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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PRESTON HOLLOW CAPITAL LLC,

Plaintiff Below,
Appellant,

v.

NUVEEN ASSET MANAGEMENT, LLC,

Defendant Below,
Appellee.

No. 222, 2022

Court Below: Superior Court of the State of Delaware

C.A. No. N19C-10-107

REDACTED PUBLIC VERSION
DATED: November 18, 2022

APPELLEE NUVEEN ASSET MANAGEMENT, LLC'S REPLY BRIEF IN SUPPORT OF ITS CROSS-APPEAL

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INTRODUCTION

The undisputed record evidence shows PHC suffered no reputational harm (or any other injury) from a handful of allegedly slanderous statements (the "Statements") by Nuveen. Nevertheless, PHC maintains the doctrine of slander *per se* permits it to ask a jury for over $600 million in compensatory damages, plus punitive damages. According to PHC, the absence of injury is irrelevant because slander *per se* supposedly creates a presumption that cannot be rebutted even at trial, much less on summary judgment, and ***requires*** a jury to award damages in this case. Delaware law and common sense foreclose that argument.

The *per se* presumption excuses PHC only from proving "special damages" (*i.e.*, specific economic loss), not from proving reputational harm in the first place. Reputational harm is the gravamen of any defamation claim, from which all compensatory damages must derive. A factfinder cannot be required to follow an irrebuttable presumption of reputational harm where the undisputed evidence affirmatively shows no such harm has occurred.

Moreover, PHC's desired presumption should not be applied here at all. PHC is an artificial entity—a limited liability company—not a natural person with feelings for whom the slander *per se* presumption was developed. And the Statements were

made not to a wide audience but to only a few recipients, all of whom were deposed and uniformly testified that the Statements did not affect PHC's reputation.

PHC also insists it need not demonstrate injury from the alleged slander, as opposed to injury from changing market conditions[1] or from alleged "threats" and economic pressure that are the subject of other PHC lawsuits against Nuveen. But PHC has sued separately on tortious interference and antitrust claims for the same alleged damages and has never explained how its strategy would avoid the risk of duplication. PHC told the Court of Chancery that Nuveen's alleged "threats" (as opposed to defamation) were an independent cause of its financial loss. It repeats to this Court that its financial loss was due to a "boycott" of PHC, an "agree[ment]" "to not do this business anymore," and broker-dealers who "felt compelled" by Nuveen. Reply/Answering Br. 19-20, 24, 25. PHC's damages expert in this case testified his methodology is used in antitrust actions. A2982; B786. PHC is trying antitrust and tortious interference claims, not the defamation claim that is before this Court.

PHC contends Nuveen has the burden of "apportioning" causation among its various causes of action. But PHC ignores that, under Delaware law, it has the

[1] PHC's own witness admitted [redacted] B909. [redacted] B1094, and many other factors hurt PHC's business. B1098-99, B1177-80. Long before the Statements, PHC missed its [redacted] B1129.

burden of first showing by a preponderance of the evidence that reputational loss from slander was a substantial factor in causing harm. Because PHC has not made such a showing, the issue of "apportioning" causation does not even arise.

PHC attempts to meet its burden by relying on the Court of Chancery's opinion in one of PHC's tortious interference cases. But that opinion did not analyze "slander," "defamation," or PHC's "reputation." Moreover, the findings PHC cites are not entitled to preclusive effect under collateral estoppel or law of the case.

Finally, a *per se* presumption (even if applied) would not entitle PHC to the windfall it seeks. Because the undisputed evidence shows PHC's reputation was not harmed, the presumption would, at most, permit a jury to award nominal damages. But PHC has eschewed nominal damages. The Superior Court's judgment should be affirmed; if it is not, Nuveen's cross-appeal should be granted.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN APPLYING SLANDER *PER SE* TO PHC'S CLAIM

The Superior Court committed legal error by allowing PHC to invoke the slander *per se* doctrine. The purposes of that doctrine are not served here, where the Statements were made to just six counterparties, and any harm to an artificial entity like PHC is economic, traceable, and quantifiable. PHC's contrary argument is legally flawed.

