HOLTEC INTERNATIONAL, Plaintiff/Appellant, v. JAVERBAUM WURGAFT HICKS KAHN WIKSTROM & SININS, P.C. Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-000830-24 ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION CAMDEN COUNTY SAT BELOW: HON. MICHAEL J. KASSEL, J.S.C. DOCKET NO.: CAM-L-002069-24

BRIEF FOR PLAINTIFF/APPELLANT HOLTEC INTERNATIONAL

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PRELIMINARY STATEMENT

This action arises out of defendant Javerbaum Wurgaft Hicks Kahn Wikstrom Sinins, P.C.'s ("Javerbaum") publication of defamatory statements about Holtec International ("Holtec") to promote and sensationalize its legal representation of Holtec's former Chief Operating Officer in a private employment dispute. Holtec's appeal seeks reversal of the Trial Court's summary dismissal of Holtec's defamation complaint, which the Court ordered pursuant to New Jersey's anti-SLAPP statute, as well as an attendant award of attorneys' fees to Javerbaum. The basis for Holtec's appeal is that the Trial Court misapplied the plain language of the recently enacted statute, which does not protect Javerbaum's commercial speech regarding a private employment dispute that is not a matter of public concern under New Jersey law.

In mid-2023, Javerbaum published several posts on its firm webpage and social media platforms regarding its legal representation of Holtec's Former Chief Operating Officer, Kevin O'Rourke. Although Mr. O'Rourke alleged in his suit against Holtec that he was "wrongfully terminated" after providing critical feedback on a draft document prepared for a potential investor, Javerbaum claimed to the public – without any factual basis – that its client, Mr. O'Rourke, alleged being terminated after "resisting" submission of **false financial statements** to an investor in a lawsuit valued at "millions". In

attempting to promote its legal services, Javerbaum also stated that one of its partners, Drake Bearden, would be providing representation to vindicate Mr. O'Rourke's rights as an alleged whistleblower.

Despite being alerted as to the false and misleading nature of its statements, Javerbaum refused to take down the posts until Holtec filed the defamation Complaint. Thereafter, Javerbaum filed an application for summary dismissal of Holtec's Complaint, pursuant to NJ-UPEPA. In order to use New Jersey's anti-SLAPP law as a sword (rather than a shield), Javerbaum argued disingenuously that its posts had "nothing to do" with the law firm's representation of Mr. O'Rourke and everything to do with informing the public about New Jersey law protecting whistleblowers. Following briefing of the statute's applicability, the Trial Court heard oral argument and entered an Order granting Javerbaum's application and dismissing Holtec's Complaint with prejudice. In rendering its decision, the Trial Court erroneously found that: (1) Javerbaum's posts constituted a matter of public concern, as defined by long-standing New Jersey law – solely because the statements at issue accuse a corporation of fraud; (2) the defamatory statements at issue did not implicate NJ-UPEPA's commercial speech exemption, because such an outcome could not be "what the Legislature intended"; and (3) Holtec could not advance a legally cognizable claim of defamation, despite pleading all elements sufficiently.

As discussed more fully below, the plain language of NJ-UPEPA is unambiguous and its application to the facts straightforward – nonetheless, the Trial Court erred in failing to consider NJ-UPEPA as written and improperly speculating as to the Legislature's intent. More specifically, the Trial Court erred in finding that: (1) Javerbaum's statements constituted a matter of public concern, where the posts at issue pertain predominantly to Javerbaum's involvement in a private employment-related dispute between Holtec and its former employee; (2) Javerbaum's statements did not constitute commercial speech, exempt from NJ-UPEPA's reach, despite the fact that the statements at issue were made by an entity in the business of providing legal services and in relation to its legal services; and (3) despite Holtec's "perfectly pled" Complaint, a reasonable fact-finder could not find any cognizable claim of defamation.

PROCEDURAL HISTORY[1]

On July 5, 2024, Holtec filed a Summons and Complaint against Javerbaum. (Pa175 – Pa190). On August 8, 2024, Javerbaum filed its

[1] The following citation form is adopted:
"Pa" – Plaintiff's Appellate Appendix
"1T" – September 13, 2024 Transcript and Oral Decision on Order to Show Cause and Application to Dismiss Plaintiff's Complaint with Prejudice
"2T" – October 24, 2024 Transcript and Oral Decision on Defendant's Application for Attorney's Fees and Costs

application for an Order to Show Cause – in lieu of an answer or responsive pleading – pursuant to NJ-UPEPA. (Pa001 – Pa078). On August 9, 2024, the Trial Court granted Javerbaum's application and Ordered that Holtec appear and show cause on September 13, 2024 as to why an Order dismissing its Complaint with prejudice, pursuant to NJ-UPEPA, should not be entered. (Pa079 – Pa082). On September 3, 2024, Holtec filed its opposition to Javerbaum's application. (Pa083 – Pa174). Thereafter, Javerbaum filed briefing in response to Holtec's opposition on September 9, 2024.[2]

On September 13, 2024, the parties appeared – via zoom – before the Trial Court. (1T). Following a hearing on Javerbaum's application, the Court entered an Order partially granting Javerbaum's application for dismissal of Holtec's Complaint, with prejudice, pursuant to NJ-UPEPA's summary dismissal provisions. (Pa191). The Court also scheduled a subsequent hearing for October 24, 2024, to address Javerbaum's application for statutory attorney's fees. (1T44 – 1T45).

On October 7, 2024, Bruce Rosen of Pashman Stein Walder Hayden, PC filed a Certification of Attorney Fees on behalf of Javerbaum. (Pa193). Holtec filed its opposition to same on October 18, 2024. (Pa221). Thereafter, the

[2] Pursuant to R. 2:6(1)(a)(2), Javerbaum's response is omitted from Plaintiff's Appellate Appendix.

parties appeared before the Trial Court on October 24, 2024. (2T). The Trial Court subsequently entered an Order granting Javerbaum's request for statutory attorney's fees in the amount of $49,545.50 and costs of $316.29. (Pa226).

Holtec filed a Notice of Appeal on November 20, 2024. (Pa228).

STATEMENT OF FACTS

A. The O'Rourke Litigation

On or about June 1, 2023, Holtec's former Chief Operating Officer, Kevin O'Rourke ("O'Rourke") filed a Summons and Complaint against Holtec (the "O'Rourke Litigation") alleging violations of the New Jersey Conscientious Employee Act. (Pa010). In his Complaint, O'Rourke alleged that between August 21, 2022 and August 30, 2022, O'Rourke was involved with the creation of a "prospectus" for a potential investor. (Pa013). After allegedly informing his supervisors that some statements about Holtec in the draft prospectus were false, misleading, and/or inaccurate, O'Rourke claims he was wrongfully terminated. (Pa018 – Pa022). O'Rourke did not allege that Holtec submitted (or ever proposed submitting) false and/or misleading financial statements to any investor or entity; instead, O'Rourke claimed that he informed his superiors – at some juncture – that the draft document contained *projections* he deemed "false, unattainable, and/or unrealistic". (Pa014 – Pa018).

O'Rourke's Complaint was filed by Javerbaum in Camden County, New Jersey. On July 7, 2023, the Asbury Park Press published an article about the O'Rourke Litigation with the headline: "Ex-Holtec CFO accuses company of 'make believe' financial statements in whistleblower suit". (Pa039).

B. Javerbaum's Promotion of the O'Rourke Litigation

On July 24, 2023, Javerbaum published an article on its website, javerbaumwurgaft.com, about Javerbaum's involvement in the O'Rourke Litigation. (Pa049). The article appeared under the firm's "Our News" page, which contains the following disclaimer:

> **This web site constitutes an ADVERTISEMENT.** No aspect of this advertisement has been approved by the Supreme Court of New Jersey. Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision. Results achieved in prior matters may vary depending on the particular facts and legal circumstances of your case.

(Pa095). In the first paragraph of the article, Javerbaum wrote: "Mr. O'Rourke claims that Holtec terminated his employment **after he resisted submitting false financial statements** to a major investor, an issue involving hundreds of millions of dollars." (Pa050) (emphasis added). The Javerbaum article also quoted the Asbury Park Press's headline regarding Holtec's creation of "make believe" financial statements and linked to the article for context. (Pa050). At all times relevant, Javerbaum – as the author of O'Rourke's Complaint – was

aware that the term "financial statements" did not appear anywhere in the Complaint. Javerbaum was specifically aware — as the author of O'Rourke's Complaint — that O'Rourke claimed he raised objections internally at Holtec regarding a draft internal document regarding certain revenue projections (Pa014 – Pa023). Despite this knowledge, Javerbaum, for its own article, parroted the Asbury Park Press's mischaracterization of the internal Holtec document as containing "financial statements". To further broaden its reach to the public, Javerbaum then re-published that article on the law firm's LinkedIn page and the firm's Facebook page. (Pa051 – Pa052).

On August 8, 2023, and at the request of Holtec, the Asbury Park Press issued a retraction of its original article and issued an "Editor's Note" stating:

> A term used in the headline and in this story's lead has been replaced with terms that make it clear to readers that the documents Kevin O'Rourke claims were false and misleading were not Holtec's "financial statements" as defined by the United States Generally Accepted Accounting Principles. **The Complaint does not reference those statements**, which are subject to audit, and the CFO would have already agreed to them. The Asbury Park Press did not intend any reader to conclude that the referenced documents were financial statements and regrets any misunderstanding that may have occurred before the Asbury Park Press updated this story.

(Pa053). Holtec made Javerbaum aware of the Asbury Park Press's retraction, but Javerbaum refused to retract or revise its own article to, at a bare minimum,

remove any reference to "false financial statements". (Pa180 – Pa181). Until recently, Javerbaum also refused to remove the link to the retracted Asbury Park Press article and/or replace it with the updated article containing the Editor's Note. (Pa180 – Pa181).

C. Javerbaum's Defamatory Statements Caused Harm to Holtec

In the wake of Javerbaum's defamatory statements, Holtec was forced to dedicate significant time and resources explaining the falsity of Javerbaum's statements to Holtec's critical third-party relationships. (Pa179). Those third-party relationships included Holtec's primary bank, its insurance broker, state and federal government agencies, international regulators, and many clients. (Pa179). Worse yet, Javerbaum's defamatory statements jeopardized Holtec's $75 million two-year grant with a foreign government and risked Holtec's access to federal financing programs, including an approximate $1.5 billion loan from the Department of Energy. (Pa179). Javerbaum's defamatory statements also put Holtec at risk of losing certain federal government projects in California, New Mexico, and other states. (Pa179). Consequently, Holtec filed its Complaint against Javerbaum alleging defamation on July 5, 2024. (Pa175).

Since the filing of Holtec's Complaint for defamation, Javerbaum has retracted the article in question.

STANDARD OF REVIEW

A. The Summary Dismissal Order and Fee Award are Subject to *de novo* Review

This Court's review of the Trial Court's interpretation and application of NJ-UPEPA is *de novo*. *See Saccone v. Bd. of Trs. of Police & Firemen's Ret. Sys.*, 219 N.J. 369, 380 (2014) (noting that interpretation of statute is "question of law subject to de novo review" on appeal). In reviewing the Trial Court's legal determinations *de novo*, this Court affords no special deference to the courts' interpretation of the relevant statute(s). *Manalapan Realty, L.P., v. Twp. of Comm. of Manalapan*, 140 N.J. 366, 378 (1995).

When interpreting the meaning of a statute, a court must aim "to effectuate the Legislature's intent." *W.S. v. Hildreth*, 252 N.J. 506, 518-19 (2023) (citing G*illeran v. Twp. of Bloomfield*, 227 N.J. 159, 171 (2016)). The best evidence of such intent is the statutory language itself read in accordance with its "ordinary meaning and significance and . . . in context with related provisions so as to give sense to the legislation as a whole." *Sanjuan v. Sch. Dist. of W. N.Y.*, 256 N.J. 369, 378 (2024) (internal citations omitted).

B. The New Jersey Uniform Public Expression Act

In 2020, the Uniform Law Commission approved the "Uniform Public Expression Protection Act" ("UPEPA") as model legislation to promote uniformity in anti-SLAPP laws across states and prevent SLAPP motions from

becoming just as "abusive" as SLAPP suits themselves. (Pa101, Pa115 – 116). As noted by some commentators, "UPEPA is an amalgam of pre-existing state anti-SLAPP statutes that incorporates the beneficial aspects of the state statutes, such as anti-SLAPP motion exemptions, while excluding components of state statutes that have been detrimental to the litigants." (Pa116 – Pa117). Significantly, the model statute provides for a special motion to dismiss SLAPP suits, and an expedited hearing upon the filing of the special motion. However, in recognizing that anti-SLAPP protections may be abused, the model statutory scheme also shields three types of litigation from being dismissed – namely, suits against governmental units, employees, and/or agents, **and litigation arising from commercial speech**. (Pa117 – Pa118) (emphasis added).

New Jersey enacted its own version of UPEPA in 2023. (Pa096). In doing so, the New Jersey legislature adopted a near identical statutory scheme to the model UPEPA, which provides defendants in alleged SLAPP suits with an expedited hearing and dismissal process through an Order to Show Cause. *See* N.J. Stat. 2A:53A-51 ("Order, show cause). NJ-UPEPA expressly states:

> **b. Except as otherwise provided in subsection c.,** this act applies to a cause of action asserted in a civil action against a person based on the person's:
>
> (1) communication in a legislative, executive, judicial, administrative, or other governmental proceeding;

> (2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or
>
> (3) exercise of the right of freedom of speech or of the press, the right to assembly or petition, or the right of association, guaranteed by the United States Constitution or the New Jersey Constitution, **on a matter of public concern.**

See 2A:53A-50(b)(1)-(3) (emphasis added). Subsection c, however, adopts UPEPA's "exemptions," and mandates:

> **c. This act does not apply to a cause of action asserted:**
>
> (1) against a governmental unit or an employee or agent of a governmental unit acting or purporting to act in an official capacity;
>
> (2) by a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety; or
>
> (3) **against a person primarily engaged in the business of selling or leasing goods or services if the cause of action arises out of a communication related to the person's sale or lease of the goods or services**.

Id. at (c)(1)-(3) (emphasis added).

Additionally, NJ-UPEPA provides that a court "shall award court costs, reasonable attorney's fees, and reasonable litigation expenses related to the order to show cause" if the moving party prevails on the order to show cause. However, NJ-UPEPA also provides that if the responding party prevails, the

Court may award the responding party fees and costs *only if* the court finds that the order to show cause was filed frivolously or with intent to delay proceedings. *See* 2A:53A:58.

Importantly, the summary dismissal process under NJ-UPEPA requires a two-step analysis, wherein Courts must first decide whether the statute applies to the cause of action, and if it does, Courts must then consider whether:

(a) the responding party failed to establish a *prima facie* case as to each essential element of any cause of action in the complaint; or

(b) the moving party established that either the complaint fails to state a claim upon which relief can be granted, or that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Dismissal with prejudice under NJ-UPEPA's summary process is only appropriate where the Court determines that the statute applies, ***and*** the Court further determines that the plaintiff failed to set forth a prima facie case, failed to state a legally cognizable claim ***or*** the movant is entitled to judgment as a matter of law based on the undisputed facts.

