IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON,	§	
	§	
Plaintiff	§	
	§	
v.	§	No. 6:08cv00089
	§	
CISCO SYSTEMS, INC. RICHARD FRENKEL, MAULLUN YEN and JOHN NOH,	§	
	§	
Defendant	§	

PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING DEFENDANTS' MOTION IN LIMINE NO. 1

I. Introduction

Albritton respectfully requests that the Court reconsider its Order granting Defendants' Motion *in Limine* No. 1 because he believes that the briefing on this issue was confusing, the result of which may have led the Court to commit reversible error.

II. Discussion

The Court has discretion under Rule 59 to reconsider its *in limine* Order. *See Torregano v. Cross*, 2008 U.S. Dist. LEXIS 47965, at *4-5 (E.D. La. June 21, 2008), *citing Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990). Reconsideration is permitted when necessary to correct a clear error of law or to prevent manifest injustice. *See Torregano*, 2008 U.S. Dist. LEXIS, at *5.

Defendants' motion asked the Court for a Rule 37 sanction foreclosing Albritton from introducing evidence of damages not included in his Rule 26 computation of damages. Although Cisco's motion appears to seek general relief—much the same way as one would file a motion seeking to exclude all opinions not set forth in an expert report—the true purpose of Defendants' motion was to eliminate Plaintiff's reputational damages. By casting a wide net and scouring the record in search of a technical foul, Defendants hoped to exclude damages it has long known are claimed in this case. Cisco's motion rested on three arguments: (1) Plaintiff's reputational damages were not included in the computation of damages section of his initial disclosures; (2) Cisco did not know Albritton was going to prove reputational damages; and (3) it was prejudiced by Albritton's refusal to produce documents regarding his financial health. *See* D.E. 191 at 1-3.

The Court granted Defendants' motion finding that "Plaintiff's unamended initial disclosures explicitly limit recovery to damages for mental anguish and punitive damages." *See* D.E. 258 at 1. However, Albritton's reputational damages are not subject to the initial disclosures at issue and Albritton is entitled to reputational damages as a matter of law.

Plaintiff believes the Court should reconsider its ruling for the following reasons.

First, this is defamation *per se* case. In *per se* cases, harm to reputation is presumed and failure to instruct the jury on reputational damages is reversible error. *See Tex. Disposal Sys.*

Landfill, Inc. v. Waste Mgmt. Holdings, Inc., 219 S.W.3d 563, 582-585 (Tex. App. Austin 2007). *See* Exh. 1.

Second, the computation of damages provision Defendants rely upon does not apply to the reputational damages at issue in this case. *See Williams v. Trader Publ'g Co.*, 218 F.3d 481, 486 n.3 (5th Cir. 2000).

Third, even if the Court were to find that Plaintiff's initial disclosures are technically deficient, that alone does not warrant such a serious exclusionary sanction. Fed.R.Civ.P. 37(c).

A. Plaintiff Is Entitled To Reputational Damages As A Matter Of Law

Albritton has pleaded that Defendants' statements are defamatory *per se*. In a *per se* case, failure to instruct the jury on presumed damages is reversible error. *See Tex. Disposal Sys.*, 219 S.W.3d at 583-585 (where there is some evidence in the record upon which a reasonable juror could find that the statements were false and understood by the recipient to be defamatory *per se*, the trial court erred in refusing to submit an instruction about presumed damages).[1]

Texas law recognizes that general reputational damages are difficult to quantify and not susceptible to ready computation. *See e.g. Peshak v. Greer*, 13 S.W.3d 421, 427 (Tex. App. Corpus Christi 2000, no pet.) ("The amount of general damages is very difficult to determine, and the jury is given wide discretion in its estimation of them."). For that reason, they are presumed in cases of *per se* defamation. "If the statement is slander *per se*, no independent proof of damage to the plaintiff's reputation or of mental anguish is required, as the slander itself gives rise to a presumption of these damages." *Moore v. Waldrop*, 166 S.W.3d 380, (Tex.App—Waco 2005, no pet.) (citing *Mustang Athletic Corp. v. Monroe*, 137 S.W.3d 336, 339 (Tex.App.—Beaumont 2004, no pet.)).

The Court has already ruled that defamation *per se* will be resolved by the jury. *See* D.E. 217 at 8. If the jury finds that the posts are defamatory *per se*, harm to Albritton's reputation is

[1] In this case, Cisco's counsel, Mr. Babcock, represented the Defendants at trial. Defendants successfully convinced the trial court to keep the issue of presumed damages from the jury, leading the Court to reversible error. *See Tex. Disposal.*, 219 S.W.3d at 573.

presumed and the jury must award some amount of reputational damages to Albritton.[2] *See Tex. Disposal Sys.*, 219 S.W.3d at 584-585. Thus, the Court's ruling excluding reputational damages is likely reversible error. *See id.*

B. Albritton Was Not Required To Calculate His Reputational Damages

Cisco sought to eliminate Albritton's right to presumed recovery upon a *per se* finding because he failed to identify reputational damages in the computation section of his initial disclosures. To be clear, Cisco's argument is based only on the computation of damages section of Plaintiff's initial disclosures.[3] Other parts of Plaintiff's disclosures identified reputational fact witnesses who were later deposed by Cisco.

Cisco's "computation of damages" argument fails because Albritton is not required to calculate the general damages he seeks. Albritton's claimed damages are not the type of damages that give rise to the type of documentary evidence or expert opinion one would rely upon to make a Rule 26(a)(1)(A)(iii) disclosure of a computation of damages. *See Williams*, 218 F.3d at 486 n.3 (damages that are vague and are generally considered a fact issue for the jury may not be amenable to the kind of calculation disclosure contemplated by [Rule 26(a)(1)(A)(iii)].); *see also Crocker v. Sky View Christian Acad*., 2009 U.S. Dist. LEXIS 1116, at *7-8 (D. Nev. Jan. 8, 2009) (distinguishing general damages, for which a computation is not feasible at the time initial disclosures are required, from specific damages for lost income and medical expenses, which require a computation under Rule 26 but are not asserted in this case); *Santos v. Farmers Ins. Exch.*, 2008 U.S. Dist. LEXIS 56630, at *4 (E.D. Mich. July 24, 2008) (same). Here, Albritton seeks non-economic general damages, which are not amenable to the type of disclosures contemplated by Rule 26(a)(1)(A)(iii). *See Williams*, 218 F.3d at 486 n.3.

The Court may exclude Plaintiff's ability to offer a computation of his reputational damages at trial. However, Plaintiff's failure to disclose a computation of damages cannot be the basis upon which to exclude presumed damages, the calculation of which is entrusted to the jury.

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[2] *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002) (in defamation *per se* cases, Plaintiff is entitled to recover actual damages for injury to his reputation and for mental anguish as a matter of law).

[3] Although Albritton's disclosures may not have been perfect, they do not rise to the level of a failure to disclose his damages. *Henry's Marine Serv. v. Fireman's Fund Ins.*, 2006 U.S. App. LEXIS 12770, at *28 (5th Cir. 2006).

C. Exclusion As A Rule 37 Sanction Is Not Warranted

Because a computation of reputational damages is not required, it cannot be the basis of a Rule 37 exclusionary sanction. But, even if the Court found otherwise, Albritton's technical violation is an insufficient basis upon which to exclude half of his claimed damages at trial.

Rule 37 provides that if a party fails to produce information required by Rule 26(a) or (e), the party is not allowed to use that information at trial, unless the failure was "substantially justified or is harmless." The term "harmless" is included in Rule 37 to cover the situation where a fact known to all parties is inadvertently omitted from a Rule 26(a)(1)(A) disclosure. In determining whether failure to disclose evidence is harmless, the Court's discretion is to be guided by four factors: (1) the importance of the evidence; (2) the prejudice to the opposing party of allowing the evidence in; (3) the possibility of curing any prejudice by granting a continuance; and (4) the explanation, if any, for the party's failure to identify the evidence. *Primrose Operating Co. v. Nat'l Am. Ins. Co.,* 382 F.3d 546, 563-564 (5th Cir. 2004).

The importance of evidence of the harm to Albritton's reputation weighs heavily against granting Cisco's motion. There is no doubt that the evidence that the Court has excluded is important to Plaintiff's case which is, at its core, a claim that his good name was tarnished by Defendants. Cisco's motion seeks to exclude one of two categories of compensatory damages sought by Albritton. Cisco understands the importance of reputational evidence, which is why Mr. Babcock stated during the pretrial hearing that Cisco was not interested in mediating this case after the Court excluded Plaintiff's reputational damages. The Court's Order is overly harsh when the importance of the evidence is compared to the alleged discovery foul committed.

Cisco has not been harmed by Albritton's Rule 26(a)(1)(A)(iii) disclosure.[4] Cisco's motion argued that Defendants did not learn until the pretrial order that Albritton was going to prove reputational damages. *See* D.E. 191 at 2. Cisco's argument is not credible. Albritton made

[4] Cisco's motion argues it was prejudiced by not being permitted to depose Albritton's clients. *See* D.E. 191 at 3. Cisco's argument lacks merit. First, Cisco never asked to depose Albritton's clients. Second, even if it had that testimony would have been irrelevant and inadmissible because Albritton is not claiming specific damages. Moreover, given the Court's Orders denying Cisco other irrelevant and harassing discovery it is unlikely that the Court would have permitted Cisco to start deposing Plaintiff' clients to discover information about his finances.

specific allegations of reputational harm in his Complaint, repeatedly stating that the articles at issue are libelous *per se*, entitling him to presumed general damages of mental anguish and harm to reputation. *See* Exh. 2 at ¶¶ 9, 33, 37, 39, 40 & 44. During deposition, Albritton testified that he believes his reputation has been harmed and he was claiming damages that are presumed under the law, although he could not attribute a dollar figure to those damages. *See* Exh. 3. Cisco deposed at least six fact witnesses about the harm to Albritton's reputation. *See* Exh. 4. Cisco brought a motion to compel wherein it candidly admitted that Albritton pleaded and claimed damages to his reputation. *See* Exh. 5. The parties filed multiple briefs in connection with Cisco's motion to compel, which specifically addressed Albritton's reputational damages. *See* Exh. 6. In resolving Cisco's motion, Magistrate Judge Bush specifically found that "Albritton is seeking damage to his professional reputation, but seeks no direct economic losses." *See* Exh. 7. Albritton's reputational damages were briefed again in connection with Cisco's motion for reconsideration. *See* Exh. 8. Reputational damages were also briefed during summary judgment. *See* Exh. 9 On this record, Cisco cannot credibly contend that it was surprised at pretrial by Albritton's claim to reputational damages.

Nor does Cisco's insistence that Albritton's refusal to produce his tax returns justify the sanction Cisco seeks. Albritton's refusal to produce the documents about which Cisco complains was substantially justified as demonstrated by Judge Bush's Order denying Cisco's Motion to Compel.[5] *See* Exh. 7. Cisco cannot morph its failed motion into a motion for sanctions

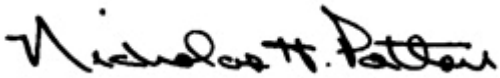
Plaintiff will be prejudiced if the damages the law presumes in his favor are excluded. In comparison, the omissions Cisco complains of are harmless and substantially justified.

III. Conclusion

Plaintiff respectfully requests that Cisco's Motion *in Limine* No. 1 be DENIED.

[5] Albritton did not provide discovery regarding lost profits because he is not claiming those damages in this case. During discovery, Cisco insisted on irrelevant, overly broad and harassing discovery from Albritton. Albritton objected. Cisco brought a motion to compel. Magistrate Judge Bush denied Cisco's motion. Although Judge Bush clearly understood that Albritton was claiming reputational damages, and expressly stated so in his Order, he correctly ruled that because Albritton was seeking only general presumed damages, Cisco was not entitled to Albritton's most private records. *See* Exh. 7. This Court denied Cisco's Motion for Reconsideration. *See* Exh. 10. Neither of the Court's rulings was based on any alleged failure by Albritton to claim reputational damages.

Respectfully submitted,



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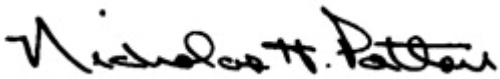
CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this 18th day of May, 2009.



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LEXSEE 219 S.W.3D 563

Texas Disposal Systems Landfill, Inc., Appellant v. Waste Management Holdings, Inc. (f/k/a Waste Management, Inc.) and Waste Management of Texas, Inc., Appellees

NO. 03-03-00631-CV

COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

219 S.W.3d 563*; *2007 Tex. App. LEXIS 2689

April 3, 2007, Filed

SUBSEQUENT HISTORY: Petition for review denied by *Waste Mgmt. Holdings, Inc. v. Tex. Disposal Sys. Landfill, Inc., 2007 Tex. LEXIS 1116 (Tex., Dec. 14, 2007)*
Motion for rehearing on petition for review denied by *Waste Mgmt. Holdings, Inc. v. Tex. Disposal Sys. Landfill, 2008 Tex. LEXIS 338 (Tex., Apr. 4, 2008)*

PRIOR HISTORY: [**1] FROM THE DISTRICT COURT OF TRAVIS COUNTY, 126TH JUDICIAL DISTRICT. NO. 97-12163, HONORABLE PAUL DAVIS, JUDGE PRESIDING.
Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc., 2006 Tex. App. LEXIS 11126 (Tex. App. Austin, Dec. 29, 2006)

DISPOSITION: Affirmed in part; Reversed and Remanded in part on Motion for Rehearing.

COUNSEL: For APPELLANT: Mr. David H. Donaldson, Jr., Mr. James A. Hemphill, GRAVES, DOUGHERTY, HEARON & MOODY, P.C., Austin, TX.

For APPELLEE: Mr. Dan W. Davis, Mr. Sean R. Cox, COOK & ROACH, L.L.P., Mr. Robert B. Dubose, ALEXANDER DUBOSE JONES & TOWNSEND, L.L.P., Houston, TX; Mr. David T. Moran, Mr. Charles L. Babcock, IV, JACKSON WALKER, L.L.P., Dallas, TX; Mr. Robert M. Roach, Jr., COOK & ROACH, L.L.P., Austin, TX.

JUDGES: Before Chief Justice Law, Justices B. A. Smith and Pemberton; Justice B. A. Smith not participating.

OPINION BY: W. Kenneth Law

OPINION

ON MOTION FOR REHEARING

[*569] We grant appellant's and overrule appellees' motions for further rehearing, [1] withdraw our opinion and judgment issued December 29, 2006, and substitute the following in its place. Appellant Texas Disposal Systems Landfill, Inc. challenges the take-nothing judgment entered against it following a jury trial, contending that the trial court committed charge error regarding issues of defamation per se and presumed damages; that the jury's zero-damages award was against the great weight and preponderance of the evidence; and that the trial court erred in dismissing certain claims on summary judgment, including Texas Disposal's causes of action for defamation, tortious interference, and attempted monopoly/antitrust. Appellee Waste Management [2] argues in a cross point that, as to the defamation claims, even if Texas Disposal's issues are [**2] sustained on appeal, the take-nothing judgment should be affirmed based on the lack of evidence of actual malice. We will affirm in part and reverse and remand in part.

1 Appellant's motion requests only that a factual

error be corrected, while "reserv[ing] its right to seek a petition for review in the Texas Supreme Court on substantive issues."

2 We will refer collectively to appellees Waste Management of Texas, Inc. and Waste Management Holdings, Inc. (f/k/a Waste Management, Inc.) as "Waste Management."

BACKGROUND

Texas Disposal owns and operates a landfill in southeast Travis County ("the [*570] Texas Disposal landfill"). Waste Management is one of Texas Disposal's competitors in the waste removal and landfill services industry serving the Austin and San Antonio markets.

In 1995, Texas Disposal and Waste Management competed against one another for a contract to provide waste removal and landfill services to the City of San Antonio. By May 1995, San Antonio and Texas Disposal had begun bona fide [**3] negotiations on a contract for Texas Disposal to assume operations of the city's Starcrest Transfer Station, from which Texas Disposal would haul San Antonio's waste to the Texas Disposal landfill, starting in February 1997. San Antonio's city council passed an ordinance in December 1996 authorizing the city manager to negotiate and execute a contract for Texas Disposal to privately operate the Starcrest Transfer Station in accordance with the terms of the proposed agreement between Texas Disposal and San Antonio, which was attached and incorporated into the ordinance. As of the end of January 1997, however, the parties had not yet executed a final contract.

In November 1996, the City of Austin issued a "request for proposal," seeking bids from companies to provide waste removal and landfill services. Texas Disposal and Waste Management both submitted bids and, as of February 1997, had been selected as the two companies to proceed to Phase II of the bid process for providing the "landfill" and "materials recovery facility and transfer station or landfill" services to the City of Austin.

On January 30, 1997, before either the San Antonio or the Austin contract was finalized, Waste [**4] Management caused an "Action Alert" memo to be distributed to environmental and community leaders in Austin, including several members of the Austin City Council. Waste Management hired Don Martin, a consultant, to draft the memo. Martin gathered information from several Waste Management officials, who then approved the memo for publication. [3] Martin sent the memo to an Austin environmental advocate to be "broadcast over his fax network" to the designated group. The topic of the Action Alert was San Antonio's proposal to contract with Texas Disposal to assume operations of the Starcrest Transfer Station. The memo warned readers about the increased traffic and environmental problems that would result, questioned the environmental integrity of the Texas Disposal landfill, and urged recipients of the memo to contact public officials in San Antonio and Austin, as well as the *San Antonio Express News*, to inform them of "your concerns."

3 Waste Management disputes that it gave final approval. Martin initially testified that Loren Alexander of Waste Management reviewed and approved the memo. Two years later, Martin testified that, upon reading Alexander's deposition denying that he approved it, Martin was changing his testimony to agree that Alexander did not give final approval for the memo.

[**5] In October 1997, Texas Disposal filed suit against Waste Management, [4] alleging that Waste Management had routinely attempted to disparage Texas Disposal's reputation in an effort to eliminate competition. Based on such conduct, Texas Disposal claimed that Waste Management was liable for defamation, tortious interference with an existing or prospective contract, and business disparagement. The petition discussed the Action Alert memo as a specific example of improper conduct by Waste Management, which, according to Texas Disposal, caused economic damages by [*571] delaying the execution of the San Antonio and Austin waste disposal contracts. [5] In addition to compensatory and punitive damages, Texas Disposal sought injunctive relief against Waste Management.

4 Martin was originally named as a defendant, but the claims against him were voluntarily dismissed.

5 Texas Disposal ultimately finalized its contract with San Antonio in January 1998 and with Austin in May 2000 (following a temporary contract that had been entered into with Austin in February 1999).

[**6] After this initial suit was filed, Waste Management published a series of communications that

we will collectively refer to as the "1998 Communications." Waste Management sent a memo to the San Antonio Public Works Department on March 10, 1998, questioning the legality of Texas Disposal operating the Starcrest Transfer Station due to the restrictions in the facility's zoning ordinance and its previously issued permit. Additionally, in May 1998, Waste Management sent an unsigned memo to the San Antonio City Council and the Texas Natural Resource Conservation Commission (TNRCC) urging that the proposed contract with Texas Disposal would result in multiple permit violations. And, on July 14, 1998, Waste Management issued a press release that claimed Texas Disposal had "inspired" a protest demonstration over Austin's landfill and that urged reasons why Texas Disposal should not be selected in Austin's bid process. Texas Disposal amended its petition on July 25, 2000, to include claims based on the 1998 Communications.

Waste Management denied each of the allegations and asserted, as affirmative defenses, that (1) the alleged statements were true and, thus, not defamatory; (2) the statements [**7] were privileged communications made by an interested party in petitioning the government about a matter of public concern; and (3) portions of Texas Disposal's claims were time-barred by the statute of limitations. Waste Management also specially excepted that Texas Disposal had failed to plead sufficient facts to support each of its claims, primarily based on a lack of proof concerning causation and damages.

Waste Management moved for partial summary judgment in January 2001, seeking dismissal of Texas Disposal's claims based on the 1998 Communications, which had been added to the petition in 2000, because they were not pled within the applicable one- and two-year statutes of limitations. [6] *See Tex. Civ. Prac. & Rem. Code Ann. §§ 16.002-.003* (West 2002 & Supp. 2006) (limitations periods for defamation, tortious interference, and business disparagement). Texas Disposal responded that the 1998 Communications claims were not time-barred because they related back to the original pleading, which broadly alleged that Waste Management had "routinely" engaged in a pattern of improper conduct that was "ongoing and continuous." *See id. § 16.068* (West [**8] 1997).

> 6 The motion also sought to dismiss claims based on Waste Management's hiring of Texas Disposal's former employees, which had been added in Texas Disposal's July 2000 amended petition, as being barred by res judicata because they were subject to a final judgment in a separate suit in Bexar County. These claims were ultimately dismissed and are not a part of this appeal.

The trial court granted Waste Management's motion for partial summary judgment, holding that Texas Disposal's claims based on the 1998 Communications were new and distinct transactions that did not relate back and were, therefore, barred by the statute of limitations. *See id. §§ 16.002-.003, .068*. Accordingly, on March 2, 2002, the court dismissed those claims with prejudice. [7]

> 7 Subsequently, the court reconsidered this ruling, prompting Waste Management to file a renewed motion for partial summary judgment on the issue, to which Texas Disposal filed a response. In its March 25, 2003 summary judgment order, the court again resolved the issue in favor of Waste Management.

[*572] [**9] Texas Disposal filed a third amended petition in May 2002, adding antitrust claims against Waste Management for its "attempt to monopolize" in violation of *Texas Business and Commerce Code section 15.05(b)*. Texas Disposal claimed that, because Waste Management held more than 45% of the San Antonio market and 38% of the Austin market, its efforts to eliminate competition by disparaging Texas Disposal resulted in a "dangerous probability of achieving monopoly power." *See Tex. Bus. & Com. Code Ann. § 15.05(b)* (West 2002). Texas Disposal relied in part on the 1998 Communications as support for this claim, which was not limited by a two-year statute of limitations. *See id. § 15.25* (West 2002).

In turn, Waste Management sought another motion for partial summary judgment. *See Tex. R. Civ. P. 166a(c), (i)*. For each of Texas Disposal's claims, Waste Management asserted nearly twenty separate grounds for dismissal, including the statute of limitations, the protection afforded to privileged communications in petitioning the government, and that assorted essential elements of Texas Disposal's claims [**10] had been conclusively negated and/or lacked any evidentiary support.

Texas Disposal then filed its own motion for partial summary judgment, asking the court to hold as a matter

of law that (1) the Action Alert memo was "published," (2) the memo was defamatory and defamatory per se, (3) the statements within and impressions arising from the memo were false, (4) Waste Management knew of this falsity at the time of publication, and (5) a contract existed between Texas Disposal and the City of San Antonio upon which its claim for tortious interference was based.

On March 25, 2003, the trial court signed a "final, corrected order" of summary judgment on both Waste Management's and Texas Disposal's motions; the court granted and denied portions of each party's motion. In the order, the court specifically delineated the grounds for its rulings. In relevant part to this appeal, the trial court's order concluded that:

> (1) Texas Disposal's claims based on the 1998 Communications for defamation, tortious interference, and business disparagement were time-barred by the statute of limitations;
>
> (2) the March and May 1998 memos were privileged by Waste Management's right to petition [**11] the government/public interest privilege;
>
> (3) material fact issues remained about the essential elements of proximate cause, falsity, and damages on Texas Disposal's defamation claims;
>
> (4) the Action Alert memo was "published" and contained certain statements that were reasonably capable of defamatory meaning; specifically, as a matter of law, the following statements in the Action Alert were "defamatory":
>
> > (a) that the Texas Disposal facility "applied for and received an exception to the EPA subtitle D environmental rules";
> >
> > (b) that "Other landfills in Central Texas and San Antonio in similar clay formations are using the full synthetic liner in addition to clay soils";
> >
> > (c) the impression or implication that the Texas Disposal facility is environmentally less protective than other area landfills, including Waste Management's;
> >
> > [*573] (d) the impression or implication that the Texas Disposal facility does not have a leachate collection system [8];
>
> (5) Texas Disposal is, as a matter of law, a limited purpose public figure that must prove "actual malice" to prevail on its defamation claim, but a fact issue remained on that element because Waste Management [**12] failed to conclusively negate actual malice;
>
> (6) at the time of Waste Management's allegedly tortious interference with an existing contract, no contract existed between Texas Disposal and San Antonio for the operation of the Starcrest Transfer Station, and no claim was pled by Texas Disposal about tortious interference with an Austin contract; thus, Texas Disposal's claim for tortious interference with an existing contract was dismissed for no evidence;
>
> (7) Waste Management's alleged interference with a prospective contract between Texas Disposal and San Antonio, and between Texas Disposal and Austin, did not prevent the formation of these contracts; Waste Management's alleged interference with a prospective contract did not proximately cause any damage or loss to Texas Disposal; thus, these claims were dismissed for no evidence;
>
> (8) although there was evidence of

> Waste Management's specific intent to monopolize, its conduct allegedly performed in an attempt to monopolize did not, as a matter of law, constitute predatory or anticompetitive conduct, and did not create a dangerous probability of achieving monopoly power over the waste management markets in San Antonio [**13] or Austin; thus, these claims were dismissed for no evidence.

Thus, following the court's order, the only claim remaining for trial on the merits was defamation related to the Action Alert memo, on which Texas Disposal was required to prove actual malice. [9]

> 8 The record reflects that leachate is "any liquid that comes in contact with garbage." The liquid may result from nature or may be generated by the waste in the landfill. Because this liquid is polluted, state and federal regulations (such as "Subtitle D" of the EPA rules) require that landfills have a method of collecting, extracting, and disposing of it. By implying that Texas Disposal's landfill had no leachate collection system, the memo implied that the landfill failed to comply with Subtitle D.
>
> 9 Although the summary judgment order also found fact issues remaining on the business disparagement claim, thereby preserving the claim for trial, it is not relevant here because the claim was dismissed on directed verdict, and Texas Disposal did not raise the dismissal of this claim as an issue on appeal.

[**14] Texas Disposal specifically requested that the jury charge include questions, definitions, and instructions regarding defamation per se and the related issue of presumed damages. [10] Waste Management objected to the inclusion of these issues in the charge. Ultimately, the jury charge submitted by the court did not ask the jury whether the statements were defamatory per se nor instruct the jury on presumed damages. Instead, the charge asked only whether the statements were false; whether there was clear and convincing evidence that Waste Management knew of the falsity or had serious doubts about the statements' truth (i.e., whether Waste Management had published the statements with actual malice); whether Waste Management had acted with common [*574] law malice; and what amount of damages, both actual and exemplary, should be awarded.

