IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID RUDOVSKY and LEONARD SOSNOV,	:	CIVIL ACTION
Plaintiffs,	:	NO. 09-CV-727
v.	:	
WEST PUBLISHING CORPORATION, WEST SERVICES INC., AND THOMSON LEGAL AND REGULATORY INC. t/a THOMSON WEST,	:	
Defendants.	:	

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, ALTERNATIVELY, FOR A NEW TRIAL

SATTERLEE STEPHENS BURKE & BURKE LLP
James F. Rittinger, Esq. (adm. *pro hac vice*)
Aaron M. Zeisler, Esq. (adm. *pro hac vice*)
230 Park Avenue, 11th Floor
New York, New York 10169
Tel: (212) 818-9200

Of Counsel: Glenn C. Edwards, Esq.

KLEHR HARRISON HARVEY BRANZBURG LLP
Matthew J. Borger, Esq.
1835 Market Street, Suite 1400
Philadelphia, PA 19103
Tel: (215) 568-6060

Dated: February 25, 2011

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Defendants West Publishing Corporation, West Services, Inc. and Thomson Legal & Regulatory, Inc. (herein, "West"), through their undersigned attorneys, respectfully submit this reply memorandum of law in further support of their renewed motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(b), or, in the alternative, for a new trial, pursuant to Fed. R. Civ. P. 59.

PRELIMINARY STATEMENT

In their attempt to support the unsupportable $5.2 million verdict in this case, plaintiffs in their opposition papers ("Pls.' Opp.") resort to a panoply of tactics. They attack straw men arguments that West has never made. They try to convince the Court that West has waived arguments despite an absolutely clear record of preservation. They completely misconstrue and misrepresent West's legal arguments in an attempt to convince the Court they are invalid. They simply ignore the inconvenient parts of the record – for example, complaining about West's "false attribution" of their names while repeatedly failing to acknowledge the existence of the publishing agreement and their own concession at trial that West had the contractual right use their names even if they were no longer involved with the Treatise. They rail about West's "corporate greed" in producing a supplement that earned maybe $17,000 in revenues. They demand punishment for "reprehensible behavior" despite the fact that – other than paying them money – West took virtually every step demanded to correct its error. And plaintiffs even lead it all by suggesting that, despite plaintiffs' own claims as to the public importance of the Treatise here, West is not deserving of the First Amendment protections that so clearly, and which plaintiffs admitted, govern such speech.

When the smoke clears, however, what plaintiffs don't say is as important as their misdirections. They do not dispute that, in order to sustain the award in this case – in particular, the presumed or punitive damages or the false light claim – they were required to demonstrate

"actual malice" by clear and convincing evidence, and moreover that this Court has a constitutional duty to conduct an independent review of the record to assure that they did so. They do not contest the principle that the jury's general verdict cannot stand if any of its possible bases are unsupportable (though they do claim, wrongly, that West waived this rule). They weakly (at best) argue that they did not need to show that anyone actually had read the pocket part at issue here and deemed it defamatory of plaintiffs. And most importantly, they do not seriously attempt to defend the massive punitive damages award – some 28 times an already-substantial compensatory damages award – given that it so plainly violates due process.

Considering plaintiffs' papers, it is now abundantly clear that judgment as a matter of law must be entered for West on all claims. First and foremost, plaintiffs' burden to prove actual malice required them, as a matter of federal constitutional law, to show that West knew (or had substantial doubts) that the 2008 Supplement was inadequate – indeed, so inadequate that it would defame plaintiffs. That is, in order to show that West knowingly made a false defamatory statement, plaintiffs must first show that West knew that the "statement" it was making had the defamatory implication plaintiffs ascribe. Plaintiffs seek to avoid this clear burden by recharacterizing West's argument as one about Pennsylvania law on libel *per se/per quod*, but that flatly misconstrues the argument.

Plaintiffs' attempt to meet this standard, moreover, falls far short of the convincing clarity that the constitution requires. Indeed, despite plaintiffs' claims of evidentiary abundance, it is plain that they produced not a *single* piece of evidence that is probative of subjective awareness on the part of anyone at West that the 2008 Supplement was defamatory. The most plaintiffs showed was that West could have, or should have, known, or failed to act according to reasonable professional standards, but Supreme Court authority is absolutely clear that these

showings do not suffice for actual malice. When this Court fulfills its constitutional obligation to independently review this "evidence," it is clear that the jury's actual malice finding cannot stand. Thus, not only must the punitive damages award be stricken in its entirety, but the compensatory damages award must be at least vacated because we cannot tell whether the jury based any part of it on impermissible presumed damages or on false light invasion of privacy rather than defamation.

But judgment for West must, in fact, be entered even as to defamation because Pennsylvania law is clear that not only must the Court determine that the 2008 Supplement *could* be read by the average person as being defamatory of plaintiffs, the jury must determine that one or more readers *actually did so*. Plaintiffs' argument to the contrary ignores, among other things, the fact that the Pennsylvania legislature has deemed, by statute, these to be distinct elements of a plaintiffs' defamation claim burden. And plaintiffs do not even attempt to claim that, in fact, they produced evidence that any one read enough of the 2008 supplement, and knew enough extrinsic facts about the state of the law, to walk away with a lowered opinion of plaintiffs.

The punitive damages claim must fail for still other reasons than the failure to show actual malice. First, plaintiffs did not show common-law malice, and their argument to the contrary is based entirely on the idea that West's attribution of plaintiffs' names as authors was indifferent to plaintiffs' rights – all the while completely ignoring the fact that, as plaintiffs testified at trial, West had a contractual right to do so. Second, the punitive damages award is grossly excessive as a matter of due process. Not only do plaintiffs not even attempt to argue that any of the factors the Supreme Court has instructed courts to examine to determine "reprehensibility" were proven here, but plaintiffs likewise cannot seriously contest that the 28:1

ratio of punitive to compensatory damages is far beyond anything the Supreme Court would allow.

Finally, plaintiffs dispute that any of the errors made in the jury instructions – errors that the Court, in all candor, admitted to (though tried to correct) – is grounds for a new trial. Largely, plaintiffs attempt to argue that such errors were not sufficiently preserved, but they ignore the fact that the Court, after each set of instructions to the jury, expressly stated that the parties had all objections preserved. Moreover, plaintiffs do not attempt to show that it was highly probable that these errors, taken cumulatively, did not affect the verdict. Accordingly, even to the extent judgment is not entered for West as a matter of law – and it should be – the Court must at least vacate the judgment and set the matter down for a new trial.[1]

ARGUMENT

I. PLAINTIFFS FAILED TO ESTABLISH WEST ACTED WITH ACTUAL MALICE.

In its opening brief ("Defs.' Br."), West demonstrated that plaintiffs had failed at trial to adduce sufficient evidence from which the jury could have found, by clear and convincing evidence, that West had acted with "actual malice." (Defs.' Br. at 9-18.) To avoid any confusion on this point – some of which is evident in plaintiffs' brief – the consequence of this failure is that, as a matter of federal constitutional law, (1) punitive damages may not be awarded, *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *U.S. Healthcare, Inc. v. Blue Cross*, 898 F.2d 914, 929 (3d Cir. 1990); (2) presumed damages (i.e., damages unsupported by actual proof) may not be awarded, *see Gertz*, 418 U.S. at 349-50; *U.S. Healthcare*, 898 F.2d at 929; and (3) liability for false light invasion of privacy may not be sustained, *see Time, Inc. v.*

[1] In their opposition papers, plaintiffs attached (as Exhibits A-C) copies of the complete deposition transcripts for witnesses Sarah Redzic, Catherine Smith and Teri Kruk. (Pls.' Opp. at 4 n.2.) West wishes to caution the Court, however, that only excerpts from these depositions were played for the jury, and thus plaintiffs' exhibits include material that is not part of the trial record in this case.

