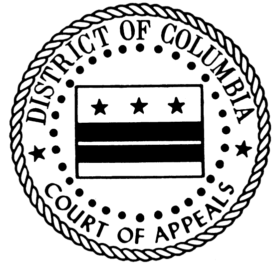

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No. 22-CV-00262
No. 22-CV-00300

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

GERALD WALDMAN,

Appellee/Cross-Appellant,

v.

CAPITOL INTELLIGENCE GROUP, INC., ET AL.,

Appellants/Cross-Appellees.
Civil Action No.: 2018 CA 005052 B

OPENING BRIEF OF APPELLEE/CROSS-APPELLANT GERALD WALDMAN

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RULE 28(a)(2) DISCLSOURE

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

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- 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*

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 1
INTRODUCTION 1
ISSUES PRESENTED 4
STATEMENT OF THE CASE 4
I. The Personal Nature of Semler's Animosity Towards Waldman 9
a. The Brookland Inn Bankruptcy and Foreclosure. 9
b. Semler Attempts to Make a Deal With Waldman, Who Refuses. 11
c. Waldman Refuses Semler's Further Offers 12
II. Semler "Complains" to the U.S. Trustee's Office; the USTO Does Not State or Imply that Waldman was Under Any Type of Civil or Criminal Investigation. 14
III. The Condo Project and June 2018 BNCA Meeting; Semler Defames Waldman. 17
a. Waldman Sells the Lot, Negotiates an Easement Preserving the Mural, and Has No Stake in or Control Over the Condo Project. 17
b. Semler Defames Waldman at the June 2018 BNCA Meeting. 18
c. Using Online Platforms, Semler Spreads and Multiplies the Defamation. 20
SUMMARY OF ARGUMENT 21
ARGUMENT 22
I. The Court Should Affirm Denial of the Special Motion to Dismiss. 22
a. The Anti-SLAPP Act Does Not Apply Here 22
b. Waldman is Not a Limited Purpose Public Figure 23
c. Defendants' Statements at the 2018 BNCA Meeting and Online Thereafter are Actionable Defamation. 25
d. Defendants' Accusations of Fraud, Corruption, and Criminality Are Not True 29
e. Waldman Produced Sufficient Evidence of Actual Malice. 31
II. The Court Should Reverse the Grant of the Special Motion to Dismiss as to the Nonexistent Claim from 2017. 39
a. This Court has Jurisdiction to Hear the Cross-Appeal. 39

b. Waldman Did Not Plead This Claim—the Superior Court Erred in Dismissing a Nonexistent Claim. 44

c. Any Such Claim Was Moot After Waldman Disclaimed It, and the Superior Court Should Not Have Decided It. 46

III. The Court Should Not Disturb the Superior Court's Denial of Semler's Motion to Set Security. 47

CONCLUSION 50

<u>**TABLE OF AUTHORITIES**</u>

Page(s)

Cases

B.J. v. R.W.,
266 A.3d 213 (D.C. 2021) 47

Boley v. Atl. Monthly Grp.,
950 F. Supp. 2d 249 (D.D.C. 2013) 22, 24, 33, 36

Carpenter v. King,
792 F. Supp. 2d 29 (D.D.C. 2011) 30

Clampitt v. Am. Univ.,
957 A.2d 23 (D.C. 2008) 38

Classic CAB v. D.C. Dep't of For-Hire Vehicles,
244 A.3d 703 (D.C. 2021) 46

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 42

Competitive Enter. Inst. v. Mann,
150 A.3d 1213 (D.C. 2016), *as amended* (Dec. 13, 2018) 3, 4, 22, 26, 28, 31, 32, 33, 39, 40, 41, 42

D.C. Metro. Police Dep't v. Fraternal Ord. of Police/Metro. Police Dep't Lab. Comm.,
997 A.2d 65 (D.C. 2010) 48

D.C. v. Simpkins,
720 A.2d 894 (D.C. 1998) 43

Doe No. 1 v. Burke,
91 A.3d 1031 (D.C. 2014) 32, 36

Flax v. Schertler,
935 A.2d 1091 (D.C. 2007) 48

Greenbelt Coop. Publ'g Ass'n v. Bresler,
398 U.S. 6 (1970) 27

Guilford Transp. Indus., Inc. v. Wilner,
760 A.2d 580 (D.C. 2000) 26, 27, 28

Hall v. D.C.,
867 F.3d 138 (D.C. Cir. 2017) 26, 29, 30

Harte–Hanks Commc'ns, Inc. v. Connaughton,
491 U.S. 657 (1989) 32

In Garrison v. Louisiana,
379 U.S. 64 (1964) 25

Klayman v. Seagal,
783 A.2d 607 (D.C. 2001) 28

L.S. v. D.C. Dep't on Disability Servs.,
285 A.3d 165 (D.C. 2022) 47

Landise v Mauro,
141 A.3d 1067 (D.C. 2016) 49, 50

McFarlane v. Sheridan Square Press,
91 F.3d 1501 (D.C. Cir. 1996) 37

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964) 32

OAO Alfa Bank v. Ctr. for Pub. Integrity,
387 F. Supp. 2d 20 (D.D.C. 2005) 24

Rolinski v. Lewis,
828 A.2d 739 (D.C. 2003) 41, 42

Rosen v. American Isreal Pub. Affairs Committee, Inc.,
41 A.3d 1205 (D.C. 2012) 26

Semler, et al. v. Brookland Square, LLC, et al.,
Case No. 1:18-cv-02915 (D.D.C.) 6

Smith v. District of Columbia,
399 A.2d 213 (D.C. 1979) 26

St. Amant v. Thompson,
390 U.S. 727 (1968) 32, 33, 36, 37

In re: The Brookland Inn, LLC,
No. 14-00522-SMT (Bankr. D.D.C.) 10

United States v. Stephenson,
891 A.2d 1076 (D.C. 2006) 40

Von Kahl v. Bureau of Nat'l Affairs, Inc.,
934 F.Supp.2d 204 (D.D.C. 2013) 26

Waldbaum, 627 F.2d at 1290 & 1298 n.33 .... 24, 25

Welsh v. McNeil,
162 A.3d 135 (D.C. 2017) 47

Statutes

Anti-SLAPP Act
D.C. Code §§ 16-5501, *et seq.* 21, 22, 31, 40, 41, 47, 48, 50

§ 16-5501(3) 22

§ 16-5502(b) 1, 22, 33, 39

D.C. Code § 11–721(a)(1) 39, 40

D.C. Code § 15-703(a) 47, 49

Other Authorities

D.C. Bar Ethics Opinion 256, *available at* https://www.dcbar.org/bar-resources/legalethics/opinions/opinion256.cfm 7

D.C. R. App. P. 3(c)(6) 48

Fed. R. Civ. P. 11(b) 5

Restatement (Second) of Torts s 580A (1977) 25

JURISDICTIONAL STATEMENT

Semler and CIG's 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).

The cross-appeal (22-cv-300) is an interlocutory appeal of the same orders subject to the appeal, but of the partial grant of the Special Motion to Dismiss. Pursuant to this Court's order of July 5, 2022, Waldman addresses the jurisdiction of this Court to hear the cross-appeal in the argument section of this brief.

INTRODUCTION

Nearly six years ago, on July 16, 2018, Waldman filed the underlying defamation action against Cross-Appellees/Defendants Peter K. Semler and Capitol Intelligence Group, Inc. ("CIG", and collectively the "Defendants" or "Semler"[1]). This defamation action is not about Defendants' opinions concerning nor participation in public discourse related to the development of 3736 12th Street NE in Brookland (formerly, the Brookland Inn) and a mural overlooking the lot. Indeed, Waldman was not even the owner, developer, or builder of the project.[2] Rather, this action is about Semler hijacking such public discourse to continue years of

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[1] Because Semler is the sole owner, operator, "journalist", and author of the content published by CIG, Waldman collectively refers to the Defendants as "Semler" throughout this brief.

[2] Waldman previously owned the land and, at the time, owned the adjacent building upon which the mural is painted.

harassing Waldman with false and malicious accusations of fraud, corruption, and being the subject of a criminal investigation by the U.S. Trustee and Department of Justice in connection with Waldman's successful purchase of the Brookland Inn at public auction in 2015, a property that Semler coveted and planned to gentrify into a "design boutique B&B."

Three years later, in June 2018, and still irrationally blaming Waldman for the failure of his plan to gentrify the Brookland Inn, Semler seized upon the proposed development of the Brookland Lot as an opportunity to defame Waldman and cast him into a false light by co-opting public discussion to spread baseless accusations of fraud, corruption, and criminal investigations. Semler, as was anyone, was free to oppose a development by participating in public debate. Such participation, however, did not entitle Defendants to defame Waldman or cast him in a false light by publishing objectively false statements in furtherance of Semler's personal vendetta. Thus, Waldman's filed a Verified Complaint bringing defamation and false light claims based upon Defendants' 2018 publications falsely accusing him of fraud, corruption, and being under criminal investigation.

As his defense, Semler portrays himself as a community activist, investigative journalist, and free-speech martyr in a public crusade to save a Brookland mural from "obliteration" by Waldman. Semler further maligns Waldman as a corrupt developer determined to destroy the mural by building a condo building, and whom defrauded Semler from purchasing the very land subject

to development. Notably, Semler does not support most of the relevant factual assertions in his story with citations to evidence in the record, other than occasional paragraphs from his own self-serving declarations. [*See* Defs.' Opening Br. ("Br.") at 1-4, 11-27] This is because the truth undermines his defense: Semler's private grudge against Waldman is neither a matter of public interest nor germane to any public discourse about the condo development by a third party.