> 10 Also, at the close of the evidence Texas Disposal requested a partial directed verdict on the issue of defamation per se, which the trial court denied.

The jury found that the statements [**15] were false and that, by clear and convincing evidence, Waste Management knew of the falsity or had serious doubts about their truth. Thus, the jury entered an affirmative finding on actual malice. Nonetheless, the jury determined that Waste Management's publication of the Action Alert caused zero actual damages to Texas Disposal. Further, the jury concluded that Waste Management had not acted with common law malice and, therefore, awarded no exemplary damages. In accordance with this verdict, on August 5, 2003, the court entered a final, take-nothing judgment against Texas Disposal. Following an unsuccessful motion for new trial, Texas Disposal filed this appeal.

DISCUSSION

Texas Disposal challenges the judgment in the following six issues: whether (1) the trial court erred in refusing to question and instruct the jury regarding Texas Disposal's defamation per se claim and presumed damages, (2) the jury's finding of zero damages is against the great weight and preponderance of the evidence, (3) the court erred in dismissing the 1998 Communications claims on statute of limitations grounds, (4) the court erred in ruling that the March and May 1998 memos were privileged communications, [**16] (5) the court erred in dismissing Texas Disposal's claims for tortious interference with an existing and/or prospective contract, and (6) the court erred in dismissing the attempted monopolization/antitrust claim. In a cross point, Waste Management argues that the take-nothing judgment should be affirmed because there was not clear and convincing evidence of actual malice. We will begin with Waste Management's cross point and then address each of Texas Disposal's issues in turn. [11]

> 11 As an initial matter, Texas Disposal claims that this Court lacks jurisdiction over Waste Management's cross point because Waste Management did not file a separate notice of appeal on the issue of affirming the take-nothing judgment based on a lack of evidence about actual malice. *See Tex. R. App. P. 25.1(c)*. According to

> Texas Disposal, a separate notice of appeal is necessary because Waste Management seeks greater relief by this cross point than was granted by the trial court. We disagree and address the merits of Waste Management's cross point. *See Helton v. Railroad Comm'n, 126 S.W.3d 111, 119 (Tex. App.--Houston [1st Dist.] 2003, pet. denied)* (distinguishing (1) cross points requiring separate notice of appeal because they seek to alter judgment by seeking more relief than was granted in judgment from (2) cross points that do not require separate notice of appeal because they present merely an alternative basis for affirming judgment); *First Gen. Realty Corp. v. Maryland Cas. Co., 981 S.W.2d 495, 503 (Tex. App.--Austin 1998, pet. denied)* (no separate notice of appeal is needed for appellees to present alternative grounds for affirming take-nothing judgment).

[**17] **Actual Malice**

Waste Management argues that, even if Texas Disposal's issues regarding its defamation claims are sustained on appeal, the take-nothing judgment should be affirmed because there is not legally sufficient evidence to uphold the jury's finding of actual malice.

To prevail on a defamation claim, a plaintiff who is a limited purpose public figure, such as Texas Disposal, [12] must prove by clear and convincing evidence that the defendant published the allegedly defamatory statements with actual malice. *Gertz v. Robert Welch, Inc., 418 U.S. 323, 342,* [*575] *94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)*; *WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998)*. Actual malice means that the defendant published the statement either with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)*; *see also Turner v. KTRK-TV, Inc., 38 S.W.3d 103, 119-20 (Tex. 2000)*. Evidence is "clear and convincing" if it supports a firm conviction on behalf of the trier of fact that the fact to be proved is true. *Bentley v. Bunton, 94 S.W.3d 561, 596-97 (Tex. 2002)*. [**18]

> 12 Texas Disposal does not contend that the trial court erred in ruling that it is a limited purpose public figure.

In reviewing a jury's determination on the issue of actual malice, the *First Amendment* requires that we independently decide whether the evidence in the record is sufficient to pass the constitutional threshold, which bars a public figure's recovery for defamation when the element of actual malice is not supported by clear and convincing proof. *Bose Corp. v. Consumers Union, 466 U.S. 485, 510-11, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)*. Although questions regarding the sufficiency of the evidence are traditionally questions of law, we do not treat this inquiry as a "pure question of law" because it involves issues of credibility. *Harte-Hanks Communs., 491 U.S. 657, 685, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989)*; *Bentley, 94 S.W.3d at 597*. "No constitutional imperative can enable appellate courts to do the impossible--make crucial credibility determinations without the benefit of seeing the witnesses' demeanor. If [**19] the *First Amendment* precluded consideration of credibility, the defendant would almost always be a sure winner as long as he could bring himself to testify in his own favor." *Bentley, 94 S.W.3d at 597*.

Thus, in determining whether there was sufficient evidence to support the jury's determination on actual malice, we give some amount of deference to the fact finders and review the factual record in full. *Id. at 598*. The supreme court has set forth specific steps to be taken in conducting such a review:

> [A]n independent review of evidence of actual malice should begin with a determination of what evidence the jury must have found incredible. . . . Next, undisputed facts should be identified. . . . Finally, a determination must be made whether the undisputed evidence along with any other evidence that the jury could have believed provides clear and convincing proof of actual malice.

Id. at 599 (citing *Harte-Hanks, 491 U.S. at 690-91*). The *Bentley* court further explained that, even if a defendant testifies in favor of itself, "[t]he fact finder may choose with reason to disregard the defendant's [**20] testimony." *Id.* If the jury's decisions regarding credibility are reasonable, then the appellate court must defer to the jury's determinations. *Id.*

Here, the jury answered "yes" when asked whether there was clear and convincing evidence that Waste Management published the Action Alert memo with knowledge of its falsity or with serious doubts about its

truth. The jury was instructed that, for purposes of this question, Waste Management "means only those persons, including Don Martin and Al Erwin, [13] in the WMT organization who had responsibility for the publication of the Action Alert memo." [14]

13 Martin was the consultant hired by Waste Management to prepare the memo. Erwin was one of Martin's primary sources of information relating to the landfill liner and leachate collection system issues discussed in the Action Alert memo.

14 The jury was further instructed on the meaning of clear and convincing evidence.

[*576] The Action Alert memo reported that "[t]he San Antonio City Council is currently [**21] considering a proposal to greatly increase the amount of their municipal waste they truck 70 miles to Travis County . . . to the Texas Disposal System. . . . PLUS the proposal calls for privatizing San Antonio's Starcrest Transfer Station with TDS taking over the operations." The memo then discussed what types of waste Texas Disposal would be hauling: "TDS may bring municipal solid waste, commercial waste, special waste, construction waste, roll-off containers, and sludge and liquid waste. . . . There are no restrictions on the types of waste that may be disposed of at the TDS landfill, with the exception of hazardous waste." Next, the memo contained a paragraph regarding environmental concerns, which included warnings that the Texas Disposal contract would "result in a large increase in heavy truck traffic along IH-35 . . . [and] a commensurate increase in the amount of air traffic emissions . . . and the potential for accidents." The trial court ruled in its March 23, 2003 order that all of the above statements (except the statement that San Antonio's arrangement with Texas Disposal was a "proposal") were reasonably capable of a defamatory meaning. [15]

15 The trial court also ruled, however, that the statement about increased traffic on IH-35 was not actionable because it was "opinion, rhetoric, or hyperbole."

[**22] The portion of the memo causing Texas Disposal the greatest concern is subtitled "Landfill Liner and Leachate Collection." The trial court specifically ruled in its March 2003 order that the statements in and the implications created by this paragraph were defamatory. In full, this paragraph stated:

> Unlike other landfills in the Travis County area, TDS's landfill applied for and received an exception to the EPA Subtitle D environmental rules that require a continuous synthetic liner at the landfill and a leachate collection system utilizing a leachate blanket to collect water that comes in contact with garbage (so that it cannot build up water pressure in a landfill). TDS requested and received state approval to use only existing clay soils as an approved "alternative liner" system, rather than use an expensive synthetic liner over the clay. Other landfills in Central Texas and San Antonio in similar clay formations are using a full synthetic liner in addition to the clay soils.

Finally, the memo concluded with a call to action, encouraging readers to "contact the San Antonio Mayor, City Council, and Public Works Director . . . [a]nd/or contact the San Antonio Express [**23] News with your concerns. Also contact Travis County officials to let them know of your environmental and traffic concerns."

As instructed by *Bentley*, we begin our independent review by examining the favorable evidence offered by Waste Management to determine what the jury must have found incredible. *See id.* Martin, the author of the memo, testified that, at the time of publication, he did not believe any of the statements to be false and did not entertain serious doubts about the truth, and that he still believes the statements to be true. Martin further contended that he did not intend the memo to convey that Texas Disposal's landfill was illegal, environmentally unsound, or lacking a leachate collection system. Erwin, the Waste Management employee who provided Martin information concerning the landfill's lining and leachate collection system, similarly testified that he did not provide any information to Martin that he knew to be false or about which he seriously doubted the truth. Erwin also testified that TNRCC staff people expressed concerns [*577] about the integrity of Texas Disposal's landfill.

Based on the jury's affirmative answers to falsity and actual malice, the jury [**24] must have disbelieved these self-serving statements. As long as that determination was reasonable, we too should ignore this evidence. *See id.* (discussing *Harte-Hanks, 491 U.S. at*

690-91, in which Court upheld jury's disregard of "defendant's self-serving assertions regarding its motives and its belief in the truth of its statements"). In light of the undisputed evidence and the remainder of Martin's and Erwin's testimony, we conclude that the jury had reason to disbelieve their denials.

A primary topic discussed in the testimony of both Martin and Erwin was the portion of the Action Alert memo contrasting (1) Texas Disposal's use of an "alternative liner" system through an "exception" to the EPA rules with (2) other landfills' usage of "a continuous synthetic liner at the landfill and a leachate collection system utilizing a leachate blanket" as "required" by Subtitle D of the rules. It is undisputed that this portion of the memo created a false and defamatory impression that Texas Disposal's landfill is environmentally unsound and is less protective than other landfills, including Waste Management's. [16] The falsity of these statements arises because, in reality, [**25] there are two methods of complying with Subtitle D, the performance design method and the synthetic liner system. The evidence in the record demonstrates that these two methods are environmentally equal. It is further undisputed that Texas Disposal's landfill had been approved and licensed by the TNRCC and that, because Texas Disposal's landfill was located in a "low permeability" clay formation, it had some environmental advantages over other landfills. Moreover, not all of the landfills operated by Waste Management have a full synthetic lining. Thus, contrary to what was reported in the Action Alert, Texas Disposal's landfill is compliant with Subtitle D and is not environmentally unsound or less protective than Waste Management's.

16 The trial court ruled as such in its March 2003 summary judgment order, and Waste Management does not challenge that ruling on appeal. *See supra* footnote 8 and accompanying text.

Martin acknowledged that he "had a . . . fairly good understanding of the overall emphasis of [**26] Subtitle D" and that, through the course of his career, he "absolutely" had been able "to discuss Subtitle D liner landfill issues with engineers." Martin also testified that, at the time he wrote the memo, he understood that there were two ways to comply with Subtitle D (a performance design or a composite liner) and that he understood that Texas Disposal's "alternative design" was in compliance with Subtitle D. Martin also knew at the time he wrote the memo that Texas Disposal's landfill had been licensed by the TNRCC and that it (according to his own testimony) was located in one of the most "environmentally suitable locations" due to the "low permeability clay," which he considered to "off-set" the lack of a synthetic liner. Nonetheless, Martin said that he "assumed" that Texas Disposal's landfill was environmentally unsound because he considered the alternative design to be a "loophole around" the federal regulations.

Martin also admitted that the intent of saying that Texas Disposal's landfill was an "exception" to the EPA rules was "to convey the message that [Texas Disposal's landfill is] not [in] compliance with Subtitle D." Martin testified that the statement was "intended [**27] to be a negative." He further [*578] agreed that the "statement was intended to be a negative comment for consumption by the public generally" and that the "ultimate use of it would be to get back to the City of San Antonio [officials] . . . negatively." He agreed that the ultimate intent of the Action Alert was to prevent San Antonio from awarding its contract to Texas Disposal and that "the negative comment that [Texas Disposal's landfill] was not in compliance with Subtitle D" was specifically used as a means to achieve that purpose. When asked whether it was his "intention with the Action Alert to give the reader the impression that the EPA Subtitle D environmental rules required a continuous synthetic liner at the landfill and a leachate collection system that TDSL did not have," Martin responded, "yes." Martin also testified that, at the time he authored the memo, people in Austin were upset with San Antonio regarding water supply issues, and he agreed that he "saw the Action Alert memo as an opportunity to try to tap into some of that outrage and resentment about San Antonio."

This testimony presents evidence to support a finding of actual malice because it demonstrates that, [**28] at the time Martin wrote the Action Alert memo, he knew (1) that Texas Disposal's landfill was compliant with Subtitle D, (2) that the "performance design" and "synthetic liner" systems were considered equally environmentally sound methods of complying with Subtitle D, and (3) that the statements would create the negative impression that Texas Disposal's landfill was less environmentally sound than Waste Management's and/or not in compliance with Subtitle D. If a speaker has reason to "strongly suspect" that his representation of the

facts is misleading, then it is considered a "calculated falsehood" for purposes of actual malice. *Turner, 38 S.W.3d at 120*. Moreover, Martin testified that the purpose of the Action Alert was to hurt Texas Disposal in the competition between it and Martin's client, Waste Management. Although "actual malice" is not synonymous with ill will, spite, or evil motive, evidence that the defendant harbored ill will towards the plaintiff is often probative on the issue of whether the defendant was reckless with the truth in publishing the statements. *See Bentley, 94 S.W.3d at 602*; *Casso v. Brand, 776 S.W.2d 551, 558 (Tex. 1989)*. [**29] Also, Martin's decision to leave out any mention of the Texas Disposal landfill's advantageous location in "low permeability" clay indicates his intent to create a false impression that the landfill was environmentally unsound. *Huckabee v. Time Warner Entm't Co., 19 S.W.3d 413, 425-26 (Tex. 2000)* (defendant's selective omission of facts to purposefully create false portrayal of events was evidence of actual malice); *see also Brown v. Petrolite Corp., 965 F.2d 38, 47 (5th Cir. 1992)* (in case regarding defamatory statements made by company about its competitor, Fifth Circuit upheld jury's finding of actual malice based on evidence that defendant "had the motive to publish a false report and that it acted negligently in preparing the report. More importantly, evidence in the record demonstrates that [defendant] was aware of information directly contradicting its findings but failed to explain these contrary results.").

Finally, Martin testified that he made no attempt to verify any of the information in the Action Alert memo with any person outside of the Waste Management organization; he did not verify his statements with anyone at the TNRCC or with [**30] any independent engineers or environmentalists, and he did not seek a response from Texas Disposal. [17] Although the failure [*579] to investigate does not, on its own, demonstrate actual malice, a purposeful avoidance of the truth does. *See Harte-Hanks, 491 U.S. at 692* (ignoring two sources that could objectively verify allegations was purposeful avoidance of discovering facts that might show allegations' falsity); *Bentley, 94 S.W.3d at 601* (actual malice existed where defendant "deliberately ignored" "all those who could have shown [him] that his charges were wrong"). Here, Martin completely failed to talk to anyone outside of Waste Management--a company that was paying Martin specifically to create a public perception that its landfill services were superior to those of its competitor, Texas Disposal--when there were people available in Austin who could have easily verified whether the information reported in the memo was true or false. Under these circumstances, and in addition to the evidence discussed above, we consider Martin's failure to independently verify any of the information to be indicative of actual malice. *See Bentley, 94 S.W.3d at 601*. [**31]

> 17 Martin also provided inconsistent testimony about the review and approval of the memo that he obtained from Waste Management personnel. He initially testified in his deposition, which was read aloud to the jury, that people from Waste Management (specifically, Loren Alexander) had reviewed and given final approval to the memo before he submitted it for a "fax blast" to the Austin "environmental community." Then, in live testimony, Martin announced that, because he had since read Alexander's deposition in which he denied approving the memo, Martin was changing his testimony to say that Alexander had not approved the memo. While this is not direct proof that Martin knew of the falsity or seriously doubted the truth about the statements in the Action Alert, it does provide circumstantial evidence about his overall credibility as a witness. From Martin's equivocating about who was ultimately responsible for the statements in the memo, the jury could infer that Martin was willing to alter his testimony to protect himself and/or his long-time associates at Waste Management.

[**32] Erwin (the source of much of this information) similarly testified that he understood Waste Management would benefit from the Action Alert memo because "the public would perceive that one of them [Waste Management] was more environmentally responsible than the other [Texas Disposal]." Erwin admitted, however, that when he told Martin that other area landfills were using full synthetic liners, he knew that not all of Waste Management's landfills were fully lined. He also acknowledged understanding at the time that "performance design" and "synthetic liner" are two alternative methods for complying with Subtitle D, meaning that Texas Disposal's method was equally compliant. For the same reasons we discussed concerning Martin's testimony, Erwin's testimony provides evidence of actual malice. *See Brown, 965 F.2d at 47*; *Bentley, 94 S.W.3d at 601-02*; *Huckabee, 19 S.W.3d at 425-26*.

Based on the above, there is clear and convincing evidence in the record that, when Martin authored the Action Alert and when Erwin provided him information to include in the Action Alert, they, at a minimum, had serious doubts about its accuracy. Thus, we [**33] overrule Waste Management's cross point and affirm the jury's finding of actual malice. Consequently, we proceed to Texas Disposal's first issue.

Charge Error

In its first issue, Texas Disposal urges that the trial court's refusal to submit certain questions and instructions in the jury charge related to defamation per se and presumed damages constitutes reversible error. In determining whether the jury charge was in error, we review the trial court's refusal to submit the particular items for an abuse of discretion. *In re V.L.K., 24 S.W.3d 338, 341 (Tex. 2000)*. A trial court abuses its discretion by [*580] acting arbitrarily, unreasonably, or without consideration of guiding principles. *Walker v. Gutierrez, 111 S.W.3d 56, 62 (Tex. 2003)*. Although the trial court has considerable discretion to determine which jury instructions are necessary and proper, the court is required to submit questions, instructions, and definitions that are raised by the written pleadings and supported by the evidence. *Tex. R. Civ. P. 278*; *In re V.L.K., 24 S.W.3d at 341*. "*Rule 278* is a directive to trial courts requiring them to [**34] submit requested questions to the jury if pleadings and any evidence support those questions." *4901 Main, Inc. v. TAS Auto., Inc., 187 S.W.3d 627, 630 (Tex. App.--Houston [14th Dist.] 2006, no pet.)*. A trial court may refuse to submit a question to the jury if (1) there is no evidence, (2) there are no pleadings, or (3) the issue is uncontroverted. *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Asso.., 710 S.W.2d 551, 555 (Tex. 1986)*. We will not reverse a judgment based on charge error in the absence of harm, which results if the error "probably caused the rendition of an improper judgment" or "probably prevented the petitioner from properly presenting the case to the appellate courts." *Tex. R. App. P. 44.1*; *see Harris County v. Smith, 96 S.W.3d 230, 234-35 (Tex. 2002)*; *Lone Star Gas Co. v. Lemond, 897 S.W.2d 755, 756 (Tex. 1995)*.

Here, Texas Disposal specifically complains that the trial court "erroneously refused to query the jury as to whether the Action Alert was defamatory per se, or to correctly instruct the jury that it could find presumed damages for a statement that is defamatory [**35] per se." We agree. [18]

18 Waste Management contends that the issue briefed by Texas Disposal preserved error only on the lack of a defamation per se *question*, but not the accompanying *instruction*. We reject this hyper-technical interpretation. It is clear from Texas Disposal's complaint about the court's failure to "query" the jury that Texas Disposal is collectively complaining about the court's refusal to submit the relevant questions and instructions regarding defamation per se and presumed damages. For instance, one of the subheadings of Texas Disposal's first issue states, globally, that "TDSL was entitled to a jury charge consistent with the law of defamation per se" and thereafter discusses error regarding both the question and instructions. Texas Disposal has effectively presented this issue for our review. *See Tex. R. App. P. 38.1(e)* ("statement of an issue will be treated as covering every subsidiary issue that is fairly included").

Under Texas law, a statement is [**36] defamatory if it tends to injure a person's reputation and thereby expose the person to public hatred, contempt, ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation. *See Tex. Civ. Prac. & Rem. Code Ann. § 73.001* (West 2005). There are two types of defamation: per quod and per se. *Moore v. Waldrop, 166 S.W.3d 380, 384 (Tex. App.--Waco 2005, no pet.)*. Statements that are defamatory per quod are actionable only upon allegation and proof of damages. *Alaniz v. Hoyt, 105 S.W.3d 330, 345 (Tex. App.--Corpus Christi 2003, no pet.)*; *see also Time, Inc. v. Firestone, 424 U.S. 448, 459, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976)* (evidence of injury is required to support award of compensatory damages in defamation case). Thus, before a plaintiff can recover for defamation per quod, the plaintiff must carry his burden of proof on both the existence of and amount of damages. *See Leyendecker & Assoc., Inc. v. Wechter, 683 S.W.2d 369, 374 (Tex. 1984)*; *Peshak v. Greer, 13 S.W.3d 421, 427 (Tex. App.--Corpus Christi 2000, no pet.)*.

On the other hand, [**37] statements that are defamatory per se are actionable without proof of injury. *Bentley, 94 S.W.3d at 605*; *Knox v. Taylor, 992 S.W.2d 40, 50 (Tex. App.--Houston [14th* [*581] *Dist.] 1999, no pet.)* (statement is considered defamatory per se if words

are so obviously hurtful to plaintiff's reputation that they require no proof of their injurious character to make them actionable). Thus, if the alleged statements have been classified as defamatory per se, general damages are presumed without requiring specific evidence of harm to the plaintiff's reputation thereby entitling the plaintiff to recover, at a minimum, nominal damages. *Bentley, 94 S.W.3d at 604* ("As a matter of law . . . [defamatory per se statements] entitle [plaintiff] to recover actual damages for injury to his reputation and for mental anguish."); *see also Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 1331 (5th Cir. 1993)* (explaining critical distinction under Texas law between proof required to recover damages for defamation versus defamation per se). [19] A false statement will typically be classified as defamatory per se if it injures a person in his office, [**38] profession, or occupation, *Knox, 992 S.W.2d at 50*; charges a person with the commission of a crime, *Leyendecker, 683 S.W.2d at 374*; imputes sexual misconduct, *Moore, 166 S.W.3d at 384*; or accuses one of having a loathsome disease, *Bolling v. Baker, 671 S.W.2d 559, 570 (Tex. App.--San Antonio 1984, no writ)*; *see also Alaniz, 105 S.W.3d at 345*.

19 There is a difference, however, between general and special damages. Even if the statements have been determined to constitute defamation per se, proof of the actual injury suffered is required to recover special damages such as lost profits, incurred costs, lost time value, and future injury--which were sought by Texas Disposal in this case. *See Peshak v. Greer, 13 S.W.3d 421, 427 (Tex. App.--Corpus Christi 2000, no pet.)*; *Ryder Truck Rentals, Inc. v. Latham, 593 S.W.2d 334, 337 (Tex. App.--El Paso 1979, writ ref'd n.r.e.)*; *see also Fox v. Parker, 98 S.W.3d 713, 726-27 (Tex. App.--Waco 2003, pet. denied)* (recovery of special damages requires jury to determine that defamatory statement proximately caused injury); *Knox v. Taylor, 992 S.W.2d 40, 60-63 (Tex. App.--Houston [14th Dist.] 1999, no pet.)* (although damages for injury to reputation were presumed based on defamation per se, proof of actual lost profits was required); *Restatement (Second) of Torts § 622* (1977).

[**39] The issue of whether statements are defamatory per se is generally a matter of law to be decided by the court. *West Tex. Utils. Co. v. Wills, 164 S.W.2d 405, 411 (Tex. Civ. App.--Austin 1942, no writ)*. The trial court should consider the statements and determine whether, even without proof of harm, the statements were so obviously injurious to the plaintiff that, as a matter of law, the plaintiff is entitled to recover damages. *See Alaniz, 105 S.W.3d at 345*. The court may, however, pass the inquiry to the jury if it determines that an ambiguity exists about the meaning and effect of the words or that a predicate fact question remains about whether the statements were published or were false. *Musser v. Smith Protective Serv., Inc., 723 S.W.2d 653, 655 (Tex. 1987)*; *West Tex. Utils., 164 S.W.2d at 411*.

Here, through both a motion for summary judgment and a request for directed verdict, Texas Disposal asked the court to rule as a matter of law that the statements in the Action Alert memo were defamatory per se. The trial court denied both requests. By these rulings, however, the trial court did not affirmatively rule [**40] that the statements were not defamatory per se. Rather, these rulings demonstrate merely that, prior to the conclusion of the trial, the court was not convinced as a matter of law that no ambiguities remained on the issue. *See City of Keller v. Wilson, 168 S.W.3d 802, 823 (Tex. 2005)* (summary judgment or directed verdict is only appropriate if evidence is so clear that reasonable jurors could reach only one conclusion).

[*582] The trial court entertained multiple pleadings from both parties in preparing the jury charge. Through the course of these proceedings, Texas Disposal undeniably preserved the charge error it complains of here by submitting in writing substantially correct questions and instructions related to these issues, separately and specifically objecting in writing to the exclusion of these requests in Waste Management's and the court's proposed charges, and obtaining rulings on its requests and objections. *See Tex. R. Civ. P. 272-274*; *First Valley Bank v. Martin, 144 S.W.3d 466, 474-76* (Wainwright, J., concurring) (discussing preservation of charge error under *State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 238-41 (Tex. 1992)*). [**41]

Specifically, Texas Disposal proposed that the jury be asked whether "any of the following statements, impressions, or implications from the Action Alert . . . are defamatory, and, if defamatory, were they defamatory per se?" in connection with instructions that a "statement is defamatory per se if it tends to affect an entity injuriously in its business, occupation, or office, or charges an entity

with illegal or immoral conduct" and that, in making its determination, the jury should "consider a reasonable person's perception of the statement, impression, or implication in the context of the Action Alert as a whole, and in light of the surrounding circumstances." Texas Disposal further requested that the jury be instructed that answering "yes" to the defamatory per se question means "damage to reputation is presumed and no proof of actual damage to reputation is required. If you did not find a statement defamatory per se, there must be evidence of injury to reputation for damage to be awarded for this element." [20]

20 Waste Management argues in its "Motion for Further Rehearing" that this "Court made a key mistake" by "ignoring" the fact that, in refusing to submit Texas Disposal's requested instruction and question, the trial court "impliedly rule[d] that there was no defamation per se as a matter of law." First, we note that the court's refusal to submit the requested instruction and question were discussed. Second, to the extent Waste Management believes this "ruling" insulates it from appellate review, we disagree because this appeal was filed for the purpose of challenging that decision.

