In the
United States Court of Appeals
for the Ninth Circuit

Nos. 12-35238, 12-35319

OBSIDIAN FINANCE GROUP, LLC, *ET AL.*,

Plaintiffs-Appellees and Cross-Appellants,

v.

CRYSTAL COX,

Defendant-Appellant and Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
No. 3:11-cv-00057-HZ
The Honorable Marco A. Hernandez

CRYSTAL COX'S REPLY BRIEF ON APPEAL AND RESPONSE BRIEF ON CROSS-APPEAL

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REPLY BRIEF ON APPEAL[1]

I. *Gertz v. Robert Welch, Inc.* Applies Equally to All Who Speak to the Public Using the Mass Media, Regardless of Whether They Are Members of the Institutional Press, and Failure to Apply This Rule Was Plain Error

Cox's Opening Brief explained why the protections of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), equally cover all who speak to the public using mass media technology, regardless of whether they are members of the institutional press. Cox Opening Br. 7–15. This section will explain why this rule is sufficiently clear that the district court's refusal to apply it was not just error but plain error.

The Supreme Court has expressly stated that the First Amendment applies equally to the institutional press and to others who speak to the public:

> "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." [*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652], at 691 (SCALIA, J., dissenting) (citing [*First Nat'l Bank of Boston v.*] *Bellotti,* 435 U.S. [765], at 782); see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 784 (1985) (Brennan, J., joined by Mar-

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[1] While this brief was being drafted, plaintiffs asked an Oregon county sheriff to conduct a "foreclosure sale" of Cox's right to pursue this appeal, so that "Cox will be incapable of continuing the [appeal]." Dist. Ct. dkt. no. 148, at 7. Plaintiffs' theory was that an indigent defendant who could not afford a supersedeas bond might have her federal appellate rights seized (as "intangible property") by state officials and sold to the prevailing plaintiff, who could then dismiss the defendant's appeal. On Cox's application, Dist. Ct. dkt. no. 145, the district court blocked the proposed sale, Dist. Ct. dkt. no. 152, thus preserving this Court's jurisdiction over the appeal.

> shall, Blackmun, and STEVENS, JJ., dissenting); *id.,* at 773 (White, J., concurring in judgment).

Citizens United v. FEC, 130 S. Ct. 876, 905 (2010). This rejection was a considered judgment, and one that was important to the Court's holding that speech by corporations was fully protected by the First Amendment.

The *Citizens United* majority expressly argued that allowing restrictions on corporate speech would mean that speech in corporate-owned media outlets (such as newspapers) could be restricted as well. *Id.*; *see also id.* at 927–28 (Scalia, J., concurring, joined by Thomas & Alito, JJ.). Not so, argued the dissenters: The institutional press gets special First Amendment protections that other speakers (such as Citizens United) do not get, so allowing limitations on corporate speech generally would not undermine the protections offered to corporate-owned media outlets. *Id.* at 951–52 & n.57. The majority rejected the dissent's argument, squarely holding that First Amendment rules apply the same way to non-institutional-press speakers as well as to the institutional press. *Id.* at 905.

So the *Citizens United* majority announced, as a broad rule, that the First Amendment rules are the same for the institutional press as for other speakers. And the majority also made clear that this equality of treatment specifically applies to the First Amendment defamation rules as well. The majority expressly cited, in support of its general statement, the five Justices' views

in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*., 472 U.S. 749 (1985), a libel case in which those five Justices concluded that the institutional press received no extra First Amendment protections from libel law. The majority therefore adopted those five Justices' views as its own, establishing that "the institutional press has [no] constitutional privilege beyond that of other speakers" in libel cases as well as in other cases.

And this conclusion was not unexpected. Every federal circuit that has considered the question has likewise held that the First Amendment defamation rules apply equally to the institutional press and to others who speak to the public using mass media communications. *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000); *Avins v. White*, 627 F.2d 637, 649 (3d Cir. 1980); *Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986); *Garcia v. Bd. of Educ.*, 777 F.2d 1403, 1410 (10th Cir. 1985); *Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975).[2]

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[2] Appellees argue that *Flamm* only took the view "that nonmedia defendants are entitled to some but not all of the constitutional privileges enjoyed by media defendants," Obsidian Br. at 34, but that is mistaken. *Flamm* expressly stated that "a distinction drawn according to whether the defendant is a member of the media or not is untenable." 201 F.3d at 149.

