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No. 22-cv-262
No. 22-cv-300

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Capitol Intelligence Group, Inc.,
Peter K. Semler,
Appellants/Cross-Appellees

v.

Gerald Waldman
Appellee/Cross-Appellant

On appeal from the Superior Court of the District of Columbia
Civil Division, Case No. 18 CA 5052(B)
(The Honorable Fern Flanagan Saddler)

OPENING BRIEF OF APPELLANTS/CROSS-APPELLEES CAPITOL INTELLIGENCE GROUP, INC. AND PETER K. SEMLER

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April 9, 2024

RULE 28(a)(2) DISCLOSURE

The parties in the trial and appellate proceedings, and their respective counsel, are:

Plaintiff-Appellee/Cross-Appellant Gerald Waldman represented by Brandon Nagy, Esq. and Michael Tucci Esq. of Stinson LLP

Defendant-Appellant/Cross-Appellee Capitol Intelligence Group, Inc. represented by Mark I. Bailen Esq. of Mark I. Bailen P.C. and Ariana Woodson Esq.

Defendant-Appellant/Cross-Appellee Peter K. Semler, *Pro Se*[1]

Capitol Intelligence Group, Inc.is a privately held corporation with no parent corporation.

[1] Counsel for Capitol Intelligence Group, Inc. also represented Peter K. Semler at the outset of this case in the trial court, however, Semler wished to proceed *pro se* in or around May 11, 2020. Counsel withdrew from representing Mr. Semler effective June 26, 2020, however, Semler continued to join filings made on behalf of co-defendant Capitol Intelligence Group, Inc. in the Superior Court, including the Notice of Appeal filed on or about April 7, 2022. Semler wishes to continue to proceed *pro se* in this appeal and he joins this brief of co-defendant-appellant/cross-appellee Capitol Intelligence Group, Inc.

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JURISDICTIONAL STATEMENT

This appeal (22-cv-262) is an interlocutory appeal of orders denying (in part) a Special Motion to Dismiss under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502(b) as permitted by *Competitive Enter. Inst v. Mann*, 150 A.3d 1213, 1228-30 (D.C. 2016) (as amended 2018).

Plaintiff-Appellee Gerald Waldman has cross-appealed (22-cv-300) seeking review of the orders to the extent they granted (in part) the Special Motion to Dismiss but there is no existing authority permitting an interlocutory appeal of an order granting a Special Motion to Dismiss (in whole or in part) under § 16-5502. Pursuant to this Court's order of July 5, 2022, the parties are to address the issue of whether this Court has jurisdiction to hear the cross-appeal (22-cv-300) in their briefs in this appeal. Defendants-Appellants contend there is no jurisdiction unless the Court reverses the denial of the Anti-SLAPP motion and dismisses all claims against them.

INTRODUCTION

This case implicates nothing less than the District of Columbia's commitment to "the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" and public figures. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). Few debates are more

consequential to the citizens in the District of Columbia than urban renewal, gentrification, and displacement of communities. Real estate developer and subprime lender Gerald Waldman's defamation and false light claims against Peter Semler, an award-winning journalist, and his company Capitol Intelligence Group, Inc. ("CIG"), are a blatant attempt to silence Semler for engaging in debate over, and for his protest of, Waldman's efforts to construct a nine-unit condominium building, with penthouse, that has now blocked the view of the iconic mural, *A Survivor's Journey*, in the Brookland neighborhood of Washington, D.C.

This case is a textbook example of a "SLAPP" – a Strategic Lawsuit Against Public Participation. Recognizing the chilling and intimidation effects such meritless lawsuits have on free speech and the First Amendment, the D.C. Council enacted the "Anti-SLAPP Act of 2010" to provide a clear path for the prompt dismissal of meritless claims that aim to silence debate and criticism on issues of public concern—claims precisely like those brought here. In denying the Anti-SLAPP motion below, the Superior Court (Saddler, J.) abdicated its role to "vigilantly stand guard against even the slight encroachments on the fundamental constitutional right of all citizens to speak out on public issues without fear of reprisal," *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 50 (D.C. 1983), thereby warranting this appeal.

An internationally renowned street artist created the mural *A Survivor's Journey*, which highlights the plight of abused women and maintains special

cultural significance in the Brookland neighborhood. Seeking to preserve the mural for the benefit of the community, Semler first attempted to purchase the building on which the mural is painted – a property which Waldman, through his lending practices, had forced into foreclosure. But Semler was unable to do so, either before foreclosure or after, despite Waldman's assurances otherwise, in part due to fraudulent conduct that occurred during the foreclosure and bankruptcy process of the building's seller. Semler reported this fraudulent conduct to the United States Trustee's Office (the "USTO"). Semler thereafter attended a community meeting in June 2018 where Waldman was advocating for the community's support for his condo development that would block the mural. Semler highlighted the damage the condo will have on the mural. Angered by Semler's opposition to the project and his somewhat harsh words and rhetoric, Waldman swiftly "slapped" back at Semler, filing this lawsuit less than a month later. Because Semler's expression of his views at the community meeting in June, which were recorded on video, and in a follow-up investigative op-ed article published online by CIG (the "Op ed"), constitute "act[s] in furtherance of the right of advocacy on issues of public interest," the Anti-SLAPP Act applies in this case.

This means that Waldman's claims only survive dismissal under the Act if he can demonstrate they are "likely to succeed on the merits." The Superior Court, relying on a paucity of evidence, incorrectly held that Waldman can discharge this burden. But Semler's comments at the June 2018 community meeting are protected

speech on a matter of public concern and, at most, constitute rhetorical hyperbole or non-actionable name-calling. Similarly, Semler's commentary in his Op-Ed does not rise to actionable statements of fact. While the Superior Court correctly found that Waldman easily satisfies the limited purpose public figure test—thereby requiring him to show proof by clear and convincing evidence that defendants published with actual malice—it did not identify any concrete evidence from which a jury could discern that Semler published with knowledge of falsity or reckless disregard of the truth. This Court must conduct an independent, de novo review of the evidence in the record which shows that Semler did not "fabricate" or otherwise misrepresent (knowingly or otherwise) his belief that the USTO was investigating the alleged fraud.

Waldman's retaliatory defamation claims against Semler and his company, CIG, are exactly what the Anti-SLAPP law was designed to vanquish: claims intended to burden and harass both a journalist whose reporting the plaintiff does not like and a local citizen defending his neighborhood against a ruthless developer focused on the bottom line at all costs. The Court should reverse the Superior Court's order and enter judgment in favor of Semler and CIG.

ISSUES PRESENTED

1. Did the Superior Court err by not granting Defendants' special motion to dismiss under the D.C. Anti-SLAPP Act in its entirety where the Plaintiff failed to meet his burden of establishing that his defamation and false light claims are

"likely to succeed on the merits" because there were no false and defamatory statements of fact made with actual malice by Defendants-Appellants.

2. Did the Superior Court err in denying the motion for leave to file the August 26, 2020 Letter from the U.S. Trustee which contained relevant evidence that further supported the special motion to dismiss under the Anti-SLAPP Act?

3. Does this Court have jurisdiction to hear the cross-appeal seeking review of an order granting in part a special motion to dismiss under the Anti-SLAPP Act, and if so, whether the Superior Court correctly dismissed the claims for defamation and false light in the Complaint based on a publication that was published beyond the statute of limitations period?

4. If there is jurisdiction for the cross-appeal, then whether the Superior Court has "discretion" to disregard the clear statutory language in D.C. Code § 15-703 requiring the court to fix time for plaintiff to comply with requirement that he post security to allow underlying action to proceed.

STATEMENT OF THE CASE

A. Complaint and Anti-SLAPP Motion

On July 16, 2018, Waldman filed this defamation and false light action against Semler and CIG alleging that Semler's commentary in videos published on January 14, 2017 and June 19, 2018, and in an Op-Ed published on June 24, 2018, by CIG was false and defamatory or placed him in a false light.

On November 16, 2018, Semler and CIG moved to dismiss the action under

the D.C. Anti-SLAPP Act, or in the alternative, under Rule 12(b)(6), Superior Court Rules of Civil Procedure. Waldman opposed the motion on December 17, 2018 and Semler and CIG filed a reply on January 10, 2019. Consistent with what has become a pattern in this case of seeking to increase defendants' litigation costs, Waldman filed a motion on January 18, 2019 seeking to strike portions of the defendants' opposition and accompanying exhibits (which showed that, contrary to Waldman's verified Complaint claiming he was not involved in the development project at issue, his company is listed as "owner" on various DCRA permits for the project) or alternatively to file a sur-reply. On February 4, 2019, the Superior Court granted the alternative relief allowing a sur-reply in which Waldman attempted to explain the glaring inconsistencies between his pleading and the evidence.