Further, the court's refusal to include Texas Disposal's proposed instruction and question should not be confused with the court's prior denials of Texas Disposal's requests to rule as a matter of law on defamation per se through motions for summary judgment and directed verdict. The importance of recognizing that those denials did not constitute a final ruling on the defamation per se issue is because the issue remained open for decision at the time the charge was prepared. At that point, it is correct that the trial court affirmatively decided that the statements were not defamatory per se and, accordingly, refused to query the jury on the issue. This decision, however, is appealable and was in error.

[**42] It was erroneous for the trial court to refuse to submit these questions and instructions to the jury because they were raised by the written pleadings and supported by the evidence--namely, evidence that Waste Management libeled Texas Disposal in a manner injurious to its business. *See Tex. R. Civ. P. 278* (court is required to submit questions, instructions, and definitions raised by written pleadings and supported by evidence); *Knox, 992 S.W.2d at 50* (evidence that statements were understood by recipient as being injurious to plaintiff's business supports finding of defamation per se). Although defamation per se is generally a legal question, in this case there were underlying ambiguities that could not be decided as a matter of law and needed to go to the jury. [21]

21 Waste Management asserts that Texas Disposal failed to present an argument on appeal that fact issues remained regarding defamation per se. We disagree. Texas Disposal argued in its opening brief that the trial court erred by failing to instruct and question the jury "regarding whether the Action Alert was defamatory per se. . . . Specifically [Texas Disposal] requested that the trial court give the jury a proposed Question 1 to determine whether certain statements in the Action Alert, and the Action Alert as a whole, constituted libel per se." It is implicit within Texas Disposal's argument that it believed fact questions remained on the issue of defamation per se because the existence of fact questions provides the basis for arguing that the jury--the fact finders--should have been queried on the issue. *See Tex. R. App. P. 38.1(e)* ("The statement of an issue or point will be treated as covering every subsidiary question that is fairly included."); *Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690, 32 Tex. Sup. Ct. J. 266 (Tex. 1989)* ("[I]t is our practice to construe liberally points of error in order to obtain a just, fair, and equitable adjudication of the rights of the litigants.") Furthermore, Texas Disposal elaborated on this claim in its reply brief by asserting that "[a] fact issue was raised as to defamation per se, and thus the issue should have been submitted to the jury."

[*583] [**43] This Court's prior opinion in *West Texas Utilities Co., 164 S.W.2d 405*, is instructive on this issue. There, the defendant made a statement that was injurious to the plaintiff's occupation, and the court refused to submit an issue to the jury regarding the statement's slanderous nature. *Id. at 408*. The defendant argued that the issue of defamation per se was not appropriate for the jury's consideration because statements should only be deemed defamatory per se as a matter of law when it is possible to make that

determination "on their face, without innuendo or explanation." *Id. at 411*. This Court disagreed, adopting the Restatement's view that the trial court should "determine[] whether a communication is capable of a defamatory meaning," but it is up to the jury to "determine[] whether a communication, capable of a defamatory meaning, was so understood by its recipient." *Id.* This Court further explained that the trial court should make the initial determination as to "whether it is actionable, either per se or per quod, but where it is ambiguous, of doubtful import, or susceptible of two or more interpretations, its actionability [**44] must ordinarily be decided by the jury under appropriate instructions from the court." *Id.* Only after the underlying fact questions (such as those regarding publication and "the meaning of the words conveyed to the recipient") are decided does the question of law arise as to "whether the words are [defamatory] per se." *Id.* Thus, the plaintiff in *West Texas Utilities* was entitled to its requested instruction and question in the jury charge. *Id.*

Here, a jury was needed to determine the exact meaning and effect of the words because much of the Action Alert's defamatory character arose not from its blatant statements but, rather, from the impressions it created and inferences it encouraged. *See id.* (jury to determine how statement was understood by recipient); *see also Musser, 723 S.W.2d at 655* (predicate fact question about meaning and effect of words may be passed to jury); *Restatement (Second) of Torts § 614, cmt. b* (1977) (if judge decides statement is capable of defamatory meaning, then "further question" exists for jury of "whether the communication was in fact understood by its recipient in the defamatory [**45] sense"). A fact issue also remained as to whether or not the statements in the Action Alert were false, as demonstrated by the trial court's denial of both Waste Management's and Texas Disposal's summary judgment motions on the issue of falsity. Because there was some evidence in the record upon which a reasonable juror could find that the statements in the Action Alert memo were false and understood by the recipient to injure Texas Disposal's business reputation, the trial court erred in refusing to submit Texas Disposal's requested [*584] question and instructions. Further, the court's failure to query the jury on defamation per se was harmful to Texas Disposal because it, in turn, prevented Texas Disposal from having an instruction included in the charge about presumed damages and, thereby, from potentially recovering some amount for these damages. Accordingly, the error in the court's charge "probably caused the rendition of an improper judgment." *See Tex. R. App. P. 44.1*.

Texas Disposal's first issue is sustained, and its defamation claims regarding the Action Alert are remanded to the trial court for a new trial consistent with this opinion. *See id. 43.3(b)*. [**46]

Damages Award

In its second issue, Texas Disposal contends that the jury's finding of zero damages is contrary to the great weight and preponderance of the evidence. In light of our conclusion that the jury should have been queried on defamation per se and presumed damages, it is necessary to also remand the damages issue because Texas Disposal will be entitled to some amount of presumed general damages if, on remand, the jury answers the defamation per se question affirmatively. In its motion for further rehearing Waste Management disagrees with this conclusion and argues that, even when a jury is instructed that a plaintiff is entitled to presumed damages based on an affirmative finding of defamation per se, the jury may still opt to award zero damages. We disagree. With defamatory per se statements, general damages for injury to character, reputation, feelings, mental suffering or anguish, or other wrongs not susceptible to monetary valuation are presumed. *Mustang Ath. Corp. v. Monroe, 137 S.W.3d 336, 339 (Tex. App.--Beaumont 2004, no pet.)* ("In *Leyendecker* and *Bentley*, the Supreme Court of Texas held statements which are defamatory per se entitle [**47] a plaintiff, as a matter of law, to recover actual damages for injury to reputation."); *Peshak, 13 S.W.3d at 427* ("In actions of libel per se, the law presumes the existence of some actual damages, requiring no independent proof of general damages."); *Ryder Truck Rentals, Inc. v. Latham, 593 S.W.2d 334, 337 (Tex. App.--El Paso 1979, writ ref'd n.r.e.)* (defamation per se entitles plaintiff to presumed general damages for injury to character, reputation, feelings, mental suffering or anguish, and other wrongs not susceptible to monetary valuation). Although the amount of actual general damages remains a question for the jury, when an affirmative finding of defamation per se has been entered and presumed damages are appropriate, the plaintiff is entitled to an award of at least one dollar in nominal damages, even if zero actual damages are awarded. *See Doe v. Chao, 540 U.S. 614, 621, 124 S. Ct. 1204, 157 L. Ed. 2d 1122* & n.3, *540 U.S. 614, 124 S. Ct. 1204, 157 L.*

Ed. 2d 1122 (1994) (emphasis added) (recognizing that, when presumed damages are appropriate in defamation actions, there is an "entitlement to recovery" because "common law rule would not require [plaintiff] to show particular items of injury [**48] in order to receive *a dollar recovery*"). [22]

22 Waste Management incorrectly argues in its motion that this holding "diverges from existing law." *See Peshak, 13 S.W.3d at 427* (jury may opt to award only nominal damages when general damages are presumed in defamation per se case); *Denton Publ'g Co. v. Boyd, 448 S.W.2d 145, 147 (Tex. Civ. App.--Fort Worth 1969)*, *aff'd*, *460 S.W.2d 881 (Tex. 1970)* (upon finding of defamation per se, "[a]t least nominal damages must be awarded" in addition to "such actual damages as might be shown to be the proximate result of the publication"); *Express Pub. Co. v. Hormuth, 5 S.W.2d 1025, 1027 (Tex. Civ. App.--El Paso 1928, writ ref'd)* (because article was libelous per se and false, "court properly instructed the jury to find for plaintiff at least nominal damage"); *Mayo v. Goldman, 57 Tex. Civ. App. 475, 122 S.W.449, 450 (Tex. Civ. App.--Texarkana 1909, no writ)* (regarding defamation per se charge error, court held that, when words are defamatory per se and false, plaintiff is "entitled to recover at least nominal damages, without regard to [defendant's] intent in speaking"); *Houston Printing Co. v. Moulden, 15 Tex. Civ. App. 574, 41 S.W. 381, 387 (Tex. Civ. App.--Austin 1897, writ ref'd)* (court correctly instructed jury to find nominal damages for plaintiff regarding defamation per se even if he suffered no actual damages to character); *see also* (*Restatement (Second) of Torts § 620* (where defamatory statement is actionable per se, defendant is liable for at least nominal damages); 4 Sharon L. Michaels, *Texas Torts & Remedies* § 52.09[1] (2006) ("[W]hen there is a finding that a defamatory statement is defamatory per se . . . it is proper for the trial court to instruct the jury to find at least nominal damages."); 24-2 *Texas Court's Charge Reporter* No. 99-2-22 (Lexis 2002) instructing jury that "Damages must be awarded for a statement that is defamatory per se, although the amount is within your discretion. Thus, you must award at least nominal damages, and such further damages, if any, as proximately resulted from defamatory statements.")

In challenging this holding, Waste Management relies on *Adolph Coors Co. v. Rodriguez* for the holding that "libel per se merely allows the aggrieved party to go to the jury without the requirement of specific proof of the injurious character of the libelous statement. It does not require the jury actually to find any amount of damages." *780 S.W.2d 477, 488 (Tex. App.--Corpus Christi 1989, writ denied)* (citation omitted); *see also Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 1331 (5th Cir. 1993)* (citing *Adoph* for proposition that jury "may choose not to award presumed damages" in cases of libel per se) (also cited by Waste Management). *Adolph*, however, never mentions the concept of nominal damages and stands for the more specific proposition that exemplary damages are not available upon a finding of zero actual damages, *780 S.W.2d 488*--which is true even if a party is entitled to or awarded nominal damages, as recognized by *Snead, 998 F.2d at 1334 & 1335* n.15. *See Tex. Civ. Prac. & Rem. Code § 41.004* (West Supp. 2006) (in defamation cases filed after September 2003, exemplary damages not recoverable absent award of actual damages in more than nominal amount).

To the extent that *Adolph* and *Snead* hold that the amount of actual damages is left in the jury's discretion and that proof of actual injury is required to recover special damages, we agree. However, to any extent the opinions hold that an entry of zero, rather than at least nominal, damages is appropriate in response to an affirmative finding of defamation per se, we disagree. Further, contrary to *Snead*, rather than considering nominal damages to be separate and apart from presumed damages, *see 998 F.2d at 1334-35*, we consider nominal damages to be a form of presumed damages that are appropriate when the jury determines that the defamatory per se statements have not caused substantial harm to plaintiff's reputation or when the purpose of the suit is simply to vindicate plaintiff's reputation. *See Restatement (Second) of Torts § 620, cmt. a-b* (explaining these as appropriate reasons for nominal damages in defamation per se cases).

[*585] [**49] Although remanding for a determination on defamation per se and presumed damages does not always require that we also remand the issues of special and exemplary damages, we believe in this case that the damages arising from the defamation claims should be presented to the jury collectively because, otherwise, the presentation of evidence would be unfairly hindered and piecemeal. A litigant is entitled to a fair trial before a jury that is properly instructed on the issues authorized and supported by the law governing the case. *Harris County, Tex. v. Smith, 96 S.W.3d 230, 234 (Tex. 2002)*. If the appellate court cannot say that the jury was not affected by the erroneous charge in arriving at the amount of damages, then the issue should be reversed and remanded. *Id.* Here, had the jury been properly instructed that certain damages may be presumed in light of finding defamation per se, the jury's consideration of all damages would likely have been different. *See Tex. R. App. P. 44.1(a)(1)* (reversal warranted where error complained of probably [*586] caused rendition of improper judgment); *Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 723-24 (Tex. 2003)* [**50] (while not technically incorrect, inclusion of spoilation instruction probably caused rendition of improper judgment because it "unfairly stigmatized" party, thereby "tilting" or "nudging" jury's view; thus, remand was necessary); *Jenkins v. Taylor, 4 S.W.2d 656, 661 (Tex. Civ. App.--Austin 1928, writ dism'd)* (where statements were defamatory per se and court's charge error "deprived the jury of finding damages based upon the general presumption of law that damages flow from the publication of a per se libel," court remanded for new trial); *see also LaGloria Oil & Gas v. Carboline Co., 84 S.W.3d 228, 242-43 (Tex. App.--Tyler 2001, pet. denied)* (court remanded to allow same jury to determine issues of liability and limitations under correctly worded charge). Therefore, on remand, the jury should be questioned and instructed about special and exemplary damages as well as presumed damages.

Texas Disposal's second issue is sustained.

Statute of Limitations

In its third issue, Texas Disposal claims the trial court erred by granting summary judgment on its claims arising from the 1998 Communications. Texas Disposal advances two arguments to [**51] support its position that the claims were not barred by the statute of limitations. First, it argues that the 1998 Communications "relate back" to its original petition because they were part of a pattern of continuing wrongful conduct that started with the improper actions alleged in the original petition. Second, Texas Disposal argues that, even if the claims do not relate back, the claims are not barred by the statute of limitations because the claims arise from a continuing tort.

We review a trial court's grant of summary judgment de novo. *McCarthy Bros. Co. v. Continental Lloyds Ins. Co., 7 S.W.3d 725, 728 (Tex. App.--Austin 1999, no pet.)*. In a summary judgment case, the issue on appeal is whether the movant met its summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Tex. R. Civ. P. 166a(c)*; *Calvillo v. Gonzalez, 922 S.W.2d 928, 929 (Tex. 1996)*. The statute of limitations is an affirmative defense, and a defendant is entitled to summary judgment upon presentation of sufficient evidence to conclusively establish each element [**52] of its affirmative defense as a matter of law. *Friendswood Dev. Co. v. McDade & Co., 926 S.W.2d 280, 282 (Tex. 1996)*; *Akin v. Santa Clara Land Co., 34 S.W.3d 334, 340 (Tex. App.--San Antonio 2000, pet. denied)*. The burden of proof is on the movant, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. *Friendswood Dev. Co., 926 S.W.2d at 282*; *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47 (Tex. 1965)*. Therefore, we must view the evidence and reasonable inferences drawn therefrom in the light most favorable to the nonmovant. *See Great Am. Reserve Ins. Co., 391 S.W.2d at 47*.

Texas Disposal first argues that the 1998 Communications relate back to its original petition because they are part of a pattern of continuing wrongful conduct that commenced with the actions that formed the basis of the original petition, not isolated acts. We disagree.

The statute of limitations is one year for defamation claims and two years for tortious interference with business relations. *Tex. Civ. Prac. & Rem. Code Ann. §§ 16.002(a)* [**53] , *.003*. The claims based on the 1998 Communications (which included [*587] memos sent in March and May 1998 and a press release issued on July 14, 1998) would have accrued on those respective dates of publication. Thus, the limitations period for the defamation claims based on each communication would

have expired, respectively, in March and May 1999 and on July 14, 1999, and the limitations period for the tortious interference claims would have expired, respectively, in March and May 2000, and on July 14, 2000. *See id. §§ 16.002(a), .003, .068.* Texas Disposal did not amend its petition until July 25, 2000, after the statute of limitations for all of the alleged actions had expired.

Under the relation-back doctrine, an original pleading tolls the statute of limitations for claims asserted in subsequent, amended pleadings as long as the amendments are not based on new, distinct, or different transactions or occurrences. *Id. § 16.068.* A"transaction" is defined as a set of facts that gives rise to the cause of action premised thereon. *Id.*; *see Hill v. Heritage Res., Inc., 964 S.W.2d 89, 121 (Tex. App.--El Paso 1997, pet. denied).* Texas law treats each alleged defamatory [**54] publication as a single transaction with an independent injury. *See Akin, 34 S.W.3d at 340.* The test is not whether the newly asserted claims are otherwise part of the same general course or pattern of conduct as those originally pled. *See Tex. Civ. Prac. & Rem. Code Ann. § 16.068*; *Leonard v. Texaco, Inc., 422 S.W.2d 160, 163 (Tex. 1967)*; *Waddill v. Phi Gamma Delta Fraternity, 114 S.W.3d 136, 144 (Tex. App.--Austin 2003, no pet.).*

Under the relation-back test, the claims based on the 1998 Communications were "new" because they occurred after the original petition had been filed and were "distinct or different" because each communication was addressed to a different audience about different specific issues and was issued months apart from the other communications. Furthermore, under Texas defamation law, we treat each of the 1998 Communications as a separate transaction with an independent injury. *See Akin, 34 S.W.3d at 340.* Texas Disposal's contention that the acts are part of a pattern of wrongful conduct is not the focus of an inquiry under a relation-back analysis. *See* [**55] *Tex. Civ. Prac. & Rem. Code Ann. § 16.068*; *Leonard, 422 S.W.2d at 163.*

In its second argument, Texas Disposal asserts that the claims asserted in its July 25, 2000 amended petition are not time-barred because the 1998 Communications were part of a continuing tort that had not yet accrued. Generally, a cause of action accrues when a wrongful act causes an injury. *Upjohn Co. v. Freeman, 885 S.W.2d 538, 542 (Tex. App.--Dallas 1994, writ denied).* However, a continuing tort is an ongoing wrong causing a continuing injury that does not accrue until the tortious act ceases. *Id. at 543* (pill taken daily that caused continuing injury is basis for continuing tort); *Adler v. Beverly Hills Hosp., 594 S.W.2d 153, 156 (Tex. Civ. App.--Dallas 1980, no writ)* (although each day of false imprisonment is itself separate cause of action, court viewed involuntary detention without access to counsel in mental hospital as one continuing tort). A plaintiff can bring a single suit for the period of time it sustains injuries from a defendant's conduct. *Upjohn, 885 S.W.2d at 543*; *Adler, 594 S.W.2d at 156.* [**56] The concept of a continuous tort originated in trespass-to-land and nuisance cases and has since been expanded to include false-imprisonment cases. *Upjohn, 885 S.W.2d at 542.* Treating regularly occurring torts, such as false imprisonment, as continuing torts avoids a multiplicity of suits and does not force an aggrieved plaintiff to choose between filing successive suits or facing denial of the privilege of the full limitation [*588] period in filing suit for each day of the false imprisonment. *Id.*; *Adler, 594 S.W.2d at 156.* However, if each of the defendant's separate behaviors caused a distinct injury, the continuing tort rule does not apply. *Upjohn, 885 S.W.2d at 543.*

Each of the 1998 Communications was a discrete transaction: each was addressed to a different audience, each concerned a different issue, each was issued months apart from the other communications, and each caused an independent injury. The 1998 Communications do not represent a constant, continuous pattern of tortious conduct that courts have found to constitute a continuing tort, such as each day of a false imprisonment or the daily consumption of a harmful medication. [**57] *See id.*; *Adler, 594 S.W.2d at 156.* Furthermore, Texas Disposal has not offered any authority, nor have we found any, that broadens the continuing tort doctrine to include actions based on defamation, tortious interference, or tortious acts that are intermittent and irregular in nature. Rather, our research has revealed only contrary authority. *See Dickson Constr. v. Fidelity & Deposit Co., 960 S.W.2d 845, 851-52 (Tex. App.--Texarkana 1997, no pet.)* (disparaging comment, coupled with speaker's refusal to modify position and any harm that ensued, did not constitute continuing tort).

We hold that all of Texas Disposal's claims based on the 1998 Communications are time-barred because (1) Texas Disposal asserted them after the relevant limitations period expired, (2) the claims do not relate back to its 1997 petition, and (3) the claims do not

constitute a continuing tort. Texas Disposal's third issue is overruled.

Privileged Communications

In its fourth issue, Texas Disposal complains that the trial court erred in granting summary judgment on Waste Management's ground that the March and May 1998 memos were privileged communications. Because [**58] we hold that any defamation claim resulting from the publication of the 1998 Communications is barred by limitations, we need not reach Texas Disposal's issue of whether these two memos were privileged communications under the "public interest" or "right to petition the government" exceptions to defamation. Texas Disposal's fourth issue is overruled.

Tortious Interference

In its fifth issue, Texas Disposal urges that the trial court erred in dismissing on summary judgment its claims for tortious interference with an existing and/or prospective contract. We begin with the existing contract claim and then turn to the prospective contract claim.

Tortious interference with an existing contract

Texas Disposal asserts that it had a viable contract with San Antonio in May 1995 and that, due to Waste Management's interference, the execution of the San Antonio contract was unduly delayed, causing Texas Disposal to suffer economic damages. We disagree.

A cause of action for tortious interference with an existing contract is based on the principle that a contract is a property right subject to protection from unwarranted interference. *See Raymond v. Yarrington, 73 S.W. 800, 803 (Tex. 1903).* [**59] Although a business is not protected from most forms of competition, it may have a superior right, by contract or otherwise, to be so protected in certain circumstances. *See Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 717 (Tex. 2001)*. A cause of action for tortious interference will not lie in the absence of a contract. *S & A Marinas, Inc. v. Leonard Marine Corp., 875 S.W.2d 766, 768 (Tex. App.--Austin 1994, writ denied)*.

[*589] Binding and enforceable contracts are formed when an offer is made and accepted, when there is a meeting of the minds, and when the terms are sufficiently certain to define the parties' obligations. *See Copeland v. Alsobrook, 3 S.W.3d 598, 604 (Tex. App.--San Antonio 1999, pet. denied)*. The determination of a meeting of the minds, and thus offer and acceptance, is based on the objective standard of what the parties said and how they acted, not on their subjective state of mind. *Id.* If a trial court can determine conclusively that no contract existed, summary judgment is appropriate. *S & A Marinas, Inc., 875 S.W.2d at 768*.

Texas Disposal asserts that the grant of summary judgment on this [**60] issue was error because Texas Disposal produced more than a scintilla of evidence that a contractual relationship existed between Texas Disposal and San Antonio at the time of Waste Management's interference. Texas Disposal further asserts that, even absent a formal contract, Texas Disposal's and San Antonio's relationship had matured to a point where Waste Management had a legal duty not to interfere.

To prove that it had a contract with the City of San Antonio, Texas Disposal relies on ordinances passed by the city council in May 1995 and December 1996, which, respectively, extended its disposal services contract and authorized the city manager to execute an agreement with Texas Disposal, subject to the addition and modification of material terms. It is undisputed, however, that a final contract between San Antonio and Texas Disposal was not executed in writing until January 7, 1998.

The May 1995 ordinance authorized the city manager or his representative to execute a contract with Texas Disposal for waste disposal services for a term not to exceed thirty years and authorized payment for the services. The ordinance did not discuss the Starcrest facility, an essential part of the [**61] final agreement. The terms of the ordinance indicate that the city manager was authorized to engage in negotiations to execute a contract that would be similar to the previous Texas Disposal contract and would conform to San Antonio's waste disposal services request for proposal guidelines. The authorization to negotiate and execute a contract is not tantamount to expressing an intent to be bound. *S & A Marinas, Inc., 875 S.W.2d at 768*. Accordingly, the May 1995 ordinance did not create a contract between Texas Disposal and San Antonio.

In the alternative, Texas Disposal argues that a contract existed when the city council passed its December 1996 ordinance authorizing the city manager to execute an agreement with Texas Disposal pursuant to the "Proposed Agreement with Texas Disposal to Operate

Transfer Station" subject to the addition or modification of some material provisions. The ordinance required the city manager to further negotiate and refine the terms of the agreement to give San Antonio the first right of use of and access to the transfer facility, to acquire the power to limit services available to third parties, to acquire the power to change the composition [**62] of the oversight panel, to make the new contract independent of the old contract with Texas Disposal with respect to termination, and to add a term that would permit San Antonio to terminate the transfer station agreement for cause on account of a material breach. The ordinance also authorized the city council to veto any contract term that was materially different from the contract modifications listed in the ordinance.

The December 1996 ordinance is not evidence of a contract between San Antonio and Texas Disposal. To the contrary, the ordinance's language requiring the addition [*590] or modification of material terms affecting termination of the contract and San Antonio's use of the facility, as well as the clause requiring city council approval for contract terms that significantly differ from the requirements set forth in the ordinance, demonstrate San Antonio's continued interest in pursuing and negotiating a waste disposal contract with Texas Disposal. To hold that the brief and cursory language of the ordinances was sufficient to form a contract would contravene public policy allowing governmental agencies to reconsider actions taken with respect to a contract not yet finalized. [**63] *See S & A Marinas, Inc., 875 S.W.2d at 768*.

We hold that the May 1995 and December 1996 ordinances did not demonstrate that a contract existed between San Antonio and Texas Disposal, and thus the trial court did not err in dismissing Texas Disposal's action for tortious interference with an existing contract.

Tortious interference with a prospective contract

Although Texas Disposal was eventually awarded both the San Antonio and Austin contracts it sought, Texas Disposal claims that it is entitled to damages for the alleged delays in obtaining the contracts caused by Waste Management's actions under a theory of tortious interference with prospective contractual relations. *See Baty v. Protech Ins. Agency, 63 S.W.3d 841, 859 (Tex. App.--Houston [14th Dist.] 2001, pet. denied)*; *Ash v. Hack Branch Distrib. Co., 54 S.W.3d 401, 414-15 (Tex. App.--Waco 2001, pet. denied)*. Texas Disposal asserts that it was error for the trial court to dismiss this claim on summary judgment. We disagree.

To prove a cause of action for tortious interference with prospective contractual relations, a plaintiff must establish the following elements: [**64] (1) a reasonable probability that the parties would have entered into a business relationship; (2) an intentional, malicious intervention or an independently tortious or unlawful act performed by the defendant with a conscious desire to prevent the relationship from occurring or with knowledge that the interference was certain or substantially likely to occur as a result of its conduct; (3) a lack of priviledge or justification for the defendant's actions; and (4) actual harm or damages suffered by the plaintiff as a result of the defendant's interference, i.e., that the defendant's actions *prevented the relationship from occurring*. *See Bradford v. Vento, 48 S.W.3d 749, 757 (Tex. 2001)* (agreeing with appellate court's analysis of issue); *Baty, 63 S.W.3d at 860*; *Ash, 54 S.W.3d at 414-15*. Conduct that is merely "sharp" or unfair is not actionable. *See Baty, 63 S.W.3d at 860*; *Ash, 54 S.W.3d at 414-15*.