Semler now asks this Court to turn the Anti-SLAPP sufficiency of the evidence standard on its head, *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1221 (D.C. 2016), *as amended* (Dec. 13, 2018), and force Waldman to disprove by clear and convincing evidence each of Semler's lies. Semler's mental gymnastics don't stop there: on the one hand, he avers that he is an award winning journalist with decades of experience, including in rooting out financial crime. On the other hand, he expects this Court to believe him when he conflates the U.S. Trustee's Office (USTO) and DOJ conducting a criminal investigation with perfunctorily reviewing materials submitted by an angry member of the public pursuant to the USTO policy and practice of encouraging public engagement. Indeed, Semler expects the Court to credit his "subjective belief" that Waldman was being criminally investigated for fraud because neither USTO attorney with whom he communicated told him Waldman was not being investigated. In the District of Columbia, however, Semler's fabrications are not a viable defense to defamation. Rather, the question for this Court is whether Waldman produced enough evidence

at this early stage that "a jury properly instructed on the law . . . could reasonably find for" Waldman. *Mann*, 150 A.3d at 1236. After review of the extensive evidentiary record from the Superior Court, this Court must answer in the affirmative.

ISSUES PRESENTED

1. Whether, based upon the evidence in the record, the Superior Court correctly found that a jury properly instructed on the law could reasonably find that Waldman could prevail on his claims.
2. Where a plaintiff does not plead a claim and disclaims that it is pleading a claim at the earliest opportunity, whether the Superior Court errs by considering a motion to dismiss that nonexistent or moot claim and dismissing that claim as if it was being brought by the plaintiff.
3. Where an appellee challenges an order its opening brief that it did not include in its notice of appeal, whether the Court of Appeals may review that order.

STATEMENT OF THE CASE

Pursuant to D.C. Rule of Appellant Procedure 28(i), and to avoid repetition with Semler's opening brief [Br. at 5-11], Waldman does not include a complete recitation of the "nature of the case, the course of the proceedings, and the disposition below." Waldman, however, disputes the misleading spin and fanciful narrative with which Semler purports to describe the proceedings below. Accordingly, Waldman makes the following corrections:

Complaint and Anti-SLAPP Motion: [Br. 5-6]

- In a Verified Complaint filed on July 16, 2018, Waldman brought claims against Semler and CIG for defamation and false light stemming from Semler's comments, videos, and news article made and posted on June 19 and 24, 2018. Waldman did **not** bring any claim against Semler for his harassing and false statements made at the Askala Café on January 14, 2017. [*See* JA 30-80 (Ver. Compl. & Exs. thereto)]

- Waldman disputes Semler's characterization that he engaged in a "pattern in this case of seeking to increase defendants' litigation costs." [Br. at 6] The Superior Court's docket and transcripts of the proceedings speak for themselves: Semler initiated numerous non-meritorious motions and repeatedly attempted to reopen already decided matters or interject new, irrelevant issues into the proceedings necessitating a response. [*See generally*, Superior Court docket] The Superior Court made no finding that Waldman ever engaged in any improper litigation tactics. In contrast, in the early stages of this case, Semler filed a separate lawsuit in the United States District Court for the District of Columbia seeking an injunction against and money damages from Waldman. The federal court dismissed Semler's claims with prejudice and sanctioned Semler pursuant to Fed. R. Civ. P. 11(b) for his abuse of the judicial process to harass Waldman by "repeatedly submitting multiple filings that were replete with irrelevant and highly incendiary allegations against [Waldman]" and "present[ing the filings] for an improper

purpose[.]" [JA 669-70 (Minute Order, July 3, 2019, in *Semler, et al. v. Brookland Square, LLC, et al.*, Case No. 1:18-cv-02915, D.D.C.)]

- Waldman is not, and never was, the developer of the condo project. There are no "glaring inconsistencies between his pleadings and the evidence" on that issue. [Br. at 6] Semler's description of "various" (two) DCRA building permits that reference an LLC owned by Waldman (which LLC previously owned the land) [Br. at 6] and a motion to strike Semler's submission of that "evidence" is intentionally misleading. First, Semler's submission of a "true and correct" building permit (per Semler's declaration) was **not** a true and correct copy of the actual permit issued by DCRA. Semler knew this because one month prior he filed the actual DCRA permit (which shows nothing to do with Waldman) in the frivolous federal lawsuit for which Semler was sanctioned. Second, records disclosed by DCRA in response to a FOIA request confirmed that the other "permit" Semler attempted to rely on in the Superior Court listed Waldman's LLC as "owner" due to a clerical error that had already been corrected (which Semler must have known after reviewing copies of the permitting file). [JA 466-470, 473-532 (Waldman Feb. 4, 2019 Surreply & Exhibits thereto)]

<u>Initial Anti-SLAPP Hearing and Limited Discovery</u>: [Br. at 6-8]

- Waldman disputes Semler's characterization of discovery from the USTO. [Br. at 7] Neither Waldman nor his attorneys conducted "secret meetings" or otherwise did anything underhanded or unethical. It is a normal part of discovery

practice to contact a third party[3] who may have knowledge relevant to a case and ask that third party to memorialize their memories in a declaration. Waldman also disputes Semler's legal argument regarding the USTO's invocation of privilege as to certain of its internal communications. [Br. at 7] In fact, Semler, through counsel, improperly[4] filed into the Court's docket several pages of documents from the USTO that were obviously inadvertently produced (they had red boxes around portions to indicate necessary redactions and the notation "WP" for work product). Upon being confronted with the privilege issue, Semler's counsel filed a motion to temporarily seal those documents. The Superior Court then sealed those pages and denied Semler's multiple subsequent attempts to unseal them. Semler never sought to compel production from the USTO over its privilege objection pursuant to Civil Rules 26 or 37 which would've brought the USTO into the proceeding to defend its privilege assertion. [*See* JA795-96 (discussing this issue); *see* Sup. Ct. docket]

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[3] Here, Semler refers to the two USTO attorneys whom deny that they ever told Semler that Waldman was under criminal investigation, in direct contradiction to Semler's declaration submitted in support of the Special Motion to Dismiss. [JA 694-704 (Guzinski and Jones Decls.)]

[4] *See* D.C. Bar Ethics Opinion 256, *available at* https://www.dcbar.org/bar-resources/legalethics/opinions/opinion256.cfm (explaining that several ethical rules are violated by an attorney who distributes to others materials over which the producing party claims privilege but that were inadvertently produced to the distributing attorney).

Order on Anti-SLAPP Motion: [Br. at 8-9]

- Waldman disputes Semler's characterizations of the Court's Orders beyond the bare facts of their dates and what specific relief was granted or denied. The remainder merely is Semler's legal argument.

Reconsideration: [Br. at 9]

- Waldman disputes Semler's legal arguments, including that his motion for reconsideration "identified errors of fact and law" and other descriptions of supposed error by the Superior Court. Waldman also disputes Semler's description of surreply briefing: the Court allowed additional briefing only after Semer injected new issues and claims at the February 20, 2020 hearing.[5]

New Evidence: [Br. at 9-10]

- Waldman disputes Semler's description of the referenced boilerplate response letter sent by the USTO to Semler. [JA 894b] The letter makes no admissions and merely refers to the contents of Semler's prior letter (which Semler did not include)—not to any position by the USTO or DOJ with respect to Waldman.

Motion to Fix Security: [Br. at 10-11]

- Waldman disputes Semler's editorializing and characterization of Waldman as having "fled" the jurisdiction of Washington, D.C. In fact, Waldman averred in the Verified Complaint filed 40 months prior to Semler's motion to set

[5] Semler did not include a transcript of that hearing in the Joint Appendix.

security that he lived in a Florida. Moreover, Waldman continued to own property and have business interests in the District. [JA 31 & 34 (Ver. Compl. ¶¶ 1, 21-22)]

Omnibus Order: [Br. at 11]

- Waldman disputes Semler's characterizations of the Court's Omnibus Order beyond the bare facts of its date and what specific relief was granted or denied. The remainder merely is Semler's legal argument.

STATEMENT OF FACTS

Pursuant to D.C. Rule of Appellant Procedure 28(i), and to avoid repetition with Semler's opening brief [Br. at 11-28], Waldman does not include a complete recitation of the "facts relevant to the issues submitted for review with appropriate references to the record" (Rule 28(a)(7)). Waldman, however, disputes the misleading spin and fanciful narrative with which Semler purports to describe the relevant facts, including Semler's repeated failures to cite to the record in support of many of his most incendiary and misleading "factual" statements. [*See* Br. at 11-28] Accordingly, Waldman makes the following abbreviated statement of facts:

I. The Personal Nature of Semler's Animosity Towards Waldman

a. The Brookland Inn Bankruptcy and Foreclosure.