B. Initial Anti-SLAPP Hearing and Limited Discovery

On February 5, 2019, the Superior Court held a hearing on the motion. The Honorable Fern Flanagan Saddler first ruled that defendants' motion in the alternative, under Rule 12(b)(6), is denied. (JA 582.)[2] The Court then held the Anti-SLAPP motion in "abeyance" to allow for limited discovery on the following matters: "One, as to whether plaintiff is a limited purpose public figure; and two, as to whether plaintiff was under investigation by the United States Trustees at the time of defendant's statements alleging such as well as to whether defendant has actual knowledge of such information." (JA 598.)

[2] References to "JA" refer to the Joint Appendix submitted with this Brief.

The parties proceeded with limited discovery pursuant to the Court's order. Defendants served a subpoena on the U.S Trustees Office ("USTO") for documents relating to the complaint that Semler and his lawyer at the time, Benny Kass, had made to the Office, and the investigation thereof. Around the same time, Plaintiff, through his litigation counsel and their partner, Marc Albert, conducted a secret meeting with the USTO during which his counsel convinced the USTO attorneys to prepare and submit affidavits. (JA 696 at ¶6.)

The USTO produced documents in response to subpoena including communications from Semler seeking updates on the investigation into Waldman and others, as well as internal communications among the USTO attorneys who would later submit affidavits. (JA 628-642.) As defendants believed these communications were dispositive of "whether plaintiff was under investigation by the United States Trustees at the time of defendant's statements alleging such," they filed for leave to file the documents with the Court. Shortly thereafter, the USTO claimed work product protection over the internal communications (meaning the documents were "made in anticipation of litigation or for trial." Sup. Ct. R. Civ. Pro. 26(b)(3)), and sought to claw them back. At USTO's request, defendants moved to seal the documents filed with the Court.

Although the Court expressly allowed discovery into "whether defendant has actual knowledge of [whether plaintiff was under investigation by the United States Trustee]," Waldman did not seek to depose either Semler or CIG, or request

any documents or other materials from them.[3]

C. Order on Anti-SLAPP Motion

The parties submitted supplemental briefs on July 23 and 30, 2019 and the Court heard argument at a second Anti-SLAPP motion hearing on August 23, 2019. The Superior Court then announced its ruling on the Anti-SLAPP motion at a hearing on November 14, 2019, and issued a written order on November 19.

The Superior Court first *sua sponte* reversed its earlier order denying the Rule 12(b)(6) motion (asserted in the alternative) and instead granted the motion as to the first of the three publications—the January 2017 video—for being time barred under the statute of limitations. (JA 6.) The order then denied the Anti-SLAPP motion in its entirety. While the Superior Court correctly found that defendants made the prima facie showing that the Anti-SLAPP Act applies (JA 6) and also correctly concluded that Waldman is a limited purpose public figure (JA 9-10), it erred in holding that Waldman could meet his burden of showing that a jury could reasonably find in his favor on claims based on the June 19, 2018 video and the June 24, 2018 Op Ed. (JA 8-11.) The Superior Court failed to examine Semler's actual words in the June 19 video in context and instead relied on the Complaint's inaccurate characterizations of what was said. The ruling also misapplied the actual malice standard – applying a reasonableness test (*i.e.*

[3] At a hearing on May 13, 2019, the Superior Court ruled that defendants were not entitled to limited discovery—only plaintiff—as discovery is intended to assist plaintiff with meeting his burden under the second prong of the Anti-SLAPP Act.

negligence) instead of the heightened actual malice standard as set forth by the Supreme Court and this Court. (JA 8.) The Superior Court also failed to identify clear and convincing evidence that defendants published with actual malice and ignored affirmative evidence to the contrary.

D. Reconsideration

Seven days later, on November 26, 2019, defendants filed a motion for reconsideration. Waldman opposed on December 10, 2019 and defendants filed a reply on December 13, 2019. The reconsideration motion identified errors of fact and law, including that the Superior Court ignored the USTO's assertion of work product which indicated that it was anticipating litigation in connection with the complaint submitted by Semler. The motion alternatively sought the unsealing of the USTO emails and their consideration by the Court on the motion. At a February 21, 2020 hearing, the Superior Court set an oral argument date for the motion for May 20, 2020. Once again, Waldman requested the opportunity to submit additional briefing (even though the motion had been fully briefed). The Superior Court acquiesced. As his filing included new arguments that Waldman forgot to raise in his earlier opposition, defendants had to prepare and file a reply on March 4, 2020. The hearing was then rescheduled (due to Covid outbreak) for August 19, 2020 and the Superior Court took the motion under advisement.

E. New Evidence

Following the August 19 hearing, Semler received a letter from the USTO responding to his letter sent in April 2019 to then Attorney General William Barr to inquire about the status of the Waldman investigation. The letter, dated August 26, 2020, and signed by Acting U.S. Trustee for Region 4 William Fitzgerald, refers to the "complaints of bankruptcy fraud made by [Semler] to the Alexandria and Baltimore field offices regarding Gerald Waldman in *The Brookland Inn* case ..." and states that "The United States Trustee does not comment upon the status of investigations of bankruptcy fraud." (JA 894b.) Defendants sought leave on September 3, 2020 to file the letter as new evidence in further support of Semler's subjective belief in the truth of his statements. Waldman opposed.

F. Motion to Fix Security

The motion for reconsideration (and the subsequent motion to supplement the record) remained pending for more than a year, by which time Waldman had sold his Watergate condominium and moved permanently to West Palm Beach, Florida. Concerned about the mounting costs and expenses of this litigation (the protection against was an important consideration for the D.C. Council in enacting the Anti-SLAPP Act) and the fact that Waldman had now fled the jurisdiction, defendants sought to avail themselves of the rights conferred under D.C. Code § 15-703 which provides that the defendant may request that a nonresident plaintiff "to give security for costs and charges that may be adjudged against him."

Waldman refused to post security, which required defendants to file a motion on October 25, 2021 for the court to fix the security amount. Waldman opposed.

G. Omnibus Order

On March 16, 2022, the Superior Court (Saddler, J.) issued an "Omnibus Order" addressing the outstanding motions.[4] She revised her earlier order on the Rule 12(b)(6) motion and instead granted the Anti-SLAPP motion in part (dismissing the time-barred claim based on the January 2017 publication) and denied it in part (on the June 2018 publications) mostly for reasons set forth in her earlier order. (JA 26-27.) She also denied the motion to supplement the record with the U.S. Trustee's August 26, 2020 letter, based on alleged representations made by counsel at a non-existent hearing and denied the motions to unseal the USTO's emails and to fix time for plaintiff to comply with security requirement, claiming (contrary to the statute) that she had discretion to do so. (JA 22, 28-29.)

Defendants filed a timely appeal on April 8, 2022. Plaintiff cross-appealed the ruling granting the Anti-SLAPP motion in part on April 20, 2022.

STATEMENT OF FACTS

A. Defendant Peter Semler – D.C. Resident, Community Activist, and Investigative Journalist with Decades of Experience and Accolades.

Semler is a resident and fourth generation native of the District of Columbia. He has been an active, working journalist for over three decades and gained best

[4] On January 1, 2022, the Honorable Maurice Ross took over Civil Calendar 6 from Judge Saddler but Judge Saddler issued the March 16, 2022 ruling.

practice experience at City News Bureau of Chicago, Journal of Commerce, CNN, Bloomberg Business, CBS 60 Minutes, and as a founder and editor of the online publication Mergermarket, a product of the Financial Times. He has received the Scoop of Year (UK) award for travelling as an undercover illegal immigrant from Albania to the United Kingdom for the London Sunday Times. (JA 123.)

Semler is also an active and vocal member in his Brookland neighborhood in Northeast, Washington, D.C. Recognized as a "community activist" by Peter Saba of the District of Columbia's Office of Attorney General, among others, Semler has been pro-active in preserving neighborhood landmarks such as Howard University Divinity School Campus, working with then Metropolitan Police Department Chief Peter Newsham on community safety and security issues in the Brookland neighborhood, and, particularly relevant to this case, attempting to save the landmark mural *A Survivor's Journey.* (JA 124.) (Mural at JA 461.)

Commissioned by the District of Columbia government and the District Alliance for Safe Housing (DASH), the mural was created in 2010 by internationally renowned street artist Joel Bergner, also known as Joel Artista. The mural is painted on a wall on the south side of the Brookland Inn &

Café, overlooking the parking lot at 3736 12th Street N.E., and therefore, prior to the development spearheaded by Waldman. it could be seen by anyone heading north on 12th Street in the Brookland neighborhood. The mural shows an African-American woman looking into a brighter, more positive place and turning her back on the dark scene behind her. It signifies the plight of abused women and the journey they take to better circumstances in their lives, free from the mistreatment they once experienced.[5]

Semler owns and operates defendant CIG, a Delaware corporation doing business as a financial news media group in Washington as "Capitol Intelligence Group -Turning Swords into Equity" and "Black Business News" ("BBN").

(JA 461 (photo of mural prior to construction of Waldman's development).)