A. PHC's description of the slander *per se* doctrine is inaccurate

1. Slander *per se* does not excuse proof of reputational harm

In opposition to the cross-appeal, PHC argues that, "[u]nder *Spence*," it is entitled to a presumption of damages from "statements that malign one in a trade, business, or profession." Reply/Answering Br. 34. That description sweeps too broadly.

Neither *Spence* nor any other Delaware authority relieves a slander *per se* plaintiff of the need to prove reputational harm, which is the *sine qua non* of defamation. As this Court explained in *Spence v. Funk*, slander *per se* serves the very specific function of relieving a plaintiff ***only*** of the need to prove ***special damages***, *i.e.*, specific economic loss attributable to the slander: "[T]he general rule is that oral defamation is not actionable without special damages. But there are four

categories of defamation, commonly called slander *per se*, which are actionable without proof of special damages." 396 A.2d 967, 970 (Del. 1978). *See also Doe v. Cahill*, 884 A.2d 452, 463 n.55 (Del. 2005) (reaffirming that libel *per se* plaintiffs need not prove special damages); Del. P.J.I. Civ. § 11.3 (2000) (slander *per se* plaintiffs are relieved only from showing special damages, not from showing reputational injury of some kind).

Restatement (Second) Torts § 573 comment b (1977), cited at Reply/Answering Br. 38, is in accord. Entitled "Slanderous Imputations Affecting Business, Trade, Profession or Office," that section does not establish a right to presumed general damages in slander *per se* cases or excuse proof of reputational harm. It provides only that one who disparages another in the conduct of a business, trade, or profession "is subject to liability without proof of special harm"—that is, without special damages.

Here the undisputed evidence proves the Statements caused no reputational harm to PHC. Accordingly, the slander *per se* doctrine, even if applicable, cannot save PHC's defamation claim.

2. Any *per se* presumption must be rebuttable

Nor does *Spence* create the irrebuttable presumption of reputational harm PHC seeks—a presumption extending from summary judgment all the way to trial even

where a court has found, based on undisputed evidence, that the slander caused the plaintiff no injury. There is no support in Delaware law for PHC's doctrinal leap, which would violate public policy by awarding windfalls where no injuries have occurred. It would also raise due process concerns by presuming "injuries" that are contrary to fact.

Undisputed evidence rebuts any presumption of reputational harm in this case. Delaware Rule of Evidence 301 provides that a party subject to a presumption may rebut it by showing "that the nonexistence of the presumed fact is more probable than its existence." *See also South v. Baker*, 62 A.3d 1, 24 (Del. Ch. 2012) (explaining how presumptions may be rebutted).

In opposition to the cross-appeal, PHC contends that "42 states ... apply a presumption of general damages from malicious defamation per se." Reply/Answering Br. 38. But PHC fails to cite a single case supporting what it urges here—an irrebuttable presumption of reputational harm, even where the undisputed record establishes no such harm and thereby refutes any presumption. PHC provides no reason to change Delaware law.[2]

[2] Many of PHC's cases involve libel rather than slander. Others allow recovery of "damages based on proven harm." *Hearst Corp. v. Hughes*, 466 A.2d 486, 495 (Md. 1983); *see also Joseph v. Scranton Times, L.P.*, 129 A.3d 404, 430 (Pa. 2015) ("reputational injury" is "prerequisite to a defamation plaintiff's recovery of damages

B. Because any alleged injury to PHC is traceable and quantifiable, it is not entitled to any *per se* presumption

Limited liability companies like PHC have no feelings and cannot suffer psychological harm. Any injury to PHC is measurable in financial terms. Applying the *per se* doctrine without considering the key differences between natural and artificial persons disserves the doctrine's purposes. *See Synygy, Inc. v. Scott-Levin*,

