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Case Number 448,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN PAUL MAC ISAAC,

Plaintiff/Counterclaim Defendant Below, Appellant/Appellee,

v.

POLITICO LLC, ROBERT HUNTER BIDEN, and BFPCC, INC.,

Defendants/Counterclaim Plaintiff Biden Below, Appellees/Appellant Biden.

Case No. 448,2024

Appeal from the Superior Court of the State of Delaware in C.A. No. S22C-10-012 RHR

APPELLEE POLITICO LLC'S ANSWERING BRIEF

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PRELIMINARY STATEMENT

Appellant John Paul Mac Isaac's Opening Brief reinforces that the Superior Court got it right, and its dismissal of Politico LLC ("Politico") with prejudice should be affirmed.

Mac Isaac has acknowledged this litigation arose because he thrust himself into a controversy of his own making: he states that after Hunter Biden visited his computer repair shop amid the 2020 presidential election, he copied Mr. Biden's data and shared it with both the FBI and a lawyer for Rudy Giuliani in an effort to exonerate President Trump. Op. Br. at 4-5. He further states that, after Giuliani's attorney shared the data with the *New York Post*, he "verified" how he came into possession of Mr. Biden's laptop data for this "exposé," published on October 14, 2020. *Id.* at 11. In addition, Mac Isaac acknowledges after the *New York Post* article was published, he fielded questions from "numerous journalists" about the data outside his business. *Id.* at 11-12.

His complaint against Politico – one of many media organizations covering the laptop imbroglio – arises from an article published on October 19, 2020 ("the Article"), reporting on a letter signed by more than 50 former counterintelligence officials questioning the origins and authenticity of the data published by the *New York Post*. In a remarkable concession, Mac Isaac admits the Article itself is

accurate, but alleges the headline – "*Hunter Biden story is Russian disinfo, dozens of former intel officials say*" – falsely implies he is a Russian agent.

The Superior Court appropriately determined Mac Isaac could not maintain a defamation claim against Politico, or indeed any other claim, because (1) the Article does not defame Mac Isaac, (2) the headline is not of and concerning Mac Isaac, and (3) Mac Isaac is a limited purpose public figure who must plead facts to support an inference of actual malice, which he failed to do.

On appeal, Mac Isaac fails to challenge two of the Superior Court's three holdings requiring dismissal of the claims against Politico, thereby waiving these arguments. His appeal should be dismissed, and the Superior Court's ruling affirmed, on these grounds alone. Even if this Court conducts a *de novo* review of each of the Superior Court's determinations as to Politico, Delaware law clearly establishes that Politico's dismissal with prejudice should be affirmed.

NATURE OF PROCEEDINGS

This appeal arises out of a now-dismissed lawsuit filed by Plaintiff John Paul Mac Isaac against Cable News Network, Inc. ("CNN"), Politico LLC, Robert Hunter Biden ("Mr. Biden"), and the Biden for President Campaign Committee, Inc. ("BFPCC"). Mac Isaac twice amended his complaint. The Second Amended Complaint ("SAC"), filed August 2, 2023, asserted defamation, civil conspiracy to commit defamation, and aiding and abetting against Politico. B058-B063 ¶¶ 100-130, B072-B077 ¶¶ 167-199.[1]

On August 8, 2023, Politico moved to dismiss the SAC pursuant to Superior Court Rule 12(b)(6). Following oral argument in February 2024, Judge Robert H. Robinson granted Politico's motion, as well as motions to dismiss filed by co-defendants, on September 30, 2024. The Superior Court dismissed the defamation claim against Politico on the grounds that (1) the Article did not defame Mac Isaac, (2) the only challenged statement, the Article's headline, did not concern Mac Isaac, and (3) Mac Isaac is a limited purpose public figure who must plead facts to support an inference of actual malice, and he failed to do so. Order at 16. The

[1] Appellant's Opening Brief Appendix does not attach exhibits to the SAC, nor does it include any of the briefing on Politico's motion to dismiss. For the convenience of the Court, this brief refers to the complete SAC with exhibits submitted with Politico's Supplemental Appendix, rather than the incomplete SAC submitted with the Opening Brief Appendix.

Superior Court also dismissed Mac Isaac's aiding and abetting and conspiracy claims against Politico and the other defendants, finding they could not be sustained where the defamation claims had failed. *Id.* at 24.

Mac Isaac appealed the Superior Court's decision as to Politico, Mr. Biden, BFPCC, but did not challenge the ruling as to CNN.

SUMMARY OF ARGUMENT[2]

1. Denied. The Superior Court correctly held Mac Isaac is a limited purpose public figure who must plead and prove actual malice, but failed to do so. *See* Order at 16. Mac Isaac voluntarily thrust himself into a public controversy of his own creation, providing data on Hunter Biden's laptop to Rudy Giuliani, who in turn provided it to *The New York Post*, setting "events into motion that he surely knew would spin out of control." Order at 13. Mac Isaac amplified the laptop controversy by hosting an impromptu press conference, publishing a written statement and even authoring a book. *Id.*; *see also* B252-253; B048 ¶ 52.

