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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** **EFILED: NOVEMBER 9, 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 REPLY BRIEF ON APPEAL AND CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

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INTRODUCTION

Nuveen prosecuted a campaign to destroy Preston Hollow by spreading malicious lies in the community of broker-dealers that Nuveen knew were crucial to Preston Hollow's business. Nuveen boasted in recorded calls that the top broker-dealers agreed to stop working with Preston Hollow on its bread-and-butter deals—100% placements. The campaign largely succeeded. Preston Hollow's business with those broker-dealers evaporated almost immediately, and its deal volume plummeted.

Yet the Superior Court refused to let a jury hear the evidence and decide to what extent Nuveen must compensate Preston Hollow. It granted summary judgment to Nuveen, finding that Preston Hollow suffered no harm. It reached this result by weighing conflicting evidence, making credibility determinations from deposition testimony, drawing inferences *in favor of* Nuveen, and drawing them *against* Preston Hollow.

The result is contrary to well-established Delaware law and previous judicial determinations in this case.

Delaware law presumes that Nuveen's lies, told with actual malice, injured Preston Hollow's reputation. The Court of Chancery concluded after trial that Nuveen's lies and threats to the broker-dealers injured Preston Hollow. That should have been enough to defeat Nuveen's summary judgment motion, and Preston

Hollow offered far more evidence on both Nuveen's campaign and its damaging effects.

Granting summary judgment to Nuveen was not justice. It cannot stand. The Superior Court's erroneous application of the law and refusal to consider the evidence requires reversal of the judgment.

ARGUMENT ON APPEAL

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. *Spence*'s presumption of damages applies to slander per se

This Court recognized in *Spence v. Funk* that "the law presumes damages" for statements that "malign one in a trade, business, or profession." 396 A.2d 967, 970 (Del. 1978). Yet Nuveen argues that *Spence* requires slander per se plaintiffs to "prove some sort of reputational injury." Nuveen Br. 20. *Spence* says no such thing, for good reason: It is incompatible with a presumption of damages. *See* Del. P.J.I. §22.13 (2000) ("the purpose of a damages award" is "fair and reasonable compensation for harm wrongfully caused by another"); *Danias v. Fakis*, 261 A.2d 529, 531 (Del. Super. Ct. 1969) ("To constitute slander or defamation actionable per se the nature of the charge must be such that the Court can *legally presume that the person defamed has been injured in his reputation or business and occupation*.") (emphasis added) (citing *Snavely v. Booth*, 176 A. 649 (Del. Super. Ct. 1935)). Nuveen cites *Marcus v. Funk*, 1993 WL 141864 (Del. Super. Ct. Apr. 21, 1993), a post-trial opinion in a libel case, but *Marcus* acknowledges that "general damages for injury to reputation" were "presumed for libel at common law" in part because "[i]njury to reputation . . . cannot be accurately measured." *Id.* at *1.

It is not correct, as Nuveen argues, that "[n]umerous Delaware courts in the wake of *Spence* have required slander per se plaintiffs to plead and prove reputational injury." Nuveen Br. 20. None of the three trial-level cases Nuveen cites supports its position:

- Nuveen notes that *Schweitzer v. LCR Capital Partners, LLC*, 2020 WL 1131716 (Del. Super. Ct. Mar. 9, 2020) listed "injury" as an element of defamation and dismissed a complaint that failed to allege "the impact this statement had" on plaintiff. Nuveen Br. 20. Actually, the court dismissed the complaint for multiple pleading defects, including "no facts indicating, even generally, to whom this statement was made" or "how this statement was understood." 2020 WL 1131716, at *10.
- *Read v. Carpenter*, 1995 WL 945544 (Del. Super. Ct. June 8, 1995) dismissed a defamation claim because certain statements were absolutely privileged, *id.* at *3; other statements were not defamatory, *id.* at *4; and for other statements, publication was not alleged, *id.* at *5. The "bare allegation" of injury quoted on page 20 of Nuveen's brief was rejected merely because it did "not provide support for plaintiff's slander per se claim." *Id.*

- *Bloss v. Kershner*, 2000 WL 303342 (Del. Super. Ct. Mar. 9, 2020) is irrelevant; the court recited "injury" as an element but dismissed the case after a bench trial because "[t]he evidence produced at trial fails to establish a defamatory statement that was made by [defendant] to any third party." *Id.* at *6.

None of these cases mentioned reputational injury, let alone held it must be pleaded and proved in a case of slander per se.

Having failed to support its threshold proposition, Nuveen writes: "Thus, courts have repeatedly held that a plaintiff's failure to prove reputational loss warrants summary judgment, even in slander per se cases." Nuveen Br. 21. Nuveen cites one libel case from Delaware federal court and two Pennsylvania cases:

- *Igwe v. E.I. Du Pont De Nemours & Co.*, 2005 WL 196577 (D. Del. Jan. 26, 2005), was a libel case that does not support Nuveen's argument. The Court granted summary judgment because the statement at issue on defendant's website—calling plaintiff an "Information Scientist" rather than "Senior Information Scientist"—was not defamatory. *Id.* at *4.

- *FJW Investment, Inc. v. Luxury Bath of Pittsburgh, Inc.*, 2019 WL 1782190 (Pa. Super. Ct. Apr. 23, 2019) applied Pennsylvania law.[1] The majority wrote "a plaintiff in a defamation *per se* action must provide proof of actual harm," *id.* at *3; but the concurrence cited Pennsylvania Supreme Court precedent holding that presumed general damages are available in Pennsylvania on a showing of "actual malice," a standard not met in *FJW*. *Id.* at *7 (Shogan, J., concurring) (quoting *Joseph v. Scranton Times, L.P.*, 129 A.3d 404, 430-32 (Pa. 2015)).
- *Synygy, Inc. v. ZS Associates, Inc.*, 110 F. Supp. 3d 602 (E.D. Pa. 2015) is a libel case applying Pennsylvania law. *Synygy* acknowledged that presumed general damages are available if there was actual malice, *id.* at 614-15, but found no evidence of actual malice. *Id.* at 615-16.

Nuveen's cited cases do not support its argument. None disallowed the presumption of general damages where, as here, there was actual malice.

[1] *FJW* is an unpublished memorandum decision, dated April 23, 2019. Under 210 Pa. Code § 65.37, subject to two inapplicable exceptions, "An unpublished memorandum decision filed prior to May 2, 2019, *shall not be relied upon or cited by a Court or a party in any other action or proceeding*[.]" (emphasis added).