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for mental and emotional injuries"); *Kneebinding, Inc. v. Howell*, 201 A.3d 326, 355 (Vt. 2018) (even in *per se* libel case, "plaintiff must still show some actual harm to recover general, compensatory damages"). Still others (like Delaware) relieve plaintiffs merely of the need to prove special damages. *Barlow v. Int'l Harvester Co.*, 522 P.2d 1102, 1117 (Idaho 1974); *Haworth v. Feigon*, 623 A.2d 150, 158-59 (Me. 1993); *McCusker v. Roberts*, 452 P.2d 408, 414 (Mont. 1969); *Liberman v. Gelstein*, 605 N.E.2d 344, 348 (N.Y. 1992). Others presume merely nominal damages. *Burden v. Elias Bros. Big Boy Rests.*, 613 N.W.2d 378, 382 (Mich. Ct. App. 2000); *Stewart v. Nation-Wide Check Corp.*, 182 S.E.2d 410, 414 (N.C. 1971); *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). Still others provide any presumption is rebuttable. *Kennedy v. Sheriff of E. Baton Rouge*, 935 So. 2d 669, 675 (La. 2006); *Wilson v. Wilson*, 2007 WL 127657, at *3 (Ohio Ct. App. Jan. 19, 2007).

PHC does not cite New Jersey, which has limited any presumption to nominal damages to avoid "unguided" jury awards. *W.J.A. v. D.A.*, 43 A.3d 1148, 1160 (N.J. 2012) (plaintiffs must "prove actual harm, pecuniary or otherwise, to [their] reputation" to recover compensatory damages). Nor does PHC reference other states that have abolished presumed damages, even in *per se* defamation cases. *Gobin v. Globe Publ'g Co.*, 649 P.2d 1239, 1242 (Kan. 1982); *see also United Ins. Co. of America v. Murphy*, 961 S.W.2d 752, 756 (Ark. 1998) ("a plaintiff in a defamation case must prove reputational injury in order to recover damages"); *Arthaud v. Mut. of Omaha Ins. Co.*, 170 F.3d 860, 862 (8th Cir. 1999) ("Missouri courts [now] require a showing of actual damages in all defamation cases."); *Smith v. Durden*, 276 P.3d 943, 952 (N.M. 2012) ("New Mexico law requires plaintiffs to prove actual injury to reputation for recovery in all defamation cases.").

Inc., 51 F. Supp. 2d 570, 581 n.9 (E.D. Pa. 1999); *CMI, Inc. v. Intoximeters, Inc.*, 918 F. Supp. 1068, 1084 (W.D. Ky. 1995). PHC concedes four states, including New York, have held that "businesses cannot invoke the *per se* rule." Reply/Answering Br. 38. Delaware should join them.[3]

Even if there were no categorical rule preventing artificial entities from invoking slander *per se*, this Court should hold that doctrine unavailable to PHC on the particular facts here. As PHC acknowledges, Reply/Answering Br. 12-13, slander *per se* was developed to address situations where a person defamed "might never know the extent" of his reputational harm and it is too "difficult to trace specific financial loss" caused by the defamation. *Spence*, 396 A.2d at 970. Neither purpose is served here.

PHC's CEO conceded its "market reputation" should be assessed according to a [redacted] A1850. Any lost business PHC purportedly suffered would be eminently traceable. PHC characterizes the high-yield municipal bond market as "small" and "close-knit." PHC Opening Br. 5. A PHC spreadsheet produced in discovery detailing its high-

[3] PHC cites *Professional Investigating & Consulting Agency, Inc. v. Hewlett-Packard Co.*, 2015 WL 1417329 (Del. Super. Ct. Mar. 23, 2015) (Reply/Answering Br. 37-38), but there the defendant "waived" the issue of "whether PICA, as a corporation, could recover humiliation damages." *Id.* at *3.

yield municipal bond originations from 2017 through Q3 2021 listed just [redacted] with whom PHC did business in 2017 and 2018. A2824-35.

