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)

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. The Superior Court Correctly Held that the Anti-Slapp Act Applies to this Case 3

II. Waldman Is A Limited Purpose Public Figure Who Must Prove Actual Malice By Clear and Convincing Evidence 6

III. Waldman Has Not Proffered Sufficient Evidence of Actual Malice Under the Anti-SLAPP Act. 9

A. Waldman's Circumstantial "Evidence" Falls Far Short of Clear and Convincing Evidence of Actual Malice 10

B. Waldman's Authority Does Not Support Actual Malice Here 15

IV. Waldman, Like the Superior Court, Fails to Identify False and Defamatory Statements of Fact at June 2018 Meeting or in Op-Ed 17

V. The Superior Court Correctly Granted the Anti-SLAPP Motion on Waldman's Time-Barred Claim 19

VI. The Superior Court Erred By Failing to Fix Time for Plaintiff to Comply with Security Requirement 20

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Air Wisconsin Airlines Corp. v. Hoeper, 571 U.S. 237 (2014) 18

Boley v. Atlantic Monthly Group, 950 F.3d 249 (D.D.C. 2013)..... 15, 16

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984).....1, 2

Clampitt v. Am. Univ., 957 A.2d 23 (D.C. 2008) 13

Competitive Enterprise Institute v. Mann, 150 A.3d 1213 (D.C. 2016), *as amended* (2018)..... 10, 15, 19

Connick v. *Myers*, 461 U. S. 138 (1983) 2

Fells v. Service Employees Int'l Union, 281 A.3d 572 (D.C. 2022) 5, 6

Fridman v. Orbis Business Intelligence, Ltd, 229 A.3d 494 (D.C. 2020).....10

Garrison v. Louisiana, 379 U.S. 64, 79 (1964) 8

Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970).....6, 9

Hall v. District of Columbia, 867 F.3d 138 (D.C. Cir. 2017).....19

Harte-Hanks Communications Inc. v. Connaughton, 491 U.S. 657 (1989).....15

Herbert v. Lando, 441 U.S. 153 (1979) 19

Jacobson v. Clack, 309 A.3d 571 (D.C. 2024)..... 1, 3, 20

Jankovic v. Int'l Crisis Grp., 494 F.3d 1080 (D.C. Cir. 2007) 10

McFarlane v. Sheridan Square Press, 91 F.3d 1501 (D.C. Cir. 1996) 11

Moss v. Stockard, 580 A.2d 1011 (D.C. 1990).....7

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).....3, 7

United States v. Nobles, 422 U.S. 225 (1975) 13

Parks v. U.S., 451 A.2d 591 (D.C. 1982) 13

St Amant v. Thompson, 390 U.S. 727 (1968)..... 15, 16

Saudi American Public Rel. Aff. Comm. v. Inst. for Gulf Affairs, 242 A.3d 602 (D.C. 2020).....5

SEC v. National Student Marketing Corp., 18 Fed.R.Serv.2d 1302, 1305 (D.D.C.1974) 13

United States v. AT & T, 86 F.R.D. 603 (D.D.C.1979) 13

United States v. Dunkel, 927 F.2d 955 (7th Cir. 1991).....1

Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980).....8

Statutes

D.C. Code § 15-703 20

D.C. Code § 16-5501(1)(A)(ii) and (B).....4

D.C. Code § 16-5501(3).....5

D.C. Code § 16-5502(b).....4

Rules

Sup. Ct. R. Civ. Pro. 26(b)(3) 13

Other

Committee Rpt. On Bill 18-893 (Nov. 18, 2010). 4

INTRODUCTION

Six years into this litigation and after multiple rounds of briefing, including his opening brief in this Court, it is still not clear what specific statements of fact concerning Plaintiff Gerald Waldman are false and defamatory. Waldman continues to point to his Complaint where he mischaracterized alleged statements by Defendants Peters Semler and Capitol Intelligence Group, Inc. – Turning Swords into Equity ("CIG"). This is fine, Waldman asserts, because this Court performs *de novo* review of the record and thus, apparently, can search for itself for possible defamatory statements of fact.[1] But as one court aptly stated, "Judges are not like pigs, hunting for truffles buried in briefs" or the record. *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Rather, the obligation to "make an independent examination of the whole record" on *de novo* review is to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).