Because Texas Disposal was awarded both contracts it sought, Texas Disposal cannot prove its third element, that Waste Management's actions prevented the contracts from forming. Thus, the trial court [**65] properly dismissed the claim on summary judgment. *See Tex. R. Civ. P. 166a(c)*; *Rhone-Poulenc, 997 S.W.2d 217 at 223*.

Implicit in Texas Disposal's claim is an invitation to expand the doctrine of tortious interference with prospective business relationships to make actionable conduct that results in *delaying the execution* of a contract, even though the formation of a contract was not prevented. Delays caused by competitor conduct are inherent in the course of doing business, and enlarging the scope of tortious inference for prospective relationships to include delays would run afoul of the policy encouraging competition in the market. *See Ash, 54 S.W.3d at 414* ("Conduct that is merely 'sharp' or unfair is not actionable and cannot be the basis for an action for [*591] tortious interference with prospective relations.") (citing *Sturges, 52 S.W.3d at 726*). As an intermediate appellate court, we have no authority to alter the scope of an established cause of action. *See Petco Animal Supplies, Inc. v. Schuster, 144 S.W.3d 554, 564-65 (Tex. App.--Austin 2004, no pet.)* ("intermediate appellate court [**66] [must] follow the precedents of

the Texas Supreme Court unless and until the high court overrules them."). Because there is no supreme court authority holding that a cause of action for tortious interference with prospective business relationships includes conduct that results only in a delay of the execution of a contract, we must affirm the trial court's dismissal of this claim. Texas Disposal's fifth issue is overruled.

Attempted Monopolization/Antitrust

In its sixth issue, Texas Disposal asserts that the trial court erred by dismissing its antitrust claim for a lack of evidence. To prevail on a claim of attempted monopolization, a plaintiff must establish that the defendant engaged in predatory or anticompetitive conduct with a specific intent to monopolize and had a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; *see also Tex. Bus. & Com. Code Ann. § 15.05(b)*. Here, on summary judgment, the trial court ruled that Waste Management's conduct, allegedly performed in an attempt to monopolize, did not, as a matter of law, (1) constitute [**67] predatory or anticompetitive conduct or (2) create a dangerous probability of Waste Management achieving monopoly power over the San Antonio or Austin markets. [23] To demonstrate that the court's grant of summary judgment against its antitrust claim was in error, Texas Disposal must demonstrate that there is evidence in the record to raise a genuine issue of material fact on both of these essential elements; if the record is void of evidence to support any single essential element, we must affirm the dismissal. *See Tex. R. Civ. P. 166a*.

23 Specifically, the court ruled that, pursuant to Waste Management's traditional summary judgment grounds, it had conclusively negated these two essential elements of Texas Disposal's attempted monopolization claim and that, pursuant to its no-evidence ground, Texas Disposal had failed to produce a scintilla of evidence to support the dangerous probability element. *See Tex. R. Civ. P. 166a(c), (i)*; *Wal-Mart Stores, Inc. v. Rodriguez, 92 S.W.3d 502, 506 (Tex. 2002)* (no evidence standard); *Elliott-Williams Co. v. Diaz, 9 S.W.3d 801, 803 (Tex. 1999)* (traditional standard). The court denied Waste Management's motion as to the "intent to monopolize" element, finding that there was evidence in support of it. Thus, Texas Disposal's challenge on appeal is limited to the other two elements--predatory or anticompetitive conduct and a dangerous probability of achieving a monopoly.

[**68] Generally, Texas Disposal claims that Waste Management engaged in anticompetitive behavior by lobbying and negotiating with government officials from Austin and San Antonio in a manner that would advance Waste Management's business and harm Texas Disposal's and that was defamatory of Texas Disposal. Next, Texas Disposal asserts that, while these alleged anticompetitive activities were taking place, Waste Management controlled over 48% of the San Antonio landfill market and 35% of the Austin landfill market, meaning that there was a high probability of success for Waste Management to obtain a monopoly of the landfill market in these cities.

We begin our review by considering whether there is evidence in the record to demonstrate that Waste Management's efforts to prevent Texas Disposal from obtaining the San Antonio and Austin contracts created a dangerous [*592] probability of monopoly. To withstand summary judgment on the element of "dangerous probability of monopoly," a plaintiff must adduce proof that the defendant's conduct "threatens actual monopolization." *Spectrum Sports, 506 U.S. at 456*. In determining if there is an actual danger of monopoly, we must "consider [**69] the relevant product and geographic market and the defendant's economic power in that market." *Id. at 459*. Courts have required evidence clearly defining the relevant market in order for a plaintiff to prevail on this element. For example, in *Surgical Care Center v. Hospital Service District No. 1*, the plaintiff's evidence was insufficient because the expert defined the "geographic area" simply by relying on the service area without identifying what other hospitals or clinics may have been competitors within that area. *309 F.3d 836, 840 (5th Cir. 2002)*. Also, the time to analyze whether there is a dangerous probability of monopolization is when the acts occur, not in hindsight. *Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 991 (5th Cir. 1983)*. Just because the defendant does not ultimately achieve a monopoly does not mean there was not a dangerous probability that the defendant would succeed. *Id.*

Because the purpose of the statute is to protect the public's interest in a competitive market, the test is

directed "not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy [**70] competition itself." *Spectrum Sports, 506 U.S. at 458*. The Supreme Court noted that it "may be difficult to distinguish robust competition from conduct with long-term anticompetitive effects" but cautioned courts to "avoid constructions . . . which might chill competition, rather than foster it." *Id. at 458-59*.

Texas Disposal has failed to provide evidence concerning the relevant market and Waste Management's ability to lessen competition within that market. Although the geographic area centers on Austin and San Antonio, the record reflects that both parties also transport waste from various surrounding communities. Texas Disposal fails, however, to explain what the market availability for their services was in these areas at the time of Waste Management's actions and, much less, what other waste disposal competitors existed in the relevant market and, if there were any other competitors, what percentage of the market they controlled. A review of Texas Disposal's various summary judgment pleadings and appellate briefs reveals the same broad argument each time without any supporting evidence.

Specifically, Texas Disposal consistently asserts that [**71] Waste Management controlled 48% of the landfill market in San Antonio and 35% in Austin. But, Texas Disposal never cites or attaches any evidence that supports this claim. Moreover, even assuming it is true that Waste Management controlled approximately 40% of the market, this is not evidence of a dangerous probability of monopoly without evidence to define the market, as discussed above. Finally, the fact that Waste Management controlled less than half of the relevant market does not, standing alone, create a genuine issue of material fact about whether Waste Management had a dangerous probability of achieving monopoly power. This situation is easily contrasted with the supreme court's recent review of cases in which the defendants' control of 75%-100% of the market was considered material. *See Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671, 50 Tex. Sup. J. 21, 2006 Tex. LEXIS 1038, at *48* & n.62 (Tex. Oct. 20, 2006) (citing *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*; *United* [*593] *States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*; *see also Surgical Care Ctr., 309 F.3d at 840 n.5* [**72] (noting that evidence was insufficient where defendant's control of 42%-44% share of market "was not dominant").

Based on Texas Disposal's failure to provide evidence that Waste Management's actions created a "dangerous probability of monopoly," which is an essential element of Texas Disposal's attempted monopolization claim, the trial court did not err in granting Waste Management's summary judgment on this claim. *See Tex. Bus. & Com. Code Ann. § 15.05(b)*; *Tex. R. Civ. P. 166*.

Texas Disposal's sixth issue is overruled.

CONCLUSION

Regarding Texas Disposal's defamation claims arising from the Action Alert memo, we hold that the jury's finding of actual malice is supported by clear and convincing evidence and that the trial court erred in refusing to question and instruct the jury on the issues of defamation per se and presumed damages. Therefore, we overrule Waste Management's cross point and sustain Texas Disposal's first and second issues. This requires that we reverse and remand the court's take-nothing judgment for a new trial on Texas Disposal's defamation claims arising from the Action Alert memo consistent with [**73] this opinion.

Regarding Texas Disposal's claims arising from the 1998 Communications, we hold that the trial court correctly concluded that they are barred by the statute of limitations and, therefore, do not decide whether they were privileged communications. Accordingly, we overrule Texas Disposal's third and fourth issues. Regarding Texas Disposal's claims for tortious interference and attempted monopolization, we hold that the trial court correctly granted summary judgment as to both claims because Texas Disposal failed to put forth evidence of at least one essential element of each claim. As a result, we overrule Texas Disposal's fifth and sixth issues. Based on these rulings, the judgment is affirmed in all other respects.

W. Kenneth Law, Chief Justice

Before Chief Justice Law, Justices B. A. Smith and Pemberton;

Justice B. A. Smith not participating

Affirmed in part; Reversed and Remanded in part on Motion for Rehearing

Filed: April 3, 2007

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**NO. 6:08-CV-00089**
(1)CISCO SYSTEMS, INC., (2)RICHARD FRENKEL, (3)MALLUN YEN & (4)JOHN NOH,	§	
	§	
	§	
Defendants.	§	

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW, ERIC M. ALBRITTON, Plaintiff, and complains of ***CISCO SYSTEMS, INC., RICHARD FRENKEL, MALLUN YEN & JOHN NOH***, Defendants, and would respectfully show unto the Court as follows:

I.

PARTIES

1. ***ERIC M. ALBRITTON ("ALBRITTON")*** is an individual residing in Gregg County, Texas.

2. ***CISCO SYSTEMS, INC. ("CISCO")*** is a corporation organized and existing under the laws of the State of California with its principal place of business in San Jose, California. CISCO has been duly served and has placed itself before this Court for all purposes.

3. ***RICHARD FRENKEL ("FRENKEL")*** is an individual who, upon information and belief, resides in the State of California. FRENKEL has been duly served with process and has placed himself before this Court for all purposes.

4. ***MALLUN YEN ("YEN")*** is an individual who, upon information and belief, resides in the State of California. She may be served with process by delivering a copy of the petition and a citation to her at her usual place of business located at 170 West Tasman Drive, M/S SJC-10/2/1, San Jose, California 95134-1700.

5. ***JOHN NOH ("NOH")*** is an individual who, upon information and belief, resides in the State of California. He may be served with process by delivering a copy of the petition and a citation to him at his place of business located at 170 West Tasman Drive, M/S SJC-10/2/1, San Jose, California 95134-1700.

II.

VENUE & JURISDICTION

6. This Court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1332 (West 2008), in that Plaintiff and Defendants are citizens of different states and the amount in controversy exceeds $75,000.00.

7. Venue is proper in the Eastern District of Texas in that all or a substantial portion of the occurrences giving rise to Plaintiff's claims occurred in the Eastern District of Texas.

III.

FACTUAL BACKGROUND

8. ALBRITTON is a licensed attorney representing clients in the United States District Courts for the Eastern District of Texas since 1996. Since 1998, he has practiced law, almost exclusively, in the Eastern District of Texas. In addition, he has resided in and been licensed to practice law in the State of Texas since November 4, 1994.

9. Throughout his professional career, ALBRITTON has enjoyed a sterling reputation for ethical and responsible legal representation. Neither the State Bar of Texas nor any state or federal court has ever issued any sanctions against ALBRITTON. Likewise, his law license has never been suspended or revoked for any reason. As a result of this reputation, Plaintiff has developed a successful law practice concentrated largely in intellectual property disputes in the Eastern District of Texas.

10. In furtherance of this practice, ALBRITTON filed a patent infringement suit against CISCO on behalf of ESN, LLC on October 16, 2007.

11. FRENKEL is an attorney licensed to practice law in the State of California. He is employed by CISCO as Director, Intellectual Property – Consumer & Emerging Technologies.

12. YEN is an attorney licensed to practice law in the State of California. She is employed by CISCO as Vice President, Worldwide Intellectual Property.

13. NOH is Senior Public Relations Manager for CISCO.

14. In October of 2007 and for a number of months prior thereto, FRENKEL published an internet "blog" purporting to cover patent litigation, particularly in what FRENKEL and CISCO termed the "Banana Republic of East Texas." At that time, FRENKEL's postings could be found at http://trolltracker.blogspot.com. Until shortly before the filing of this suit, FRENKEL purposefully published his comments anonymously.

15. In October of 2007, while still publishing anonymously, FRENKEL posted scandalous and defamatory allegations about ALBRITTON. As set forth in more detail below, FRENKEL's statements constitute libel and libel per se.

16. In particular, on October 17, 2007, FRENKEL posted a blog entitled "Troll Jumps the Gun, Sues Cisco Too Early." In that post, FRENKEL identifies ALBRITTON and "T. Johnny Ward" as local counsel for ESN. Further, in that post FRENKEL claims that ESN filed suit on October 15, 2007, instead of on October 16, 2007. Finally, FRENKEL in this post falsely asserts that ESN subsequently filed an amended complaint "to change absolutely nothing at all, by the way, expect for the filing date of the complaint." In fact, the amended complaint incorporated by reference the patent whereas the original complaint did not.

17. On October 18, 2007, FRENKEL stated as fact that ALBRITTON had "conspired" with the Clerk of the United States District Court for the Eastern District of Texas to "alter documents to try to manufacture subject matter jurisdiction where none existed." FRENKEL further stated as fact that ALBRITTON's misconduct was simply "another example of the abusive nature of litigation in the Banana Republic of East Texas."

18. A true and correct copy of the defamatory writings distributed by FRENKEL is attached hereto as Exhibit A.

19. It is a felony offense to alter court documents.

20. FRENKEL amended his post to delete the comments concerning the "Banana Republic of East Texas," but did not withdraw his allegation that ALBRITTON engaged in a crime until the blog was taken off line in February 2008; as such, FRENKEL continuously published the libelous statements concerning ALBRITTON from October 2007 until February 2008.

21. At the time he made these statements, FRENKEL was acting in the course and scope of his employment with CISCO and in his official capacity as Director, Intellectual Property – Consumer & Emerging Technologies for CISCO.

22. In fact, FRENKEL had been charged by CISCO with responsibility for management of the very case in which he alleged ALBRITTON had conspired with the Clerk to feloniously alter official documents.

23. FRENKEL published the blog with the knowledge and consent of CISCO, including NOH, Senior Public Relations Manager, Corporate Communications and YEN, Vice President Worldwide Intellectual Property.

24. In fact, FRENKEL published the libelous statements on October 18, 2007, at the express request and direction of NOH, CISCO's Senior Public Relations Manager and YEN, CISCO's Vice President, Worldwide Intellectual Property

25. After publishing the libelous statements on October 18, 2007, NOH, Senior Public Relations Manager, Corporate Communications, with the knowledge of YEN, congratulated FRENKEL for making the libelous statements and describing them as "brilliant."

26. FRENKEL published the libelous statements about ALBRITTON and referred to the United States District Court for the Eastern District of Texas as the "Banana Republic of East Texas" despite the fact that CISCO has availed itself of the United States District Court for the Eastern District of Texas by filing an intellectual property lawsuit in this very same district against a foreign competitor.

27. Before FRENKEL published his false and defamatory statements regarding ALBRITTON, FRENKEL and his supervisors, including YEN, had actual knowledge

that the statements were false, entertained serious doubts as to the truth of the statements, possessed obvious reasons to doubt the veracity of the statements and/or purposefully avoided the truth in publishing the statements.

28. After FRENKEL published his false and defamatory statements regarding ALBRITTON, he and YEN obtained additional information from various sources, which confirmed that the statements were false or, at a minimum raised a reasonable doubt as to the accuracy of the statements; nevertheless, FRENKEL, YEN and NOH did nothing to correct or retract the libelous statements.

29. FRENKEL, YEN, NOH and CISCO have purposefully maximized the dissemination of the libelous statements and the damage inflicted upon ALBRITTON by, among other things, continuously publishing the libelous statements until the blog was taken off line in February 2008, by providing links to the libelous statements including a link entitled "Eric Albritton" and by directly disseminating the blog to reporters and other members of the media.

30. FRENKEL, YEN, NOH and CISCO purposely elected to publish the statements on a web site devoted to intellectual property litigation and focused on the Eastern District of Texas. In so doing, Defendants knew that ALBRITTON concentrated his practice on patent litigation in the Eastern District of Texas and intended that litigants and attorneys would have ready access to the libelous representations.

31. On information and belief, FRENKEL further employed search engine optimization tools and techniques to direct individuals and entities seeking information about ALBRITTON through popular search engines such as "Google" to the defamatory statements. FRENKEL, YEN, NOH and CISCO have continuously published the libelous statements

from at least October 18, 2007 through February 2008. On January 30, 2008, FRENKEL boasted that his site had hosted its one hundred thousandth (100,000th) visitor.

IV.

CAUSES OF ACTION

A.

DEFAMATION

32. In publishing the false and libelous statements described above, FRENKEL, YEN, NOH and CISCO have defamed ALBRITTON in direct violation of Texas law. In particular, FRENKEL, YEN, NOH and CISCO published—either directly or through their agents—false and defamatory statements of "fact" referring directly to ALBRITTON that caused actual damages to ALBRITTON. In so doing, FRENKEL, YEN, NOH and CISCO acted with actual malice, gross negligence, reckless disregard and/ or in the absence of ordinary care for the truth of the statement and ALBRITTON's reputation.

33. Further, Defendants' wholly false statement that ALBRITTON "conspired" with the officials of the United States District Court to feloniously alter official documents is libelous per se. More particularly, such an outrageous and unsubstantiated statement invariably tends to injure ALBRITTON's reputation and to expose him to public hatred, contempt, or ridicule; expose ALBRITTON to financial injury; and impeach ALBRITTON's honesty, integrity, virtue or reputation thus exposing him to public hatred and ridicule. *See* Tex. Civ. Prac. & Rem. Code Ann. § 73.001 (West 2008).

34. Likewise, Defendants' statements are libelous per se in that they are of such a character as to injure ALBRITTON in his office, profession or occupation and directly accuse him of the commission of a crime.

B.

NEGLIGENCE

35. Both FRENKEL and CISCO failed to use ordinary care in the representation that ALBRITTON had conspired with federal officials to alter official court documents. In particular, neither Defendant used ordinary care to ensure that their statements were true or acted with reckless disregard for the truth of their allegations. Likewise, it was foreseeable to Defendants that their statements, if false, would reasonably be expected to injure ALBRITTON in his reputation and business relations.

C.

GROSS NEGLIGENCE

36. ALBRITTON would show the Court that the conduct of CISCO, FRENKEL, YEN and NOH rises to the level of gross negligence in this State. In particular, CISCO, FRENKEL, YEN and NOH acted with the specific intent to injure ALBRITTON in his reputation and business.

37. At a minimum, CISCO, FRENKEL, YEN and NOH acted with conscious indifference to ALBRITTON's rights, safety or welfare despite an actual, subjective awareness that such conduct posed an extreme degree of risk of harm to ALBRITTON's reputation and business relations.

38. Likewise, CISCO directed, authorized, approved and/or ratified the conduct of FRENKEL, YEN and NOH. Moreover, at the time of the defamation, CISCO employed FRENKEL, YEN and NOH in a managerial capacity, and each of them acted in the course and scope of their employment. CISCO, YEN and NOH have done nothing since the publication of the statements to disclaim them or distance themselves from them..

V.

DAMAGES

39. As a direct and proximate result of the conduct of FRENKEL, YEN, NOH and CISCO, ALBRITTON has endured shame, embarrassment, humiliation, mental pain and anguish. Additionally, ALBRITTON has and will in the future be seriously injured in his business reputation, good name and standing in the community. He will, in all likelihood, be exposed to the hatred, contempt, and ridicule of the public in the general as well as of his business associates, clients, friends and relatives. Consequently, ALBRITTON seeks actual damages in a sum within the jurisdictional limits of this Court.

40. Furthermore, ALBRITTON is entitled to exemplary damages from FRENKEL, YEN, NOH and CISCO. ALBRITTON would show the Court that FRENKEL, YEN, NOH and CISCO acted with the specific intent to injure ALBRITTON in his reputation and business. At a minimum, they acted with conscious indifference to the rights, safety or welfare of ALBRITTON with actual, subjective awareness that such conduct posed an extreme degree of risk of harm to the reputation and well-being of ALBRITTON.

41. Likewise, CISCO is vicariously liable for the outrageous conduct of FRENKEL, YEN and NOH in that it directed, authorized, approved and/or ratified the libelous statements. In like fashion, CISCO has done nothing since the publication of the statements to disclaim them or distance itself from the conduct of FRENKEL, YEN and NOH.

42. Moreover, at the time of the defamation, CISCO employed FRENKEL as Director, Intellectual Property – Consumer & Emerging Technologies and gave him specific responsibility for the ESN litigation. As a result, FRENKEL was employed in a managerial capacity and acted in the course and scope of his employment at the time he published the defamatory statements.

43. Likewise, both YEN and NOH acted at all times in the course and scope of their professional employment with CISCO in directing the libelous postings. As CISCO's Vice President of Intellectual Property Worldwide and its Senior Public Relations Manager, respectively, both YEN and NOH at all times acted as vice-principals of the corporation.

VI.

CONCLUSION & PRAYER FOR RELIEF

44. It has long been said in this State that "libel is the sword of the coward" and "anonymity the shield of a dastard." Having anonymously attacked the integrity and reputation of ALBRITTON and impugned the dignity of the United States District Court for the Eastern District of Texas, FRENKEL, YEN, NOH and CISCO should now be called to account for their conduct.

WHEREFORE, PREMISES CONSIDERED, ERIC M. ALBRITTON respectfully prays that CISCO SYSTEMS, INC., RICHARD FRENKEL, MALLUN YEN and JOHN NOH be cited to appear and answer for their actions and that, upon final trial of this cause, he have Judgment against them for the full amount of his actual damages together with such punitive damages as may be necessary to deter Defendants from similar outrage in the future, pre-judgment and post-judgment interest at the highest lawful rate and all costs of this proceeding.

Respectfully Submitted,

THE LAW OFFICE OF JAMES HOLMES, P.C.

By: /s/
James A. Holmes
State Bar No. 00784290

605 SOUTH MAIN, STE. 203
HENDERSON, TEXAS 75654
(903) 657-2800
(903) 657-2855 (fax)
jh@jamesholmeslaw.com

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Original Complaint has been duly served on all parties via the electronic filing system of the Eastern District of Texas on this, the 16th day of June 2008.

_____/s/_____
James A. Holmes

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TYLER DIVISION

ERIC M. ALBRITTON,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	C.A. NO. 6:08-CV-00089
	*	
CISCO SYSTEMS, INC., RICK FRENKEL, MALLUN YEN & JOHN NOH,	*	
	*	
Defendants.	*	

****

ORAL DEPOSITION OF

ERIC M. ALBRITTON

OCTOBER 27TH, 2008

****

ORAL DEPOSITION OF ERIC ALBRITTON, produced as a witness at the instance of the CLAIMANT, and duly sworn, was taken in the above-styled and numbered cause on the 27th of October, 2008, from 12:44 p.m. to 4:24 p.m., before Tammy Staggs, CSR in and for the State of Texas, reported by machine shorthand, at the Law Offices of James A. Holmes, 605 South Main, Suite 203, Henderson, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

A. Okay.

Q. Do you understand that that is an obligation that you as a plaintiff have to do in this case regardless of who the judge is?

A. Well, I understand that Judge Snyder entered an order in this case. If you'll show me the order -- I don't remember the exact language. This is the first time I've ever been in Judge Snyder's court in a civil case, but I presume that there is an obligation to make the damage disclosure.

Q. Okay. The damage disclosure that your lawyer made, whether he was obligated to or not -- or maybe he's just a good guy, but... (as read): Plaintiff does not seek any economic damages. Plaintiffs -- plaintiff seeks only an appropriate award of damages for his mental anguish and punitive damages sufficient to detour defendants from future misconduct. The amounts of these awards are soundly in the discretion of the jury.

Is that -- is that the damages you're seeking in this case?

A. Yes, sir.

Q. All right. And so you are not seeking any economic damages at all?

A. I'm not seeking economic -- I'm not saying that I can quantify money that I've lost as a result of

these defamatory statements.

Q. But are you going to say to the jury that even though you can't quantify it, you think that you have lost --

A. No, I'm not going to say that because I can't quantify it. I mean, I very well may have, but I -- I'm not seeking that damage because there's no way to know it. People don't call me up and say, hey, Eric, we're not using you anymore because, you know, Rick Frenkel told us that you're a criminal.

Q. Okay.

A. It doesn't work that way.

Q. All right. So -- so for whatever reasons you're not -- you're not going to claim reputational damages in this case?

A. That's not true.

Q. Okay. So you are going to claim reputational damages?

A. Well, Mr. Babcock, you're a lot smarter than me about first amendment law. I don't -- I don't know exactly what you mean. I'm not claiming lost wages or money damages, economic damages, as a result of lost business based on the defamatory statements. But has my reputation being harmed --

Q. Yes.

A. -- I believe that it has. Can I -- can I quantify that monetarily? No, I cannot. And I don't intend to tell the jury that I should be paid "X" dollars because of my -- my reputation has been diminished by "X" dollars. I'm not going to quantify that at all. Because frankly, there's no way to know how I -- exactly how I've been harmed, and frankly that's the reason the law, as I understand it, says that damages are presumed, because people don't call me up and say, hey, we are not hiring you anymore because you're evidently a criminal.

Q. Well, are you -- are you asking for presumed reputational damages?

A. I'm -- I'm -- whatever I'm entitled to under the law and under the contours of what Mr. Holmes said is all that I'm seeking.

Q. Well, what he says is that you're only seeking damages for mental anguish and punitive damages.

Let me ask it that way. Is that all that you're seeking: mental anguish damages and punitive damages?

A. All I can tell you is I'm not seeking economic damages.

Q. And you won't rule anything else out?

A. I'm not seeking any economic damages. And I'm

not seeking, you know, health care or, you know, something like that. I've not been to the doctor as a result of this.

Q. Okay.

A. So no medical expenses, no economic damages.

Q. Will you rule out presumed reputational damages or are you seeking that?

A. I don't know what a presumed -- I don't know what the meaning of that word is or that phrase "reputational damages."

Q. Well --

A. I'm not seeking economic damages, that's all I can tell you.

Q. Okay. And so that's all you're going to rule out, right?

A. Mr. Babcock, I don't know all -- I'm telling you I don't -- I'm not seeking money damages for lost economics based on economic harm.