In contrast to a libelous article on the front page of the Wall Street Journal, or a slanderous utterance made on the stage of an industry-wide conference, the reputational effects of the Statements, if any, would be readily discernible. The Statements were made to just six of PHC's counterparties, and all were deposed. Nuveen Opening Br. 8. The Superior Court's finding that PHC suffered no harm among the six recipients is well supported by their testimony, as they uniformly testified that the Statements did not affect PHC's reputation:

- RBC's view of PHC did not change, and it continued to bring deals to PHC. B1424, B1437-38. PHC's briefs do not even argue the Statements had any effect on RBC.
- Goldman's witnesses testified that the Statements had no effect on Goldman's view of PHC: [redacted] A2530; *see also* B1260, B1262-64, B1288-96.[4] ***Before*** the Statements, Goldman had never closed a 100% placement with PHC. B1257. ***Afterwards***, PHC's own witness admitted

[4] PHC cites Goldman's development of "guidelines" for evaluating municipal bond transactions, Reply/Answering Br. 21, [redacted] B1269-80.

Goldman discussed "once a month" with PHC "a number of different opportunities that we're going to pursue together." B1114.[5]

- The record shows that after the Statements, "Deutsche did not reduce its business with" PHC. *PHC LLC v. Nuveen LLC*, 2020 WL 1814756, at *16 nn. 244, 246 (Del. Ch. Apr. 9, 2020) ("Chancery Opinion"). PHC's CEO testified Deutsche [redacted] B1217; *see also* B773, B805-06.
- The Statements did not change Citigroup's opinion of PHC or affect its business practices. A2761; B1368-70. PHC concedes Citigroup told PHC in February 2019 [redacted] B772. Citigroup worked on at least [redacted] with PHC after the Statements. A2766-67. PHC asserts, with no record proof, that these were syndicated public issuances.

[5] Below, PHC admitted [redacted] of Goldman told PHC in February 2019 [redacted] B772. Now, PHC incorrectly asserts Goldman put PHC business "on hold," and "[redacted] could not recall when he last spoke with Preston Hollow about a potential transaction." Reply/Answering Br. 21. [redacted] testified, "I don't recall whether it's 2019 or 2020." [redacted] He subsequently discussed a 2019 transaction, [redacted], and said [redacted] B1287.

Reply/Answering Br. 25. Even if that were true, the transactions nonetheless show Citigroup continued to work with PHC after the Statements.

- BAML's witness said BAML [redacted] PHC after the Statements. B1046. BAML made the decision [redacted] B1037-45, B1055-57.
- The Statements did not change Wells Fargo's opinion of PHC, B1626-27, and afterwards Wells continued to bring deals to PHC. A2421; B901-02. PHC concedes Wells told PHC in February 2019 [redacted] B773. PHC admits it was able to close three Wells deals after the Statements. A2826. It contends the deals were not entirely "new," Reply/Answering Br. 24, but they still show Wells's continued work with PHC. PHC complains Wells first offered the Gary, Indiana transaction to Nuveen, but then admits PHC "got the deal" anyway. *Id.*
- PHC contends Miller told JPMorgan that PHC's "practices were bad for the municipal bond market," Reply/Answering Br. 23, but that is well short of slander. JPMorgan's witness recalled only that Miller was "dissatisfied"

Nuveen lacked an opportunity to participate in a transaction. B268.[6] Regardless, JPMorgan did not change: [redacted] *Id.*; B271 [redacted]; B273 [redacted]; B274-76, B282, B285.

PHC does not cite a single case providing a business a presumption of reputational harm where (1) any alleged harm can be readily identified and quantified, and (2) undisputed evidence shows no reputational harm actually occurred.

C. The First Amendment precludes application of any presumption of damages in this case

PHC concedes that "in the absence of actual malice the First Amendment precludes presumed ... damages for statements about matters of public concern." Reply/Answering Br. 35. This principle precludes applying the presumption here.