Hill, 385 U.S. 374, 387-88 (1967). Although plaintiffs purport, unsuccessfully, to marshal sufficient evidence of actual malice, plaintiffs do not dispute that, if they have not, then these claims cannot be allowed to stand. (Pls.' Opp. at 22.)

A. Plaintiffs were required to show that West knew the 2008 Supplement was so inadequate as to be defamatory of them.

West showed in its opening brief that, in a case such as this where the allegedly defamatory publication is not defamatory on its face – i.e., West did not publish a statement saying, "Professors Rudovsky and Sosnov incompetently authored the 2008 Supplement" – then demonstrating actual malice requires plaintiffs to show that the defendant intended, knew (or, at least, was reckless in not knowing) the defamatory implications of the published statement. (Defs.' Br. at 12-13.) As an initial matter, plaintiffs' assertion that West failed to argue this point in its pre-verdict Rule 50(a) motion (Pls.' Opp. at 27-29) is preposterous. West's argument on this point could not have been any clearer:

> MR. RITTINGER: In order to recover either under *Gertz* and the progeny -- this is the Supreme Court of the United States that we're talking about now, Your Honor. And they have to prove knowledge of falsity and reckless disregard for the truth as Your Honor knows. There is absolutely no evidence in this case that West knew that what it was doing was inaccurate and out of date.
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> ***
>
> MR. RITTINGER: Your Honor, the plaintiffs testified that they had a contractual right. The only problem -- they didn't have a contractual right to put their name on something that -- and I'll use their term -- a sham. That they didn't have.
>
> THE COURT: Right.
>
> MR. RITTINGER: But there's no evidence that they knew it was a sham.
>
> ***
>
> MR. RITTINGER: Your Honor, they -- the Supreme Court has held, and we've cited cases to you that a high departure from normal editorial standards is not sufficient.
>
> THE COURT: A what kind of departure?

> MR. RITTINGER: A high departure, a strong departure. I forget the language, Your Honor, but I think we've quoted in the -- I'm sorry.
>
> "Highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting adhered to by responsible publishers is not sufficient."
>
> Your Honor, there's no question that they put in evidence that we were negligent, but they didn't put in evidence that we were trying to do anything or that we – even if you want to interpret that as a high departure or an extreme departure, it is not sufficient to constitute actual malice as a matter of law. And it's especially not sufficient to constitute actual malice when you take the testimony of these people who, she did do something, she may have -- she was too young, she shouldn't have done it. There's no question about that. But she certainly didn't intend to do anything wrong. She thought she was doing her best, and she should -- and she should have been supervised.
>
> Of course, this shouldn't have happened, but that does not mean, as a matter of law, it comes close to approaching the actual malice standard.

(12/15 Tr. 17-20; *see also id.* at 27 (Mr. Rittinger: "Why in the world would West ever publish anything it thought was inaccurate and out of date? It makes no sense, and there's no evidence about it.")).

To be charitable, plaintiffs' assertion of waiver in the face of the language quoted above is perhaps understandable given that plaintiffs completely misconstrue West's argument as an argument about Pennsylvania law regarding libel *per se*. (Pls.' Opp. at 30-33.) It is not. The argument West makes has nothing to do with the *per se*/*per quod* distinction or its continued viability under Pennsylvania law. Rather, West's argument is about the *federal* constitutional requirement of actual malice – which plaintiffs do not dispute they had to meet in order to establish false light invasion of privacy or to obtain either presumed or punitive damages – and the clear holdings of courts that where, as here, the alleged defamation is by implication, actual malice requires clear and convincing proof that the defendant knew of the purportedly defamatory implications. (Defs'. Br. at 12-13.) Thus, plaintiffs' claim that the cases cited by

West involve other states' laws is confused, since each of these cases involved the application of the First Amendment's actual malice requirement, not state defamation law.

Plaintiffs do not dispute that West's cited cases accurately state the meaning of "actual malice" in implication cases, nor do they offer any authority to the contrary. Plaintiffs do claim, incorrectly, that these cases "expressly limited their holdings to the public official/public figure context." (Pls.' Opp. at 32.) This is not so. The cases cited by West happened to be public official/figure cases – where actual malice is required to establish liability – but there is nothing in these cases' discussion of "actual malice" that remotely suggests that it does not apply equally to the well-established requirement that, at least in cases (like here) involving speech of public interest,[2] even a private plaintiff must establish actual malice in order to recover presumed or punitive damages or to recover for false light invasion of privacy.

The unstated premise underlying plaintiffs' argument is that there are two different types of "actual malice" – one for speech about public officials and public figures, and one for public interest speech concerning private figures. Not only is there no authority for such a proposition – and plaintiffs cite to none – but the Supreme Court, when it established actual malice as a requirement for punitive and presumed damages, expressly stated that "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." *Gertz*, 418 U.S. at 350; *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990) ("[W]e

[2] Plaintiffs have not disputed that – as they conceded at trial – this case involves speech on matters of public interest rather than purely private concern. (*See* Defs.' Br. at 10 n.5.)

held [in *Gertz*] that the States could not permit recovery of presumed or punitive damages on less than a showing of *New York Times* malice.").[3]

Actual malice, in other words, is actual malice, and it is defined by the standard in *New York Times*: "knowledge that [the defamatory falsehood] was false or … reckless disregard of whether it was false or not." 376 U.S. at 279-80. And the cases cited originally by West stand for the sensible proposition that that this high standard cannot be satisfied merely by showing that the defendant knew or recklessly disregarded the falsity of statements that it neither intended to be nor understood as defamatory. (Defs'. Br. at 12-13.) To hold otherwise would require a speaker to carefully examine each statement for all possible defamatory implications, lest he or she be subject to a jury award of presumed or punitive damages wholly unbounded by proof of actual harm. Such a rule presents precisely the potential for chilling speech on matters of public concern that compelled the Supreme Court in *Gertz* to require such awards to be supported by clear and convincing evidence of actual malice. *See Gertz*, 418 U.S. at 348-50.

Thus, it is not enough, as plaintiffs ultimately argue, that they establish that West knew or recklessly disregarded the "falsity" of the statement that plaintiffs authored the 2008 Supplement (even assuming such a statement could be inferred). Particularly given the plaintiffs' eventual concession that their contract with West gave West the right to attribute them as authors even if they were no longer involved with the Treatise, such a rule would effectively allow imposition of presumed and punitive damages on West for nothing more than West's negligence in failing to create an adequate pocket part, a standard flatly inconsistent with the constitutional standards of

[3] Thus, plaintiffs' claim that West attempted to "mislead" the Court is not just insulting, it is simply false. Since it is clear that "actual malice" means the same thing for speech about public or private plaintiffs, the holdings of the cases cited by West are equally applicable here, even to the extent those cases did, in fact, involve public plaintiffs.