The overwhelming majority of states—42 of them, including Delaware—presume general damages for injury to reputation, subject only to the requirement of showing actual malice under *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974) (where it applies). *See, e.g.*, *Toler v. Süd-Chemie, Inc.*, 458 S.W.3d 276, 282 (Ky. 2014) ("injury to reputation is presumed" for defamation per se); *Askew v. Collins*, 722 S.E.2d 249, 251 (Va. 2012) (same).[2] A 43rd state, Vermont, presumes special

[2] *See also Pensacola Motor Sales, Inc. v. Daphne Auto., LLC*, 155 So. 3d 930, 942-43 (Ala. 2013); *MacDonald v. Riggs*, 166 P.3d 12, 18 (Alaska 2007); *McClinton v. Rice*, 265 P.2d 425, 429 (Ariz. 1953); *Barker v. Fox & Assocs.*, 192 Cal. Rptr. 3d 511, 524 (Cal. Ct. App. 2015); *Rowe v. Metz*, 579 P.2d 83, 85 (Colo. 1978); *Gleason v. Smolinski*, 125 A.3d 920, 947 n.31 (Conn. 2015); *Campbell v. Jacksonville Kennel Club, Inc.*, 66 So. 2d 495, 497 (Fla. 1953); *ACLU, Inc. v. Zeh*, 864 S.E.2d 422, 434 n.15 (Ga. 2021); *Russell v. Am. Guild of Variety Artists*, 497 P.2d 40, 42 (Haw. 1972); *Barlow v. Int'l Harvester Co.*, 522 P.2d 1102, 1117 (Idaho 1974); *Bryson v. News Am. Publ'ns*, 672 N.E.2d 1207, 1214-15 (Ill. 1996); *Baker v. Tremco Inc.*, 917 N.E.2d 650, 657 (Ind. 2009); *Barreca v. Nickolas*, 683 N.W.2d 111, 116 (Iowa 2004); *Kennedy v. Sheriff of E. Baton Rouge*, 935 So. 2d 669, 675 (La. 2006); *Haworth v. Feigon*, 623 A.2d 150, 158-59 (Me. 1993); *Hearst Corp. v. Hughes*, 466 A.2d 486, 490-95 (Md. 1983); *Burden v. Elias Bros. Big Boy Rests.*, 613 N.W.2d 378, 382 (Mich. Ct. App. 2000); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 259 (Minn. 1980); *Phillips Bros., LP v. Winstead*, 129 So. 3d 906, 929 (Miss. 2014); *McCusker v. Roberts*, 452 P.2d 408, 414 (Mont. 1969); *Hutchens v. Kuker*, 96 N.W.2d 228, 232 (Neb. 1959); *Bongiovi v. Sullivan*, 138 P.3d 433, 448 (Nev. 2006); *MacDonald v. Jacobs*, 201 A.3d 1253, 1259 (N.H. 2019); *Liberman v. Gelstein*, 605 N.E.2d 344, 347-48 (N.Y. 1992); *Stewart v. Nation-Wide Check Corp.*, 182 S.E.2d 410, 414 (N.C. 1971); *Skjonsby v. Ness*, 221 N.W.2d 70, 73 (N.D. 1974); *Niotti-Soltesz v. Piotrowski*, 86 N.E.3d 1, 5 (Ohio Ct. App. 2017); *Mitchell v. Griffin TV, L.L.C.*, 60 P.3d 1058, 1061, 1066 (Okla. Civ. App. 2002); *Cook v. Safeway Stores, Inc.*, 511 P.2d 375, 378 (Or. 1973); *Joseph v. Scranton Times, L.P.*, 129 A.3d 404, 432 (Pa. 2015); *Nassa v. Hook-SupeRx, Inc.*, 790 A.2d 368, 374-75

damages instead. *See Kneebinding, Inc. v. Howell*, 201 A.3d 326, 355 (Vt. 2018). This consensus reflects "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)).

Nuveen asks this Court to change Delaware law and adopt the minority rule, a request this Court has previously refused. In *Doe v. Cahill*, the defendant and *amici curiae* "argue[d] extensively" that the Court should "change Delaware libel law to require that a libel plaintiff must plead and prove damages." 884 A.2d 451, 463 n.55 (Del. 2005). The Court rejected the argument as "contrary to the settled law of libel," concluding: "We see no reason to change this rule here." *Id.* This Court should do the same for slander per se.

(R.I. 2002); *Fountain v. First Reliance Bank*, 730 S.E.2d 305, 309 (S.C. 2012); *Walkon Carpet Corp. v. Klapprodt*, 231 N.W.2d 370, 373-74 (S.D. 1975); *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015); *Allred v. Cook*, 590 P.2d 318, 320-21 (Utah 1979); *Valdez-Zontek v. Eastmont Sch. Dist.*, 225 P.3d 339, 349 (Wash. Ct. App. 2010); *Richard H. v. Rachel B.*, 2018 WL 2277775, at *5 (W. Va. May 18, 2018); *Dalton v. Meister*, 188 N.W.2d 494, 497 (Wis. 1971); *Hill v. Stubson*, 420 P.3d 732, 741 (Wyo. 2018).

B. Contrary to Nuveen's argument, the presumption of damages applies to both libel and slander per se

Nuveen tries to avoid this Court's jurisprudence in *Spence*, *Sheeran*, *Kanaga I*, *Kanaga II*, and *Doe* on the basis that those cases involved claims of libel, not slander per se. Nuveen Br. 21-22.

Nuveen ignores that libel and slander per se both enjoy the same presumption of damages. For both torts, if liability is established, the factfinder must award "at least nominal damages." Restatement (Second) of Torts ("Restatement") §620. Because *some* amount of damages—nominal damages or something more—is presumed, and the amount is a question for the jury, the presumption cannot be fully rebutted. *Kanaga v. Gannett Co.*, 687 A.2d 173, 182-183 (Del. 1996) ("*Kanaga I*") ("[A]s 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."); *Sheeran v. Colpo*, 460 A.2d 522, 524-25 (Del. 1983) ("In the case of a deliberate or reckless libel, damage to reputation is presumed and you [the jury] 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.").

Thus, the well-settled rule 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, applies equally to slander per se. The defendant may introduce evidence to mitigate damages, such as "[d]isbelief by hearers." Restatement §621, Reporter's Note. But such evidence is not a defense to liability.

As it concerns the presumption of damages, this Court has never drawn a distinction between libel and slander per se. Indeed, in *Kanaga II*, the Court quoted from *Spence*'s discussion of slander per se to articulate the presumption of damages in a libel case:

> In *Spence v. Funk*, Del. Supr., 396 A.2d 967, 970 (1978) (citing Prosser Law of Torts § 112 (1971)), this Court held that there is a presumption of damages with respect to statements that 'malign one in a trade, business or profession.' Thus, under Delaware law, injury to reputation is permitted without proof of special damages. In *Kanaga I*, this Court ruled that 'to accuse Dr. Kanaga of recommending unnecessary surgery for her own pecuniary gain is to malign her in her business or profession.' 687 A.2d at 181. *Spence's* presumption would sustain a separate humiliation award in this case had one been rendered.