The Statements involve a matter of "public concern." They relate to fair business practices and regulatory compliance in an industry with public importance. PHC acknowledges that the municipal bond market, which provides funding for

[6] The Court of Chancery's reference to statements "cut from the same cloth" (Reply/Answering Br. 23 n.7), concerned so-called "threats" and economic pressure, not misrepresentations. Chancery Opinion, at *15.

cities, states, and other government entities for public projects, "has public significance and regulatory oversight." *Id*. at 36. The market has significance for taxpayers, who ultimately finance the transactions. The Statements implicated MSRB Rule G-17, which requires fair disclosures in municipal bond transactions. B1203-07.

The "public concern" test is met. *See Cousins v. Goodier*, 2022 WL 3365104, at *6 (Del. Aug. 16, 2022) (private email to law firm complaining about partner's lawsuit in his personal capacity seeking to preserve a nearby high school's "Indians" mascot was a matter of "public concern" because it related to matters of public debate, governmental action, and "public resources"); *Care One Mgmt. LLC v. United Healthcare Workers East*, 43 F.4th 126, 138 (3d Cir. 2022) (accusations of overbilling and patient care issues at nursing homes involve "matters of public concern") (citation omitted); *Boule v. Hutton*, 328 F.3d 84, 91 (2d Cir. 2003) (allegations of "fraud in the art market" meet test).

PHC cites *Connolly v. Labowitz*, 519 A.2d 138, 141 (Del. Super. Ct. 1986), but there a statutory scheme "provid[ed] that the functioning of the peer review mechanism shall be private and not subject to public examination." Also inapposite is *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*., 472 U.S. 749, 762 (1985) (plurality opinion), where a credit report sent to five subscribers "who, under the

terms of the subscription agreement, could not disseminate it further," was "solely in the individual interest of the speaker and its specific business audience," was "like advertising," and was thus "hardy and unlikely to be deterred by incidental state regulation."

There is no evidence of actual malice. PHC's sole argument for finding actual malice is the Court of Chancery's misrepresentation finding. Reply/Answering Br. 37. But, as explained in Part II-B, *infra*, that finding is not entitled to preclusive effect. PHC contends it is "for the jury to decide whether Nuveen acted with actual malice." Reply/Answering Br. 37. But "[t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S., 657, 685 (1989). Accordingly, no presumption is available here.

II. THE SUPERIOR COURT ERRED IN APPLYING COLLATERAL ESTOPPEL AND LAW OF THE CASE

PHC argues the Court of Chancery found that Nuveen "spread lies" and "injured Preston Hollow." Reply/Answering Br. 34. But the Court of Chancery's opinion did not even mention "slander" or PHC's "reputation," and contained no finding that any "lies" caused injury to PHC. Moreover, PHC is pursuing its slander claim with respect to three entities (Deutsche Bank, BAML, and RBC) as to which the Court of Chancery found ***no*** tortious interference. Chancery Opinion, at *14, *16. PHC is pursuing its slander claim regarding another entity (Citigroup) as to which the court made no findings in its analysis at all. *Id*. at *19. Any suggestion that the Court of Chancery decided the issues before this Court is incorrect.

A. The Court of Chancery never found any reputational harm or any other harm caused by slander

The Court of Chancery ruled it lacked jurisdiction over defamation and dismissed the claim, expressly opining that defamation claims "are subject to the findings made" in Superior Court. *PHC LLC v. Nuveen LLC*, 216 A.3d 1, 4 (Del. Ch. 2019). Neither defamation nor PHC's reputation was part of the subsequent Court of Chancery proceeding, which was limited to tortious interference.

Accordingly, the Court of Chancery made no findings regarding loss of reputation or any other injury from slander. ***All*** references to injury in the Court of

Chancery's opinion were in the context of the elements of ***tortious interference***—not defamation. Thus, the Court of Chancery found that "[t]he record shows" that broker-dealers acted "in response to Nuveen's ***threats***." Chancery Opinion, at *16 (emphasis added). "Threats" are different from slander.

