Nos. 12-35238, 12-35319

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OBSIDIAN FINANCE GROUP, LLC; KEVIN D. PADRICK,

Plaintiffs-Appellees and Cross-Appellants

v.

CRYSTAL COX,

Defendant-Appellant and Cross-Appellee

On Appeal From the United States District Court
for the District of Oregon
No. 3:11-cv-00057-HZ
Honorable Marco A. Hernandez

OBSIDIAN FINANCE GROUP, LLC AND KEVIN D. PADRICK'S RESPONSE BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FRAP 26.1

To the extent FRAP 26.1 applies, Obsidian Finance Group, LLC hereby states that it has no parent corporations and no publicly held company owns 10% or more of its stock.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction because the parties' citizenship is diverse and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332. This Court has jurisdiction of the appeal of defendant Crystal Cox ("Cox") for the reasons stated in her opening brief. This Court has jurisdiction of the cross-appeal of plaintiffs Kevin Padrick ("Padrick") and Obsidian Finance Group, LLC ("Obsidian") pursuant to 28 U.S.C. § 1291. Plaintiffs are cross-appealing a summary judgment order and an evidentiary ruling, both of which merged with the final judgment and are appealable as part of the final judgment. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 599, 605 (2009); *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 889 n.1 (9th Cir. 2001). Plaintiffs timely filed their notice of appeal on April 24, 2012 (2-SER-52), within 30 days of the district court's March 27, 2012 order denying Cox's motion for a new trial (1-ER-2). *See* FRAP 4(a)(4)(A)(v).

STATEMENT OF ISSUES FOR REVIEW

The questions presented by Cox's appeal are:

(1) Which standard of review applies;

(2) If "plain error" review applies, whether the district court committed "plain error" in its jury instructions;

(3) If *de novo* review applies, whether the district court correctly concluded that the *Gertz* standard does not apply because Cox is not "media" and Padrick's service as a bankruptcy trustee is not a matter of "public concern";

(4) If *de novo* review applies, whether the district court correctly concluded that the *Sullivan* standard does not apply because Padrick and Obsidian are not "public figures" or "public officials";

(5) Whether any instructional error was harmless and did not affect Cox's substantial rights; and

(6) Whether the jury's award is excessive.

The questions presented by Padrick's and Obsidian's appeal are:

(1) Whether the district court erred in granting summary judgment to Cox as to all but one of her defamatory posts about Padrick and Obsidian, which ruling the court based on a conclusion that such statements could only be read as statements of opinion, not verifiable fact, as a matter of law; and

(2) Whether the district court erred in excluding expert testimony regarding the influence of derogatory statements in online search results on buyers.

STATEMENT OF THE CASE

This is a defamation case. In 2010, Cox posted false statements about Padrick and Obsidian on various websites, asserting that they had committed tax

fraud and other crimes. Padrick and Obsidian sued Cox for defamation under Oregon law. As to all but one of the statements, the district court *sua sponte* granted summary judgment for Cox, holding that most of Cox's statements were assertions of opinion, not fact, and therefore completely shielded by the First Amendment. The district court allowed only one of Cox's posts to go to the jury. With regard to that post, the jury found in favor of plaintiffs, awarding $1.5 million to Padrick and $1 million to Obsidian. Cox moved for a new trial, which motion was denied.

STATEMENT OF FACTS

Kevin Padrick and David Brown are the principals and owners of Obsidian. (2-SER-62-64.) Obsidian provides financial advisory services to other businesses, including businesses in distress and businesses purchasing distressed assets. (2-SER-64-66.) Obsidian also has an investment business. (2-SER-64.) Reputation and trustworthiness are extremely important in Obsidian's business. (2-SER-83-86; 2-SER-91-92.) Obsidian has been in business since 2003 and had 10 employees at the time of trial. (2-SER-64-65.)

In December 2008, Obsidian was retained to provide consulting and advisory services to a company called Summit Accommodators, Inc. ("Summit") in connection with Summit's bankruptcy. (Def.'s Trial Ex. 527; 2-SER-93-98.)

