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10 **UNITED STATES DISTRICT COURT**  
 11 **DISTRICT OF ARIZONA**

12  
 13 XCENTRIC VENTURES, LLC, an  
 Arizona limited liability company, and  
 14 JABURG & WILK, P.C., a professional  
 corporation,,

15 Plaintiff,

16 v.

17 SHAWN RICHESON,

18 Defendant.

Case No. 2:10-CV-01931-PHX-NVW

**MEMORANDUM ON AMOUNT IN  
 CONTROVERSY TO ESTABLISH  
 DIVERSITY JURISDICTION**

(Assigned to Hon. Neil Wake)

19  
 20 Plaintiffs Xcentric Ventures, LLC (“Xcentric”) and Jaburg & Wilk, P.C. (“Jaburg  
 21 & Wilk”) (collectively “Plaintiffs”), hereby submit the following Memorandum pursuant  
 22 to the Court’s request to demonstrate that there are sufficient damages in this matter to  
 23 satisfy the amount in controversy requirement to establish diversity jurisdiction in this  
 24 court.

25 **MEMORANDUM**

26 **I. PRELIMINARY STATEMENT**

27 The record will reflect that Plaintiffs filed an emergency application for a  
 28 temporary restraining order without notice and an application for order to show cause why

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1 a preliminary injunction should not issue on September 9, 2010. Oral argument on that  
2 matter was held on September 21, 2010. Defendant Richeson stipulated to the entry of the  
3 requested preliminary injunction. Following argument, the court asked for additional  
4 briefing on the issue of Plaintiffs' claimed damages in order to support the amount in  
5 controversy requirement to establish diversity jurisdiction. This is that brief.

## 6 **II. ARGUMENT**

7 Federal district courts are empowered to adjudicate claims between "citizens of  
8 different States" where the amount in controversy "exceeds the *sum or value* of \$75,000."  
9 28 U.S.C. § 1332(a)(1) (emphasis added). The fact that the Plaintiffs and Defendant  
10 Shawn Richeson ("Richeson") are citizens of different states is not in dispute. The only  
11 matter requiring attention is the sufficiency of a claim for damages.

12 In order to satisfy the amount in controversy requirement for diversity jurisdiction,  
13 plaintiffs may aggregate all claims against a defendant. Fed. R. Civ. P. 18; 28 U.S.C. §  
14 1332; *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 585, 125 S.Ct. 2611,  
15 2635 (2005). Generally, the amount in controversy alleged in the complaint will satisfy  
16 the requirement unless it appears to a legal certainty that the Plaintiff cannot claim the  
17 jurisdictional amount in good faith. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398  
18 (9th Cir. 1996); *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215 (7th Cir 1995); *Larkin v.*  
19 *Brown*, 41 f. 3d 387 (8th Cir. 1994); *Klepper v. First American Bank*, 916 F.2d 337 (6th  
20 Cir. 1990).

21 In this brief, Plaintiffs' assert damages in the amount in excess of \$75,000. Those  
22 damages include claims for presumed damages, the value of injunctive relief; and punitive  
23 damages; all of which may be aggregated to satisfy the amount in controversy  
24 requirement. *See Exxon*, 545 U.S. at 585, 125 S.Ct. at 2635.

### 25 **A. Per Se Defamation Results in Presumed Damages**

26 In Arizona, a publication that impeaches the honesty, integrity, or reputation of a  
27 person, or which is damaging to his professional reputation, is libelous *per se* and  
28 presumptive damages shall be awarded without proof of special damages. *Peagler v.*

1 *Phoenix Newspapers, Inc.*, 114 Ariz. 309, 316, 560 P.2d 1216, 1223 (1977); *McClinton v.*  
2 *Rice*, 76 Ariz. 358, 364-65, 265 P.2d 425, 429-30 (1953). Generally, even when a  
3 plaintiff can show no actual damages, if defamation is shown, plaintiff may recover at  
4 least nominal damages. *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 179 (2d  
5 Cir. 2000); *see also Van-Go Transport Co., Inc. v. New York City Bd. of Educ.*, 971  
6 F.Supp. 90, 100 (E.D.N.Y.1997); *see, e.g., Suckenic v. Levitt*, 177 A.D.2d 416, 416, 576  
7 N.Y.S.2d 258, 258 (1991) (nominal damages of 1¢); *Buckley v. Littell*, 539 F.2d 882, 897  
8 (2d Cir.1976) (nominal damages of \$1); *cf. Orlowski v. Koroleski*, 234 A.D.2d 436, 437,  
9 651 N.Y.S.2d 137, 137 (1996) (awarding nominal damages in slander *per se* case where  
10 plaintiff failed to prove any injury).