Likewise, this Court's past decisions also endorse the view that the First Amendment applies the same way to the institutional press and to others who speak to the public. In *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 694 n.4 (9th Cir. 1998), this Court cited *Gertz*, albeit in dictum, for the proposition that a "private person who is allegedly defamed" must show "that the defamation was due to the negligence of the defendant," drawing no distinction between the media defendants and the lead, nonmedia, defendant (Coors). Likewise, in *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993), this Court rejected any distinction between the institutional press and other speakers when it comes to the newsgatherer's privilege, reasoning that "it makes no difference whether '[t]he intended manner of dissemination [was] by newspaper, magazine, book, public or private broadcast medium, [or] handbill' because '"[t]he press in its historic connotation comprehends every sort of

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Flamm did state that it "need not extend the constitutional safeguards of *Hepps* and *Milkovich*, which involved media defendants, to every defamation action involving a matter of public concern," *id*., but explained the significance of this in the very next sentence: "Rather, in a suit by a private plaintiff involving a matter of public concern, we hold that allegedly defamatory statements must be provably false, and the plaintiff must bear the burden of proving falsity, at least in cases where the statements *were directed towards a public audience* with an interest in that concern." *Id.* (emphasis added). *Flamm* thus suggested a distinction based on whether the speech was said to a non-public audience (a circumstance such as that in *Dun & Bradstreet*, where the speech was circulated to only five subscribers). *Flamm* firmly rejected any distinction based on whether the speaker was a member of the institutional press.

publication which affords a vehicle of information and opinion."'" *Id*. at 1293 (quoting *von Bulow ex rel. Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987), which in turn quoted *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)).

Cox argued, Trial Mem. 1–6, 2 ER 63–68, that solo online speakers who are trying to communicate to the public are as much a part of the "media" and the "press" protected by the "freedom of speech, or of the press" as are members of the institutional press. *Cf., e.g.*, *Lovell*, 303 U.S. at 452 (stating that the "press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion"); *Shoen*, 5 F.3d at 1293 (quoting *von Bulow*, 811 F.2d at 144, which in turn quoted *Lovell* on this point). This is the argument that Cox made in the motion for a new trial, and that Cox is now making on appeal.

II. Cox's Allegations Constitute Speech on Matters of Public Concern, and It Was Plain Error to Conclude the Contrary

Cox's statement that formed the basis for the verdict alleged that a government-appointed trustee committed tax fraud against the government, while engaging in the administration of a bankrupt company with "at least $30 million that was still outstanding and owing" to investors, Trial Tr. 64 (plaintiffs' opening statement). Plaintiffs contend that such alleged misconduct was nonetheless a matter of merely "private concern" for purposes of

libel law, and the district court agreed. That is not correct, and it was plain error for the district court to take this view.

Publicly made allegations that a person or organization is involved in crime generally constitute speech on matters of public concern. *See, e.g.*, *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1298 (11th Cir. 2008) (accusations of "alleged violations of federal gun laws" by gun stores were on "a matter of public concern"); *Boule v. Hutton*, 328 F.3d 84, 91 (2d Cir. 2003) ("fraud in the art market" is "a matter of public concern").

Indeed, even consumer complaints about noncriminal conduct by a business generally constitute speech on matters of public concern. This Court has so held as to a small business store owner's refusal to give a refund to a customer who had bought an allegedly defective product. *Gardner v. Martino*, 563 F.3d 981, 989 (9th Cir. 2009). It has so held as to supposedly excessive rent charged by a mobile home park operator. *Manufactured Home Communities, Inc. v. County of San Diego*, 544 F.3d 959, 965 (9th Cir. 2008) (labeling this a subject of "public debate"); *id.* at 966 (Callahan, J., dissenting) ("agree[ing] with the majority" that the claims of plaintiff's "rent increases and operation of the mobile home park were issues of public concern"). And the Second Circuit has so held as to a lawyer's supposedly being "an 'ambulance chaser' with interest only in 'slam dunk cases.'" *Flamm*,

201 F.3d at 147, 150 (holding that such allegations were on "a matter of public concern"). *A fortiori*, allegations of criminal fraud against the government by a government-appointed bankruptcy trustee in a multi-million-dollar bankruptcy would be even more a matter of public concern.