CIG covers global and domestic business deals and financial news. For example,

[5] Peter Semler, *CI View: DC's new Vandals Jerry Waldman and Lindsay Reishman set to destroy Black feminist mural #Brookland* (https://capitolintelgroup.com/ci-view-dc-new-vandals-jerry-waldman-and-larry-reishman-set-to-destroy-black-feminist-mural-brookland/) (last updated April 17, 2023).

domestically, CIG has investigated and reported on Community Reinvestment Act ("CRA") credits that are available to developers but have often been abused, an issue that can have a direct impact on local communities. (JA 124-25.)

B. Plaintiff Gerald Waldman – Controversial Real Estate Developer

Waldman is a "legal" resident of Florida. He claims to come to the District on "frequent business trips" as he "continues to own real property and business interests therein" and, at the time of the filing of this lawsuit, maintained a "condo" residence at the Watergate. He describes himself as a "property developer who has purchased and developed real estate in the Washington, D.C. metro area for over forty years." (JA 31 (Compl. ¶¶ 1, 7).)

Waldman regularly engages with the public by attending community gatherings and meetings with politicians to convince the public and elected officials to support his development projects. (JA 32.) He also has been involved in numerous controversies and disputes relating to his "real property and business interests," which has often led to litigation in the District of Columbia courts[6]

[6] A search of the dockets in the District of Columbia Superior Court and Maryland courts show over a dozen lawsuits involving Gerald Waldman. (*See* JA 154, 156.) In 2008, for instance, Independence Federal Savings Bank, a one-time leading community bank founded and managed by local African Americans, sued Waldman alleging that he attempted to cheat the bank out of its rightful priority position on a lien. *See Independence Federal Savings Bank v. Waldman et al*., 2008 CA 005055, filed July 15, 2008, D.C. Superior Court. Waldman also has sued local attorney Donald Temple over alleged breach of a loan agreement. Temple struggled with repayment while battling cancer and suffering from a pulmonary embolism. *See Waldman v. Temple*, 2013 CA 005658 B, filed August 19, 2013, D.C. Superior Court and transcripts Volume II of II of Temple Test. 6:16-23, filed

Waldman is also no stranger to the courts in Florida, where he acknowledges that he is a "named-plaintiff in several multimillion-dollar lawsuits in West Palm Beach," (JA 43 (Compl. ¶ 70)), including a contentious defamation suit against his neighbors in his Florida condominium. (JA 937-71.)

The instant case against Semler and CIG arises from their exercise of their First Amendment rights to voice opposition to Waldman's construction, with

partners, of a three-story condominium building directly next to the mural *A Survivor's Journey*, nearly entirely obstructing the mural from public view. A photo of the building under construction and obstructing the mural is above. (JA 463.) Waldman has been at the forefront of this controversial effort, advocating on behalf of the project at community meetings and lobbying city officials.

September 29, 2015. (JA 172.) In another lawsuit, Waldman is alleged to have illegally changed the locks on his tenants when they refused to sign a new lease they were not obligated to sign. *Collins v. Waldman et al.,* 2009 CA 0568, Complaint, ¶ 14-21, D.C. Superior Court.

C. Semler Attempts to Purchase the Building and Lot on 12th Street to Save the Mural, *A Survivor's Journey*

Semler correctly understood that if the empty lot on 12th Street fell into the hands of a developer such as Waldman, the mural *A Survivor's Journey* would be threatened. Accordingly, Semler attempted to purchase the lot and the neighboring building—the Brookland Inn & Café—upon which the mural is painted. (JA 125.)

In or around January 2015, Semler contracted to purchase the Brookland Inn & Café including the adjacent parking lot, from the owner, Brookland Inn LLC (the "Seller"), whose managing member and owner was Rabindranauth "Rob" Ramson. The property was in foreclosure and bankruptcy at the time. Waldman held the note on the property and thus was the mortgagee and beneficiary under a deed of trust (Marc Albert, a partner in the firm of Waldman's counsel in this case, Stinson, served as trustee on the deed of trust). After the sales contract was submitted to the Bankruptcy Court, Judge S. Martin Teel, Jr, allowed sufficient time for Semler to consummate a sale with the Seller before any foreclosure sale. However, about two weeks before the scheduled sale, Semler noticed that the provisions in the sales contract had been changed without his knowledge and Semler's signature had been forged on the contract. As the Seller had refused to sell on the terms in the original contract, the Seller was in breach of the sales contract, and the deal fell through. The beneficiary of this apparent subterfuge was Waldman, as he proceeded to foreclose on the property and took ownership of it on favorable terms at the foreclosure sale on March 17, 2015. (JA 125.)

Prior to the sale, Semler and his attorneys held a conference call with the trustee for Waldman's deed of trust, Marc Albert, to discuss the issue of the forged executed sales contract that had been filed in the bankruptcy proceeding. Albert also served as counsel of record to Waldman, the secured creditor, in the bankruptcy proceeding. Albert advised that he would set up a meeting between Semler and Waldman so that Waldman could arrange for the transfer of the property to Semler post-foreclosure auction. Albert said he could not attend that meeting because, as trustee, it would be considered "collusion" and he "could be accused of rigging the foreclosure [auction]." (JA 125-26.)[7]

Semler and Waldman met on March 12, 2015, just days before the foreclosure sale, at the Army & Navy Club of Washington, a location chosen by Semler in honor of Waldman's service in Vietnam.[8] During the meeting, Waldman admitted that he and Albert knew about the forged sales contract submitted to the Bankruptcy Court and Semler noted that he was considering his

[7] Similar dual representation by the Stinson firm occurred in the matter referenced above involving Attorney Donald Temple. Temple testified at trial in that case: "Well, I was surprised because there was this deed of trust. And the lawyer was also trustee in the bankruptcy court. And under D.C. law, when there was a dispute of that nature, the trustees represent both the debtor and the creditor. In this particular case, the creditors' lawyers were against me. And that's a violation of the law." *See Waldman v. Temple,* 2013 CAB 5658 Volume II of II, entered September 29, 2015, D.C. Superior Court, Temple Test. 14:6 -15:15). (JA 180.)

[8] Semler has reciprocal privileges at the Army & Navy Club due to his membership in the National Club in London.

options to salvage the sale through court challenges. They then discussed the plan for Waldman to take ownership of the Brookland Inn & Café building and adjacent lot at the foreclosure auction and, upon acquisition of the property, he would transfer it to Semler for the original sales price of $1.85 million. Relying on Waldman's representations during the meeting and their agreement, Semler did not pursue relief against the Seller in the Bankruptcy Court or otherwise attempt to forestall the foreclosure. (JA 126.)

Yet after taking ownership of the property at the foreclosure auction (conducted by Albert as trustee), Waldman neglected to return Semler's calls or respond to other communications and failed to carry-out the March 12, 2015 agreement to transfer the Brookland Inn & Cafe and adjacent lot to Semler. Waldman later offered to sell if Semler would resell the adjacent parking lot (the 3736 12th Street N.E. property) back to Waldman but Semler refused, knowing that Waldman planned to build a condo building on the lot that would block the iconic mural *A Survivor's Journey*. (JA 126-27.)

Semler felt defrauded by Waldman's actions. Waldman had convinced Semler during their meeting at the Army & Navy Club that Semler could obtain the property from Waldman and therefore Semler did not need to challenge the Seller in the bankruptcy court. Semler therefore allowed the foreclosure to proceed, which permitted Waldman to take control of the property. Waldman then reneged on their deal when he insisted he would only sell the property if Semler

would resell the parking lot back to him. Semler also believed that Waldman may have colluded with the Seller in presenting the revised contract for sale with Semler's forged signature since Waldman—not even the seller Ramson—was the only beneficiary of that fraudulent conduct. (JA 127.)

D. Semler's Communications with the U.S. Trustee's Office

On advice of counsel, Semler directed his real estate lawyer, Benny Kass, to inform the USTO of the submission of the falsified sales contract in the bankruptcy court. Kass submitted a letter on May 5, 2015 to the USTO in Alexandria requesting an investigation into this matter and referencing what counsel considered to be "at best an irregularity and at worst a forgery."[9] The letter also noted that Semler believed that Waldman had knowledge of the "problem." Semler subsequently followed up with the USTO by email (JA 628-41), in person, and on the phone regarding what he considered to be a fraud that was perpetrated on him. (JA 127.) Semler also advised the USTO regarding his belief that Waldman had knowledge and was likely complicit in the alleged fraud. Bradley Jones and Joseph Guzinski of the USTO responded, informing Semler that they opened an investigation into fraud allegations regarding the sale of Brookland Inn & Café. Semler also discussed on the telephone with the USTO the possibility of criminal charges being filed against Waldman for his knowledge of (and potential further involvement with) the falsified contract for sale documents

[9] *See* letter to the U.S. Trustee, *In re Brookland Inn LLC*, Case No. 14-00522-SMT Docket No. 50. (JA 158-59.)

as well as Waldman's subsequent refusal to honor the deal made between himself and Semler at the Army & Navy Club meeting. (JA 127-28.)