Gertz.[4] Plaintiffs must, rather, demonstrate that West knew of, intended or at least recklessly disregarded (in the constitutional sense) the fact that the 2008 Supplement was *so* inadequate as to defame plaintiffs by the mere association with it. This, plaintiffs clearly did not do.

B. Plaintiffs failed to establish with convincing clarity that West knew or recklessly disregarded that the 2008 Supplement was defamatory.

Plaintiffs' attempt to marshal evidence in support of the jury's apparent finding of actual malice fails, because it supports at most a finding that West was negligent or perhaps even grossly negligent, which is insufficient. None of the "evidence" plaintiffs rely upon establishes the critical feature of an actual malice finding – i.e., the *subjective* nature of the inquiry. *See Gertz*, 418 U.S. at 334 n.6 (actual malice equates to "subjective awareness of probable falsity"); *Harte-Hanks Comm'c'ns v. Connaughton*, 491 U.S. 657, 667 (1989) ("the standard is a subjective one … the defendant must have made the false publication with a high degree of awareness of ... probable falsity, or must have entertained serious doubts as to the truth of his publication.") Plaintiffs' evidence falls far short of allowing a jury to find actual malice with the "convincing clarity" required by the constitution. *See Tucker*, 237 F.3d at 284. And that is even more clear given this Court's constitutional obligation to conduct an independent review of the evidence of actual malice – a duty plaintiffs concede is appropriate for this Court.[5] (Pls.' Opp. at 18-19.) West submits that this Court cannot review the evidence at trial and conclude that it

[4] The implications of plaintiffs' position are readily apparent and troubling. The conceded contractual right of West to continue to use plaintiffs' names as authors is a highly common provision with respect to legal and other publications. Even accepting that this right does not extend to (in the plaintiffs' words) "sham" publications, to impose not only liability but *punitive* damages here would potentially subject publishers of these important works to wide-ranging and largely unbounded liability unless they took every possible precaution to ensure that no jury could find the work inadequate. And as shown in this case, where West attempted to correct the problem by assigning a trusted author and highly experienced editor to fix the alleged problem, authors are unlikely to believe that any work will meet their personal standards.

[5] Even to the extent that, as plaintiffs suggest (Pls.' Opp. at 18-19), traditional deference to the factfinder's assessment of credibility still obtains under this independent review, *see, e.g.*, *Howard v. Antilla*, 294 F.3d 249 n.8 (1st Cir. 2002), plaintiffs' failure to establish actual malice here cannot be said to turn on any issues of witness credibility.

established, with convincing clarity, that West entertained subjective doubts about the purportedly defamatory nature of the 2008 Supplement.

Plaintiffs seek to support their verdict by, first and foremost, claiming that they met their burden by showing that "when defendants expressly attributed authorship of the pocket part to the plaintiffs, they knew that their statement was false." (Pls.' Opp. at 22; *see also id.* at 33.) It is remarkable to note that plaintiffs can make this argument without even so much as acknowledging West's contractual right to make just such a "false" statement – which plaintiffs conceded at trial. (12/14 Tr. 21-22, 31, 46, 97.) Regardless, however, as demonstrated above the constitutional standards of actual malice require a greater showing than this – there must be evidence to support a finding that West knew (or recklessly disregarded) that what it was publishing was defamatory.

Apparently recognizing this burden, plaintiffs point to the following evidence: (1) West's statements to the effect that "the Treatise was ***their*** book" (Pls.' Opp. at 23); (2) West's purported "profit motive" (*id.* at 24); (3) the "inexperience and lack of training and supervision" of Sarah Redzic, the author of the 2008 Supplement (*id.*); (4) the advertisements for the Treatise (*id.* at 25); and (5) Redzic's supposed knowledge of the "competent" Wasserbly treatise (*id.* at 11-12). None of this evidence establishes the crucial element of actual malice, i.e., that anyone at West subjectively knew or entertained doubts about the adequacy of the 2008 Supplement.[6]

The fact that West claimed its undisputed ownership of the Treatise says, quite plainly, *nothing* about West's subjective understanding of the supposed inadequacy of the 2008

[6] Plaintiffs suggest that they established "purposeful avoidance," but fail to point to any evidence of this. (Pls.' Opp. at 23-24.) In *Harte-Hanks*, the "purposeful avoidance" statement referred to the defendant's decision not to interview someone that they knew was a key witness. *See* 491 U.S. at 692. There was, moreover, ample evidence that the publisher knew of several serious inconsistencies and obvious signs of problems with the story. *See id.* at 691. By contrast, here there is no evidence that anyone at West had any reason to believe there was a problem with the 2008 Supplement and deliberately chose to avoid it. The most that the evidence shows is a failure to investigate, which *Harte-Hanks* makes clear is not adequate to establish actual malice. *See id.* at 692.

Supplement. Or, rather, to the extent it says anything at all, it points up the absurdity of plaintiffs' suggestion that West would deliberately publish "its book" *knowing* (or suspecting) that it was so bad as to be defamatory – which would clearly tarnish West every bit as much as it purportedly did plaintiffs. Moreover, if "ownership" of a publication was by itself sufficient (as plaintiffs imply) to charge the publisher with knowledge of its defamatory falsehoods, then the actual malice protection would be wholly illusory.

As for West's "profit motive," plaintiffs' citation to *Harte-Hanks* is fascinating, since the Supreme Court stated quite clearly that "[n]or can the fact that the defendant published the defamatory material in order to increase its profits suffice to prove actual malice." 491 U.S. at 667. The Court's oblique assertion that "it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry" was made to support its conclusion that the Sixth Circuit's discussion of profit motive was not meant to itself establish actual malice but merely to support the substantial other evidence. *See id.* at 667-68.

Moreover, the evidence at trial was that West's revenues and profits from this book were minimal – only $17,000 in revenue (12/15 Tr. 79) – such that West was (and is) considering dropping it altogether.[7] If anything, this evidence cuts *against* the necessary finding – plaintiffs would have this Court infer that West deliberately defamed not only them but West's own excellent reputation (as plaintiffs testified (12/14 Tr. 9)) for a paltry sum. This makes no sense,

[7] The only evidence of this "profit motive" – or "corporate greed" (Pls.' Opp. at 7) – pointed to by plaintiffs is Jean Maess' testimony that "we spend more time on large high revenue products than on a lower, smaller product." (12/15 Tr. 81-82.) The West guideline, of course, directed its editors to use their "best business judgment," and as Maess also testified, "If you have two products and you're going to spend a lot of time on one and less time on the other, you're going to take the product that's more important to the customer and has more customers." (*Id.*) It is difficult to understand what is objectionable about this policy or how it says anything probative of actual malice.

but in any case this "profit motive" by itself is not evidence of the subjective awareness of West that its supplement was so inadequate as to be defamatory.[8]

Plaintiffs fail to explain why it is that Sarah Redzic's lack of training and experience is probative of West's knowledge that the supplement was inadequate. If anything, Redzic's lack of experience serves only to bolster her own testimony that she believed that what she had produced was sufficient. (Defs.' Br. at 14.) Plaintiffs' reliance on *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161 (Mass. 1975) is completely misplaced. The court there did not state that inexperience was itself probative of actual malice; rather, the court determined there was sufficient evidence of actual malice as to a newspaper editor who testified that he was "surprised" at the conclusions of a story about a plaintiff he knew personally to be an "excellent citizen," *in light of* the editor's knowledge of the reporter's inexperience. *See id.* at 174. (In other words, the same "surprising" conclusions from an experienced reporter might not have raised the same subjective doubts.) But here, the undisputed testimony was that Redzic's editor never read the supplement. (Defs.' Br. at 14-15.)