2. Denied, but not addressed in this Answering Brief because it relates solely to Mac Isaac's appeal of the ruling as to co-Defendant/Appellee, Hunter Biden. *See* Order at 23.

3. Denied, but not addressed in this Answering Brief because it relates solely to Mac Isaac's appeal of the ruling as to co-Defendant/Appellee, Hunter Biden. *See* Order at 23.

4. Mac Isaac's Opening Brief fails to address three separate and independent bases for the Superior Court's ruling. Mac Isaac admitted the Politico

[2] Mac Isaac's Summary of the Argument does not include the final argument section in the Opening Brief pertaining to Politico, titled The Superior Court Erred when it Concluded that the Politico Headline was Not Defamatory. *See* Argument Part III. This argument is denied.

Article was not defamatory, challenging only the first of two headlines. The Superior Court correctly held dismissal was proper because the challenged headline was not defamatory in the context of the Politico Article, that the headline is not of and concerning him because it did not reference him "directly or indirectly" and that he did not adequately plead actual malice. Order at 16. Mac Isaac also fails to address the Superior Court's dismissal of his ancillary conspiracy and aiding and abetting claims. *Id.* at 24. These arguments are therefore waived.

5. The Superior Court correctly held the challenged headline was not defamatory in the context of the Politico Article, which Mac Isaac admits is accurate. Order at 16.

6. The Superior Court correctly held the headline of the Politico Article was not of and concerning Mac Isaac because it did not reference him, "directly or indirectly." Order at 16.

7. In addition to finding Mac Isaac to be a limited purposed public figure, the Superior Court correctly held he failed to satisfy his burden to plead and prove facts to support an inference of actual malice. Order at 16.

COUNTERSTATEMENT OF FACTS

A. Mac Isaac's Release of Hunter Biden's Data

In April 2019, Hunter Biden presented his laptop at Mac Isaac's Wilmington computer repair shop, The Mac Shop, Inc., to have data recovered. B041 ¶¶ 11-18. Three months later, as "news of Hunter Biden's business dealings with the Ukraine were coming more into focus," Mac Isaac contacted the FBI and ultimately produced it to the agency in response to a grand jury subpoena. B042 ¶¶ 24-25, B093.

Mac Isaac also kept a copy of the recovered data. Sometime after U.S. Senate dismissed impeachment charges against then-President Donald Trump, Mac Isaac provided the data to Robert Costello, attorney for then-President Donald Trump's counsel Rudy Giuliani. B042-B043 ¶¶ 26, 28. According to Mac Isaac:

> At the conclusion of the impeachment proceedings …, believing the laptop contained information pertinent to the proceedings that was not provided to the President and relevant to his defense, Mac Isaac contacted Trump's personal lawyer, Rudy Giuliani.

Op. Br. at 5. Mr. Giuliani, in turn, sent Mr. Biden's data to the *New York Post*, and Plaintiff "verified how he came into possession of the recovered data to the NY POST." B043 ¶ 28, B045 ¶ 41.

On October 14, 2020, the *New York Post* published an "exposé about Mr. Biden's data" with a picture of the Repair Authorization from Mac Isaac's shop that he had given Mr. Costello, identifying The Mac Shop as "where HUNTER had

dropped his laptop off for repair." B044 ¶ 36, B045-B046 ¶¶ 43-44. Although Mac Isaac alleges that he "did not want to be identified" by the *New York Post*, that same day, he participated in an interview with the *Daily Beast* and "other media outlets." B045 ¶ 41, B046 ¶ 45. Upset with the coverage, "Plaintiff's counsel wrote a statement and approached media outlets with that statement." B046 ¶ 46, B092-B096. The website justthenews.com published it "for all to read." B048 ¶ 52.

B. The Intelligence Officers' Public Statement and Politico's Article

The *New York Post* report, published three weeks before a contentious presidential election, captured the attention of politicians, national security analysts, and news outlets nationwide. In the following days, Congressman Adam Schiff stated he suspected the alleged release of emails was part of a Russian disinformation campaign, prompting comment by the Director of National Intelligence and FBI leadership that they did not have information corroborating that assertion. B048 ¶¶ 51-52, B109-B111. The Biden campaign also denied allegations that the laptop data showed a link between Joe Biden and his son's business dealings, while Republicans alleged the *New York Post* article and reports critical of the Bidens were being censored on social media, all of which was reported by Politico. *See* B065 ¶ 136 (citing Kyle Cheney & Natasha Bertrand, *Biden campaign lashes out at New York Post*, Politico (Oct. 14, 2020),

https://www.politico.com/news/2020/10/14/biden-campaign-lashes-out-new-york-post-429486).

On October 19, 2020, 50 former intelligence officers signed a "Public Statement on the Hunter Biden Emails," stating that they "do not know if the emails…are genuine or not and that [they] do not have evidence of Russian involvement," but that the released information had "all the classic earmarks of a Russian information operation." B047 ¶ 47, B102. The former officials stated "that our experience makes us deeply suspicious that the Russian government played a significant role in this case," and "[i]f we are right, this is Russia trying to influence how Americans vote in this election, and we believe strongly that Americans need to be aware of this." B101-B108.