Plaintiffs' attempts to distinguish these cases are unsound. First, plaintiffs argue that "*Gardner* has no precedential value on this issue anyway because the plaintiff *conceded* the existence of 'an issue of public interest' in that case, so the Court never discussed whether there actually was one, let alone 'found' one." Obsidian Br. 38 n.11. But the *Gardner* opinion noted only that plaintiffs conceded that defendants' statements were "'in connection with an issue of public interest'" for purposes of the Oregon anti-SLAPP statute. *Gardner*, 563 F.3d at 986 & n.7 (in Part A, "Oregon's Anti-SLAPP Statutes").

In its separate discussion of the First Amendment, this Court independently labeled the statements as subject to the *Gertz* standard, which applies to statements "on a matter of public concern." *Id.* at 989. The *Gardner* opinion said nothing to suggest that it was relying on the plaintiffs' state law concession in determining the First Amendment "on a matter of public concern" question. Instead, the court cited *Gertz* as its own statement of the controlling First Amendment principle.

Second, plaintiffs concede that "allegations that local companies or professionals are preying on vulnerable citizens" are speech on a matter of public concern, citing *Manufactured Home Communities* and *Flamm*. Obsidian Br. 36–37. But plaintiffs argue that "[a]llegations of fraud, illegality, or corruption in a particular consumer industry," which "have a direct impact on the public" (citing, among other cases, *Gardner*), are "fundamentally different than specific allegations of fraud and illegal conduct leveled against a single individual (and his company) regarding a single bankruptcy that affects the debtor and its creditors but has no significant impact on the general public." Obsidian Br. 37–38.

Yet there is no such fundamental difference between "allegations that local . . . professionals are preying on vulnerable citizens" and allegations that a local professional is preying on the citizenry by allegedly trying to defraud the government. Both involve allegations of wrongful conduct that may harm the public. Both may involve even individual incidents of wrongful conduct, as in *Gardner*. Both may lead to a libel lawsuit, if the allegation turns out to be incorrect, and the *Gertz* requirements (or, for public figures, the *New York Times* requirements) are satisfied. But both classes of allegation are indeed on matters of public concern, and are thus entitled to the *Gertz* and *New York Times* protections.

III. This Court Was Correct in Stating That the *Gertz* Requirement of a Showing of Negligence Applies Even in Private Concern Cases

This Court stated in *Newcombe*, 157 F.3d at 694 n.4, that, "when a publication involves a private person and matters of private concern," *Gertz* provides that "[a] private person who is allegedly defamed concerning a matter that is not of public concern need only prove, in addition to the requirements set out by the local jurisdiction, that the defamation was due to the negligence of the defendant." Likewise, in *United States v. Alvarez*, 617 F.3d 1198, 1206 n.7 (9th Cir. 2010) (dictum), *aff'd*, 132 S. Ct. 2537 (2012), this Court stated that, "[a] false statement of fact can be punished upon a showing of mere negligence in the context of purely private defamation."

As Cox's opening brief argued, this approach makes sense. The Supreme Court and this Court have generally rejected strict liability for speech in a wide range of contexts, including contexts far removed from speech on matters of public concern. Cox Opening Br. 24–25. In particular, both the Supreme Court and this Court have concluded that the bar on strict liability applies even in obscenity and child pornography cases, despite the likelihood that strict liability in those cases would only chill adult pornography—speech that the Supreme Court has held is not within the "public concern" category. *Id.* at 25–26.

Plaintiffs seek to dismiss this argument by contending, among other things, that, "A state tort action is not comparable to a federal statute creating parallel civil and criminal liability." Obsidian Br. 41. But the Supreme Court has long held, beginning with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that a state libel tort action fully implicates First Amendment protections—including protections against strict liability—as much as do criminal statutes, whether state or federal.

"It matters not that [a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press] has been applied in a civil action and that it is common law only . . . ." *Id.* at 265. Indeed, "[t]he fear of damage awards" under libel rules that impose strict liability "may be markedly more inhibiting [of constitutionally protected speech] than the fear of prosecution under a criminal statute." *Id.* at 277. And criminal law precedents were dispositive in the Court's rejecting strict liability in a state tort law context: "A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale." *Id.* at 278.