In reviewing summary dismissals under NJ-UPEPA, appellate courts must first determine *de novo*, whether NJ-UPEPA applies. If, and only if, the appellate court determines that NJ-UPEPA applies to the cause of action, should

the appellate court then review, again *de novo*, whether the plaintiff advanced a *prima facie* case, whether the complaint states a cause of action upon which relief can be granted, or whether the movant established the right to judgment as a matter of law. *See* 2A:53A-55.

LEGAL ARGUMENT

POINT I
NJ-UPEPA DOES NOT APPLY TO JAVERBAUM'S KNOWINGLY FALSE AND DEFAMATORY COMMERCIAL SPEECH

(Raised Below – Pa191; 1T28 – 1T31, 1T40 – 1T41)

The Trial Court's Orders dismissing Holtec's Complaint and awarding fees to Javerbaum should be reversed and vacated because NJ-UPEPA does not protect Javerbaum's defamatory commercial speech.

As a threshold matter, it is Javerbaum's burden to demonstrate that its statements constitute a "matter of public concern" warranting invocation of NJ-UPEPA's summary dismissal provision(s). Javerbaum cannot (and did not) meet that burden, and the Trial Court's finding to the contrary was erroneous. *See* Point II infra. But even if Javerbaum could establish that its statements pertained to a matter of public concern, they would still fall outside the protections of NJ-UPEPA because they were related to Javerbaum's services as a law firm and were specifically intended to advertise those services. As set forth above, in the text of the statute, speech sufficiently implicating a matter of

public concern falls within NJ-UPEPA's scope – however, the protection afforded is not absolute. The statute clearly and unambiguously states:

> This act does not apply to a cause of action asserted . . . against a person primarily engaged in the business of selling or leasing goods or services if the cause of action arises out of communication related to the person's sale or lease of the goods or services.

See 2A:53A-50(3)(c)(3) (hereinafter referred to as the "commercial speech exemption"). Stated differently, statements may pertain to a matter of public concern, but still fall outside the protections of NJ-UPEPA if, despite touching on a matter of public concern, they were made by a person or entity (like Javerbaum)[3], primarily engaged in the selling of services (such as legal services)[4] and the statements relate to the sale of those services (such as advertising Javerbaum's representation, in a particular type of matter, against a large company).

When faced with statutory interpretation, the court's task is "to determine and effectuate the Legislature's intent." *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 553 (2009). "The Legislature's intent is the paramount goal when

[3] NJ-UPEPA defines "person" as "an individual, estate, trust, partnership, business or nonprofit entity, governmental unit, or other legal entity." *Id.* at (2)(a)(1).

[4] With respect to "goods or services", the statute only excludes "the creation, dissemination, exhibition, or advertisement or similar promotion of a dramatic, literary, musical, political, journalistic, or artistic work". *Id.* at (2)(a)(1).

interpreting a statute and . . . the best indicator of that intent is the statutory language." *DiProspero v. Penn*, 183 N.J. 477, 492 (2005). Thus, any analysis to determine legislative intent begins with the statute's plain language. *Id.* at 493. The plain language of the statute "must be construed in accordance with its ordinary and common-sense meaning." *Saccone v. Bd. of Trs. of the Police & Firemen's Ret. Sys.*, 219 N.J. 369, 380 (2014). If the plain language of the statute is clear and "susceptible to only one interpretation" the Court should apply that plain-language interpretation. *DiProspero*, 183 N.J. at 492.

In the proceeding below, Javerbaum conceded that the Complaint at issue is a cause of action against a "person . . .engaged in the business of selling goods or services". Nonetheless, Javerbaum maintained that the commercial speech exemption is inapplicable, because "the news item on Javerbaum's website had "nothing to do with Javerbaum's sale of goods or services" and there was – allegedly – no solicitation of business whatsoever. Such claims are both nonsensical and disingenuous, given that: (1) Javerbaum is a law firm primarily engaged in selling and/or providing legal services to clients; and (2) the defamatory statement forming the basis of Holtec's Complaint is that Mr. Bearden – a partner and attorney employed by Javerbaum – is providing legal representation (i.e., rendering services) to Holtec's former CFO in a "whistleblower" suit allegedly valued at millions. Indeed, Javerbaum cannot

credibly deny (and did not deny in the proceedings below) that but for its professional representation of O'Rourke, the statements regarding O'Rourke's suit against Holtec would not have been published on its "news" page – with the word "ADVERTISEMENT" – at all.

Moreover, the legislature's purposeful use of the word "relates" indicates that the defamatory statement(s) at issue need only have some connection to or reference Javerbaum's legal services. *See Feit v. Horizon Blue Cross & Blue Shield of N.J.*, 385 N.J. Super. 470, 483 (App. Div. 2006) ("The phrase 'relates to' should be given its broad common-sense meaning); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. __, 111 S.Ct. 478, 483 (1990) (noting that common sense meaning of "relate to" implies connection and/or reference to). Javerbaum's claim that the post has "nothing to do" with its legal services is without merit, given the post (and the defamatory statement at issue) expressly discuss Mr. Bearden's representation of O'Rourke.

Javerbaum also claimed that NJ-UPEPA must apply – despite the exemption's plain, unambiguous language – because to interpret the law otherwise would prohibit lawyers from ever having the protection of UPEPA while commenting on a case they filed. This sentiment was shared by the Trial Court, which rejected application of the commercial speech exemption by reasoning:

> I mean, there's language there about applying this broadly, which would mean that exceptions are to be applied narrowly, usually. I'm sure there's some Latin expression that memorializes that sentiment.
>
> But beyond that, if you're right, every law firm in the state of New Jersey should be changing their website practice this morning so as to not risk a litigant in one of the cases they're handling that's not their client filing a defamation lawsuit against them.
>
> I don't want to overstate my concern, **but I don't think the legislature meant that type of result.** I think what they were trying to do is to make sure that the type of activity on the boardwalk or one competitor of over loudspeakers calling their other competitor, you know, a crook and that type of thing, that that somehow -- that some trial judge doesn't pigeon-hole that into an anti-SLAPP statute, that type of thing.

(1T40 – 1T41).

However, New Jersey law has never recognized any public policy providing lawyers with absolute immunity from defamation claims – to the contrary, this Court has recognized that even lawyers may be liable when making false, defamatory statements. *See e.g.*, *Seidman & Pincus, LLC v. Abrahamsen*, 2018 N.J. Super. Unpub. LEXIS 2197 at *17 (N.J. Super. Oct. 4, 2018) (recognizing plaintiffs' "good faith basis" in bringing defamation claims against attorney defendants); *Russo v. Nagel*, 358 N.J. Super. 254 (App. Div. 2003) (evaluating whether attorney was liable for allegedly defamatory advertisement). In enacting NJ-UPEPA, the legislature did not expressly or

implicitly create a new privilege or safe harbor for "attorney speech" that does not already exist.

Instead, the statute expressly states that "[g]oods or services" – as used in the commercial speech exemption – does not include the creation, dissemination, exhibition, or advertisement or similar promotion of a dramatic, literary, musical, political, journalistic, or artistic work." *See* 2A:53A-50(2)(a)(1). It says nothing about a law firm's representation of its clients or statements the law firm may publish regarding its services. Javerbaum's post is, at bottom, commentary on its legal services in a single case – a category that is not excluded by the definition of goods and services. To find otherwise would require this Court to improperly read additional words into NJ-UPEPA that the Legislature did not include. *See State v. Smith*, 197 N.J. 325, 332 (2009) ("[C]ourts are not to read into a statute words that were not placed there by the Legislature."); *Paff v. Galloway Twp.*, 229 N.J. 340, 353 (2017) (holding that where specific definition is absent, court "must presume that the Legislature intended the words that it chose and the plain and ordinary meaning ascribed to those words.").

Consequently, a plain language reading of the commercial speech exemption – coupled with NJ-UPEPA's defined terms, indicates that Javerbaum may not use the statute as a mechanism for shielding itself from Holtec's

defamation claim. The Trial Court erred in failing to consider the statute's plain language, speculating as to the Legislature's intent, finding that the commercial speech exemption does not apply to the set of facts presented in this instance, and dismissing Holtec's Complaint – with prejudice – as a result.

POINT II
JAVERBAUM'S SPEECH DID NOT PERTAIN TO A MATTER OF PUBLIC CONCERN

(Raised Below – Pa191; 1T26 – 1T27)

Javerbaum's advertisement of its role in the O'Rourke case was not an exercise of free speech on a matter of public concern. It was an internet campaign designed to generate notoriety and business for Javerbaum by falsely sensationalizing the nature and significance of a case it brought against a large company with a recognizable name. As a result, the false statements within Javerbaum's advertisement are actionable, and the Trial Court's ruling to the contrary should be reversed.

As discussed more fully above, NJ-UPEPA was enacted to prevent suits filed solely to discourage legitimate and/or fair criticism of powerful entities and/or actors. The statute was not designed to prevent legitimate suits seeking redress for knowingly false statements published for personal gain. The Legislature's intent is evidenced by the express language of the statute, which states:

> **Except as otherwise provided in subsection c.,** this act applies to a cause of action asserted in a civil action against a person based on the person's:
>
> (1) communication in a legislative, executive, judicial, administrative, or other governmental proceeding;
>
> (2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or
>
> (3) exercise of the right of freedom of speech or of the press, the right to assembly or petition, or the right of association, guaranteed by the United States Constitution or the New Jersey Constitution, **on a matter of public concern**.

See N.J.S.A. 2A:53A-50(b) (emphasis added). Although NJ-UPEPA does not define "a matter of public concern", New Jersey courts have previously held that "[w]hen published by a media or media-related defendant, a news story concerning public health and safety, a highly regulated industry, or allegations of criminal or consumer fraud or a substantial regulatory violation will, by definition, involve a matter of public interest or concern." *Senna v. Florimont*, 196 N.J. 469, 496 (2008). "In all other media and non-media cases, a court should consider the content, form, and context of the speech." *Id*. at 497.

"Content requires that [courts] look at the nature and importance of the speech." *W.J.A. v. D.A.*, 210 N.J. 229, 244 (2012). For instance, in examining whether the content of speech constitutes a matter of public concern, New Jersey

courts may look to whether the speech at issue promotes self-government, advances the public's vital interests, or whether the speech "predominately relates to the economic interest of the speaker." *Id*. With respect to context, courts consider the identity of the speaker, the ability to exercise due care, and the targeted audience. *Id*.

The Supreme Court's decision in *Senna* is instructive for determining whether a private figure's defamation claim against a non-media defendant touches on a "matter of public concern" warranting First Amendment protection. There, the court examined two competing businesses on a boardwalk – one of whom broadcast over a public address system to customers that his competitor engaged in fraudulent practices. *Senna*, 196 N.J. at 431. Although the statements in question involved allegations of consumer fraud and were targeted towards the public, the Court set out a multi-factor test to determine whether the allegedly defamatory statements sufficiently implicated a matter of public concern. *Id.* at 493. In finding that the statements in question fell short, the Court noted:

> Discourse on political subjects and critiques of the government will always fall within the category of protected speech that implicates the actual-malice standard. Public policy and common sense also suggest that the same protections be given to speech concerning significant risks to public health and safety . . .

> Here, the identity of the speaker is an important factor. Defendant would have us conclude that whenever one business tars its competitor with the canard of consumer fraud, the accusation, even if false, involves a matter of public concern. However, this was not a case of disinterested investigative reporting by a newspaper, using a variety of sources, to demonstrate that customers were being defrauded by a service-oriented business . . .

Id. at 497, 499. In further noting that the speech at issue "was not more highly valued because [Defendants] charged a rival with consumer fraud rather than a peccadillo," *Senna* makes clear that accusations of fraud – without more – are insufficient to constitute matters of "public concern" warranting First Amendment protection.[5]

Shortly thereafter, the District Court of New Jersey examined *Senna*'s holding and agreed that under New Jersey law, both content and context must be considered when determining whether defamatory speech constitutes a matter of public concern. *See Prof'l Recovery Servs., Inc. v. Gen. Elec. Capital Corp.*, 642 F. Supp. 2d 391, 406 (D. N.J. 2009). In *General Electric*, the Court

[5] This Court also observed that "the public concern inquiry under the First Amendment is very similar to the whistleblowing inquiry under CEPA" in that the expression at issue must "add to the debate on matters of public importance," must have public ramifications, and cannot pertain to wholly "private grievances" in order to satisfy New Jersey's definition of a "matter of public concern". *See Russo v. City of Atl. City*, 2021 N.J. Super. Unpub. LEXIS 357 at *17, DOCKET NO. A-4024-18, (N.J. App. Div. Mar. 4, 2021).

examined a set of facts where an individual alleged that her former employer – a debt collector contracting with lenders and credit issuers – stole confidential information from its clients. *Id.* The Court acknowledged that the allegations of theft were of "great import" and involved the public's "vital interests". *Id.* at 407. Nonetheless, the allegations at issue did not constitute a matter of public concern where context indicated that "a reasonable jury could conclude that [defendant] was a disgruntled former employee with an ax to grind" rather than a disinterested third-party reporting on fraud. *Id.*

Following *General Electric*, the Supreme Court of New Jersey also relied on *Senna* in determining that a website the defendant created accusing the plaintiff of sexually abusing him as a child did not implicate a matter of public concern. *See W.J.A. v. D.A.*, 210 N.J. 229, 244 (2012). The Supreme Court acknowledged that the speech at issue accused plaintiff of "engaging in serious criminal conduct" – however, the Court reiterated that such an allegation, on its own, could not constitute a matter of public concern. *Id.* at 245. Further, defendant's publishing of the allegations "to the entire country" did not "necessarily make his allegations a matter of public interest" where his statements pertained – predominantly – to a private dispute between the parties. *Id.* at 246.

More recently, this Court reiterated *Senna*'s holding that "speech does not involve a matter of public interest merely because it concerns a highly regulated industry". *See Okeke v. Chinedu Sani Anekwe*, 2022 N.J. Super. Unpub. LEXIS 1262, at *20 (App. Div. July 12, 2022). In *Okeke*, the plaintiff – a public accountant – alleged that defendant posted false and defamatory statements regarding plaintiff's accounting practice on Facebook and Yelp and accused defendant of filing a false complaint with the Better Business Bureau (BBB) and Department of Consumer Affairs. *Id.* at *1, 6. In rejecting defendant's contention that his statements were a matter of public concern, this Court noted that defendant's statements predominantly pertained to a dispute between two private individuals. *Id.* at *21-22. Although defendant made statements about plaintiff's practice on public platforms, his status as a disgruntled former client further supported the Court's conclusion that the statements at issue were not made to advance any public interest. *Id.*

Despite all of the above, Javerbaum argued below that its statements regarding the O'Rourke Litigation constitute protected speech on a matter of public concern. (1T5, 1T34 – 1T35); N.J.S.A. 2A:53A-50(b)(3).[6] More

[6] Javerbaum did not argue (and the Trial Court did not find) that Sections 50(b)(1) or 50(b)(2) apply. As such, Holtec only addresses the Trial Court's error insofar it found NJ-UPEPA applicable under section 50(b)(3).

specifically, Javerbaum claimed that its statements warrant protection, because they involve "commentary" on a lawsuit pertaining to "New Jersey's law protecting whistleblowers" and "discussion of the use of the Courts to enforce that law". (Pa001). However, Javerbaum ignored the distinction *Senna* drew between media and non-media defendants. As discussed more fully above, content and context are both pivotal to determining whether a non-media defendant – like Javerbaum – made statements implicating public concern.