On October 19, 2020, Politico published the Article, reporting on the intelligence officials' letter, with the headline "*Hunter Biden story is Russian disinfo, dozens of former intel officials say*." B059 ¶ 103; B198-B205. The subheadline, "More than 50 former intelligence officials signed a letter casting doubt on the provenance of a New York Post story on the former vice president's son," offered additional context. *Id*. The Article summarized and hyperlinked to the intelligence officials' letter for readers to review themselves, and also included hyperlinks to other news reports about a potential Russian hack of Burisma, "the Ukrainian energy company that gave Hunter Biden a board seat." B203.

Mac Isaac is not named in the Article. The only reference to him is that "the Post reported it was given a copy of Hunter Biden's laptop hard drive by President Donald Trump's personal lawyer Rudy Giuliani, who said he got it from a Mac shop owner in Delaware who also alerted the FBI." B059-B060 ¶ 108, B200.

C. Mac Isaac's Lawsuit

Mac Isaac filed his Complaint on October 17, 2022, alleging a claim for defamation against Politico, as well as conspiracy to defame and aiding and abetting against all Defendants, which included Congressman Schiff, Mr. Biden, and CNN.

Mac Isaac filed his First Amended Complaint on January 20, 2023, adding BFPCC, a "Delaware corporation that was used for the 2020 Presidential campaign of President Joseph R. Biden," as a defendant. On January 30, 2023, Politico filed a motion to dismiss, and Plaintiff did not file a response. In March, the federal government intervened on behalf of Congressman Schiff and removed the case to the District of Delaware. The federal court promptly dismissed the claims against Schiff and remanded the case to the Superior Court.

Mac Isaac filed his Second Amended Complaint on August 1, 2023, in accordance with a stipulation and order governing the briefing schedule for motions to dismiss. The SAC asserted the same three claims against Politico as in

prior versions of the pleadings: defamation, civil conspiracy to commit defamation, and aiding and abetting. B058-B063 ¶¶ 100-130, B072-B077 ¶¶ 167-199.

The SAC contends that the Article's headline is "false," and that it "alleges that Plaintiff committed crimes including (but not limited to) working with Russians to spread 'disinformation' relating to the son of Democratic Party nominee, now President, Joseph Biden, thereby implicating Plaintiff in the commission of a treasonous act by being part of an attempt to undermine American democracy and the 2020 Presidential election." B061-B062 ¶¶ 115, 120.

D. Politico's Motion to Dismiss the SAC

On August 8, 2023, Politico moved to dismiss the lawsuit on grounds that (1) the challenged headline was not capable of the defamatory meaning Mac Isaac alleged, (2) the headline was true or substantially true at the time of publication, and (3) Mac Isaac was a public figure in the context of his release of Mr. Biden's data, and his SAC failed to plead actual malice. B180-B193. Politico also argued that the conspiracy and aiding and abetting claims failed for the same reasons the defamation claim failed. B194-B196.

In his response in opposition, Plaintiff admitted that the body of the Article was accurate. *E.g.*, B220 ("Had Politico used a different (accurate) headline or if they had changed it once it came to light that the headline clearly did not match the message of the Article, Plaintiff may not have a valid claim against them."); B216

("Politico published an article that contained writing that was substantially true but whose headline said the complete opposite of what the body of the article attempted to say."). Mac Isaac nevertheless argued the headline was "propaganda," and suggested that readers do not "read[] past the headline." B221. Mac Isaac also argued that he "was thrust into the cortex of the laptop scandal," thus was not a limited purpose public figure, and that he had sufficiently pled actual malice because "the author(s) of the headline knew or should have known that the headline did not convey the message in the letter from the 51 intelligence officials." B230-B233.

On reply, Politico argued that the headline, read in isolation as Mac Isaac suggested, was not of and concerning Mac Isaac. B248. Politico also argued that, in any event, the headline and the Article must be read in context, and in context, nothing about Mac Isaac was defamatory. B248-B250. Politico further argued that Mac Isaac created this controversy and had participated in extensive interviews with the media prior to publication of the Article, thus was required to plead actual malice, and his actual malice pleading was insufficient. B250-B258.

E. Order on Appeal

Following oral argument, Judge Robert H. Robinson granted Politico's motion to dismiss. The Superior Court observed that "[i]n the body of the article, the only reference to Mac Isaac is to a 'Mac shop owner in Delaware,'" and noted

that "Mac Isaac admits if the court deems the headline as non-defamatory, he does not have a claim." Order at 15-16. Judge Robinson's opinion concluded:

> Regardless of whether the headline is true or false, it does not mention Mac Isaac, either directly or indirectly. Furthermore, the sub-headline states, "More than 50 former intelligence officials signed a letter casting doubt on the provenance of a New York Post story on the former vice president's son," which clarifies the headline. … [E]ven if the statements were defamatory or concerned Mac Isaac, he is a limited purpose public figure, and he has not adequately pled actual malice.

Id. at 16 (emphasis added).