After the Brookland Inn, LLC, whose managing member and owner was Rabindranauth "Rob" Ramson, defaulted on a promissory note made with Waldman and secured by a deed of trust on the real property located at 3736-3740 12th Street, NE in Brookland (the "Property"), Waldman began foreclosure

proceedings. [JA 338, ¶ 2] On September 9, 2014, the Brookland Inn LLC filed a voluntary Chapter 11 bankruptcy petition in an effort to prevent foreclosure. [JA 365-72 (Docket Report, *In re: The Brookland Inn, LLC*, No. 14-00522-SMT (Bankr. D.D.C.) (closed March 27, 2015)] On January 15, 2015, after motions and a hearing, the bankruptcy court granted Waldman relief from the automatic stay so that the foreclosure auction could proceed. [*Id.* at 370 (Dkt. 36-37)]. The public foreclosure auction was scheduled for March 17, 2015. [JA 338, ¶ 3]

Semler claims that on January 14, 2015, he contracted with Ramson to purchase the property. [JA 158] Semler intended to gentrify the Property into a "design boutique B&B," replacing the historic Brookland Café with a "first class restaurant" of a "top-chief [sic]," and building out office space for Defendant CIG to occupy. [JA 344, 356, 362 (Semler emails); JA 433-34, ¶¶ 3-4 (Supp. Semler. Decl.)] Semler also intended—and claims he promised to church officials—that the remodeled accommodations would be used for members of Pope Francis' entourage during the upcoming Papal state visit in September 2015. [JA 32, ¶ 11; JA 344, 356, 362] Semler had to quickly purchase the Property as part of a 1031 Exchange, or else suffer significant tax liability. [JA 353, 355, 362] As the holder of the promissory note and beneficiary of the deed of trust, Waldman stood to recover regardless of whether the Property was sold to Semler, another buyer, or at public foreclosure auction. [JA 338, ¶ 4]

b. Semler Attempts to Make a Deal With Waldman, Who Refuses.

Despite having contracted with Ramson, on February 3, 2015, Semler, through his attorney Benny Kass, reached out to Waldman attempting to make a side deal to either purchase the Property after Waldman foreclosed, borrow from Waldman to fund Semler's plans, or involve Waldman as a partner. [JA 338-39, ¶ 5; JA 344-46, 354-56] Semler and Mr. Kass began disputing with Ramson the terms of their contract for sale of the Property and copying Mr. Albert, Waldman's attorney and the trustee on the deed of trust scheduled for foreclosure auction. [JA 347-53] Citing the contract dispute with Ramson, in or around March 2015 Semler refused to close on the contract with Ramson to purchase the Property prior to the March 17, 2015 foreclosure sale. [JA 158-59; JA 354-55] Waldman had nothing to do with the dispute between Ramson and Semler regarding the contract for sale of the Brookland Inn. [JA 341, ¶ 14] Semler did not file anything or make any efforts in the bankruptcy court or another court, to "stall foreclosure" or otherwise enforce his alleged contract rights prior to the foreclosure. [JA 366-71 (Bankr. Docket)]

On March 11, 2015, Waldman met with Semler at the Army & Navy Club to hear Semler's ideas about the property, but Semler's pitch was unreasonable and the meeting was a waste of Waldman's time; no deal was reached. [JA 339, ¶ 7] Semler told Waldman of his Papal plan and the pressing 1031 exchange, and they did not discuss the Mural. [*Id.*]

That afternoon Semler emailed Waldman the proposed terms of the deal and followed up the next day expressing that he "will not be participating in the foreclosure auction" because of his dispute with Ramson; stating concern about a potential other bidder and a lengthy eviction fight with Ramson; and, requesting Waldman consider Semler's pitch. [JA 354-55] Semler concluded: "I think for all our sakes we need to have an agreement before the foreclosure auction." [*Id.*] They did not reach a pre-foreclosure deal and on March 17, 2015, Waldman was the successful bidder against other bidders and developers at the public foreclosure auction, which Semler attended but did not participate in. [JA 339-40, ¶¶ 8-9; *see* JA 404-05 (March 17, 2015 video shot by Semler)]

c. Waldman Refuses Semler's Further Offers.

Immediately after the foreclosure auction, Semler emailed Waldman "Congratulations." [JA 358] Now that Waldman owned the property, Semler noted that "all we need to do now is chase out Ramson and reach a fair and equitable deal with all involved (Donald, Franco) [Semler's other partners] and be 1031 exchange compliant." [*Id.*] Mr. Kass also requested that Mr. Albert change some wording in the receipt and certificate used at the auction so that, "if [Waldman] then decides to sell it to [Semler]," Semler could avoid D.C. property transfer taxes and recordation fees. [JA 360] Uninterested in Semler's unrealistic and unreasonable terms, Waldman did not respond. [JA 340, ¶ 10; JA 126-27, ¶ 9]

On March 30, 2015, Semler again emailed a proposal to Waldman, stated he is "open to any reasonable suggestions about a partnership," reiterated his tax and Papal-occupancy concerns, and closed that he is "look[ing] forward to hearing from [Waldman], and hopefully to a fruitful joint arrangement." [JA 362-63; JA 340, ¶ 11] Waldman responded with a businesslike counteroffer, which Semler never accepted. [*Id.*]

On May 5, 2015, Semler, through Mr. Kass, sent to the U.S. Trustee's Office a letter accusing Ramson of fraud related to the failure of their contract. [JA 158-59] The letter does not accuse Waldman of fraud, merely noting that Waldman was aware of the contract dispute prior to the foreclosure sale. (*Id.*). Semler then forwarded the letter to Waldman, described it as being "about Ramson attempt to defraud me at closing and in DC Bankruptcy court," and suggested the letter would help "in getting Ramson . . . out of the picture." [JA 364; JA 340, ¶ 12] Semler further proposed that Waldman sell him only the building portion of the Property and retain the 3736 12th St. empty lot at issue here. (*Id.*). Waldman did not agree and kept his distance from Semler. (*Id.*). In June Semler's opportunity to complete the 1031 exchange ended and he realized a tax liability. [*See* JA362 (stating June 2015 deadline)] Since then, Semler has continued to hold a grudge against Waldman and harass him. [JA 341, ¶ 13] For example, in January 2017,[6] Waldman was in the

[6] Semler describes this incident as a Ward 5 community meeting where Waldman "taunted" Semler. [Br. at 22-23] Because Semler edited the encounter down to a 97

Askale Café in Brookland purchasing food. Semler interrupted the transaction at the counter to accuse Waldman of "mortgage fraud" related to the Brookland Inn bankruptcy. [JA 35-36, ¶¶ 30-32; JA 59-62 (Exs. 5 & 6)]

II. Semler "Complains" to the U.S. Trustee's Office; the USTO Does Not State or Imply that Waldman was Under Any Type of Civil or Criminal Investigation.

On **April 4, 2016**, nearly a year after Semler's attorney sent the letter to the U.S. Trustee Office's and apparently still blaming Waldman for his personal problems, including the failure of the 1031 tax exchange, Semler wrote an email Bradley Jones at the USTO office stating he "would be willing to file criminal charges or supply you with a signed affidavit if needed regarding the fraud related to the sale and foreclosure on the Brookland Inn[.]" [JA 628-29] Semler goes on to describe his issues with Ramson. However, Semler does **not** accuse Waldman of fraud, but does allege that Semler formed an oral backroom deal with Waldman to subvert the public auction and sell Semler the property. [*Id.*] Waldman did not subvert the auction and Semler's contemporaneous emails with Waldman belie Semler's allegations of a deal. [*Supra*] Notably, Semler admits that his own attorney, Mr. Kass, repeatedly "refused" to "report the irregularities" with the Ransom contract to the bankruptcy court. [JA 629]

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second video, the Court can review Semler's harassment for itself. [Br. at 22 n.11 (active youtube link); JA 59-62 (Ver. Compl. Exs. 5 & 6)]

Later on **April 4, 2016**, in response to Semler's email, Mr. Guzinski (a different USTO attorney) emailed Mr. Kass and described Semler's email as "alleging criminal acts in connection with his … efforts to purchase the Brookland Inn." [JA 633] Semler's email had only accused Ramson of "fraud" and Mr. Guzinski does not mention Waldman. [*Id.*]

On **December 30, 2016**, Semler wrote another email to Mr. Jones (and also Mr. Guzinski) of the USTO. Semler states that he "would like to pursue my complaint on the fraud case regarding the sale of the Brookland Inn" and, for the first time, implies Mr. Waldman is a target of his fraud allegation. [JA 636] Semler concludes with an admission that he does not believe an investigation is ongoing or Waldman is the subject of criminal charges: "I remain at your disposition if you decide to pursue further investigation or criminal charges in the matter." [*Id.*]

On **April 11, 2017**, Semler sent a final email to Mr. Guzinski. [JA 641] Semler explains Mr. Kass no longer represents him and offers availability to meet with Mr. Guzinski. [*Id.*] Semler also reiterates that he "made repeated requests… for Mr. Kass to inform [the bankruptcy court] of the apparent fraud as an officer of the court", which Mr. Kass had refused to do. Semler also included a youtube link to video shot by Semler of his harassment of Waldman at the Askale Café in January 2017, which Semler inaccurately described as showing Waldman "using threats and menaces against me". [*Id.*]

Aside from Semler's three emails, Semler submitted three declarations in support of the Anti-SLAPP motion. [JA 123; JA 433; JA 619] With respect to the USTO, the crux of Semler's declarations are that he claims to have communicated with Mr. Jones and Mr. Guzinski over a period of years; that he told them "that "Waldman has knowledge of [Ramson's supposed fraud] and was likely complicit in the fraud as well"; and that they told Semler "that they opened an investigation into my allegations." [JA 127, ¶ 11; JA 434, ¶ 6; JA 621-24, ¶¶ 13-20]

Assistant United States Trustee Guzinski and former United States Trustee Trial Attorney Jones, however, submitted declarations contradicting Semler's declarations. [JA 694-704] Mr. Guzinski and Mr. Jones describe the USTO policy of politely accepting all allegations from the public in line with USTO policy, reviewing the allegations whether legitimate or not, and then having minimal further contacts initiated by Semler's repeated requests that they begin a criminal investigation. [*Id.*]

Mr. Guzinski averred that he has "**never stated or implied to Mr. Semler that Mr. Waldman was under any type of civil or criminal investigation.**" [JA 697, ¶ 11 (emphasis added)] Mr. Jones averred that when speaking with Semler, he "would not have stated whether or not any party was under investigation by the USTO or the [DOJ] for bankruptcy fraud or any criminal matter." [JA 703, ¶ 21] Both also explained that USTO and DOJ policy "prohibits its attorneys from commenting or disclosing the existence of a criminal investigation or referral,"

which they would have explained to Semler [JA 697, ¶ 11; JA 702, ¶ 14] Mr. Jones further states that in any conversation with Semler, after explaining the policy prohibiting confirming or denying an actual investigation, he "would have stated only that we were reviewing the documents that [Semler] sent us and looking into the allegations that he made." [JA 703, ¶ 21]

III. The Condo Project and June 2018 BNCA Meeting; Semler Defames Waldman.

a. Waldman Sells the Lot, Negotiates an Easement Preserving the Mural, and Has No Stake in or Control Over the Condo Project.