IV. Plaintiff Kevin Padrick Should Have Been Treated as a Temporary Government Official, Because He Held a Court-Appointed Position

Though Kevin Padrick was not formally a government employee, he was appointed by a court to exercise the duties of a trustee pursuant to the Bankruptcy Act. This makes him tantamount to a temporary government official, so that statements about his actions in the discharge of his governmentally assigned duties must be evaluated under the *New York Times* standard.

Since Cox's opening brief was filed, the California Court of Appeal decided *Young v. CBS Broadcasting, Inc.*, 212 Cal. App. 4th 551 (2012), which is closely analogous to this case. In *Young*, as in this case, a libel lawsuit was brought by someone who was not a full-time government employee, *id.* at 560, but who had been appointed by a court to "take control" of another's "affairs." *Id.* at 561.

The Court of Appeal concluded that plaintiff was "a public official," 212 Cal. App. 4th at 560, precisely because of this court appointment: "By her court appointment," plaintiff Young "became an agent of the state with the power to interfere in the personal interests of a private citizen to whom she was not related and without that citizen's consent." *Id.* at 561. "A person holding these sovereign powers over another unrelated person and using them for compensation is subject to the public's independent interest in her performance, and warrants public scrutiny," *id.* at 562, thus becoming sub-

ject to the First Amendment public official tests. Likewise, in this case, by his court appointment plaintiff Padrick became a compensated agent of the state with power to deal with the property of a privately owned corporation—a corporation with over $30 million in liabilities.

To be sure, because *Young* involved a conservatorship over an individual and not just a business, Young also had nonfinancial powers, such as control over the conservatee's medical decisions. *Id.* at 561–62. But the *Young* opinion did not stress this as an independent basis for public official status, and indeed the bulk of CBS's allegations against Young had to do with her supposed financial misbehavior with regard to the conservatee's property. *Id.* at 556–57.

Likewise, as Cox argued in her opening brief (at 27–28), the Texas Court of Appeals treated a private psychologist, who was appointed by a trial court to decide parental visitation, as a public official. *HBO v. Harrison*, 983 S.W.2d 31, 37–38 (Tex. App. 1998) (cited by *Young*, 212 Cal. App. 4th at 560). And the Idaho Supreme Court concluded that a plaintiff was a public figure, chiefly because of his status as a "court appointed guardian [of an incompetent person], a pivotal figure in the controversy regarding the accounting of the estate that gave rise to the defamation . . . action[]." *Bandelin v. Pietsch*, 563 P.2d 395, 398 (Idaho 1977); Cox Opening Br. 28–29.

Plaintiffs' attempts to distinguish these cases are unsound. Plaintiffs argue that the psychologist in *HBO v. Harrison* "was granted sole authority by the family court to decide parental visitation . . . making his authority the same as 'that of a judge,'" Obsidian Br. 44 (citation omitted), while Padrick's service "was subject to 'tremendous oversight' by the bankruptcy court, the United States Trustee, and the Creditors Committee." *Id.* But in the normal course of things, the decisions of a court-appointed psychologist would be subject to oversight by the court, and the *HBO v. Harrison* opinion nowhere suggested the contrary. (The opinion stressed that the psychologist had the power to determine visitation and not just to investigate, 983 S.W.2d at 37, but it did not suggest that the court delegated its power irrevocably.) And of course the custody decision was subject to review by appellate courts, and was subject to "oversight" by the parties, who—like the Creditors Committee in a bankruptcy case—could ask the court to review the decision.

Plaintiffs also argue that *HBO v. Harrison* "relied in part on the Texas constitution," Obsidian Br. 44, but the Texas court's analysis predominantly focused on the First Amendment and on the First Amendment caselaw developed by the Supreme Court and by courts in other states, *see, e.g.*, 983 S.W.2d at 36–38, and mentioned the Texas Constitution only in a small por-

tion of a footnote, *see id.* at 39 n.4, and then in the conclusion, *id.* at 44–45, discussing the separate question of whether there was "specific, concrete evidence of actual malice to defeat summary judgment," *id.* at 45. And *Young* recognized the First Amendment basis of *HBO v. Harrison*, by relying on it in California. *Young*, 212 Cal. App. 4th at 560.