Gannett Co. v. Kanaga, 750 A.2d 1174, 1184 (Del. 2000) ("*Kanaga II*"). This language belies Nuveen's effort to recharacterize *Kanaga II* as "confirm[ing] that there is no presumption of reputational harm under Delaware law." Nuveen Br. 22.[3]

[3] While *Kanaga II* noted the lower court had "instructed the jury that [plaintiff] must prove actual damages," that instruction's correctness was not disputed on appeal. 750 A.2d at 1184.

Finally, Nuveen points to *Spence*'s comment that the "general rule" of libel "that any publication which is libelous on its face is actionable without pleading or proof of special damages" is "a basic way in which libel differs from slander." 396 A.2d at 970; *see* Nuveen Br. 21-22. But that observation did not apply to slander per se, which *Spence* confirmed is, like libel, actionable without pleading or proof of special damages. *Spence*, 396 A.2d at 970.

C. Nuveen's hyperbole cannot change the fact that Delaware public policy supports the presumption of damages

Nuveen warns that applying long-settled Delaware law in this case would "violate[] Delaware public policy" and "open the floodgates to baseless litigation that would inevitably chill free speech and invite frivolous and commercially disruptive litigation." Nuveen Br. 23, 25.

"Delaware courts have previously rejected similar hypothetical 'floodgate' arguments." *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 398 (Del. 2013); *see also Preston v. Allison*, 650 A.2d 646, 649 (Del. 1994). Nuveen's argument also has it backward. *Nuveen* is trying to change the law. The presumption of damages stems from the common law. Opening Br. 29 (citing authorities); *see also Spence*, 396

A.2d at 970; *Dun & Bradstreet*, 472 U.S. at 760; Restatement §621 cmt. a. The presumption of damages for slander per se is the majority rule nationwide. *Supra* note 2. Generations have passed without a single flood.[4]

Delaware public policy supports maintaining strong protections against the kind of malicious slander Nuveen was caught on tape using "to destroy Preston Hollow." *Preston Hollow Capital LLC v. Nuveen LLC*, 2020 WL 1814756, at *19 (Del. Ch. Apr. 9, 2020) ("*Nuveen I*"). This Court has repeatedly "interpreted Section 9 of the Delaware Bill of Rights, colloquially referred to as the 'open courts' or 'remedies' clause, to provide a 'strong state constitutional basis for remedies to recompense damage to one's reputation.'" *Ramunno v. Cawley*, 705 A.2d 1029, 1035 (Del. 1998) (quoting *Kanaga I*, 687 A.2d at 177). And "Section 5 establishes generally the right of freedom of expression for citizens, provided that they are 'responsible for the abuse of that liberty.'" *Kanaga I*, 687 A.2d at 177 (quoting Del. Const. Art. I, §5). Nuveen has abused its freedom of expression, and Delaware has

[4] Nuveen incorrectly asserts that Preston Hollow commenced "serial litigation," bringing claims in three courts. Nuveen Br. 12, 25. In fact, Preston Hollow brought *all* its claims in the Court of Chancery. *It was at Nuveen's urging* that the court transferred or dismissed without prejudice the claims other than tortious interference. *See Preston Hollow Capital LLC v. Nuveen LLC*, 216 A.3d 1, 16 (Del. Ch. 2019); *Nuveen I*, 2020 WL 1814756, at *12.

a strong public interest in ensuring that injury from malicious slander does not go unremedied where it is "difficult to trace specific financial loss" because a defamed person like Preston Hollow "might never know the extent of a lost opportunity." *Spence*, 396 A.2d at 970.

There is no basis for Nuveen's argument that the presumption of damages violates due process under *Western & Atlantic Railroad v. Henderson*, 279 U.S. 639 (1929). Nuveen Br. 24-25. *Western & Atlantic* did not address defamation; it addressed a presumption of liability concerning railroad accidents that was trigged merely by the occurrence of an accident, without evidence of negligence. *Id.* at 640, 642. The Court held a presumption of liability that required no evidentiary showing was arbitrary. By contrast, the presumption of damages for defamation arises *only if* the factfinder concludes a defendant committed slander per se or libel and, for matters of public concern, acted with actual malice. Those findings are present here.

Finally, Nuveen warns that Preston Hollow "seeks windfall damages where no harm has occurred." Nuveen Br. 24. But whether harm has occurred, the extent of the harm, and what constitutes fair compensation are all matters for the jury. *See Kanaga I*, 687 A.2d at 182-183; *Lacey v. Beck*, 161 A.2d 579, 580 (Del. Super. Ct. 1960) ("Fundamentally, the jury is the part of our judicial system which is entrusted with the determination of the facts; and the amount of damages is a question of

fact."); Del. P.J.I. §22.13 (2000). There is ample evidence in this record of the grievous harm suffered by Preston Hollow, and the Superior Court erred by taking this question away from the jury.

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

A. Nuveen bears the burden to segregate harm caused by Nuveen's lies from harm caused by its threats

The Court of Chancery found Nuveen harmed Preston Hollow's business through a campaign of malicious lies and threats. *See Nuveen I*, 2020 WL 1814756, at *16. Nuveen told lies and made threats as part of a unified effort to put Preston Hollow out of business. *Id.* at *1. Nuveen's stated purpose was to cause bulge-bracket broker-dealers to stop doing 100% placements with Preston Hollow. [A0204-05; A0246-48.] That occurred, and Preston Hollow's business suffered severe damage. [A2576; A2579; A3227; A3236-37.]

Nuveen argues that the victim, Preston Hollow, must "isolat[e] any reputational harm specifically attributable to slander" from harm caused by threats. Nuveen Br. 28-29. That is incorrect. *See* Opening Br. 40 n.7. Nuveen ignores *Comdyne I, Inc. v. Corbin*, 908 F.2d 1142 (3d Cir. 1990), where the Third Circuit addressed a defamation case in which both actionable and non-actionable statements contributed to plaintiff's damages. *Comdyne* explained that "the burden shifts to the defendant to demonstrate how the damages should be apportioned among the

concurrent causes." *Id.* at 1152.[5] Nuveen has not attempted to meet its burden. While we have found no Delaware case on point, and Nuveen cites none, no policy justifies letting a tortfeasor escape liability merely because it made it difficult to segregate harms by committing multiple torts simultaneously.

Nuveen's argument also fails because apportionment is unnecessary: Where harm caused by multiple torts "is indivisible, there is no apportionment of damages among the concurrent causes." *Comdyne*, 908 F.2d at 1152 (finding it unnecessary to determine whether harm was indivisible because defendant "never introduced any evidence at trial on the issue of apportionment"); *see also* Restatement §433A(2). That rule fully applies here because Nuveen used threats to emphasize the lies—to demonstrate its conviction that Preston Hollow's alleged conduct was intolerable. [*See, e.g.*, A0189-192.]