Waldman never developed the lot. On or about January 18, 2018, Waldman sold the land to District Quarters (an unrelated entity), who planned to construct a condo building. [JA 342, ¶ 17] As a term of the sale, Waldman negotiated a perpetual use agreement easement, which was recorded [JA 534-42 (easement)], that ensures the distance between the buildings will be maintained in perpetuity regardless of the lot's owner or development. Therefore, the subsequent owner cannot destroy the mural by constructing on top of it. [JA 342, ¶ 17; JA 34-35, ¶¶ 23-25] Waldman is not the owner, developer, or builder of the condo project, has no control over the actual design or construction, and has no financial interest in the property or its development. [JA 478-80, ¶¶ 4-9; JA 473-542 (Waldman Exhibits 18-32 (building permits, land records, DCRA records, and a declaration from the actual developer all proving Waldman is unrelated to the condo project); JA 466-70 (portion of Waldman brief explaining the exhibits)]

b. Semler Defames Waldman at the June 2018 BNCA Meeting.

On June 19, 2018 the Brookland Neighborhood Civic Association held a meeting which included a presentation by a representative of District Quarters regarding its planned condo project on the property. Semler recorded a portion of this meeting (the "Video"),[7] which the Court should watch in its entirety instead of relying on the descriptions in Semler's brief. [Br. at 23-26]

Waldman did not introduce himself as the owner of the Property at the meeting. Rather, Waldman "specifically explained that [he] had sold the property to District Quarters, who was developing it." Waldman also referred to the perpetual use easement that maintains the distance between the buildings, preserving the mural. [Video at 1:19-54; *see* also, JA 478-79, ¶ 3] Barely one minute after discussion of District Quarter's project began, Semler interrupted the proceedings to shout from the audience that "Mr. Waldman has always planned [to destroy the Mural]. Also [he] has problems with the DOJ." [Video at 1:08] Semler continued to interrupt the presentation by District Quarters, at one point shouting at Waldman (who was also in the audience): "You took this by theft and fraud." Upon being reprimaneded by the BNCA moderator for interrupting, Semler insisted that "everybody else should know." [Video at 3:25] Throughout the meeting, Semler continued to mutter out loud and interrupt the proceedings by shouting false

[7] [Br. at 24, n.13 (youtube link); JA 58 (Ver. Compl. Ex. 4)]

accusations of corruption and graft at Waldman. Despite being warned by the BNCA moderator that he would be removed from the meeting, Semler continued to yell at Waldman, including threatening a "federal court action" to stop development and accusing Waldman of violating DC law. [Video at 12:15] Towards the end, Semler again interrupted the meeting to accuse Waldman of "doing everything under the table, bribery, corruption to get this far." [Video at 17:05]

As the BNCA moderator attempted to wrap-up discussion of District Quarter's condo project, Semler again interrupted to reference the "US Trustee" and accuse Waldman of "pure corruption Brooklyn style" and bribing city counsel members to get approvals for development projects.[8] [Video at 19:15] The BNCA moderator and other officers present ordered Semler to leave the meeting. As he left, he continued to hurl accusations at Waldman, including: "I told the truth. There was corruption." And "You are already in [inaudible] the Trustees of the U.S. Justice Department." [Video at 19:35]

After the meeting, the BNCA president emailed the BNCA membership denouncing Semler's accusations against Waldman as "disruptive and disrespectful" and contrasting Semler's antics with the expression of "legitimate concerns and dialogue [that] can be conducted respectfully, for the benefit of the community[.]" [JA 689-91]

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[8] Semler argues he actually said "Brookland" style. [Br. at 35] Accusing someone of any style of corruption is defamatory.

c. Using Online Platforms, Semler Spreads and Multiplies the Defamation.

After the BNCA meeting, Semler uploaded the video he shot to CIG's youtube channel, further publishing the defamation. [JA 55-57 & Video] The Defendants further posted a comment stating that Waldman "has been cited for real estate fraud to the US Trustee of the Department of Justice." [JA 57] Then, on June 24, 2018, Defendants posted an article to the CIG website entitled: "CI VIEW: DC's new Vandals Jerry Waldman and Lindsay Reishman set to destroy Black feminist mural #Brookland." [JA 50-54] The article embeds the video of the BNCA meeting, further publishing those defamatory statements. The article also contains additional false claims, including that Waldman is "subject to a criminal bankruptcy fraud complaint with the US Trustee of the Department of Justice"; accusing Waldman of "bamboozling, and most probably corrupting" local officials to "sneak through" unrelated and unspecified developments; and falsely casting Waldman as a racist. [*Id.*; *see* JA 38-41, ¶¶ 50-64 (Ver. Compl. documenting the online publications)] Defendants repeatedly republished and further disseminated the defamation [*id.*], which remains online today.

SUMMARY OF ARGUMENT

The Court should affirm the denial of the Special Motion to Dismiss for several reasons. First, the Anti-SLAPP Act does not apply because Defendants' defamatory statements alleging fraud, corruption, and criminal investigations against Waldman concern Semler's purely private grudge and not advocacy on issues of public interest. Second, Waldman is not a limited purpose public figure for the same reason—the defamation was not germane to the supposed public discourse about a third party's condo development. Waldman's claims easily surpass the applicable negligence standard. Third, Defendants' statements and false light at the 2018 BNCA meeting and online thereafter are actionable defamation. They are false and misleading statements of fact, not pure opinion. Fifth, the evidence in the record surpasses the actual malice standard. Waldman produced copious evidence directly contradicting Semler's supposed subjective belief the defamatory statements were true, or at least establishing Defendants' reckless disregard for their falsity.

The Court should reverse the partial grant of the Special Motion to Dismiss as to a defamation claim for Semler's harassment of Waldman at the Askale Café in 2017. Waldman did not plead such a claim and, to eliminate confusion, Waldman disavowed such a claim at the earliest opportunity, rendering it moot.

The Court should not review, or should affirm, the Superior Court's denial of Defendants' motion to set a security amount. Defendants did not include that order in their notice of appeal and it is not a final, appealable order. Therefore, the Court

has no jurisdiction to hear it. Also, the applicable statue is unconstitutional as applied and the Superior Court properly exercised its jurisdiction to set the amount of security as zero by denying the motion.

ARGUMENT

I. The Court Should Affirm Denial of the Special Motion to Dismiss.

The Court conducts a *de novo* review of the Superior Court's order on a Special Motion to Dismiss under the Anti-SLAPP Act. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1240 (D.C. 2016), *as amended* (Dec. 13, 2018).

a. The Anti-SLAPP Act Does Not Apply Here.

As a threshold matter, the Superior Court erred in subjecting Waldman's claims to the Anti-SLAPP Act, D.C. Code §§ 16-5501, *et seq.* (the "Act" or "Anti-SLAPP Act"). The Act applies only where the defendant "makes 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[.]" § 16-5502(b); *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1232 (D.C. 2016), *rhrg. denied*, *as amended* Dec. 13, 2018. Although the Act is interpreted broadly, *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 254–55 (D.D.C. 2013), the scope of "issues of public interest" is not unlimited. In defining "issue of public interest," the Act admonishes that "[t]he term . . . shall not be construed to include private interests[.]" D.C. Code § 16-5501(3).

Here, Waldman brings claims based on Defendants' false and defamatory allegations against him of fraud, corruption, and criminal conduct. [JA 36 (Ver.

Compl.)] Throughout their voluminous briefing of the Special Motion to Dismiss, Motion for Reconsideration, and now in this appeal, Defendants make clear that their accusations of fraud, corruption, and criminal conduct levied against Waldman arise from and are directed towards Semler's **private** (and failed) interest in purchasing the Brookland Inn for himself. [*E.g.*, JA 95-98 (Semler's spin on Brookland Inn bankruptcy and fraud)); Br. at 16-21 (same)] It is these specific defamatory statements, and not Defendants' general protest or opinion (including with regard to the Mural), that form the basis of Waldman's defamation claim.

Indeed, the BNCA where Semler first published his defamatory accusations believed Semler's "disruptive and disrespectful" outbursts were so out of line with public discourse that the BNCA president sent an apology email to the membership. [JA 689-91] In light of the purpose of the Act to protect legitimate public participation, the Court should not countenance Defendants' attempt to co-opt the Act and public discourse as a shield to serve their own private ends.

b. Waldman is Not a Limited Purpose Public Figure.