Plaintiffs try to distinguish *Bandelin* on the grounds that it "involved a public figure, *not* a public official." Obsidian Br. 45. But of course the *New York Times* test would apply regardless of whether Padrick were treated as a public figure or as a public official. In *Bandelin*, the court concluded that statements about the plaintiff were subject to the *New York Times* standard because of his "'participation in the particular controversy giving rise to the defamation,'" 563 P.2d at 398, specifically his role as the court-appointed "guardian of the estate" of an incompetent, *id.* Cox's statements about Padrick should likewise be subject to the *New York Times* standard because of Padrick's role as the court-appointed trustee of the Summit bankruptcy estate.

Finally, plaintiffs argue that Cox's argument "should not be considered" because Cox had argued before trial that Padrick was a public figure rather than labeling him a public official. But as the opening brief notes, "public

figure" is often used by courts as a broad term that also includes public officials. Cox Opening Br. 30–31 (citing many cases).

To elaborate on one of the several examples of this usage given in the opening brief, this Court in *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1251 (9th Cir. 1997), stated that, "Under the rule first announced in *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964), a public figure can recover damages from a news organization, for harms perpetrated by its reporting, only by proving 'actual malice.'" Of course, the rule first announced in *New York Times* was that a public *official* can recover damages (both from a news organization and from the individual defendants in that case, 376 U.S. at 256) only by proving "actual malice." The phrase "public figure" does not appear in the *New York Times* opinion, and the Supreme Court did not extend the *New York Times* rule to non-public-officials until *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). *See id.* at 134 (plurality opinion); *id.* at 162 (Warren, C.J., concurring in the judgment). But the *Eastwood* statement is nonetheless correct, precisely because "public figure" has often been used broadly to include public officials as well as other publicly visible people.

Likewise, to give one more example, *Florida Star v. B.J.F.,* 491 U.S. 524, 531 n.6 (1989), described *Garrison v. Louisiana*, 379 U.S. 64 (1964),

as involving an "interest in [a] public figure's reputation," though *Garrison* likewise spoke consistently of "public officials," *id.* at 67, 73–78, and involved a public official. Again, this usage on the Court's part in *Florida Star* was correct, but only because "public figure" is often used to include public officials.

V. Defendant's First Amendment Arguments Have Been Sufficiently Preserved for Review

Cox's opening brief explained why her First Amendment arguments have been sufficiently preserved for review. Cox Opening Br. 31–37. Parties normally must specifically object to a court's proposed jury instructions. Fed. R. Civ. P. 51(c)(1). Yet "when the trial court has rejected plaintiff's posted objection and is aware of the plaintiff's position, further objection by the plaintiff is unnecessary." *Loya v. Desert Sands Unified School Dist.*, 721 F.2d 279, 282 (9th Cir. 1983) (citing *Brown v. Avemco Inv. Corp.*, 603 F.2d 1367, 1370–71 (9th Cir. 1979)); *see also Mukhtar v. California State Univ., Hayward*, 299 F.3d 1053, 1062–63 (9th Cir. 2002), *amended by* 319 F.3d 1073 (9th Cir. 2003); *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1189 (9th Cir. 2005).

In this case, the district court was amply aware of Cox's position that she was entitled to First Amendment protections. Indeed, the court wrote a detailed opinion, released the day after trial, expressly rejecting the view that

the jury should have been instructed pursuant to *New York Times* or *Gertz*. And the day before trial, the court expressly rejected Cox's First Amendment arguments in announcing its oral ruling in response to her legal memorandum, filed a week before. Cox Opening Br. 32–34. Here, as in *Loya*, "the trial court [had] rejected plaintiff's posted objection and [was] aware of the plaintiff's position," so "further objection by the plaintiff [was] unnecessary."

Plaintiffs argue that *Loya*, *Mukhtar*, and *Dorn* "were tried prior to 2003, when there was more flexibility in the application of FRCP 51," on the theory that "[p]rior to 2003, FRCP 51 was less specific about how and when a party had to object to jury instruction[s] to preserve alleged errors." Obsidian Br. 17. But both the old and the new versions of Rule 51 spoke in much the same way about "how and when a party had to object to jury instruction[s]." *Loya*, *Mukhtar*, and *Dorn* simply set forth a general principle that the contemporaneous objection requirement is aimed at alerting the judge to a party's position, and so if the judge had been made aware of the party's position, repetition of the objection is unnecessary. Nothing in the change to Rule 51 undermines that principle.