Here, the Superior Court's failure to grant the Anti-SLAPP motion in its entirety is a forbidden intrusion on the First Amendment rights of Semler and CIG. Semler was speaking out on one of the most hotly debated public affairs topics in urban communities – gentrification. The condo project that Waldman allowed to be built blocking view of *A Survivor's Journey* mural created angst and ire among the

[1] *See* Waldman's Opening Brief ("Waldman Br." or "Br.") at 25. CIG's opening brief, to which Semler joined, is hereafter referred to as "CIG's Br."

community, and fueled debate over the condo project. (CIG's Br. at 21, 22, 25.)

JA 463. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick* v. *Myers*, 461 U. S. 138, 145 (1983).[2]

The actual malice rule provides such protection, and this Court "must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose*, 466 U.S. at 511. Waldman's evidence of actual malice falls far short of the constitutional threshold. The affidavits from the attorneys in the U.S. Trustee's Office ("USTO") are inconclusive at best. Indeed, one of the attorneys informed Semler that he was "looking into [Semler's] allegations," which directly supports Semler's belief that

[2] Waldman claims that he negotiated an easement to protect the mural. (Br. at 17.) Per its terms (JA 535), the easement protects only Waldman's private interests in ensuring "a means of pedestrian access and passage to and from the rear and side of the [Brookland Inn property] to 12th Street N.E." The trash and parking were in the rear of the building so this ensured access for Waldman's tenants. It had *nothing* to do with the mural.

the office was investigating Waldman. Emails that Semler sent to Waldman and the USTO years before the publications also provide no support for a finding that Semler knowingly made any false statements or acted in reckless disregard of the truth more than two years later. The evidence is simply far short of the quality or quantum that courts have required of the clear and convincing standard.

To sidestep actual malice, Waldman attempts to argue that this case does not involve advocacy on issues of public interest to be covered by the Anti-SLAPP Act and he is not a limited purpose public figure. But the facts speak for themselves—this was a hotly debated matter of public interest and Waldman injected himself into the debate as a fierce advocate for the condo development. This is a classic SLAPP suit and Waldman is the prototypical limited public figure.

Finally, if the Court asserts jurisdiction, it should affirm the ruling granting the Anti-SLAPP motion on Waldman's time-barred claim. His attempt to "disavow" the claim (after recognizing its futility) is not legally viable, especially in light of this Court's ruling in *Jacobson v. Clack,* 309 A.3d 571 (D.C. 2024).

Consistent with the "principle that debate on public issues should be uninhibited, robust, and wide-open," *N.Y. Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964), this Court should reverse the order denying the Anti-SLAPP motion.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT THE ANTI-SLAPP ACT APPLIES TO THIS CASE

Waldman claims the case concerns "private interests" and therefore

Semler's commentary supposedly does not constitute "acts in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). He cites no authority to support this contention.

Waldman's claims fall squarely under the Anti-SLAPP Act. Indeed, in advocating for adoption of the Act, the Council's Committee on Public Safety and the Judiciary recognized the increase in the use of lawsuits, like this one, as a tool to punish and attempt to silence the expression of an opposing or critical point of view. Committee Rpt. On Bill 18-893 (Nov. 18, 2010) at 1. The Committee Report cited the case of a real estate developer, like Waldman, who sued two Capitol Hill advocates for voicing opposition to a development. The actions of the advocates "should have been protected" but "they, and any others who wished to express opposition to the project, were met with intimidation." *Id*. at 3-4.

CIG and Semler have made "a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." They made "an oral or written statement . . . [i]n a place open to the public or a public forum in connection with an issue of public interest" and they have engaged in "expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(A)(ii) and (B).

The Act defines "[i]ssue of public interest" as "an issue related to health or safety; environmental, economic, or community well-being; the District

government; a public figure; or a good, product, or service in the market place." § 16-5501(3). This Court "'liberally interpret[s]' what qualifies as an issue of public interest, and a given statement need only 'relate' (rather than expressly refer to) one of the above topics to fall within the Act's protections." *Fells v. Service Employees Int'l Union*, 281 A.3d 572, 581 (D.C. 2022) (quoting *Saudi American Public Rel. Aff. Comm. v. Inst. for Gulf Affairs*, 242 A.3d 602, 611 (D.C. 2020)).