The Superior Court also erred by finding Waldman is a limited purpose public figure with respect to Defendants' defamatory statements.[9] To be a "limited purpose public figure" required to prove "actual malice," the defamatory statements must

[9] If Waldman is not a limited purpose public figure, then he need not prove "actual malice"—only negligence—to prevail on his defamation claims. The myriad evidence in the record shows Waldman could meet that minimal showing, and Defendants do not dispute this. [*See* Br.]

"have been germane to the plaintiff's participation in [a public] controversy." *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 260–61 (D.D.C. 2013). "To qualify as a public controversy, the law requires . . . that the resolution of the issue affect others besides the immediate participants in the debate." *OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 46–47 (D.D.C. 2005).

Here, Defendants' accusations of "fraud," "corruption," and a "criminal investigation" of Waldman by federal authorities relate to Semler's personal and *private* attempt to purchase the Brookland Inn. Indeed, Semler avers that "[m]y personal or financial interest in the property is of no public interest[.]" [JA 435, ¶ 9] Defendants' accusations are not germane to the public debate on gentrification or a particular condo project's potential effect on the mural. Rather, Defendants' defamatory statements concern an issue—Semler's contract dispute—that only affects Semler, Waldman, and Ramson, the "immediate participants" in that controversy. Indeed, the very forum where Semler expressed his private animus recognizes that such expression was not part of the public debate on the development project. [JA 689-91 (BNCA apology email)]

In a footnote, Defendants argue that their accusations of fraud and criminality are "germane to the plaintiff's participation in the controversy"—identified as the condo project—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.'" [Br. at 40 n.16 (quoting *Waldbaum*, 627 F.2d at 1298)] Defendants

quotation is inapplicable: *Waldbaum* concerned a quasi-public official (the president and CEO of the second largest cooperative in the country) and relied on the Restatement (Second) of Torts s 580A (1977) and *In Garrison v. Louisiana*, 379 U.S. 64 (1964), both of which expressed this rule is for public officials. *Waldbaum*, 627 F.2d at 1290 & 1298 n.33.

Contrary to Semler's misleading rhetoric [*see* Br. at *passim*], the condo project belonged to District Quarters and Waldman did not own, control, or have a financial interest in the project. [*Supra*, Statement of Facts ("SoF") § 3.a] That Waldman attended the BNCA meeting and spoke in favor of the project as a member of the public does not make him any more of a limited public figure—or false accusations of fraud and criminality any more germane—than anyone else in the audience.

c. Defendants' Statements at the 2018 BNCA Meeting and Online Thereafter are Actionable Defamation.

Defendants argue that the Superior Court failed to identify any actual defamatory statements of fact at the June 19, 2018 BNCA meeting or subsequent article and online postings. [Br. at 31-33] Defendants further argue that the Superior Court improperly relied on Waldman's "allegations" about the contents of Defendants' statements and not the statements themselves. [*Id.*] This argument misses the point: under *de novo* review, this Court will evaluate the statements themselves and find that they are capable of a defamatory meaning.

As the Verified Complaint explicitly pleads, Waldman's defamation claim is based upon the June 19, 2018 oral statements at the BNCA meeting and the subsequent "CI View" written statements "accusing Waldman of fraud, corruption, and being the subject of criminal investigation by the U.S. Trustee and Department of Justice." [JA 43, ¶ 72]

A statement is defamatory "if it tends to injure [the] plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Mann*, 150 A.3d at 1241 (alteration in original) (quoting *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 594 (D.C. 2000)). "The statement 'must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous, or ridiculous.'" *Id.* (quoting *Rosen*, 41 A.3d at 1256). Under D.C. law, "**a statement that falsely imputes a criminal offense is defamatory *per se*.**" *Hall v. D.C.*, 867 F.3d 138, 149 (D.C. Cir. 2017) (emphasis added) (citing *Smith v. District of Columbia*, 399 A.2d 213, 220 (D.C. 1979) and *Von Kahl v. Bureau of Nat'l Affairs, Inc.*, 934 F.Supp.2d 204, 218 (D.D.C. 2013)).

Here, before being removed from the meeting by the BNCA moderator for his disruptive outbursts, Semler repeatedly interrupted the BNCA meeting to impute criminal offenses on Waldman, including theft, fraud, corruption, and "trouble"[10] with the USTO. [*Supra*, SoF, § 3.b.] After the BNCA meeting, Defendants published

[10] Although difficult to determine exactly what word was stated, from the context it appears to be "trouble." [Video at 19:35]

additional written statements imputing crimes of fraud and corruption upon Waldman in connection with his purchase of the Brookland Inn at public auction. [*Supra*, SoF, § 3.c.]

Defendants' criminal accusations are neither "ambiguous" nor "name calling" that is "typical in heated debates at public meetings." [Br. at 33, 39 (citing *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970) (holding that "rhetorical hyperbole" obvious even to "the most careless reader" was not defamatory)); *see* Br. at 33-39 (arguing no statement is actionable)] Statements are nonactionable "imaginative expression" or "rhetorical hyperbole" only if they "cannot reasonably be interpreted as stating actual facts about an individual." *Guilford*, 760 A.2d at 596-97. Here, however, Defendants' accusations of criminal conduct purport to state facts about Waldman and specifically reference Waldman's purchase of the Brookland Inn Property. Indeed, at the BNCA meeting, Semler's parting words were that he was telling "the truth" about specific acts of "corruption" that have caused Waldman to be in trouble "with the Trustees of the U.S. Justice Department" [Video at 19:05], as opposed to using hyperbole or "imaginative expression" to make a rhetorical point. And the post-meeting written statements were obviously not made in the "heat" of the moment and specifically accuse Waldman of real estate fraud to acquire the Brookland Property and of being "subject to a criminal bankruptcy fraud complaint." [JA 50-54]

Nor are the statements mere opinion. [Br. 33, 38] "[S]tatements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false." *Guilford*, 760 A.2d at 597. "[I]f the statements assert or imply false facts that defame the individual, they do not find shelter under the First Amendment simply because they are embedded in a larger policy debate." *Mann*, 150 A.3d at 1242–43. In *Mann*, this Court rejected a nearly identical "opinion" argument. Like in *Mann*, here Defendants accuse Waldman of engaging in specific criminal acts in purchasing the Brookland Inn and being the target of a specific criminal investigation into those acts, as well as engaging in misconduct related to his profession as a developer. Further, like in *Mann*, Defendants have withheld from the reader the *true* facts of Semler's "criminal complaint," as well as Semler's personal and financial involvement, and instead implied unstated defamatory facts. *Mann*, 150 A.3d at 1245–46. Thus, draping Defendants' false criminal accusations in the mantle of an "Op-ed" does not render them nonactionable.

Ultimately, defamation must be interpreted "in the sense in which it would be understood by readers to whom it was addressed[.]" *Klayman v. Seagal*, 783 A.2d 607, 613 (D.C. 2001). Defendants even quote *Klayman*, 783 A.2d at 613, for the proposition that "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." [Br. at 37] This, of course, cuts both ways: the entire context of Defendants' accusations of fraud, corruption, and

criminality can also support the defamatory nature of the specific accusations at issue. Thus, Defendants' quibbling that a factfinder could conceivably interpret some of the defamatory statements in a non-defamatory manner [*see* Br. at 33-39], even if correct, does not render erroneous the Superior Court's ruling that a properly instructed jury **could** conclude the statements were untrue and defamatory.

d. Defendants' Accusations of Fraud, Corruption, and Criminality Are Not True.

Defendants also argue that all of their defamatory accusations regarding fraud and a USTO criminal investigation related to Semler's attempt to purchase the Brookland Inn are true or substantially true. [Br. at 37-39]

Not only are these accusations of criminal conduct defamatory *per se*, *Hall*, 867 F.3d at 149, but they are also objectively false. Waldman is not now, nor ever has been, under criminal investigation by the U.S. Trustee or Department of Justice, or have any "problems with the DOJ." [JA 32, ¶ 9] Indeed, both the District of Columbia and Maryland case searches performed by Defendants [JA 153-56], and the search of the Federal District of the District of Columbia docket [JA 377-78] performed by Waldman, produce no criminal cases. Defendants' accusations concerning a Trustee's investigation in the Brookland Inn bankruptcy are proven false by the fact that the bankruptcy docket for the Brookland Inn (within which Semler filed the letter to the Trustee requesting an investigation into Ramson for fraud as Dkt. 50) contains no entries until Defendants' bizarre December 4, 2018

filing of a letter requesting that Bankruptcy Judge S. Martin Teel, Jr. examine all 272 pages of Defendants' Anti-SLAPP motion, Opposition to Plaintiff's Motion to Extend Time to Respond in this case, and the exhibits thereto. [JA 366-71 (Bankr. Dkt); JA 379-80 (letter)] Had the USTO investigated Waldman and found any wrongdoing, it is inconceivable that the Trustee would not have alerted the bankruptcy court by filing something in the docket.

