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.	

ORDER

AND NOW, this __ day of _____, 2011, upon consideration of the Defendants' Motion For Reconsideration Or, Alternatively, For Certification For Interlocutory Appeal, dated April 12, 2011 (the "Motion"), the parties' submissions in support thereof and in opposition thereto, the hearings thereon, and all prior pleadings and proceedings had herein,

IT IS HEREBY ORDERED that Defendants' Motion is GRANTED to the extent that it seeks reconsideration. Upon reconsideration by this Court, judgment as a matter of law is to be entered in favor of Defendants pursuant to Fed. R. Civ. P. 50(b), dismissing the case in its entirety with prejudice, because plaintiffs failed to adduce any evidence at trial: (1) that anyone at West acted with actual malice, i.e., that any West employee knew and/or entertained serious doubts that the 2008 Supplement was inadequate and defamatory of the plaintiffs when published; or (2) that any reader of the 2008 Supplement understood that it was defamatory as required by Pa. Cons. Stat. § 8343(a).

[Alternatively] IT IS HEREBY ORDERED that Defendants' Motion is GRANTED to the extent that it seeks certification of the denial of Defendants' Rule 50 motion for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) because the denial of that motion: (1) involves a controlling question of law; (2) for which there is substantial ground for difference of opinion; and (3) an immediate appeal may materially advance the ultimate termination of the litigation.

BY THE COURT:

_____

U.S.D.J.

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

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

DEFENDANTS' MOTION FOR RECONSIDERATION OR, ALTERNATIVELY, FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

Defendants West Publishing Corporation, West Services Inc., and Thomson Reuters (Legal) Inc. (formerly known as Thomson Legal and Regulatory Inc.) d/b/a Thomson West (together "West"), by and through their attorneys, Satterlee Stephens Burke & Burke LLP and Klehr Harrison Harvey Branzburg LLP, hereby move this Court pursuant to Local Federal Rule 7(g) for reconsideration of the Court's March 30, 2011 Memorandum and Order denying West's renewed motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), or, in the alternative, move for certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The grounds for this Motion are set forth in the accompanying Memorandum of Law.

Dated: April 12, 2011

Respectfully submitted,

/s/ James F. Rittinger

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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' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION OR, ALTERNATIVELY, FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

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Dated: April 12, 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 memorandum of law in support of their motion for reconsideration of the Court's denial of West's renewed motion for judgment as a matter of law, or, in the alternative, for certification for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b).

PRELIMINARY STATEMENT

This action is far from the typical defamation case. Plaintiffs, two law professors who authored a treatise for defendant West, do not make any claim that West directly stated anything defamatory about them. Rather, their complaint is that West published a "pocket part" update of the treatise (the "2008 Supplement"), attributed to plaintiffs as authors (along with "The Publisher's Staff"), which plaintiffs claim was so inadequate an update as to defame them because of the implication to readers that they were responsible for its inadequacies. West concedes that its efforts were not up to its standards, and retracted and replaced the supplement as quickly as practical after plaintiffs brought the problem to West's attention. But, as discussed below, West denies that it published the supplement knowing it was so inadequate, and further denies that there is any evidence that even one reader of the supplement discerned any defamatory implications as to plaintiffs in the brief time that the pocket part was on the shelves.

Trial was held on December 13-16, 2010. The jury returned a verdict in favor of plaintiffs on the claims of defamation and false light invasion of privacy, and awarded the plaintiffs $90,000 each in compensatory and $2.5 million each in punitive damages. Judgment on the verdict was entered on December 17.

On January 13, 2011, West filed a renewed motion for judgment as a matter of law ("JMOL") pursuant to Fed. R. Civ. P. 50(b) or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59. In addition to the issues discussed herein – namely, that plaintiffs had not

presented sufficient evidence of actual malice nor had they presented evidence that any reader of the 2008 Supplement understood it to be defamatory – West argued that (1) Pennsylvania law did not allow presumed damages; (2) there was insufficient evidence to support an award of punitive damages as a matter of Pennsylvania law; (3) the award of punitive damages exceeded the limits allowable as a matter of due process; and (4) there were serious errors in the jury instructions.