Plaintiffs cite *Hunter v. County of Sacramento*, 652 F.3d 1225, 1230 n.5 (9th Cir. 2011), for the proposition that "the 2003 amendment abrogated the

rule set out in our pre-2003 decisions." Obsidian Br. 17. But *Hunter* concluded that the amendment to Rule 51 *relaxed* the contemporaneous objection requirements, by providing for plain error review. 652 F.3d at 1230 n.5. It did not conclude that the amendment *strengthened* the contemporaneous objection requirements, and did not abrogate the *Loya* principle that "when the trial court has rejected plaintiff's posted objection and is aware of the plaintiff's position, further objection by the plaintiff is unnecessary."

Plaintiffs argue that the *Loya* principle applies only when a party has "'offered an alternative instruction.'" Cox Opening Br. 15–16 (quoting *Medtronic, Inc. v. White*, 526 F.3d 487, 495 (9th Cir. 2008)). But no such alternative instruction was offered in *Loya* and *Dorn*, and *Medtronic* said only that an exception to the contemporaneous objection requirement "is available," *id.*, under those circumstances—it did not state that the exception is *only* available under certain circumstances (a statement that would have been inconsistent with *Loya* and *Dorn*).

The same is true of *United States v. Klinger*, 128 F.3d 705 (9th Cir. 1997), which in any event dealt with Fed. R. Crim. P. 30 and not Fed. R. Civ. P. 51. *Klinger* said,

> We do, however, recognize "a sole exception to the requirement of a formal, timely, and distinctly stated objection" when a proper objection would be a "pointless formality." A proper objection would be a "pointless formality" if: (1) "throughout the trial the party argued the

> disputed matter with the court"; (2) "it is clear from the record that the court knew the party's grounds for disagreement with the instruction"; and (3) the party proposed an alternate instruction.

Id. at 711 (citation omitted). *Klinger* did not say that a proper objection would *only* be a pointless formality when all three elements are met, and indeed an objection could easily be a pointless formality if the first two elements are satisfied but the third is not (again, as in *Loya* and *Dorn*). The "pointless formality" doctrine might be the "sole exception" to the contemporaneous objection requirement. But this does not define when the "pointless formality" doctrine is satisfied, nor does it require that all three elements be present in all cases for that doctrine to be satisfied.

Finally, contrary to the plaintiffs' suggestion, in *Loya* this Court did *not* conclude "that the plaintiff *complied*" with the formal contemporaneous objection requirements of Rule 51. Obsidian Br. 17–18. Rather, this Court concluded that those requirements should be waived under the circumstances, and cited an earlier case that it characterized as saying that, "when the trial court has rejected plaintiff's posted objection and is aware of the plaintiff's position, further objection by the plaintiff is unnecessary." 721 F.2d at 282.

VI. The Failure to Instruct the Jury in Accordance with the First Amendment Rules Was Not Harmless

For the reasons given above and in the opening brief, the jury should have been instructed that it needed to find "actual malice" in order to hold

Cox liable, given *New York Times*. At least, the jury should have been instructed that it needed to find "actual malice" in order to hold Cox liable for presumed damages, and negligence in order to hold Cox liable for proven compensatory damages, given *Gertz*. Yet, because no such instructions were given, the jury had no occasion to decide whether the "actual malice" or negligence requirements were satisfied.

Plaintiffs argue, Obsidian Br. 46–50, that this Court can make these findings itself, and conclude that the failure to instruct the jury to decide the negligence and "actual malice" questions was harmless. But this is not clear, both as to negligence and especially as to "actual malice."

Whether Cox "in fact entertained serious doubts as to the truth of [her] publication"—which is what "actual malice" means here, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)—is a difficult question. Even "[f]ailure to investigate" (a matter on which the jury was also not asked to opine) would not be enough to show "actual malice." *Id.* at 733. Nor would "extreme departure from professional standards," though again no such departure was found by the jury here. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665–66 (1989). "The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.'" *Id.* at 688.

Moreover, "actual malice" must be shown through clear and convincing evidence. *New York Times*, 376 U.S. at 285–86; *Gertz*, 418 U.S. at 350 (holding that even a "private defamation plaintiff" may not collect presumed and punitive damages if he has "establishe[d] liability under a less demanding standard than that stated by *New York Times*"). This is why proof of "actual malice" is seen as such a "demanding" standard. *See, e.g.*, *Gertz*, 418 U.S. at 337 (referring to "the demanding requirements of the *New York Times* test").