Nonetheless, Defendants argue that it is Waldman's burden to prove a negative—that he has not been investigated as alleged. [Br. at 37-38 (citing *Carpenter v. King*, 792 F. Supp. 2d 29, 34 (D.D.C. 2011)]. Yet, with respect to statements that falsely impute a criminal offense, District of Columbia law recognizes that a defamation action can lie even where the subject of the defamation cannot prove he acted noncriminally if the report of the crime is made in bad faith or with indifference to or reckless disregard of its effects upon the subject of the defamatory accusation. *Hall*, 867 F.3d at 149 (vacating summary judgment for defamation defendant because "a reasonable jury could conclude that [defendant] negligently made a false report, indifferent to or reckless of its effects on [plaintiff.]"). Here, Defendants' bad faith, indifference, and reckless disregard for Waldman's rights when alleging fraud and criminal conduct is demonstrated by the fact that no evidence Defendants proffer supports these accusations except for Semler's self-serving declarations about his speculation that Waldman "may have colluded with Ramson" (never mind that Waldman, as the secured creditor, stood to

gain no additional benefit) and supposed interactions with the USTO, which, despite their careful and misleading wording, are belied by Semler's own contemporaneous emails and other record evidence. [*Supra*, SoF, § 2] Also, USTO attorneys Guzinski and Jones deny telling Semler that Waldman was under any investigation, civil or criminal. [JA 697, ¶ 11; JA 703, ¶ 21]

Indeed, Defendants' argument that it is literally true that Semler "cited" Waldman "to" the USTO highlights [Br. at 30] exactly why a jury could find the statement defamatory: complaining to the USTO is *not* a "criminal" "citation" or "complaint" as those words are commonly understood or the context indicated, and Semler, who is not a law enforcement officer, has no legal authority to "cite" or issue a "criminal complaint" to anyone for anything. Therefore, a reasonable jury could find Defendants' statements untrue and actionably defamatory.

e. Waldman Produced Sufficient Evidence of Actual Malice.

If the Anti-SLAPP Act applies (it does not), and if Waldman is a limited purpose public figure with respect to the defamatory statements (he is not), then the Court must examine the evidence presented at this early stage and determine whether Waldman is "likely to succeed on the merits" *Mann*, 140 A.3d at 1232–33. The standard for "likely" success is significantly lower than the ultimate civil burden of persuasion, a preponderance of the evidence. *Id.* at 1234. It is lower than the "likelihood of success on the merits" used to evaluate requests for temporary stays and preliminary injunctions. *Id.* Rather, the Anti-SLAPP "likely to succeed on the

merits" standard is akin to requesting judgment as a matter of law based upon the evidence proffered by the parties at this pre-discovery phase. Consequently, the Motion may be granted "only if the court can conclude that the claimant could not prevail *as a matter of law*, that is, after allowing for the weighing of evidence and permissible inferences by the jury." *Id.* at 1236 (emphasis in original). "Actual malice" may be proven by showing that "the defendant either (1) had 'subjective knowledge of the statement's falsity,' or (2) acted with 'reckless disregard for whether or not the statement was false.'" *Id.* at 1252 (quoting *Doe No. 1 v. Burke*, 91 A.3d 1031, 1044 (D.C. 2014)).

The "subjective" measure of the actual malice test requires the plaintiff to prove that the defendant actually knew that the statement was false. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). The plaintiff may show "reckless disregard" by showing that the defendant had serious doubts about the truth of the statement inferentially, by proof that the defendant had a "high degree of awareness of [the statement's] probable falsity." *Harte–Hanks Commc'ns*, *Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). A showing of reckless disregard is not automatically defeated by the defendant's testimony that he believed the statements were true when published; the fact-finder must consider assertions of good faith in view of all the circumstances. *St. Amant v. Thompson,* 390 U.S. 727, 732 (1968) ("[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.").

Further, "actual malice may be established by proof that the 'story [was] fabricated by the defendant, or [was] the product of his imagination.' " *Boley*, 950 F. Supp. 2d at 262 (quoting *St. Amant*, 390 U.S. at 732). Thus, "in considering the evidentiary sufficiency of the plaintiff's response to a special motion to dismiss filed under D.C. Code § 16–5502(b), the question for the court is whether the evidence suffices to permit a reasonable jury to find actual malice with convincing clarity." *Mann*, 150 A.3d at 1252.

First, the Court should reject Defendants' misstatements of the law and attempt to the Anti-SLAPP summary judgment-like legal standard on its head. [Br. at 39-47] Waldman need only present evidence sufficient that "a jury properly instructed on the law . . . could reasonably find for" Waldman. *Mann*, 150 A.3d at 1236. No matter how many times Defendants say otherwise, Waldman need not conclusively rebut and refute every self-serving statement in Semler's declarations. Nor are Defendants entitled to inferences from the evidence in their favor.

Second, the Court must look to the basis of Semler's supposed subjective belief as to the truth of his accusations. In his second (and final) supplemental declaration, Semler averred that he bases his subjective belief that Waldman was under criminal investigation by the USTO and DOJ on "neither [Mr. Guzinski] nor anyone else from the U.S. Trustee's office ever advised me that it was not investigating or considering the fraud charges." [JA 625, ¶ 23]

This is an absurd rationale that a reasonable jury, properly instructed, could discredit based upon the evidence in the record. As just a few examples:

- Semler's contemporaneous emails to Waldman seeking a deal contradict his claims that he felt "defrauded" by Waldman or has subjective belief Waldman was involved in Ramson's supposed fraud. [*Supra*, SoF § 1]
- Both Mr. Guzinski and Mr. Jones aver that they explained the USTO and DOJ policy prohibiting them from telling Semler whether or not there is a civil or criminal investigation into Waldman. [JA 697, ¶ 11; JA 702, ¶ 14]
- The USTO testimony does not describe investigatory steps or actions and it denies having detailed conversations, interviews, or information gathering from Semler that would be necessary for a USTO investigation into the fraud complaint (and, if substantiated, a referral to the DOJ for a criminal investigation).[11] [JA 696-98, ¶¶ 9-17; JA 702-03, ¶¶ 13-21]
- The May 2015 letter supposedly constituting the "criminal complaint" does not even allege Waldman committed a criminal act. [JA 158-59]
- On April 4, 2016, Semler wrote to Jones reiterating that he "*would be willing* to file criminal charges or supply you with a signed affidavit if needed", demonstrating he did not believe criminal charges had begun. [JA 628-29]

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[11] The USTO is not empowered to conduct criminal investigations and refers such actions to the DOJ.

- On December 30, 2016, Semler emailed Guzinski saying he would "like to **pursue** my complaint on the fraud case" and "I remain at your disposition **if you decide to pursue further investigation or criminal charges in the matter.**" [JA 636 (emphasis added)] Mr. Guzinski never responded. [JA 698, ¶ 17] Semler's email again demonstrates he did not believe a criminal investigation had begun.
- Semler terminated his attorney, Mr. Kass, after Mr. Kass refused Semler's repeated requests to assert fraud in the bankruptcy court. [JA 641] It is reasonable to infer that Mr. Kass' refusal was an expression of doubt as to the merits of Semler's claim.

Nor can Semler rely on Mr. Jones stating 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." [Br. at 21] Mr. Jones' declaration contrasts such "looking into" with an actual "investigation," and indicates he would've explained the difference to Semler. [JA 703, ¶ 21]

Had Semler actually believed that the USTO was conducting a criminal investigation of Waldman for fraud related to Semler's failed purchase of the Brookland Inn, then Semler would not have felt the need to request an investigation three more times over nearly two years. Semler's repeated volunteering to file an affidavit or provide more information to the USTO further underscore that not even he believed a USTO investigation and criminal referral to the DOJ could occur

without his further involvement. After all, Semler's fraud allegations against Waldman are based on oral conversations between the two. [*See, e.g.*, JA 126-27, ¶¶ 8-9, JA 620-21, ¶¶ 8-9]

Moreover, the evidence amply demonstrates that Defendants simply "fabricated" or "imagined" the accusations. [*See* JA 343-64 (Semler's emails); JA 338-41, ¶¶ 5-14; JA 158-59 (May 5, 2015 Letter); JA 364 (Semler email: "Dear Jerry, here is the letter we sent to the US Trustee about Ramson attempt to defraud me at closing and in DC Bankruptcy court.")] The leap from accusing Ramson [JA 158-59; JA 364] to "wanting" an investigation into Waldman [JA 379-80 (Semler letter)] to "fraud" by and "criminal investigation" of Waldman is a pure fabrication. Indeed, the video Semler cites in support of an alleged March 11 oral contract between him and Waldman is nothing but 40 seconds of Semler explaining how Google Glass works. [JA 402-03]

Thus, the evidentiary record, including the USTO evidence and Semler's own emails requesting an investigation long after he avers that he believed the investigation had begun, all demonstrate Semler had "subjective knowledge of the statement's falsity," or, at a minimum, acted with "reckless disregard for whether or not the statement was false." *Burke*, 91 A.3d at 1044. Further, "actual malice may be established by proof that the 'story [was] fabricated by the defendant, or [was] the product of his imagination.'" *Boley*, 950 F. Supp. 2d at 262 (quoting *St. Amant*, 390 U.S. at 732). And the testimony from the USTO confirms that Semler has

fabricated a criminal investigation from the USTO's adherence to its policy of accepting and reading public complaints, no matter how absurd. This is especially true given that Semler is not a "layperson" unable to make the technical distinction. Rather, Semler swears that he is an accomplished and award winning journalist with decades of experience, including in rooting out financial corruption. [Br. at 11-12 (describing Semler's journalism experience)] Thus, a reasonable jury could easily discredit Semler's "subjective belief" and find "actual malice." *See St. Amant*, 390 U.S. at 732 ("subjective belief" cannot be "fabricated" or "the product of [defendant's] imagination").