Context is important. [redacted] [*See* [redacted]] Broker-dealers that underwrite and sell municipal bonds are regulated by the Municipal Securities Rulemaking Board, under whose rules they must "deal fairly

[5] Although *Comdyne* applied New Jersey law, it relied on the Restatement, which Delaware courts also follow.

with all persons and must not engage in any deceptive, dishonest, or unfair practice." MSRB Rule G-17. Nuveen's threats provided financial motivation to the broker-dealers, and the lies created reputational and compliance concerns. [A2670-71; A2884; A2887-88.] They worked in tandem; it is not possible to "isolate" harm caused by Nuveen's lies from its threats.

None of Nuveen's cases is to the contrary. *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) considered whether the plaintiffs' theory of antitrust injury was suitable for class certification. Nuveen observes that *Comcast* requires class-action damages to be tied to the theory of liability (Nuveen Br. 28-29), but that case was grounded in technicalities of federal antitrust and class-action law. *See Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 374-75 & n.10 (3d Cir. 2015) (limiting *Comcast* to antitrust context at issue).

In *Kanaga II*, this Court reversed because the jury was not asked to distinguish general damages (which were presumed) from special damages (which require proof), and certain evidence supporting special damages was inadmissible. 750 A.2d at 1184. It had nothing to do with apportioning damages from concurrent causes. And in *McGuire* and *Phillips*—both physical accident cases—summary judgment was based on the absence of *any* evidence of causation. *Phillips v. Del. Power & Light Co.*, 216 A.2d 281 (Del. 1966); *McGuire v. McCollum*, 116 A.2d

897 (Del. Super. Ct. 1955). There is ample evidence of causation in this case, as discussed below.

B. Issues of fact preclude summary judgment on whether Nuveen's statements proximately caused injury to Preston Hollow

1. The Court of Chancery's finding that Nuveen's statements proximately caused injury is preclusive

If it were necessary to show proximate cause, the Court of Chancery already found Nuveen's conversations with the broker-dealers proximately caused injury to Preston Hollow. Opening Br. 37-41. Nuveen responds that the Court of Chancery only analyzed injury from tortious interference and did not find "reputational harm from slander." Nuveen Br. 44.

Nuveen misses the mark because collateral estoppel applies "in a suit on a *different cause of action*" and binds that party to *findings of fact*. *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999), *as modified* (May 27, 1999) (emphasis added). The Court of Chancery found harm and causation *as a matter of fact*. *Nuveen I*, 2020 WL 1814756, at *15-16 ("Nuveen's Interference Proximately Caused Preston Hollow Harm"), at *15 ("Preston Hollow has Demonstrated Harm"), *id.* ("Nuveen motivated these changes in policy and business behavior. . . . After phone calls from Nuveen, internal reviews of 'boundaries' and 'matrixes' arose, and business with Preston Hollow evaporated. Goldman's deal

'matrix' may be genuine; the point is that Nuveen motivated its creation. The story repeats with JPMorgan."). Whether that harm is "reputational" or economic (*i.e.*, special damages), summary judgment was inappropriate.[6] And while Nuveen used both "threats and lies" to injure Preston Hollow, *id.* at *1, that just means there were multiple tortious causes of the injury. *See* Section II.A above.

2. Ample record evidence shows Nuveen intended to, and did, injure Preston Hollow with its malicious lies

Nuveen cannot dispute that its intent in slandering Preston Hollow was to put Preston Hollow out of business. [A0247-48.] Nor can it dispute that Preston Hollow's business declined dramatically, or that referrals from broker-dealers for 100% placements dried up, immediately after Nuveen launched its slander campaign. [A2576; A2579; A3227; A3236-37.] Instead, Nuveen claims its campaign was not the cause; Preston Hollow's lost business was mere happenstance; and Miller, Nuveen's head of municipal finance, lied when he said "Wells Fargo, Goldman, JPMorgan, BAML, and Citi have—have agreed to—to not

[6] Indeed, it has been argued that, for a for-profit legal entity like Preston Hollow, economic injury *is* evidence of "reputational loss." Meiring de Villiers, Quantitative Proof of Reputational Harm, 15 Fordham J. Corp. & Fin. L. 567 (2009).

do this business anymore[.]" [A0246; *see also* A0204-05.] The record contradicts those assertions. But it is incontrovertible that material facts are in dispute.

a) Goldman Sachs

Nuveen attempts to minimize the impact Miller's statements had on Goldman, but the record is clear.

[redacted] [A0240.] [redacted]

No one from Goldman questioned whether Preston Hollow deals violated MSRB Rule G-17. [redacted]

After Miller made defamatory statements to Goldman's [redacted] Goldman then stopped all business with Preston Hollow because of concerns about [redacted]

Nuveen says [redacted] "did not mention any of the At-Issue Statements" to the Goldman bankers, including [redacted]. Nuveen Br. 32. But [redacted] described Nuveen's statements in conversations with Preston Hollow [A1268], so [redacted] must have described them to [redacted]—or at least a jury could so find.

[redacted] also met with Miller in January 2019. [redacted] Miller's statements about Preston Hollow caused [redacted] to [redacted] A0814-15 (Weiner).] [redacted] testified that Nuveen [redacted]

The guidelines were not, as Nuveen contends, created to "enable" Goldman to do business with Preston Hollow; Goldman had previously submitted a joint proposal to the [redacted] with Preston Hollow. Instead, [redacted] Miller's false accusations had their desired effect: as of 2021, [redacted] could not recall when he last spoke with Preston Hollow about a potential transaction after the guidelines were put in place. [redacted]

Nuveen admits the guidelines were not applied to 100% placements with Nuveen, and quotes [redacted] testimony that the guidelines were not applied because the Nuveen placements were not "new project[s]." Nuveen Br. 34 n.62. [redacted]

b) JPMorgan Chase

The story repeats with JPMorgan: before Miller's campaign, JPMorgan was pursuing business with Preston Hollow; afterwards, JPMorgan informed Preston Hollow that it was no longer interested.

In November 2018, [redacted] of JPMorgan told Matt Levin of Preston Hollow that JPMorgan wanted to underwrite a Preston Hollow/Howard University transaction. [redacted] In early 2019, when Preston Hollow contacted JPMorgan to follow up on [redacted] entreaties, JPMorgan dodged Preston Hollow repeatedly before telling Preston Hollow that it would not have enough time to evaluate the transaction internally, *no matter how much time JPMorgan was given*. [redacted]

Nuveen asserts "there is no evidence that Miller even uttered the At-Issue Statements to anyone at JPM." Nuveen Br. 36. Not so: Miller *admitted during his deposition* that his conversation with JPMorgan was similar to his other conversations, and that he definitely told JPMorgan that Preston Hollow's practices were bad for the municipal bond market. [A2238-39; A2278.] And Miller told Deutsche Bank on December 21, 2018 that he had spoken with JPMorgan the day before—the same day he defamed Preston Hollow to BAML, Goldman, and Citi, among others—and JPMorgan gave him a "firm commitment" it would stop working with Preston Hollow. [A0244.][7] He got that right: JPMorgan abandoned its interest in the Howard University deal and has not approached Preston Hollow to do business since. [A2825-28.]

c) Wells Fargo

Nuveen denies that Wells Fargo changed its policies because of Miller's statements and claims that Wells Fargo has closed "**three** deals" (Nuveen's

[7] This evidence led Vice Chancellor Glasscock to conclude that Miller's conversations with JPMorgan (and others) were "cut from the same cloth" as the recorded conversations with Deutsche Bank and Goldman. *Nuveen I*, 2020 WL 1814756, at *15.

emphasis) since Miller's slander, one of which was "initiated" by Wells Fargo. Nuveen Br. 39.