Although Semler could not find his emails with USTO attorneys Jones and Guzinski at the time that he submitted his Declaration in support of the Anti-SLAPP motion in November 2018, the USTO produced the emails during the limited discovery period in April 2019. Those emails corroborate Semler's recollection regarding his communications with the USTO. For instance:

- **Semler's April 4, 2016 Email to Jones**. Several months after Semler's lawyer sent a letter to the USTO, Semler emailed Bradley Jones on April 4, 2016 to follow up on an earlier telephone call. The email provides details of fraudulent conduct, including that during a March 2015 meeting, Waldman, Waldman said that "he and his attorney were aware that Mr. Ramson had fraudulently added the paragraphs to the executed sales contract. Waldman said 'Ramson did it and has done it before.'" (JA 628-29.)

- **Guzinski's April 4, 2016 Email to Benny Kass**. Within an hour of Semler's email to Jones, Kass received an email from Guzinski. (JA 632, 698.) Guzinski refers to Semler's email to Jones which he characterizes as "alleging criminal acts in connection with his (or his company's efforts) to purchase the Brookland Inn." Guzinski states that he would like to "arrange a conference call . . . to discuss the matter." (JA 632-33.)

- **Semler's December 30, 2016 Email to Guzinski and Jones**. Semler stated that he "would like to pursue [his] complaint on the fraud case regarding the sale of the Brookland Inn." He also noted that a "person close to the seller, Ramson, indicated that Mr. Ramson is willing to testify against Mr. Waldman." (JA 636, 698.)

- **Semler's April 11, 2017 Emails to Guzinski**. Semler emailed Guzinski attaching a letter to Kass that "reconfirm[ed]" that Kass' "legal representation was terminated effective April 4, 2016." Then, Semler emailed Guzinski again, forwarding his earlier December 30, 2016 email,

and stating that he was able to meet that week or later in the month to discuss the fraud issues. (JA 639, 641.)

While both Guzinski and Jones claimed in their affidavits not to recall every detail of their conversations with Semler, neither denies that the USTO was investigating his complaint (and the USTO asserted "work product protection" over their internal communications relating to Semler's complaint).[10] Rather, Jones stated that his "general and customary" practice was to inform people who submitted complaints that he would "look at everything they sent [him]" and "look[] into the allegations that he made." (JA 702, 703 (Jones Aff. ¶¶ 14, 21).)

E. Semler Continues Effort to Save the Mural, *A Survivor's Journey*

Although Waldman scuttled Semler's attempt to save the mural by acquiring the building and adjacent lot in 2015, Semler continued to press to save the mural. Semler was concerned that Waldman would physically remove the mural from the wall or otherwise destroy the building on which it is painted. In fact, the mural was vandalized in or around July 2018, as recorded in a police incident report. (JA 161.) Semler was also concerned that Waldman would build a structure on the adjacent lot that would block the view and, for all practical purposes, deprive the community the enjoyment of the mural. Accordingly, Semler protested the mural's destruction at community events and to city officials. (JA 128.)

[10] The USTO first asserted work product when the Defendants filed leave to file the email chain on April 17, 2019. Counsel for the USTO provided written confirmation to the undersigned counsel on June 24, 2019 that the USTO continues to maintain its assertion of work product protection over the communications.

1. The January 14, 2017 Ward 5 Community Meeting

Semler and other Brookland community members discussed land use and real estate development issues at a meeting for Ward 5 residents with D.C. Council Chairman Phil Mendelson in the Askale Café in Brookland in January 2017. Residents expressed significant frustration about development projects in their community, such as Waldman's. As Mendelson explained in an interview conducted by Semler after the meeting:

> Clearly, what I am picking up is that the community is very frustrated with the way development, real estate development, land use development, has proceeded in the ward. There is a real feeling that the community has no say in what is going on. And that there has been a disconnect and the disconnect is growing between the community and city hall with regard to how we're using land.[11]

Although the event was for Ward 5 residents to speak with Chair Mendelson, Waldman, who owned a Watergate condominium in Ward 2, crashed the event. (JA 128.) Prior to the start of the meeting, Semler approached Waldman to advise that the "issue of the Brookland Café is still in the U.S. Trustee's [office]" and "the neighborhood does not want you to bring down the mural." In response, Waldman rudely scoffed at Semler and taunted him, repeating over and over that Semler was a "sick person" and "something is wrong with [him]." (JA 59-60.) A transcription of the 97 second January 14 video is as follows:

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[11] BBN interviews DC Council Chairman Phil Mendelson #AskaleCafe, https://www.youtube.com/watch?v=LwEB3MWAeNo at 0:35.

PS: So Mr. Waldman, you know that the whole issue of the Brookland Café is still in the U.S. Trustee's….
GW: Please, leave me alone.
PS: And you know the neighborhood does not want you to bring down the mural.
GW: Get away from me. Something is wrong with you.
PS: No. no, we want that mural at the café not destroyed, you know.
GW: There is something wrong with you. You're a sick person.
PS: No, sir, it was mortgage fraud, thank you.
GW: You want to call that out in public?
PS: Yes.
GW: You are going to end up in court…
PS: Please do so, I would love it, please do so.
GW: This gentlemen is accusing me of something.
PS: No, I have brought it the trustee, to Justice, its Trustee
GW: Get away from me, you are a sick person.
PS: Sir, I live in this residence [sic]. I am doing this stuff for the community.

(JA 59.) Semler also video recorded the meeting with the Council Chair and posted various parts on YouTube.[12]

2. The June 19, 2018 BNCA Meeting

Semler advocated on behalf of Brookland residents to save *A Survivor's Journey* at a meeting of the Brookland Neighborhood Civic Association ("BNCA) on June 19, 2018. Waldman and a business partner, District Quarters VP for Acquisition Evan Muchai, attended the meeting to discuss their plans to build a nine-unit, three-story condo building directly adjacent to *A Survivor's Journey*. (JA

[12] https://www.youtube.com/watch?v=Oc8qqRuO3Ao; https://www.youtube.com/watch?v=nrIyvOk6sZI; https://www.youtube.com/watch?v=LwEB3MWAeNo; https://www.youtube.com/watch?v=Oc8qqRuO3Ao.

129.) Waldman explained to a resident at the meeting in a condescending tone that "it's a very nice building, ma'am, and it's a place for people to live. It will be nine apartments within a few hundred yards of the Metro station." (JA 58 (Ex. 4 to Compl. at timestamp 2:08).)[13]

Residents of the community voiced opposition to the construction project, identifying a number of issues, including flooding problems with construction on the lot, predatory practices by developers who are only concerned with the bottom line and who do not care about the neighbors in the community, and, significantly, the fact that Waldman and his partners did not care how the community felt and did not work with the community but instead imposed the development on them. (*See, e.g.*, *id.* at timestamps 5:40, 15:07, 15:25.) As it was, residents were already angry at what they saw as out-of-control gentrification in the Brookland neighborhood that was causing damage to the environment, including flooding issues. Many felt Waldman's development would cause further environmental damage. (JA 164 (Niki Davis Decl. 11/16/18) ¶ 9.) During the meeting, Semler introduced himself and raised the issue that the view of the mural would be blocked by the building. (JA 58 at timestamp 11:56.) He stated that he was "shocked" that the development had gotten so far. (*Id*. at 12:05.)

Waldman vigorously attempted to defend himself and the project in the meeting, stating that while he is not a resident of the community, he does own

[13] Also available at https://www.youtube.com/watch?v=ZRQD-lD-pcA&t=1077s

property there and he and Muchai have met with members of the community. (*Id*. at 16:25) But a community member countered that the neighbors were only being *told* what was being done and their input was not being sought from Waldman or Muchai. Semler then chimed in to say that, in his view, "that's why they have to do everything under the table, bribery, corruption to get this far." (*Id*. 17:00-15) There was no comment or discussion on Semler's comment and the meeting organizers then moved onto identifying plans for follow-up meetings. Semler responded that, as an alternative, they could pursue an "injunction in federal court, let's get rid of it" suggesting they could try to stop the project altogether. (*Id*. at 17:55.)