The Superior Court also dismissed Mac Isaac's aiding and abetting and conspiracy claims against Politico and the other defendants. "Because Mac Isaac's defamation claims against all the defendants fail, the derivative claims he raises of civil conspiracy to defame (count 5) and aiding and abetting defamation (count 6) cannot survive." *Id.* at 24.

F. Mac Isaac's Appeal

Mac Isaac timely appealed the order as to its dismissal of Mac Isaac's claims against Politico, as well as his claims against BFPCC and Mr. Biden. *See* Notice of Appeal. In his Opening Brief, Mac Isaac does not challenge two key holdings by Judge Robinson regarding his defamation claim. First, he does not address how the headline, read in isolation as he insists, is of and concerning him. Op. Br. at 22-24. Second, although Mac Isaac argues the court erred in determining he was a limited purpose public figure, *id.* at 9-16, he does not address Judge Robinson's

conclusion that Mac Isaac "has not adequately pled actual malice," Order at 16 (emphasis added). Mac Isaac does not challenge the Superior Court's dismissal of his ancillary claims. *Id.* at 24.

ARGUMENT

I. MAC ISAAC WAIVED ANY ARGUMENTS THAT THIS COURT SHOULD REVERSE ANY SUPERIOR COURT HOLDINGS HE FAILS TO RAISE IN HIS OPENING BRIEF.

Question Presented

Whether Mac Isaac has waived, by failing to raise in his Opening Brief, any arguments that the Superior Court incorrectly held that (1) the headline was not of and concerning him, (2) he had sufficiently pled actual malice, or (3) his derivative claims failed for the same reasons as his defamation claim. Order at 16.

Scope of Review

"It is well established that to assure consideration of an issue by the court, the appellant must both raise it in the Summary of the Argument and pursue it in the Argument portion of the brief." *Roca v. E.I. du Pont de Nemours & Co*., 842 A.2d 1238, 1242 (Del. 2004) (cleaned up). Failure to do so results in waiver of the argument. *Id.*

Merits

Mac Isaac's appeal is woefully insufficient to revive any claim against Politico based on the Article. He fails to challenge, and has therefore waived, two of the Superior Court's separate and independent reasons for its ruling: that Politico's headline was not of and concerning Mac Isaac, and that Mac Isaac did not sufficiently allege Politico published the challenged statement with actual

malice. The Superior Court's ruling should be affirmed on these grounds alone. He also does not raise, and therefore has waived, any objection to the dismissal of his ancillary claims for conspiracy and aiding and abetting.

This Court's rules provide that "[t]he merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal." Del. Supr. Ct. R. 14(b)(vi)(A)(3). In other words, "the appealing party's opening brief must fully state the grounds for appeal, as well as the arguments and supporting authorities on each issue or claim of reversible error." *Roca*, 842 A.2d at 1242-1243. This Court has repeatedly found waiver where the appealing party has failed to do so. *Id.* (party "abandoned and waived that issue in his appeal to this Court by raising it for the first time at oral argument"); *Briggs v. Dep't of Servs. for Child.*, 2023 Del. LEXIS 357, at *7-8 (Del. Oct. 30, 2023) (party deemed to have conceded claim through "failure to dispute the Family Court's determinations as to each failed element of her case plan constitutes a waiver of the issue").

"To state a claim for defamation under Delaware law, the plaintiff must plead and ultimately prove that: 1) the defendant made a defamatory statement; 2) concerning the plaintiff; 3) the statement was published; and 4) a third party would understand the character of the communication as defamatory." *Page v. Oath Inc.*, 270 A.3d 833, 842 (Del. 2022) (per curiam) (cleaned up). Additionally, "[i]f the

plaintiff is a public figure, even for a limited purpose, the public figure defamation plaintiff must [also] plead and prove that 5) the statement is false and 6) that the defendant made the statement with actual malice." *Id.*

Mac Isaac's Opening Brief focuses solely on the Superior Court's determination that the Politico Article headline was not defamatory.[3] He fails to address the Superior Court's determination that the Article, and specifically its headline, did not "concern[] Mac Isaac," and did not present any argument or authority to rebut the Superior Court's determination that Mac Isaac "has not adequately pled actual malice." Order at 16. Additionally, Mac Isaac does not challenge the Superior Court's dismissal of his ancillary claims. *See* Order at 24. By failing to raise the Superior Court's holdings on elements essential for his defamation claim on appeal, Mac Isaac concedes the Superior Court ruled correctly. In any event, a *de novo* review leads to the inevitable conclusion that the Superior Court's decision should also be affirmed on its merits.

[3] Mac Isaac also fails to include his appeal of the Superior Court's dismissal for lack of defamatory meaning in his Summary of the Argument. *See* Op. Br. at 2-3.

II. THE CHALLENGED STATEMENTS ARE NOT CAPABLE OF THE DEFAMATORY MEANING MAC ISAAC ALLEGES.

Question Presented

Whether the Superior Court correctly found the Politico Article lacked defamatory meaning. Order at 16.

Scope of Review

A trial court's decision to grant a motion to dismiss for failure to state a claim is reviewed *de novo*. *Page*, 270 A.3d at 842. Mac Isaac has appealed the Superior Court's decision granting Politico's motion to dismiss for failure to state a claim.[4] Questions of law are reviewed *de novo*. *Silverman v. Silverman*, 206 A.3d 825, 829 (Del. 2019).