The deal that Nuveen claims was "initiated" by Wells Fargo after Miller's slander is a 2019 bond issuance by Roosevelt University. *See* Nuveen Br. 39 (citing A2826). That was not a new deal; it was the final phase in the Roosevelt University transaction that closed in October 2018—which, as it happened, is what spurred Miller to embark on his campaign of lies. [B912-13; A0244.] [redacted]

The [redacted] transaction proves the impact of Miller's statements. Internal Wells Fargo emails show [redacted]

d) Citigroup

Nuveen does not deny that Miller told Citi that Preston Hollow was predatory and lied to bond issuers. Nuveen Br. 8. Citi's reaction to Miller's statements is not debatable either, as relevant conversations were recorded. Citi told Miller it would no longer do 100% placements with Preston Hollow.

The recordings belie Nuveen's claim that [redacted] the Citi employee contacted by Miller on December 20, 2018, did not lie in his deposition to protect Miller and Nuveen. Nuveen Br. 40. When asked in his deposition if Miller asked him not to do business with Preston Hollow, [redacted] But in a recorded call immediately after his call with Miller, [redacted] said [redacted] who was also on the call: [redacted] To which [redacted] responds: [redacted] [*Id.*] But then [redacted] Citi has lived up to [redacted] promise.

Finally, Nuveen says Citi "continued to work with PHC and show PHC deals" (Nuveen Br. 40), but this is more misdirection. The testimony Nuveen cites shows that Citi solicited Preston Hollow along with others as a potential purchaser of *syndicated public issuances*, a business segment that is not at issue in this case. [A2766-68.]

e) Bank of America

Nuveen is no more faithful to the record when it comes to BAML. Despite admitting in its brief that Miller made defamatory statements to [redacted] of BAML (Nuveen Br. 8) and Miller's own deposition admission that he did so [A2238-39; A2278], Nuveen implies the contrary by citing [redacted] statement that he does not remember Miller saying anything bad about Preston Hollow (Nuveen Br. 41).

Nuveen then suggests that, while BAML changed its policy to eliminate business with Preston Hollow around the time of Miller's call, it is pure coincidence having nothing to do with Miller. *Id.* A jury could easily find otherwise. Among other reasons, Miller told Deutsche Bank on December 21, 2018 that, after he spoke with [redacted] and put BAML "in the box," BAML gave him a "firm commitment" not to transact with Preston Hollow. [A0244.] If BAML had decided not to transact with Preston Hollow a month before Miller's calls, as Nuveen claims, Miller would not have put BAML in the box.

f) Deutsche Bank

Nuveen claims there was no one at Deutsche Bank "whose opinion of PHC changed as a result of the Statements." Nuveen Br. 35. [redacted] a Deutsche Bank employee, testified in 2019 that, after hearing Miller malign Preston

Hollow, [redacted] Deutsche Bank's relationship with Preston Hollow continued, but that does not negate the statements' impact on Deutsche Bank.

Nuveen seeks to avoid this damning testimony by saying [redacted] Nuveen Br. 36 n.70. That is false: [redacted] [AR0008.]

g) Summary: The Superior Court made credibility determinations, drew inferences favorable to Nuveen and rejected inferences favorable to Preston Hollow

"This Court stringently applies the rule that summary judgment may be granted only where there are no genuine issues of material fact in dispute." *Locey v. Hood*, 765 A.2d 952 (Del. 2000) (TABLE). Yet other than a block quote on page 12 of the Damages Decision, the Superior Court did not mention any factual disputes.

See Ex-B 12.[8] It accepted at face value denials by the broker-dealers' witnesses that their opinions of Preston Hollow had changed, dismissing any question of their credibility as "[s]peculation." *See* Ex-B 14-15.

A court may not "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). The jury decides the weight to give witnesses' testimony, particularly where, as here, (i) the witnesses have a strong financial incentive to shade their testimony to favor Nuveen, and (ii) there is a disconnect between their words and actions. *See* Opening Br. 44-45. The court below further erred by drawing inferences from the evidence in Nuveen's favor and not in Preston Hollow's favor. "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).

[8] References to "Ex-" are to the Opening Brief.

3. The testimony of Preston Hollow's witnesses was admissible evidence of injury

A Preston Hollow executive testified [redacted] [A3226 (Weiner).] He continued: [redacted] [A3227.] Another executive testified, [redacted] [B1213 (Thompson).] A third Preston Hollow executive testified, [redacted] [A3236 (Albarran).] Preston Hollow's witnesses have personal knowledge about these matters. And there is no dispute Nuveen called Preston Hollow "predatory" and "unethical," as was relayed to Mr. Weiner. *Compare* [A3226], *with* Opening Br. 9-10 (citing record). A rational jury could infer, like the Court of Chancery, that Preston Hollow suffered actual injury. *See Nuveen I*, 2020 WL 1814756, at *15-17, *21.

Nuveen argues that all the testimony of Preston Hollow's executives should be ignored because it is "self-serving hearsay" or "unduly speculative." Nuveen Br. 48-50.

The "self-serving" argument fails. Testimony of interested witnesses is perfectly good evidence that can raise an issue of fact. The jury, not the court on summary judgment, decides what weight to give the evidence. *See Locey*, 765 A.2d 952 (party's affidavit created issue of fact for jury, even though contradicted by all other witnesses); *Emory v. Nanticoke Homes, Inc.*, 1985 Del. Super. LEXIS 1063, at *7 (Del. Super. Ct. July 19, 1985) (defamation plaintiff's affidavit created issue of fact, even though contradicted by alleged source of statement).

Nuveen's "hearsay" and "unduly speculative" arguments fail too. This Court explained in *Kanaga II* that a plaintiff's testimony about what she heard in her community was probative of reputational injury. *Kanaga II*, 750 A.2d at 1184; *see also* D.R.E. 803(21) (hearsay exception for reputational evidence). Nuveen tries to dismiss *Kanaga II* by observing that the plaintiff had personal knowledge of her "daily humiliation and embarrassment" in dealing with third-parties. Nuveen Br. 47. But *Kanaga II* also highlights the plaintiff's testimony that she "was told about" rumors circulating about herself. 750 A.2d at 1184. Preston Hollow's executives

have personal knowledge of their interactions with broker-dealers and how those interactions changed after Nuveen's attack.