When a BNCA official announced that the project to build the nine-unit condo development was a "matter of right"—meaning that "they can do what they want"—Semler became exasperated and interjected that "there are a lot of things that are not a matter of right." (*Id*. at 18:53.) The BNCA official told Semler to "calm down" to which he responded that he would not because "this is pure corruption Brookland style" and "this happens in Ward 5 because no one stands up." (*Id*. 19:11.) As the video shows, that comment was *not* directed at Waldman or anyone in particular. Semler left the meeting before it ended but others, including Niki Davis, a Brookland resident and founder of United Neighbors, further pressed Semler's concerns about the mural. Waldman apparently promised

to attend a follow-up meeting for residents to voice their concerns but never did. (JA 164 (Davis Decl. ¶ 5-6).)[14]

3. The June 24, 2018 Op Ed

As a journalist, news media owner, and Brookland resident, Semler thereafter wrote a news and opinion piece regarding the iconic mural *A Survivor's Journey* and Waldman's construction of the nine-unit condo building which would obliterate view of the mural. Posted on his website CapitolIntelgroup.com on or about June 24, 2018, and titled, "CI VIEW: DC's new Vandals Jerry Waldman and Lindsay Reishman set to destroy Black feminist mural #Brookland," the Op-Ed discusses how the mural is not only an important message about female survivors of abuse, but also a landmark in the Brookland community. (JA 50-54.) It represents a part of the cultural renaissance taking place in Washington; a revival of African-American art and its place in our society.

The "CI" of "CI VIEW" stands for Capitol Intelligence, Semler's news operation (and co-defendant in this action), and signifies to the reader that this is the organization's viewpoint – i.e. opinion – on these matters. The Op-Ed extensively canvasses the black art renaissance and uses the mural to segue into

[14] After the meeting, a resident referred the matter to a Georgetown University affiliated not-for-profit, Community Mediation, run by Caroline Cragin, for participation by Semler, Waldman, Muchai, Reishman, and community member Christopher Smith. Semler agreed to attend but it did not move forward. Cragin was unable to answer why the mediation fell through, but Semler was ready, willing and able to participate. (JA 130, 164.)

discussing the failure of developers to properly inform Brookland residents and elected officials of the controversial building so they could protect a painting of "great artistic and cultural importance." (JA 52-54.) The article also criticizes city officials and the BNCA for their failure to protect the community. The reference to Waldman and Reishman as "vandals," is both literal and figurative. The mural, in fact, was vandalized (JA 161), and Waldman's proposed building will block the view of the mural, which in essence further vandalizes it. Tellingly, Waldman does not challenge the "vandal" reference as false in his Complaint.

Semler embedded a number of videos in the Op-Ed to illustrate and expand on the points raised in the piece, including interviews with black artists, community activists, and others. Semler also linked to the videos of the encounter with Waldman on January 14, 2017, at the Askale Café prior to the meeting with Council Chair Mendelson, and the June 19, 2018 BNCA meeting. Semler also published the Op-Ed on www.patch.com, Twitter, and LinkedIn.

In conjunction with this reporting, Semler interviewed ANC Commissioners and other city officials. At least three of the five ANC commissioners, Gayle Hall-Carley, Ursula Higgins, and Henri Makembe, all denied that they were told of the development project or had no recollection of being informed of it. Ms. Higgins, Chair for ANC 5B, stated that Waldman approached all members of the board in September of 2017 but only requested a curb cut at that time. She also noted that

"many others [of the community]" have expressed concerns over the project once they realized the building would obstruct the mural. (JA 131.)

F. The Complaint

Less than a month after Semler merely suggested filing an injunction to stop Waldman's development at the BNCA meeting, Waldman retaliated by filing this lawsuit on July 16, 2018. The Complaint identifies three publications as the basis for defamation and false light invasion of privacy claims: videos of January 14, 2017 and June 19, 2018, and the Op-Ed published on June 24, 2018.

SUMMARY OF ARGUMENT

The Superior Court correctly held that defendants made a prima facie showing that Waldman's claims against them "arise from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). The Superior Court erred, however, in concluding that Waldman met his burden of establishing that his claims were "likely to succeed on the merits." *Id.* The June 2018 video and Op-Ed that Waldman challenges do not contain actionable statements of fact that are false and defamatory or otherwise place him in a false light, and therefore he cannot prevail as a matter of law. Further, as a public figure, Waldman was required to meet the rigorous burden of showing by clear and convincing evidence that Semler published his commentary with actual malice, and the Superior Court did not cite or otherwise identify anywhere near the quantum of

evidence necessary for Waldman to prove by clear and convincing evidence that Semler or CIG published with actual malice.

This Court lacks jurisdiction to hear the cross-appeal because the order granting the anti-SLAPP motion in part is not a final order and it does not otherwise satisfy the collateral order doctrine. However, interests of judicial economy counsel in favor of exercising pendent jurisdiction if the Court were to reverse the Superior Court on the issues raised in this appeal and grant the Anti-SLAPP motion in its entirety. In that event, there would essentially be a final order making it ripe to hear the issues raised in the cross appeal.

If the Court entertains jurisdiction for the cross-appeal, then it should address the Superior Court's denial of the motion to fix time for plaintiff to comply with the requirement that he post security. D.C. Code § 15-703 requires the plaintiff to post security and it does not give the Superior Court discretion to refuse to comply with the statute.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING THE ANTI-SLAPP MOTION BY INCORRECTLY HOLDING THAT WALDMAN WAS "LIKELY TO SUCCEED ON THE MERITS" OF HIS CLAIMS

As this Court has noted, "[a] court's review for legal sufficiency is a particularly weighty endeavor when First Amendment rights are implicated." *Competitive Enterprise Institute v. Mann,* 150 A.3d 1213, 1240 (D.C. 2016) (as amended 2018) (applying *de novo* review of sufficiency of evidence in Anti-

SLAPP motion). In evaluating a special motion to dismiss pursuant to the D.C. Anti-SLAPP Act, the court must "consider whether a properly instructed jury could find for the plaintiff 'both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.'" *Id.* (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984)). The court must "test the legal sufficiency of the evidence to support the claims" and, if it concludes that the claimant cannot prevail as a matter of law, dismissal is appropriate. *Id.* at 1236, 1240.

"To pursue a claim for defamation, a plaintiff must allege and prove four elements: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Rosen v. American Israel Public Affairs Committee, Inc.*, 41 A.3d 1250, 1255–1256 (D.C. 2012) (citation omitted). Where, as here, a plaintiff alleging defamation is a limited purpose public figure, "the fault component embodied in the third defamation element is heightened; the plaintiff must then show by clear and convincing evidence that the defendant's [alleged]

defamatory statement was published with actual malice, i.e. either subjective knowledge of the statement's falsity or a reckless disregard for whether or not the statement was false." *Doe No 1 v. Burke*, 91 A.3d 1031, 1044 (D.C. 2014).

A false light claim "requires a showing of: (1) publicity (2) about a false statement, representation or imputation (3) understood to be of and concerning the plaintiff, and (4) which places the plaintiff in a false light that would be offensive to a reasonable person." *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 859 (D.C. 1999). But "'a plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion.'" *Klayman v. Segal*, 783 A.2d 607, 619 (D.C. 2001) (quoting *Moldea v. New York Times Co.* (*Moldea II*), 22 F.3d 310, 319 (1994)). Instead, where the plaintiff rests both his defamation and false light claims on the same allegations, the claims should be analyzed in the same manner. *See Harrison v. Washington Post Co.*, 391 A.2d 781, 784 n. 8 (D.C. 1978).

A. The Superior Court Failed to Identify Any Actual Defamatory Statements of Fact at June 19, 2018 BNCA Meeting or in the Op-Ed

In its November 19, 2019 Order, ("2019 Order"), the Superior Court identified the allegedly defamatory content as follows:

> Defendants made numerous statements concerning Plaintiff at the BNCA meeting and online, which included allegations of fraud and corruption by Plaintiff, and allegations that Plaintiff had been cited *by* the United States Trustee's Office. A properly instructed jury

> could find each of these statements damaging to Plaintiffs standing in his trade, profession, and community.

(JA 7 (emphasis added)). The Superior Court failed to cite or point to Semler's actual words—as contained on the video or in the web postings—but instead incorrectly described the evidence or otherwise relied entirely on Waldman's allegations and characterizations of the evidence – not the actual evidence. For instance, the record evidence plainly shows that defendants did not state or write that "Plaintiff had been cited *by* the United States Trustee's Office." Even plaintiff did not attempt to twist the statement in such a way. As he concedes, the statement—posted as text below a YouTube video—was that plaintiff had been "cited … ***to*** the US Trustee…" (JA 39, 56 (emphasis added).) That distinction is significant because it is indisputable that Semler (and his prior lawyer) did, in fact, cite Waldman *to* the USTO. Thus, the statement is true as a matter of law.

In reciting the case "facts" in its 2019 Order, the Superior Court relied exclusively on plaintiff's allegations in the Complaint (including its mischaracterizations of the evidence) instead of the actual evidence in the record. (*See* JA 3-4.) Semler's actual words are on the videos or in written documents (*see, e.g.*, JA 55-58) and defendants' Anti-SLAPP briefing cited to the actual time stamps for the relevant statements in the videos. The Superior Court's failure to consider this evidence is clear error because plaintiff's characterizations are not evidence, and in any event, are inaccurate in many instances. The Superior Court thus jettisoned its constitutionally required duty to "vigilantly stand guard against

even the slight encroachments on the fundamental constitutional right of all citizens to speak out on public issues without fear of reprisal." *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 50 (D.C. 1983).