Merits

Mac Isaac's challenge to the Superior Court's ruling that the Article and its headline were not defamatory – the only holding he fully raises in this appeal –

[4] Politico and Mac Isaac agree that the standard of review is *de novo*; however, the Opening Brief cites authority on the standard of review for a summary judgment ruling, where a factual record has been developed through discovery, rather than the standard of review for a 12(b)(6) dismissal. Op. Br. at 22 ("Under the *de novo* standard of review, the Delaware Supreme Court must determine whether the facts of record entitle the movant to judgment as a matter of law, viewing those facts in the light most favorable to the non-moving party. (*Locey v. Hood*, 765 A.2d 952 (Del. 2000)").

relies on two out-of-jurisdiction cases that reinforce that the decision was correct. Delaware law requires a challenged statement to be read in context, and when the headline is considered together with an Article he has admitted is accurate, Mac Isaac's claim fails.

To support a defamation claim, a challenged communication must be capable of a defamatory meaning, and a third party must understand the defamatory communication to refer to the plaintiff. *Williams v. Howe*, 2004 Del. Super. LEXIS 130, at *10 (Del. Super. Ct. May 3, 2004); *see also Read v. Carpenter*, 1995 Del. Super. LEXIS 251, at *11 (Del. Super. Ct. June 8, 1995). As Mac Isaac correctly notes, "[i]n considering the defamatory quality of words, it is the duty of the Court to take them in their plain and natural meaning, and to understand them as would a person of average intelligence and perception." Op. Br. at 23 (quoting *Corbett v. Am. Newspapers, Inc*., 5 A.2d 245, 246 (Del. Super. Ct. 1939)); *see also Riley v. Moyed*, 529 A.2d 248, 253 (Del. 1987) (stating the same). "Courts have not hesitated to find insufficient innuendo when only a strained, unreasonable, unjustifiable innuendo of the headline would support the plaintiff's contention that the challenged language exposes her to public shame, hatred, or ostracism." *Idema v. Wager*, 120 F. Supp. 2d 361, 368 (S.D.N.Y. 2000) (cleaned up), *aff'd*, 29 F. App'x 767 (2d Cir. 2002) (cited at Op. Br. at 23).

Delaware courts have repeatedly stated that in determining whether a statement bears the defamatory meaning asserted, courts should read it in context. *Images Hair Sols. Med. Ctr. v. Fox News Network, LLC*, 2013 Del. Super. LEXIS 593, at *13-14 (Del. Super. Ct. Dec. 20, 2013) ("potentially-defamatory" statements in news report were "not capable of defaming Plaintiffs when viewed in context"); *see also Page*, 270 A.3d 833 at 846 (reading headline in context with article, which "contains substantially similar language" and was not actionable). *John Doe No. 1 v. Cahill*, 884 A.2d 451, 467 (Del. 2005) ("the context in which the statements were made is probative").

Additionally, when evaluating the lawsuit under the Rule 12(b)(6) standard, the Court must consider whether Mac Isaac "may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint." *Shotspotter Inc. v. Vice Media, LLC*, 2022 Del. Super. LEXIS 268, at *3 (Del. Super. Ct. June 30, 2022). Although courts "accept as true all of the well-pleaded allegations of fact" on a 12(b)(6) motion, it need not accept conclusory allegations "without specific supporting factual allegations," and "must accept only those reasonable inferences that logically flow from the face of the complaint." *Page v. Oath Inc*., 2021 Del. Super. LEXIS 127, at *5 (Del. Super. Ct. Feb. 11, 2021) (cleaned up), *aff'd*, 270 A.3d 833. In other words, the Court is "not required to

accept every strained interpretation of the allegations proposed by the plaintiff." *Id.*

In support of his argument that he sufficiently plead defamatory meaning, Mac Isaac's Opening Brief relies on a New York federal case, *Idema v. Wager*, 120 F. Supp. 2d 361, which supports Politico's position rather than his own. *See* Op. Br. at 23. In *Idema*, a police and military training organization and its leader sued over an article with the headline "Militant Sues Red Hook," claiming that the term "militant" would "associate them with members of the Communist party, or in the alternative, with individuals who advocate the overthrow of the United States government by force." 120 F. Supp. 2d at 363-364. The court rejected this interpretation, finding "a reading of the article and the headline together does not suggest to a reasonable reader" what the plaintiffs espoused. *Id.* at 367 (emphasis added). Rather, "[t]o adopt the plaintiff's interpretation of the word 'militant' as referring to 'revolutionary Socialism' would not explain any statement in the article, but would add an entirely new and independent thought that finds no support in the body of the article." *Id.* at 368 (cleaned up).