11 This commonly recognized principle is expressly recognized in Arizona. *See Horn*  
12 *v. Ruess*, 72 Ariz. 132, 134-35, 231 P.2d 756, 758 (1951) (recognizing that *per se*  
13 defamation entitles the party against whom the defamation was aimed to damages in some  
14 amount without necessity of either alleging or proving special damages).

15 In this case, there can be no doubt that numerous statements made by Defendant  
16 Richeson about Xcentric and Jaburg & Wilk are defamatory *per se*. *See e.g.*, Document 8  
17 - Decl. of Maria Crimi Speth, September 8, 2010, ¶¶ 8, 14, 15, 34, 35 and Exhibits  
18 referenced thereto. Consequently, some amount of damages must be awarded under the  
19 doctrine of presumed damage. *See Horn*, 72 Ariz. at 134-35, 231 P.2d at 758.

20 Although it may be argued that presumed damages are speculative, they will be  
21 upheld in whatever amount awarded when reasonable. All that is necessary is “an  
22 estimate, however rough, of the probable extent of actual loss a person had suffered and  
23 *would suffer in the future*, even though the loss could not be identified in terms of  
24 advantageous relationships lost, either from a monetary or enjoyment-of-life standpoint.”  
25 *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1138 (7th Cir. 1987)  
26 (quoting Prosser and Keeton on Torts, § 116A at 843).

27 In *Brown & Williamson* the plaintiffs introduced testimony intended to show that it  
28 has suffered harm to its reputation based on the defendant’s statement; none of the

1 testimony was supported with evidence of direct monetary value. 827 F.2d 1119, 1138-39.

2 Instead, the plaintiffs offered the following in support of their defamation claims:

3 First, Brown & Williamson's general counsel testified that  
4 after the broadcast there were calls from the field sales force  
5 indicating that their contacts were asking "how in the world  
6 could Brown & Williamson have done such a thing." Second,  
7 a department sales manager for Brown & Williamson testified  
8 that sales managers in the Chicago area had received negative  
9 comments from distributors, retailers, and consumers. The  
10 reports he received indicated that the sales staff had been  
11 disrupted in their normal activities by questions from retailers  
12 and consumers about the broadcast. Third, the former Vice  
13 President of Marketing for Brown & Williamson testified that  
14 the company had a reputation it cared about and that he  
15 believed that Viceroy's customers care about the reputation of  
16 the company from which they buy cigarettes. He also testified  
17 that the company's reputation among governmental entities  
18 was important because the cigarette industry is such a closely  
19 regulated industry. Fourth, the company introduced evidence  
20 that the Perspective<sup>1</sup> (including its rebroadcasts) was seen by  
21 over 2.5 million people in the Chicago area. In addition, over  
22 two million people read a 1984 article in the *Saturday Evening*  
23 *Post* which repeated some of the most damaging portions of  
24 the Perspective. Brown & Williamson also argued that the  
25 Perspective was especially devastating because Chicago area  
26 viewers believe that Jacobson's Perspective are reliable.

16 *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1138-39 (7th Cir.  
17 1987). Based on these assertions, Brown & Williamson sought \$7,000,000 in  
18 compensatory damages. *Id.* The jury awarded \$3,000,000. *Id.* The district court reduced  
19 the damage award to \$1.00 stating that Brown & Williamson had failed to prove any  
20 pecuniary damages. *Id.* The Seventh Circuit reinstated the original \$3,000,000 award,  
21 reasoning that:

22 district court incorrectly relied on Brown & Williamson's  
23 failure to prove any actual damages such as lost sales. . .  
24 Brown & Williamson could choose, as it did, to forego any  
25 proof of special damages and seek to recover compensatory  
26 damages under the doctrine of presumed damages. Brown &  
27 Williamson is entitled in this case to recover under the  
28 doctrine of presumed damages because [the publication] was  
libelous *per se*.

<sup>1</sup> Jacobson's Perspective is a popular news segment the ten o'clock news in Chicago.