4. Preston Hollow proffered admissible expert evidence of special damages

Preston Hollow's opening brief cited evidence, including from its damages expert, Dr. Goldstein, that creates an issue of fact concerning special damages. Opening Br. 41-43. Nuveen contends that Dr. Goldstein's evidence should be ignored. Nuveen Br. 50-52. Its arguments are baseless.

First, Nuveen says Dr. Goldstein did not segregate damages caused by defamation from damages caused by tortious interference or antitrust violations. Nuveen Br. 50. As shown in Section II.A, those torts all occurred in the same conversations, and if there is any need to segregate damages, Nuveen must do it, not Dr. Goldstein.

Second, Nuveen mischaracterizes *Kanaga II* as holding that a "'before/after' calculation of income was impermissible." Nuveen Br. 51. Not so. The reason *Kanaga II* found the expert analysis flawed was that the earnings data on which it was based (Schedule Cs from plaintiff's income tax returns) had not been admitted into evidence or supported by competent testimony. 750 A.2d at 1185-88. Nuveen can make no such objection here.

Third, Nuveen cites no authority in support of its assertion that a market share analysis "would not suffice as proof of special damages" because it is supposedly "non-specific and untethered to defamation." Nuveen Br. 52. Special damages are "material loss capable of being measured in money." Restatement §575 cmt. b. To put a dollar figure on Preston Hollow's loss, Dr. Goldstein used a market share-based DCF analysis, which is a standard methodology endorsed by Delaware courts. *See Owen v. Cannon*, 2015 WL 3819204, at *16 (Del. Ch. June 17, 2015); *Agilent Techs. v. Kirkland*, 2010 WL 610725, at *28 (Del. Ch. Feb. 18, 2010).

The rest of Nuveen's arguments go to weight, not admissibility. Namely:

- Nuveen says it is "demonstrably false" that Dr. Goldstein considered and ruled out other potential causes of Preston Hollow's decline in business. Nuveen Br. 51. The record is to the contrary. [A2971-72; A2993; A3013-14; *see also* A3239-40.]
- Nuveen says Dr. Goldstein "never addressed historic inflows into the municipal bond market at the end of 2018 and beginning of 2019 that made PHC's 'product' highly unattractive to its primary customers, the bond issuers—who could get better deals (lower yields) on the public market." Nuveen Br. 52. Again, not so: Dr. Goldstein testified that

[redacted] [A3013-14.] Nuveen's argument also ignores that Preston Hollow's strategy focused [redacted] [A3225-26; A3236; A3239-40.]

- Finally, Nuveen criticizes Dr. Goldstein for using the term "eyeballing" at his deposition. But what Dr. Goldstein testified was that he [redacted] [A3015 [redacted]

These arguments are for the jury. On summary judgment, it is "not permissible" for the court "to weigh the evidence or to resolve conflicts arising from pretrial documents, affidavits, depositions or other evidence." *Cerberus Int'l*, 794 A.2d at 1149.

SUMMARY OF THE ARGUMENT ON CROSS-APPEAL

1. Denied. The Superior Court correctly ruled that the slander per se doctrine applies to this case. Under *Spence*, slander per se applies to statements that malign one in a trade, business, or profession. Case law in Delaware and the Restatement uniformly hold that this doctrine applies when the plaintiff is a company. Nuveen's request that this Court change the settled law of Delaware should be rejected.

2. Denied. The Superior Court correctly ruled that the doctrines of collateral estoppel and law of the case bind Nuveen with respect to certain findings by the Court of Chancery. After a full trial on the merits, the Court of Chancery found that Nuveen intentionally and recklessly spread lies to malign Preston Hollow's honesty, legal compliance, and business practices, which injured Preston Hollow.

   a. Collateral estoppel applies because the Court of Chancery's factual findings were necessary to its judgment.

   b. In addition, or alternatively, law of the case applies to the Court of Chancery's factual and legal determinations because the case was transferred pursuant to 10 *Del. C.* § 1902.

ARGUMENT ON CROSS-APPEAL

I. Defamation Per Se Applies To Companies, Not Just Individuals

A. Question Presented

Did the Superior Court correctly find that the doctrine of defamation per se applies where the plaintiff is a company, not an individual? Yes. [A3203-05.]

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 I*, 687 A.2d at 176.

C. Merits of Argument

1. Gertz *is irrelevant to the question presented and does not apply anyway*

Nuveen's lead argument relies on a decision that has nothing to do with whether courts should treat business entities differently than individuals with respect to defamation per se. Nuveen Br. 55-56. *Gertz* did not address whether the per se rule applies to companies—the plaintiff was an individual. *Gertz* holds only that in the absence of actual malice the First Amendment precludes presumed or punitive damages for statements about matters of public concern. 418 U.S. at 348-49. That proposition is just as true for companies as it is for individuals.

Anyway, *Gertz* does not apply here because (i) Nuveen's slander of a single competitor is not a matter of public concern under *Dun & Bradstreet*, 472 U.S. at 763, and (ii) Nuveen acted with actual malice (*see* Ex-A 29).

Nuveen argues that its statements to broker-dealers are matters of public concern due to "the public importance of the municipal bond market" and the "strong financial interest" of "taxpayers" to "ensur[e] that all entities, including [Preston Hollow], comply with applicable regulations." Nuveen Br. 55. But the fact that an industry has public significance and regulatory oversight, and may (or may not) impact taxpayer dollars, does not elevate Nuveen's lies about its competitor to the kind of public discourse the First Amendment protects. *See Connolly v. Labowitz*, 519 A.2d 138, 141 (Del. Super. Ct. 1986) (statements "made only to certain members of the medical profession and concerned only the conduct of a single practitioner" were not matters of public concern, notwithstanding licensing statute "evidenc[ing] a public concern for the quality of health care services which should be available for the public"). As Judge Taylor concluded in *Connolly*, "I cannot accept the proposition that every negative statement made by a physician concerning the professional conduct of another physician is entitled to protection as a matter of public concern." *Id.* The same reasoning applies here.

Nuveen also argues that, under *Gertz*, "unless and until [Preston Hollow] makes a showing of actual malice, the First Amendment precludes the application of any presumption." Nuveen Br. 55-56. But the Court of Chancery has already found that Nuveen acted with actual malice. Ex-A 29.[9] Even if not, it would be for the jury to decide whether Nuveen acted with actual malice as a predicate for awarding presumed or punitive damages.

2. Case law, the Restatement, and common sense all support treating companies and individuals the same

Nuveen argues that "[c]ase law, the Restatement, and common sense support treating companies and natural persons differently under the slander *per se* doctrine." Nuveen Br. 56. But Nuveen does not cite *any* Delaware case that supports its argument, and it does not cite the Restatement *at all*. For sensible policy reasons, Nuveen's argument is an outlier not accepted in Delaware, the Restatement, or in almost any other state.