Plaintiffs fare no better in their newly minted attempt to recast West's advertisement of the Treatise as a "republication" of the supposedly defamatory 2008 Supplement. It is difficult, frankly, to even fathom the argument of plaintiffs on this point – their statements about the advertisement focus on the supposedly "misleading" listing of their names as authors (Pls.' Opp. at 15), but amazingly enough plaintiffs do not even mention their own concessions that West has a contractual right to continue to use their names. "Misleading" is, in any case, not the same as defamatory, and there is plainly nothing defamatory about the continued association of plaintiffs with the Treatise. There is no claim, much less evidence, that this yet-to-be-published 2011

[8] Compare this "profit motive" evidence to that in *Harte-Hanks*, where the court of appeals had found that the defendant newspaper was locked in a fierce struggle for circulation with a competitive paper and that the defamatory story was a direct attempt to discredit its competitor's version of events. *See* 491 U.S. at 665 n.6.

version of the Treatise is a "sham." And there is no sense in which this advertisement can be said to continue to connect the plaintiffs to the long-since-withdrawn 2008 Supplement that the jury found to be defamatory. How this advertisement is in any way probative of West's state of mind as to the 2008 Supplement is impossible to understand.[9]

Finally, plaintiffs rely on the supposed "fact" that another West publication, *West's Pennsylvania Criminal Practice* (authored by Richard Wasserbly), showed what a competent supplement would look like, and that Redzic must have known this because it was "***edited by Redzic herself***." (Pls.' Opp. at 12 (bold italics in original).) Plaintiffs' cite to the evidence for this "fact" is, in a word, misleading. Plaintiffs refer to the testimony of Jean Maess, but cut off their citation before plaintiff's counsel asked Maess whether Redzic had actually edited the Wasserbly treatise – which Maess made clear she did not know. [12/15 Tr. 72-73.] Plaintiffs point to no evidence, in other words, to support the claim that Redzic edited the Wasserbly treatise.[10]

What is missing in each of these pieces of "evidence" is the crucial element of subjective awareness, or at least serious doubt, by West that the 2008 Supplement was so inadequate as to be defamatory.[11] While plaintiffs cite to some cases in which similar pieces of evidence were

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[9] Plaintiffs' cases are simply nothing like the instant case. In *Corabi*, the advertisement for the defamatory story essentially repeated the libel, and the court held that, even if the advertisement had been independently produced, it at least put the editors on notice, pre-publication, of how the defamatory story was being viewed. *See* 273 A.2d at 916-17. *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899 (Pa. 2007), involved the republication of the same allegedly defamatory statement after plaintiff had put defendant on notice that he considered it false by filing suit. The *Weaver* court held that evidence of republication in the face of protest – like a refusal to retract – could be probative of actual malice. *See id.* at 467-71. But there is nothing whatsoever in the advertisement here that in any way repeats or republishes the allegedly defamatory content of the 2008 Supplement. And, of course, West *did* retract the 2008 Supplement once plaintiffs brought its inadequacies to West's attention.

[10] Even if there were, of course, this would be nothing more than, at best, evidence that Redzic was aware of a superior supplement, but it would say nothing about Redzic's own subjective belief that her work on the 2008 Supplement was inadequate. Nor have plaintiffs suggested there is any evidence regarding when or what she read in the Wasserbly treatise compared to her authorship of the 2008 Supplement.

[11] Plaintiffs attack a straw man argument by saying that "[d]efendants argue that there can be no finding of actual malice unless they confess" to the required state of mind. (Pls.' Opp. at 25.) Note, of course, the lack of any

deemed probative, in each case that evidence was accompanied by other evidence that *did* demonstrate subjective awareness. Plaintiffs here, however, cannot try to forge such evidence of subjective awareness out of an amalgam of testimony that contains no such evidence – and certainly, not with the convincing clarity required.

Plaintiffs' evidence of actual malice, in other words, is not more than the sum of its parts. It adds up to, at best, evidence that West *could* have determined, maybe even *should* have determined, that its supplement was inadequate. But the law on actual malice is clear that negligence, or even an "extreme departure from professional standards," *Harte-Hanks*, 491 U.S. at 665, does not satisfy the constitutional requirement. That is the most plaintiffs showed, and that renders any award of presumed or punitive damages, or any finding of liability for false light, invalid as a matter of law.

C. The compensatory damages award must be vacated.

Moreover, because the compensatory damages award ($90,000 per plaintiff) was based on *both* defamation and false light, and on *both* actual and presumed damages, it too must be vacated. Again, plaintiffs do not dispute the well-established rule that, where a general verdict is based on multiple grounds, one or more of which is determined to be invalid, the verdict must be vacated because the Court cannot determine on which ground – valid or invalid – the jury based its verdict. (Def's Br. at 17.) This is particularly so where the damage award may rest on grounds that are constitutionally invalid. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 284 (1964).

Plaintiffs argue, however, that West failed to object to the Court's verdict sheet, and have thus waived this argument. (Pls.' Opp. at 41.) As discussed *infra* at 26, however, the Court

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citation to West's brief for this claim, because there is no such argument to be found there. But while actual malice need not be established by West's own testimony, it surely requires *some* evidence – and plaintiffs point to none.

preserved all objections after instructing the jury. Moreover, West certainly *did* object to the lack of a special verdict sheet, and for the precise reason at issue, i.e., the inability to determine the jury's basis for any compensatory damages award (12/16 Tr. 5-6, 102-03).[12] There is, in any case, no requirement that a party request special interrogatories in order to preserve the operation of the general verdict rule, and plaintiffs point to none.[13] Such a rule would require each party to request special interrogatories as to every possible material fact and/or legal theory, resulting in absurdly complicated verdict sheets.

II. PLAINTIFFS FAILED TO ADDUCE EVIDENCE THAT ANY READER UNDERSTOOD THE 2008 SUPPLEMENT AS DEFAMATORY.

Plaintiffs claim that they were not required to prove that any reader of the 2008 Supplement actually understood the publication to be defamatory.[14] (Pls.' Opp. at 34.) What is more interesting is what plaintiffs do not say, however. They do not dispute that (as West showed in its opening brief, *see* Defs.' Br. at 21) they failed to introduce evidence of any such

[12] West argued that the Court needed to give the jury a special verdict sheet precisely because "the problem is … when the jury comes in, if all they have is a compensatory damage award, you don't know what they did it on." (12/16 Tr. 5.) West's counsel also specifically referred to the requirement of *New York Times* cited above. (*Id.*)

[13] The sole case cited by plaintiffs, *Montgomery County v. Microvote Corp.*, 2001 WL 722150 (E.D. Pa. 2001), does not even discuss the "general verdict rule." Its statement regarding waiver when a party has failed to object to the absence of a jury interrogatory is simply inapposite here: West does not assign as error the failure to submit a jury interrogatory, rather the error is the jury's impermissible finding of actual malice, an error that the general nature of the verdict makes impossible to rule out as tainting the jury's damage award. In *Microvote*, by contrast, the plaintiff did not claim any error in the jury's verdict; rather, it asked the Court to amend the judgment to reflect the liability of a settling, nondefendant joint tortfeasor, which the court refused to do because the plaintiff had not only failed to ask for any interrogatory or instruction to the jury on that question, but had failed even to present any evidence. *See id.* at *4. Nothing in *Microvote* in any way supports plaintiffs' implied argument that the failure to request detailed interrogatories allows the Court to sustain a general verdict when one or more of the instructed bases for liability is shown to be constitutionally invalid.