PHC suggests that Nuveen has the burden of "apportioning" causation between slander and tortious interference. But this misses the point: Under Delaware law, PHC must ***first prove its case*** by showing that the alleged slander was at least a substantial factor in bringing about reputational harm that supposedly caused its economic damages. Speculation of a mere possibility is not enough. Nuveen Opening Br. 29-30; Reply/Answering Br. 17 (conceding summary judgment may be "based on the absence of ***any*** evidence of causation") (emphasis in original). Unless PHC has made such a showing—which it has failed to do in this case—then the issue of "apportioning" causation does not even arise. The Court of Chancery's findings do not help PHC, because they do not address defamation or reputational harm at all.

Comdyne I, Inc. v. Corbin, 908 F.2d 1142 (3d Cir. 1990), does not support PHC. *Comdyne* is a commercial disparagement default judgment case applying New Jersey law, not a Delaware defamation case. It actually refutes PHC's argument by explaining that "where a harm is produced by concurrent acts, each act is the cause of the harm ***if it was a material element or 'substantial factor' in bringing the harm***

about." *Id.* at 1151 (emphasis added). PHC has failed to make that essential initial showing—that the alleged slander was a substantial factor in causing injury in the first place.

B. The Court of Chancery's findings relating to misrepresentations to Goldman Sachs are not preclusive

PHC points to the Court of Chancery's findings, as part of its tortious interference decision after dismissal of the defamation claim, that Nuveen made knowing "misrepresentations" to Goldman, which it contends show actual malice. Reply/Answering Br. 41. But neither collateral estoppel nor law of the case applies.

1. Collateral estoppel does not apply because the Court of Chancery's misrepresentation findings were not essential to the judgment

The Court of Chancery made findings regarding misrepresentations only with respect to a single phone call on December 21, 2018 to Goldman Sachs, one of the six counterparties to whom the Statements were made. Chancery Opinion, at *17. The court considered the misrepresentations only in a very narrow context—rejecting Nuveen's tortious-interference affirmative defense of "business competition" on the ground it had engaged in "wrongful means"—***not*** in deciding whether PHC had suffered any kind of injury or loss. *Id.* The misrepresentation findings were not essential to the Court of Chancery's tortious interference liability holding and therefore lack collateral estoppel effect.

First, the Court of Chancery did not treat the misrepresentation findings as essential to its holding. It found that "threats" alone were sufficient to reject the "business competition" defense. The Court of Chancery listed the seven-factor test for wrongfulness from § 767 of Restatement (Second) and noted: "Section 767 lists several wrongful means, of which I find two obtain: misrepresentation and economic pressure." Chancery Opinion, at *17. The opinion contains two separately labeled sub-headings, each of which was an independent ground for rejecting the business competition defense. *Id.* at *17-18. Nothing in the opinion's discussion of "Nuveen's Improper Economic Pressure," *id.* at *18, depended on the prior discussion of misrepresentations. Rather, Vice Chancellor Glasscock stated without caveats: "A party loses its privilege to compete if it exerts improper economic pressure." *Id*. He did not say a party loses its privilege if it "exerts improper economic pressure" ***and*** makes misrepresentations. PHC is simply wrong (Reply/Answering Br. 43) in saying the court balanced all seven factors together or treated them as "cumulative." Indeed, PHC itself told the Court of Chancery that Nuveen's economic pressure on broker-dealers was an "independent" and "separate" basis for finding improper means. B529, B533, B537; BR33. PHC summarized its tortious interference claim without even mentioning misrepresentations. BR19-20; B486-87.

Second, the non-essential nature of the misrepresentation findings is confirmed by the fact that the Court of Chancery made them only with respect to Goldman. Chancery Opinion, at *16. Yet the court found tortious interference liability as to five other broker-dealers. *Id*. at *19. The court treated so-called "threats" as a sufficient basis for tortious interference liability.