There is no question that the condo project debate (and Semler's comments) relate to environmental, economic and community well being, a public figure (Waldman—as addressed further below), and a good or product (the condo units to be built on Waldman's land that he sold to the developers). Further, Semler has petitioned the USTO regarding irregularities in the Bankruptcy Court proceedings that enabled Waldman to foreclose on the property. And he has communicated his views to the public as part of his efforts to save the public landmark *A Survivor's Journey* mural. These are unquestionably issues of public interest.

Waldman argues that Semler had a private interest because at one time he tried to acquire the Brookland Inn. (Waldman Br. at 23-24.) But that is not a private interest covered by the statute, which are "statements directed primarily toward protecting the speaker's commercial interests." D.C. Code § 16-5501(3). Semler did not make statements to "protect" any purported "commercial interests" since he has no commercial interests in the property. Semler's only interest, like dozens of others who attended the community meeting in June 2018, was to protect

the community's rights. (*See, e.g.*, JA 128-30, 647-50 (Semler and Davis Decls.).) But even if he had a private interest, "'both the statutory text and our precedents make clear that statements 'intermixing public and private interests' fall within the scope of the Anti-SLAPP Act." *Fells*, 281 A.3d at 582. The Superior Court correctly applied the Act in this case.

II. WALDMAN IS A LIMITED PURPOSE PUBLIC FIGURE WHO MUST PROVE ACTUAL MALICE BY CLEAR AND CONVINCING EVIDENCE

The Superior Court incorrectly found, based on errors of law and fact, that Waldman could prove that Semler and CIG published their commentary with actual malice. Perhaps realizing the weakness of his actual malice evidence, Waldman presses the Court to make the untenable finding that a real estate developer who attends a public meeting to advocate in favor of a controversial development project is not a limited purpose public figure. The Supreme Court addressed a nearly identical situation in *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 8-9 (1970) where a real estate developer, like Waldman, was seeking to push through a plan to build housing units. That plaintiff's "status clearly fell within even the most restrictive definition of a 'public figure.'" *Id*. at 9.

Here, following this well-established precedent, the Superior Court correctly held that Waldman is a limited purpose public figure. This is not a close call. Waldman does not contest that there was a pre-existing public controversy and that he injected himself into the controversy with the intent of affecting its outcome. (*See* Waldman Br. at 23-25 not challenging either of those prongs.) Instead,

Waldman argues that Semler's commentary was not "germane" to Waldman's participation in the public controversy. (Br. at 23-24.) Germaneness is seldom an issue because there must be a showing that the challenged commentary is "wholly unrelated" to the controversy. *See Moss v. Stockard*, 580 A.2d 1011, 1031 (D.C. 1990) ("'Defamatory statements *wholly unrelated* to the controversy do not merit *New York Times* protection") (emphasis added). Indeed, Waldman does not cite a single case where a court found the defendant's speech not to be germane. The two cases he does cite, (Br. at 24), found no issue with germaneness.

It cannot be reasonably argued that Semler's commentary was "wholly unrelated" to the controversy—indeed, it is directly related—for several reasons. First, the condo project debated at the community meeting was being developed on the very land that Waldman acquired through foreclosure (after the Bankruptcy was dismissed) and is the subject of Semler's complaint to the USTO. The mural which was discussed at the meeting is painted on the side of the Brookland Inn building. (JA 125.) The Op-Ed provided extensive background about the history and creation of the mural. (JA 68-74.) Semler's comments concerning Waldman's acquisition of the property are undoubtedly related to this public debate.

Second, Waldman, himself, put his ownership of the properties at issue. Waldman vigorously attempted to defend himself and the condo project in the meeting, stating that "I am a neighbor, I might not live here but I own property, I take care of it very well." (JA 58 at timestamp 16:25.) He also describes how he

has presented previously at BNCA meetings and before the ANC where, Waldman claimed, it unanimously approved the project. (*Id.* at 16:10.)[3] In other words, he was telling the community that they should trust him because he owns property in the community and that he has worked with the community in the past to address concerns. The circumstances of how Waldman came to own the properties (and Semler's complaint to the USTO concerning the irregularities in the Bankruptcy Court) are certainly relevant (and cannot be "wholly unrelated") to the matter.