1 *Brown & Williamson*, 827 F.2d at 1139. Because courts accept a party's *good faith*  
2 *allegation of the amount in controversy*, good faith assertions of damages was all that  
3 was necessary to support the claim.<sup>2</sup> *Lauchheimer v. Gulf Oil*, 6 F. Supp. 2d 339, 343  
4 (D.N.J. 1998); *see also Palmer v. Kelly*, 54 Ariz. 466, 468, 97 P.2d 209, 209-10 (1939)  
5 (relying on the “opinion and judgment of a reasonable man” to assess presumed damages).

6 Importantly, “actual injury is not limited to out-of-pocket loss.” *Boswell v. Phoenix*  
7 *Newspapers, Inc.*, 152 Ariz. 9, 19-20, 730 P.2d 186, 196-97 (1986) Instead, the more  
8 common types of harm inflicted by defamatory statements are recognized, including  
9 damage to reputation and standing in the community, personal humiliation, and mental  
10 anguish and suffering. *Id.*; *see generally Dun & Bradstreet, Inc. v. Greenmoss Builders,*  
11 *Inc.*, 472 U.S. 749, 105 S.Ct. 2939 (1985).

## 12 **B. The Value of Injunctive Relief**

13 The value of injunctive relief may also be included in calculating the amount in  
14 controversy for the purpose of determining jurisdiction. *Hunt v. Washington State Apple*  
15 *Advertising Comm’n*, 432 U.S. 333, 347, 97 S.Ct. 2434, 2443 (1977). It is well established  
16 that in actions seeking injunctive relief the amount in controversy is measured by the  
17 value of the right to be protected. *Id.*; *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9<sup>th</sup> Cir.  
18 2002); *Jackson v. American Bar Assoc’n*, 583 F.2d 829, 831 (9th Cir. 1976). The right to  
19 conduct business free from interference, and avoidance of the potential losses that will  
20 flow from such interference, is a protectable right. *Hunt*, 432 U.S. at 347, 97 S.Ct. at  
21 2443. Accordingly, when a person seeks an injunction or other form of specific relief, it  
22 is the value to the plaintiff of conducting his business or personal affairs free from the  
23 activity sought to be enjoined that is the yardstick for measuring whether the amount in  
24 controversy requirement has been satisfied. C. Wright, A. Miller, & E. Cooper, *Federal*  
25 *Practice & Procedure* § 3708 (1976).

26  
27 <sup>2</sup> The amount in controversy will be determined from an examination of the complaint at the time it was filed.  
28 *Id.* However, if it “appears to a legal certainty that the claim is really for less” based upon the face of the pleadings  
or other proof, then the allegation of the amount in controversy is open to question. *Id.*

1 Here, the amount in controversy is measured by the value to Xcentric and Jaburg &  
2 Wilk of conducting its business free from Richeson’s defamation and destruction of their  
3 reputations, and by the value of costs avoided. Richeson made clear his intent to continue  
4 his barrage of defamatory internet posts “for the next 3 years” and to reach his goal of  
5 destroying Plaintiffs’ businesses. Document 8 - Decl. of Maria Crimi Speth, September 8,  
6 2010, ¶ 35 and Exhibits referenced. Three years of continuous, wide-spread, defamatory  
7 internet posts would cost the firm and Xcentric in excess of \$75,000 just in direct costs to  
8 mitigate the damage through increased advertising and search engine optimization. To  
9 Jaburg & Wilk alone, increased search engine optimization would likely cost more than  
10 \$1,000 per month, and increased public relations advice and advertising would likely cost  
11 more than an additional \$1,000 per month. In addition, absent an injunction, it is likely  
12 that Defendant would succeed in diverting some clients from doing business with  
13 Plaintiffs. It is likely that the loss of a single client could easily deprive Jaburg & Wilk of  
14 more than \$10,000 revenue and could deprive Jaburg & Wilk of more than \$75,000 in  
15 revenue. The loss of several clients would multiply the likely damage. It is reasonable to  
16 presume that the value of the injunction to Jaburg & Wilk alone likely exceeds \$75,000 by  
17 conservatively estimating a savings of \$72,000 in increased public relations and SEO  
18 costs to mitigate damage from Defendants conduct, and the likely preservation of more  
19 than \$30,000 in revenue from clients over a three year period.

