in the video pertain to Plaintiffs' claimed damages as a result of Defendants' publications," and "in determining what injury has been done to the plaintiff's reputation, the jury may consider, inter alia, the character and previous general standing of the plaintiff in the community") (citation omitted).

associates told them, since there is ample evidence of similar statements to provide circumstantial guaranties of trustworthiness.

CONCLUSION

The Damages Decision erred insofar as it dismissed Preston Hollow's defamation claim, failed to apply *Spence*'s presumption of injury, and found no evidence of reputational injury or special damages. The Court should:

(a) Reverse the Damages Decision and remand the case to the Superior Court for a jury trial on the remaining liability issue as well as general compensatory damages, special damages, and punitive damages;

(b) Issue instructions that general compensatory damages are presumed and their amount—both what has been proved and what is probable—is a question for the jury;

(c) Hold that the Court of Chancery conclusively found that Nuveen's statements proximately caused harm to Preston Hollow's business, which the jury should quantify; and

(d) Reverse the Damages Decision insofar is it found no record evidence of reputational injury or special damages.

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2022, the foregoing document was caused to be served upon the following counsel of record via File and Serve*Xpress*:

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