Third, Semler cannot establish his subjective belief through reference to the USTO's assertion of work product privilege in 2019 over certain emails or other post-publication information. [*See* Br. at 42 (arguing work product privilege proves subjective belief)] Defendants quote *McFarlane v. Sheridan Square Press*, 91 F.3d 1501, 1508 (D.C. Cir. 1996), for the proposition that "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[.]" This is indeed the law. And it is precisely why the many "facts" and "inferences" Defendants point to from after the June 2018 publications are irrelevant to the actual malice analysis.[12]

[12] The Superior Court properly denied Defendants' motion for leave to file an August 26, 2020 letter to Semler from the USTO. [JA 894b] The letter does not prove the truth of a criminal investigation; it merely summarizes a 2019 letter Semler sent to

The email over which the USTO has asserted work product privilege is sealed and unsealing it is not properly before the Court as Defendants have never filed a motion to compel under either Civil Rules 26 or 37. The USTO's assertion of "work product privilege" is irrelevant; it does not "indicate as a matter of law" and is not "dispositive" that the USTO criminally investigated Waldman. [Br. at 42] Defendants continue to improperly attempt to narrow work product privilege to only documents created during litigation. In actuality, "the attorney work product doctrine is intended to protect pure expressions of legal theory or mental impressions, . . . given that the very process of deciding . . . the questions to be asked, . . . offers insight into how the attorney taking or directing the taking of the statements views the case." *Clampitt v. Am. Univ.*, 957 A.2d 23, 30 n.8 (D.C. 2008) (internal quotations and modifications omitted). The fact that the USTO has asserted work product privilege is not a judicial determination that the communications are privileged. Nor does the work product designation shed light upon the content of the communications. An email by a USTO attorney expressing the "legal" or "mental impression" that a public complaint is frivolous and does not warrant an investigation is protected by work product privilege as much as a draft motion prepared during litigation. A properly instructed jury would not be allowed to—and

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Attorney General Barr. It also post-dates the defamatory statements and therefore has no relevance to Semler's subjective belief.

this Court correctly declined to—speculate as to the contents of the communications over which the USTO has asserted privilege.

"[I]n considering the evidentiary sufficiency of the plaintiff's response to a special motion to dismiss filed under D.C. Code § 16–5502(b), the question for the court is whether the evidence suffices to permit a reasonable jury to find actual malice with convincing clarity." *Mann*, 150 A.3d at 1252. The evidence of Semler's subjective disbelief, reckless disregard, and fabrication satisfy the standard.

II. The Court Should Reverse the Grant of the Special Motion to Dismiss as to the Nonexistent Claim from 2017.

a. This Court has Jurisdiction to Hear the Cross-Appeal.

This Court's jurisdiction to hear the Cross-Appeal is found in three places, each alone adequate to confer jurisdiction. **First**, contrary to Semler's assertion [Br. at 47-49], this Court did not hold in *Competitive Enter. Inst. v. Mann* ("*Mann*"), 150 A.3d 1213, 1227-32 (D.C. 2016), *as amended* (Dec. 13, 2018), that "only denials of" special motions to dismiss are appealable. (Order, May 9, 2022) Rather, *Mann* held that the **denial** of a special motion to dismiss, although not a final order, is appealable on an interlocutory basis. In contrast to a denial, *Mann* explains: "The **grant** of a special motion to dismiss, on the other hand, **is appealable as a final order**." (*Id.* at 1227 n.14 (emphasis added) (citing D.C. Code § 11–721(a)(1)). Although technically dicta because *Mann* was originally reviewing a denial of an Anti-SLAPP motion to dismiss, the Court's conclusion that a grant is a final order

makes this Court's jurisdiction plainly evident under D.C. Code § 11-721(a)(1) ("The District of Columbia Court of Appeals has jurisdiction of appeals from -- all final orders and judgments of the Superior Court of the District of Columbia").

To the extent that this Court is concerned that the partial grant here is not a final order despite this Court's opinion in *Mann*, Waldman acknowledges that, generally speaking, "to be final under § 11–721(a)(1), an order must dispose of the whole case on its merits[.]" *United States v. Stephenson*, 891 A.2d 1076, 1078 (D.C. 2006). However, the *Stephenson* court explained that this is "so that the court has nothing remaining to do but to execute the judgment or decree already rendered." *Id.* Here, the partial grant at issue does not dispose of the 2018 defamation claims, but it does finally dispose of the Askale Café claim (again, which Waldman did not actually bring). There is nothing left for the Superior Court to do on the merits of that phantom claim. Instead, the Superior Court would proceed to discovery on the 2018 claims, and separately determine whether and how much (if any) attorneys' fees should be assessed under the Anti-SLAPP statute for the few paragraphs Semler originally briefed on the Askale Café claim. Thus, the order granting dismissal of the Askale Café claim is final, even if couched as "partial" in consideration of the surviving, separable claims.

Despite the finality of the partial grant of the Anti-SLAPP motion to dismiss, Semler argues that the "purpose behind the Anti-SLAPP Act" is solely to protect "defendants and free speech," but Waldman is a plaintiff. [Br. at 47-48] That purpose

is not impinged by allowing interlocutory appeal of a partial grant of the Anti-SLAPP Act. Moreover, recognizing that the grant of the special motion to dismiss is final serves the underlying purpose of the "final order" rule. "The requirement of finality serves the important policy goals of preventing the unnecessary delays resultant from piecemeal appeals and refrain[ing] from deciding issues which may eventually be mooted by the final judgment." *Rolinski v. Lewis*, 828 A.2d 739, 745 (D.C. 2003) (internal quotations omitted). Here, Semler's failed special motion to dismiss already caused six years of delay. And now, Semler has filed an interlocutory appeal over the denial of their special motion to dismiss.

Therefore, if this Court deems that the grant of the special motion is not final, then there will be a piecemeal appeal that wastes even more judicial and party resources. Indeed, if this Court were to deny jurisdiction over the cross-appeal and then reverse the Superior Court as Semler requests—and it should not—then the appellate proceedings would be serial as the current cross-appeal would immediately follow. Nor will a decision on the subject of the cross-appeal—the Askale Café claim Waldman did not actually bring—ever be potentially mooted by a later, final judgment in the Superior Court on the 2018 defamation claims Waldman did bring and for which the Superior Court denied the special motion to dismiss. Accordingly, this Court should follow its opinion in *Mann* and recognize its jurisdiction over Waldman's cross-appeal from the grant of the special motion to dismiss.

Second, the Court has jurisdiction to hear the cross-appeal under the collateral order doctrine, which provides that "[s]ome trial court rulings that do not conclude the litigation nonetheless are sufficiently conclusive in other respects that they satisfy the finality requirement of our jurisdictional statute." *Rolinski v. Lewis*, 828 A.2d 739, 746 (D.C. 2003). This Court "follow[s] the Supreme Court in recognizing a 'small class' of orders that fall within this category:

> that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). "Under the so called 'collateral order' doctrine, orders in this small class are immediately appealable to this court even though they do not terminate the action in the trial court." *Id.*

In *Mann*, this Court extensively examined the Anti-SLAPP special motion to dismiss and the collateral order doctrine, and held that a non-final order denying a special motion to dismiss meets all of the criteria of the collateral order doctrine. *Mann*, 150 A.3d at 1227-30. This Court's analysis of conclusivity, separability, unreviewability, and substantial public interest, *id.* at 1228-32, are all equally applicable to the grant of a special motion to dismiss. The only difference is that here the core issue is from the plaintiff's perspective, and involves not the merits of the claims, but whether the plaintiff must immediately participate in burdensome fee

shifting proceedings under the Anti-SLAPP statute despite successfully defeating the rest of the special motion to dismiss. In this way, the denial of a special motion and the grant are two sides of the same coin, and therefore the collateral order doctrine grants appellate jurisdiction for each.

Third, the Court has jurisdiction over the cross-appeal under its pendent jurisdiction. This Court looks for at least one of three criteria when exercising pendent jurisdiction:

> (1) whether the nonappealable issue is inextricably intertwined with the immediately appealable issue; (2) whether review of the nonappealable issue would be necessary to ensure meaningful review of the appealable issue*;* and (3) whether the nonappealable issue is so closely related to the appealable issue, or turn[s] on such similar issues, that a single appeal should dispose of both simultaneously' and, in some cases, [would] terminate the entire proceeding without a second appeal[.]"

D.C. v. Simpkins, 720 A.2d 894, 900 (D.C. 1998) (internal emphasis, quotations, and citations omitted).

Here, all three criteria are met. First, the appeal and cross-appeal both involve the Anti-SLAPP special motion to dismiss and the construction of Waldman's Verified Complaint. Second, reviewing the cross-appeal involves examining the allegations and evidence of Semler's years of hostility, harassment, and false statements. This Court will conduct such review to meaningfully review the denial of the special motion subject to Semler's appeal. Third, the review of the appeal and cross-appeal issues will involve the same record from the Superior Court and, depending on this Court's decision, could terminate the entire proceeding without

the need for a second appeal. Accordingly, the Court has pendent jurisdiction over the cross-appeal.

b. Waldman Did Not Plead This Claim—the Superior Court Erred in Dismissing a Nonexistent Claim.

As is common, Waldman organized his Verified Complaint chronologically. [Ver. Compl., JA 30] First, Waldman describes numerous instances of harassment and false statements by Semler dating back years. [*Id.*] The historic harassment, such as when Semler accosted Waldman at the Askale Café in January 2017 [JA 35-36, ¶¶ 30-35], provides context to help evaluate the private and malicious nature of Defendants' subsequent false and defamatory publications.