How a properly instructed jury would have evaluated Cox's beliefs is an entirely speculative question. Perhaps the jury would have concluded that Cox was a true believer who was militantly confident in her views, even if those views were mistaken and perhaps unreasonable. Perhaps not. The only way to determine with any reasonable confidence how a jury would resolve this question about Cox's mental state is to have a properly instructed jury make this decision.

RESPONSE BRIEF ON CROSS-APPEAL

VII. The District Court Correctly Held That Only the Dec. 25, 2010 Post Was Potentially Libelous

The district court's July 7, 2011 and Aug. 23, 2011 opinions correctly and in detail explained why all of Cox's posts except the Dec. 25, 2010 post were expressions of opinion that, in context, were "not sufficiently factual to

be proved true or false." *Obsidian Finance Group, LLC v. Cox*, 812 F. Supp. 2d 1220, 1234 (D. Or. 2011); *Obsidian Finance Group, LLC v. Cox*, 2011 WL 2745849, *7 (D. Or. July 7, 2011). The posts were placed on a site titled "obsidianfinancesucks.com," a name that leads "the reader of the statements [to be] predisposed to view them with a certain amount of skepticism and with an understanding that they will likely present one-sided viewpoints rather than assertions of provable facts." 812 F. Supp. 2d at 1232. "[T]he occasional and somewhat run-on almost 'stream of consciousness'–like sentences read more like a journal or diary entry revealing defendant's feelings rather than assertions of fact." *Id*. at 1233.

"Defendant regularly invokes language which is figurative, hyperbolic, imaginative, or suggestive," including terms such as "'immoral,'" "'really bad,'" "'thugs,'" "'evil doers,'" and the like. *Id*. Speculative or hyperbolic assertions such as that "Padrick hired a 'hit man' to kill her" or "that the entire bankruptcy court system is corrupt" "diminish the reader's expectations that statements posted by defendant on her blog are to be taken as provable assertions of fact." *Id*. "A reasonable reader would understand that defendant's postings" simply reflected "her subjective belief of pervasive corruption throughout the bankruptcy court system and exemplified by the Summit Accommodators bankruptcy." *Id*.

And when "the content and context of the surrounding statements are considered," *id.* at 1234, even the statements that might in isolation seem like factual assertions would be seen by reasonable readers as opinions. "[T]he context in which those statements were made dispels a reader's understanding that they are assertions of fact." *Id*.

Cox was speaking about technical financial and legal questions, in a context that clearly showed her to be a layperson and not a specialist. The district court correctly recognized that reasonable readers would perceive such speech as expression of a layperson's surmise, not of an expert's knowledge.

To be sure, as the district court recognized, Internet speech—and speech on blogs in particular—is not categorically immune from defamation liability. *Id.* For instance, the context of some posts about bankruptcy proceedings or tax law on some blogs may suggest that they contain factual assertions by those who are expert on the subject. Such posts could indeed lead to defamation liability, if they contain false factual assertions and the proper First Amendment *mens rea* standards are satisfied.

But the context of other posts suggests that they are simply editorial judgments that express harshly negative views about their subjects. Such statements might well be seen as nonactionable opinion in traditional media as well as on the Internet. *See, e.g.*, *Worldnet Software v. Gannett Satellite*

Info. Network, 702 N.E.2d 149, 153 (Ohio Ct. App. 1997) (so holding as to newspaper columns, given that "the general context of the statements" showed that they were "subjective, opinionated statements about" plaintiffs); *id.* at 154 (holding the contrary as to some statements in a television broadcast, but in large part because "[t]he report appeared during a news broadcast . . . and there is no indication that the statements were made in the midst of a commentary or editorial"). And the district court correctly viewed the obsidianfinancesucks.com posts as nonactionable opinion here.