Third, as noted in CIG's opening brief, courts provide a wide berth in determining germaneness. (CIG Br. at 40 n. 16, citing *Waldbaum*, 627 F.2d at 1298 and *Garrison v. Louisiana*, 379 U.S. 64 (1964).) Waldman argues that this authority is "inapplicable" (Br. at 25) because *Waldbaum* involved a "quasi-public official" (which is a made-up term not recognized under the public official/figure jurisprudence) and *Garrison* supposedly "expressed this rule" only for public officials. But *Garrison* was decided before the Supreme Court extended the actual malice rule to public figures and there is no reason this concept should not apply to public figures, as the *Waldbaum* court did.

Finally, Waldman attempts to minimize his involvement in the condo project in his Complaint, Declarations, and appeal brief, but that does not affect the germaneness of Semler's commentary. His historical revisionism flies in the face

[3] The video of the meeting, (JA 58), is also available at https://www.youtube.com/watch?v=ZRQD-lD-pcA&t=1077s

of his conduct, documented in the videos over which he sues. For instance, he announced at the June 2018 community meeting:

> So ma'am, so I have been coming to this organization for about four years now, since I bought that building. And made two presentations regarding this here and made several presentations at the ANC. The ANC voted 100% to support this at the local level.

(JA 58 at timestamp 16:00.) As noted previously, the permits for the condo project were initially pulled in the name of Waldman's company. He calls this a clerical error (Br. at 6), but his conduct at the public meetings indicated that Waldman was centrally involved in the condo project, and he was not, as he attempts to portray himself, just a random person who "spoke in favor of the project as a member of the public" at the BNCA.[4] Like the real estate developer in *Greenbelt Coop. Publ'g Ass'n,* Waldman falls "within even the most restrictive definition of a 'public figure.'" 398 U.S. at 9.

III. WALDMAN HAS NOT PROFFERED SUFFICIENT EVIDENCE OF ACTUAL MALICE UNDER THE ANTI-SLAPP ACT.

Recognizing that the evidence supporting purported actual malice falls far short of what is required for a plaintiff to meet his burden, Waldman accuses CIG

[4] During the limited discovery period permitted by the Superior Court, defendants requested Waldman provide information regarding his role in the condo project and his relationship with the developers. Waldman refused to provide this information and the Superior Court later ruled at a May 13, 2019 hearing that discovery by defendants was not permitted. (JA 993 (Joint Appdx. Vol. III).) The transcript of the May 13 hearing was inadvertently not included in the Joint Appendix but leave is concurrently being sought to file herewith as Volume III.

and Semler of "turn[ing] the Anti-SLAPP sufficiency of the evidence standard on its head." (Waldman Br. at 3.) But that is not the case. The standard is what this Court enunciated in *Mann*, namely that "[t]he precise question the court must ask [in ruling on an Anti-SLAPP motion] is whether a jury properly instructed on the law, *including any applicable heightened fault and proof requirements*, could reasonably find for the claimant on the evidence presented." *Mann*, 150 A.3d at 1236 (emphasis added). This means that he must show evidence of actual malice by clear and convincing evidence.

As explained in *Fridman v. Orbis Business Intelligence, Ltd*, "[t]his constitutional standard 'is a daunting one' which very few public figures can meet." 229 A.3d 494, 509 (D.C. 2020) (affirming grant of Anti-SLAPP motion where plaintiffs failed to present sufficient evidence of actual malice). "Merely 'show[ing] that [the] defendant should have known better' than to believe the truth of his publication does not suffice." *Id*. (quoting *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 589 (D.C. Cir. 2016)). Waldman tries to obfuscate the issue and states that the Anti-SLAPP Act's "likely to succeed on the merits" standard is a "significantly lower standard" than "a preponderance of the evidence" (Br. at 31) but that ignores the holdings in *Mann* and *Fridman* that a plaintiff must "set forth facts that would allow a jury to find actual malice" by clear and convincing evidence. *Fridman*, 229 A.3d at 509 and *Mann*, 150 A.3d at 1236.