[14] Plaintiffs knock down a straw man with their assertion that West's position is "a defamation plaintiff cannot prevail unless an actual recipient of the statement testifies that he understood the statement to be defamatory." (Pls.' Opp. at 34.) West has never argued this. While it is clear, as discussed herein, that sufficient evidence of recipient understanding must be presented, there is no requirement that it be in the form of testimony by a recipient. For example, in *Tucker*, the evidence that satisfied this element took the form of newspaper articles discussing the plaintiffs' diminished reputation in the community. *See* 237 F.3d at 283. Such evidence could also come in the form of plaintiffs' own testimony as to reactions by others, *see Capozzi v. Lucas*, 2004 WL 5572908, at *7 (M.D. Pa. 2004) – but, of course plaintiffs here testified that no one ever suggested to them that they deemed the 2008 Supplement defamatory. (12/14 Tr. 39; 43-44; 96, 100.)

actual understanding. They also fail completely to even mention the terms of the governing statute here, which expressly makes "the defamatory character of the communication" and "the understanding by the recipient of its defamatory meaning" *distinct elements* of the plaintiffs' case. *See* 42 Pa. Cons. Stat. § 8343(a)(1) and (4). And plaintiffs do not dispute West's showing (based in part on the plaintiffs' own testimony) that the realization by the reader of the supplement's supposedly defamatory inadequacy would require several steps, and thus there is no basis to *assume* such understanding merely by the fact of publication. (Defs.' Br. at 21-22.)

Perhaps most strikingly, plaintiffs fail to address the Third Circuit's clear statement in *Tucker v. Fischbein*, 237 F.3d 275 (3d Cir. 2001), that "[i]f the court determines that the statement is capable of defamatory meaning, the jury must then decide whether the recipient actually understood the statement to be defamatory," *id.* at 281-82, except to make the claim that the Third Circuit was for some reason merely affirming the (completely uncontroversial) proposition that plaintiffs are *permitted* to offer evidence of such actual understanding. (Pls.' Opp. at 35 n.16.) This reading simply cannot be squared with the opinion, however. It is clear that the Third Circuit was noting the evidence of actual understanding to show that plaintiff had satisfied the requirement imposed upon her by Pennsylvania statute. *See id.* at 283 (noting that § 8343(a)(4) "requir[es] plaintiff to prove that the recipient understood the statement as defamatory").

Synygy, Inc. v. Scott-Levin, Inc., 51 F. Supp. 2d 570 (E.D. Pa. 1999), *aff'd*, 229 F.3d 1139 (3d Cir. 2000), clearly confirms this reading, because the district court granted summary judgment to the defendant due to the lack of evidence that anyone in the audience for the defamatory statement understood it to be defamatory. *Id.* at 582-83. Plaintiffs suggest that *Synygy* is a holding that there was no evidence connecting the statement to the plaintiff, rather

than a failure to show actual understanding by recipients of its defamatory nature. (Pls.' Opp. at 35.) This is clearly not so. Not only did the *Synygy* court expressly state that there *was* an audience member who "connected the slide with the plaintiff," but the court expressly cites to § 8343(a)(4) and not to (a)(5), which is the distinct statutory element of "[t]he understanding by the recipient of it as intended to be applied to the plaintiff."

So too, in *Mediaworks, Inc. v. Lasky*, 1999 WL 69545585 (E.D. Pa. Aug. 26, 1999), the district court vacated and remanded a bankruptcy court judgment of defamation because the bankruptcy court had failed to find that the recipients had understood the communication to be defamatory. *See id.* at *8. Plaintiffs appear to dismiss this holding as nothing more than a requirement that some finding be made on the element (*see* Pls.' Opp. at 36 n.17), but of course if evidence of actual understanding were not a necessary element to sustain a defamation claim, the district court would have had no need to remand. Note, as well, that the bankruptcy court *had* found that the communication at issue would "naturally engender in the minds of recipients" a defamatory impression, *see* *8 – which is precisely the standard that plaintiffs (erroneously) claim is all they needed to prove (Pls.' Opp. at 35 (quoting *Corabi v. Curtis Pub'g Co.*, 273 A.2d 899, 907 (Pa. 1971))). Clearly, the district court's holding is that this finding went only to the element of whether the communication was capable of defamatory meaning (under § 8343(a)(1)), and that the additional, distinct element of *actual understanding* by recipients was required by § 8343(a)(4).

Notably, despite arguing that a requirement of proof of actual understanding of the defamatory nature of the communication is "utterly contrary to Pennsylvania law," (Pls.' Opp. at 34), plaintiffs manage to produce not a single case addressing § 8343(a)(4) and holding that proof of actual understanding is *not* required. In neither *Joseph v. Scranton Times L.P.*, 959

A.2d 322 (Pa. Super. 2008), nor *Corabi* was the issue of recipient understanding of defamatory meaning raised. *See Joseph*, 959 A.2d at 327-28 (stating issues on appeal); *Corabi*, 273 A.2d at 903 (same). The quotation from *Joseph* relied upon by plaintiffs (Pls.' Opp. at 34) is from a discussion of proof of *damages*, not recipient understanding. *See* 959 A.2d at 344. And the plaintiffs' quote from *Corabi* – the "naturally engendered impression" test, as it were – is from a discussion by the Court about the determination of whether a statement is *capable* of defamatory meaning, not the statutorily distinct element of recipient understanding. *See* 273 A.2d at 447.

Indeed, *Corabi* actually confirms West's position. The Court clearly holds that the statement's capacity for defamatory meaning and the recipients' actual understanding of that meaning are distinct elements: "If the court determines that the statement is capable of a defamatory meaning, it is for the jury to determine whether *it was so understood* by the recipient." 273 A.2d at 442 (emphasis added). *Corabi* does not say "could" or "would" be understood as argued by plaintiffs and accepted by the Court. (12/16 Tr. 7, 18-19.) Plainly, since *Corabi* holds that the "objective" standard relied upon by plaintiff (i.e., whether the statement would "naturally engender" a defamatory impression among "average persons") is the proper test for the first of these two elements, there must be something further that the plaintiff must prove on the second. Else, what precisely is the jury to determine? And, indeed, courts following *Corabi* have so held. *See Reichman v. Bureau of Affirmative Action*, 536 F. Supp. 1149, 1180 (M.D. Pa. 1982) ("While we question whether the memorandum is capable of defamatory meaning, [plaintiff] presented no evidence that the recipients understood it as having such a meaning. The only witness to testify about the effect of the memorandum stated that he did not know what it meant…") (granting judgment to defendant).