On March 30, 2011, the Court issued its Memorandum and Order deciding the motions (Dkt. # 104, 105) (the "Order"). The Court denied West's motion for judgment as a matter of law. The Order did not specifically address any of the law or arguments made by West on its JMOL motion; rather, as discussed below, the Court held that there was evidence that West had represented the plaintiffs as authors of the 2008 Supplement (which West had the contractual right to do) and that the supplement was so inadequate that it "must have" harmed plaintiffs' reputations.[1] The Court, again without specifically addressing any of West's assigned errors, rejected the claims regarding the jury instructions.[2] The Court did, however, determine that the punitive damages award was excessive and ordered a new trial if the plaintiffs did not accept a remittitur of the punitive damages to $110,000 each. On April 8, 2011, the plaintiffs rejected the remittitur and filed a Motion for Reconsideration of that portion of the Court's Order conditioning denial of West's motion for a new trial on plaintiffs' acceptance of the remittitur.[3]

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[1] The Court did not address in any manner West's arguments regarding the availability of presumed damages or the sufficiency of the evidence to support punitive damages under Pennsylvania law.

[2] The Court averred that the West "did not actually identify any specific error in the charge," Order at 3, a claim that is difficult to square with West's actual submissions. *See* West Rule 50/59 Mem. (Dkt. #92), at 30-36.

[3] Defendants will respond to plaintiffs' Motion for Reconsideration within the allotted 14 days for opposition pursuant to Local Rule 7.1(c).

West now moves for reargument of its JMOL motion in order to correct two clear errors of law; namely that: (1) the Court ignored the requirement that plaintiffs adduce clear and convincing evidence of actual malice – i.e., that West knew the 2008 Supplement was so inadequate as to be defamatory of plaintiffs – in order to sustain liability for false light, punitive damages or presumed damages; and (2) the Court ignored the clear language of Pennsylvania's defamation statute (and binding Third Circuit authority) requiring plaintiffs to prove (which they did not) whether a recipient of the defamatory publication "actually understood the statement to be defamatory."

ARGUMENT

I. THE COURT'S DENIAL OF WEST'S RULE 50 MOTION WAS BASED ON TWO CLEAR ERRORS OF LAW.

A motion for reconsideration may be granted upon a showing of "(1) An intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [issued its order]; or (3) the need to correct a clear error of law or to prevent manifest injustice." *Tristate HVAC Equip., LLP v. Big Belly Solar, Inc.*, 2011 WL 204738, at *1 (E.D. Pa. 2011). As discussed in more detail below, there are at least two clear errors of law apparent in the Order that, if corrected, would require entry of judgment as a matter of law in favor of West on all claims.

First, as was conceded by plaintiffs and acknowledged by the Court, plaintiffs were required to adduce clear and convincing evidence of actual malice on West's part in order to sustain liability for false light and either punitive or presumed damages. The Court's only apparent nod in the Order to plaintiff's satisfaction of this burden was its statement that West had stated that the plaintiffs were authors of the 2008 Supplement when, the Court stated, that was not true. This analysis, however, ignores the substantial authority submitted by West that

plaintiffs' burden was to show clear and convincing evidence that West knew the 2008 Supplement was so inadequate as to be defamatory of plaintiffs – and the complete lack of any such evidence. There is nothing in the Order suggesting that the Court determined there was sufficient evidence for the jury to make the necessary finding, and certainly nothing suggesting that the Court satisfied itself, in its constitutionally-mandated independent review, that such clear and convincing evidence of actual malice was supplied.

Second, West supplied the Court with controlling authority (Pennsylvania statute and the interpretation of it by, *inter alia*, the Third Circuit) that in order to establish defamation, plaintiffs had to present evidence that some reader of the 2008 Supplement understood it to be defamatory of plaintiffs – a conclusion that was by no means obvious given the nature of the alleged defamation and the knowledge of extrinsic facts necessary. Moreover, it was essentially undisputed that plaintiffs submitted no such evidence of recipient understanding. Yet, in its Order the Court relied solely on its assessment that the 2008 Supplement was so inadequate that the reputation of the plaintiffs "must have suffered." This very phrasing is an implicit concession by the Court that no *actual* reputational harm was proven.

A. The Court failed to determine that plaintiffs presented clear and convincing evidence of actual malice.

It is undisputed (indeed, conceded by plaintiffs) that the speech in this case involves a matter of public interest. *See* West Rule 50/59 Mem. (Dkt. # 92), at 10 & n.5. Accordingly, the protections of the First Amendment required plaintiff to adduce clear and convincing proof of "actual malice" (as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny) in order to establish liability for false light invasion of privacy, *see Time, Inc. v. Hill*,

385 U.S. 374, 387-88 (1967),[4] and to support any award of presumed or punitive damages, *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50 (1974); *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 929 (3d Cir. 1990). A publication is made with "actual malice" if it is made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Gertz*, 418 U.S. at 334.