B. Semler's Comments At BNCA Meeting Are Not Actionable Defamation Or False Light

1. Semler's Actual Comments Are Not Statements of Fact or Otherwise They Lack Defamatory Meaning

Waldman challenges comments by Semler at the June 19, 2018 BNCA meeting (JA 37-38 (Compl. ¶¶ 39-47)) but none is actionable for defamation or false light as a matter of law. Rather, each at most, is an ambiguous statement or name calling that, while typical in heated debate at public meetings such as the BNCA meeting, are not actionable under the law. *See, e.g., Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970) (noting that accusation made at public zoning board meeting that plaintiff real estate developer engaged in "blackmail" was not defamatory as "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole."). Thus, "'imaginative expression' and 'rhetorical hyperbole' are not actionable in defamation because they 'cannot reasonably be interpreted as stating actual facts about an individual.'" *Guilford Transp. Indus. v. Wilner* 760 A.2d 580, 596-97 (D.C. 2000).

Waldman alleged that Semler accused him of "always plann[ing] a 'pop-up' to destroy the mural" to destroy the mural and stated that "the proposed building

will block the mural," (JA 37 (Compl. ¶¶ 39, 43)) but these are not verbatim quotes from the video and, in any event, do not rise to the level of actionable defamation because they lack a defamatory meaning or otherwise are substantially true. Waldman concedes that he is working with the developer to build a building on the empty lot in front of the mural. (JA 34 (Compl. ¶ 23).) Whether it will partially block the mural, fully block the mural, or "destroy" the mural is a matter of opinion and even if factual, not capable of bearing a defamatory meaning. *See Klayman*, 783 A.2d at 613 (defamatory statement "must be more than unpleasant or offensive;" it must be "odious, infamous or ridiculous").

Further, Semler's comment that Waldman *always* planned to build on the lot, which would block the mural, is based on Semler's assessment of Waldman's conduct – *i.e*. his refusal to sell the Brookland Inn & Café unless Semler sold the empty lot back to Waldman. This implied, in Semler's view, that Waldman always intended to build on that lot. It is not defamatory for Semler to express this view regarding a matter of public concern. *See Guilford*, 760 A.2d at 597 ("Assertions of opinion on a matter of public concern receive full constitutional protection if they do not contain a provably false factual connotation.").

The Superior Court blindly credits plaintiff's claim that "Defendant accused Plaintiff of 'doing everything under the table, bribery, corruption to get this far." (JA 3.) But the video shows that Semler was responding to a community member's complaint that the developers failed to consult with the community about the

condominium project and hid their plans and thus he opined, "that's why *they* had to do everything under the table, bribery, corruption, to get this far." (JA 58 at 17:02.) Critically, Semler did not refer in particular to Waldman and his opinion was based on his discussions with local ANC members who claimed they knew nothing about the project. Indeed, Waldman denies that he was the developer.

The Superior Court also blindly accepts the allegations that Semler "accused Plaintiff of 'pure corruption Brooklyn style'" (JA 4) even though the video evidence shows that Semler does not accuse Waldman personally of corruption – rather, he states: "*this* is pure corruption *Brookland* style" (not "Brooklyn" style as Waldman alleges). Had the Superior Court reviewed the context of this statement—as it was required to do—it would have seen that this comment came in response to a BNCA official telling Semler to "calm down." Semler responded:

> I am not calming down. This is pure corruption Brookland style. In Ward 2 this would not happen in Georgetown. This happens in Ward 5 because nobody stands up. . . . They don't talk to you, they bribe our council member to get ahead.

(JA 58 at 18:56.) When viewed in context, these comments are also not actionable. They are heat-of-the-moment outbursts that are too vague and ambiguous to form a provably false statement of fact. It is not clear what is meant by "corruption Brookland style" and the reference to a "bribe" has no context to it.

Similarly, there is nothing defamatory about Semler "threatening Waldman with 'federal court action' to stop development." (JA 38 (Compl. ¶ 44.)) As Waldman has demonstrated in bringing this case, anyone can sue anyone for

anything, and suggesting an injunction to stop the development is not a statement of fact that can be proven false, nor is it capable of a defamatory meaning. Rather, in this context, a reasonable viewer of the video would not understand this comment to be a direct accusation that Waldman committed any actual crimes but instead ambiguous, hyperbolic claims made in the heat of debate. *See Mann*, 150 A.3d at 1247 ("First Amendment tips the judicial balance in favor of speech" when analyzing "ambiguous statement").

"It is axiomatic that opprobrious epithets, even if malicious, profane, and in public, are ordinarily not actionable." *Barrow v. Smith*, 78 N.E.2d 735, 737 (Ohio 1948). Thus, calling a person a "crook" has been held to be "mere name-calling." *Moore v. Waldrop*, 166 S.W.3d 380, 386 (Tex. App. 2005). Semler effectively engaged in this type of name-calling when Waldman sneered at Semler and asked, "what is wrong with you?" in a condescending tone. Semler countered, "You took this by theft and fraud" (JA 58 at 3:10), which was essentially name-calling similar to labeling someone a "crook." Such insults and hyperbole are not actionable. *See Moore*, 166 S.W.3d at 386; *Greenbelt Coop. Publ'g*, 398 U.S. at 13-14.

In sum, the evidence in the record does not match up to plaintiff's allegations that were relied upon by the Superior Court. The law requires for the trial court to review actual evidence (not allegations), but also to consider allegedly libelous statements in context. *See Guilford Trans. Ind., Inc.,* 760 A.2d at 597 (in defamation, "context . . . remains critical to our inquiry"); *Klayman*, 783 A.2d at

613 (defamation must be interpreted "in the sense in which it would be understood by readers to whom it was addressed. . . . Context serves as a constant reminder that a statement in an article may not be isolated and then pronounced defamatory … statements must be examined within the context of the entire article.")

When viewed in context, Semler's comments are not attacks on Waldman, as Waldman claims, but outbursts manifesting the frustration and exasperation that Semler and his neighbors felt about gentrification in their neighborhood.

2. *Semler's Comments Are True or Substantially True*

Much of Semler's commentary—to the extent he makes a statement of fact—is also true or substantially true. The burden of proving falsity rests squarely on the plaintiff, and he "must demonstrate either that the statement is factual and untrue, or an opinion based implicitly on facts that are untrue." *Carpenter v. King*, 792 F. Supp. 2d 29, 34 (D.D.C. 2011) (quoting *Lane v. Random House*, 985 F. Supp. 141, 150 (D.D.C. 1995)). It is an absolute defense to a defamation claim if the statements are substantially true, *e.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991), *Klayman*, 783 A.2d at 613, and statements need not be exactly true provided they are substantially true. *See Foretich v. CBS, Inc.,* 619 A.2d 48, 60 (D.C.1993) ("It is not necessary [for a defendant] to establish the literal truth of the precise statements made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."). This applies especially in situations where words such as "fraud" are used, as fraud has "various

meanings under the law." *Orr v. Argus Press*, 586 F.2d 1108, 1111-12 (6th Cir. 1978) (reversing verdict for plaintiff and dismissing case because use of terms "fraud" and "swindle," in connection with a "phony shopping mall investment scheme" were not unfair descriptions of conduct).

For instance, the comments that Waldman has "problems with the DOJ" or that the USTO is involved (JA 36-37) are based on Semler's reporting to the USTO (a branch of DOJ) his concerns over the foreclosure of the Brookland Inn property in the bankruptcy proceeding . *See* May 2015 letter from Semler's counsel to USTO (JA 158) and numerous other communications that Semler had with the USTO (as confirmed in the USTO affidavits) (JA 628-41, 697-98). These comments are substantially true.[15]

C. The Challenged Statements in the June 24, 2018 Op-Ed Are Not Actionable As A Matter of Law

The Superior Court does not identify what is specifically actionable in the June 24, 2018 Op Ed, but Waldman challenges four comments. (JA 39-40.) Two comments relate to the building of the nine-unit condo that will block the view of the mural, *A Survivor's Journey*. As discussed above, these comments are non-actionable opinion. Even if Waldman did not explicitly state that "he sees no reason for the need to preserve" the mural, this is Semler's assessment based on

[15] For this same reason, the comment that Waldman "has been cited for real estate fraud to the US Trustee of the Department of Justice" (JA 39 (Compl. ¶ 52)) is also substantially true.

Waldman's actions over the past several years where the only outcome will be an obstructed view of the mural—a fact that Waldman does not dispute and has borne true—and thus Semler reasonably believed that Waldman never believed it was necessary to preserve the mural in its original form.