A. Waldman's Circumstantial "Evidence" Falls Far Short of Clear and Convincing Evidence of Actual Malice

Waldman acknowledges that the starting point for this analysis is Semler's testimony regarding his state of mind submitted in his three declarations supporting the Anti-SLAPP motion. (*See* Br. at 33-34 and JA 134, 438, 619.) These sworn statements establish that Semler believed in the truth of his accusations against Waldman. (*See e.g.* JA 127 ("I felt defrauded by what Mr. Waldman did to me. He convinced me that I could get the property, which is why I dropped the challenge in the Bankruptcy Court.").) Against this backdrop,[5] Waldman argues that the jury need not accept Semler's testimony and offers seven "examples" of why not. None provide affirmative proof of actual malice.

Waldman first argues that Semler's emails in early 2015 (more than three years before the challenged statements) "contradict his claims that he felt 'defrauded.'" (Br. at 34.) The actual malice determination is based on the subjective state of mind of the defendant "when he acted," *i.e*. at the *time* of publication. *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1508 (D.C. 1996). After Semler sent the emails in 2015 it became clearer that Waldman was likely involved in the fraudulent conduct, (JA 127), and thus the old emails do not provide evidence of actual malice.

Waldman next points to the USTO affidavits stating it would have advised Semler of the policy of not commenting on whether there was a civil or criminal

[5] The Superior Court granted Waldman's request to take limited discovery but he chose not to depose Semler and question him on his first two Declarations.

investigation on Waldman. But the Jones Affidavit creates a huge hole in this argument. Jones testified that he probably told Semler that the USTO was "reviewing the documents that [Semler] sent us and looking into the allegations he made." (JA 703, ¶ 21.) "Looking into" is a synonym for investigating, and neither Jones nor Guzinski ever advised Semler that USTO was *not* investigating. Jones also stated that it was the policy "not to comment on any *ongoing* investigations or criminal referrals." (JA 702, ¶ 14.) By using the term "ongoing," it is logical to believe that the USTO had no restrictions on informing Semler if there was no ongoing investigation or criminal referral. They never did that. Waldman also argues that the affidavits do not describe the investigatory steps that supposedly "would be necessary for a USTO investigation into the fraud complaint" (Brief at 34), but that proves nothing because Guzinski and Jones state that they would not disclose details of the investigations. There is simply nothing in the affidavits to support clear and convincing evidence that Semler published with knowledge of falsity or a high degree of awareness of probable falsity.

The probative value of the USTO affidavits are further undermined by the USTO's assertion of work product protection over certain documents subpoenaed in this case. Waldman argues that CIG and Semler did not move to compel production of the alleged work product materials, but at that point in the case, the Superior Court already had ruled that they were not entitled to conduct discovery. (JA 993.) Moreover, CIG and Semler have accepted the work product assertion (at

least at this time) because it supports Semler's subjective view about what the USTO was doing. In other words, the USTO's belief that certain documents in its possession relating to Semler's complaint were "prepared in anticipation of litigation or for trial," (Sup. Ct. R. Civ. P. 26(b)(3)), is in complete alignment with what Semler believes, and it thus cuts against Waldman's claim that Semler's belief about the USTO investigating Waldman is so outlandish that it must have been fabricated. Indeed, to the extent Waldman believes that the materials the USTO is withholding could not possibly have been created in anticipation of litigation or trial, he should have challenged that assertion. (And the Superior Court granted him the discovery rights to do so.)[6]

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[6] Waldman's reliance on *Clampitt v. Am. Univ.*, 957 A.2d 23, 30 n.8 (D.C. 2008) is misplaced. *Clampitt* does not state that the work product protection need not involve litigation or preparation for trial. (Br. at 38.) Rather, it merely identifies the type of materials created by counsel that are protected. *Parks v. U.S.*, 451 A.2d 591, 607-608 (D.C. 1982) sets forth parameters for work-product protection:

> The work-product doctrine, more specifically, creates a "qualified privilege" for materials prepared by an attorney (or attorney's agent) in anticipation of trial. [*United States v. Nobles,* 422 U.S. 225, 237-39(1975)]; Super.Ct.Civ.R. 26(b)(3). "Initially, there must be a demonstration by the resisting party that the disputed material has in fact been prepared 'in anticipation of litigation or for trial,'" *SEC v. National Student Marketing Corp.,* 18 Fed.R.Serv.2d 1302, 1305 (D.D.C.1974) (*quoting* FED.R.CIV.P. 26(6)(3)); that is, the party must show that the material is "work product." *See United States v. AT & T,* 86 F.R.D. 603, Guideline No. 14 at 626 (D.D.C.1979).

Of course, the term "work product" colloquially can mean the product of work performed by anyone. But assertion of "work product" protection by the USTO in this legal proceeding necessarily invokes the qualified privilege described in *Parks*, and only applies in connection with anticipation of litigation and for trial.

Waldman points to Benny Kass's May 2015 letter which allegedly did "not even allege that Waldman committed a criminal act" but that letter was superseded by later communications (both oral and by email), that Semler had with the USTO. (*See, e.g*. JA 628-42 (emails between Semler and USTO).) Waldman claims that Semler's April 4, 2016 email offering to file criminal charges somehow shows that Semler "did not believe criminal charges had begun" (Br. at 34), but again, this was years before the alleged defamation and during the interim, Semler had multiple other communications with the USTO. This proves nothing about Semler's state of mind in June 2018. Similarly, Semler's email on December 30, 2016 where he states that he "remain[s] at your disposition if you decide to pursue further investigation or criminal charges" does not prove that Semler believed there was no investigation. Indeed, use of the word "further" indicates that Semler believed that some investigation already was ongoing.

Finally, Waldman refers to Semler's termination of his lawyer Benny Kass as evidence of actual malice. As the correspondence makes clear, Semler terminated Kass because the USTO attorneys would not respond directly to Semler if he was represented by counsel. (JA 639, 641.) Semler expressly states in an April 11, 2017 email (JA 641) that he did not realize that Guzinski had not responded earlier because Guzinski believed Semler was represented by counsel. The real estate matter on which Kass provided counsel was terminated in 2015 (and Kass died in 2019). It is a stretch, to say the least, (and likely not admissible

evidence) that his not assisting Semler with communications to the USTO can be interpreted as a rejection of the merit of those claims.

This evidence does not "discredit" Semler's Declarations and falls far short of the quantum and quality of evidence needed to establish clear and convincing evidence of actual malice. *C.f, Harte-Hanks Commc'ns., Inc. v. Connaughton*, 491 U.S 657 (1989) (defendants' failure to interview the one unbiased witness who had direct knowledge of the events and their possession of transcripts of audio tapes that refuted the statements made in their publication supported a finding that their "inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the] charges."); *Mann*, 150 A.3d at 1252-54 (evidence that investigative reports contradicting the statements of the defendants was in their possession and read by them).

B. Waldman's Authority Does Not Support Actual Malice Here

The Superior Court did not cite any authority that supports a finding that the evidence in this record is sufficient to establish actual malice by clear and convincing evidence. Waldman cites two cases, *St. Amant v. Thompson*, 390 U.S. 727 (1968) and *Boley v. Atlantic Monthly Group*, 950 F.3d 249 (D.D.C. 2013) for the proposition that "actual malice may be established by proof that the story was fabricated by the defendant or was the product of his imagination." *Id*. at 262.

There was insufficient evidence to find actual malice in both of those cases. Similarly, there is no evidence here to suggest that Semler fabricated any "story"

about the USTO's review of his complaint about Waldman. Indeed, it is undisputed that Semler made a complaint to the USTO (*see* JA 632-33 (Guzinski describing Semler's email as "alleging criminal acts in connection with his (or his company's efforts) to purchase the Brookland Inn")), focusing first on fraud by the prior owner of the Brookland Inn and then Waldman as well. It is also undisputed that neither attorney at USTO advised Semler that USTO was *not* investigating Waldman. Jones states that he likely told Semler that the USTO was "looking into the allegations he made."[7] No reasonable jury could find that Semler fabricated the "story" that Waldman was being investigated when the USTO admits that it likely told Semler that it was "looking into" Semler's allegations. Neither *St. Amant* nor *Boley* support finding actual malice on the evidence in this record.[8]