Nuveen argues that prior Delaware cases have not addressed whether the per se doctrine applies to company plaintiffs. Nuveen Br. 56 & n.120 (citing cases). But as the cases cited by Nuveen illustrate, Delaware courts uniformly do not

[9] Nuveen argues that it should not be collaterally estopped from re-litigating whether it acted with actual malice. That argument is refuted in Section II below.

distinguish between individuals and companies concerning defamation per se. *See, e.g.*, *Pro. Investigating & Consulting Agency, Inc. v. Hewlett-Packard Co.*, 2015 WL 1417329, at *3-4 (Del. Super. Ct. Mar. 23, 2015) (denying post-trial motion to set aside jury verdict in favor of corporation on defamation per se claim).

Despite referencing the Restatement in its point heading (Nuveen Br. 56), Nuveen does not cite the Restatement in that section. Why not? Because the Restatement directly contradicts Nuveen's argument: "A corporation for profit has a business reputation and may therefore be defamed in this respect. Thus *a corporation may maintain an action for defamatory words that discredit it and tend to cause loss to it in the conduct of its business, without proof of special harm resulting to it*." Restatement §561 cmt. b (emphasis added); *accord id.* §573 cmt. b (noting the per se rule "also protects the corporation itself against slander").[10]

Case law from other states overwhelmingly goes against Nuveen. Of the 42 states that apply a presumption of general damages from malicious defamation per se, *supra* note 2, our research has found only four holding that businesses cannot invoke the per se rule: Michigan, Montana, New York, and Washington.

[10] The same rules apply to unincorporated businesses like Preston Hollow, a limited liability company. Restatement §562.

Nuveen cherry-picks federal district court cases from two states, Pennsylvania and Kentucky: *Synygy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp. 2d 570, 582 (E.D. Pa. 1999) (applying Pennsylvania law) and *CMI, Inc. v. Intoximeters, Inc.*, 918 F. Supp. 1068, 1078 (W.D. Ky. 1995) (predicting Kentucky law). Nuveen Br. 57. Neither case applies Delaware law. And while in dicta those decisions criticize applying the per se rule to companies, neither case decides the issue. *See Synygy*, 51 F. Supp. 2d at 581 n.9 ("I will not find that Duffy's alleged statement is not defamation per se."); *CMI*, 918 F. Supp. at 1083-85 (finding statements were not defamation per se based on nature of statements themselves).

Finally, Nuveen's brief wrongly suggests *Agar v. Judy*, 151 A.3d 456, 478 (Del. Ch. 2017), supports its position. Nuveen Br. 58-59. *Agar* does not address this question; the plaintiffs were individuals. *Agar* addresses why a *public figure* must prove actual malice. 151 A.3d at 478. Here, Preston Hollow is not a public figure (Ex-B 15) and Nuveen acted with actual malice (Ex-A 29).

II. The Court Of Chancery's Findings Bind Nuveen Under The Doctrines Of Collateral Estoppel And Law Of The Case

A. Questions Presented

Did the Superior Court correctly find the Court of Chancery's findings bind Nuveen under the doctrine of collateral estoppel? Yes. [A1601; A1623-29; A1702-04; A1709-12; A1728-33.]

Did the Superior Court correctly find the Court of Chancery's findings bind Nuveen under the doctrine of law of the case? Yes. [A1708-09; A1725; A1728-33.]

B. Scope of Review

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).

"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)).

C. Merits of Argument

1. Collateral estoppel bars Nuveen from relitigating the "existence, falsity, and malicious nature" of its statements to Goldman

"Pursuant to the doctrine of collateral estoppel, if a court has decided an issue of fact necessary to its judgment, that decision precludes relitigation of the issue in a suit on a different cause of action involving a party to the first case." *M.G. Bancorporation*, 737 A.2d at 520 (citation omitted). "The test for applying the collateral estoppel doctrine requires that (1) a question of fact essential to the judgment (2) be litigated and (3) determined (4) by a valid and final judgment." *Id.*

The Court of Chancery entered final judgment that "[Nuveen] committed the tort alleged in Count II, tortious interference with business relations, and judgment is entered against [Nuveen] and in favor of Plaintiff on Count II." [AR0005]; *see also Nuveen I*, 2020 WL 1814756, at *19 ("Nuveen is liable for tortious interference with business relations."). In reaching that judgment, the court found Nuveen employed "wrongful means," including knowing and reckless misrepresentations to Goldman. *Id.* at *17.

The Superior Court precluded Nuveen from relitigating the "existence, falsity, and malicious nature" of its statements to Goldman "(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.'" Ex-A 29; *see also id.* 19-28. Nuveen argues that collateral estoppel does not apply for three reasons. None has merit.

First, Nuveen claims it was the prevailing party because the Court of Chancery declined to issue an injunction. Nuveen Br. 63-64. But the Court of Chancery's judgment says Preston Hollow is the prevailing party, not Nuveen: "judgment is entered against Defendants and in favor of Plaintiff on Count II." [AR0005.] None of the cases cited by Nuveen involved a final judgment issued "in favor of" the party invoking collateral estoppel.

Nuveen's argument is also irrelevant because "prevailing party" is not an element of collateral estoppel. This Court has held that a judgment can "include[] a collateral adverse ruling" against the prevailing party "that can serve as a basis for the bars of res judicata, collateral estoppel, or law of the case in the same or other litigation." *Hercules Inc. v. AIU Ins. Co.*, 783 A.2d 1275, 1277 (Del. 2000); *see also Del. Dep't of Nat. Res. & Env't Control v. Food & Water Watch*, 246 A.3d 1134, 1138 (Del. 2021). If that happens, the prevailing party may appeal the judgment. *See Hercules*, 783 A.2d at 1277. The Court of Chancery's judgment contained rulings that were adverse to Nuveen, but Nuveen did not appeal.

Second, Nuveen claims the finding that it made "misrepresentations" to Goldman was unnecessary to the judgment because Nuveen's "economic pressure" was independently sufficient to find Nuveen used "wrongful means." Nuveen Br. 65-67. That is wrong because the "independent bases" rule in Comment i to Section 27 of the Restatement (Second) of Judgments applies only to *alternative* findings—not, as here, *cumulative* findings. The Court of Chancery "weigh[ed]" these findings as part of the "seven-part test" (which it also called a "balancing test") in Section 767 of the Restatement (Second) of Torts; they were analyzed not independently but cumulatively. *Nuveen I*, 2020 WL 1814756, at *17; Ex-A 21-22.

In addition, this Court has never adopted the "independent bases" rule from the Restatement (Second) of Judgments. Other than the Damages Decision, our research has found only one Delaware lower court that has cited it: *Hills Stores Co. v. Bozic*, 1997 WL 153823 (Del. Ch. Mar. 25, 1997) (*see* Nuveen Br. 66). But *Hills* applied *New York* preclusion law, *id.* at *5 & n.10, and its primary reason not to apply collateral estoppel was that the original judgment was its own, which it retained jurisdiction to interpret and enforce, *id.* at *5. Neither consideration exists here.