At the outset, Javerbaum's boilerplate claim that the "subject matter of this Complaint is indisputably a matter of public concern" was unsupported, given this Court has previously held that a CEPA allegation alone does not constitute a matter of public interest. *See Russo v. City of Atl. City*, 2021 N.J. Super. Unpub. LEXIS 357, at *17-18 (App. Div. Mar. 4, 2021); *Mehlman v. Mobil Oil Corp*., 153 N.J. 163, 188, 707 A.2d 1000 (1998) ("[T]he offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee.")

Additionally, Javerbaum failed to explain how statements regarding Mr. Bearden's legal representation of O'Rourke in a private dispute "promote[s] self-government or advance[s] the public interest". *W.J.A*, 210 N.J. at 244. Characterizing Javerbaum's post as a "discussion" on public policy is generous,

given there is virtually no exploration and/or examination of CEPA[7] – instead, the post predominantly concerns Mr. Bearden's representation of a disgruntled, former employee against his former employer. As in *Okeke*, the defamatory statements here do not cross the threshold of a "matter of public concern" where: (1) Javerbaum is "not akin to a disinterested reporter using a variety of sources" to demonstrate fraud affecting the public; and (2) the "whistleblower" allegations at issue – *even if construed as true* – are tangential to Javerbaum's legal representation in a private dispute that has no significant bearing on public health, safety, or well-being. As recognized by *Senna*, Javerbaum's allegations are not a matter of public concern simply because they contain baseless charges of financial fraud "rather than a peccadillo". The internal Holtec document to which O'Rourke refers in his complaint was never shared with the public; it was a draft internal document – prepared by a private corporation – regarding certain revenue projections.

Although the Trial Court noted *Senna*'s significance, its analysis of whether Javerbaum's statements sufficiently implicate a matter of "public concern" is limited to the following:

[7] Although Javerbaum uses the term "whistleblower" multiple times, the Conscientious Employee Protection Act (i.e., the law underpinning O'Rourke's suit) is never mentioned or discussed in Javerbaum's posts.

> But I just thought parenthetically, an argument was made that this is not a matter of public importance, that type of thing. I think it is. Holtec is a major – major company . . . But they're a big company. That's not meant pejoratively. They're in the business, I understand, of nuclear reactors, that type of thing. That's a significant thing. I think [it] is hard to argue that this is just a dust-up between two small competitors over who gets – you know, boardwalk business.

(1T26 – 1T27). However, *Senna* made clear that speech is not matter of public concern simply because it involves a business in a "highly regulated industry". *Senna,* 196 N.J. at 500. Nor has any New Jersey court ever held that the size of a corporation dictates whether any speech pertaining to it constitutes a matter of public concern.

To the contrary, *Senna* and *Okeke* make clear that the relevant inquiry is whether *the speech itself* constitutes a matter of public concern. In finding that Javerbaum's defamatory statements are a "matter of public concern" warranting application of NJ-UPEPA, the Trial Court failed to consider that: (1) the statement at issue pertains to Javerbaum's representation of a private individual (content); (2) the statement at issue pertains to a single, employment-related dispute and/or grievance (content); (3) the article – as a whole – does not reference CEPA or provide any meaningful discussion of same for the public's benefit (context); (4) the accusations of fraud are not legal claims in the O'Rourke Litigation, or any pending proceeding (context); and (4) the post was

published by an entity that is neither a media defendant, nor a "disinterested" third-party (context).

Simply put, the O'Rourke Litigation (and Javerbaum's statements regarding same) have nothing to do with Holtec's business in the nuclear industry, or any relationship between Holtec and the public. Instead, the post predominantly pertains to Javerbaum's representation of O'Rourke in a lawsuit valued at "millions" for its client. The Court erred in failing to properly consider content and context – as required by *Senna* – when holding that Javerbaum's defamatory statements are a "matter of public concern" shielded by NJ-UPEPA.

POINT III
HOLTEC PLED A LEGALLY VIABLE CLAIM OF DEFAMATION, ADDUCED PRIMA FACIE EVIDENCE OF EACH ELEMENT OF ITS CLAIM, AND JAVERBAUM DID NOT—AND CANNOT DEMONSTRATE THAT IT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

(Raised Below – Pa191; 1T7 – 1T8)

NJ-UPEPA's statutory framework requires reversal of the Trial Court's Orders unless this Court determines, *de novo*, that: (1) Javerbaum's speech pertained to a matter of public concern; ***and*** (2) Holtec failed to demonstrate that the commercial speech exemption applied; ***and*** (3) Holtec failed to plead a viable claim for defamation; ***or*** (4) Javerbaum can establish that it is entitled to judgment as a matter of law. As set forth above, Javerbaum's statements did not pertain to a matter of public concern, and Holtec did demonstrate that the

commercial speech exemption applies. But even if the opposite were true, NJ-UPEPA still requires reversal of the Trial Court's Orders, because Holtec pled a viable defamation claim, put forth *prima facie* evidence of every element of that claim, and Javerbaum made no showing that it would be entitled to judgment as a matter of law on that claim, absent the protections of NJ-UPEPA.

Under New Jersey law, defamation claims must satisfy three elements to survive a motion to dismiss. *G.D. v. Kenny*, 411 N.J. Super. 176, 186 (2009). Those elements are: (1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher. *Leang v. Jersey City Bd. of Educ.*, 198 N.J. 557, 585 (2009). With respect to the last element, false statements about public officials, public figures, and matters of public concern are not actionable unless they were made with actual malice. *Senna*, 196 N.J. at 498.

Where the subject speech "does not involve matters of public concern" courts apply a negligence standard. *Id*. at 491. This is so because "[s]peech that does not involve matters of public concern requires that greater weight be placed on an individual's interest in an unimpaired reputation." *Id*. Malice must be established by clear and convincing evidence, whereas negligence carries a preponderance of the evidence burden. *See Lynch v. N.J. Educ. Ass'n*, 161 N.J.

152, 169 (1999). Whether a statement is defamatory is a matter of law to be determined by the court. *Higgins v. Pascack Valley Hosp.*, 158 N.J. 404, 426 (1999).

In its Complaint, Holtec alleged that on or about July 24, 2023, Javerbaum published an article on its website, javerbaumwurgaft.com, about the suit between its client and Holtec. (Pa176). Included in that article was the knowingly false statement that "Mr. O'Rourke claims that Holtec terminated his employment after ***he resisted submitting false financial statements to a major investor***, an issue involving hundreds of millions of dollars." (Pa.176). Holtec's Complaint also alleged that Javerbaum's article referenced and linked to the Asbury Park Press's false statement, "Ex-Holtec CFO accuses the company of 'make believe' financial statements in whistleblower suit," even though Javerbaum knew that statement was false. (Pa176). Holtec further alleged that Javerbaum's article was then posted on Javerbaum's LinkedIn page, and the firm's Facebook.com page for a wide audience of third-parties to view. (Pa178). Holtec also alleged damage to its reputation as a result of Javerbaum's statements, and specific facts demonstrating the harm it suffered. (Pa178 – Pa179). Consequently, the Complaint indisputably sets forth sufficient facts demonstrating that Javerbaum made false statements about Holtec to the general public, and that Holtec suffered harm as a result of those statements.

Because Javerbaum's statements do not constitute a matter of public concern (for the reasons discussed more fully above), New Jersey law only requires Holtec to demonstrate that Javerbaum "acted negligently in failing to ascertain the truth" of its defamatory statements. 2022 N.J. Super. Unpub. LEXIS 1262, at *18. But even if that were not the case, Holtec's Complaint goes further and specifically alleges that as the drafter of O'Rourke's complaint, Javerbaum had actual knowledge that its statements, and the statements of the Asbury Park Press were false. (Pa176, Pa180).

Finally, Holtec alleged that despite being made aware on several occasions of the inaccuracies in its article, and the fact that the Asbury Park Press issued a retraction of its false statements, Javerbaum refused to take its article down and/or correct it up until the filing of Holtec's Complaint – i.e., Javerbaum intentionally refused to correct its statements for over a year. (Pa177). As the Trial Court noted:

> I don't think it's been poorly pled. There – as I understand it, the plaintiff is focusing on a website posting. The website posting indicates this O'Rourke lawsuit. There is this dust-up about whether it's a financial statement or prospectus. It's not – we'll get into that a bit. But I don't know what Holtec could have done to plead it better . . .
>
> But I don't see this as being a pleading problem. I see this being, frankly -- and we'll get to this. They don't have a case on the merits. It's not there. I could be wrong about that. But I don't see it as being a poorly

> pled complaint. I think it's a perfectly appropriate complaint.

(1T7 – 1T8). Despite acknowledging that Holtec pled a viable cause of action, the Trial Court's error here is two-fold.

First, the Trial Court erred in requiring Holtec to prove legal viability of its claim by demonstrating "actual malice" – as discussed more fully above, the Trial Court's conclusion that Javerbaum's speech constituted a "matter of public concern" is both unsupported and at odds with analytical framework set forth by *Senna* and its progeny. Where the defamatory speech at issue does not sufficiently implicate any significant public interest, the proper standard for evaluation of Holtec's claim is negligence. The record, however, is devoid of any consideration of same, despite Holtec's well-pled assertions that: (1) Javerbaum represents O'Rourke in the underlying litigation and is therefore familiar with the facts pled by its clients; and (2) despite being aware of the inaccuracies in its post, Javerbaum refused to retract its statement and/or make any edit until Holtec filed its defamation suit.

Second, the Trial Court erred by determining – as a matter of law – that Holtec could not prove that the statement at issue is false. In arguing the "Fair Report Privilege", Javerbaum claimed that its posts were "accurate and fair" because the post does not expressly accuse Holtec of "filing a false financial statement" and "later explain[s] that the financial statements at issue were

financial information that were to be provided to a potential investor in a prospectus". (Pa001). Javerbaum also claimed that its posts were "substantially true" because the term "financial statements" should be understood by its broad dictionary definition and "a reasonable reader" would not "reach for the definition of financial statement as defined by Generally Accepted Accounting Principles ("GAAP"). (Pa001). The Trial Court seemingly agreed, by finding that a "financial statement" could be any document containing "financial information":

> If I put on my legal pad, I have $500,000 in the bank, to me, that's a financial statement. It doesn't qualify as a financial statement under whatever federal agency audits or monitors -- or a CPA would not call it a financial statement. But it's a document that contains financial information. And I think that calling it a financial statement rather than a piece of paper that some guy wrote his life savings amount on is not going to transform it into defamation.

(1T18).

However, as pointed out by Holtec in the briefing below, the term "financial statement" is commonly used and understood as a term of art not only in the business world, but also in consumer transactions.[8] As at least one federal

[8] In issuing a retraction to its July 7, 2023 article, the Asbury Park Press clarified that O'Rourke's Complaint never referenced "financial statements" as defined by the United States Generally Accepted Accounting Principles and removed the term from the article. (Pa053). The Asbury Park's retraction is evidence that a

bankruptcy court has noted, "[t]he term is not vague . . . the term refers to documents . . . which contain information regarding assets and liabilities, and/or income and expenses and/or profit and loss." *Kriegman v. Alfarone (In re LLS Am., LLC)*, 2013 Bankr. LEXIS 1262, at *6-7 (Bankr. E.D. Wash. Mar. 28, 2013) (emphasis added); see also *Boyce v. Soundview Technologies Grp., Inc*., 464 F.3d 376, 386, n.7 (2d Cir. 2006) (noting that a financial statement includes a balance sheet, income statement, operating statement or profit and loss statement, cash flows, a statement of changes in retained earnings, and other analyses); *Financial Statement*, Black's Law Dictionary (10th ed.15 2014). The Third Circuit has also acknowledged that the term "financial statement" is far less broad than the term "financial condition". *See e.g., In re Feldman*, 500 B.R. 431, 437 (Bankr. E.D. Pa. 2013).

Moreover, Javerbaum's post did not "explain" or detail the specific materials and/or statements its client alleged were false and/or inaccurate in Holtec's proposal to a potential investor. Nor did the post include any information with respect to Holtec's defenses and/or counterclaims. Instead, the post summarily stated that Holtec was being accused – by its former Chief Operating Officer – of intending to submit "false financial statements to a major

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reasonable fact finder could find that Javerbaum's statements were false and misleading.

investor" and quoted another article's headline: "Ex-Holtec CFO accuses the company of 'make believe' financial statements in whistleblower suit" for added color and context. Reading Javerbaum's statements "as a whole," the post contains one basic and defamatory indictment – that Holtec's former Chief Financial Officer was terminated after accusing Holtec of submitting false balance sheet(s), income statement(s), operating statement(s), profit and loss statement(s), cash flows, a statement(s) of changes in retained earnings, and/or other analyses to a "major investor." The defamatory statements at issue cannot be considered accurate nor fair, where O'Rourke's Complaint does not include any of the above.

As a result, a reasonable fact-finder could conclude that Javerbaum "reported" (implicitly and explicitly) that Holtec fired its Chief Financial Officer for refusing to assist in committing serious financial crimes. That assertion of fact amounts to defamation, where: (1) there is no evidence of Holtec's commission of any financial crimes; and (2) there is no evidence – on the record, or otherwise – of O'Rourke having accused Holtec of attempting to commit financial crimes by submitting false or "make believe" financial statements. As such, the Trial Court erred in finding – as a matter of law – that despite Holtec's well pled allegations, it could not state a legally viable cause of action.

CONCLUSION

For the foregoing reasons, Holtec respectfully requests that this Court reverse the Trial Court's Order granting Javerbaum's application to dismiss Holtec's Complaint with prejudice pursuant to NJ-UPEPA. Holtec further requests that this Court vacate the October 24, 2024, Order awarding Javerbaum statutory attorneys' fees and grant all further relief, at law or in equity, to which Holtec may be entitled.

Respectfully Submitted,

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Date: February 20, 2025

HOLTEC INTERNATIONAL Plaintiff/Appellant, v. JAVERBAUM WURGAFT HICKS KAHN WIKSTROM & SININS, P.C., Defendant/Respondent.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO.: A-000830-24** **ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY** **SAT BELOW:** **HON. MICHAEL J. KASSELL, J.S.C.** **DOCKET NO.: CAM-L-002069-24**

BRIEF FOR DEFENDANT/RESPONDENT JAVERBAUM WURGAFT HICKS KAHN WIKSTROM & SININS, P.C.