The other two statements that Waldman challenges are also not actionable. First, the reference to the "criminal bankruptcy fraud complaint" refers to the complaint Semler submitted to the USTO (which the USTO confirms that it received). (JA 697-98, 894b.) Second, Semler essentially recaps his comments from the BNCA meeting when commenting "Waldman and Reishman are able to sneak through highly controversial developments by bamboozling and most probably corrupting, local neighborhood Advisory Neighborhood Commissions (ANC) and civic organizations such as the Brookland Neighborhood Civic Organization (BNCA)." For the reasons discussed above, this type of vague, hyperbolic assessment based on the undisputed facts that Waldman has pushed through a nine-unit condo building development that has met heated neighborhood opposition, is non-actionable opinion.

D. The Superior Court Incorrectly Held That Waldman Can Meet His Burden of Proving "Actual Malice"

The Superior Court correctly found that, under the *Waldbaum* public figure test adopted by this Court, Waldman qualifies as a limited purpose public figure. *See Doe v. Burke*, 91 A.3d 1031, 1042 (D.C. 2014) ("*Burke I*") (applying inquiry articulated by the D.C. Circuit in *Waldbaum v. Fairchild Publ'ns,* 627 F.2d 1287,

1297 (D.C.Cir.1980)). As the *Burke I* Court explained, the focus of the test is whether: (1) "the controversy to which the defamation relates was the subject of public discussion *prior* to the defamation" and (2) "a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution." *Id*. (internal quotation marks and citations omitted). Waldman does not dispute—nor could he—that there was a pre-existing public controversy in the Brookland Community about development generally and the construction of the condominium building. Nor did he challenge his role in the controversy. Thus, under *Burke I*, he squarely falls within the definition of limited purpose public figure as the Superior Court held.[16]

As a public figure, Waldman must meet the daunting burden of establishing sufficient proof to prove by clear and convincing evidence that either Semler or CIG published with actual malice. "A plaintiff may prove actual malice by showing that the defendant either (1) had 'subjective knowledge of the statement's

[16] Waldman argued below that a third aspect of the *Waldbaum* test—not addressed by this Court in *Burke I*—is that the "alleged defamation must have been germane to the plaintiff's participation in the controversy." This prong is easily satisfied because anything to do with the plaintiff's "talents, education, experience, and motives could have been relevant to the public's decision whether to listen to him." *Waldbaum*, 627 F.2d at 1298. As the Supreme Court has noted, "anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." *Garrison v. Louisiana*, 379 U.S. 64, 79 (1964). The Superior Court granted Waldman limited discovery to secure evidence relating to his status as a public figure but he failed to take any discovery on this issue.

falsity,' or (2) acted with 'reckless disregard for whether or not the statement was false.'" *Mann*, 150 A.3d at 1252 (quoting *Burke I*, 91 A.3d at 1044). "The 'subjective' measure of the actual malice test requires the plaintiff to prove that the defendant actually knew that the statement was false. . . . The 'reckless disregard' measure requires a showing higher than mere negligence; the plaintiff must prove that 'the defendant in fact entertained serious doubts as to the truth of [the] publication.'" *Id.* In reviewing the evidentiary sufficiency of plaintiff's response to an Anti-SLAPP motion, "the question for the court is whether the evidence suffices to permit a reasonable jury to find actual malice with convincing clarity." *Id*.

There is no evidence in the record of actual malice which is likely why the Superior Court resorted to a negligence standard. It held that "there was no reasonable basis for Defendants' statement alleging that Plaintiff was under investigation by the United States Trustee's Office." (JA 8). But "reasonableness" is not the test for actual malice. *See Lohrenz v. Donnelly*, 350 F.3d 1272, 1284 (D.C. Cir. 2003) (Defamation plaintiff "must show more than 'highly unreasonable conduct" to establish actual malice) *quoting Harte-Hanks Communications Inc. v. Connaughton*, 491 U.S. 657, 666 (1989). More than 50 years of post-*Sullivan* jurisprudence makes clear that "reckless disregard" cannot be proven by what a reasonable person would have done or should have done. *St Amant v. Thompson*, 390 U.S. 727, 730-31 (1968) (reckless disregard "is not measured by whether a reasonably prudent man would have published, or would have investigated before

publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.").

The Superior Court essentially concluded that it was unreasonable for Semler to have believed that since he "filed a complaint against Plaintiff" that "Plaintiff is presumptively under investigation." (JA 8.) But that does not in any way establish that Semler in fact had "serious doubts as to the truth of his publication," especially here where the evidence shows that the USTO attorneys informed Semler that they were "looking into" his claims (JA 703) and, as it turns out, they anticipated litigation as they asserted work product protection over their internal communications. The Superior Court ignored these critical facts. The Anti-SLAPP Act, however, requires the Court to review *all* evidence in the record to determine whether a reasonable jury could find actual malice by clear and convincing evidence. When considering the evidence here—including evidence that defeats or detracts from the other evidence—there is nothing close to clear and convincing evidence of actual malice.

At bottom, it appears that the Superior Court fundamentally misunderstood the term actual malice. The Superior Court's response to defendants' motion for reconsideration on this point makes no sense:

> The Court there was referring to a finding of a statement being false, and whether Mr. Semler believed it to be true, not whether there was Actual Malice.

(JA 27). On the contrary, actual malice directly concerns one's belief of the truth.

In fact, the evidence overwhelmingly establishes a *lack* of actual malice. USTO attorney Bradley Jones admitted that he generally tells people who submitted complaints to the USTO that he is "look[ing] at everything they sent me" and "looking into the allegations" *i.e.*, that he is investigating the complaint. (JA 702 (¶ 14), 703 (¶ 21).) Semler believed as much as he has consistently stated in his Declarations. (*See, e.g.*, JA 127 (¶ 11), 624 (¶ 23).) As their affidavits confirm, neither Jones nor Guzinski told Semler that the USTO was *not* investigating the matter, nor do they provide any reasons why Semler would not believe as much. In fact, the circumstances establish that a USTO investigation was underway – the USTO has now admitted that it was anticipating litigation based on Semler's complaint. Semler's belief was not only a reasonable one, but it was entirely accurate. While the Superior Court relied on Guzinski's statement (JA 697 (¶ 11)) that he never "stated or implied . . . that Mr. Waldman was under any type of civil or criminal investigation," Guzinski does not deny that he was investigating and he did not claim to know (nor can he) what Semler inferred from their communications. That statement does not provide proof of actual malice.

The actual malice standard focuses on the "defendant's state of mind when he acted" – that is, at the time of publication. *McFarlane v. Sheridan Square Press*, 91 F.3d 1501, 1508 (D.C. Cir. 1996) ("inference of actual malice must necessarily be drawn solely upon the basis of the information that was available to and considered by the defendant prior to publication"). The Superior Court improperly

cherry picks from correspondence—which is ambiguous at best[17]—sent to the USTO months or years before Semler expressed his views at the BNCA meeting in June 2018, to conclude what Semler believed when he made his comments. Remarkably, although permitted limited discovery on defendants' "actual knowledge, plaintiff did not take Semler's deposition. This is striking because the mental processes of the defendant are critical to the actual malice inquiry. *See Herbert v. Lando*, 441 U.S. 153, 172 (1979) (allowing deposition of journalist because "our cases necessarily contemplate examination of the editorial process to prove the necessary awareness of probable falsehood."). Plaintiff inexplicably failed to seek this evidence. There is simply insufficient evidence to prove, by clear and convincing evidence, Semler's awareness of any falsity.

Indeed, Semler continued to believe in the truth of his statements as he wrote to U.S. Attorney General William Barr in April 2019 to inquire about the delay in the investigation by the USTO. Semler received a response to that inquiry in a August 26, 2020 letter from the Acting U.S. Trustee for Region 4, but the Superior Court erroneously denied defendants' request, filed on September 3, 2020, to

[17] The Superior Court apparently believed that because Semler checked in with the USTO in April 2016, December 2016 and April 2017—14 to 30 months before the BNCA meeting—to see whether he could further assist the investigation, that Semler somehow did not believe, at the time of publication in June 2018, that an investigation was underway. This reasoning is not logical and the emails do not amount to "clear and convincing evidence" that Semler did not believe that the USTO was not investigating Waldman—especially where, as here, the USTO would have advised him that it was "looking into" his claims.

supplement the record with the letter, even though the letter provided further evidence of the truth of Semler's comments and his lack of actual malice. *See* JA 894b (noting that the USTO had received the complaints of "bankruptcy fraud" but advising that it "does not comment upon the status of investigations of bankruptcy fraud"). It was an abuse of discretion for the Superior Court to refuse to consider the newly discovered evidence (submitted more than 18 months before the Court submitted its final order). The Superior Court made the absurd contention that a request for leave to file was raised at an "August 8, 2020 hearing" (JA 22) but no such hearing was conducted on that date, and in any event, it would be metaphysically impossible to discuss leave to file the letter on August 8, 2020 when the letter is dated August 26, 2020 and was not received by Semler until August 31, 2020.[18] Because the Superior Court provided no legitimate basis for not considering relevant evidence, this is an abuse of discretion. *In re Estate of Yates*, 988 A.2d 466, 468 (D.C. 2010) ("court's action is an abuse of discretion if no valid reason is given or can be discerned for it").