A plurality of federal circuit courts follows the approach of the first Restatement of Judgments to give preclusive effect to alternative findings. Thus, in

Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc., the Third Circuit carefully analyzed the rule, the First and Second Restatements, and the approaches of other circuits; it decided to join the Second, Seventh, Ninth, and Eleventh Circuits in giving preclusive effect to alternative findings. 458 F.3d 244, 251-56 (3d Cir. 2006); *accord Herrera v. Wyoming*, 139 S. Ct. 1686, 1710 (2019) (Alito, J., dissenting) (noting this is "an important question that this Court has never decided" but "[t]he First Restatement has the more compelling position"); *Yamaha Corp. v. United States*, 961 F.2d 245, 255 (D.C. Cir. 1992); Restatement of Judgments § 68 cmt. n (1942) ("Where the judgment is based upon the matters litigated as alternative grounds, the judgment is determinative on both grounds, although either alone would have been sufficient to support the judgment.").

In *Rogers v. Morgan*, this Court affirmed the use of collateral estoppel from a criminal suppression motion in a subsequent civil action. 208 A.3d 342, 354 (Del. 2019). The Court acknowledged the plaintiff's argument that "technically and strictly speaking, the suppression decision may not have been necessary to the judgment of conviction" was "colorable" but applied collateral estoppel because the issue had been "central and essential to the motion to suppress, and the issue received careful attention and was resolved after an adversarial hearing." *Id.* Here, Nuveen's lies to Goldman were "central and essential" to the Chancery action;

"received careful attention"; and were "resolved after an adversarial hearing"—indeed, after a full trial. Nuveen had its day in court.

Third, Nuveen claims that collateral estoppel violates its right to trial by jury. The United States Supreme Court laid that claim to rest decades ago in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). There, the SEC brought a suit in equity and obtained a declaration that a merger proxy was materially false and misleading; in a parallel class action for damages, the defendant was estopped from contesting that finding. *Id.* at 325, 337. The Supreme Court explained that because "the party against whom estoppel is asserted has litigated questions of fact, and has had the facts determined against him in an earlier proceeding . . . there is no further factfinding function for the jury to perform, since the common factual issues have been resolved in the previous action." *Id.* at 335-36.

The Superior Court routinely gives preclusive effect to factual findings by the Court of Chancery on claims for which a party would otherwise have the right to a jury. *See, e.g.*, *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1073 (Del. 1983) ("Chancery's findings of fact must be given collateral estoppel effect" in action for fraud in Superior Court); *Arch Ins. Co. v. Murdock*, 2018 WL 1129110, at *8 (Del. Super. Ct. Mar. 1, 2018).

Nuveen cites no case supporting its argument that defamation should be an exception to the doctrine of collateral estoppel. *See* Nuveen Br. 67-68. The cases Nuveen cites merely ruled that the proper forum for a defamation claim is the Superior Court—a forum that Nuveen sought and obtained.

2. Law of the case applies to the Court of Chancery's factual findings

"The law of the case doctrine, like the *stare decisis* doctrine, is founded on the principle of stability and respect for court processes and precedent." *Kanaga II*, 750 A.2d at 1181. "Once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears." *Kleinberg v. Aharon*, 2017 WL 4444216, at *1 (Del. Ch. Oct. 4, 2017) (quoting *Zirn v. VLI Corp.*, 1994 WL 548938, at *2 (Del. Ch. Sept. 23, 1994)). The Superior Court ruled that the law of the case doctrine applies to the Court of Chancery's factual findings because the defamation claim was transferred pursuant to 10 *Del. C.* § 1902. Ex-A 14-15.

Nuveen advances two arguments in opposition. Neither has merit.

First, Nuveen says that law of the case does not apply because an action transferred pursuant to 10 *Del. C.* § 1902 is not the same case as it was in the

transferor court. Nuveen Br. 69. That is incorrect. The statute says the "proceeding may be transferred"—not started anew. 10 *Del. C.* § 1902. "All or part of the papers filed, or copies thereof, and a transcript of the entries, in the court where the proceeding was originally instituted shall be delivered in accordance with the rules or special orders of such court . . . . For the purpose of laches or of any statute of limitations, the time of bringing the proceeding shall be deemed to be the time when it was brought in the first court." *Id.*; *cf.* 15 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, Jurisdiction § 3867 (4th ed. 2020) ("Rulings made by the transferor court remain in effect in the transferee court" in federal multi-district litigation). Case law distinguishes between transfer of an action under 10 *Del. C.* § 1902 and "re-filing" a case "as a new complaint"; in the latter case the plaintiff goes "without the benefit of the filing date relating back to the original . . . complaint." *Wells Fargo Bank, NA v. Strong*, 2014 WL 6478788, at *4 (Del. Ch. Nov. 19, 2014). In sum: There was one, and only one, case.

Second, Nuveen argues that law of the case applies exclusively to legal determinations, not to facts. Wrong again. In *Cede & Co. v. Technicolor, Inc.*, this Court held that the Court of Chancery's calculation of a discount rate and corporate debt figure in an appraisal case—purely factual matters—"were clearly established as the law of the case," 884 A.2d at 40, and that the doctrine applies to "*findings of*

fact and conclusions of law by an appellate court," *id.* at 39 (emphasis added). Nor did the Court limit the law of the case doctrine to appellate factual findings—the discount rate and debt figure at issue were not decided on appeal because "neither party challenged the calculation on appeal to this Court." *Id.*; *see also Haveg Corp. v. Guyer*, 211 A.2d 910, 912 (Del. 1965) (un-appealed factual conclusion "stands as the law of the case"); *Kleinberg*, 2017 WL 4444216, at *1 (facts found at first trial in bifurcated case are law of the case). The same reasoning applies here because defamation was severed from Preston Hollow's original case in the Court of Chancery, and Nuveen did not appeal that judgment.

Nuveen cites two trial-level decisions by one Vice Chancellor limiting law of the case to legal conclusions. Nuveen Br. 70. But those decisions offer no good reason to limit law of the case to legal conclusions. While factual findings ordinarily occur at trial or on appeal—*i.e.*, at the end of a case—here, as in *Cede* and *Kleinberg*, law of the case should apply to factual findings because the Superior Court trial will involve the same facts as the Court of Chancery trial. No good purpose would be served by permitting two co-equal courts of this State to reach opposite conclusions about the same facts disputed by the same parties on the same evidence.

CONCLUSION

For the foregoing additional reasons, the Court should reverse the Superior Court's grant of summary judgment against Preston Hollow. The rulings challenged in Nuveen's cross-appeal should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2022, the foregoing *Redacted Public Version of Appellant's Reply Brief on Appeal and Cross-Appellee's Answering Brief on Cross-Appeal* was caused to be served upon the following counsel of record via File and Serve*Xpress*:

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