[7] After Waldman began pursuing development of the Brookland Inn parking lot, Semler came to realize that Waldman was the only beneficiary of the fraud in the Bankruptcy Court. *See* CIG Br. at 19. Waldman sold the parking lot in January 2018 to 3736 12th LLC. (JA 479.) D.C. Recorder of Deeds records the sale as for $1 million. The public record does not disclose whether Waldman is a part owner of the LLC that purchased the lot. Waldman had acquired both the parking lot and Brookland Inn through foreclosure on his note (JA 340) for $1.67 million according to the Recorder of Deeds. Public records show that the currently assessed value of just the Brookland Inn property is almost $2 million. (*See* Square 3883, Lot 0028 at https://otr.cfo.dc.gov/page/real-property-tax-database-search.) This belies his claims (Br. at 10) that he fared no better forcing foreclosure than receiving payment on his note. The value of the properties was (and is) substantially more than the note. He had motive to defraud Semler.

[8] Contrary to Waldman's claims otherwise, CIG and Semler argued in their opening brief that he cannot meet even the negligence standard. (CIG Br. at 47.)

IV. WALDMAN, LIKE THE SUPERIOR COURT, FAILS TO IDENTIFY FALSE AND DEFAMATORY STATEMENTS OF FACT AT JUNE 2018 MEETING OR IN OP-ED

Waldman does not dispute that the Superior Court failed to specifically identify false and defamatory statements of fact by CIG or Semler. This argument "misses the point," he argues, (Br. at 25), because under *de novo* review, this Court can scour the record to try to find allegedly actionable statements. Waldman and the court below provide no assistance to this Court. Instead, he simply rehashes generalizations, citing to allegations (not evidence) in his Complaint and claiming generally that his claim is based on comments accusing him of "fraud, corruption and being subject to criminal investigation by the U.S. Trustee and [DOJ]," (Br. at 26), without accurately linking the actual words stated to Waldman. He also continues to misquote and mischaracterize what was stated at the June 2018 meeting (CIG Br. at 32), mostly by ascribing specifically to Waldman Semler's comments made generally about the developer and others. Indeed, Waldman admits in some instances it is "difficult to determine exactly what word was stated." (Br. at 26 n. 10.)

Waldman also falsely states that Semler accused him of "engaging in specific criminal acts in purchasing the Brookland Inn." (Br. at 28.) The one, off-the-cuff remark where Semler referenced theft and fraud was made in response to Waldman's sneering at him; the context surrounding the comment shows that no one would understand what exactly Semler was referencing. (*See* CIG Br. at 36; JA 58-60.) This hyperbole cannot constitute actionable defamatory statements of fact.

The refences to Waldman being "subject to" a complaint for bankruptcy fraud and "cited to" the USTO in the Op Ed and online posting are true or substantially true. There can be no dispute that Semler made a complaint to the USTO and his use of the term "cited to" is substantially accurate. Waldman argues that only law enforcement can "cite" but he cites no authority to support that claim. (Br. at 31.) Further, as a layperson, the law does not hold Semler to legal technicalities. So long as the "gist" of the statement is accurate—which it is here because Semler reported Waldman to the USTO—"it is irrelevant whether trained lawyers or judges might with the luxury of time have chosen more precise words." *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 255 (2014).[9]

Waldman states that he "is not now, nor ever been, under criminal investigation by the U.S. Trustee or Department of Justice, or have any 'problems' with the DOJ," (Br. at 29), but he cites no evidence in the record to support that claim. He cites only allegations in his Complaint. The Anti-SLAPP Act requires him to identify evidence in the record, and the evidence that the USTO will not comment on the details of any investigation and they were "looking into the allegations that [Semler] made" (JA 703) is not sufficient to prove falsity.[10]

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[9] In an attempt to deflect attention from the lack of evidence to support his claims, Waldman makes various irrelevant and inaccurate attacks on Semler. *See, e.g*, Br. at 5 (claiming that Semler was sanctioned by federal court in his *pro se* injunction action when court actually denied Waldman's request for costs and fees (JA 669)).