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Dated: March 26, 2025

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PRELIMINARY STATEMENT

Plaintiff Holtec International Corporation ("Holtec" or "Plaintiff") filed a retaliatory defamation Complaint seeking to silence Defendant Javerbaum, Wurgaft Hicks Kahn Wikstrom & Sinins, P.C. ("Javerbaum") after the law firm publicized the filing of a whistleblower lawsuit against Holtec on behalf of its fired CFO, Kevin O'Rourke ("the O'Rourke Complaint"). The firm's four-paragraph news item on its website and social media was not only a non-actionable fair report of its whistleblower filing but included a link to a news article which identically described the O'Rourke Complaint.

The trial court correctly found that Holtec's defamation Complaint against Javerbaum involved matters of public concern and failed to set forth a *prima facie* case for defamation. As a result, the trial court ruled the Complaint was a Strategic Lawsuit Against Public Participation ("SLAPP") and dismissed it with prejudice pursuant to the Uniform Public Expression Protection Act ("UPEPA" or "anti-SLAPP law"), awarding Javerbaum appropriate legal fees.

Holtec now appeals, incredibly arguing that UPEPA does not apply to any speech by lawyers under the statute's commercial exception, and that even if it did, the speech - devoid of any solicitation -- was not a matter of public concern. Finally, Holtec desperately argues that it had pleaded a viable claim of defamation.

UPEPA requires that the statute should be read broadly. Precedent demands that exceptions be interpreted narrowly -- with Holtec bearing the burden of proving that any exception applies. Contrary to that law, Holtec takes the opposite tack. Its (1) broad interpretation of UPEPA's commercial exception and (2) its attenuated view of what constitutes a matter of public concern should be rejected by this Court. These meritless positions indeed demonstrate exactly why the anti-SLAPP law exists.

Holtec's baseless defamation claim is the strongest evidence that this defamation lawsuit is a SLAPP suit. Javerbaum's posts make clear that "the [O'Rourke] lawsuit claims Holtec terminated Mr. O'Rourke when he objected to including **false information in a prospectus intended for [an investor]**" (emphasis added). That statement is true and Holtec does not dispute it.

Yet Holtec engages in semantic gamesmanship in its attempt to claim falsity. Holtec cites to another passage in the same short post in which Javerbaum says the complaint says O'Rourke was terminated "after he resisted submitting false financial statements to a major investor." Holtec claims the term "financial statements" was never used in the complaint and is an accounting term of art that implies Holtec had committed "serious financial crimes." Even if, arguendo, the terms are not completely synonymous (which they are), it does not really matter whether the O'Rourke Complaint claims he "resisted

submitting false financial statements" or "objected to including false information in a prospectus," because the "gist" or "sting" of these allegations is the same to a reasonable reader and provides no basis for defamation as a matter of law. Therefore, the trial court correctly determined that a reasonable reader would not interpret the use of the words "financial statement" as defamatory.

In so ruling, the trial court never reached two equally strong arguments raised by Javerbaum, first that the Complaint, raising a matter of public concern, fails to plead a factual basis for actual malice as required by this Court, and second, that the posts were absolutely protected under the fair-report privilege -- where so long as a publisher accurately reports the contents of a public filing, it is immune from a defamation suit. In fact, the O'Rouke Complaint contains far more startling and compelling allegations than the posts detailing O'Rouke's unambiguous warnings to Holtec officials that submitting false and misleading information in the proposed prospectus could be illegal.

Therefore, for the reasons that follow, this Court should affirm the trial Court's dismissal of this SLAPP suit and order that legal fees be awarded for defending this appeal.

PROCEDURAL HISTORY

Javerbaum adopts the procedural history as set forth by Plaintiff.

STANDARD OF REVIEW

Javerbaum agrees that this Court's review of the decision below is *de novo*.

COUNTERSTATEMENT OF FACTS

1. The Underlying O'Rourke Complaint

On June 1, 2023, Defendant Javerbaum filed a Complaint on behalf of its client, Kevin O'Rourke against Holtec and its President and CEO Krishna Singh, alleging whistleblower allegations under CEPA. Pa011.

The Complaint alleges that while O'Rourke was CFO for Holtec, Defendant Singh sent O'Rourke a draft of an investment prospectus that included financial projections to be sent to a prospective investor, Hyundai Engineering and Construction. Pa013 at ¶10. Among other warnings, O'Rourke responded to his immediate superior by stating that:

> they need to discuss the Prospectus because the financial projections could not possibly be completed accurately in the timeframe demanded by Defendant Singh, the document included numerous false and misleading statements, and **legally the document could not contain "make believe" or unsupported financial projections.**

Id. at ¶15. (emphasis added). O'Rourke also sent his superiors details about statements he thought were materially false or misleading. Id. at ¶17. Among the statements O'Rouke believed to be false in the draft prospectus were that:

- Holtec was not in violation of a debt covenant, despite a contrary statement. Pa014 at ¶ 21a.
- Defendants never had long term debt. Id. at ¶ 21b.
- Not more than 10 percent of Holtec's income was from a single customer. Id. at ¶ 21c.
- That an estimate of the value of certain software "was both arbitrary and grossly exaggerated and that in his opinion the software had a market value of nearly zero dollars. Id. at ¶ 21d.
- That the Prospectus grossly overvalued Holtec's manufacturing facilities. Id. at ¶ 21e.
- That the Prospectus grossly overstated the amount of money spent on research and development. Id. at ¶21f.
- That a statement claiming Holtec self-financed a $300 million manufacturing facility was misleading because Holtec raised the money by selling state tax credits. Id. at ¶21g.
- That the entirety of part two of the Prospectus contained financial projections that were materially false and/or were unattainable and unrealistic. Id. at ¶21h.
- That for one project, Holtec's internal projections showed a $150 million loss over five years while Singh wanted the Prospectus to say that the project would break even during that time. Pa015 at ¶¶ 22-24.
- That a business venture that was not finished would have projected sales of $ 100 million within five years when there was no factual basis for that projection. Id. at ¶¶ 25-27.

The O'Rourke Complaint then alleges that CEO Singh minimized O'Rourke's concerns to his face, id., and then dismissed him from further involvement in the prospectus. Pa016 at ¶¶ 32-33. Nevertheless, the Complaint alleges that O'Rourke was brought back to help, id., and the following day, he

again wrote his supervisors, informing them "that submitting the Prospectus as currently drafted could violate the law" because it contained false information about the company, id. at ¶¶ 38-39, and that "numerous statements in the prospectus were false and misleading and that there was a high likelihood that the financial projections included in the prospectus were materially inaccurate." Pa017 at ¶ 42. Thus, O'Rourke raised serious concerns about financial information that Holtec was planning to provide to a major investor. Shortly thereafter, O'Rourke was fired. Id. at ¶ 52.

2. The *Asbury Park Press* News Stories

On July 7, 2023, more than a month after the O'Rourke Complaint was filed, the *Asbury Park Press* ("the *Press*") published a news story headlined "Ex-Holtec CFO accused company of 'make believe' financial statements in whistleblower suit." Pa026-31. On July 10 and 13, 2023, the *Press* published the identical online news stories with a new headline, "Holtec accused of false financial statement in whistleblower suit." Pa033-39. At some point in July 2023, "Yahoo! News" republished the original July 7 *Press* news story with its identical headline, "Ex-Holtec CFO accused company of 'make believe' financial statements in whistleblower suit." Pa040-44. All four of the news stories contain the same paragraph:

> O'Rourke's lawsuit alleges that Holtec officials – including company founder, president and CEO Krishna Singh –

> prepared to present Hyundai with an investment prospectus that **included "numerous false and misleading statements … (and) 'make believe' and unsupported financial projections" in August 2022**. (emphasis added)

These news reports included other serious allegations against Holtec cited in O'Rourke Complaint, including that errors, as well as "materially false or fraudulent data," were contained within this financial document and that the financial projections within it were either materially false or "completely unattainable and unrealistic" and that O'Rourke told his superiors that what they planned to file "could violate the law" because it contained false information about the company.

3. The Javerbaum Posts

The instant Complaint alleges that on or about July 24, 2023, Javerbaum published a news item about the O'Rourke Complaint on the "Our News" section of its website, javerbaumwurgaft.com, Pa176 at ¶¶ 9-10 (text on Pa50), on its LinkedIn page, Pa177 at ¶15 (text on Pa51) and on its Facebook.com page Id. at 16 (text on Pa52) (collectively, the "Posts" or "Javerbaum Posts"). The Posts read identically as follows:

> **Javerbaum Wurgaft Files Whistleblower Lawsuit Against Holtec International on Behalf of Former CFO**
> 7.24.23
>
> Javerbaum Wurgaft partner Drake P. Bearden Jr. has filed a lawsuit against Holtec International Corporation (HIC) and Holtec International Power Division (HIPD) on behalf of

> Kevin O'Rourke, former Chief Financial Officer of HIC. Mr. O'Rourke claims that Holtec terminated his employment after he resisted submitting false financial statements to a major investor, an issue involving hundreds of millions of dollars.
>
> Recently the case was highlighted in an article entitled "Ex-Holtec CFO accuses the company of 'make believe' financial statements in whistleblower suit," published on Yahoo.com (link)
>
> The lawsuit claims that Holtec terminated Mr. O'Rourke when he objected to including false information in a prospectus intended for Hyundai Engineering and Construction,
>
> "As a whistleblower, Mr. O'Rourke bravely spoke out against the misconduct at Holtec. Whistleblowers should be protected for their commitment to integrity," said Bearden. "The upcoming court proceedings will provide a platform to examine the facts and determine Holtec International Corp.'s level of responsibility and accountability.

Pa050-052.

4. The *Asbury Park Press* Clarification

On or about August 8, 2023, approximately two weeks after the Javerbaum Posts appeared, the *Press* clarified its headline and the news story's lead, after apparent pressure from Holtec.[1] Pa054-57. The editor's note preceding the revised news story said that:

> A term used in the headline and in this story's lead has been replaced with terms that make it clear to readers that the

[1] The revised *Press* news story also includes a statement provided by Holtec the week of August 8, 2023 in place of a previous notation that a spokesperson for Holtec could not be reached for comment.

> documents Kevin O'Rourke claims were false and misleading were not Holtec's "financial statements" as defined by United States Generally Accepted Accounting Principles. The Complaint does not reference these statements, which are subject to audit, and the CFO would have already agreed to them. The *Asbury Park Press* did not intend any reader to conclude that the referenced documents were financial statements and regrets any misunderstanding that may have occurred before the *Asbury Park Press* updated this story.

Pa054

5. Holtec's Defamation Counterclaim Against O'Rourke

Holtec reacted to the O'Rourke Complaint by counterclaiming against O'Rourke for breach of contract and tortious interference based upon O'Rourke's failure to file his allegations involving confidential information under seal. Pa046-48, 059. Holtec later attempted to amend its Counterclaim to add defamation claims against O'Rourke (1) for Javerbaum's posting of the allegedly defamatory news article concerning the O'Rourke Complaint and (2) for purportedly "upon information and belief" having "defamatory statements from the Complaint repeated and published outside of the proceeding." Pa065 at ¶40.

The Court in the O'Rourke matter struck all references to Javerbaum's Posts from the proposed counterclaim and allowed only that the claim that O'Rourke shared unspecified defamatory statements to move forward. Pa049.

6. The Instant Complaint

Unable to sue O'Rourke over Javerbaum's Posts in the O'Rourke Litigation, Holtec filed the instant one-count defamation Complaint against Javerbaum itself on July 5, 2024.

The Complaint alleges three defamatory statements:

- Statements referencing Holtec's "financial statements," being make believe," an allegation that is not contained in the O'Rourke Complaint. Pa178 at ¶29a.[2]
- Statements saying that O'Rourke was terminated for resisting submitting "false financial statements," an allegation not contained in the O'Rourke Complaint. Id. at ¶29b.
- Statements linking to the *Press* article that contained similar defamatory statements that has since been retracted and revised, without changing the link to the revised or retracted article. Id. at ¶¶29c., 45

The Complaint does not specifically state why use of the phrase "financial statements" is defamatory or how a prospectus is somehow not a financial statement or document.

7. The Trial Court Decision

The trial court declared that the matter was of public importance eligible for the anti-SLAPP law because Holtec was a major corporation in the business

[2] As stated above, the "make believe" reference, part of the *Press* headline, was a reference to O'Rourke's warning, included in the Complaint, that the document could not contain "make believe" or unsupported financial projections.

of nuclear reactors and was not in any way a competitor of Javerbaum. 1T26-27. The court referred to Holtec's view of what constituted commercial speech as "expansive," and said, "[I]f you're right …no law firm could ever put [materials referring to] their present cases on their website…" 1T31:1-9. The Court also dismissed Holtec's argument that describing the O'Rouke Complaint's allegations as instructing O'Rourke to file a "false financial statement" is no more serious than providing false information in an investment prospectus, both of which he said were crimes or serious civil violations. (1T18-22)

> I don't think that I need to look at this with green eyeshades to determine whether or not the exact phraseology used in the posting comports with the exact same terminology that the SEC uses, that type of thing.
>
> I think, quite the contrary, the average person looking at the post, they would understand that financial statements is being used in a far broader context rather than a very, very narrow context.

1T23:2-11 The Court then dismissed the matter with prejudice under the anti-SLAPP law and held a separate hearing on the award of legal fees.

ARGUMENT

The Anti-SLAPP law, adopted from the Uniform Public Expression Protection Act (approved by the Uniform Law Commission in 2020), provides

at N.J.S.A. 2A:53A-50(2)(b) (Scope) that it applies to a cause of action asserted in a civil action against a person[3] based on the person's:

> (2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative or other governmental proceeding, or
>
> (3) exercise of the right of freedom of speech . . . guaranteed by the United States Constitution or the New Jersey Constitution, on a matter of public concern.

Once an Order to Show Cause (N.J.S.A. 2A:53A-51) is filed, the movant can request a stay of all discovery, (N.J.S.A. 2A:53A-52(4)), which is presumptive, (id. at (4)(a)(3), and a hearing shall be held "as expeditiously as possible" (N.J.S.A. 53A-53(a)). In ruling on the Order to Show Cause, the Court may consider the pleadings, the order to show cause application and supporting certifications, briefs, any reply or response to the order to show cause, and any evidence that could be considered in ruling on a motion for summary judgment. (N.J.S.A. 2A:53A-54).

Next, the Court "shall dismiss with prejudice a cause of action, or part of a cause of action if":

(1) The moving party establishes under subsection b that the Act applies. (STEP ONE)
(2) The responding party fails to establish the Act does not apply, and (STEP TWO)

[3] "Person" is defined in N.J.S.A. 2A:53A-50(a)(3) as "an individual, estate, trust, partnership, business or non-profit entity, governmental unit, or other legal entity."

(3) either

(a) the responding party fails to establish a *prima facie* case as to each essential element of any cause of action in the complaint.