Because the so-called "threats" were an independent basis for the Court of Chancery's judgment, the "misrepresentation" findings with respect to Goldman lack preclusive effect. *See Caravel Academy, Inc. v. Campbell*, 1987 WL 16720, at *2-3 (Del. Super. Ct. Aug. 6, 1987) (prior judgment not preclusive where it rested on two grounds—willful resignation and cause for termination); *Venetsanos v. Pappas*, 184 A. 489, 491 (Del. Ch. 1936) (prior decision that partnership never existed not preclusive because it rested on alternative ground that written partnership agreement not validly delivered); *see also Rogers v. Morgan*, 208 A.3d 342, 353-54 (Del. 2009) (applying collateral estoppel where prior determination "essential").

Delaware law is consistent with Restatement (Second) on Judgments, § 27, comment *i* (1982): "If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Annotations to § 27 include dozens of decisions following

comment *i* from the U.S. Courts of Appeals for the Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits, and from numerous states.

PHC, which repeatedly relies on the Restatements throughout its briefs, urges this Court to change Delaware law and depart from the Second Restatement on Judgments. This Court should reject that invitation. PHC fails to cite a single case in which any Delaware court—in the 40 years since the Second Restatement was issued—has rejected § 27, comment *i*, or any other part of the Second Restatement in interpreting Delaware law. To the contrary, this Court has opined that "the United States Supreme Court recently reiterated that the federal courts also look to the Restatement (Second) of Judgments for 'the ordinary elements of issue preclusion.'" *California State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 842 (Del. 2018).

PHC's "prevailing party" argument (Reply/Answering Br. 42) is a red herring. Paragraph 1 of the Judgment on which PHC relies to argue it is a "prevailing party" would have been the same had the misrepresentation findings been omitted entirely from the decision. Even reciting a specific finding in a judgment does not give it preclusive effect, if it is not essential to the holding. *See Venetsanos*, 184 A. at 493 (non-essential finding lacks preclusive effect even if "decree in express terms professes to affirm a particular fact") (citation omitted). The rule applies even when

findings are "incorporated in the … judgment." *Colditz v. Eastern Airlines*, 329 F. Supp. 691, 695 (S.D.N.Y. 1971).

There is a separate reason the misrepresentation findings are not preclusive: the Court of Chancery ultimately denied PHC's requested injunctive relief. *See King Drug Co. of Florence, Inc. v. Abbott Labs.*, 2022 WL 866681 (E.D. Pa. Mar. 23, 2022) (no preclusion where party obtained liability finding but not injunctive relief). Whether Nuveen appealed the misrepresentation findings is beside the point because PHC did not obtain an award of affirmative relief—monetary, injunctive, or declaratory.

The special jury trial right of Delaware Constitution Article I, § 5 also militates against applying collateral estoppel here. PHC relies on federal law (Reply/Answering Br. 45), but Delaware law embodies a "strong preference for jury determinations of defamation claims." *Organovo Holdings, Inc. v. Dimitrov*, 162 A.3d 102, 125 (Del. Ch. 2017).

2. Law of the case does not apply to the misrepresentation findings

PHC argues that the law of the case doctrine applies to the Court of Chancery's misrepresentation findings. That is incorrect, for multiple reasons.

First, law of the case applies only to "the subsequent course of the same litigation." *Washington v. Delaware Transit Corp.*, 226 A.3d 202, 212 (Del. 2020)

(quoting *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990)). But this is not the same case as the Court of Chancery proceeding. The Vice Chancellor dismissed the defamation claim, with election to transfer, and the Chancery case concluded with a "Final Order and Judgment." AR3-4.

In the Superior Court, PHC filed a new defamation complaint and, in accordance with 10 *Del. C.* § 1902, paid a new filing fee and received a different Superior Court docket number—hallmarks of a new civil action. Had PHC done nothing after the Court of Chancery's dismissal of the defamation claim, this case would not exist. *See Wells Fargo Bank, NA v. Strong*, 2014 WL 3530829, at *3 (Del. Ch. Jul. 15, 2014) (dismissal where party failed to file new complaint in transferee court).