Waldman, however, bases his defamation and false light claims not on every potentially defamatory statement published by the Defendants over the years, but only on several specifically identified false accusations of "fraud, corruption, and being the subject of a criminal investigation by the U.S. Trustee and Department of Justice[.]" [JA 43, ¶ 72 (Count I Defamation – Libel & Slander)] Waldman organized these specific libelous statements into two groups subtitled "Defendants **Defame** Waldman at Public Meeting" and "Defendants Repeatedly Publish the **Defamatory** Statements", which allege the Defendants' publications at a June 19, 2018 BNCA meeting and online repeatedly thereafter. [JA 36-41, ¶¶ 36-64 (emphasis added)]

Despite the clear subtitles and obvious context within the Verified Complaint, Semler argues that Waldman's use of the ubiquitous paragraph "incorporat[ing] by reference" the allegations of "the preceding paragraphs" in the defamation count [JA 43, ¶ 71] somehow created a claim by Waldman of defamation predicated on Semler's 2017 harassment of Waldman in the Askale Café. [Br. at 47-49] Any such reading of the Verified Complaint is clearly an error. That section of the Verified Complaint is even subtitled "Defendants **Accost** Waldman in a Café and Accuse Him of Mortgage Fraud" [JA 35], in stark contrast to the "Defame" and "Defamatory" subtitles of the operative libelous publications later in the Verified Complaint.

Nonetheless, in their Special Motion to Dismiss, Defendants erected the strawman claim and argued that Semler's harassment of Waldman in the Askale Café in 2017 is outside the statute of limitations for a defamation claim. [JA 110-12] To stamp out any potential confusion, at the first possible opportunity (his response brief), Waldman disavowed claiming defamation from that incident and explained that his claims were "based upon the June 19, 2018 oral statements at the BNCA meeting and the subsequent 'CI View' written statements … ." [JA 306-07 (Resp. to Mot. to Dismiss, filed Dec. 17, 2018]. Waldman did not attempt to articulate or defend a claim based upon the 2017 harassment [*see id.*] including at oral argument on February 5, 2019. [*See* JA 543 (hearing transcript)]

That the 2017 Askale Café incident was not thereafter briefed or argued by either party as being the basis of a separate defamation claim [*see, e.g.*, JA 604 (Defs.' Supplemental Br., Jul. 23, 2019)], or further argued at the subsequent hearings on May 13 or August 23, 2019, proves that the Defendants understood that Waldman did not plead such a claim in the Verified Complaint.[13] Accordingly, the Superior Court erred by granting the Anti-SLAPP motion to dismiss as to this nonexistent claim.

c. Any Such Claim Was Moot After Waldman Disclaimed It, and the Superior Court Should Not Have Decided It.

To the extent the Verified Complaint, could be construed as pleading a defamation claim based on the 2017 Askale Café harassment (and it should not be), that claim became moot when Waldman disavowed bringing it. "A case is moot when the issues presented are no longer 'live' or the parties lack 'a legally cognizable interest in the outcome.' This includes when the court is asked to decide only abstract or academic issues." *Classic CAB v. D.C. Dep't of For-Hire Vehicles*, 244 A.3d 703, 705 (D.C. 2021) (quotations omitted)

[13] The Defendants' revival of a challenge to the non-existent claim in their motion for reconsideration was a *post hac* attempt to rewrite the record for the **sole** purpose of providing Defendants grounds to seek attorneys' fees under the Anti-SLAPP Statute. [JA 776 (Mot. for Reconsideration at 7)] At the time they filed their motion to set security, Defendants absurdly claimed $40,000 in attorneys' fees attributable to "dismissing" this never-pleaded claim. This Court should not tolerate Defendants' naked gamesmanship.

Once Waldman committed on the record—in his response brief and again reiterated at oral argument—the question of whether a (non-existent) claim related to the 2017 incident is time-barred and subject to dismissal under the Special Motion Dismiss became "only abstract or academic".

Mootness matters because it is jurisdictional: "mootness is 'a threshold question of law that must be resolved prior to, and independently of, the merits of the case." *L.S. v. D.C. Dep't on Disability Servs.*, 285 A.3d 165, 172 n.10 (D.C. 2022) (quoting *B.J. v. R.W.*, 266 A.3d 213, 215 (D.C. 2021)). "Mootness and standing are related concepts in that, generally speaking . . . , the requisite interest that 'must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Id.* (quoting *Welsh v. McNeil*, 162 A.3d 135, 144-45 (D.C. 2017) (Glickman, J., concurring in part)). Therefore, the Superior Court clearly erred when it granted dismissal of the moot (and non-existent) claim under the Anti-SLAPP Act instead of as moot. Accordingly, this Court should reverse the partial grant of Defendants' Special Motion to Dismiss.

III. The Court Should Not Disturb the Superior Court's Denial of Semler's Motion to Set Security.

Semler argues that "if there is jurisdiction on the cross-appeal, the court should then reverse the order denying" Semler's motion to set security pursuant to D.C. Code § 15-703(a). [Br. at 49-50] Not so.

First, this Court lacks jurisdiction to review that order because Semler did not include it within his notice of appeal, which specified that Semler's interlocutory appeal of the March 16, 2022 Omnibus Order was only "insofar as the orders denied Defendants' Special Motion to Dismiss under the D.C. Anti-SLAPP Act and related requests for relief." [Semler Notice of Appeal, Apr. 8, 2022] Under D.C. R. App. P. 3(c)(6), if the appellant "designate[s] only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited[,]" then the scope of the appeal is so limited. *See Flax v. Schertler*, 935 A.2d 1091, 1099 (D.C. 2007) ("It is correct that if an appellant chooses to designate specific determinations in his notice of appeal—rather than simply appealing from the entire judgment—only the specified issues may be raised on appeal.") (internal quotation omitted); *D.C. Metro. Police Dep't v. Fraternal Ord. of Police/Metro. Police Dep't Lab. Comm.*, 997 A.2d 65, 70 (D.C. 2010) (explaining that the "notice of appeal is a jurisdictional requirement.").

Second, the Omnibus Order is not a final judgment or order, and therefore the ruling on the motion to set security therein is not appealable. Neither the collateral order doctrine nor pendent jurisdiction are availing because the motion to set security lacks finality and is unrelated in substance or law to the interlocutory appeal and cross-appeal of the orders on the Anti-SLAPP motion.

Third, as to the merits, the statute plainly provides the Superior Court discretion to set the amount of a deposit—necessarily including an amount of zero:

"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**." D.C. Code § 15-703(a) (emphasis added). Semler misquotes[14] *Landise v Mauro*, 141 A.3d 1067, 1075 (D.C. 2016) for the proposition that this court "has held" that requiring a security is mandatory. *Landise* has no such holding; it examines and holds the statute is neither unconstitutional[15] on its face or as applied to that particular nonresident plaintiff whom assets were wholly outside the District. *Id.* at 1074-1077. Here, in contrast to *Landise*, Semler did not—and could not—show that Waldman has no assets in the District from which to collect a judgment for costs if Semler ultimately prevails. [*See* JA 915-26 (Waldman Resp. to Semler's Mot. (explicating facts with cites to record evidence))] Thus, the Superior Court did not abuse its discretion.

Fourth, the statute applies only to taxable costs, not attorneys' fees. D.C. Code § 15-703(a). Semler makes no argument on this point in his brief [Br. at 49-50], and has waived it. Moreover, Semler's request that the Superior Court require

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[14] Semler's supposed quotes are from the Westlaw headnote (and even then one is misquoted), **not** the Court's opinion, and relate only to the Court stating the text of the statute.

[15] Landise challenged the constitutionality under the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution, or, alternatively, in violation of the Privileges and Immunities Clause of the Fourteenth Amendment. Both clauses prevent states from discriminating against citizens of other states. *Landise*, 141 A.3d at 1074.

Waldman to deposit hundreds of thousands of dollars in attorneys' fees and speculative future costs **is** unconstitutional under the privileges and immunities clause. Including hundreds of thousands of speculative attorneys' fees merely because of the potential fee-shifting under the Anti-SLAPP statute would slam the courthouse door on all but the most deep-pocketed of nonresident defamation plaintiffs. Additionally, the District's justification of the statute—"to avoid a situation in which a successful defendant, usually a District resident, is compelled to file suit in a foreign jurisdiction in order to collect costs awarded him here", *Landise*, 141 A.3d at 1077—is inapplicable to Waldman who has assets in the District, and therefore the statute would be unconstitutional if applied. Accordingly, the Court should not reverse the Superior Court's denial of Semler's motion to set security.

CONCLUSION

For the foregoing reasons, the Court should (1) reverse the Superior Court's March 2022 Omnibus Order with respect to its dismissal under the Anti-SLAPP Act of the nonexistent claim based on Semler's 2017 statements and instead order that such a claim was either never brought or was mooted by Waldman's disclaimer of said claim; (2) affirm the Superior Court's March 2022 Omnibus Order in all other respects; and, (3) remand this action to the Superior Court for further proceedings on the merits of Waldman's claims.

Dated: June 10, 2024

(resubmitted for filing on June 11, 2024 pursuant to instructions of the clerk of the court)

Respectfully submitted by

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Certificate of Service

I hereby certify that on the 10th day of June 2024 the foregoing was served via the Court's e-filing system on Defendant CIG's counsel of record (Mark Bailen) in the case and by email to all counsel of record (including to Defendant CIG's other counsel, Ariana Woodson) and with consent to *pro se* Appellant/Cross-Appellee Peter Semler.

Additionally, on this 11th day of June, 2024, the foregoing was refiled and again served via the Court's e-filing system on Defendant CIG's counsel of record (Mark Bailen) and via email with consent to all counsel of record (including to Defendant CIG's other counsel, Ariana Woodson) and *pro se* Appellant/Cross-Appellee Peter Semler. The foregoing was also served on Ariana Woodson by mail.

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