(b) The moving party establishes that:

(i) The responding party failed to state a cause of action upon which relief can be granted; or

(ii) There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

N.J.S.A. 2A:53-55(a).

Other provisions include an appeal as of right (N.J.S.A 2A:53A-57) and that reasonable attorney's fees and costs shall be awarded to a prevailing moving party (N.J.S.A. 2A:53A-58). Importantly, the act provides that it shall be broadly construed and applied to protect the "exercise of the right of freedom of speech . . . guaranteed by the United States Constitution or the New Jersey Constitution." N.J.S.A. 2A:53A-59. The Act was effective as of October 7, 2023.

I. STEP ONE: THE SPEECH AT ISSUE IS PROTECTED UNDER THE UPEPA

A. The Speech at Issue Is a Matter of Public Concern

Holtec's stilted view of what constitutes a matter of public concern has no basis in law or fact. Holtec claims, for example, that public concern should be judged by the publisher's motive and/or whether the speech was "falsely

sensationalized," in this case "against a company with a recognizable name." (Pb19).

As applied to this matter, UPEPA applies to either "communications on an issue under consideration or review in a legislative, executive, judicial, administrative or other governmental proceeding," N.J.S.A. 2A:53A-50(b)(2), or to "the exercise of the right of free speech . . . guaranteed by the United States Constitution or the New Jersey Constitution, on a matter of public concern." N.J.S.A. 2A:53A-50 (b)(3). The Act also requires that it "shall be broadly construed and applied to protect the exercise of the right of freedom of speech and of the press, the right to assembly and petition, and the right of association, guaranteed by the United State Constitution or the New Jersey Constitution." N.J.S.A. 2A:53A-59.

The subject matter of this Complaint is indisputably a commentary concerning a filed Superior Court lawsuit alleging violation of a state law protecting whistleblowers, an important public policy, against one of Camden County's largest employers. It is therefore, on its face, a communication "on an issue under consideration or review in a . . .judicial . . .proceeding," and within the scope of the law.[4]

[4] To the extent Plaintiff objects to Defendant raising this provision on appeal (as suggested at Pb24 n.5), it should be permitted because this appeal is a first interpretation of a new statute that is of great public importance or interest, the issue

Moreover, it is an exercise of freedom of speech on a matter of public concern: a lawsuit against a public company accused of violating a statute meant to "protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." Lippman v. Ethicon, Inc., 222 N.J. 362, 378 (2015) (citation omitted). The public importance of access to information from Court proceedings is manifest. See e.g. Richmond Newspapers, Inc. v. Va., 448 U.S. 555, 575 (1980) (access to the courts advances the First Amendment's "core purpose of assuring freedom of communication on matters relating to the functioning of government"); Hammock by Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356, 375 (1995) ("There is a presumption of public access to documents and materials filed with a court in connection with civil litigation.").

Our Supreme Court's previous determinations as to whether a "matter of public concern" exists comes in the context of whether the actual malice standard is to be applied in a defamation suit involving matters of public concern. While the First Amendment itself requires that public officials and other public figures plead and prove actual malice, *i.e.*, that the statements at

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is a legal one presented for *de novo* review based on a complete record and Plaintiff may respond in its reply brief. See, Pannucci v. Edgewood Park Senior Hous. - Phase 1, LLC, 465 N.J. Super. 403, 410 (App. Div. 2020).

issue were made with knowledge of falsity or with reckless disregard for the truth, as an element of any defamation claim. See e.g., New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964)[5] and Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967), New Jersey expanded the actual malice requirement through its "fair comment" privilege to incorporate all matters of public concern. Senna v. Florimont, 196 N.J. 469, 496-97 (2008). See also, Durando v. Nutley Sun, 209 N.J. 235, 250 (2012) ("Today, in New Jersey the actual-malice standard protects both media and non-media defendants who make statements involving matters of public concern, regardless of whether the targets of the statements are public figures or private persons.")

While the media is presumptively entitled to the privilege under Senna, this additional protection can and is applied to non-media speech under a specific test:

> To determine whether speech involves a matter of public concern or interest that will trigger the actual-malice standard, a court should consider the content, form, and context of the speech. See Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 761–62 (1985) (opinion of Powell, J.). Content requires that we look at the nature and importance of the speech. For instance, does the speech in question promote self-government or advance the public's vital interests, or does it predominantly relate to the economic interests of the speaker? Context requires that we look at the

[5] Note that Sullivan involved a defamation suit concerning an advertisement regarding a matter of public concern that solicited funds along with public support.

> identity of the speaker, his ability to exercise due care, and the identity of the targeted audience.

Senna, 196 N.J. at 496-97. Since Senna was decided, the U.S. Supreme Court in Snyder v. Phelps, 562 U.S. 443, 453 (2011) further broadened the federal constitutional definition of a matter of public concern beyond Dun & Bradstreet, concluding that speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," Id. (citation omitted), or when it "is a subject of legitimate news interest; that is, "a subject of general interest and of value and concern to the public." (citations omitted).

The Uniform Law Commissioners' UPEPA commentary confirms the proposed law's adoption of both the Dun & Bradstreet "content, form and context" formula for determining a matter of public concern (as adopted by our Supreme Court in Senna) as well as Snyder's broader standard where speech that is "fairly considered as **relating to** any matter of political, social or other concern to the community" should be demarked as a matter of public concern. See Comment 9 to Section 2 (Scope), Uniform Public Expression Protection Act (UPEPA), National Conference of Commissioners on Uniform State Laws (2020). https://www.uniformlaws.org/viewdocument/finalact110?CommunityKey=4f486460-199c-49d7-9fac 05570be1e7b1&tab=librarydocuments (emphasis added).

Senna makes clear that even commercial speech not involving direct competitors could be a matter of public concern requiring the actual malice standard. Senna was a defamation case involving two competing games of chance on the Wildwood boardwalk. Id. at 474-75. While the defendant there urged that Plaintiff be required to plead and prove actual malice because boardwalk games are a highly regulated industry pursuant to Sisler v. Gannett, 104 N.J. 256 (1986), the Senna Court balked and refused to apply the standard because the parties were competitors and did not deserve actual malice protection. The Court said that:

> when a business owner maligns his competitor in the marketplace for apparent economic gain, it is difficult to reach the conclusion that such commercially disparaging expressions are at the heart of free speech values or implicate any of the concerns that animated the *New York Times* decision. There seems to be no sound reason why, under our common law, a business should not be expected to exercise due care in speech that may affect the economic well-being of a competitor.

Id. at 495-96. However, Holtec and Javerbaum are neither in the same business nor competitors. Moreover, the Senna Court did not create a categorical approach to any speech other than direct competitors. Instead, it required an examination of the content, form and context of the speech in question for all speech other than media reports and discourse on governmental issues.

The Court recognized there are other forms of commercial speech for which the actual malice standard should apply depending on the content, form and context of the statements at issue. The content form and context of the Javerbaum Posts are just such speech.

First, one of the four paragraphs of the Javerbaum Posts that Holtec complains of is the republished headline from, and link to, a news article in the *Press*/Yahoo.com and therefore under Senna, presumptively a matter of public concern.

Second, the Court need look no further than the Complaint's own recitation of Holtec's connections to governments around the world (it has a major presence in Camden, N.J.) and the United States to see the public concern that its actions engender. See Pa179 at ¶¶ 34-35 (referring, among other things, to potential lost multi-million-dollar contracts with foreign governments, a $1.5 billion loan from the federal Department of Energy and projects involving several state governments). Those facts alone reflect that the Javerbaum Posts involved speech about the functioning of government and describing a lawsuit critical of a company intertwined with state and federal governments that certainly "advance[s] the public's vital interests." In the same vein, the link to the *Press*/Yahoo.com article linked in Javerbaum's Posts describes Holtec's disputes with New Jersey over tax credits.

"[U]nquestionably, attorney speech about what is pending or occurring in court is political speech." Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 863 (1998). Any regulation of this speech should require strict scrutiny. Id. Chemerinsky points out that it is important for attorneys who zealously represent their clients to make statements (within Court rules) because doing so helps defend their clients' reputations; helps gather crucial evidence, such as others coming forward to support the allegations in a civil complaint; and brings abuses of the law to light. Id. at 867-71. "Attorney speech often serves to advance the interests of the client and the interests of society. The former explains why attorney speech, at times, is part of the duty of zealous representation. The latter helps to explain why attorney speech is protected by the First Amendment." Id. at 871.

Even if Javerbaum were an interested party in that it filed the O'Rourke Complaint and wrote about it, the content, form and context of what was presented – including citation to a disinterested source – created nothing more than a factual description – a fair report -- of that lawsuit. See Section II.D infra. Ironically, one of Holtec's primary concerns appears to be that Javerbaum did not update the link to the Yahoo.com story after the *Press* ran a clarification, a claim with no cause of action. See Section II.F infra. Therefore, an evaluation

of the content, form, and context of the speech at issue demonstrates that the subject matter of Javerbaum's Post is a news report of the filing of the O'Rouke Complaint, which is a matter of public concern, deserving the heightened protection of UPEPA.

B. Holtec's other arguments do not change the content, form and context of the Posts

Holtec claims that the Javerbaum Posts are not matters of public concern by arguing that the Posts are attorney advertising merely because Javerbaum includes a series of generalized disclaimers on its web pages – despite the fact that the disclaimer was present in only one of three places the Posts appeared. As explained above, even if the Javerbaum Posts were attorney advertising, it does not mean that such statements cannot somehow erase UPEPA protections for posting a narrative and linked reference to a published news article on a matter of concern. Holtec does not, and cannot, offer any argument as to how Javerbaum's disclaimer predominates over the content, form and context of the Posts.

Holtec's citation to W.J.A. v. DA, 210 N.J. 229 (2012) is also misleading. In that case, a nephew alleged that he was sexually abused long ago by an uncle and created a website directed at the uncle's past activities. The Court ruled that despite some references to sexual abuse in general, the defendant's website was based on the defendant's personal feelings about alleged errors that occurred at

a long-past trial which absolved the uncle and thus not a matter of public concern. Id. at 245-46.

Holtec claims the Javerbaum Posts do not relate to a matter of public concern because they involve "a private dispute," there is "virtually no exploration and/or examination of CEPA," the post "predominantly concerns Mr. Bearden's representation of a disgruntled former employee against his former employer," and the document referred to the O'Rourke lawsuit "was never shared with the public." Pb25-26. The absurdity of this argument is all too clear. Unlike W.J.A., the Javerbaum Posts involve only the allegations contained in a newly-filed lawsuit against a company that involves a matter of public concern, and which included a media report of that filing. The Posts explain the attempted enforcement of the whistleblower statute.

If Holtec's proposition were to be accepted, then no lawsuit involving confidential documents – not the Pentagon Papers nor the infamous Monsanto Papers, nor the tobacco industry's internal documents revealing their knowledge of its dangers, nor any trade secrets case could be a matter of public concern. Holtec's arguments address factors that are irrelevant to determining whether the Posts are a matter of public concern.

C. The "Commercial Speech" Exception to UPEPA Does Not Apply

Holtec misreads UPEPA to exempt categorically either any commercial speech, or any speech by lawyers or law firms, from the law's protections. Pb at 14. In fact, New Jersey's UPEPA reads:

> (c)This act does not apply to a cause of action asserted:
>
> […]
>
> (3) against a person primarily engaged in the business of selling or leasing goods or services if the cause of action arises out of a communication related to the person's sale or lease of the goods or services.

N.J.S.A. 2A:53A-50.

There are two parts to this exception. First, if the cause of action is asserted against a "person primarily engaged in the business of selling or leasing goods or services," that on its face would apply to every businessperson and every service provider. However, the second part significantly constricts the exception by adding: "if the cause of action arises out of a communication related to the person's sale or lease of the goods or services."

There is no dispute that Javerbaum is in the business of selling its services. However, the Posts in question, which are essentially a fair report of the underlying O'Rourke Complaint and link to the *Press* article, are not related to Javerbaum's sale of those services.

The Post's four paragraphs published on three different sites – two on social media and one on Javerbaum's own website – can be summarized as follows:

- The headline simply says that Javerbaum filed a whistleblower lawsuit against Holtec's former CFO.
- Paragraph one identifies the fact that Javerbaum partner Drake P. Bearden Jr. filed a whistleblower lawsuit against Holtec on behalf of its client, Kevin O'Rouke, Holtec's former CFO.
- Paragraph two includes a link to the *Press* article as republished on Yahoo.com with the Yahoo.com headline.
- Paragraphs one and three explain the substance of the complaint.
- Paragraph four is a quote from Mr. Bearden discussing the law that protects whistleblowers and the process by which the case will be determined.

There is no solicitation whatsoever; simply a description of litigation filed by the firm and how the filing of the litigation was covered by the media. In fact, the very statements published in the *Press* (and republished on Yahoo.com) are at the heart of Holtec's Complaint. The Post does not, for example, explain where Mr. Bearden or the law firm can be contacted if readers want to file a similar lawsuit, nor does it compare its products to competitors, nor does it in any way talk to readers about other firm services. It is not related to the sale of its legal services to O'Rourke, but to the filing of a lawsuit on his behalf involving an important state law. It simply emphasizes – without any adulteration—a report in the media based upon information in a public filing.

UPEPA was never meant to exempt all speech by sellers, just commercial speech made in direct advertising of its goods or services. The commentary to the uniform law explains the difference:

> If a mattress store is sued for false statements made in the advertising of mattresses – whether by an aggrieved customer or a competitor – the mattress store would not be able to avail itself of the Act. But if the same mattress store were sued for tortious interference for organizing a petition campaign to oppose the building of a new school, its activity would not be related to the sale or leave of goods or services, and it could use the Act for protection of its First Amendment conduct.
>
> Comment 13 to Section 2 (Scope), Uniform Public Expression Protection Act (UPEPA), National Conference of Commissioners on Uniform State Laws (2020). https://www.uniformlaws.org/viewdocument/final-act-110?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1&tab=librarydocuments

Here, Javerbaum is being sued not because it was advertising its services, but because it had publicized the fact that it had filed a whistleblower lawsuit against Holtec.[6] In Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 265 (1998), our Supreme Court, relying on U.S. Supreme Court precedent, interpreted commercial speech in much the same way, as "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980). It is

[6] The posting of firm achievements or recent filings is ubiquitous among medium and larger-sized law firms, as demonstrated by the website of counsel for Holtec: https://www.whiteandwilliams.com/experience-archive.

"speech proposing a commercial transaction." Id. at 562 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)). In Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, (1983), the Supreme Court explained that informational pamphlets about contraceptives that were mailed to households could not be characterized merely as proposals to engage in commercial transactions, nor does the fact that the pamphlets were conceded to be advertisements compel the conclusion that they are commercial speech. Id. at 66 (citing Sullivan, 376 U.S. at 265-66, which again involves a political advertisement).