### 20 C. Punitive Damages Awardable for Defamation

21 Once some damage has been established, punitive damages are awardable pursuant  
22 to Arizona Revised Statutes (“A.R.S.”) section 12-651 (“Recovery in any action shall  
23 include *all damages* for any such tort suffered by the plaintiff in all jurisdictions.”  
24 (emphasis added)). This is especially true when a defendant has shown ill will, hatred,  
25 spite, or desire to injure through his defamatory conduct. *Hansen v. Stoll*, 130 Ariz. 454,  
26 459 636 P.2d 1236, 1241 (App. 1981).<sup>3</sup> Moreover, the reprehensibility of a wrongdoer’s

27 <sup>3</sup> Importantly, when a punitive damage award is conditioned upon a showing of promoting a knowing or  
28 reckless falsehood, even the First Amendment provides the wrongdoer no protection. U.S. Const. Amend. 1. *Selby v. Savard*, 134 Ariz. 222, 228, 655 P.2d 342, 348 (1982).

1 conduct influences the amount awarded. *See Sec. Title Agency, Inc. v. Pope*, 219 Ariz.  
2 480, 501, 200 P.3d 977, 998 (App. 2008). In determining the reprehensibility of the  
3 defendant's conduct, courts consider whether:

4 the harm caused was physical as opposed to economic; the  
5 tortious conduct evidenced an indifference to or a reckless  
6 disregard of the health or safety of others; the target of the  
7 conduct had financial vulnerability; the conduct involved  
repeated actions or was an isolated incident; and the harm was  
the result of intentional malice, trickery, or deceit, or mere  
accident.

8 *Sec. Title Agency, Inc.*, 219 Ariz. at 501, 200 P.3d at 998 (quoting *State Farm*, 538 U.S.  
9 408, 409, 123 S.Ct. 1513, 1515-16)). It is likewise appropriate to “consider the magnitude  
10 of the *potential harm* that the defendant’s conduct would have caused to its intended  
11 victim if the wrongful plan had succeeded, as well as the possible harm to other victims  
12 that might have resulted if similar future behavior were not deterred.” *TXO Prod. Corp. v.*  
13 *Alliance Res. Corp.*, 509 U.S. 443, 460, 113 S. Ct. 2711, 2721-22 (1993).

14 Here, punitive damages are not only appropriate but necessary. The primary  
15 purpose of punitive damages is to punish the wrongdoer and to deter others from  
16 emulating his conduct. *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330, 723  
17 P.2d 675, 679 (1986). It is necessary to deter future similar conduct.

18 Defendant Richeson embarked on a purposeful, extortion-driven campaign to  
19 falsely and recklessly defame Plaintiffs on the internet; a medium that is instantly  
20 accessible to millions of people worldwide. Even after being confronted with facts  
21 showing that the statements he was posting on various internet sites were false, he  
22 responded that he “did not care”; his goal was to ensure the firm “couldn’t get a client if  
23 they [sic] stood on the corner with a sign saying ‘we sue for food’.” *See* Document 8 -  
24 Decl. of Maria Crimi Speth, September 8, 2010, at ¶¶ 11-13 and Exhibits referenced  
25 thereto. Arizona juries have awarded as much as \$350,000 in punitive damages for this  
26 kind of purposeful and false smear campaign. *Selby*, 134 Ariz. At 224, 655 P.2d at 344.  
27 A similar or greater award is likely here because unlike in *Selby* where the false  
28

1 statements were made only to local authorities and resulted in an investigation that found  
2 all such allegations to be without merit, *Id.*, the defamatory statements here were  
3 widespread and impact both current and prospective clients and employees of the  
4 Plaintiffs. Richeson himself predicted, referring to the Jaburgandwilksucks.com website,  
5 that “by the time you get an emergency TRO filed on Tuesday, this baby will have hit the  
6 10K IP pull range.” (Document 8), meaning that more than 10,000 potential clients would  
7 view the defamation. That sort of widespread and focused defamation would likely result  
8 in many potential clients turning away from Jaburg & Wilk, could easily alarm a number  
9 of current clients, and would cause lingering damage to the firm’s reputation.