However, the allegedly defamatory publication in this case is only defamatory (if at all) by implication or innuendo. That is, plaintiffs' claim is not that West stated that they were incompetent authors; the 2008 Supplement plainly makes no explicit defamatory claim about the plaintiffs at all. The claim is, rather, that by attributing the 2008 Supplement to them as authors, the reader who took the time and had sufficient knowledge to comprehend its alleged inadequacies would reach the conclusion that plaintiffs had incompetently authored the supplement. And, as was not genuinely disputed by plaintiffs, the steps that a reader would necessarily need to go through to divine this purportedly defamatory implication made it impossible to presume that any such reader would have done so. *See* West Rule 50/59 Mem. at 21-22.

Under such circumstances, i.e., in case of defamation by implication, courts have consistently held that "actual malice" requires not only knowledge or reckless disregard as to falsity, but that the speaker have intended, known or at least recklessly disregarded (in the constitutional sense) the allegedly defamatory implication:

> If a plaintiff ... must establish by clear and convincing evidence that the defendants acted with actual knowledge of or in reckless disregard for the falsity of their accusations, it follows that where the plaintiff is claiming defamation by innuendo, he also must show with clear and convincing evidence that the

[4] Actual malice is required for false light as a matter of Pennsylvania law as well. *See Ciolli v. Iravani*, 651 F. Supp. 2d 356, 376 (E.D. Pa. 2009).

> defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material.

Saenz v. Playboy Enters., Inc., 841 F.2d 1309, 1318 (7th Cir. 1988); *see also Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1063-64 (9th Cir. 1998) (in defamation by implication case, plaintiff "must show that a jury could reasonably find by clear and convincing evidence that [defendant] 'intended to convey the defamatory impression'") (quoting *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 681 (9th Cir. 1990)); *Corporate Training Unlimited, Inc. v. Nat'l Broad. Co.*, 981 F. Supp. 112, 121 (E.D.N.Y. 1997) (plaintiff "must show by clear and convincing evidence that the defendant intended or was subjectively aware of the implication allegedly raised."); *Masson*, 832 F. Supp. at 1362-66; *Howard v. Antilla*, 294 F.3d 244, 252-53 (1st Cir. 2002) ("The actual malice test thus mandates a *subjective* inquiry" and requires evidence that defendant "intended or knew of the implications") (false light case).

As West demonstrated in its motion, however, there was simply no evidence that anyone at West knew or even suspected that the 2008 Supplement was inadequate, and certainly not that it would be defamatory of the plaintiffs. *See* West Rule 50/59 Mem. at 14-16; West Rule 50/59 Reply Mem. (Dkt. # 101), at 9-14. The author of the supplement, Sarah Redzic, testified she tried to put together a sufficient pocket part, and no one else at West read the pocket part before it was released. Plaintiffs' attempts to point to any evidence demonstrating awareness of the pocket part's inadequacy focused almost entirely on the supposed irresponsibility and inadequacy of West's procedures. But it is well-settled that actual malice is a subjective standard that cannot be satisfied by even "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Harte-Hanks Comm'c'ns v. Connaughton*, 491 U.S. 657, 663-67 (1989); *see Tucker v. Fischbein*, 237 F.3d 275, 286 (3d Cir. 2001); *see also Marcone v. Penthouse Int'l Magazine*

for Men, 754 F.2d 1072, 1090 (3d Cir. 1985) ("unprofessional, even negligent" publication "cannot be said to rise to the level of actual malice").

In its Order, the Court never explicitly reviewed what it found to be sufficient evidence of actual malice or what the standards for actual malice were. (The term "actual malice" was mentioned only with respect to the jury instructions). However, the Court did state, "There is no question about the fact that the defendants did represent to the subscribing public that the offending pocket part had been authored by plaintiffs, whereas they had had nothing to do with its preparation." (Order, at 3.) This appears to be a statement solely regarding the element of falsity, but if this was intended by the Court to be an assessment that there was sufficient evidence to support a finding of actual malice, then the Court plainly erred. Knowledge on West's part that the plaintiffs did not author the 2008 Supplement (if that is what the Court is stating) in no way equates to knowledge on West's part that the pocket part was so inadequate as to be defamatory. It certainly does not rise to the level of convincing clarity required by the First Amendment.

Moreover, as was also not disputed by plaintiffs, the Court has a constitutionally mandated obligation in cases such as this to conduct an "independent review" of the record in order to "'make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990) (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984)). There is simply no indication in the Order that the Court undertook this review and that the Court satisfied *itself* that plaintiffs had shown with clear and convincing evidence that West knew or at least entertained substantial doubts that the 2008 Supplement would be defamatory of plaintiffs. This is a responsibility that the Court cannot shirk, as it is a critical protection for speech on matters of public concern. *See Bose*, 466

U.S. at 501 ("[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge.").