[18] The Superior Court also falsely claimed that it "indicated that it would consider the Motion to seek leave to file a letter from John P. Fitzgerald, III, Acting United States Trustee's Office" because plaintiff had requested that the motion for leave not include "commentary or argument." No such statement or request was made to the court. As part of the Rule 12-I meet and confer process, plaintiff's counsel stated to defendant's counsel that he did not want the motion to include argument, but defense counsel noted that Rule 12-I(d)(2) requires a motion to be accompanied by points and authorities in support. (JA 894.)

The Court also mistakenly refers to purported "bias" as evidenced by "the contentious relationship between the parties" as providing evidence of actual malice. (JA 11.) The Court is wrong on this point as well. As another Superior Court judge succinctly explained in the *Mann* case:

> Defendants' malice, including the hostility, attack, bias, the extent of criticism, . . . is not the type of actual malice recognized in a defamation lawsuit. "Actual malice," as a term of art, has a different meaning from how the term is commonly understood. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52 (1974), and it is not synonymous with the malice that connotes ill-will, spite, or animosity. *Masson v. New Yorker Magazine, Inc*., 501 U.S. 496, 510-11 (1991). Malice in the libel context is simply a shorthand expression of the "knowledge of falsity or reckless disregard of the truth" standard, and ill will or a bad motive towards the plaintiff is not the standards for malice. *Old Dominion Branch No. 496 v. Austin,* 418 U.S. 264, 281 (1974*)*; *see Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (noting personal spite, ill will or desire to injury the plaintiff cannot be the basis to find for the plaintiff in a libel case).

Mann v. National Review, Case No. 2012 CA 8263, Slip. Op. at 6 (D.C. Sup. Ct., Order on Motion to Compel, Sept. 30, 2019) (Anderson, J.). This Court in *Mann* merely noted that bias may be relevant when "evaluating other evidence" but here, unlike in *Mann* where the defendants were aware of several investigative reports that purportedly exonerated the plaintiff, there is no other evidence. Despite the Court's allowance of limited discovery, plaintiff took no discovery of Semler. Any purported bias evidence—which is not documented in this record—cannot save plaintiff's claims for defamation or false light.

There is simply no evidence in the record that Semler knew what he stated was false or that he entertained serious doubts as to the truth of the publications. Even under a negligence standard, there is insufficient proof to support the claim. It is undisputed that Semler contacted the USTO multiple times over two years regarding his claims of fraud in the Brookland Inn bankruptcy proceeding. He diligently followed up his telephone calls and meetings with emails to Guzinski and Jones. (JA 628-41.) His belief as a layperson assuming that the USTO was doing its job cannot amount to negligence (or actual malice).

II. THE COURT LACKS JURISDICTION TO HEAR THE CROSS-APPEAL RELATING TO THE TIME-BARRED CLAIM BASED ON THE JANUARY 14, 2017 VIDEO

Plaintiff cross-appeals in connection with dismissal of claims arising from one of the three publications in this case. In support of jurisdiction for the cross-appeal, plaintiff raises three arguments.

First, plaintiff cites *dicta* from *Competitive Enterprise Institute v. Mann* that a grant of a special motion to dismiss under the Anti-SLAPP Act is a final order. But the Anti-SLAPP motions in *Mann* were all initially denied in their entirety and it did not address an appeal of an order granting a motion in part. Second, plaintiff argues that reasons supporting appeal under the collateral doctrine for a partial *grant* of an anti-SLAPP motion are "equally applicable" to arguments supporting appeal of a *denial* of an anti-SLAPP motion. That is not true because the arguments cited in *Mann* supporting interlocutory appeal for the denial of an anti-

SLAPP motion heavily rely on the purpose behind the Anti-SLAPP Act in protecting defendants and free speech, which simply do not apply to plaintiffs such as Waldman. Finally, plaintiff cites pendent jurisdiction. One of the criteria of pendent jurisdiction—that resolution of both the appeal and cross-appeal could dispose of the entire action—is applicable, but only if the Court were to grant the relief sought by defendants (*i.e*. dismissal of all claims under the Anti-SLAPP Motion). In that scenario, it would further judicial economy to dispose of the cross-appeal at this time as well. If the Court were to affirm in whole or part, however, those interests would not be served and it need not consider the cross-appeal.

If the Court entertains jurisdiction for the cross-appeal, as a threshold matter, there is no dispute whether any claims based on statements made in the January 14, 2017 video are barred by the one-year statute of limitations. D.C. Code § 12-301(4); *Mullin v. Washington Free Weekly, Inc*., 785 A.2d 296, 298 (D.C. 2001) ("Defamation occurs on publication, and the statute of limitations runs from the date of publication.").[19] Plaintiff only disputes whether he actually *asserted* a claim

[19] Although there is no specific statute of limitations for false light under D.C. Code § 12-301, "where, as here, a stated cause of action is intertwined with one for which a limitations period is prescribed, [courts] apply the specifically stated period." *Jankovic v. Int'l Crisis Grp.,* 494 F.3d 1080, 1086 (D.C. Cir. 2007) (citation omitted). Here, the false light claim is intertwined with – and indeed relies on the exact same facts as – the defamation claim. It is therefore also subject to the one-year limitation period under D.C. Code § 12-301(4). *See, e.g., Stovell v. James*, 965 F. Supp. 2d 97, 101 (D.D.C. 2013) (applying one-year limitations period to false light claim).

for defamation/false light based on that publication. But a plain reading of his Complaint clearly identifies and quotes from each of the three publications at issue: 1) January 14, 2017 video; 2) June 19, 2018 video; and 3) the June 24, 2018 Op Ed, and then the counts for defamation and false light expressly incorporate the "aforementioned false and defamatory statements." (JA 35-39, 43, 45.) The description of the January 2017 video references the number of YouTube subscribers who may have seen the video (JA 36) – a fact that would only be relevant if asserting defamation and false light claims. As drafted, the claims for defamation and false light clearly include the January 2017 publication. The Superior Court properly dismissed the claim pursuant to the Anti-SLAPP motion.

III. IF THERE IS JURISDICTION ON THE CROSS-APPEAL, THE COURT SHOULD THEN REVERSE THE ORDER DENYING THE MOTION FOR COURT TO FIX TIME FOR PLAINTIFF TO COMPLY WITH SECURITY REQUIREMENT

Pursuant to D.C. Code § 15-703(a):

> The defendant in a suit instituted by a nonresident of the District of Columbia, or by one who becomes a nonresident after the suit is commenced, upon notice served on the plaintiff or his attorney after service of process on the defendant, may require the plaintiff to give security for costs and charges that may be adjudged against him on the final disposition of the cause … In case of noncompliance with these requirements, within a time fixed by the court, judgment of nonsuit or dismissal shall be entered. The security required may be by an undertaking, with security, to be approved by the court, or by a deposit of money in an amount fixed by the court.

As this Court has held, the statute "require[s] nonresident…plaintiffs to post security as a condition of moving forward with an action in the District of

Columbia courts." *Landise v Mauro*, 141 A.3d 1067, 1075 (D.C. 2016). Plaintiff is a nonresident of the District of Columbia as he has been a legal resident of Florida since 2010. (JA 31.) During the pendency of this action he sold his residence in D.C., prompting defendants to serve written notice requiring plaintiff to post security or deposit funds under the statute. (JA 913.) Plaintiff refused, forcing defendants to file the motion to fix time for plaintiff to post security. (JA 908.) Without explanation, the Court denied the motion, claiming that it was "exercising its discretion" to do so. (JA 27-28.) As this Court stated in *Landise*, the statute "*requires* plaintiff to post security as a condition of moving forward with an action." 141 A.3d at 1075 (emphasis added). The Superior Court does not have unbridled discretion to deny this request and ignore the mandate of the statute. Accordingly, the Court should reverse the Superior Court and order that the motion be granted and security be set at the amount requested by defendants.

CONCLUSION

For the foregoing reasons, the Court should reverse the Superior Court's March 2022 Omnibus Order and grant the Anti-SLAPP motion in its entirety, dismissing all claims against Appellants/Cross-Appellees.

Respectfully submitted,

/s/ Mark I. Bailen

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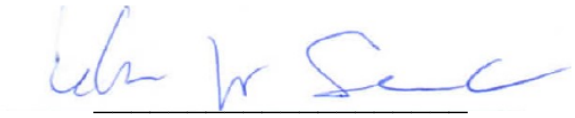

Peter K. Semler, *Pro Se*
Appellant/Cross-Appellee

April 9, 2024

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Mark I. Bailen
Signature

22-cv-262/300
Case Number(s)

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April 9, 2024
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellants' Opening Brief was sent via this Court's e-filing system, on April 9, 2024, to all counsel of record.

/s/ Mark I. Bailen