III. PRESUMED DAMAGES ARE NOT AVAILABLE UNDER PENNSYLVANIA LAW.

In its opening brief, West showed that the Pennsylvania Superior Court (in *Walker v. Grand Central Sanitation, Inc.*, 634 A.2d 237 (Pa. Super. Ct. 1993)), and any number of federal district courts following *Walker*, have held that a plaintiff may only recover such damages as actually proven by competent evidence – i.e., in other words, presumed damages are no longer available. (Defs.' Br. at 23.) Plaintiffs assert that West cannot make this argument in its post-trial Rule 50 motion because it failed to make it in its pre-trial (i.e., Rule 50(a)) motion. (Pls.' Opp. at 37.) Of course, as plaintiffs concede (Pls.' Opp. at 37), West did argue that the jury should not be charged on presumed damages, albeit based primarily on the absence of evidence of actual malice, as required constitutionally to support such damages. Nevertheless, even if the Court were to demand a tighter correlation than that, courts have held that failure to specify a particular ground in a Rule 50(a) motion does not bar assertion of that ground in a Rule 50(b) motion where a manifest injustice would result or where that ground presents a "purely legal error." *See, e.g.*, *AIG Global Secs. Lending Corp. v. Banc of America Secs.*, 386 F. App'x 5, 6 (2d Cir. 2010); *Fabri v. United Techs. Int'l*, 387 F.3d 109, 119 (2d Cir. 2004).[15] That is precisely the case here, i.e., West's claim on this point is not that insufficient evidence was presented to allow presumed damages – it is that, as a matter of Pennsylvania law, such damages are not allowed under any circumstances.[16]

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[15] The reason for requiring a pre-verdict Rule 50(a) motion is to afford the opposing party an opportunity to correct any alleged evidentiary insufficiencies prior to the jury retiring. *See, e.g.*, *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 286 (2d Cir. 1998). Where the question is purely one of law, however, the opposing party is not prejudiced by lack of a pre-verdict motion. Here, even had West specifically argued pre-verdict that presumed damages were not available as a matter of law, there is obviously no other evidence that plaintiffs could have presented to "correct" that problem. Presumed damages are either allowed, or they are not.

[16] The requirement of a pre-verdict motion also applies only to a post-trial motion under Rule 50(b); Rule 59 contains no such requirement. If this Court determines that West may not assert this ground in favor of its motion for judgment as a matter of law, West requests that the Court treat this issue as a ground for its alternative motion for a new trial under Rule 59.

On the merits, plaintiffs' argument rests almost entirely on their claim that the Pennsylvania Supreme Court, in *Corabi*, held that presumed damages are available and that therefore *Walker* could not reach a contrary conclusion. (Pls.' Opp. at 37-39.) *Corabi*, however, did not so hold – whether presumed damages were available was not at issue in the case. *See* 273 A.2d at 919-20. Certainly, the *Walker* court did not deem itself to be precluded from its holding. And even though *Walker* did not expressly decide whether presumed damages might still be available where actual malice is proven, its holding in cases where no actual malice is shown is just as contrary to the alleged "holding" in *Corabi*, yet no courts have questioned that *Walker* is good law on this point.

Even though *Walker* may not have explicitly precluded presumed damages where actual malice is shown, the Pennsylvania courts have repeatedly reaffirmed the general principle that "[c]ourts in libel cases should be guided by the same general rules regarding damages that govern other types of tort recovery." *Sprague v. Walter*, 656 A.2d 890, 923 (Pa. Super. Ct. 1995); *see also Joseph*, 959 A.2d at 344; *DiSalle v. P.G. Pub'g Co.*, 544 A.2d 1345, 1370 (Pa. Super. Ct. 1988); *Agriss v. Roadway Express, Inc.*, 483 A.2d 456, 474 (Pa. Super. Ct. 1984). Damages in tort cases are generally not allowed in excess of what is proven; as the Supreme Court stated, presumed damages makes "the common law of defamation an oddity of tort law." *Gertz*, 418 U.S. at 349. Thus, even if *Walker* and its progeny have not squarely answered the question, the general principles articulated in Pennsylvania tort law preclude the award of damages in the absence of competent proof of harm. Because plaintiffs do not dispute that they offered no such proof of reputational harm, the jury's award of compensatory damages potentially rests on an invalid ground and, under the general verdict rule, cannot stand. *See supra* at 14.

IV. THE PUNITIVE DAMAGES AWARD CANNOT BE SUSTAINED.

A. Plaintiffs did not establish common-law malice.

In addition to the fact that plaintiffs did not establish actual malice, the punitive damages award cannot be sustained because Pennsylvania law also requires the establishment of common-law malice, which plaintiffs did not satisfy even if the Court concludes that actual malice was established. (Defs.' Br. at 24.) Plaintiffs suggest (though they do not come right out and argue) that Pennsylvania limits the requirement of common-law malice to public official/figure cases. None of plaintiffs' authority, however, actually holds that common-law malice is *not* required in private-figure cases. Moreover, Pennsylvania courts have repeatedly stated that damages in defamation cases should follow the same general rules as for other torts, and additionally that Restatement (Second) Torts § 908 "is the law in Pennsylvania on punitive damages." *DiSalle*, 544 A.2d at 1370-71. Section 908 is in no way limited to public officials or public figures.

Plaintiffs concede that, while there may be significant overlap between actual and common-law malice, they are not identical. (Pls.' Opp. at 42-3.) The difference between the two – common-law malice's focus on the defendant's attitude towards plaintiffs' rights versus actual malice's focus on attitude towards the truth – is particularly significant in this case. Plaintiffs rely on "[t]he fact that defendants falsely and expressly attributed authorship of the sham pocket part to plaintiffs" (*id.* at 43), but once again completely fail to acknowledge their own testimony that West had a right to attribute authorship to the plaintiffs. The attribution of plaintiffs as authors could not be "reckless indifference" to their rights when West believed – correctly, as finally admitted by plaintiffs – that it had the right to do so.

Finally, plaintiffs do not dispute that, even when based on recklessness, common-law malice requires conduct that is nevertheless "outrageous." *See, DiSalle*, 544 A.2d at 1364; *Hughes v. Consol-Pa. Coal Co.*, 945 F.2d 594, 616 (3d Cir. 1991). Even gross negligence is not

sufficient. *See Vance v. 46 and 2, Inc.*, 902 A.2d 202, 206-07 (Pa. Super. Ct. 2007). Plaintiffs make no attempt to satisfy this standard. Clearly, the jury did not find West's conduct admirable. But on the evidence in the record, it amounted to, at most, gross negligence. There is simply nothing "outrageous" about West's failure to take more care in producing the 2008 Supplement – again, particularly considering the fact that West correctly believed it had the contractual right to continue using plaintiffs' names.

B. The punitive damages award violates the due process clause.

Plaintiffs apparently recognize that the jury's award of $5 million – which represents a 28:1 ratio to an already sizable compensatory damage award – is simply unsustainable as a matter of due process, for they make virtually no effort to defend it. Despite duly citing Supreme Court precedent rejecting "simple mathematical formulas," the fact remains that the Supreme Court has never approved a ratio of that magnitude, and has stated (as plaintiffs concede) that anything more than the low single figures would have to be justified by a "particularly egregious act [that] has resulted in only a small amount of economic damages." *State Farm v. Campbell*, 538 U.S. 408, 425 (2003). There is, in short, no legitimate dispute that the jury's punitive damages award, even if one is justified at all, simply does not comport with due process and cannot stand.