In sum, the Court either failed completely to determine whether plaintiffs had met their obligation to prove actual malice, or in doing so it applied a standard that significantly lowered the burden on plaintiffs.[5] This was plain error and correction is necessary to avoid manifest injustice.

B. The Court failed to require evidence that any reader understood the 2008 Supplement as defamatory.

The Court likewise erred with respect to plaintiff's proof of an essential element of defamation. Under Pennsylvania statutory law, a defamation plaintiff must prove not only "the defamatory character of the communication," but *also* "the understanding by the recipient of its defamatory meaning." Pa. Cons. Stat. § 8343(a)(1), (4). As the Third Circuit, and courts of this district, have held, this means that "[i]f the court determines that the statement is capable of a defamatory meaning, the jury must then decide whether the recipient *actually understood the statement to be defamatory*." *Tucker*, 237 F.3d at 281-82 (emphasis added and citations omitted); *see also Synygy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp. 2d 570 (E.D. Pa. 1999) (granting summary judgment to defendant where "there is no evidence that anyone understood the

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[5] Allowing a finding of actual malice based solely on West's purported knowledge that the plaintiffs did not author the 2008 Supplement – without proof that West knew the pocket part was defamatory – is a particularly egregious error in this case. It is undisputed (indeed, admitted by plaintiffs) that West had the contractual right to attribute the pocket part to plaintiffs despite their lack of involvement in the 2008 update (although, due to the cumulative nature of such updates, plaintiffs were the authors of approximately ninety percent of the content), provided that the supplement was not (in plaintiffs' words) a "sham." *See* Tr. 12/14/10 (Dkt. # 87) at 21-22, 31, 46, 97.) The Court's apparent ruling on actual malice, therefore, allowed imposition not only of liability but *punitive* damages without any evidence that West knew, or even suspected, that it was doing anything wrong *at all*. The First Amendment simply does not allow such a result.

[communication] to say anything defamatory about plaintiff"), *aff'd*, 229 F.3d 1139 (3d Cir. 2000); *see generally* West Rule 50/59 Mem., at 18-23; West Rule 50/59 Reply Mem., at 15-18.

It is undisputed that plaintiffs presented no evidence whatsoever that any reader of the 2008 Supplement understood that it was defamatory – indeed plaintiffs testified that they had no evidence that anyone thought less of them as a result of the publication. And as previously discussed, unlike the typical defamation case, it cannot be presumed that the reader would have had such an understanding, because the reader would have had to not only read the parts alleged to be inadequate but would have to have the knowledge necessary to discern that inadequacy and to attribute that inadequacy to plaintiffs. *See* West Rule 50/59 Mem., at 21-22.

In the Order, however, the Court once again did not explicitly address this point. The Court did say, however, that "as to whether plaintiffs were defamed by the publication, the evidence clearly permitted the jury to find that the pocket parts in question were totally inadequate, so much so that the reputation of the purported authors must have suffered." (Order, at 3.) This is plainly contrary to Pennsylvania law, for it relieved the plaintiffs of the burden to prove that anyone actually understood the publication as defamatory – indeed, is a tacit concession by the Court that no such evidence was presented. If the potentially defamatory nature of the publication is by itself sufficient to allow the inference (in the absence of proof) that the readers *must* have understood it as such, then there is absolutely no difference between these two statutory elements, despite the legislature's care (as confirmed by the courts) in specifying them as separate, independent elements of a plaintiff's case. *See* Pa. Cons. Stat. § 8343(a)(1), (4); *Tucker*, 237 F.3d at 281-82; *Synygy*, 51 F. Supp. 2d at 582-83.

Thus, the Court erred in finding sufficient evidence to support liability for defamation. When coupled with the Court's error in finding sufficiently clear and convincing evidence of

actual malice, it is clear that West's motion for judgment as a matter of law was required to be granted in its entirety.[6] Reconsideration is warranted to correct these clear errors of law and the manifest injustice that has resulted.

II. ALTERNATIVELY, THE COURT SHOULD CERTIFY THE DENIAL OF WEST'S MOTION FOR INTERLOCUTORY APPEAL.

Alternatively, should the Court determine that reconsideration of its decision on West's renewed JMOL motion should not be granted, then the denial of that motion should be certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). A non-final order may be certified for interlocutory appeal where it "(1) involves a controlling question of law; (2) for which there is substantial ground for difference of opinion; and (3) which may materially advance the ultimate termination of the litigation." *Marcelle v. City of Allentown*, 2010 WL 3606405, at *2 (E.D. Pa. 2010); *Russ-Tobias*, 2006 WL 516771, at *32.