So too here: Mac Isaac's asserted innuendo, that the Article headline implied he was a Russian agent, is not supported by the Article. Neither the headline standing alone nor the Article suggest that Plaintiff was a "Russian agent" or otherwise "part of a Russian disinformation campaign." B061 ¶ 117. Instead, both

the Article and the hyperlinked letter suggest that Russians may have hacked Mr. Biden's laptop before it landed at the Delaware Mac shop. The Article notes that Russia was reported to have hacked Burisma, "the Ukrainian energy company that gave Hunter Biden a board seat," and quotes Giuliani discussing the "purported Biden email trove" in the *Wall Street Journal*: "Could it be hacked? I don't know. I don't think so. If it was hacked, it's for real. If it was hacked, I didn't hack it. I have every right to use it." *See* B203.

Mac Isaac's Opening Brief cites another out-of-jurisdiction decision, this time from the Ninth Circuit, that also supports the Superior Court's ruling. *Kaelin v. Globe Commc'ns Corp*., 162 F.3d 1036 (9th Cir. 1998), involved a challenge to a tabloid cover headline that appeared on its own, 17 pages apart from an admittedly accurate article. Finding a "reasonable juror" could have found that the front-page headline "was too far removed from the cover headline to have the salutary effect" the defendant claimed, the Court permitted the case to proceed past a motion to dismiss. *Id.* at 1041. The Court limited its holding to the context of a tabloid cover headline, noting it "is unlike a conventional headline that immediately precedes a newspaper story." *Id.* Politico's Article, in contrast, has a "conventional headline," with the text of the Article immediately following. Moreover, as the Superior Court correctly observed, "the sub-headline states, 'More than 50 former intelligence officials signed a letter casting doubt on the

provenance of a New York Post story on the former vice president's son,' which clarifies the headline." Order at 16. Any reasonable reader would read the headline and its clarifying subheadline together and in full context with the Article. All of the authority cited in Mac Isaac's Opening Brief therefore supports the Superior Court's conclusion that when properly read in context with the accurate Article, the Politico headline is not defamatory.

Additionally, where claims are based on a "defamation by implication" theory, an allegedly defamatory statement "must be reasonably read to impart false innuendo," and "must affirmatively suggest that the author intends or endorses the reference." *Abraham v. Post*, 2012 Del. Super. LEXIS 492, at *8 (Del. Super. Ct. Sept. 26, 2012) (cleaned up) (citing *Chapin v. Knight-Ridder, Inc*., 993 F.2d 1087, 1092-93 (4th Cir. 1993)); *see also Shotspotter*, 2022 Del. Super. LEXIS 268, at *34 ("plaintiffs must 'show something that establishes defendants' intent to communicate the defamatory meaning'" (quoting *Kendall v. Daily News Publ'g Co*., 716 F.3d 82, 90 (3d Cir. 2013))). Mac Isaac acknowledged this intent requirement in his opposition briefing before the Superior Court, but does not address it on appeal. *See* B226 (plaintiff "must show something that establishes defendant['s] intent to communicate the defamatory meaning" (citing *Kendall*, 716 F.3d at 90 (emphasis added)).

The SAC does not plead any facts supporting the assertion that Politico intended to insinuate that he was a "Russian agent" as Delaware law requires. B061 ¶ 117. Indeed, the only mention of Plaintiff in the non-defamatory Article is one he acknowledges is accurate. *See* B060 ¶ 108. Accordingly, the Superior Court's holding that the headline is not defamatory should be affirmed on the separate and independent basis that Mac Isaac failed to plead a required element of his claim.

III. THE SUPERIOR COURT CORRECTLY HELD THE ARTICLE HEADLINE DOES NOT CONCERN MAC ISAAC.

Question Presented

Whether the Superior Court correctly found the headline was not of and concerning Mac Isaac. Order at 16.

Scope of Review

The Court reviews the Superior Court's ruling granting a motion to dismiss "under a *de novo* standard of review and appl[ies] the same standard as the trial court." *Page*, 270 A.3d at 842. Questions of law are reviewed *de novo*. *Silverman*, 206 A.3d at 829.

Merits

The Superior Court's separate and independent finding that the challenged headline did not "concern" Mac Isaac because "it does not mention [him], directly or indirectly," should also be affirmed. Order at 16. His claim fails this most basic of required elements because the headline he challenges does not mention him, and is far removed from the accurate passing reference to him at the end of the Article.

In his Opening Brief, Mac Isaac concedes that the Article is accurate, but nevertheless argues that its headline "implicated him as being part of a Russian disinformation operation." Op. Br. at 24. His asserted basis for this tenuous connection is because "[h]e is referenced in the article but the article itself, while accurate, is tainted by its headline." *Id.*; *see also* B061 ¶ 117 (alleging that the

Article's headline, read together with the oblique reference to Plaintiff, an unnamed "Mac shop owner in Delaware," falsely implies "that the Plaintiff [is] part of a Russian disinformation campaign and/or, more specifically, a Russian agent").[5]

In challenging the Superior Court's of and concerning ruling as to Mr. Biden, Mac Isaac argues that a challenged statement can be of and concerning a plaintiff even if he is not mentioned by name where a "common mind" would conclude he was the subject. Op. Br. at 18 (citing *Smartmatic USA Corp. v. Newsmax Media, Inc*., 2024 Del. Super. LEXIS 628, at *50 (Del. Super. Sept. 12, 2024)). The same Superior Court decision further holds that "the statements must be specifically directed at the plaintiff to be actionable." *Smartmatic*, 2024 Del. Super. LEXIS 628, at *50. No "common mind" would adopt the strained reading of the Article's headline Mac Isaac espouses.