To the extent that Holtec's ludicrous notion that any speech by an attorney, particularly an attorney of record, is simply commercial speech undeserving of anti-SLAPP protection, the Court need look no further than numerous U.S. Supreme Court cases that conclude lawyer speech that advances client interests, checks governmental power, or advocates on matters of public concern is provided the utmost protection under the First Amendment. See, e.g., In re Primus, 436 U.S. 412, 426-29 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); NAACP v. Button, 371 U.S. 415, 444 (1963).

In Matter of Hinds, 90 N.J. 604, 627 (1982) our own Supreme Court expressly acknowledged the importance of extrajudicial speech by attorneys of record. The Court said that attorneys of record have direct responsibility for the

representation of parties and the actual conduct of a trial. "They are individuals who have confidential information and an intimate knowledge of the merits of the prosecution," the Court said. "Their views are invested with particular credibility and weight in light of their positions. Hence, their statements relating to the trial are likely to be considered knowledgeable, reliable and true." Id.

Without soliciting language, the only way such informational Posts could be interpreted as proposing a commercial transaction is if every lawyer communication – whether on the courthouse steps at a press conference defending a client or announcing the filing of a lawsuit – is viewed as proposing a commercial transaction.

This is essentially what Plaintiff is arguing. But curiously missing from Plaintiff's brief is any mention of the common law rule that exceptions to a statutory scheme, such as argued here, must be construed narrowly. See, e.g., Young v. Schering Corp., 141 N.J. 16, 25–26 (1995) (citing Service Armament Co. v. Hyland, 70 N.J. 550, 558–59 (1976)); Hovbilt, Inc. v. Township of Howell, 263 N.J.Super. 567, 570 (App. Div. 1993), *aff'd*, 138 N.J. 598.

Moreover, it is a longstanding legal principle that "[w]hen a proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it." Meacham v. Knolls Atomic Power Lab. 554 U.S. 84 (2008). Thus, the burden of proving justification or exemption under a special

exception to the prohibitions of a statute generally rests on one who claims its benefits. Trade Comm'n v. Morton Salt Co. 334 U.S. 37, 44–45 (1948).

Further, as Young also points out, a court should avoid a literal interpretation of individual statutory terms or provisions that would be inconsistent with the overall purpose of the statute. Young, 141 N.J. at 25–26. The overall purpose of UPEPA is to create a mechanism that would end meritless cases brought by powerful parties which aim to silence critics by making it impossible for those with fewer resources to spend the time and money necessary to defend themselves. Statement by Governor Murphy on signing of UPEPA. https://www.nj.gov/governor/news/news/562023/20230907d.shtml. "This law will expedite the process to get these cases dismissed on behalf of the journalists, small businesses, activists, and countless others who have been unfairly targeted by these lawsuits over the years." Id.

UPEPA requires that our courts seek uniformity with other UPEPA states. None of those states has yet interpreted the commercial exemption, but states with older anti-SLAPP laws that are similar but not identical to New Jersey's have done so. While anti-SLAPP statutes in California (which has the oldest, strongest, and most-litigated anti-SLAPP law) and Texas (newer and also highly litigated) are similar but more encompassing than New Jersey's, rulings in both states are based on the same Supreme Court definitions of commercial speech

and emphasize that commercial speech itself is not precluded under their statutes. Those states' rulings indicate that the exemptions in those laws apply only to certain communications related to a good, product, or service in the marketplace—communications made not as a protected exercise of free speech by an individual, but as "commercial speech which does 'no more than propose a commercial transaction.'" Castleman v. Internet Money Ltd., 546 S.W.3d 684, 690 (Tex. 2018) (quoting Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 340 (1986)). See also Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (discussing the "limited form of First Amendment protection" that commercial speech receives).

For example, in Castleman, the Supreme Court of Texas found that although defendant was primarily engaged in the business of selling goods, his allegedly defamatory statements about plaintiff's business methods and services did not arise out of his own sale of goods or services or his status as a seller of goods and services but rather from his status as a consumer of plaintiff's services. Id. Moreover, the intended audience of Castleman's statements was not an actual or potential buyer or customer of the goods he sells. Castleman intended his statements to reach plaintiff's actual or potential customers. "His statements constituted protected speech warning those customers about the quality of O'Connor's services, not pursuing business for himself. Neither

[defendant] Castleman nor his business stood to profit from the statements at issue, and although he might have been personally gratified by the damage the statements might make to [plaintiff's] O'Connor's business, the statements do not fall within the [Texas Citizens Participation Act's] commercial-speech exemption." Id. 546 S.W.3d at 690–91.

Similarly, in Simpson Strong-Tie Co. v. Gore, 230 P.3d 1117 (2010), a company sued an attorney who was soliciting potential plaintiffs for a class action involving the company's products claiming trade libel and defamation. Id. at 1120-21. The defendant attorney invoked the state's anti-SLAPP law. Id. In opposing application of the commercial speech exception, the attorney did not dispute that he is in the business of selling legal services, that the company's causes of action arose from his advertisement of those services, and that the purpose of the advertisement was to promote his legal services. Id. at 1129. The point of contention, the California Supreme Court concluded, was whether the causes of action "aris[e] from . . . representations[7] of fact about [the attorney's]…business operations, goods, or services." Id. The Supreme Court agreed with the Court of Appeal and ruled that even assuming, arguendo, that the advertisement implies that the company's products are defective, that

[7] New Jersey's anti-SLAPP law refers to a cause of action "aris[ing] out of a communication." N.J.S.A. 2A:53A-50(c)(3).

implication "is not 'about' [the attorney's] or a competitor's 'business operations, goods, or services....' It is, rather, a statement 'about' [the company] — or, more precisely, the company's products. It therefore falls squarely outside [the California anti-SLAPP law's] exemption for commercial speech." Id. (quoting Cal. Civ. Proc. Code § 425.17(c), (c)(1)).

Here, the Posts might in a general sense increase awareness of Javerbaum's services. However, the news item on Javerbaum's website had nothing to do with Javerbaum's actual sale of goods or services as there was no solicitation of business and it was a factual recitation of the filing of a lawsuit involving allegations that are a matter of public concern. Certainly, the Posts were informational, as in Gore, and directed at those who might have an interest in Holtec or the whistleblower statute, as in Castleman.

But even on the threshold issue of whether the Posts are exempt as so-called commercial speech, the statute also provides at that " '[g]oods or services' does not include the creation, dissemination, exhibition or advertisement or similar promotion of a dramatic, literary, musical, political journalistic, or artistic work." N.J.S.A. 2A:53A-50a(1). The Javerbaum Posts were in fact, a journalistic work. They summarized a lawsuit, included a link to a more expansive news article and included a quote from an attorney involved in the case. To that extent, if section (a)(1) were applied to c(3)'s exceptions, then the

cause of action could not "arise out of a communication related to the person's sale or lease of the goods or services," because journalistic works do not qualify as goods or services. This Court should reject Holtec's interpretation because it would lead to such absurd consequences.

Another red herring argument made by Holtec is that Javerbaum is contending that lawyers should be provided with absolute immunity from defamation claims. Pb17. This clearly demonstrates a lack of understanding of UPEPA and defamation law. UPEPA is not a statute that immunizes anyone from a defamation claim, but it does, in an expeditious fashion, weed out weak and frivolous claims that involve speech about public issues. The process was amply demonstrated by the trial court: once it determined that Javerbaum's speech involved a matter of public concern, and Holtec failed to prove that an exception applies, Javerbaum then had to demonstrate that all elements of the defamation (or similar) claim have not been met. Holtec could not prove its *prima facie* case and the matter was dismissed.

Holtec also claims the trial court somehow overstepped its bounds when it determined that the legislature did not mean to exempt attorneys' speech from the statute. Pb.17 (citing 1T40-41). But in that cited passage, the trial court was describing Senna v. Florimont's specific prohibition against providing actual malice protection to the commercial speech of competitors in the marketplace

and explaining that it believed the legislature intended that the exception be applied to a similar competitor-against-competitor scenario. The Trial Court's application of this principal ties in directly with the first paragraph in the passage cited by Holtec (Pb17), which is that black letter law requires that exceptions to a statute must be applied narrowly.

II. STEP TWO: THE COMPLAINT FAILS TO PRESENT A *PRIMA FACIE* CASE FOR DEFAMATION

A. The Elements of Defamation in New Jersey

To succeed in a defamation action based upon a statement about a public official or figure or touching on a matter of public interest or concern, a plaintiff must allege "(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the statement was communicated to another person (and was not privileged); and (3) that the defendant published the defamatory statement with actual malice." Durando, 209 N.J. at 248. Actual malice is an essential element of its defamation claim, where the pleading rules for defamation and actual malice are strictly construed. Senna, 196 N.J. at 496-97.

To determine whether a statement is defamatory, a court looks "to the fair and natural meaning [to be given to the statement] by reasonable persons of ordinary intelligence." Romaine v. Kallinger, 109 N.J. 282, 290 (1988) (quotation omitted). The law of defamation overlooks minor inaccuracies,

focusing instead on "substantial truth." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516 (1991). A court must consider a statement as a whole to determine the impression it will make on a reader. "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." Id. at 517 (citations omitted). See also G.D. v. Kenny, 205 N.J. 275, 292–94 (2011).

Moreover, it is well established in New Jersey that a plaintiff's "burden of proof for each of the elements of defamation is by clear and convincing evidence." Hornberger v. Am. Broad. Cos., Inc., 351 N.J. Super. 577, 598 (App. Div. 2002); See also Model Civil Jury Charge 3.11A (PUBLIC DEFAMATION) (Approved 03/2010; Revised 11/2022) ("[Plaintiff] must prove five elements by clear and convincing evidence.").

And finally, the allegations are limited to those set forth in the Complaint. In the case of a complaint charging defamation, plaintiff must plead facts sufficient to identify the defamatory words, their utterer and the fact of their publication. A vague conclusory allegation is not enough. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 767–68 (1989) (citing Zoneraich v. Overlook Hosp., 212 N.J. Super. 83, 101 (App. Div. 1986)). See also, Darakjian v. Hanna, 366 N.J. Super. 238, 249 (App. Div. 2004) (noting that the Supreme Court in Printing Mart applied the Zoneraich standard to a

motion to dismiss); Dello Russo v. Nagel, 358 N.J. Super. 254, 269 (App. Div. 2003) (same). Printing Mart also pointed out that essential facts supporting the alleged defamation cannot be dredged up through discovery. "A plaintiff can 'bolster a defamation cause of action through discovery, but not [ ] file a conclusory complaint to find out if one exists.'" Printing Mart, 116 N.J. at 767-68 (quoting Zoneraich, 212 N.J. Super. at 101–02) (alteration in original).

B. Javerbaum's Posts are Not Actionable

1. The Posts are True or Substantially True

Whether the meaning of a statement is susceptible of a defamatory meaning is a question of law for the court. Kotlikoff v. The Cmty. News, 89 N.J. 62, 67 (1982). In determining whether the statements are defamatory, a Court must consider the content, verifiability, and context of the challenged statements. Ward v. Zelikovsky, 136 N.J. 516, 529 (1994). In considering those factors, a court also must consider a statement as a whole to determine the impression it will make on a reader.

Courts begin their review to determine whether a statement is susceptible of a defamatory meaning by looking "to the fair and natural meaning which will be given it by reasonable persons of ordinary intelligence." Romaine, 109 N.J. at 290. The alleged defamation is that the words "financial statements" in the Posts allude to a technical meaning found in bankruptcy cases or a law

dictionary. Pb33-34. Plaintiff fails to mention that the Posts used the term as shorthand – exactly as the *Press* did and then explained just two sentences later:

> 1. **Javerbaum Wurgaft Files Whistleblower Lawsuit Against Holtec International on Behalf of Former CFO (Headline)**
> 2. Mr. O'Rourke claims that Holtec terminated his employment after he resisted submitting false financial statements to a major investor, an issue involving hundreds of millions of dollars.
> 3. Recently the case was highlighted in an article entitled "Ex-Holtec CFO accuses the company of 'make believe' financial statements in whistleblower suit," published on Yahoo.com (link)
> 4. The lawsuit claims that Holtec terminated Mr. O'Rourke when he objected to including false information in a prospectus intended for Hyundai Engineering and Construction.
>
> Pa50

There is no allegation in the Complaint that either the Paragraph 1 – the headline -- or Paragraph 4 above are defamatory. The Complaint alleges at several points that the words "financial statements" do not appear in the O'Rourke Complaint. No other explanation for why the term is defamatory is contained within the Complaint, contrary to Miele v. Rosenblum, 254 N.J. Super. 8, 12–14 (App. Div. 1991) ("plaintiff must specify the defamatory words and the meaning he attaches to them") and Defendants can only extrapolate from the *Press'* Editor's Note (Pa54) where the newspaper itself is saying that it did not mean to imply that the term "financial statements" meant an audited

financial statement as defined by Generally Accepted Accounting Principles (GAAP).

Courts do not automatically decide a case on "[t]he literal words of the challenged statement." Ward, 136 N.J. at 532. Rather, courts must "consider the impression created by the words used as well as the general tenor of the expression, as experienced by a reasonable person." Id. When considering the statement's "fair and natural" meaning, therefore, courts permit the context in which the statement appears to inform its determination of whether the statement was capable of a defamatory meaning. See Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761, 764 (D.N.J. 1981) (applying New Jersey law). "The listener's reasonable interpretation, which will be based in part on the context in which the statement appears, is the proper measure for whether the statement is actionable." Ward, 136 N.J. at 532.

Moreover, the reviewing court should view the publication as a whole in assessing the language for a defamatory meaning and "consider particularly the context in which the statement appears." Petersen v. Meggitt, 407 N.J. Super. 63, 75 (App. Div. 2009) (citing Romaine, 109 N.J. at 290).

This is exactly what the trial court did, ruling that in context, a reasonable reader would conclude that a "financial statement" could be a document containing financial information (IT18) and that the gist or sting is no different

than what was alleged in the O'Rourke Complaint. Holtec's hyper-technical definition of a "financial statement," taken from a footnote in a civil suit over breach of a stock option or Black's Law Dictionary (Pb34), is hardly the stuff of common knowledge, even among attorneys. Moreover, even if it was used as shorthand in the first reference, it was clarified in the second. That is precisely why it is so important to consider any allegedly defamatory statement in the context of the publication as a whole. Molin v. Trentonian, 297 N.J. Super. 153, 158 (App. Div. 1997), certif. denied, 152 N.J. 190 (1997), cert. denied, 525 U.S. 904 (1998).

Similar issue occurred in Durando, where a headline that might have implied a criminal charge for SEC violations was clarified a few paragraphs into the news story. Id. at 508. The Court said that the story must be viewed in the context of the entire report, which specifically explained the allegations. "Indeed, we presume that the public reads the entire article when we assess its fairness and accuracy." Id., at 524. Since falsity is the bedrock requirement of any defamation claim, "[a] plaintiff does not make a *prima facie* claim of defamation if the contested statement is essentially true." Hill v. Evening News Co., 314 N.J. Super. 545, 552 (App. Div. 1998).

