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

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

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE COURT:

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

[11] Exhibit 21, Parker Declaration Exhibit B.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(29) Admitted.

(30) Admitted.

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

(32) Admitted.

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

IV. ARGUMENT

A. Albritton Is A Private Figure

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

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

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

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

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

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

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

Id.

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

2. Frenkel's Defamatory Posts Are False

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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CISCO SYSTEMS, INC.,	§	
RICK FRENKEL, MALLUN YEN &	§	
JOHN NOH	§	

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

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

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

I. INTRODUCTION

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

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

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

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

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

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

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[22] *Id.* at 607.

[23] *Id.* at 606.

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

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

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

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Plaintiff	§	
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	§	
Defendant	§	

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

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

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

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

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

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

1. Albritton Is Entitled To Recover Damages

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Conclusion

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

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