As discussed above, there are at least two controlling questions of law involved in the Court's Order: (1) whether, in order to establish actual malice, plaintiffs were required to prove that West knew or intended the defamatory implication of its publication;[7] and (2) whether, under Pennsylvania law, plaintiffs were required to prove that some reader of the 2008

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[6] Should the Court determine that it erred only in sustaining the finding of actual malice, then (1) judgment should be granted on the false light claim; (2) the punitive damages claim should be stricken in its entirety; and (3) the compensatory damage award vacated and set for a new trial because, as a general verdict, it is impossible to determine to what extent the award rested on the improper false light verdict or upon an award of presumed damages. *See, e.g.*, *Russ-Tobias v. Pa. Bd. of Probation & Parole*, 2006 WL 516771, at *15 (E.D. Pa. 2006) (ordering new trial where JMOL granted as to one possible ground for jury damages award and it was impossible to determine which portion was attributable to permissible grounds). Alternatively, should the Court determine that it erred only with respect to the recipient understanding of the defamatory nature of the publication, then (1) judgment should be granted on the defamation claim, and (2) the award vacated and set for new trial since it is impossible to tell to what extent the damages award rested on the improper defamation verdict.

[7] The question of whether plaintiffs actually presented sufficient evidence to satisfy this standard is also a question of law, particularly given the "independent review" mandated by the First Amendment.

Supplement actually understood it to be defamatory. Both questions are "controlling" within the meaning of § 1292(b), in that, as discussed above, "an incorrect disposition would constitute reversible error if presented on final appeal." *Marcelle*, at *2. They are also both "serious to the conduct of the litigation either practically or legally," *id.*, in that even if a retrial were ultimately necessary, the question of the proper standard on both issues would be critical for both sides in fashioning their cases.

As to the second requirement, while West believes there is not actually a substantial ground for difference of opinion – i.e., any contrary position is simply unsupported by any authority – it is plain that there is ample authority from which a reasonable jurist could rule in West's favor on these two issues. With respect to the definition of actual malice in implication cases, every Court of Appeals that has decided the issue (the First, Seventh, and Ninth, to West's knowledge) has adopted West's position, and West is not aware of (and plaintiffs have never pointed to) any authority to the contrary. *See* West Rule 50/59 Mem., at 12-13. As for the interpretation of the Pennsylvania elements of defamation, the Third Circuit has flatly stated its interpretation, one followed by courts in this district. And while plaintiffs have purported to cite to Pennsylvania authority to the contrary, as West explained in its original briefing, that authority does not, in fact, support plaintiffs' position. *See* West Rule 50/59 Reply Mem., at 17-18.

Finally, certification would materially advance the ultimate termination of this litigation. As it stands now, this case would be set for a retrial based on the Court's order. Should this Court certify, and should the Third Circuit accept the appeal and rule in West's favor, the expense and Court resources for that new trial will be obviated. *See Marcelle*, at *4 (noting that

third prong may be satisfied where "an appeal could eliminate the need for a trial").[8] And even should the Circuit rule against West's position, that ruling will not have been wasted time, since it will provide valuable guidance for the litigants and the Court for the retrial, and will obviate the need for any further ruling on these legal issues (including on any potential appeal after the retrial). *See Russ-Tobias*, 2006 WL 516771, at *33 (certifying for interlocutory appeal following denial in part, grant in part of JMOL and grant of new trial motion).

CONCLUSION

For the foregoing reasons, the Court should grant West's motion to reconsider and, upon reconsideration, grant its renewed motion for judgment as a matter of law. Alternatively, the Court should certify the denial of West's renewed motion for judgment as a matter of law for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Dated: April 12, 2011

Respectfully submitted,

/s/ James F. Rittinger

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[8] Plaintiffs apparently will not disagree, for they state at page 7 of their Reconsideration Memorandum: "Plainly, it is far more efficient and fair to all parties to have this matter resolved by an appeal before any new trial proceedings."

CERTIFICATE OF SERVICE

I, Matthew J. Borger, hereby certify that the foregoing Motion for Reconsideration Or, Alternatively, For Certification For Interlocutory Appeal has been filed electronically and is available for viewing and downloading from the Court's ECF system. I further certify that on this date I served the foregoing Motion upon counsel listed below via email and federal express as follows:

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April 12, 2011

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