10 Plaintiffs recognize that punitive damages imposed must be reasonable in light of  
11 the offense and not grossly disproportionate to the harm inflicted. *BMW of N. America,*  
12 *Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 1599 (1996).<sup>4</sup> Nonetheless ratios of 7 to  
13 1 have been upheld in recent years. *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d  
14 1020, 1044 (9th Cir. 2003) (recognizing the need for proportional damage awards and  
15 upholding an award with ratio of approximately 7:1 of compensatory damages).

16 At a 7:1 ratio, a presumed damages award of only \$10,000 would support a  
17 \$70,000 punitive damage award, which, aggregated, exceeds the required amount in  
18 controversy. In this case, presumed damages approximated at the value of an injunction  
19 already exceed the amount in controversy required, and any multiple of that for punitive  
20 damages more than satisfies the jurisdictional requirement.

21 In addition, nominal damages can support an award of substantial punitive  
22 damages. Punitive damages are generally available even when compensatory damages are  
23 only nominal. *See e.g., Paul v. Hearst Corp.*, 261 F.Supp.2d 303, 309 (Pa. 2002)  
24 (recognizing that punitive damages are available in defamation even when no actual  
25 damage proven); *Roden v. Empire Printing Co.*, 16 Alaska 28, 32, 135 F.Supp. 665, 665

26 \_\_\_\_\_  
27 <sup>4</sup> In recent years, the U.S. Supreme Court and other appellate courts have recognized “single-digit ratio[s]”  
28 will usually satisfy due process. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 410, 123 S.Ct. 1513,  
1516 (2003).

1 (D. Ak. 1955) (finding that punitive damages in defamation case may be recovered even  
2 though actual damages found are only nominal); *Keehr v. Consolidated Freightways of*  
3 *De., Inc.*, 825 F.2d 133, 135 (7th Cir. 1987) (upholding punitive damage award of \$50,000  
4 even though only compensatory award was for nominal damage of \$1.00).

5 To the extent that the ratio between the punitive damages and the nominal damages  
6 of one dollar is assessed independently of the compensatory damages, the Second Circuit  
7 noted that in some cases when compensatory damages are nominal, the use of a multiplier  
8 to assess punitive damages is not the best tool. *Patterson v. Balsamico*, 440 F.3d 104,  
9 124, n.11 (2d Cir. 2006). In light of the BMW factors, the Second Circuit reduced a  
10 \$200,000 punitive damage award to \$75,000 for a malicious prosecution charge where  
11 jury awarded \$1 nominal damages. *Lee v. Edwards*, 101 F.3d 805, 807 (2d Cir. 1996)

12 Similarly, the Eighth Circuit has upheld a jury award of \$744,000 for breach of  
13 contract and nominal damages for breach of fiduciary duty. It also upheld the  
14 corresponding punitive damages in the amount of \$45,000 for the breach of contract and  
15 nearly \$1.25 million for the breach of fiduciary duty reasoning that under the BMW  
16 factors the award was acceptable because the court must consider ““whether there is a  
17 reasonable relationship between the punitive damages award and the harm likely to result  
18 from the defendant’s conduct as well as the harm that has actually occurred.” ’ *Asa-*  
19 *Brandt, Inc. v. ADM Investor Services, Inc.*, 344 F.3d 738, 747 (8th Cir. 2003).

### 20 **III. CONCLUSION**

21 All damages incurred by both Plaintiffs, including the value of presumed and  
22 punitive damages, as well as the value of injunctive relief may be aggregated to meet the  
23 amount in controversy requirements for diversity jurisdiction in federal courts. Here,  
24 Plaintiffs’ have asserted an amount in controversy which exceeds \$75,000 and there is no  
25 basis upon which the Court could determine that it appears “to a legal certainty” that the  
26 Plaintiff cannot claim the jurisdictional amount in good faith.

1 DATED this 1<sup>st</sup> day of October, 2010.

2  
3 **JABURG & WILK, P.C.**

4 /s/ Adam S. Kunz  
5 Maria Crimi Speth  
6 Adam S. Kunz  
7 Attorneys for Plaintiff

8 *Certificate of Service*

9  
10 I hereby certify that on the 1<sup>st</sup> day of October, 2010, I electronically transmitted the  
11 attached document to the Clerk’s Office using the CM/ECF System for filing.

12 I have also caused to be delivered to Defendant, who is not registered with the CM/ECF  
13 System, a copy of the attached document by First Class Mail and E-Mail:

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28 /s/ L. Matlack

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