Q. I think you were the one that raised this issue of presumed damages.

A. Generally presumed. I don't know about presumed reputational damages as you keep using that phrase.

Q. Let me ask you what -- take reputational out of it. What damages are you seeking in this case that

you believe the law presumes?

A. I'm not here to offer legal opinions. Whatever the law presumes is whatever the law presumes.

Q. Okay. So -- so to get -- get back to my question a few questions ago, you're not willing to rule out anything that the law would permit you to have other than economic damages?

A. I'm not asking for any economic damage.

Q. And other than that, you're going for everything?

A. As we sit here this second, I think a jury ought to be able to award, you know, the damages it believes are appropriate, except for I'm not asking for, you know, medical bills or economic damages.

Q. Okay. The ambiguity that I mentioned earlier was created by your complaint vis-a-vis your disclosures, and it says in your complaint that you've endured shame, embarrassment, humiliation, mental pain, and anguish. Are you still seeking damages for all those things?

A. Yes. This has been extremely, extremely traumatic.

Q. Okay. Can you identify for me a friend who was a friend of yours prior to the October 18th and 17th articles and who is -- and who is now not a friend as a

IN THE UNITED STATES DISTRICT COURT

EASTERN DIVISION OF TEXAS

TYLER DIVISION

ERIC M. ALBRITTON,]
Plaintiff,]
]
-vs-] C.A. No. 6:08-CV-00089
]
CISCO SYSTEMS, INC.,]
RICK FRENKEL, MALLUN]
YEN and JOHN NOH,]
Defendants.]
_____]

The video taped deposition of PETER J. McANDREWS, called by the Defendant Cisco Systems, Inc. for examination, pursuant to subpoena and pursuant to the Federal Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions, taken before Cynthia J. Conforti, Certified Shorthand Reporter, at 333 North Wabash, Suite 4000, Chicago, Illinois, commencing at the hour of 11:14 a.m. on the 7th day of November, A.D., 2008.

you.

THE WITNESS: Thank you.

EXAMINATION

BY MR. McWILLIAMS:

Q. Mr. McAndrews, prior to the ESN case had you associated with Johnny Ward or Eric Albritton in any other litigation in the Eastern District or anywhere else?

A. Had I personally hired them?

Q. Yes. Or your firm.

A. No.

Q. How was it --

A. Well, let me take that back.

The cases that I'm aware of, no, I'm not certain whether another member of my firm had ever used them.

Q. How was it that you happened to use them in the ESN case?

A. Because I was given a referral by multiple sources to Eric in particular and ultimately for Johnny as well.

Q. Since the ESN case have you retained them as local counsel in any other litigation?

A. I have not personally, no.

Q. Okay. Have you had any other litigation

in the Eastern District other than the ESN case?

A. Not for a case that I've been associated with.

Q. All right. Is there any reason why you would not associate with Eric or Johnny in future litigation?

A. Well, if it was left up to me, of course I would, but of course that's a decision made by a client typically, and there could be a circumstance where my recommendation would be overruled by a client.

In fact, just this past week, I recommended Eric and Johnny to a partner at my firm to use for a case where his client is involved in litigation in the Eastern District, and he accepted my recommendation, but I don't know that he was going to be able to use them because he said, "Of course this is subject to my client's approval," and I know that those are the two attorneys that have got a bad name down there.

Q. Is it your testimony that Eric Albritton and Johnny Ward have a bad name in the Eastern District?

A. I'm sorry. They have a bad name subsequent to the Troll Tracker fiasco.

Q. All right. And what -- is it your testimony that subsequent to the Troll Tracker that Eric and Johnny have a bad name in the Eastern District?

A. I, I don't know, but I know that -- I know firsthand that it's a question that will be raised by clients.

Q. And have you had a client to raise that issue?

A. Several clients.

Q. Okay. And have they declined to retain them because of that?

A. I don't know what the end result is, but I do know that there are clients that have been influenced by the Troll Tracker articles and would certainly use that as one of the factors in determining whether to hire local counsel -- whether to hire Johnny and Eric as local counsel.

Q. All right. Do you know of any single instance in which a client has declined to hire Johnny Ward or Eric Albritton because of the Troll Tracker article?

A. Again, I wouldn't have firsthand knowledge of the thinking of general counsel or a client, so the answer is no, but I suspect that that is

certainly something that the clients would consider.

MR. McWILLIAMS: Objection, nonresponsive.

BY MR. McWILLIAMS:

Q. Have you heard any lawyer who practices in the Eastern District of Texas be critical of Johnny Ward or Eric Albritton's reputation since the Troll Tracker article?

A. I have not personally heard that, no.

Q. Now, do I understand that in the filing of the ESN complaint that the basic communication with Eric Albritton's office was with Amie Mathis and you?

A. No, that's not true. She took over -- as was discussed earlier, she took over the communication chain later in the afternoon after the complaint was in Mr. Albritton's firm's hands.

Q. Okay. She took over the communication chain late in the afternoon of October the 15th.

A. That's right.

Q. And then she continued in that communication chain through the 15th and the 16th. And what about the 17th?

A. You know, I don't recall whether there were any communications with Amie on the 16th.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON,	)	
	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	CIVIL ACTION
	)	
	)	NO.: C.A. NO.
CISCO SYSTEMS, INC., RICK FRENKEL, MALLUN YEN & JOHN NOH,	)	6:08-CV-00089
	)	
	)	
	)	
DEFENDANTS.	)	

ORAL AND VIDEOTAPED DEPOSITION OF

MICHAEL SMITH

November 24th, 2008

ORAL AND VIDEOTAPED DEPOSITION OF MICHAEL SMITH, produced as a witness at the instance of the DEFENDANT, and duly sworn, was taken in the above-styled and -numbered cause on the 24th day of November, 2008, from 1:15 p.m. to 4:08 p.m., before Regenia Plant, CSR in and for the State of Texas, reported by machine shorthand, at the law offices of Siebman, Reynolds, Burg, Phillips & Smith, LLP, 713 South Washington Avenue, Marshall, Texas, pursuant to the Federal Rules of Civil Procedure.

01:22:56 you've known him, five or ten years, period?

01:22:59 A. I -- I would really be guessing because I don't really know which of the cases I've been in, he was actually involved in.

01:23:06 Q. Okay. Fair enough. During the time that you have known him, have you determined whether he has a reputation, be it good, bad, indifferent?

01:23:14 A. Yes.

01:23:17 Q. All right. And do you -- are you aware that you've been designated by Mr. Albritton as a witness on his reputation?

01:23:24 A. No, I wasn't aware of that.

01:23:29 Q. Okay. Well, Mr. Holmes can correct me if I'm wrong, but I think Mr. Albritton has done that. So my question to you is, what is his reputation.

01:23:39 A. I'm not aware of anything negative about his reputation in the -- in the legal community.

01:23:51 Q. Okay. Do you -- do you know whether he has -- I appreciate your saying you're not aware of anything negative. Are you -- do you think that he has a good reputation?

01:24:03 A. Generally, yes. I'm not aware of anything that would cause me to say that he doesn't.

01:24:10 Q. Okay. Has his reputation changed in the past five or ten years, how ever long you've known him?

01:24:13 A. No.

01:24:22 Q. Okay. Has he ever referred you a case?

01:24:27 A. Not that I know of.

01:24:30 Q. Okay. Have you ever referred him a case that you know of?

01:24:42 A. I may have referred a -- I don't think so. I might have sent a -- a call on a criminal case to him one time or -- or maybe -- there was one time in a civil case where someone was asking me to be local counsel and I think it was a civil rights case or something like that and he was one of the people that I -- that I referred them to.

01:25:04 Q. All right. Is there any reason why you wouldn't refer an appropriate case to him?

01:25:08 A. No.

01:25:13 Q. Okay. You are aware to some degree, I take it, that Mr. Albritton has sued Cisco and a fellow by the name of Rick Frenkel for defamation.

01:25:19 A. Yes.

01:25:22 Q. All right. Have you talked to Mr. Albritton about this case?

01:25:23 A. Not about this case, no.

01:25:25 Q. Okay.

01:25:27 A. Let -- let me qualify that.

01:25:28 Q. Sure.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	C.A. NO. 6:08-CV-00089
	*	
CISCO SYSTEMS, INC., RICK FRENKEL, MALLUN YEN & JOHN NOH,	*	
	*	
Defendants.	*	

****

ORAL DEPOSITION OF

ELIZABETH DeRIEUX

NOVEMBER 5TH, 2008

****

ORAL DEPOSITION OF ELIZABETH DeRIEUX, produced as a witness at the instance of the DEFENDANT, CISCO, and duly sworn, was taken in the above-styled and numbered cause on the 5th of November, 2008, from 11:42 a.m. to 11:54 a.m., before Tammy Staggs, CSR in and for the State of Texas, reported by machine shorthand, at the Law Offices of Capshaw & DeRieux, 1127 Judson Road, Suite 220, Longview, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

Mr. Albritton in a business professional sense?

A. Not that I can think of.

Q. Okay. Do you have a personal relationship with Mr. Albritton? Are you social friends, that type of thing?

A. I consider him my friend. We -- our families don't socialize. He's never been to my home. I've never been to his home. But, yes, I consider him my friend.

Q. Okay. You I'm sure are aware since you're sitting here that Mr. Albritton has designated you as a witness or disclosed you as a witness in this case. And his disclosure says that you have knowledge of the professional reputation and integrity of the plaintiff Mr. Albritton. Do you have such knowledge?

A. I do.

Q. All right. Would you tell me what knowledge you have on that subject?

A. Because I have worked for him and against him, I would say that he has a good reputation, at least in my firm and in -- among the lawyers that I know and work with here in Longview. He's very, very bright, good lawyer, ethical, hard working. And I'm trying not to circle back around and say very, very bright because that's what I keep thinking. I think that that's the

quality that I think of first when I think of Eric.

Q. Okay. Would you refer a case to him -- would you refer a client to him?

A. I would.

Q. Okay. Have you ever?

A. I can't think of one right off, but I might have.

Q. Okay. Has his reputation in your mind changed from the time that you first got to know him professionally to today, which is September 5th, 2008 [sic]?

A. Yes.

Q. Okay. And how has it changed?

A. When I first got to know him, he was a baby lawyer. Perhaps not even -- I don't believe he was even licensed at the time I first met him. And so I thought at the time that he was very, very bright, and I didn't know a lot about his personal integrity or his practice. And I think since that time, I have gotten to know him better. And he began his own practice, so his own practice grew and with that his reputation grew.

Q. Okay. And when you say "his reputation grew," did his -- did his reputation increase or was it better over time or worse over time or somewhere in the middle? When you say "his reputation grew," what do you mean by

that?

A. His reputation is better.

Q. Better today than it was --

A. Than it was when I met him.

Q. Okay.

A. Yes, I believe that's right.

Q. Okay.

MR. BABCOCK: That's all I have. Thank you. And thanks for accommodating our schedule here, we appreciate it. Mr. McWilliams may have some questions now.

EXAMINATION

BY MR. McWILLIAMS:

Q. Just a couple, Ms. DeRieux. Have you been asked to come here today or serve as a witness in this case to render any opinions other than the reputational opinions that you have about Mr. Albritton?

MR. PATTON: Objection, form.

A. No.

Q. (BY MR. McWILLIAMS) Let me ask you about the Inns of Court that you mentioned. What is the membership of the Inns of Court organization that you belong to?

A. I'm not sure what you're asking me. How many people?

Q. Well, where is the membership, where is it drawn from?

A. From attorneys who practice in the Eastern District of Texas area including Texarkana, Tyler, Longview, and surrounding areas as well.

Q. Right. Do -- do you attend those meetings?

A. I do.

Q. When is the last time you attended one of those meetings?

A. Well, I missed this one. And we meet every two months, so about two months ago.

Q. During the time that you have been a member of the Inns of Court, have you ever heard any lawyers who were members of that organization criticize the reputation of Eric Albritton?

A. Not that I'm aware of.

MR. McWILLIAMS: Thank you. Pass the witness.

EXAMINATION

BY MR. PATTON:

Q. Ms. DeRieux, you and Mr. Capshaw, your partner who is sitting here with you, practice in the federal courts of the Eastern District a lot, don't you?

A. Yes, sir.

Q. In fact, I ran into you yesterday in court in

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	C.A. NO. 6:08-CV-00089
	*	
CISCO SYSTEMS, INC., RICK FRENKEL, MALLUN YEN & JOHN NOH,	*	
	*	
Defendants.	*	

****

ORAL DEPOSITION OF

OTIS CARROLL

NOVEMBER 5TH, 2008

****

ORAL DEPOSITION OF OTIS CARROLL, produced as a witness at the instance of the CLAIMANT, and duly sworn, was taken in the above-styled and numbered cause on the 5th of November, 2008, from 9:25 a.m. to 9:36 a.m., before Tammy Staggs, CSR in and for the State of Texas, reported by machine shorthand, at the Law Offices of Ireland, Carroll and Kelley, 6101 Broadway, Suite 500, Tyler, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

representing Rick Frenkel.

THE VIDEOGRAPHER: Will the court reporter please swear the witness.

OTIS CARROLL,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. BABCOCK:

Q. Would you state your name, sir.

A. Otis Carroll.

Q. Mr. Carroll, how are you employed?

A. I'm a lawyer.

Q. And are you -- do you practice with a law firm?

A. I do. A firm called Ireland, Carroll, and Kelley in Tyler, Texas.

Q. That was my next question.

Mr. Carroll, you have been designated or disclosed as a witness in the case that you're giving your deposition in today by the plaintiff Eric Albritton. And it says, in its entirety, (as read): Mr. Carroll has knowledge of the professional reputation and integrity of the plaintiff.

Do you know anything about that?

A. I do.

Q. And what do you know?

A. I have my opinion about Eric Albritton's professional reputation and integrity, and I understood that's what he was disclosing me to talk to.

Q. That's what -- that's what it looks like. What is your opinion of Mr. Albritton's professional reputation and -- and integrity?

A. I think it's impeccable. I think he's got a reputation as being a fine -- to me and probably to Nick Patton, he's still a young trial lawyer, but...

Q. You can throw me in on that one too.

A. And to you Chip, I forgot. But he's a fine young lawyer. And in my -- my mind he's got a great reputation. And that's -- kind of sums it up.

Q. All right. And -- and have you changed your opinion as to his reputation at any time between when you first knew him as a lawyer and today, which is November 5th, 2008, the day after the great election?

A. Well, I think, you know, my opinion of him has improved. I met -- I was trying to think of this this morning. I think I met him initially when he was a law clerk to Judge Justice. And I can't remember when it was, but I'm guessing it was at least 15, maybe even 20 years ago. And then I knew him when he went to work for Scrappy Holmes and then when he -- he left and I've had cases with him and I've had cases against him and my --

to answer your question, my opinion of his abilities and his reputation has grown. I think he's -- you know, he's somebody I'm glad to count as a colleague and a friend.

Q. So his reputation in your mind is --

MR. PATTON: Objection, leading.

Q. (BY MR. BABCOCK) His reputation in your mind is better today than it might have been a year ago or two years ago or five years ago?

A. Well, to me it is.

Q. Yeah, okay. Will you tell me whether you're -- and I think you've already said this, but will you tell me whether his reputation in your eyes has improved over the last five years?

A. I mean, it has to me. And, you know, because he and I are doing the same kind of work and we weren't before. He was doing more criminal trial practice. And he got into the commercial practice and the IP practice, which a lot of us around here do, and I got to see more of him. So, you know, I guess that's the basis for my opinion as much as anything.

Q. Okay. Have you ever referred him a case?

A. Yeah, sure have. The first -- first patent case he ever had.

Q. When was that?

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON,)
Plaintiff,)
)
VS.)
) C.A. NO. 6:08-CV-00089
CISCO SYSTEMS, INC.,)
RICK FRENKEL, MALLUN YEN &)
JOHN NOH,)
Defendants.)

****

ORAL AND VIDEOTAPED DEPOSITION OF

LOUIS BRUCCELERI

NOVEMBER 10, 2008

****

ORAL AND VIDEOTAPED DEPOSITION of LOUIS BRUCCELERI, produced as a witness at the instance of the Defendants, and duly sworn, was taken in the above-styled and numbered cause on the 10th of November, 2008, from 12:51 p.m. to 1:12 p.m., before Kathy Genung, a court reporter, and a notary public in and for the State of Texas, reported by machine shorthand, at the offices of Jackson Walker, 1401 McKinney, Suite 2000, Houston, Texas 77010, pursuant to the Federal Rules of Civil Procedure, notice, and the provisions stated on the record or attached hereto.

Q. Okay.
A. -- you know, it's Marshall for now.
Q. Okay.
A. Yeah.
Q. All right. I guess, you know, you've been identified as someone with knowledge of Mr. Albritton's reputation. And I think you've touched on that, but -- but, you know, what is your knowledge of his reputation?
A. So among -- among the folks that I'm close with and work with, he's got a stellar reputation.
Q. Okay.
A. He's a go-to guy.
Q. And do you have any opinion or knowledge of his integrity?
A. So -- Only through my experiences. And I would say it's impeccable. I could convey, you know, anecdotally, he -- he is a guy that reins -- when I say us in, I would consider myself as general counsel as opposed to local. And not that we would ever intentionally do things that were kind of cute as opposed to perfectly professionally; but if it even smells like that, you know, Eric will put you in your place and make sure you don't do it on anything he's working on, anyway.
Q. Okay. And so has -- And that's your opinion of his reputation today?

A. Correct.
Q. Okay. And has his reputation changed, in your mind, from the time when you first got to know him till today?
A. No.
Q. Okay. Would you ever refer a case to him?
A. Yes.
Q. Okay. Have you referred any cases to him?
A. Yes.
Q. And how many?
A. Well, I don't do a lot of litigation.
Q. Okay.
A. But since I met him, I'm pretty sure every case I've had in East Texas, which might be between four and seven or eight, but probably closer to four. But I'd have to count them up, because sometimes there's multiple filings in a similar case.
Q. Okay. Have you had any discussions with anyone at Cisco about Mr. Albritton?
A. No. You know, Mallun Yen and I had a conversation where we touched on the Troll Tracker topic, but we didn't talk about Eric and -- and we didn't talk in any detail.
Q. And what -- what was it that you touched on with Troll Tracker?

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON,)
Plaintiff,)
)
VS.)
) C.A. NO. 6:08-CV-00089
CISCO SYSTEMS, INC.,)
RICK FRENKEL, MALLUN YEN &)
JOHN NOH,)
Defendants.)

****

ORAL AND VIDEOTAPED DEPOSITION OF

DANNY LLOYD WILLIAMS

NOVEMBER 10, 2008

****

ORAL AND VIDEOTAPED DEPOSITION of DANNY LLOYD WILLIAMS, produced as a witness at the instance of the Defendants, and duly sworn, was taken in the above-styled and numbered cause on the 10th of November, 2008, from 9:55 a.m. to 10:10 a.m., before Kathy Genung, a court reporter, and a notary public in and for the State of Texas, reported by machine shorthand, at the offices of Jackson Walker, 1401 McKinney, Suite 2000, Houston, Texas 77010, pursuant to the Federal Rules of Civil Procedure, notice, and the provisions stated on the record or attached hereto.

there.

Q. Okay. And "up there" is where?

A. Primarily Northeast Texas. That's where all the cases I have currently are pending.

Q. So you -- you are a patent litigator?

A. Yes, ma'am.

Q. And do you have a social relationship with Mr. Albritton as well as a professional relationship?

A. Yeah, somewhat. I mean, we've had meals together, that kind of thing. Yeah, I would say he's a friend of mine, yes.

Q. Okay. And is he a good friend of yours or --

A. Yeah, I'd say a good friend, yes.

Q. Okay. And you've been designated or, actually, disclosed as a person with knowledge in this case by Mr. Albritton's counsel. Are you aware of that?

A. I became aware of it, but I'm not sure when. Recently.

Q. Okay. And did you have --

A. I think --

Q. I'm sorry.

A. I was just going to say I think that's why I'm here today.

Q. Did you have a conversation with anyone about that designation or disclosure?

A. Maybe Nick.
Q. Okay.
A. Mr. Patton.
Q. And -- and what was that conversation?
A. Probably just -- I can't recall it, to be honest with you; but I just have an impression. I know that I was identified or I'm understanding I was identified, but I'm not sure how the conversation went. I just came to understand that, but I'm not sure how.
Q. Okay. And do you recall what the discussion was?
A. Nothing specific, no.
Q. Okay. Do you -- So what is your understanding about how you've been identified?
A. Well, I think I was identified as a person who may have knowledge, a typical disclosure in a litigation, as I understand it.
Q. Okay. And did they tell you what -- knowledge of what?
A. No. Actually, I don't believe they did.
Q. Okay. So you just have knowledge, but you -- but you're not aware of what knowledge they disclosed you as having?
A. Yeah. I'm assuming because I know Eric, right.
Q. Okay.

A. But I don't -- I don't think anyone's ever said we're putting you down as having knowledge of this or that fact. I don't recall that, at least.

Q. Okay.

MR. PATTON: Nancy, I don't -- I don't want you to be mislead. I've only been in this case a month --

MS. HAMILTON: Okay.

MR. PATTON: -- or a little -- little better. So when the disclosures were made, I wasn't involved at all. And I thought that might help you.

MS. HAMILTON: Right.

MR. PATTON: There's a little confusion. I came in late.

MS. HAMILTON: That's okay.

MR. PATTON: Okay.

MS. HAMILTON: That's fine.

Q. (BY MS. HAMILTON) Well, I'll tell you, at least from the disclosures that I've read, that you've been disclosed as someone having knowledge of the professional reputation and integrity of Mr. Albritton.

A. All right.

Q. Would that be consistent with your knowledge?

A. I think I do have knowledge of his reputation, yes.

Q. And what is that knowledge?

A. I mean, I've known Eric for a number of years. I've worked with him. I've worked opposite of him. I -- I believe Eric has high professional integrity. If he told me something in a case, whether he were opposing counsel or a co-counsel, I would -- I would believe it. I just find him to be a person of high integrity --

Q. Okay.

A. -- professionally.

Q. And how do you find his reputation? Do you have an opinion of his reputation as well as his integrity?

A. I think the people who know Eric, with those people, he has a good reputation. I guess the people that I talk to generally do know Eric. So I think that the people who know him believe he has a very good reputation. I think he has a good reputation.

Q. Okay. So you think --

A. At least among those people who know him, yes.

Q. Do you think he might not have a good reputation among those who don't know him? I mean, I want to get what -- What is your opinion of his reputation?

A. My opinion is that he has a good reputation, at least among those people who know him. I don't -- I'm not sure I can speak --

Q. Okay.

A. -- to those people who don't know him.
Q. Okay. And would you refer a case to him?
A. Would I refer a case to him?
Q. Uh-huh, yes.
A. Yes.
Q. Okay. Have you ever done so?
A. I have brought him in on cases. I'm trying to -- I don't know. When you say "refer," do you mean give him a case that I don't stay involved in?
Q. Yes.
A. I can't recall one right now.
Q. Okay. You said that you -- you have brought him in on cases. So has he worked with you on cases, on the same side of the case?
A. Yes.
Q. And are you currently working with him on any cases?
A. Yes.
Q. Can I have the name of the case?
A. We represent together Aloft Media. They are a handful of cases or less. We represent an outfit called Stragent. Let's see. We represent Apple together. Now, these cases I'm giving you, I didn't bring him in on all these cases. But the question was what cases I'm working with him?

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON	§	
	§	
	§	
v.	§	
	§	C. A. NO. 6:08-CV-00089
CISCO SYSTEMS, INC.,	§	
RICK FRENKEL, MALLUN YEN &	§	
JOHN NOH	§	

CISCO SYSTEMS, INC.'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

TO THE HONORABLE JUDGE:

Defendant Cisco Systems, Inc. ("Cisco") hereby files this Motion to Compel the Production of Documents ("Motion") pursuant to Rule 37 of the Federal Rules of Civil Procedure, this Court's Scheduling Order, and Local Rule 26(d) and would show the Court the following.

I. FACTUAL BACKGROUND

Eric Albritton ("Albritton") alleges in his Original Complaint ("Complaint") (a true and correct copy of the Complaint is attached as Exhibit A) that the Defendants published defamatory statements about Albritton that damaged his reputation and caused him "shame, embarrassment, humiliation, and mental pain and anguish." (Exhibit A at ¶39). He alleges that he "has and will in the future be seriously injured in his business reputation, good name and standing in the community" and " will, in all likelihood, be exposed to the hatred, contempt, and ridicule of the public in general as well as of his business associates, clients, friends and relatives." Defendants bring this motion to seek discovery of documents related to those claims because Albritton refuses to produce them.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON	§	
	§	
	§	
v.	§	
	§	C. A. NO. 6:08-CV-00089
CISCO SYSTEMS, INC.,	§	
RICK FRENKEL, MALLUN YEN &	§	
JOHN NOH	§	

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I. FACTUAL BACKGROUND

Eric Albritton ("Albritton") alleges in his Original Complaint ("Complaint") (a true and correct copy of the Complaint is attached as Exhibit A) that the Defendants published defamatory statements about Albritton that damaged his reputation and caused him "shame, embarrassment, humiliation, and mental pain and anguish." (Exhibit A at ¶39). He alleges that he "has and will in the future be seriously injured in his business reputation, good name and standing in the community" and " will, in all likelihood, be exposed to the hatred, contempt, and ridicule of the public in general as well as of his business associates, clients, friends and relatives." Defendants bring this motion to seek discovery of documents related to those claims because Albritton refuses to produce them.

The parties have conducted a meet and confer, and Albritton still refuses to produce certain documents. Specifically, Albritton refuses to produce the following documents:

- Documents evidencing Eric Albritton's damages;
- Documents evidencing Eric Albritton's mental anguish;
- A medical authorization for Eric Albritton's medical records;
- Documents evidencing all of Albritton's new matters or clients since October 16, 2007, including but not limited to engagement letters concerning such clients and matters;
- Eric Albritton and the Albritton Law Firm's tax returns for 2002 through the present; and
- Annual and interim balance sheets, income statements, and statements of cash flows for the Albritton Law Firm for 2002 through the present.

Defendants seek an order from the Court compelling Albritton to produce these relevant documents.