Moreover, there is a fatal inconsistency in Mac Isaac's argument. Throughout this litigation, Mac Isaac has argued that the headline must be read in isolation, and yet he has also argued that readers would know that the headline

[5] Confusingly, Mac Isaac claims "the Superior Court did not base its decision to dismiss the Appellant's case against Appellee Politico on whether the headline is defamatory," Op. Br. at 22, but the court below did precisely that. *See* Order at 16. This is one of the three separate and independent bases for the Superior Court's dismissal of Mac Isaac's claims. *Id.*

implies he is a Russian agent because he is referenced in the Article. Op. Br. at 24. As discussed above, courts review a challenged statement in the context of the full publication. Of course, readers who find the reference to the Mac Shop will also assimilate the non-defamatory context for the headline. But even if the Court were to read the only challenged statement – the headline – in isolation, he cannot bring a claim based on a statement that is not directed at him.

The Superior Court correctly observed that, "[r]egardless of whether the headline is true or false, it does not mention Mac Isaac, either directly or indirectly." Order at 16. To the extent Plaintiff alleges the Article's headline is false, the headline read alone is not of and concerning Plaintiff and cannot support his claim. *See Williams*, 2004 Del. Super. LEXIS 130, at *11 (Del. Super. Ct. May 3, 2004) (no defamation where plaintiff was not referred to by name in letter by defendants, and allegations of wrongdoing within letter concerned others and not the plaintiff); *Helicopter Helmet, LLC v. Gentex Corp*., 2018 U.S. Dist. LEXIS 72623, at *10 (D. Del. May 1, 2018) (dismissing under Delaware law where none of the challenged publications "mention any Plaintiff either directly or obliquely"), *aff'd*, 779 F. App'x 96 (3d Cir. 2019).

Mac Isaac admits the only reference to him in the Article is accurate. The second sentence of the second paragraph of the Article states that the *New York Post* had obtained the Biden laptop data from Giuliani, "who said he got it from a

Mac shop owner in Delaware who also alerted the FBI." B050-B060 ¶ 108. Even if Plaintiff could be identified by extrinsic evidence outside of the Article, B046 ¶ 44, this statement aligns with the pleaded truth in Plaintiff's SAC and is not actionable. B042-B043 ¶¶ 24-28; *see also Read*, 1995 Del. Super. LEXIS 251, at *13 ("The statements attributed to defendants by plaintiff essentially restate actions which plaintiff attributes to himself."). The Superior Court's decision that the challenged headline does not "concern" Mac Isaac should therefore be affirmed.

IV. THE SUPERIOR COURT CORRECTLY FOUND PLAINTIFF IS A LIMITED PURPOSE PUBLIC FIGURE WHO FAILED TO SUFFICIENTLY PLEAD ACTUAL MALICE.[6]

Question Presented

Whether the Superior Court correctly found Mac Isaac is a limited purpose public figure and that he failed to sufficiently plead actual malice. Order at 13-15.

Scope of Review

A trial court's decision to grant a motion to dismiss is reviewed *de novo*. *Page*, 270 A.3d at 842. Questions of law are reviewed *de novo*. *Silverman*, 206 A.3d at 829.

Merits

The Superior Court's decision that Mac Isaac is a limited purpose public figure because he "clearly thrust himself" into a controversy of his own creation over Mr. Biden's laptop data and failed to "adequately ple[a]d actual malice" should likewise be affirmed. Order at 16. As discussed above, Mac Isaac challenges the Superior Court's ruling that he is a limited purpose public figure, but does not address, and therefore waives, the second part of the actual malice inquiry, which is whether he plausibly pled actual malice in his SAC. Both parts of the Superior Court's actual malice ruling are correct.

[6] This Court need "not reach the actual malice issue" if there is no defamatory meaning. *Riley*, 529 A.2d at 251.

The Superior Court relied on Mac Isaac's own statements for its conclusion he qualified as a limited purpose public figure. The Court found that in an effort to influence events of national significance in the weeks leading up to a presidential election, Mac Isaac "put events into motion that he surely knew would spin out of control." Order at 13. It also noted that he had access to the media, whether through interviews, a published statement of his own, or his subsequent book tour and conference attendance, and found that "regardless of his motivations, Mac Isaac voluntarily thrust himself into the controversy." *Id.* at 14.