Moreover, the online Merriam-Webster Dictionary defines "financial statement" as "a statement of one's status with regard to money or wealth."

https://www.merriam-webster.com/legal/financial%20statement#:~:text=%3A%20a%20statement%20of%20one's%20status,or%20wealth%20compare%20financing%20statement. (accessed August 2, 2024). The reasonable reader would not likely reach for the definition of a financial statement as defined by GAAP, nor would a reasonable reader know what GAAP even represents.

Thus, there is no "defamation per se" about use of the term "false financial statements" instead of "false information in a prospectus intended for [the investor]." PA050. Even in a private offering, fraudulent financial information could result in a lawsuit or prosecution. See, e.g.,17 CFR§240.10b (prohibiting under the Securities Exchange Act of 1934 "any manipulative or deceptive device" in connection with "any security registered on a national securities exchange or any security not so registered.").) Therefore, the gist or sting of what Javerbaum published using the term "financial statements" is certainly less onerous than what is claimed by Plaintiff.

C. Actual Malice is Inadequately Pleaded

If the Court agrees that the Post concerns a matter of public concern, then there can be no dispute that actual malice must be pleaded and proven. UPEPA requires dismissal "if the responding party fails to establish a *prima facie* case as to each essential element of any cause of action in the complaint." N.J.S.A. 2A:53A-55(a)(3)(a). Thus, if this Court determines the Post at issue is a matter of public concern, then under Neuwirth v. State, 476 N.J. Super. 377 (App. Div. 2023), the case must be dismissed under UPEPA for failure to state a cause of action.

Under Neuwirth, 476 N.J. at 392-93, a complaint must state the factual basis for that knowledge of actual malice, not merely provide a rote recital of the actual malice standard. See, e.g., Pa180. (raising the insufficient allegation that "Javerbaum's conduct has been done with actual malice"). A plaintiff "must establish the complaint contains allegations which, if proven, would constitute a valid cause of action." Neuwirth, 476 N.J. Super. at 390. The other references to actual malice in Holtec's Complaint are as follows:

> Par. 45. Javerbaum's conduct to continue to publish a knowingly false article on its website and to continue to link to a knowingly false article that has since been corrected rather than the updated version is outrageous. Id.
>
> Par. 48. Javerbaum's actions to maintain the link to a knowingly false article on its website for over eleven months after the *Press* issued a retraction and revised the article shows that Javerbaum has disregarded the truth. Id.

> Par. 50. Javerbaum's actions in writing and publishing the defamatory article on its website were done to promote its own business and attract potential new clients. Id.

The Complaint asserts no facts from which a factfinder could conclude that Defendant knew, or had serious doubts about, the veracity of the allegedly defamatory statements at the time they were made, or even today. In fact, the statements were accurate when made and they remain so today. Thus, the Complaint fatally omits an essential element of defamation, making it a SLAPP suit under step two of the statute.

D. The Fair-Report Privilege Applies

Salzano v. N. Jersey Media Grp., Inc., 201 N.J. 500 (2010) describes the convergence between substantial truth and the fair-report privilege, which our Supreme Court explained is an absolute privilege against an allegation of defamation provided the report of an official proceeding or document was fairly reported. "Fair" as in fair-report does not mean that a news report contains both sides of an issue, but that the official document was accurately represented. Again, that representation does not need to be accurate in every detail.

As the court explained, once the substantial truth or accuracy of the report is established, the privilege is absolute:

> Once that is understood, it is clear that so long as the publisher fully, fairly, and accurately reports the contents of a public proceeding, he has done what is necessary and is immune from a suit for defamation based on false statements made, not by

> him, but by the participants in the proceeding. Although the truth or falsity of the information reported on may later be established, it is not the focus of the fair-report privilege. Rather, fair report is intended to increase the flow of public information about what is truly happening in our public and quasi-public institutions, no more and no less. Thus, it is satisfied where the publisher fully, fairly, and accurately reports on what is in the proceedings, including pleadings. [citation omitted]

Salzano, 201 N.J. at 532. Salzano involved a news report on a bankruptcy trustee's filing which alleged that funds had been misappropriated by the son of the CEO of a large telecommunications company. The report used words that were not used in the trustee's filing. In order to determine first whether the report was a fair and accurate depiction of the trustee's filing, the Court, as it often does, reverted to dictionary definitions to help determine the gist or sting of the allegedly defamatory words, set against the words actually used in the official document. The Salzano Court concluded that while the report and headline used the words "stolen" and "stealing," which were not used in the complaint, in common parlance, the terms "misappropriate" (which was in the trustee's report) and "steal" (which was not) are "equivalent." because "it is clear that the fair and natural meaning of the word 'steal' given by reasonable persons of ordinary intelligence is 'misappropriate.'" Salzano, 201 N.J. at 525. See also, Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 585 (2009) (citations omitted).

Thus, in order to determine whether the Posts were protected by the fair report privilege, a court must also look at the filed O'Rourke Complaint and determine whether Javerbaum's Posts' description of "filing false financial statements" carry the same gist or sting. Even a cursory review of the O'Rourke Complaint (set forth in detail in the Counterstatement of Facts), reveals that the gist or sting of the allegations are far more damning than the alleged simple falsification of "financial statements." O'Rourke is alleged to have told his superiors that what they planned to present to the investors "could violate the law" (Pa014 at ¶ 38); that the documents grossly exaggerated and misrepresented the value of Holtec's assets, investments and future growth (Pa014 at ¶21); and that the entirety of part two of the Prospectus contained financial projections that were materially false and/or were unattainable and unrealistic. Id. at ¶ 21h.

These claims are at least equally as serious as any reference to "financial statements," and certainly contain far more specific allegations of wrongdoing, outlining a wide array of potentially fraudulent disclosures. Therefore, the gist and sting of the Javerbaum Posts are far less offending than the abbreviated summary in the Posts and eligible for protection of the fair-report privilege.

E. Links to articles are not actionable

The Complaint alleges that "Javerbaum's article on its website contains defamatory statements…linking to an *Asbury Park Press* article that contained similar defamatory statements that has since been retracted and revised, without changing the link to the revised or retracted article." Pa178 at ¶ 29c.

Without articulating the issue or a legal basis for its claim of some sort of liability for republication, Holtec alleges that Javerbaum, which linked to a Yahoo.com version of the original *Press* article, had some sort of a duty to retract and/or correct the news story that appeared in the *Press*. Pa177 at ¶¶17-20. While New Jersey has not addressed this issue, cases from the Third Circuit and around the country are clear that simply posting a link to statements already published on the Web does not constitute republication.

Javerbaum's use of the link, which included the article's headline, was merely a reference to the article, not republication. As the Third Circuit put it:

> Several courts specifically have considered whether linking to previously published material is republication. To date, they all hold that it is not based on a determination that a link is akin to the release of an additional copy of the same edition of a publication because it does not alter the substance of the original publication…[U]nder traditional principles of republication, a mere reference to an article, regardless how favorable it is as long as it does not restate the defamatory material, does not republish the material. These traditional principles are as applicable to Internet publication as traditional publication, if not more so. Publishing a favorable reference with a link on the Internet is significantly easier.

> Taken together, though a link and reference may bring readers' attention to the existence of an article, they do not republish the article.

In re Phila. Newspapers, LLC, 690 F.3d 161, 174-75 (3d Cir. 2012). To conclude otherwise would destroy the statute of limitations by creating a new cause of action every time someone clicked on a link to previously published statements.

> Websites are constantly linked and updated. If each link or technical change were an act of republication, the statute of limitations would be retriggered endlessly and its effectiveness essentially eliminated. A publisher would remain subject to suit for statements made many years prior, and ultimately could be sued repeatedly for a single tortious act the prohibition of which was the genesis of the single publication rule.

Id. at 175.

Other courts have reached the same conclusion. See, e.g., Salyer v. Southern Poverty Law Ctr., 701 F. Supp. 2d 912, 917 (W.D. Ky. 2009) (holding that "[t]he hyperlink is simply a new means for accessing the referenced article"); McGlothlin v. Hennelly, 370 F. Supp. 3d 603, 613 (D.S.C. 2019) (holding that defendant "could not be held liable for reposting an article that was not even published by him but by a newspaper"). Therefore, merely quoting the headline of an article previously posted on the Web and including a link to the article, is only a reference to the article, not republication of it.

F. Failure to Retract is Not a Cause of Action

To the extent that Plaintiff is arguing there has been some sort of republication (and thus potential liability) in refusing to take down a post after notice of error, we have found no court has that has recognized that dubious basis of liability.

"Counsel have not been able to come up with any case in any American jurisdiction which recognizes a claim sounding in damages for failure to retract what is defamatory." Coughlin v. Westinghouse Broad. & Cable, Inc., 689 F. Supp. 483, 488–89 (E.D. Pa. 1988), aff'd, 866 F.2d 1408 (3d Cir. 1988). "There is no authority to support Plaintiffs' argument that a publisher may be liable for defamation because it fails to retract a statement upon which grave doubt is cast after publication." D.A.R.E Am. v. Rolling Stone Mag., 101 F. Supp. 2d 1270, 1287 (C.D. Cal. 2000), aff'd, 270 F.3d 793 (9th Cir. 2001) (citing McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1515 (D.C. Cir.1996) (noting lack of authority supporting liability for failure to retract)). In the instant matter there is not only no "grave doubt," but the Javerbaum Post is not defamatory as it is true or substantially true and is protected by the fair-report privilege.

In Schwartz v. Worrall Publ'ns Inc., 258 N.J. Super. 493, 503–04, (App. Div. 1993) this court explained the scant evidentiary value a delay in printing a retraction bears on the question of actual malice because it does not reflect

subjective knowledge at the time of publication. See also, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) (defendant-author's refusal to admit mistake did not establish that he realized the inaccuracy at the time of publication); Curran v. Phila. Newspapers, Inc., 546 A.2d 639, 648 (Pa. Super. Ct. 1988), allocatur denied, 559 A.2d 37 (1989) (focus is upon what defendant did, not what it did not do); and Rainbow v. WPIX, Inc., 117 N.Y.S.3d 51, 51 (1st Dept. 2020) (Plaintiff provides "no authority to support [her] argument that there is a duty to correct previously-acquired information—and the law does not recognize such an obligation"). Connelly v. Nw. Publ'ns, Inc., 448 N.W. 2d 901, 905 (Minn. Ct. App. 1989) (failure to retract not probative of actual malice; rather, it provided evidence that publishers reasonably believed plaintiff had not been defamed).

CONCLUSION

For the reasons set forth within, Javerbaum respectfully requests that this Court affirm the trial court's decision; declare that UPEPA applies to this Complaint and that the Complaint fails to set forth a *prima facie* case for defamation; and award legal fees and costs for this appeal to Javerbaum pursuant to the statute.

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Dated: March 26, 2025

HOLTEC INTERNATIONAL, Plaintiff/Appellant, v. JAVERBAUM WURGAFT HICKS KAHN WIKSTROM & SININS, P.C. Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-000830-24 ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION CAMDEN COUNTY SAT BELOW: HON. MICHAEL J. KASSEL, J.S.C. DOCKET NO.: CAM-L-002069-24

AMENDED REPLY BRIEF IN SUPPORT OF PLAINTIFF/APPELLANT HOLTEC INTERNATIONAL'S APPEAL

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INTRODUCTION

In its brief, Javerbaum provides no support for the trial court's errant ruling. Instead, it urges this Court to ignore the statute's plain and unambiguous language and speculate as to "legislative intent" to support its self-serving interpretation of NJ-UPEPA's provisions. Javerbaum's argument(s) are factually and legally flawed for several reasons.

First, Javerbaum admits that it provides legal services and that the posts contain information about litigation filed by the firm on a client's behalf. Nevertheless, Javerbaum argues that NJ-UPEPA's commercial speech-based exemption cannot apply, where the posts do not solicit or advertise its services. In other words, Javerbaum admits that the posts relate to its rendering of legal services on behalf of a client while arguing that the posts do not relate to its business. Recognizing the inconsistency in its own argument, Javerbaum claims that application of the exemption would frustrate NJ-UPEPA's purpose, because the defamatory statements at issue constitute protected attorney speech as well as "journalism". Javerbaum cites no legal precedent or legislative history in support of these propositions, and this Court should decline to endorse them as contrary to prevailing policy considerations.

Second, even if this Court were to find that the exemption does not warrant reversal of the trial court's order, Javerbaum cannot establish that any speech at

issue constitutes "a matter of public concern". Although it attempts to expand the definition of "public concern" to include any statement that conceivably relates to public interest, Javerbaum's posts were predominantly related to its representation of a client in a private employment-related dispute.

Javerbaum does not (and cannot) dispute that: (1) the statements at issue pertain to its representation of a private individual; (2) the statements at issue pertain to a single, employment-related dispute; (3) the posts do not reference the relevant statute or provide any discussion of "whistleblower" laws for the public's benefit; (4) fraud is not legal claim in the O'Rourke Litigation; (5) and the post was published by a law firm that is neither a media defendant nor a "disinterested" third-party. Given that Javerbaum's argument hinges entirely on the fact that the posts include the word "whistleblower" in connection with a large, private corporation, Holtec respectfully requests that this Court find that NJ-UPEPA does not apply to Holtec's claims against Javerbaum and reverse the trial court's Order accordingly.

RESPONSE TO RESPONDENT'S STATEMENT OF FACTS

Appellant relies upon the Statement of Facts set forth in its appeal.

LEGAL ARGUMENT[1]

POINT I

JAVERBAUM'S INTERPRETATION IS CONTRARY TO UPEPA'S PLAIN LANGUAGE AND PURPOSE

Hamstrung by NJ-UPEPA's plain language, Javerbaum argues that: (1) the commercial speech exemption is only intended to exempt speech "made in direct advertising" of the sale of goods and services; (2) the extrajudicial speech of attorneys must be afforded protection; (3) a literal reading of the plain language of the commercial speech exemption would be inconsistent with the overall purpose of the statute; and (4) even if the Court were to interpret the exemption by its plain language, Javerbaum's speech is immune because it is purportedly in journalism (Db23-33). In presenting various theories as to what the legislature intended while ignoring long-standing precedent with respect to statutory interpretation, Javerbaum hopes to re-write the exemption in its favor.

However, Javerbaum concedes that it is "in the business of selling its services" and the "services" in question include legal services rendered by its attorneys on behalf of clients. Javerbaum also admits that its posts "publicized the fact that it had filed a whistleblower lawsuit against Holtec" (Db25).

[1] The following citation form is adopted:
"Pra" – Plaintiff's Supplemental Reply Appendix
"Db" – Defendant/Respondent's Brief

Nonetheless, Javerbaum claims that Holtec's defamation suit does not arise from communications related to Javerbaum's representation of O'Rourke, because: (1) the posts at issue are a fair report; and (2) the posts contain "no solicitation". Javerbaum's argument is flawed for several reasons.