Despite acknowledging the clear law that "reprehensibility" is the most important indicium of reasonableness, *see id.* at 419, plaintiffs completely fail to address the factors that the Supreme Court has instructed courts to examine in order to determine reprehensibility, *see id.* In particular, plaintiffs – despite their list of "facts" (Pls.' Opp. at 46-47) – simply do not dispute the showing by West that *none* of the reprehensibility factors is present in this case. (Defs.' Br. at 28-29.) Merely repeating the words "reprehensible" and "egregious" is no substitute for actual evidence of such conduct. The complete absence of the mandated reprehensibility factors, as the

Supreme Court has noted, "renders any award suspect." *Campbell*, 538 U.S. at 419. "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* There can be little doubt that this presumption that plaintiffs were made whole by their compensatory awards obtains here, where plaintiffs achieved several times what the Court deemed a reasonable settlement value.[17]

Most of these facts actually demonstrate how far from "reprehensible" West's conduct was. The "false attribution" of authorship fails – yet again – to even acknowledge West's contractual rights. As for West's policy of putting more preparation time into more profitable treatises, it is unclear what is even supposed to be wrong about such a sensible business policy. Obviously, *sufficient* time needs to be put in – and to the extent West failed to do so due to haste, it was wrong – but again that is hardly "reprehensible." The claim that West took no action until it received plaintiffs' attorney's demand letter dated February 3, 2009 (Zeisler Reply Decl. Ex. A (Am. Compl. Ex. B)) is simply due to the fact that there is no evidence West knew it had a problem until then. The retraction letter that was sent out in March 2009 did not, it is probably true, reach all *readers*, but one month later the 2008 Supplement was replaced entirely by the 2009 Supplement that West worked diligently to produce. Indeed, a review of plaintiffs' attorney's demand letter establishes that West met virtually all of plaintiffs' non-monetary demands, including that the "retraction" letter be sent to "each subscriber," and not to "all

[17] This is particularly true given that the only proven damages, and thus the basis for the compensatory damage award, was plaintiffs' alleged humiliation. *See Campbell*, 538 U.S. at 426.

readers" as plaintiffs later demanded (after the letter had been sent to all subscribers, as demanded).[18]

Even assuming that *any* award comports with due process – and under *Campbell* it cannot – the fact that plaintiffs are amply compensated (and then some) by their compensatory damages award of $180,000 suggests, under the second *Gore* factor, that at most a punitive damages award of similar magnitude could be sustained. *See Campbell*, 538 U.S. at 425. Plaintiffs' attempt to pump up the compensatory-damages denominator by assigning value to West's voluntary agreement not to advertise the Treatise without complete disclosure of the plaintiffs' lack of involvement (Pls.' Opp. at 49-50) is of no avail. This voluntary agreement by West, rather than incur the cost to oppose a motion seeking relief of no material consequence to it, is of negligible cost to West. Certainly, plaintiffs offer this Court no basis on which to place a value on it. It is also highly debatable that plaintiffs' initial victory in this litigation, even if it is allowed to stand as to damages, actually entitles them to the type of prior restraint injunctive relief they seek.

Nor can plaintiffs successfully piggyback on the supposed harm to others. (Pls.' Opp. at 48.) This is true, first and foremost, because *there was no evidence of any such harm*. Neither plaintiffs nor West ever received a complaint about the 2008 Supplement during the four months or so it was in circulation (or thereafter). The odds that anyone other than plaintiffs was harmed is quite remote. But in any case, *Campbell* makes it clear that the second factor is based on proportionality "to the amount of harm *to the plaintiff* and to the general damages recovered." *Campbell*, 538 U.S. at 426; *see also id.* at 427 (rejecting inflation of punitive damages award

[18] The Court did not admit this letter into evidence based on plaintiffs' objection (12/14 Tr. 32-34), which West submits was error since the letter was attached to plaintiffs' Amended Complaint and was most certainly not a confidential settlement offer. The letter should thus be considered on this motion. *Cf. Wilburn v. Maritrans GP Inc.*, 139 F.3d 350, 356 (3d Cir. 1998).

based on factors that "had little to do with the actual harm sustained by the [plaintiffs]"). Moreover, "due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of a reprehensibility analysis." *Id.* at 423.[19] There is, in short, no logic to the notion that these plaintiffs should obtain the sort of windfall represented by the jury's award based on the unasserted claims of others.

Finally, plaintiffs assert that West's "wealth" is an important consideration here. (Pls.' Opp. at 48-49.) However true that may be as a matter of common law, it has no place in the due process analysis: "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 538 U.S. at 427. As shown above, the jury's award here is a violation of due process, and the fact of West's supposed "wealth" cannot rehabilitate it.

V. ALTERNATIVELY, A NEW TRIAL IS WARRANTED.

Should the court not grant West's motion for judgment as a matter of law, West has also demonstrated in its opening brief that the Court's jury instructions, taken as a whole, seriously misled and confused the jury as to the law. (Defs.' Br. at 30-36.) Such confusion and misleading of the jury plainly constitutes reversible error. *See Donlin v. Phillips Lighting N. Am. Corp.*, 581 F.3d 73 (3d Cir. 2009). Moreover, contrary to the suggestion by plaintiffs (citing to the law of the Federal Circuit, *see* Pls.' Opp. at 51), Third Circuit law is clear that if the jury instructions are found to be erroneous, the error "will be deemed harmless only if it is 'highly probable' that the error did not affect the outcome of the case.'" *Hill v. Reederei F. Laeisz*

[19] Plaintiffs try to ride on the claims of supposed subscribers who allegedly "paid for a useless, misleading and inaccurate product." (Pls.' Opp. at 48.) Again, no such claim has ever been made to West. But to the extent any such claim were viable, it would in fact be based on a different type of claim altogether – breach of contract – than the conduct allegedly directed at plaintiffs. And, of course, punitive damage awards are not even available for breach of contract. *See, e.g.*, *Johnson v. Hyundai Motor Am.*, 698 A.2d 631, 639 (Pa. Super. Ct. 1997).

G.M.B.H., 435 F.3d 404, 411 (3d Cir. 2006) (quoting *Forrest v. Beloit Corp.*, 424 F.3d 344, 349 (3d Cir. 2005)).

As an initial matter, plaintiffs repeatedly insist that West waived claims of error as to the jury instructions by failing to object. However, what plaintiffs fail to note is that the Court, after delivering the initial instructions and after each set of answers to the jury's questions, waved off any specific objections from counsel and stated that all objections were preserved. *See* 12/16 Tr. 123 ("And the charge as given is accepted [*sic* in transcript, should be "excepted"] to by every lawyer in the room and so noted."); *id.* 126 ("I will assume for the record that all the lawyers in the courtroom object to what I just said. And you will be able to raise it on appeal."); *id.* 132 ("Everybody has objections. They're all noted on record."). Whatever Rule 51 might otherwise require, it does not require a party to insist on putting objections on the record in the face of such a statement by the Court. *See* Wright & Miller, *Federal Practice and Procedure* § 2553 ("Perhaps the most sympathetic situation for permitting review, even in the absence of an objection, is one in which the trial court has assured counsel that the party's objection would be preserved for appeal even though it was not made formally.") Thus, it is clear that neither party waived *any* objections to the jury instructions. In any case, it is also true that even where no objection is made, the Court may review jury instructions for plain error. *See* Fed. R. Civ. P. 51(d)(2).