[10] Waldman complains that "Defendants argue that it is Waldman's burden to prove a negative—that he has not been investigated as alleged." (Br. at 30.) But

V. THE SUPERIOR COURT CORRECTLY GRANTED THE ANTI-SLAPP MOTION ON WALDMAN'S TIME-BARRED CLAIM

Waldman's reliance on *Mann* to support jurisdiction on appeal over the Superior Court's ruling on his time-barred claim is misplaced. The Court in *Mann* addressed in *dicta* when an Anti-SLAPP motion is granted in its entirety—not when it is granted in part such as here. Nonetheless, if the Court reverses the Superior Court's order for the reasons discussed above and directs judgment for Defendants, there would be a final order and the cross-appeal would be ripe.

A plain reading of the Complaint incorporates the allegedly defamatory statements made in 2017 at the Askale Café into Waldman's defamation and false light claims. Paragraph 32 references Exhibit 6 to the Complaint (the video of the January 2017 encounter at the Askale Café) and states that Semler "accuse[d] Waldman of 'mortgage fraud' related to the Brookland Inn and claiming that Semler 'brought it Justice, the [United States] Trustee.'" Paragraph 72 states "The aforementioned written and oral statements accusing Waldman of fraud,

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that is his burden under the law. *See Herbert v. Lando*, 441 U.S. 153, 177 (1979) (plaintiff must "prove a false publication attended by some degree of culpability on the part of the publisher"). He also claims that bad faith reports to law enforcement can be actionable in defamation, citing *Hall v. District of Columbia*, 867 F.3d 138, 147-48 (D.C. Cir. 2017). But *Hall* involved a private figure who need only prove negligence and was based on entirely different facts. There, the plaintiff was accused of skipping out on part of her restaurant tab but evidence showed that she only temporarily left the premises and had given the restaurant her credit card and drivers license, creating factual questions as to the reasonableness of the restaurant's actions. Actual malice is a subjective test—it matters what Semler believed not whether it was reasonable for him to do what he did.

corruption, and being subject to criminal investigation by the U.S. Trustee and Department of Justice are defamatory *per se*." It could not be clearer that Waldman intended to sue, and did in fact, sue, over the time-barred statements.

Waldman argues additionally that he "disavowed" the claim. But this Court addressed an analogous situation in *Jacobson v. Clack*, 309 A.3d 571 (D.C. 2024), where a plaintiff withdrew his lawsuit after being faced with an Anti-SLAPP motion. Even though that plaintiff disavowed his claims before the court even ruled, this Court nevertheless held that the provisions of the Anti-SLAPP Act apply, including attorneys' fees. *Id*. at 578-79. For the same reason, Waldman's disavowal does not shield him from the Anti-SLAPP Act, nor is this issue "moot."

VI. THE SUPERIOR COURT ERRED BY FAILING TO FIX TIME FOR PLAINTIFF TO COMPLY WITH SECURITY REQUIREMENT

Waldman argues that the Superior Court could have set the security amount at zero. But D.C. Code 15-703(a) states that the defendant (not the court) "may require the plaintiff to give security for costs and charges" so the plain language indicates that the court cannot simply set the amount at zero. In any event, the Superior Court did not set any amount—it simply denied the motion without a reason. The Court should order the Superior Court to set the security amount.

CONCLUSION

For the reasons set forth in Appellants' Opening Brief and herein, the Court should reverse the Superior Court's March 2022 Omnibus Order and grant the Anti-SLAPP motion in its entirety, dismissing all claims.

Respectfully submitted,

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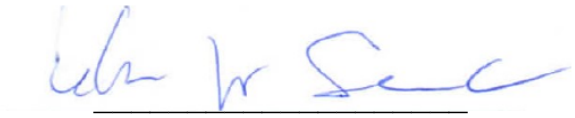

Peter K. Semler, *Pro Se*
Appellant/Cross-Appellee

July 8, 2024

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellants-Cross-Appellees Capitol Intelligence Group, Inc. and Peter K. Semler was sent via this Court's e-filing system, on July 8, 2024, to all counsel of record.

/s/ Mark I. Bailen