First, Javerbaum argues that NJ-UPEPA's commercial speech-based exemption is only excludes speech made in direct advertising of its services (Db25). However, as noted in UPEPA's commentary, adoption of the uniform act "serves two purposes: protecting individuals' rights to petition and speak freely on issues of public interest, while at the same time, protecting the rights of people and entities to file meritorious lawsuits for real injuries." (Pra007). The statute's commentary states that "[E]ven if a movant can show the Act applies . . . the Act may nevertheless not apply if the non-movant can show the cause of action is exempt." (Pra013). In other words, UPEPA is intended to protect **individual rights** grounded in the First Amendment, and not a business's commercial speech. Holtec's interpretation of the exemption is neither overly broad nor inconsistent with NJ-UPEPA's overall scheme.

While there is no applicable case law from another UPEPA state, analysis of the "Texas Citizens Protection Act" ("TCPA") is instructive where the TCPA also "protects speech on matters of public concern" by authorizing courts to conduct "expedited review of the legal merit of claims" intended to stifle

protected speech. *Lilith Fund for Reprod. Equity v. Dickson*, 662 S.W.3d 355, 363 (Tex. 2023). The TCPA also includes an exemption for suits "brought against a person **primarily engaged in the business of selling or leasing goods or services**, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer". *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.010(a)(2)(emphases added).

Recently, the Texas Court of Appeals examined the TCPA's commercial speech exemption in *Naman Howell Smith & Lee PLLC (NHSL) v. Joe A. Gamez Law Firm, P.C.*, 2024 Tex. App. LEXIS 5420 (Tex. App.— El Paso[8th Dist.], July 29, 2024). There, the plaintiff (Gamez) filed suit against the defendant (Ortega) for tort claims and alleged that Gamez's clients terminated his retainment following Ortega's statements to the clients regarding Gamez. Upon Ortega's filing of a motion for dismissal pursuant to the TCPA, Gamez argued that the commercial speech exemption foreclosed Ortega's invocation of the TCPA.

The court noted that the TCPA is designed to protect both a defendant's rights of speech and a claimant's right to pursue valid legal claims for injuries the defendant caused. *Id.* at *4. Ortega argued that the commercial speech exemption was inapplicable because he gave "limited ethical advice" to Gamez's clients and had no economic interest in whether Gamez's clients continued to

retain him. *Id.* at *12. In rejecting Ortega's interpretation of the exemption, the Texas Court of Appeals noted:

> Texas law does not limit its commercial-speech exemption to statements or conduct made for the purpose of obtaining, promoting, or securing sales, leases, or commercial transactions . . . the question we must answer is "not whether public policy should limit the commercial-speech exemption to . . . proposed commercial transactions, but whether the statute's text imposes such a limitation.

Id. at *11-12. Because Gamez's communications were made in his capacity as an attorney and arose from his services, the court declined "to construe Texas's commercial-speech exemption with an interpretive gloss" limiting its scope.

In *H-E-B, L.P. v. Maverick Int'l, Ltd.*, 2022 Tex App. LEXIS 7428, at *10 (Tex. App.— Beaumont [9th Dist.] Oct. 6, 2022), the court examined the TCPA's commercial speech exemption in the context of defamation claims. There, a buyer of industrial goods sued H-E-B following its statements to the press regarding an ongoing breach of contract dispute between the parties. Like Javerbaum, H-E-B sought protection from Maverick's claims by asserting that the suit interfered with its right to speech concerning the public interest. *Id.* at *7-8. H-E-B also argued that its statements were not actionable, because they pertained to ongoing litigation rather than any actual sale of services and/or goods. *Id.* at *8. In denying H-E-B's motion, the Court held that its statements fell squarely within the commercial speech exemption and explained:

> Had Maverick and H-E-B never entered into the alleged sales agreement for the wipes, there wouldn't have been a contract involving the sale of the wipes or a lawsuit, [or] the two events that occurred and then resulted in Danner's investigation and the newspaper articles that followed.

Id. at *3. Here, the TCPA and NJ-UPEPA's exemptions are *similar*, but with one key difference – where the TCPA requires that **the speech at issue "arise from"** the sale or lease of goods, services, or a commercial transaction, NJ-UPEPA only requires that **the suit before the court** "arise from" communication(s) **related** to the speaker's sale of goods and/or services. Therefore, NJ-UPEPA contains an exemption that is broader than the TCPA's, in that it does not require that the posts "arise from" the "actual" sale of legal services, or a specific commercial transaction. However, *even if* this Court were to construe the exemption more narrowly, the exemption would still apply.

Although Javerbaum omits quotations evidencing its intent to promote and sensationalize its representation of a client, the record before this Court is clear. For example, paragraph four is not a quote from O'Rourke's attorney simply "discussing the law that protects whistleblowers". Instead of ever mentioning the actual statute under which O'Rourke seeks relief, Mr. Bearden is quoted stating: "As a whistleblower, Mr. O'Rourke bravely spoke out against the misconduct at Holtec. Whistleblowers should be protected for their commitment to integrity[.]" (Pa050). Given that Mr. Bearden's statements arise from his

representation of O'Rourke and in advocacy of his client's unproven claims, it is unclear how the post can be seen as anything but related to Javerbaum's business.[2] Like in *Maverick*, Javerbaum cannot (and does not) deny that ***but for*** its representation of O'Rourke, the post would not exist. As the *Maverick* court declined to find that the TCPA limits its exemption to statements "made for the purpose of obtaining, promoting, or securing" commercial transactions, so should this Court decline to adopt the "interpretive gloss" Javerbaum puts forth.

Further, Javerbaum's attempt to reframe Holtec's position as advocating for a categorical bar on "any commercial speech" is a straw man argument. The term "commercial speech" never appears in the language of NJ-UPEPA, its list of defined terms, or its exemptions. While applications involving commercial speech may invoke the exemption at issue, the statute's generalized language cuts ***against*** limiting the exemption to commercial speech only.

Javerbaum's attempt to reframe Holtec's position as advocating for a categorical bar on "any speech by lawyers and/or law firms" is yet another straw man argument. Although there is much on the importance of "attorney speech"

[2] It is undisputed that the statements at issue appeared on the firm's website, which contains an "**ADVERTISEMENT**" label and includes a "**LIVE CHAT**" feature – on every webpage – for potential clients. Additionally, the original post (which has since been removed) contained a hyper-link to Mr. Bearden's attorney profile, with contact information listed.

in its briefing, Javerbaum agrees that applicability of the "commercial speech exemption" does not turn on the identity of speaker (Db32), but rather on the content and context of the speech. As in *Gamez*, **which specifically examined attorney speech**, the question for the Court is whether the plain language of the statute and its exemptions apply to the facts presented. Indeed, a case involving a law firm speaking generally about developments in the law, and/or favorable verdicts is certainly different than a law firm making false and disparaging statements about a client's adversary during active litigation to publicize and sensationalize its work.

Finally, Holtec notes that Javerbaum is now arguing that the post(s) at issue do not implicate the commercial speech exemption, because they constitute "journalistic" work (Db31). NJ-UPEPA does not define the term "journalistic" work and Javerbaum does not provide any facts, law, or legislative history supporting its interpretation. Nonetheless, to the extent this Court finds the language ambiguous, Holtec notes that – in the context of New Jersey's "news-person's privilege" – "news media" is defined . . . as "newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public". *See Trump v. O'Brien*, 403 A.2d 281, 290 (App. Div. 2008). "News" is defined as "any written, oral or pictorial information

gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect." *Id.*

Javerbaum is hard-pressed to demonstrate that the "exception to the exemption" applies, where Javerbaum is not in the business of journalism – nor is it a traditional form of press, such as a newspaper, magazine, press association, news agency, or television broadcast. *See Too Much Media, LLC v. Hale*, 206 N.J. 209, 233 (2011) (noting that legislature did not intend for "Shield Law" to apply to "all people who proclaim they are journalists"). To be sure, classifying Javerbaum's posts as "journalistic" works would defeat the purpose of the exemption, where any individual and/or entity involved in the sale of goods or services could escape its reach by simply proclaiming that they are journalists, and their statements are journalistic works.

Cut whichever way it likes, Javerbaum cannot escape the plain language of the commercial speech exemption or make a credible argument that posts about its representation of O'Rourke were not actually about its representation of O'Rourke. For these reasons, the Court should find NJ-UPEPA inapplicable.

POINT II

JAVERBAUM'S PROMOTION OF ITS CLIENT'S CASE IS NOT A MATTER OF PUBLIC INTEREST

Javerbaum claims that its posts "indisputably" pertain to a matter of public concern, where they implicate "a public company accused of violating a statute meant to 'protect and encourage employees to report illegal or unethical workplace activites'". However, Javerbaum's argument is factually and legally flawed, where: (1) Holtec is *not* a public company, (2) Mr. O'Rourke's allegations against Holtec have no impact on the public; and (3) New Jersey courts, since *Senna*, have reiterated time and again that allegations of fraud, CEPA violations, and/or general wrongdoing do not transform a declarant's speech into a "matter of public concern". As discussed more fully in Holtec's opening brief, it is context and content that govern.

Javerbaum does not address controlling New Jersey precedent on this issue – instead, it claims that *Snyder v. Phelps*, 62 U.S. 443 (2011) broadened *Senna*'s definition of "a matter of public interest" to speech "fairly considered as relating to any matter of political, social, or other concern to the community" (Db17). However, *Snyder*'s test for speech constituting "a matter of public concern" is consistent with *Senna*'s, in that the *Snyder* Court recognized:

> Deciding whether speech is of public or private concern requires us to examine the "content, form, and context" of that speech, "as revealed by the whole record." . . . In

> considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

Snyder, at 454. As at least one court within the Third Circuit has noted upon examining *Snyder*, "[a]ttempting to sharpen the distinction between public and private concerns, courts have placed emphasis on the speaker's motivations for the speech under the context element of the inquiry — primarily personal motivations for the speech may remove speech from the province of public concern." *See Tayoun v. City of Pittston*, 39 F. Supp 3d572, 580-581 (M.D. Pa. 2014). Moreover, Javerbaum's assertion that "attorney speech" about ongoing litigation is unquestionably "political" and therefore "a matter of public interest" (Db20) is unsupported.[3] Instead, several federal court decisions have expressly recognized:

> The Court has a duty to the parties, as well as the public, to attempt to minimize prejudicial publicity because, "although litigants do not surrender their First Amendment rights at the courthouse door," those rights may be subordinated to other interests that arise in the context of both civil and criminal trials . . . [C]ourts have approved restrictions on the communication between parties and the public to ensure a fair trial . . .

[3] The defined "exceptions" to "sale or lease of goods and services" omit any reference to legal services.

See United States v. Wecht, 2006 U.S. Dist. LEXIS 37612, at *14 (M.D. Pa. June 8, 2006); *United States v. Scarfo*, 263 F.3d 80, 90 (3d Cir. 2001) (approving trial court's limitation of attorney speech, "carefully aimed at comments likely to influence the trial or judicial determination"). Javerbaum's attempt to broaden *Senna's* definition of a "matter of public concern" turns on its inability to run from the facts – namely, that the post(s) at issue ***predominantly*** pertain to Javerbaum's representation of O'Rourke in a lawsuit valued (by Javerbaum) at "millions" for its client. Holtec respectfully requests this Court hold that the speech at issue is not a matter of public concern.

POINT III
HOLTEC PROPERLY PLED A CLAIM OF DEFAMATION

In its response, Javerbaum continues to maintain, erroneously, that its use of "financial statements" in the posts cannot be defamatory, where the term should be understood as any statement containing a number. Javerbaum ignores that "financial statements" is a commonly understood term of art, in both the legal and financial field. Javerbaum also ignores the fact that its posts, viewed as a whole, paint O'Rourke as a "whistleblower" who "resisted" submitting "make believe" financial statements at Holtec's behest.

Given that Javerbaum cannot keep straight whether Holtec is a private or public entity, it is wholly plausible that a reader would interpret the posts as representing that Holtec's former CFO accused Holtec of fabricating balance

sheets, assets, liabilities, income statements, and/or cash flow statements in violation of the law. Because O'Rourke's Complaint does not contain any such criminal allegations, the challenged statements are subject to defamatory meaning. *See Karnell v. Campbell*, 206 N.J. Super. 81, 89 (App. Div. 1985). If this Court finds that both Holtec and Javerbaum's interpretations of "financial statements" are reasonable, the trial court's decision must be reversed. *See Walko v. Kean College of New Jersey*, 235 N.J. Super. 139, 147 (Law Div. 1988) ("if the Court finds both defamatory and non-defamatory interpretations . . . there [is] a question of fact for the jury.").

Javerbaum's also asserts that Holtec cannot establish a *prima facie* case of defamation because its statements are shielded by the "Fair Report Privilege". However, *Salzano v. N. Jersey Media Grp., Inc.*, 201 N.J. 500 (2010) held that "the fair-report privilege . . . protects the publication of defamatory matters that appear in a report of an official action or proceeding . . . that deals with a matter of public concern." Javerbaum's defamatory statements do not constitute a "matter of public interest" and its invocation of the fair-report privilege (intended to protect free-flowing information by the media) is foreclosed. *Id.* at 513. However, even if this Court were to find that Javerbaum's posts predominantly pertained to a "matter of public concern", the Fair Report Privilege is **not** absolute as Javerbaum implies. "Statements that **accurately**

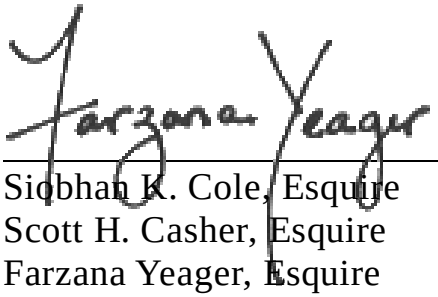
report or summarize the contents of a lawsuit enjoy a qualified immunity that can only be overcome by proof of malice." *See First Nat'l Prop. Mgmt., LLC v. Chapman*, 2024 U.S. Dist. LEXIS 10653, at *16-18 (D.N.J. Jan. 22, 2024). Moreover, the *Salzano* court has noted that the privilege "is lost . . . by a showing of fault in failing to do what is reasonably necessary to [e]nsure that the report is accurate and complete or a fair abridgement." *Salzano*, 201 N.J. at 530, 532.

Here, Javerbaum's post did not detail the statements O'Rourke alleges were false or inaccurate. Nor does the post include information about Holtec's defenses. Instead, the post contains one basic and defamatory indictment – that Holtec's former Chief Financial Officer has accused it of submitting false balance sheet(s), income statement(s), operating statement(s), profit and loss statement(s), cash flows, and/or a statement(s) of changes in retained earnings, to a "major investor". Given that Javerbaum is familiar with its client's allegations, it had every ability and opportunity to ensure that a corresponding post was accurate and fair. Instead, it posted a defamatory article to sensationalize its representation.

For the foregoing reasons, and those set forth in its opening brief, Holtec respectfully requests that this Court reverse the Trial Court's Order granting Javerbaum's application to dismiss Holtec's Complaint with prejudice pursuant to NJ-UPEPA.

Respectfully Submitted,

WHITE AND WILLIAMS LLP

By: 

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