PHC insists "[t]here was one, and only one, case." *Id*. But it told the Superior Court otherwise: "we have different docket numbers and therefore they're technically different cases. ... [T]hese are separate docket numbers, they are separate cases." A1708-09. PHC was right the first time.

PHC notes that § 1902 provides the transferring court must transfer the files to the transferee court and any statute of limitations are tolled. Reply/Answering Br. 47. But these provisions demonstrate this is a separate action; otherwise, these requirements would not be necessary.

Second, law of the case does not support PHC's argument here, because the doctrine does not apply to factual questions, as PHC itself conceded in the Superior Court. A1709 (PHC's counsel: "law of the case typically applies to legal determinations"). That principle makes sense because facts change as the evidentiary record develops throughout a case. Hence, "[t]he law of the case doctrine applies as a constraint to reconsideration of ***legal*** issues." *Izquierdo v. Sills*, 2004 WL 2290811, at *4 n.28 (Del. Ch. June 29, 2004) (emphasis in original), citing *Kenton*, 571 A.2d at 784 ("The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation."); *see also Advanced Litig., LLC v. Herzka*, 2006 WL 2338044, at *5 (Del. Ch. Aug. 10, 2006) (law of the case "does not apply to factual questions"); *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, 2015 WL 5278913, at *7 (Del. Ch. Sept. 10, 2015) ("applies only to questions of law").

PHC cites *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26 (Del. 2005), but that decision involved a lower court's duty to follow both the facts and law found "by an appellate court" in the same case. *Id.* at 39 (cited at Reply/Answering Br. 47-48). The situation here—two proceedings in separate, co-equal courts—differs.

Third, law of the case is inapplicable here because it is limited to determinations that are "necessary to the court's judgment." *French v. French*, 1992

WL 453269, at *3 (Del. Dec. 7, 1992). Nuveen has shown that the Court of Chancery's findings regarding the two alleged misrepresentations were not necessary to the tortious interference liability determination (which rested on so-called "threats" and economic coercion as an independent ground) or to its judgment denying an injunction. *See also Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, 758 F.3d 777, 781 (6th Cir. 2014) (district court correctly declined to apply law of the case where "the statement is not necessary to the outcome"); *United States v. Hussein*, 178 F.3d 125, 129-30 (2d Cir. 1999) ("preclusive effect will be given only to those findings that are necessary to a prior judgment," and, "[a]ccordingly, the law of the case doctrine has no application"); Wright & Miller, 18B FED. PRAC. & PROC. JURIS. § 4478 (3d ed. April 2022) (like issue preclusion, law of the case inapplicable "unless decision was necessary to support the judgment").

There is no basis for applying law of the case in this proceeding.

III. EVEN IF A PRESUMPTION APPLIED, PHC COULD RECOVER, AT MOST, NOMINAL DAMAGES

As noted *supra*, the undisputed absence of reputational harm precludes the application of any *per se* presumption in this case. Nonetheless, even if the Court determines that ***some*** presumption applies, that presumption would theoretically open the door only to nominal, not compensatory, damages. *See* Restatement (Second) Torts § 621, comment a (1977); Del. P.J.I. Civ. § 22.13 (2000) ("A person who has been defamed but who has not suffered any injury may recover nominal damages, usually in the amount of $1.00.").

The Superior Court did not foreclose the possibility of nominal damages in slander *per se* cases where no reputational harm is proven. But PHC has not pursued nominal damages in this case and does not seek them in its briefing in this Court.

CONCLUSION

This Court should affirm the Superior Court's summary judgment ruling. If it reverses that ruling, Nuveen's cross-appeal should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2022 a copy of the foregoing *Redacted Public Version of Appellee's Reply Brief in Support of Cross-Appeal* was served electronically upon the following counsel of record via File & Serve*Xpress*:

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