This is also the same approach that has been taken by many other courts. Thus, for instance, in *SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 982 (N.D. Ohio 2003), the court recognized that though "[i]n certain contexts, allegations of accounting fraud or the existence of government investigations may be the basis of a defamation claims," the context in that case made clear to reasonable readers that the speaker was expressing an opinion. "The Defendant's postings are fraught with figurative language and hyperbole." *Id.* The defendant's other speech "conveys an unprofessional background." *Id.* (apparently using "unprofessional" in the sense of lacking professional expertise). And a disclaimer on the discussion board "that any postings represent the opinions of the given author," rather than being endorsed by the company being discussed, would further lead reasonable readers to conclude

that the statements were rhetoric and opinion. *Id*. Likewise, in this case, Cox's figurative language and hyperbole, the tone (including the punctuation and capitalization) that suggested a layperson's beliefs rather than a professional's expert knowledge, and the labeling of the site as "obsidianfinance-sucks.com" conveyed the very same sort of message to reasonable readers.

Similarly, in *Art of Living Foundation v. Does*, 2011 WL 2441898, *7 (N.D. Cal. June 15, 2011), the court concluded that even allegations that plaintiffs "'obtained money from participants on false, deceitful declarations,'" that "'companies, individuals give money to [plaintiffs] for specific projects, but the money never reaches those projects,'" and that "'if you . . . want to launder your black money . . . then [plaintiff] is for you,'" were in context nonactionable opinions, "especially on Blogs that readers obviously expect are critical of [plaintiff]." Even the statement that, "'I am fully convinced that [Art of Living] is front-end name for a group of fraudulent NGOs[; m]y lawyer tells me that what they are doing amounts to large-scale organized fraud according to the laws of several countries,'" was found to be nonactionable opinion when seen in context. *Id.* at *8. The same analysis should apply here, "especially on [a blog] that readers obviously expect [is] critical of [plaintiff]."

To give another example, in *Couloute v. Ryncarz*, 2012 WL 541089, *6 (S.D.N.Y. Feb. 17, 2012), the court stressed the importance of "'the larger context of the website on which [the statements] were posted,'" in determining whether speech on a Web site was fact or opinion. The site in that case, "liarscheatersrus.com," was "'specifically intended to provide a forum for people to air their grievances about dishonest romantic partners.'" *Id.* "The average reader would know that the comments are 'emotionally charged rhetoric' and the 'opinions of disappointed lovers.'" *Id.* Given this context, "a reasonable reader would understand the comments to be opinion." *Id*.

Likewise, here the name "obsidianfinancesucks.com" and the hyperbolic and nonprofessional tone of the posts signals to reasonable readers that the posts are critical opinions. "If a statement appears in a place usually devoted to, or in a manner usually thought of as representing, personal viewpoints, it is also likely to be understood—and deemed by a court—to be nonactionable opinion." 1 ROBERT D. SACK, SACK ON DEFAMATION § 4:3.1 (4th ed. 2011), *quoted favorably by Couloute*, 2012 WL 541089, at *6.

Summit Bank v. Rogers, 206 Cal. App. 4th 669 (2012), offers one more example. There, the court concluded that allegations that a CEO treated a bank as "her person[al] Bank to do with it as she pleases"—with their possible implication of breach of fiduciary duty, or worse—were nonactionable

opinion. *Id.* at 698–99. The posts were on a site labeled "Rants and Raves." *Id.* at 699. They involved "colloquial epithets" that would be seen as personal opinions rather than as professional factual evaluations. *Id.* They "'lack[ed] the formality and polish typically found in documents in which a reader would expect to find facts.'" *Id*. at 700. As a result, they were "nonactionable statements of opinion, rather than verifiable statements of fact." *Id.* The same analysis would apply to the obsidianfinancesucks.com statements in this case.

CONCLUSION

For these reasons, the district court's denial of the motion for a new trial should be reversed, but the district court's earlier grant of partial summary judgment as to the obsidianfinancesucks.com posts should be affirmed.

Respectfully submitted,

s/ Eugene Volokh
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February 4, 2013

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because the brief contains 6,311 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman typeface.

Dated: February 4, 2013

s/ Eugene Volokh
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Crystal Cox's Reply Brief on Appeal and Response Brief on Cross-Appeal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 4, 2013. All participants in the case are registered CM/ECF users.

Dated: February 4, 2013

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CERTIFICATE THAT BRIEF IS IDENTICAL TO THE ELECTRONIC VERSION

I certify that this brief in *Obsidian Finance Group, LLC et al. v. Cox*, Nos. 12-35238, 12-35319, is identical to the electronic version filed February 4, 2013.

Dated: February 4, 2013

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