II. ARGUMENTS AND AUTHORITIES

Defendants seek an order compelling Albritton to produce the requested documents, which relate directly to his damage claims for mental anguish and damage to his reputation as set forth in his Complaint. Albritton has refused to produce documents related to Albritton's claim for mental anguish and his claim of damage to his business reputation. (*See* Exhibit A at ¶39).

Texas law provides that medical records and records related to the plaintiff's finances are relevant to a plaintiff's mental anguish claim. In order to recover for mental anguish, there must be (1) evidence of compensable mental anguish and (2) evidence to justify the amount awarded. *Saenz v. Fidelity & Guaranty Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996). With respect to the requirement that the plaintiff show evidence of mental anguish itself, the Texas Supreme Court has noted the difficulty of distinguishing "between shades and degrees of emotion."

Defendants' requests for financial information and costs of any medical care are also proper under Texas law to show damages or lack of damages. Texas law provides that when it comes to damages for mental anguish, the jury "cannot simply pick a number and put it in the blank," but rather must provide evidence of fair and reasonable compensation. *Saenz v. Fidelity & Guaranty Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996) (reversing the award of mental anguish damages because "there is no evidence in this case that Saenz suffered mental anguish or that $250,000 would be fair and reasonable compensation"). The Texas Supreme Court has held that evidence of mental anguish must not be simply a disapprobation of the plaintiff's conduct, but rather a "fair assessment" of the defendants' injury. *Bentley v. Bunton*, 94 S.W.3d 561, 605 (Tex. 2002) (reversing an award of $7 million in mental anguish on the basis there was insufficient evidence that the amount would "fairly and reasonably compensate" the plaintiff for his loss). In doing so, the Court held that "there must be evidence that the amount found is fair and reasonable compensation, just as there must be evidence to support any other jury finding." *Id.* at 606.

Defendants are seeking exactly the type of evidence the Texas Supreme Court has held is relevant to determine damages resulting from Albritton's alleged mental anguish. Albritton has produced no evidence of any damages resulting from his mental anguish. Evidence of the amount spent for medical care resulting from his mental anguish as well as any monetary loss he has suffered as a result of his mental anguish (or lack thereof) are directly related to his damages claims.

Similarly, evidence of an actual injury is directly related to Albritton's claim of damage to his business reputation. Certainly evidence of the financial condition of an attorney's practice is relevant to his claim that his business reputation has been injured. The very definition of libel

under Texas law acknowledges that financial injury is evidence of defamation. *See* TEX. CIV. PRAC. & REM. CODE § 73.001 (defining libel as "defamation expressed in written or other graphic form that tends to ... injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury.")

Simply put, Albritton should not be permitted to allege mental anguish and damage to his business reputation, yet refuse to produce the most obvious evidence concerning those claims. Accordingly, Defendants respectfully request an order requiring Albritton to produce the following:

- Documents evidencing Eric Albritton's damages;
- Documents evidencing Eric Albritton's mental anguish;
- A medical authorization for Eric Albritton's medical records;
- Documents evidencing all of Albritton's new matters or clients since October 16, 2007, including but not limited to engagement letters concerning such clients and matters;
- Eric Albritton and the Albritton Law Firm's tax returns for 2002 through the present; and
- Annual and interim balance sheets, income statements, and statements of cash flows for the Albritton Law Firm for 2002 through the present.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**NO. 6:08-CV-00089**
(1) CISCO SYSTEMS, INC.,	§	
(2) RICHARD FRENKEL, a/k/a	§	
"TROLL TRACKER,"	§	
(3) JOHN NOH and	§	
(4) MALLUN YEN,	§	
	§	
Defendants.	§	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW, ERIC M. ALBRITTON, Plaintiff, and files this, his Response to ***CISCO SYSTEMS, INC.'s*** Motion to Compel Production of Documents, and, in support thereof, would respectfully show unto the Court as follows:

I. Introduction And Factual Background

In October of 2007, Richard Frenkel, acting in the course and scope of his employment with Cisco Systems, Inc. and in concert with Defendants Yen and Noh, published outrageous and patently false statements against Eric Albritton. Frenkel and his cohorts continuously published the statements until Plaintiff filed this action for damages in March of 2008. Albritton sued Cisco, Frenkel, Yen and Noh for defamation, seeking to recover damages for his shame, embarrassment, humiliation, mental pain and anguish; damage to his reputation, good name and standing in the community; and exemplary damages.

Albritton has made no claim for damages from lost earnings, lost earning capacity or medical expenses as a result of defendants' tortuous conduct. To the contrary, in response to Cisco's request for Albritton's medical and financial records, Albritton repeatedly told Cisco that

A. The Documents Cisco Seeks Are Not Relevant

The documents Cisco seeks are not relevant to Albritton's claim for damages. Under Texas law, compensatory damages allowable for defamation are divided into two categories: general and specific. *See Peshak v. Greer*, 13 S.W.3d 421, 427 (Tex. App. Corpus Christi 2000). General damages include compensation for "injury to character or reputation, injury to feelings, mental anguish and similar wrongs." *Bentley v. Bunton,* 94 S.W.3d 561, 604 (Tex. 2002). A plaintiff may also elect to recover additional, "special damages" that flow from the libel including loss of earning capacity, *Peshak,* 13 S.W.3d at 427, loss of past and future income, *Shearson Lehman Hutton, Inc. v. Tucker,* 806 S.W.2d 914, 922 (Tex. App. – Corpus Christi 1991, writ dism'd), and loss of employment, *Houston Belt & Terminal Ry. v. Wherry,* 548 S.W.2d 743, 753 (Tex. App. Houston [1st Dist.] 1976, writ ref'd n.r.e.).

When the actionable statements injure the plaintiff in his office, profession or occupation, *Knox v. Taylor,* 992 S.W.2d 40, 50 (Tex. App. – Houston [14th Dist.] 1999, no pet.), or charge him with the commission of a crime, *Leyendecker & Assocs., Inc. v. Wechter,* 683 S.W.2d 369, 374 (Tex. 1984), they are defamatory *per se*. *See e.g., Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.,* 219 S.W.3d 563, 581(Tex. App – Austin 2007, pet. denied). In such cases, Texas law presumes that the plaintiff is entitled to recover general damages even in the absence of specific evidence of harm to the plaintiff's reputation. *Id.*, *see also Peshak*, 13 S.W.3d at 427 ("In actions of libel *per se*, the law presumes the existence of some actual damages, requiring no independent proof of general damages."). In fact, the Texas Supreme Court has held that a plaintiff injured in his office or profession is entitled to recover actual damages for injury to his reputation and for mental anguish as a matter of law. *See Bentley*, 94 S.W.3d at 604 ("Our law presumes that statements that are defamatory *per se* injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish."); *see also Smith v. Lowe's Home Centers, Inc.*, No. SA-03-CA-1118-XR, 2005 U.S. Dist. LEXIS 12812, at *12 (W.D. Tex. June 29, 2005) (citing *Bentley* and holding

"statements which are defamatory *per se* entitle a plaintiff, as a matter of law, to recover actual damages for injury to reputation.").

In this case, Defendants attacked Albritton in his profession. The false statement that Albritton had "conspired" with the clerk of the court to falsify official documents is so outrageous and undeniably harmful that Texas law presumes that Albritton has suffered damage to his reputation and mental anguish. Further, Albritton has expressly disclaimed any recovery for special damages attributable to loss of income and loss of earning capacity. Because Texas law entitles Albritton to an award of damages for reputational injury and mental anguish as a matter of law, there is no need or requirement that Albritton introduce specific evidence in support of these damages. *See Peshak*, 13 S.W.3d at 427 ("In actions of libel *per se*, the law presumes the existence of some actual damages, requiring no independent proof of general damages."); *see* e.*g., Parkway Co. v. Woodruff*, 901 S.W.2d 434, 443-44 (Tex. 1995)(a plaintiff may recover damages for mental anguish based on evidence sufficient to establish a "substantial disruption in the plaintiff's daily routine."). Here, Albritton need not offer any evidence other than his own testimony to prove the extent and nature of his damages. *See Williams v. Trader Publ'g Co.*, 218 F.3d 481, 486 (5th Cir. 2000)(holding that plaintiff's testimony alone was sufficient to support the jury's award for mental anguish damages); *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (same); *Smith,* 2005 U.S. Dist. LEXIS 12812, at *16 (evidence of mental anguish need not be corroborated by doctors, psychologists, or other witnesses).

Because Albritton's general damages are presumed, and the extent of those damages can be supported by his own testimony at trial, his medical and financial records are not relevant to the damages issues in this case.

B. Cisco Is Not Entitled to Albritton's Medical Records

Cisco incorrectly argues that the very fact that Albritton has claimed he suffered mental anguish is enough to require production of his medical records. In support of its position, Cisco cites to *Patterson* v. *P.H.P. Healthcare Corp.*, 90 F.3d 927, 940 (5th Cir. 1996). *See* Mot. at 4. But as this Court has previously held in an opinion omitted from Cisco's brief, *Patterson* does

decreases in Albritton's revenue may result from a myriad of reasons unrelated to the defamation disseminated by Cisco. Thus, Albritton's tax returns and related financial information will provide no additional relevant information. To the extent that Cisco seeks information related to Albritton's damaged reputation, that information is available through Albritton's testimony and/or is otherwise available from other less-sensitive sources. Thus, Cisco's request for Albritton's financial documents should be denied. *See id.* at *9.

D. The Discovery Cisco Seeks Is Unnecessary, Unreasonably Cumulative, Overly Broad And Sought For The Purpose Of Harassing Plaintiff

To the extent that the documents Cisco seeks have any marginal relevance, they are duplicative of the evidence adduced in Albritton's deposition. *Cf.* FED. R. CIV. P. 26(b)(2)(C)(i). Albritton's testimony that he has not sought any medical treatment because of Defendants' conduct and that he cannot identify any specific lost employment or income attributable to Defendants' conduct eliminates Cisco's claimed need to discover his medical records, client lists, engagement letters, tax returns, and confidential financial statements. To the extent that Albritton's claim for mental anguish entitles Cisco to any discovery, Cisco had access to that discovery during Albritton's deposition. Cisco's demand for additional discovery is unreasonably cumulative and oppressive, especially given the sensitive nature of the documents it seeks.

Additionally, "the burden . . . of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues," *Cf.* FED. R. CIV. P. 26(b)(2)(C)(i)-(iii). Here, Cisco seeks all of Albritton's medical records, whether or not they are related to this case. In fact, Cisco seeks a medical authorization giving it unlimited access to Albritton's medical records without any limit as to time and scope. *See* Mot. at 3. Cisco's requests are fatally overbroad, and Cisco has offered no explanation for the breadth of its requests. Albritton's medical records are not relevant, and when weighed

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON	§	
	§	
	§	
v.	§	
	§	C. A. NO. 6:08-CV-00089
CISCO SYSTEMS, INC.,	§	
RICK FRENKEL, MALLUN YEN &	§	
JOHN NOH	§	

CISCO SYSTEMS, INC.'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

TO THE HONORABLE JUDGE:

I. INTRODUCTION
(In Reply To Opp. at pp. 1-2)

Cisco, of course, denies that its employee Rick Frenkel ("Frenkel") published "outrageous and patently false statements" about Plaintiff (Opp. at 1), but this motion is about damages, not liability. In his disclosures, Plaintiff states that he seeks "only an appropriate award of damages for his mental anguish and punitive damages…".[1] Plaintiff's pleading, however, is much broader and seeks past and future damages to his business reputation, so we asked Mr. Albritton about this apparent discrepancy at his recent deposition: Q. (By. Mr. Babcock) "So…you're not going to claim reputational damages in this case?" His answer: "That's not true."[2]

He then testified that he would not rule out anything other than "economic damages, you know, health care, you know, something like that,"[3] concluding by saying "I think a jury ought to be able to award, you know, the damages it believes appropriate, except for I'm not asking for,

[1] Plaintiff's Initial Disclosures at 3, attached as Exhibit A.
[2] Albritton Dep. at p 76, attached as Exhibit B.
[3] *Id.* at 78.

you know, medical bills or economic damages."[4] His complaint continues to assert that he "has and will in the future be seriously injured in his business reputation (and) ... will be "exposed to the hatred, contempt, and ridicule of his business associates..." (Original Complaint (Docket #17) at 9.)

It is frequently the case that Plaintiffs who, as here, have **not** suffered damages will try to shield their financial information from discovery, which is the very reason why the Defendant seeks it, that is, to show that the Plaintiff's **business reputation** was **not** harmed. The fact finder is certainly entitled to hear that the Plaintiff made more money in the year following the alleged defamation than in the years preceding it (and how much) and that he filed more lawsuits, attracted more clients and had more financial success than before these alleged defamatory internet articles which hardly anybody read. To deprive Defendant this discovery is to deny it powerful, probative evidence in its defense.

It is an overstatement that Defendant seeks Plaintiff's "entire medical history" (Opp. at 2), but mental health information is certainly critical when Plaintiff is seeking mental anguish damages. There may be some pre-existing mental condition that will bear on whether these two articles caused him the mental anguish he claims. *See Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006), *cert. denied* 456 F.3d 704 (2006); 127 S.Ct. 1828 (2007) ("If a plaintiff by seeking damages for emotional distress places his or her psychological state in issue, the defendant is entitled to discovery any records of that state.")[5] As we argue more fully below, the motion should be granted.

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[4] *Id.* at 79.

[5] The Plaintiff certainly puts his psychological state at issue saying he suffered extreme trauma. Exh. B at 79. *See also* n. 6, *infra*.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**NO. 6:08-CV-00089**
(1) CISCO SYSTEMS, INC.,	§	
(2) RICHARD FRENKEL, a/k/a	§	
"TROLL TRACKER,"	§	
(3) JOHN NOH and	§	
(4) MALLUN YEN,	§	
	§	
Defendants.	§	

PLAINTIFF'S SUR-REPLY TO DEFENDANTS' MOTION TO COMPEL

pet. denied) is even more problematic. Reply at 3. In *Swate*, the Court specifically acknowledged that injury to reputation as the result of libel *per se* is presumed. *Id.* However, in that case, defendants were permitted to rebut the presumption—not based on medical or financial documents as sought by Cisco in this case—but because the court found Swate's reputation was so deplorable prior to the publication of the alleged defamatory statements defendants could not have further injured his reputation. *Id.* "The [*Swate*] Court cited no authority for its position the presumption was rebuttable." *Mustang Ath. Corp.*, 137 S.W.3d at 338 (distinguishing *Swate*). Courts have refused to follow *Swate* because it is at odds with the doctrine of presumed damages. *Id.* at 339. Even so, the holding in that case is very limited and allows a presumption of injury to be rebutted by evidence that a plaintiff's reputation was already ruined. *Id.* at 338. As this Court recently held in *Gatheright v. Swindle*—a case distinguishing *Swate* but not cited in Cisco's brief—*Swate* only applies to a plaintiff with an already severely tarnished reputation. 2007 U.S. Dist. LEXIS 57587, at *19 (E.D. Tex. Aug. 7, 2007).

Having enjoyed a good reputation in his community, Albritton is entitled to presumed damages. *Id.* Nothing in his medical or financial documents is relevant to rebutting his claim for damages because none of that information bears on how Albritton is perceived in the community. Albritton's private information, by definition, cannot be probative of his public reputation. *See id.* Thus, Cisco's "rebuttal" relevance argument should be rejected.

B. Cisco is Not Entitled To Albritton's Medical Records

Cisco's Reply strains to distinguish this Court's well reasoned opinion in *Burrell v. Crown Central Petroleum, Inc.*, 177 F.R.D 376 (E.D. Tex. 1997). First, Cisco attempts to distinguish *Burrell* because it arose under federal law. Reply at 3. But the discovery issues in that case, like this case, required the application of the *Federal* Rules. Second, Cisco deceptively portrays this Court as "noting" that if plaintiffs had sued under state tort law, their mental conditions would be at issue. *Id.* But, that quotation isn't the Court's at all, but rather a statement made by the plaintiffs in that case that cannot be imputed to Albritton in this case. *See*

medical records." 177 F.R.D. at 383. That potential is even greater where the plaintiff's physical or mental conditions have not been placed in controversy. *Id.* Although Albritton's case is a cause of action for defamation, the same reasoning applies. Like the plaintiffs in *Burrell*, Albritton's mental anguish damages are premised on other damages he incurred, here damage to his reputation. Like the plaintiffs in *Burrell*, Albritton need not offer medical evidence to support his mental anguish damages.[2] And as in *Burrell*, the opportunity for abuse here is far too great to allow Cisco unfettered access to Albritton's medical records absent a stronger showing of relevance.

Cisco also claims that Albritton has mischaracterized the scope of Cisco's request as seeking Albritton's "entire medical history." Reply at 2. But Cisco asked Albritton to sign a medical release form, giving Cisco access to his files without limit as to time or the nature of medical treatment provided. *See* Exh. A. Cisco's request seeks confidential documents not relevant to the damages issues in this case and is therefore overly broad, burdensome and harassing. Albritton's opposition brief specifically challenged Cisco's request as sought for the purpose of harassment, a claim Cisco's Reply does not address or dispute. *See* D.E. 74 at 8-9.[3]

C. Cisco is Not Entitled To Albritton's Financial Documents

Cisco's Reply falsely alleges that Albritton does not contest the relevance of his financial records. Reply at 5. Albritton specifically challenged relevancy in his opposition brief. *See* D.E. 74 at 4 ("The documents Cisco Seeks Are Not Relevant), and 7 (Albritton's financial documents are not relevant to the damages issues in this case.").

Cisco's Reply acknowledges that Albritton is not seeking economic damages as a result of Cisco's defamatory statement. *See* Reply at 1-2. Because Albritton's financial documents

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[2] Cisco cites to *Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1995), and *Montemayor v. Ortiz*, 208 S.W.3d 627 (Tex. App. Corpus Christi 2006, pet. denied) as supporting its argument. Reply at 4. Those cases are appellate cases in which the plaintiff's mental anguish evidence was reviewed for the *sufficiency of the evidence*. They do not address the relevancy issue before this Court. Cisco specifically criticizes Albritton for not responding to its citation to *Montemayor* in its opening brief. Reply at 4, n. 7. That case is clearly distinguishable. There, the appellate court overruled an award of damages because plaintiff failed to show liability. *See* 208 S.W.3d at 659.

[3] If the Court is inclined to grant Cisco access to any medical records, the scope of those records should be limited to mental health records after the date of Cisco's defamatory statements.

cannot be relevant to damages not sought, Cisco argues that Albritton's financial information is relevant because if Albritton made more money after Cisco's defamatory statements were disseminated to a world-wide audience that generated as many as 16,000 hits on the Troll Tracker Blog alone, his business reputation could not have been harmed.[4] *See* Reply at 2. Cisco's argument is far too tenuous to demonstrate relevance. Changes in Albritton's revenue are not probative of the harm caused by Cisco's defamation because they do not show opportunities Albritton never received as a result of Cisco's conduct. The law does not require Albritton to prove a negative, which is why damages in this case are presumed. None of the documents Cisco seeks, including Albritton's internal financial documents and client lists are relevant to the damages in this case. Moreover, those documents raise issues concerning protection of attorney-client privileged information and seek Albritton's proprietary business information for which Cisco has not shown relevance sufficient to warrant disclosure.[5]

Even if Cisco could demonstrate relevance it must still show a compelling need for Albritton's tax returns, and arguably for other financial documents ultimately incorporated into those returns. *See Walker v. Rent-A-Center, Inc.*, 2006 U.S. Dist. LEXIS 72232, at *9 (E.D. Tex. Oct. 3, 2006). Cisco's argument that it has shown a compelling need for Albritton's tax returns because Albritton refused to answer its deposition questions is nonsensical. Requiring Albritton to disclose his tax returns via testimony as a precondition to not having them produced would render meaningless the protection those documents are afforded.

Cisco's request for financial documents from 2002 forward and for documents that implicate issues of privilege or contain proprietary businesses information should be denied because they are not relevant, are overly broad and are sought only to harass Albritton.

III. CONCLUSION

For all the forgoing reasons, Cisco's Motion to Compel should be DENIED.

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[4] Incredibly, Cisco's Reply brief argues that "hardly anyone read" its defamatory internet posts. Reply at 2.

[5] Cisco's request for financial records is egregiously over broad in seeking all financial documents from as far back as five years before Cisco's defamatory statements were published. *See* Exh. A.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ERIC ALBRITTON,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	**Case No. 6:08cv89**
	§	**(Judge Schell)**
CISCO SYSTEMS, INC., ET AL.,	§	
	§	
Defendants.	§	

ORDER

Before the Court is Defendant Cisco's Motion to Compel production of certain documents (Dkt. 55). Albritton has sued Cisco for defamation. The gist of the suit centers on statements made by Cisco's employee and published on a blog site. The essential libelous terms, according to the Complaint, boil down to possible references to Albritton as a "patent troll", conspirator, and criminal abettor in backdating documents. Albritton filed suit and claimed damages for mental anguish, and alleged that he was financially injured in his profession.

Cisco wants copies of Albritton's medical records which would reflect on his claim for mental anguish. Albritton, in his deposition and in his response, indicates that he is not making a claim for medical expenses and has sought no such treatment. Undaunted, Cisco continues to press for his medical records, maintaining its right to review. Cisco's request for Albritton's medical records is **DENIED.** Any marginal relevance that could be demonstrated is far outweighed by privacy considerations, especially in light of Albritton's binding admissions that he has not sought such treatment and is not making a claim for medical expenses.

Albritton also has admitted he is not seeking loss of income. Yet Cisco believes it is entitled to Albritton's tax returns. Albritton is seeking damage to his professional reputation, but seeks no

direct economic losses. In light of these concessions and admissions, the Court finds that Cisco's request should in all things be **DENIED.**

SO ORDERED.

SIGNED this 15th day of January, 2009.

DON D. BUSH
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**NO. 6:08-CV-00089**
(1) CISCO SYSTEMS, INC.,	§	
(2) RICHARD FRENKEL, a/k/a	§	
"TROLL TRACKER,"	§	
(3) JOHN NOH and	§	
(4) MALLUN YEN,	§	
	§	
Defendants.	§	

PLAINTIFF'S OPPOSITION TO CISCO SYSTEMS, INC.'S MOTION FOR DISTRICT JUDGE TO RECONSIDER MAGISTRATE JUDGE'S ORDER DENYING CISCO'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

In October of 2007 Richard Frenkel, acting in the course and scope of his employment with Cisco Systems, Inc. and in concert with Defendants Yen and Noh, published outrageous and patently false statements against Eric Albritton. Frenkel and his cohorts continuously published the statements until Plaintiff filed this action for defamation in March of 2008. Albritton sued Cisco, Frenkel, Yen and Noh, seeking to recover damages for his shame, embarrassment, humiliation, mental pain and anguish; damage to his reputation, good name and standing in the community; and exemplary damages.

Albritton claims no damages for lost earnings, lost earning capacity or medical expenses resulting from Defendants' tortious conduct. To the contrary, in response to Cisco's request for Albritton's medical and financial records, Albritton repeatedly told Cisco that (1) he has not sought any medical treatment because of Defendants' conduct; and (2) cannot identify any specific lost employment or income attributable to the conduct. Despite a complete lack of relevance to the issues in dispute, Cisco moved to compel Albritton's most confidential and sensitive medical and financial records. Specifically, Cisco moved to compel Albritton to sign a broad waiver giving Cisco unlimited access to his entire medical history, his firm's balance sheets, income statements and statements of cash flows for every year since 2002, all engagement letters executed by the firm since October of 2007, and both his and his firm's federal tax returns since 2002. Magistrate Judge Bush considered the parties' arguments and briefs and agreed with Albritton. Cisco's motion to compel was denied.[1] DE# 74.

Cisco now seeks the Court's reconsideration, contending that Judge Bush's ruling is wrong. Yet to support its motion, Cisco does no more than disagree with his decision. Cisco fails entirely to meet the exceptionally high standard imposed by 28 U.S.C. § 636(b)(1)(A). ("A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been

[1] *See* DE#s 55, 74, 72 and 78. Albritton incorporates by reference his response (DE# 74) and sur-reply (DE# 78) in opposition to Cisco's motion to compel in support of this response to Cisco's motion for reconsideration.

discovery sought must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue. *Id.* at *7 Courts have likewise recognized the legal tenet that the rules should not be misapplied so as to allow "fishing expeditions in discovery." *Id.* In such circumstances, courts will enter a protective order preventing the propounding party from abusing the discovery process. *See id.* at *8.

II. Argument

Cisco cannot demonstrate that Judge Bush's ruling is clearly erroneous or contrary to law because the documents Cisco seeks are not relevant to Albritton's claim for damages. Cisco first argues that Albritton's private medical and financial records must be produced because in order to recover for mental anguish, Albritton must offer (1) evidence of compensable mental anguish and (2) evidence to justify the amount awarded. *See* Mot. at 5. According to Cisco, because Albritton must put on some evidence of his mental anguish to support his allegations, all documents remotely concerning his health or financial position are relevant. Cisco next contends that it is entitled to Albritton's complete medical history and seven years of financial records to rebut his claim of damages. Cisco's arguments lack merit. Albritton has not put his medical or financial history at issue in this case and seeks only general damages that are presumed under Texas law. Cisco fails to demonstrate that it is entitled to rebut a claim for damages with medical and financial records that are not relevant to any element of damages that Albritton claims. This motion is another attempt by Cisco to manufacture relevance where none exists so that it can undertake an unlimited search through Albritton's most sensitive documents. Judge Bush rejected those efforts once already. Because Cisco cannot demonstrate that Judge Bush clearly erred, so should this Court.

A. The documents Cisco seeks are not relevant

The documents Cisco seeks are not relevant to Albritton's claim for damages. Under Texas law, compensatory damages allowable for defamation are divided into two categories: general and specific. *See Peshak v. Greer,* 13 S.W.3d 421, 427 (Tex. App.—Corpus Christi 2000, no pet.). General damages include compensation for "loss of reputation and mental

anguish." *Bentley v. Bunton,* 94 S.W.3d 561, 604 (Tex. 2002). A plaintiff may also elect to recover additional, "special damages" that flow from the libel including loss of earning capacity, *Peshak,* 13 S.W.3d at 427, loss of past and future income, *Shearson Lehman Hutton, Inc. v. Tucker,* 806 S.W.2d 914, 922 (Tex. App.—Corpus Christi 1991, writ dism'd), and loss of employment, *Houston Belt & Terminal Ry. v. Wherry,* 548 S.W.2d 743, 753 (Tex. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).