Plaintiffs – as they repeatedly do in their papers – attack a straw man argument when they say that "no court overturns a jury verdict merely because the jury asked questions." (Pls.' Opp. at 53.) Of course that is so; West never suggested otherwise. But the jury's questions are evidence that the Court's candidly acknowledged errors in instruction had created confusion. This is particularly true as to the second set of questions, where the jurors asked, with respect to

liability for defamation, whether they were "still working under the idea of presuming that at least one person could have thought less about [plaintiffs]." [12/16 Tr. 130.] As pointed out in West's opening brief, even if presumed *damages* were appropriate (and as argued above, they were not), such a presumption has nothing to do with the *liability* question the jurors were asking about.

Moreover, and with all due respect to the Court, plaintiffs are wrong when they say that the Court's re-instruction was correct. (Pls.' Opp. at 54.) Even though the jurors clearly asked about liability for defamation (question #1 on the verdict sheet), the Court then proceeded to instruct them on presumed damages. (12/16 Tr. 130-31.) This is particularly problematic because, as discussed *supra* at 5-9, the jury was required to actually determine whether anyone understood the 2008 Supplement as defamatory of plaintiffs. Yet the Court's instruction – that "you … don't have to have any actual proof that their reputations were – that somebody else thought less of them" – when read as an instruction on liability (as the jurors asked), indisputably misstates the law, and in a highly prejudicial way to West given the complete lack of evidence of recipient understanding.

In this same answer to the jurors' question, the Court also stated that the standard for defamation here was whether "the supplement was, to some extent, less than adequate." (12/16 Tr. 131.) Again, the Court gave no opportunity for objection. And the instruction is clearly wrong – a slight inadequacy could not satisfy the standard for defamation, and plaintiffs provide absolutely no authority to suggest otherwise. Moreover, this was not merely "one word" in the charge, it was the *last instruction* heard by the jurors on the issue. The extent of the inadequacy of the 2008 supplement was, moreover, clearly a contested issue in the case.[20]

[20] It is true that West's submitted instructions referred to a finding of whether the supplement was "inaccurate and out-of-date." This, however, was taken directly from the Court's ruling, a few days before trial, on West's motion

As to the Court's failure to instruct the jury, pursuant to 42 Pa. Cons. Stat. § 8343(a)(4), that it must find that recipients actually understood the publication as defamatory, *see supra* at 15-18, plaintiffs once again incorrectly assert waiver. There is, first, no question that West requested just such an instruction. Then, at the charging conference after the Court's submission of proposed instructions to the parties, West objected and again requested that the Court instruct that the jury must find that the publication "was understood" to be defamatory. (12/16 Tr. 18.) Plaintiffs admit this (Pls.' Opp. at 57), but claim that when the Court denied the request, West "acceded" to that ruling. But nothing requires West to continue to object in the face of the Court's clear ruling. West made its objection properly under Rule 51(b)(2), and nothing more is required, *see* Rule 51(c)(2)(A).

The Court's failure to give the requested instruction that an "extreme departure from professional standards" was likewise error, given the facts of this case. Plaintiffs' claim that professional standards has nothing to do with this case is preposterous – a major portion of plaintiffs' case is that West failed properly to review the 2008 Supplement and thus allowed an inadequate (and defamatory) publication go out the door. (*See, e.g.*, Pls.' Opp. at 6-7.) Plaintiffs' claim that this standard only applies to public official or public figure cases is simply another attempt to argue that "actual malice" means one thing for public plaintiffs and another for private – which, as discussed *supra* is contrary to clear Supreme Court law. Plaintiffs make a similarly erroneous claim with respect to the Court's failure to instruct the jury that to establish

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for reconsideration of the Court's denial of summary judgment. *See* Zeisler Decl. Ex. L (submitted with West's original moving papers). West reasonably believed that further objection as to this standard was futile. Moreover, even West's submitted instruction followed directly after the definition of "defamatory" as requiring a finding that the publication "tends so to harm the reputation of that person as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her." Divorced from this definition of "defamatory," however, the Court's instruction about "to some extent, less than adequate" is markedly different from what the Court had ruled in its motion for reconsideration and from what West had requested.

actual malice the plaintiffs were required to establish (with convincing clarity) that West knew or recklessly disregarded the defamatory nature of the 2008 Supplement.

Taken together, these errors significantly lessened the burden on plaintiffs on key points of evidentiary dispute at trial. It cannot be said that it is "highly probable" that the errors did not infect the verdict, and plaintiffs do not even argue otherwise. At the very least, therefore, a new trial is required.

Finally, plaintiffs' response to West's argument that the jury verdict was against the great weight of the evidence is, first, to reiterate its evidence of actual malice. As discussed *supra* this evidence did not establish actual malice with convincing clarity, but even if the Court were to determine that there was just barely enough to support the finding, the Court should still determine that the verdict was against the weight of the evidence (and highly likely to be due to one or more of the instructional errors detailed above). Plaintiffs also rely on the fact that West only called one witness, but why this should be a relevant consideration is unclear: it was plaintiffs' burden to establish all of the elements of their case. The "weight of the evidence" is not, as plaintiffs would apparently have it, some mechanical comparison of the amount of evidence or number of witnesses on each side.

Plaintiffs' claim that the size of the punitive damages award alone is insufficient to establish error is certainly sometimes true, but the cases cited do not stand for the proposition that an excessive award can never be evidence of tainted jury deliberation. Indeed, *Dunn v. HOVIC*, 1 F.3d 1371, 1383 (3d Cir. 1993) contemplates just such a possibility. Of course, West is not relying merely on the size of the verdict, but the evidence of instructional error and juror

confusion discussed above. The $5 million award, however, clearly bears no relationship to the proven facts of this case.[21]

CONCLUSION

For the foregoing reasons, as well as those stated in West's opening brief, West's motion for judgment as a matter of law should be granted, or in the alternative, the judgment against West vacated and the case set for a new trial.

Dated: February 25, 2011

Respectfully submitted,

/s/ James F. Rittinger
James F. Rittinger, Esq. (admitted *pro hac vice*)
Aaron M. Zeisler, Esq. (admitted *pro hac vice*)
SATTERLEE STEPHENS BURKE & BURKE LLP
230 Park Avenue, 11th Floor
New York, NY 10169-0079
Tel: (212) 818-9200
Email: jrittinger@ssbb.com
azeisler@ssbb.com

Of Counsel
Glenn C. Edwards, Esq.

/s/ Matthew J. Borger
Matthew J. Borger, Esq.
KLEHR HARRISON HARVEY BRANZBURG LLP
1835 Market Street, Suite 1400
Philadelphia, PA 19103
Tel: (215) 568-6060
Email: mborger@klehr.com

[21] This is especially true given the Court's own assessment at the conclusion of trial that the value of the case was only $15,000 per plaintiff. (12/16 Tr. at 136.)