Mac Isaac argues that he "did not seek attention, nor did he want it," and "[a]ttention sought him and found him." Op. Br. at 13. But surely he had to know the public would demand information regarding the source of the laptop data and whether it was authentic. *See, e.g.*, *Price v. Chaffinch*, 2006 U.S. Dist. LEXIS 28974, at *18 (D. Del. May 12, 2006) (plaintiff, who took a position running an indoor firing range with air quality problems, "knew or should have known that he was injecting himself into a situation in which, as the head of a controversial facility, there was a substantial risk of public scrutiny and defamation"); *vacated in part on other grounds sub nom. Price v. MacLeish*, 2006 U.S. Dist. LEXIS 57026 (D. Del. Aug. 14, 2006). He thrust himself into – and indeed, created – the debate concerning Mr. Biden's laptop data by providing it to Mr. Giuliani's counsel, "verif[ying]" it for the *New York Post*, and participating in lengthy interviews with

members of the press. B042-B043 ¶¶ 24-28, B045 ¶ 41, B046 ¶ 45. The public would only know Mac Isaac was the "Mac shop owner in Delaware" referenced in the Politico Article because of the *New York Post* article he engineered, and because of the many articles published by other media organizations featuring Mac Isaac's interview – all of which were published five days prior to the Politico Article.

Viewing the facts through the lens of the federal Pennsylvania case cited in Mac Isaac's Opening Brief further emphasizes that he was a limited purpose public figure. *See* Op. Br. at 15-16. *Mzamane v. Winfrey* states that the rationale of a heightened fault standard for public figures rests on "self-help," as they "have greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." 693 F. Supp. 2d 442, 498-499 (E.D. Pa. 2010). Mac Isaac had great access to channels of communication – by his own admission, "numerous journalists" sought his statements concerning the leaked data. *See also* B252-253 (citing dozens of articles reporting on Mac Isaac and featuring his statements).[7] Additionally, unhappy with the coverage, Mac Isaac shopped a statement, which

[7] He also published a book. *See* John Paul Mac Isaac, *American Injustice: My Battle to Expose the Truth*, Liberatio Protocol (2022).

was published by justthenews.com. B048 ¶ 52, B092-B096. *Mzamane* also states that the actual malice standard takes into account the "assumption of risk," as "public figures in some sense voluntarily put themselves in a position of greater public scrutiny and thus assume the risk that disparaging remarks will be negligently made about them." 693 F. Supp. 2d at 499. Even if he initially sought anonymity, Mac Isaac assumed the risk that his identity would eventually be known, and that disparaging statements would be made about him as the source of the laptop data.

Because Mac Isaac "voluntarily inject[ed] himself . . . into a particular public controversy[, he] thereby becomes a public figure" who must plead and prove clear and convincing evidence of actual malice to recover for defamation. *See O'Gara v. Coleman*, 2020 Del. Ch. LEXIS 60, at *23-24 (Del. Ch. Ct. Feb. 14, 2020) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 478 (1974)); *see also McCafferty v. Newsweek Media Grp., Ltd.*, 955 F.3d 352, 359 (3d Cir. 2020) (finding a plaintiff to be a limited-purpose public figure because he "voluntarily inject[ed] himself into the political controversies surrounding President Trump and the President's critics").[8]

[8] *See also US Dominion, Inc v. Fox News Network*, 2023 Del. Super. LEXIS 42, at *4-5 (Del. Super. Ct. Jan. 27, 2023) (acknowledging Dominion was "drawn into [a] particular controversy" regarding the 2020 election and the court would therefore likely find it was a public figure under Delaware law, and that Dominion conceded the actual malice standard applied as well). While Dominion may have

"Actual malice means that a statement was made with knowledge that it was false or with reckless disregard of whether it was false or not." *Page*, 270 A.3d at 863-864 (cleaned up). "Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author in fact entertained serious doubts as to the truth of his publication, or acted with a high degree of awareness of probable falsity." *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991) (cleaned up). As a public figure, Mac Isaac "must both plead and prove that the allegedly defamatory statements were made with 'actual malice,'" and at the pleading stage of the case, Plaintiff "must plead facts that permit that conclusion." *Page*, 2021 Del. Super. LEXIS 127, at *11 (cleaned up); *accord Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 56 (1st Cir. 2012) (explaining "actual-malice buzzwords" were insufficient because they were not "backed by well-pled facts").

Mac Isaac's Opening Brief does not acknowledge his pleading burden, nor does it challenge the Superior Court's finding that although the "uses the term 'actual malice in his SAC, those words in and of themselves are not sufficient" to satisfy it. Order at 14. The Superior Court clearly outlined its two-part ruling: "[E]ven if the statements were defamatory or concerned Mac Isaac, he is a limited [purpose] public figure and he has not adequately pled actual malice." Order at 16

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been "drawn into" one political controversy, Plaintiff "voluntarily inject[ed]" himself into another political controversy. *See id*. at *3-4.

(emphasis added). Mac Isaac simply ignores the second half of the actual malice inquiry. His only arguable nod to the fault requirement is an assertion that "Plaintiff clearly showed that the [sic] Politico knew the headline was false because its article contradicts its headline." Op. Br. at 23. If anything, this would show a lack of actual malice, and that any alleged different meaning conveyed by the headline was unintentional. *See Masson*, 501 U.S. at 510 ("Mere negligence does not suffice."). Both because Mac Isaac thrust himself into a controversy of his own making and because he made no effort to offer anything more than "actual-malice buzzwords" to satisfy his pleading burden, the Superior Court's decision should be affirmed.

CONCLUSION

For the foregoing reasons, Politico respectfully requests that the Court affirm the Superior Court's dismissal of all claims against Politico with prejudice.

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CERTIFICATE OF SERVICE

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