When the actionable statements injure the plaintiff in his office, profession or occupation, *Knox v. Taylor,* 992 S.W.2d 40, 50 (Tex. App. — Houston [14th Dist.] 1999, no pet.), or charge him with the commission of a crime, *Leyendecker & Assocs., Inc. v. Wechter,* 683 S.W.2d 369, 374 (Tex. 1984), they are defamatory *per se*. *See e.g., Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.,* 219 S.W.3d 563, 581(Tex. App.—Austin 2007, pet. denied). In such cases, Texas law presumes that the plaintiff is entitled to recover general damages even in the absence of specific evidence of harm to the plaintiff's reputation. *Id.* at 580 ("statements that are defamatory *per se* are actionable without proof of injury."); *see also Peshak,* 13 S.W.3d at 427 ("In actions of libel *per se,* the law presumes the existence of some actual damages, requiring no independent proof of general damages."). In fact, the Texas Supreme Court has held that a plaintiff injured in his office or profession is entitled to recover general damages for injury to his reputation and for mental anguish as a matter of law. *See Bentley,* 94 S.W.3d at 604 ("Our law presumes that statements that are defamatory *per se* injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish."); *see also Smith v. Lowe's Home Ctrs, Inc.*, 2005 U.S. Dist. LEXIS 12812, at *12 (W.D. Tex. June 29, 2005) (citing *Bentley* and holding "statements which are defamatory *per se* entitle a plaintiff, as a matter of law, to recover actual damages for injury to reputation.").

In this case, Defendants attacked Albritton in his profession. The false statement that Albritton had "conspired" with the clerk of the court to falsify official documents is so outrageous and undeniably harmful that Texas law presumes that Albritton has suffered damage to his reputation and mental anguish. Further, **Albritton has expressly disclaimed any recovery**

for special damages attributable to loss of income, loss of earning capacity or medical expenses. Because Texas law entitles Albritton to an award of damages for reputational injury and mental anguish as a matter of law, there is no need or requirement that Albritton introduce specific evidence in support of these damages. *See Peshak,* 13 S.W.3d at 427 ("In actions of libel *per se,* the law presumes the existence of some actual damages, requiring no independent proof of general damages."); *see e.g., Parkway Co. v. Woodruff* 901 S.W.2d 434, 444 (Tex. 1995)(a plaintiff may recover damages for mental anguish based on evidence sufficient to establish a "substantial disruption in the plaintiff's daily routine."). Here, Albritton need not offer any evidence other than his own testimony to prove the extent and nature of his damages. *See Williams v. Trader Publ'g Co.,* 218 F.3d 481, 486 (5th Cir. 2000)(holding that plaintiff's testimony alone was sufficient to support the jury's award for mental anguish damages); *Migis v. Pearle Vision, Inc.,* 135 F.3d 1041, 1046 – 47 (5th Cir. 1998) (same); *Smith,* 2005 U.S. Dist. LEXIS 12812, at *16 (evidence of mental anguish need not be corroborated by doctors, psychologists, or other witnesses).

Because Albritton's general damages are presumed, and the extent of those damages can be supported by his own testimony at trial, his medical and financial records are not relevant to the damages issues in this case. The Magistrate Judge's order was correct. Cisco has not, and cannot, demonstrate that the Court clearly erred in denying Cisco's irrelevant and invasive discovery.

B. Cisco is not entitled to Albritton's medical records

Judge Bush ruled that Cisco is not entitled to Albritton's medical records.[3] Cisco incorrectly argues that the very fact that Albritton has claimed he suffered mental anguish is enough to require production of his medical records. In support of its position, Cisco cites to *Patterson* v. *P.H.P. Healthcare Corp.,* 90 F.3d 927, 940 (5th Cir. 1996). *See* Mot. at 5. But as

[3] See DE# 143, finding that "[a]ny marginal relevance that could be demonstrated is far outweighed by privacy consideration, especially in light of Albritton's binding admissions that he has not sought such treatment and is not making a claim for medical expenses."

rejection of the same argument by this Court in *Burrell*. There, while the Court found that medical records can be relevant as argued in Cisco's motion, it nonetheless held that a "tremendous potential for abuse" exists when a defendant has unfettered access to a plaintiff's medical records." 177 F.R.D. at 383. That potential is even greater where the plaintiff's physical or mental conditions have not been placed in controversy. *Id.* Although Albritton's case is a cause of action for defamation, the same reasoning applies. Like the plaintiffs in *Burrell*, Albritton's mental anguish damages are premised on other damages he incurred, here damage to his reputation. Like the plaintiffs in *Burrell*, Albritton need not offer medical evidence to support his mental anguish damages.[5] And as in *Burrell*, the opportunity for abuse here is far too great to allow Cisco unfettered access to Albritton's medical records absent a stronger showing of relevance. *See id.*

All of these issues were before the Magistrate Judge. There, Albritton argued that he need not present medical evidence to prove his claim, and has represented that he will not offer any such evidence at trial. Albritton has never asserted any claim for medical expenses. Albritton does not allege that he sought any health care because of Defendants' conduct. He has not designated any physicians or health care providers to corroborate his mental anguish. Indeed, he need not do so since Texas law entitles him to recover such damages as a matter of law upon establishing libel *per se*. As a result, the Court correctly concluded that Cisco's request to rummage through Albritton's medical history should be denied. *See id.* Cisco offers nothing in the instant motion to demonstrate that the Judge Bush's order was clearly erroneous, nor can it on this record.

C. Cisco is not entitled to Albritton's tax returns or other financial records

Judge Bush ruled that Cisco is not entitled to Albritton's tax returns and financial

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[5] Cisco again cites to *Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1995) as supporting its argument. Mot at 5. *Parkway* is an appellate case in which the plaintiff's mental anguish evidence was reviewed for the *sufficiency of the evidence*. It does not address the relevancy issues that were before Judge Bush or this Court as part of its review of his decision. Cisco also cites *Montemayor v. Ortiz*, 208 S.W.3d 627 (Tex. App.—Corpus Christi 2006, pet. denied). That case does not address the relevancy questions at issue or mental anguish damages.

Albritton's proprietary business information for which Cisco has not shown relevance sufficient to warrant disclosure.[6]

Cisco's claimed need for Albritton's confidential tax returns is far too tenuous to demonstrate the type of compelling need required to order their production. Increases or decreases in Albritton's revenue may result from a myriad of reasons unrelated to Cisco's defamation. Thus, Albritton's tax returns and related financial information will provide no additional relevant information. To the extent that Cisco seeks information related to Albritton's damaged reputation, that information is available through witness testimony and/or is otherwise available from other less-sensitive sources. Judge Bush was not clearly erroneous in denying Cisco's motion to compel Albritton's financial documents. *See id.* at *9.

D. Cisco is not entitled to rebut Albritton's presumed damages

Cisco contends that even if Albritton does not need medical evidence to make his case, it is entitled to Albritton's medical records for purposes of rebutting the doctrine of presumed damages. *See* Mot at 9. Similarly, Cisco now claims for the first time that Albritton's personal and business finances are direct evidence of whether his mental anguish took a toll on his work life and whether it was caused by or related to financial stress. *See* Mot. at 8.[7] Notwithstanding that Cisco cannot demonstrate clear error by raising an argument for the first time in a motion to reconsider, this new theory fails for the same reasons discussed in Albritton's sur-reply to the underlying motion. Specifically, Albritton is entitled to presumed damages and no authority supports Cisco's contention that it is entitled to unfettered access to Albritton's most sensitive documents for purposes of rebutting those presumed damages. *See* DE #78 at 2-3.

Though Cisco has retreated from the position it took in reply to the underlying motion, it now contends that rebuttal evidence is relevant in cases of presumed damages. It attributes this

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[6] Cisco's request for financial records is egregiously over broad in seeking all financial documents from as far back as five years before Cisco's defamatory statements were published. *See* Mot. at 10.

[7] Here again Cisco sites to its new and improper evidence, the APA report. *See* Mot. at 8 & Ex. C. Presumably Cisco contends that Judge Bush clearly erred by not thinking of this argument on his own.

proposition to *Bentley v. Bunton*, 94 S.W.3d 561, 605 (Tex. 2002), which remanded a punitive damages award on an evidentiary challenge. While Bentley confirms that reputational and mental anguish damages are presumed in *per se* cases, 94 S.W.3d at 604, nothing in the case suggests that the presumption of damages is rebuttable. And Cisco fails to address the Beaumont Court of Appeals decision in *Mustang Ath. Corp. v. Monroe*, which cites *Bentley* for presumed damages in *per se* cases and treats the presumption as irrebuttable. 137 S.W.3d 336, 338 (Tex.App.—Beaumont, 2004, no pet. h.) ("The Supreme Court of Texas has not held that presumption is rebuttable."). Judge Bush was correct in rejecting Cisco's rebuttal-relevance argument.

E. The discovery Cisco seeks is unnecessary, unreasonably cumulative, overly broad and sought for the purpose of harassing Albritton

To the extent that the documents Cisco seeks have any marginal relevance, they are duplicative of the evidence adduced in Albritton's deposition. *Cf* Fed. R. Civ. P. 26(b)(2)(C)(i). Albritton's testimony that he has not sought any medical treatment because of Defendants' conduct and that he cannot identify any specific lost employment or income attributable to Defendants' conduct eliminates Cisco's claimed need to discover his medical records, client lists, engagement letters, tax returns, and confidential financial statements. To the extent that Albritton's claim for mental anguish entitles Cisco to any discovery, Cisco had access to that discovery during Albritton's deposition. Cisco's demand for additional discovery is unreasonably cumulative and oppressive, especially given the sensitive nature of the documents it seeks.

Additionally, "the burden. . . of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues," *Cf* Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii). Here, Cisco seeks all of Albritton's medical records, whether or not they are related to this case. In fact, Cisco seeks a medical authorization giving it unlimited access to Albritton's medical records without any limit as to time and scope.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON, Plaintiff, v. (1) CISCO SYSTEMS, INC., (2) RICHARD FRENKEL, (3) MALLUN YEN and (4) JOHN NOH, Defendants.	§ § § § § § § § § § § §	NO. 6:08-CV-00089

PLAINTIFF'S SUR-REPLY TO DEFENDANTS'
MOTION FOR RECONSIDERATION

with a fact-based motion to compel. Cisco argued that the documents it sought were relevant to issues in this case. Albritton demonstrated that his medical records and financial records were not relevant. Albritton explained that under Texas law he could recover general and/or specific damages. General damages include damages to Albritton's reputation and mental anguish. Specific damages include lost income and medical expenses. Because—as Albritton has ***repeatedly*** told Cisco—he is not seeking damages for lost income or medical expenses, the tax returns and medical records Cisco seeks are not relevant. Judge Bush was correct in denying Cisco's motion.

In reply Cisco insists that Judge Bush's Order is contrary to law for five reasons. Each one can be dismissed in turn.

First, Cisco argues that because there has been no finding in this case that the articles are defamatory *per se*, Albritton cannot refuse to produce documents on that basis. *See* Reply at 3. Cisco misses the point. Because Cisco's accusations are *per se* defamatory, Albritton is entitled to presumed damages upon proof at trial. But, even if the jury were to rule against him on the *per se* issue, if it finds that Cisco's accusations are defamatory, Albritton can recover damages in an amount proven at trial. Albritton can recover general damages in this case based on his testimony alone. *See Williams v. Trader Publ'g Co.*, 218 F.3d 481, 486 (5th Cir. 2000) (plaintiff's testimony alone is sufficient proof of mental anguish damages). Albritton's trial testimony will be limited to general damages. He will not offer testimony regarding lost profits or medical expenses. For that reason, the tax returns and medical history Cisco seeks are not relevant. Judge Bush so held and Cisco has not shown his ruling to be clearly erroneous.

Second, Cisco argues that Albritton must prove actual malice in order to recover presumed damages. *See* Reply at 3. Cisco previously responded to Albritton's defamation *per se* case law by arguing that Cisco had a right to rebut the *per se* presumption. The reply has substituted Cisco's unwinnable "*per se* damages are rebuttable" argument with a new "required

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON	§	
	§	
	§	
v.	§	
	§	C. A. NO. 6:08-CV-00089
CISCO SYSTEMS, INC.,	§	
RICK FRENKEL, MALLUN YEN &	§	
JOHN NOH	§	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE COURT:

Defendants Cisco Systems, Inc. ("Cisco"), Richard Frenkel ("Frenkel"), Mallun Yen[1] ("Yen") and John Noh[2] ("Noh"), hereby file this Motion for Summary Judgment ("Motion") pursuant to Rule 56 of the Federal Rules of Civil Procedure and the local rules of this Court:

I. INTRODUCTION

Eric Albritton ("Albritton") was retained as local counsel to file a lawsuit on behalf of ESN against Cisco Systems, Inc.[3] ESN planned to file the suit one minute after midnight on October 16, 2007, the date ESN's patent, which was the basis for the suit, issued.[4] The midnight filing was designed to fix venue in the United States District Court for the Eastern District of Texas before Cisco could file a declaratory judgment suit in some other jurisdiction.[5]

But, from ESN's standpoint, something went wrong. The federal docket sheet for the case and the file stamp or header affixed to the top of every page of ESN's complaint reflected a

[1] Subject to her Motion to Dismiss for Lack of Personal Jurisdiction, Docket #37.
[2] Subject to his Motion to Dismiss for Lack of Personal Jurisdiction, Docket #35.
[3] Exhibit 2, Albritton Deposition at 93:24-94:1.
[4] Exhibit 2, Albritton Deposition at 26:19-23, 120:4-9, 146:20-147:2.
[5] Exhibit 2, Albritton Deposition at 120:4-14, 146:20-147:2.

filing date of October 15, 2007.[6] This was a significant problem for ESN because an October 15 filing would deprive the court of subject matter jurisdiction over the patent suit and allow Cisco's suit, filed in Connecticut on October 16, to proceed.[7] Albritton set about to correct the problem **not** by filing a motion with the court but through private telephone conversations with several employees of the court clerk's office without notice to Cisco.[8]

Albritton, through his legal assistant Amie Mathis ("Mathis"), admittedly spoke with the office of the District Clerk for the United States Court for the Eastern District of Texas five times on the telephone in an effort to alter the docket entry and stamp on the Complaint from October 15, 2007 to October 16, 2007 in the *ESN v. Cisco* litigation.[9] These private telephone calls were made without notice to or participation by Albritton's litigation opponent, Cisco, even though Albritton was well aware that Cisco was represented in the Eastern District by local attorneys Sam Baxter and former judge Robert Parker.[10]

Despite knowing both Baxter and Parker well (they are both on his witness disclosures to testify about his fine reputation[11]), Albritton did not inform either about his *ex parte* activities with the clerk. As Mathis attempted to convince the clerk to alter the docket entry, Albritton told her to "stay on top of it," and after learning that her efforts had been successful, Albritton wrote a congratulatory email to her which said "You've done good. I appreciate you."[12] He has testified that he "fully supports" everything that she did.[13]

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[6] Exhibit 3, Maland Deposition at 65:12-19, 127:18-24; Exhibit 1, Frenkel Declaration at ¶ 2.

[7] Exhibit 2, Albritton Deposition at 26:19-22, 146:20-147:2; Exhibit 1, Frenkel Declaration at ¶ 5.

[8] Exhibit 2, Albritton Deposition at 38:22-25; Exhibit 4, Mathis Deposition at 50:15-21, 51:24-52:3; Exhibit 5, Deposition Exhibit 14.

[9] Exhibit 4, Mathis Deposition at 50:15-25; Exhibit 3, Maland deposition at 54:7-22, 56:25-57:3.

[10] Exhibit 4, Mathis Deposition at 51:24-52:3; Exhibit 2, Albritton Deposition at 41:25-42:10.

[11] Exhibit 21, Parker Declaration Exhibit B.

[12] Exhibit 4, Mathis Deposition at 42:14-16; Exhibit 2, Albritton Deposition at 55:7-12.

[13] Exhibit 2, Albritton Deposition at 41:2-9, 147:15-17.

(30) Albritton has no evidence that his reputation with the judiciary in the Eastern District of Texas has been harmed.[68]

(31) Albritton has presented no evidence that his reputation with other lawyers has been harmed, and his witnesses have testified that they have no knowledge of his reputation being harmed.[69]

(32) Since the articles were published, Albritton has been appointed to the Local Rules Committee by Judge Davis in the Eastern District of Texas.[70]

(33) Albritton believes that he will make more in 2008 than he did in 2007, and he is not claiming that he has been financially harmed.[71]

IV. THE UNDISPUTED MATERIAL FACTS SHOW THAT THE ARTICLES ARE NOT ACTIONABLE BECAUSE THEY ARE (A) TRUE AS A MATTER OF LAW AND/OR (B) RHETORIC, HYPERBOLE OR OPINION AND/OR (C) NOT OF AND CONCERNING PLAINTIFF.

A. Albritton cannot prove that the articles are false as a matter of law.

Albritton bears the burden to prove that the Articles are false to prevail on his claim for defamation. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1985); *Burroughs v. FFP Operating Partners, L.P.*, 28 F.3d 543, 549 (5th Cir. 1994) ("The plaintiff has the burden of proof as to the element of falsity"). Summary judgment is proper if the undisputed material facts show that the Articles are either literally true or substantially true. *See McIlvain v. Jacobs*, 794 S.W.2d 14, 15 (Tex. 1990). Minor inaccuracies do not render an otherwise truthful article actionable. *See Brueggemeyer v. Associated Press*, 609 F.2d 825 (5th Cir. 1980).

Whether a publication is substantially true involves a consideration of whether the complained-of statement was more damaging to the plaintiff's reputation in the mind of the average listener than a truthful statement would have been. *McIlvain v. Jacobs*, 794 S.W.2d 14,

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[68] Exhibit 2, Albritton Deposition at 126:13-21.

[69] Exhibit 15, Carroll Deposition at 6:14-19, 13:23-14:4; Exhibit 16, DeRieux Deposition at 9:8-10:4, 14:1-8; Exhibit 17, Brucceleri Deposition at 21:5-22:5; Exhibit 18, McAndrews Deposition at 81:5-9; Exhibit 19, Williams Deposition at 9:18-11:5, 12:8-13:1; Exhibit 20, Smith Deposition at 12:13-13:1.

[70] Exhibit 2, Albritton Deposition at 117:8-20, 126:18-21; Exhibit 3, Maland Deposition at 131:4-18.

[71] Exhibit 2, Albritton Deposition at 132:23-133:1, 134:2-3.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON,	§	
	§	
Plaintiff	§	
	§	
v.	§	No. 6:08cv00089
	§	
CISCO SYSTEMS, INC. RICHARD FRENKEL, MAULLUN YEN and JOHN NOH,	§	**FILED UNDER SEAL**
	§	
Defendant	§	

PLAINTIFF'S CORRECTED RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(26) Disputed.[70] Frenkel did not rely on the Civil Cover Sheet because it is not an official record of filing and was not filed until Oct. 16th. Frenkel did not rely on the docket entry because he knew docket entries to be unreliable. Frenkel did not rely on the "stamp" because at all times the electronic file stamp contained the 10/16/07 filing date. Frenkel did not rely on the document "header" because it is optional and not the official court record. Frenkel, having practiced in Federal Court, and in the Eastern District of Texas, is presumed to know the local rules which state that a document is deemed filed when received. Frenkel relied upon information provided to him by Baker Botts; information that explained the court's procedure for opening a case file and how the electronic filing system generated erroneous dates in the docket of the ESN filing. Frenkel's self-serving statements are not evidence, but argument that must be resolved by the jury.

(27) Admitted. Although Albritton is claiming damages, he is not claiming lost wages or economic damages.

(28) Admitted that Albritton has no knowledge of losing friends as a result of Frenkel's defamatory posts.

(29) Admitted.

(30) Admitted.

(31) Disputed.[71] There is record evidence that Albritton's reputation has been harmed.

(32) Admitted.

(33) Disputed.[72] Albritton cannot calculate whether he has been financially harmed.

IV. ARGUMENT

A. Albritton Is A Private Figure

Although Albritton is a private-practice lawyer who was defamed as a result of representing a client in a private lawsuit against Cisco, Cisco argues this Court should find he is

[70] *See* footnotes 9-20, 28-30.
[71] Exh. 15 (McAndrews Depo.) at 79:81; 89:1-91:15; Exh. 7 (Albritton Depo) 80:10-81:13.
[72] Exh. 7 (Albritton Depo.) at 133:2-134:4.

Frenkel's "about me" section, where he identifies himself as a lawyer.[94] Frenkel's post told the reader that he, a lawyer, was accusing Albritton of a "conspiracy" to "alter" government records for a fraudulent purpose—that is, to manufacture subject matter jurisdiction. Those criminal accusations were reinforced with language used to convey criminal conduct, including allegations that there was tons of "proof" showing Albritton was guilty of the crime, that Albritton's civil cover sheet would be a key piece of evidence, and that subpoenas and witnesses may be necessary to prove Albritton's criminal activity. Under Texas law, Frenkel's statements can be reasonably understood to accuse Albritton of criminal conduct and are therefore defamatory *per se*. *Fiber Sys.*, 470 F.3d at 1163, *Mustang Athletic Corp. v. Monroe*, 137 S.W.3d 336, 339-340 (Tex. App. Beaumont [9th Dist] 2004) (chronicling Texas defamation *per se* cases).

Frenkle's readers specifically read his comments to be an accusation of a crime.[95] Frenkel received more comments about this post than any other during the month it was posted,[96] and many of those readers commented on Frenkel's accusations that Albritton engaged in criminal conduct.[97] Dr. Charles Silver, a highly respected law professor at the University of Texas understood Frenkel's comments to accuse Albritton of crime.[98] Other people who have read Cisco's comments similarly understood them to accuse Albritton of a crime.[99]

Frenkel's allegations also accuse Albritton of improper or unethical conduct[100] that, if true, would negatively impact his professional reputation by subjecting him to suspension from the practice of law and disbarment. *See* Local Rule AT-2(c);[101] *In re Jaques*, 972 F. Supp. 1070, 1078 (E.D. Tex. 1997).[102] These statements impugn Albritton's integrity in the legal profession, a fact highlighted by Cisco's expert's report which sets forth ethical rules that he tepidly suggests

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[94] Exh. 33 (original Oct. 18th post).
[95] Exh. 30 (Frenkel2.000004); Exh. 23 (Smith Depo.) at 114:16-115:24; Exh. 9 (Carroll Depo) at 9:11-11:15.
[96] Exh. 30 (Frenkel2.000004); Exhs 12-13 (Maland Depo) at 78:17-79:9; 142:3-19; Exh. 23 (Smith Depo) at 124:9-23;
[97] Exh. 29 (Frenkel.000058)
[98] Exh. 35 (Expert Report of Dr. Charles Silver) at ¶22.
[99] Baxter Decl. at ¶ 3; Williams Decl. at ¶ 3; Brucceleri Decl. at ¶ 3; Carroll Decl. at ¶ 3; Exh. 15 (McAndrews Depo.) at 36:11-37:4.
[100] Baxter Decl. at ¶ 3; Williams Decl. at ¶ 3; Brucceleri Decl. at ¶ 3; Carroll Decl. at ¶ 3.
[101] Exh. 23 (Smith Depo) at 115:19-24); Exh. 9 (Carroll Depo) at 9:11:15
[102] Exh. 23 (Smith Depo.) at 105:24-106:3; 114:16-115:24.

> talking, listening, reading and writing without constant reference to an unabridged dictionary."

Id.

Frenkel is a lawyer whose stock in trade is words. He could have used any number of words to suggest that Albritton was "working in harmony with the clerk." He could have explained that the docket date was a result of logging into the system before midnight, but filing after. Instead he chose to use the word conspiracy—a word that in most people's lexicon means a criminal plot. Moreover, he specifically identified the object of the "conspiracy" to be fraudulent and intended to harm Cisco. Because a reader of ordinary intelligence would (and did) understand Cisco's comments to accuse Albritton of criminal and/or unethical conduct, they are defamatory *per se*. *See Gateway Logistics*, 2008 U.S. Dist. LEXIS 34246, at *25-*30 (chronicling case law holding that accusations of criminal conduct or accusations that tend to injure a person in their profession are defamatory *per se*); *see also Fiber Sys.*, 470 F.3d at 1162; *Dewald v. Home Depot*, No. 05-98-00013-CV, 2000 Tex. App. LEXIS 5757, at *12 (Dallas [Fifth Dist.] 2000).

2. Frenkel's Defamatory Posts Are False

Cisco argues it is entitled to judgment without ever having the jury hear the facts because Frenkel's statements were "substantially true." Mot at 10-13. But, substantial truth cannot be proven by a subset of facts, as argued in Cisco's motion. *See Cram Roofing Co., Inc. v. Parker*, 131 S.W.3d 84, 90. (Tex. App. San Antonio [4th Dist] 2003). Rather, the substantial truth principle protects minor inaccuracies of fact from liability where they have no real impact on the gist, or the sting, of the libelous charge. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991). Cisco must prove that Frenkel's posts, taken as a whole, were no more damaging to Albritton's reputation, in the mind of the average listener, than a truthful statement would have been. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000). This Cisco cannot do because Frenkel accused Albritton of criminal and unethical conduct when no such conduct occurred. *See id.*

"play[ed] a game" about the Troll Tracker.[180] His deposition testimony confirms that he intended to send the posting to the media.[181] Noh testified inconsistently about whether he directed the media to the October 18th posting: first indicating that he sent it to "several reporters at Dow Jones and others," but then changing his mind.[182] The facts show that Noh's job was to "manage the media relations between the Cisco legal team and the press."[183] Noh testified that the reason he suggested that Frenkel blog about ESN and wanted to send the post to reporters was: "I wanted them to be aware of the [ESN filing] issue. … In hopes that they would write about it."[184] In light of Noh's job function at Cisco, his written and sworn intention to send the posting to the media, his history of communicating with the media and his inconsistent testimony on the subject, there is evidence to create a fact issue on whether he published, republished or otherwise circulated the defamatory postings.

E. Albritton Is Entitled To Damages As A Matter Of Law

Cisco's motion for summary judgment asks the Court to rule that Albritton has suffered no compensable damages as a matter of law. Mot. at 27-29. But the opposite is true. The Texas Supreme Court has held that a plaintiff accused of a crime or injured in his office or profession is entitled to recover actual damages for injury to his reputation and for mental anguish as a matter of law. *See Bentley*, 94 S.W.3d at 604 ("Our law presumes that statements that are defamatory *per se* injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish."); *see also Smith v. Lowe's Home Centers, Inc.*, No. SA-03-CA-1118-XR, 2005 U.S. Dist. LEXIS 12812, at *12 (W.D. Tex. June 29, 2005) (citing *Bentley* and holding "statements which are defamatory *per se* entitle a plaintiff, as a matter of law, to recover actual damages for injury to reputation."). In such cases, Texas law presumes that the plaintiff is entitled to recover general damages even in the absence of specific evidence of harm. *Id.*, *see also Peshak v. Greer*, 13 S.W.3d 421, 427 (Tex. App.—Corpus

[180] Exh. 25 (Cisco Privileged 000014).
[181] Exh. 17 (Noh Depo) at 41:7-22.
[182] Exh. 17 (Noh Depo) at 48:17-49:11.
[183] Exh. 17 (Noh Depo) at 32:11-13.
[184] Exh. 17 (Noh Depo) at 41:12-22.

Christi [13th Dist.] 2000) (same).

Cisco attacked Albritton in his profession and accused him of a crime.[185] The false statement that Albritton conspired with the clerk of the court to falsify official documents is so undeniably harmful that Texas law presumes that Albritton has suffered damage to his reputation and mental anguish and there is no need or requirement that Albritton introduce specific evidence in support of these damages. *See Peshak*, 13 S.W.3d at 427 ("In actions of libel *per se*, the law presumes the existence of some actual damages, requiring no independent proof of general damages."); *see* e.*g., Parkway Co. v. Woodruff*, 901 S.W.2d 434, 443-44 (Tex. 1995)(a plaintiff may recover damages for mental anguish based on evidence sufficient to establish a "substantial disruption in the plaintiff's daily routine."). Albritton need only offer his own testimony[186] to prove the extent and nature of his damages. *See Williams v. Trader Publ'g Co.*, 218 F.3d 481, 486 (5th Cir. 2000)(holding that plaintiff's testimony alone was sufficient to support the jury's award for mental anguish damages); *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (same); *Smith,* 2005 U.S. Dist. LEXIS 12812, at *16 (evidence of mental anguish need not be corroborated by doctors, psychologists, or other witnesses). Albritton is entitled to presumed damages in this case because the law does not require him to prove a negative,[187] although the record contains evidence that Albritton was harmed as a result of Cisco's defamation.[188]

After the jury has heard the evidence of malice, Albritton will also be entitled to punitive damages. *Brown*, 965 F.2d at 48 (under Texas law, punitive damages are proper in libel actions upon a showing of recklessness or malice.).

V. CONCLUSION

For all the forgoing reasons, Albritton respectfully requests that Cisco's Motion for Summary Judgment be denied, and that his Cross-Motions for Summary Judgment be granted.

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[185] Baxter Decl. at ¶ 3; Williams Decl. at ¶ 3; Brucceleri Decl. at ¶ 3; Carroll Decl. at ¶ 3; Exh. 35 (Expert Report of Dr. Charles Silver).
[186] Exh. 7 (Albritton Depo.) at 46:1-47:21; 79:15-22; 83:15-84:16
[187] Exh. 7 (Albritton Depo.) at 135:13-19.
[188] Exh. 15 (McAndrews Depo.) at 79:4-81:2, 89:1-91:15.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON	§	
	§	
v.	§	
	§	C. A. NO. 6:08-CV-00089
CISCO SYSTEMS, INC.,	§	
RICK FRENKEL, MALLUN YEN &	§	
JOHN NOH	§	

DEFENDANTS' REPLY ("REPLY") TO PLAINTIFF'S RESPONSE ("RESPONSE")[1] TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ("MOTION")

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants Cisco Systems, Inc. ("Cisco"), Richard Frenkel ("Frenkel"), Mallun Yen[2] ("Yen") and John Noh[3] ("Noh"), (collectively "Defendants") reply to Plaintiff's Response to Defendants' Motion for Summary Judgment as follows:

I. INTRODUCTION

A federal docket entry was changed after Eric Albritton's paralegal (Amie Mathis ("Mathis")) had five conversations with the United States District Clerk's office seeking that result. As the chief clerk, David Maland, wrote in a memo and later substantiated in his deposition, "(Amie) wanted the clerk's office to change the date to October 16th…the Texarkana deputy clerk was reluctant to change the date…and referred Amy to the Tyler clerk's office.

[1] This is a reply to Plaintiff's response of December 15, 2008 (the date it was due after Defendants agreed to an extension) and not the untimely amended response which was filed after hours on December 19, 2008 without leave of court or prior notice to defendants. Defendants have separately moved to strike that response.

[2] Subject to her Motion to Dismiss for Lack of Personal Jurisdiction, Docket No. 37.

[3] Subject to his Motion to Dismiss for Lack of Personal Jurisdiction, Docket No. 35.

"no evidence permitted the jury to make the findings it did"[22] and "[n]ot only must there be evidence of the existence of compensable mental anguish, there must also be some evidence to justify the amount awarded."[23] So plaintiff's position that he does not have to offer proof of damage has been rejected by both the United States and Texas Supreme Courts in *per se* libel cases and, in Texas, even when actual malice has been shown.

Of course, applicability of these constitutional and common law protections of free speech are not at issue and the "oddity" of presumed damages is avoided if the publication is not *per se* in the first place. Neither the October 17 nor the October 18 articles are defamatory *per se*. The rules on whether a publication is *per se* are familiar. "Libel *per se* means the written or printed words are so obviously hurtful to the person aggrieved that they require no proof of their injurious character to make them actionable."[24] We pause here to note that there is no evidence that the complained of Articles were "obviously hurtful" to Plaintiff. His practice has thrived (more money in 2008 than in 2007), he has, subsequent to October 18, 2007, received the coveted appointment by Judge Davis to the local rules committee and all of his damage witnesses think he's a great guy and have no evidence that his reputation has suffered.[25] Nevertheless, Plaintiff says that he has been accused of a crime and that he has been injured in his business or occupation because of this allegation of criminal misconduct. An accusation of criminality is one "specifically defined category"[26] of *per se* libel.[27]

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[22] *Id.* at 607.

[23] *Id.* at 606.

[24] *Clark v. Jenkins,* 248 S.W. 3d 418, 437 (Tex. App.--Amarillo 2008, pet. denied).

[25] Ex. 2 to Defendants' Motion, Albritton Deposition at 132:23-133:1, 134:2-3, 117:8-20, 126:18-21; Ex. 3 to Defendants' Motion, Maland Deposition at 131:4-18; Ex. 15 to Defendants' Motion, Carroll Deposition at 6:14-19, 13:23-14:4; Ex. 16 to Defendants' Motion, DeRieux Deposition at 9:8-10:4, 14:1-8; Ex. 17 to Defendants' Motion, Brucceleri Deposition at 21:5-22:5; Ex. 18 to Defendants' Motion, McAndrews Deposition at 81:5-9; Ex. 19 to Defendants' Motion, Williams Deposition at 9:18-11:5, 12:8-13:1; Ex. 20 to Defendants' Motion, Smith Deposition at 12:13-13:1.

[26] *Gateway,* 2008 U.S. Dist. LEXIS at *18.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON,	§	
	§	
Plaintiff	§	
	§	
v.	§	No. 6:08cv00089
	§	
CISCO SYSTEMS, INC. RICHARD FRENKEL, MAULLUN YEN and JOHN NOH,	§	
	§	
Defendant	§	

PLAINTIFF'S SURREPLY IN RESPONSE TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

as evidence of malice.[61] Reply at 21. But Frenkel published three different posts, one on October 17th, one on October 18th, and an amended posting of the October 18th post on October 19th. The vast majority of the facts cited by Albritton as proof of Frenkel's malice occurred before Frenkel's Oct. 18th and amended 18th posts. *See* Response at 30-37.

D. Material Fact Issues Surround Yen and Noh's Culpability[62]

Contrary to the Reply's argument, Yen and Noh face liability for assisting, encouraging, participating in and ratifying Frenkel's tort. Yen, Frenkel's direct supervisor, along with Noh, asked him to post the defamatory comments, to which Noh responded "thank you" and "brilliant." The record contains evidence that Yen and Noh each requested, encouraged, assisted and participated in Frenkel's creation of the defamatory posts, and then later ratified his tortuous conduct. These facts are sufficiently set forth in Albritton's response. *See* Response at 41-43.

E. Albritton is Entitled To Damages As A Matter Of Law[63]

Cisco disingenuously argues that Albritton has taken the "position that he does not have to offer proof of damage." Reply at 6. Cisco has confused two analytically distinct points; *entitlement* to damages versus *proof* of damages. Albritton is *entitled* to damages because Cisco's accusations are defamatory *per se*. The *amount* of the damages awarded him must be determined by the jury based on the evidence presented at trial.

1. Albritton Is Entitled To Recover Damages

The Reply acknowledges that in *per se* cases damages are presumed, but then goes on to argue that those cases restrict plaintiffs who do not prove actual malice. Reply at 4-5. Reading

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[61] Cisco relies on *Forbes, Inc. v Granada Sciences, Inc.*, 124 S.W.3d 167, 173 (Tex. 2003) for the proposition that the single publication rule precludes consideration of Frenkel's post-publishing state of mind. Reply at 21. But the single publication rule relates to starting the clock for the statue of limitations. *Id.* As *Forbes* makes clear "[d]etermining the date of an article's publication for limitation purposes involves considerations entirely different from those that apply when gauging whether actual malice exists at the time of publication." *Id.* In *Forbes*, a book containing the defamatory statements was completely out of the defendant's possession and control before he learned that his statements may be false. *Id.* The Court found that although the limitations period had not yet begun to run, a conversation defendant had after he no longer had control over his work was not sufficient evidence of malice. *Id.* In contrast, Frenkel learned that his statements were false before his last two posts were published. Moreover, at no time was Frenkel's ability to access and change his defamatory statements limited as in *Forbes*.

[62] In sur-reply to Reply at 21-23.

[63] In sur-reply to Reply at 3-13.

Cisco's argument one might be confused into believing proof of malice is a prerequisite to damages in this case. Any such understanding is incorrect.[64] Under Texas law, Albritton is entitled to an award of some amount of damages if Cisco's posts are defamatory *per se*.[65]

The test for defamation *per se* is whether the statements are reasonably capable of a defamatory meaning when construed as a whole in light of the surrounding circumstances.[66] Cisco's posts accuse Albritton of conspiring to alter an official governmental record for the express purpose of creating subject matter jurisdiction, thus benefiting his client at Cisco's expense and at the expense of the integrity of the Court. Under Texas law, Cisco's statements are defamatory *per se* because they attack Albritton in his business and occupation and insinuate criminal conduct. *See* Response at 19-23. The Reply attempts to distinguish the cases cited by Albritton but wholly fails to explain why the holdings in those cases don't compel a finding of *per se* defamation in this case. Reply 8-9. The accusations in Cisco's posts are more egregious than other accusations found to be defamatory *per se* under Texas law.[67]

The Reply artificially narrows Albritton's argument to suggest that the only issue is whether Cisco accused Albritton of a crime.[68] *Id.* at 6-7 (acknowledging Albritton's claim of harm to business or occupation but focusing only on criminal misconduct).[69] The Reply therefore fails to rebut Albritton's showing that Cisco's accusations accuse him of conduct that is harmful in his business or profession. It would be virtually impossible for Cisco to claim a reader could not have read Frenkel's comments to attack Albritton in his profession in light of its

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[64] A private figure may recover general damages upon a finding of negligence. *Gertz,* 418 U.S. at 347; *Brown*, 965 F.2d at 44-45. Where the nature of the controversy is a private dispute, no constitutional hurdle is mandated. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 761-62 (1985).

[65] *See Bentley*, 94 S.W.3d at 604; *Gateway Logistics Group, Inc. v. Dangerous Goods Mgm't Australia Ltd.,* No. H-05-2742, 2008 U.S. Dist. LEXIS 34246, at *23 (S.D. Tex. Apr. 25, 2008): *Tex. Disposal Sys. Landfill, Inc., v. Waste Mgm't Holdings, Inc.*, 219 S.W.3d 563, 580-581 (Tex. App,—Austin 2007).

[66] *See Fiber Sys. Int'l v. Roehrs*, 470 F.3d 1150, 1163 (5th Cir. 2006).

[67] *See id.* (thievery); *Gateway*, 2008 U.S. Dist. LEXIS 34246, at *23 (lying and potentially subjecting client to legal penalties); *Bentley*, 94 S.W.3d at 587, 604 (corruption); *Mustang Athletic Corp. v. Monroe*, 137 S.W.3d 336, 339-340 (Tex. App. Beaumont [9th Dist.] 2004) (vandalism); *DeWald v. Home Depot*, No. 05-98-00013-CV, 2000 Tex. App. LEXIS 5757, at *12 (Tex. App.—Dallas Aug. 25, 2000) (insinuation of stealing).

[68] We address Cisco's "definition of conspiracy" argument in the response. *See* Response at 22-23.

[69] Albritton has repeatedly asserted that Cisco's accusations are defamatory *per se* because they insinuate that he has engaged in unethical conduct impugning him in is occupation and have otherwise harmed him in his profession and occupation. *See* Response at 19-23; D.E. No. 74 at 4-5.

own expert's opinion that one reading Frenkel's posts could conclude that Albritton engaged in unethical conduct.[70] Cisco's accusations harm Albritton in his profession and are enough for a *per se* finding, irrespective of whether the alleged conduct would have led to criminal charges.[71]

Having misleadingly characterized Albritton's position as exclusively related to accusations of criminal conduct, the Reply argues that Cisco's criminal accusations are ambiguous. Reply at 7-8. Cisco goes through Frenkel's accusations plucking each word out of context and arguing that, in isolation, there is no allegation of criminal conduct. But Cisco's statements must be considered as a whole.[72] Given the temporal proximity of the posts, an average reader would not evaluate them in isolation, but would consider them together.[73] Cisco's accusations appeared in consecutive posts. The October 17 post identifies the factual predicate, including identifying Albritton, stating that the complaint was filed on October 15th and that an amended complaint was filed that changed nothing other than the filing date, that sets the stage for the October 18th post. The October 18th post does not rehash the facts of the prior post, but builds upon them to accuse Albritton of conspiring to alter official governmental records for the express purpose of manufacturing subject matter jurisdiction. The modified October 18th post was likewise read in connection with the post of October 17th. Collectively, the posts are defamatory *per se*.

The Reply also argues that if any additional information is considered in evaluating Cisco's words, its statements cannot be defamatory *per se*.[74] Reply at 7. When as here, harmful

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[70] *See* Response Exh. 36 (Expert Report of Charles Herring) at 3.
[71] *Gateway*, 2008 U.S. Dist. LEXIS 34246, at *26-30. *Mustang*, 137 S.W.3d at 340.
[72] *Bentley*, 94 S.W.3d at 581 (considering defendant's characterization of plaintiff's conduct as criminal in the context of defendants efforts over many months to prove plaintiff corrupt.)
[73] *See Celle v. Filipino Reporter Enters.*, 209 F.3d 163, 185 (2d Cir. N.Y. 2000) (considering multiple articles together, in context, to test their effect on the average reader); *November v. Time, Inc.*, 194 N.E.2d 126, 128 (N.Y.1963) (rejecting defendants attempt to parse statement and stating that if "every paragraph had to be read separately and off by itself plaintiff would fare pretty well. But such utterances are not so closely parsed by their readers or by the courts and their meaning depends not on isolated or detached statements but on the whole apparent scope and intent.").
[74] Cisco cites *Moore v. Waldrop*, 166 S.W.3d 380, 386 (Tex. App.—Waco, 2005), for the proposition that resort to extrinsic evidence defeats a finding of defamation *per se*. In *Moore*, the statement that plaintiff was a "crook" was made without any context or statement of facts. That is not the case here where Frenkel's accusations were made alongside his recitation of false facts. *See Fiber Sys.*, 470 F.3d at 1162 (distinguishing *Moore*).

accusations are used in a context that ties them to specific acts they are defamatory *per se*.[75] That is true even where the court considers the surrounding circumstances.[76] Frenkel's statements alone are defamatory *per se* and the surrounding circumstances confirm that conclusion. The posts assert that Albritton "altered documents to try to manufacture subject matter jurisdiction where none existed," described a "conspiracy" to "alter" an official filing, stated that he had "proof," that there was key "evidence" and that "witnesses" may need to be "subpoenaed." Although Cisco is correct that the filing of a complaint a day early is not criminal, that is not a fair recitation of the posts.[77] Rather, Cisco's posts set forth specific facts and then accuse Albritton of engaging in criminal, unethical or improper conduct in his role as an officer of the court to benefit his client at Cisco's detriment. The accusations that Albritton dishonestly altered the record—not the references to filing the complaint a day early that Cisco suggests are so innocuous—harm Albritton in his profession and occupation and question his veracity as a lawyer. They are *per se* defamatory.

Moreover, Frenkel's statements were understood by his readers, his own lawyers and others to accuse Albritton of a crime.[78] The fact that Frenkel's readers weren't provided with a federal or state statutes identifying the specific law under which Albritton could be charged is of no import to the *per se* determination. Clearly no citation was necessary for Frenkel's readers to understand his accusations.[79] Proof of specific instances of readers interpreting the accused statements as alleging criminal conduct is not required for a *per se* determination. However, the presence of that evidence it in this case is compelling.

Cisco seeks to undermine Albritton's strong showing of defamation *per se* by suggesting that the declarations offered in support of his response are from biased sources that cannot be

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[75] *Fiber Sys.*, 470 F.3d at 1163.
[76] *See id.* at 1163, n. 9 ("considering the surrounding circumstances does not necessarily require the use of extrinsic evidence as court must consider the context in which the statement was made . . . .").
[77] *Celle*, 209 F.3d at 181 (statements reviewed for effect on the average reader); *November*, 194 N.E.2d at 128 ("The casual reader might not stop to analyze, but could readily conclude that plaintiff is a crook and let it go at that.")
[78] *See* Response Exhs. 30 (Frenkel2.0000004); Exh. 23 (Smith Depo.) at 114:16-115:24; Exh. 9 (Carroll Depo) at 9:11-11:15. *See* Response Baxter Decl. at ¶ 3; Carroll Dec. at ¶ 3; Williams Decl. at ¶ 3; Brucceleri Decl. at ¶ 3; Response Exh. 35 (Expert Report of Dr. Charles Silver) at ¶ 35.
[79] *See Id.*

considered "ordinary readers."[80] Reply at 13. Cisco's biased argument ignores that two of the declarants are Cisco's own attorneys.[81] Moreover, any argument of bias goes to the weight of the evidence, and is not properly before the court on summary judgment. Cisco's suggestion that the declarants are not ordinary readers of Frenkel's blog falls flat when one considers the blog was targeted to patent lawyers. Cisco simply ignores other evidence, including the report of Albritton's expert witness who opined that Frenkel's posts accuse Albritton of a crime.[82]

Finally, Cisco takes issue with Albritton's citation to a Texas Penal Code section and says the Code section cannot apply to its accusations. But a stated above, Albritton need not prove that he could have been convicted of a crime for the statement to be *per se* defamatory.[83] That said, there can be little doubt that had Albritton actually conspired with the court clerk to "alter" the complaint to reflect the October 16th filing date in order to falsify jurisdiction—or duped the clerk into assisting him in perpetrating that fraud—as alleged by Frenkel, he would be guilty of a crime.[84] Albritton has made a strong showing of *per se* defamation entitling him to damages. Nothing in the Reply undermines that showing.

2. There Is Sufficient Record Evidence To Permit The Jury To Determine Damages

We turn now to Albritton's ability to prove the *amount* of his damages.[85] In this case, because Texas law entitles Albritton to an award of damages for reputational injury and mental anguish as a matter of law, there is no need that Albritton introduce specific evidence in support

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[80] Cisco relies on *Musser v. Smith*, 723 S.W. 2d 653, 655 (Tex. 1987), for the proposition that the declarants are not ordinary readers. The reasoning in *Musser* does not apply here. In *Musser* the court found that nobody could possibly consider the statements at issue to be defamatory, including the two witnesses offered by plaintiff. *Id.* Here, Cisco's posts are much more egregious and many readers did consider them to be accusations of criminal and unethical conduct. *See also Inside Radio v. Clear Channel Comms.*, 209 F. Supp. 2d 302, 307 (S.D.N.Y. 2002) (distinguishing *Musser*).

[81] Both Baxter and Carroll represent Cisco. *See* 2:07-CV-00223-DF-CE, D.E. 43 (Carroll); Mot. at 2 (Baxter).

[82] *See* Response Exh. 35 (Expert Report of Dr. Charles Silver) at ¶ 22.

[83] *See Mustang*, 137 S.W.3d at 340.

[84] There are numerous statutes that could be violated if Albritton had conspired to alter a governmental record as Cisco claimed. Albritton identified statutes in his response and during discovery. *See* Response at 20-30; Exh. 5 (*Yen Depo.*) at 139:18-22:142 and Yen Exh. 6 (18 U.S.C. § 1512).

[85] The Reply suggests that Albritton must disclose the dollar amount of his damages to Defendants. *See* Reply at 3. But Albritton's damages are not the kind of damages amendable to the calculation disclosure contemplated by Rule 26. *See Williams v. Trader Publ'g Co.*, 218 F.3d 481, 487, n. 3 (5th Cir. 2000).

of the amount of his damages.[86] Albritton need offer no evidence other than his own testimony,[87] which he expects to give at trial.[88] However, there is already evidence of Albritton's damages in the record.[89] Additionally, Albritton's family and friends will testify about his mental anguish. Cisco's claims that the evidence is not "sufficient" ignores that it is the jury, not Cisco, who makes that determination.[90]

The Reply offers the holding in *Bentley*, reversing an award of damages, as authority that proof as to the *amount* of Albritton's damages is required on summary judgment. Reply at 5-6. Cisco confuses the summary judgment standard with the appellate standard used by the *Bentley* Court.[91] The *Bentley* Court was tasked with reviewing the record after trial for the sufficiency of the evidence. *Bentley* does not stand for the proposition that such a showing is required at the summary judgment stage. Likewise Cisco's reliance on *Gertz* is misplaced. While *Gertz* requires that jury verdicts be supported by competent evidence, the Court specifically stated that "there need be no evidence which assigns an actual dollar value to the injury."[92] The jury must award the appropriate amount of damages in this case. Cisco's attempt to leverage appellate review cases to create a heightened burden of proof on summary judgment should be rejected as putting the cart before the horse.

I. Conclusion

For all of the forgoing reasons, Albritton respectfully requests Cisco's Motion (D.E. 97) be DENIED, and that the Court grant his Cross-Motions for Summary Judgment (D.E. 115).

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[86] *See Peshak v. Greer*, 13 S.W.3d 421, 427 (Tex. App.—Corpus Christi [13th Dis.] 2000) ("In actions of libel *per se*, the law presumes the existence of some actual damages, requiring no independent proof of general damages.").
[87] *See Williams*, 218 F.3d at 486 (holding that plaintiff's testimony alone was sufficient to support the jury's award for mental anguish damages); *Migis v. Pearle Vision, Inc.,* 135 F.3d 1041, 1047 (5th Cir. 1998) (same).
[88] *See* Albritton Decl. at ¶ 10. *See also* Response Exh. 7 (Albritton Depo.) at 79:15-22; 83:15-84:16.
[89] *See* Response Exh. 15 (McAndrews Depo.) at 79:4-81:2, 89:1-91:15.
[90] Cisco's citation to *Swate v. Schiffers*, 975 S.W.2d 70, 74 (Tex. App.—San Antonio 1998, pet. denied) is flawed. In *Swate*, the Court specifically acknowledged that injury to reputation as the result of libel *per se* is presumed. *See id.* However, in that case the court found Swate's reputation was so deplorable prior to the publication of the alleged defamatory statements defendants could not have further injured his reputation. *See id.* "Other courts have refused to follow *Swate* because it is at odds with the doctrine of presumed damages. *Mustang*, 137 S.W.3d at 339. *See also Gatheright*, 2007 U.S. Dist. LEXIS 57587, at *19.
[91] *Bentley*, 94 S.W.3d at 605-606 (the jury is provided the necessary latitude to award damages which are then reviewed for sufficiency the evidence supporting their conclusion).
[92] 418 U.S. at 350.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC ALBRITTON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 6:08-CV-89
	§	
CISCO SYSTEMS, INC., RICHARD FRENKEL, MALLUN YEN and JOHN NOH,	§	
	§	
	§	
Defendants.	§	

ORDER DENYING CISCO SYSTEMS, INC.'S MOTION FOR DISTRICT JUDGE TO RECONSIDER MAGISTRATE JUDGE'S ORDER DENYING CISCO'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

The following are pending before the court:

1. Cisco Systems, Inc.'s motion for District Judge to reconsider Magistrate Judge's order denying Cisco's motion to compel production of documents (docket entry #152);

2. Plaintiff's opposition to Cisco Systems, Inc.'s motion for District Judge to reconsider Magistrate Judge's order denying Cisco's motion to compel production of documents (docket entry #184);

3. Cisco Systems, Inc.'s reply to Plaintiff's response to Cisco's motion for District Judge to reconsider Magistrate Judge's order denying Cisco's motion to compel production of documents (docket entry #200); and

4. Plaintiff's sur-reply to Defendants' motion for reconsideration (docket entry #224).

Having considered the Magistrate Judge's January 15, 2009 order, the Defendants' motion to reconsider and the responsive briefing thereto, the court finds that the motion to reconsider should be, and is hereby, **DENIED**.

In its motion to reconsider, Cisco seeks a court order requiring the Plaintiff to produce his medical records, although the Plaintiff has made it clear that he is not claiming medical expenses and has sought no medical treatment for his mental anguish allegedly arising from the blog posts. Also, Cisco seeks a court order requiring the Plaintiff to produce his tax returns, although the Plaintiff concedes that he is not seeking a loss of income. Therefore, the medical records and tax returns appear to be irrelevant.

IT IS SO ORDERED.

SIGNED this the 8th day of May, 2009.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC M. ALBRITTON,	§	
	§	
Plaintiff	§	
	§	
v.	§	No. 6:08cv00089
	§	
CISCO SYSTEMS, INC. RICHARD FRENKEL, MAULLUN YEN and JOHN NOH,	§	
	§	
	§	
Defendant	§	

O R D E R

The Court, having considered Plaintiff's Motion for Reconsideration of the Court's Order Granting Defendants' Motion in Limine No. 1, concludes that the motion is well taken and therefore GRANTS the motion.

IT IS SO ORDERED.