Summit filed for bankruptcy immediately upon retaining Obsidian, and Padrick was appointed as Summit's Chapter 11 trustee. (Pls.' Trial Ex. 30 at 13.) The bankruptcy court confirmed Summit's bankruptcy plan in May 2009. (*Id*. at 1.) The plan included putting Summit's assets into a liquidating trust, with Padrick serving as trustee. (*Id*. at 35.)

In every role he has had in connection with Summit's bankruptcy, Padrick's job has been to recover the maximum amount possible for Summit's creditors. (2-SER-69-70; 2-SER-98.) Virtually all of those creditors are Summit's defrauded clients, as Summit turned out to be a Ponzi scheme in which the Summit principals misappropriated funds from clients that were supposed to be used for 1031 exchanges. (2-SER-69-70.) Of the four Summit principals, one has pleaded guilty to felonies and the other three are under federal indictment. (2-SER-70.)

Padrick's work for Summit's defrauded clients and other creditors has been very successful. The defrauded clients have recouped 85% or more of their money, which is an unusually high percentage in a bankruptcy, particularly one involving a Ponzi scheme. (2-SER-68-69.)

The positive results of Padrick's work would not protect him or Obsidian from Cox though. In 2010, Cox posted numerous false and highly derogatory statements about Padrick and Obsidian on various websites, including

ethicscomplaint.com, obsidianfinancesucks.com, and bankruptcycorruption.com. (2-SER-155-187; 2-SER-115-118.) Most of the statements relate to Padrick's work on the Summit bankruptcy, but some relate to Obsidian solar energy projects and other matters. Among other things, Cox has accused Padrick and Obsidian of being "criminals" engaged in "illegal activity" and "fraud," including "corruption," "fraud," "deceit on the government," "money laundering," "defamation," "harassment," "tax crimes," "fraud against the government," and "solar tax credit fraud." (2-SER-155; 2-SER-162; 2-SER-166-69; 2-SER-171; 2-SER-176.) She claims that Padrick and Obsidian have "broken many laws in the last 2 years to do with the Summit 1031 case." (2-SER-168.) She has stated that Padrick and Obsidian paid off "media" and "politicians." (2-SER-161.) She also has asserted that they may have hired a hitman to kill her and that "many" people have told her that Padrick "is not above killing someone to shut them up." (2-SER-170.)

On December 21, 2010, Padrick's and Obsidian's lawyers sent a cease-and-desist letter to Cox, demanding that she stop making false and defamatory statements about Padrick and Obsidian on the Internet. (2-SER-119.) The cease-and-desist letter did not stop Cox. To the contrary, only six minutes after Padrick's and Obsidian's attorneys emailed the letter to Cox on December 22, 2010, Cox replied snidely, "Finally... Thank You. I Will Read It. Wonderful... Can't Wait."

(2-SER-121.) The same day, she posted that she would continue posting about Padrick and Obsidian "in great detail and daily for the next... well... FOREVER." (2-SER-171.) Three days later, on December 25, 2010, she posted a lengthy diatribe on bankruptcycorruption.com, again accusing Padrick of tax fraud and other crimes and misconduct ("the 12/25/10 post"). (2-SER-115.)

In January 2011, Padrick and Obsidian sued Cox for defamation. (2-ER-69.) Less than a week later, Cox—having posted defamatory statements about Padrick and Obsidian for months, having refused to take down the statements when told they were false, and having now been sued for defamation—suddenly offered to "protect" Obsidian's online reputation and "promote" its business in exchange for a $2,500 monthly fee. (2-SER-123.)

Padrick and Obsidian rebuked Cox's extortion attempt and moved for partial summary judgment on the issue of liability. (2-ER-77.) Padrick submitted a declaration attesting that Cox's assertions were completely false and that he had not engaged in any illegal or fraudulent activity, had not stolen money from the government, had not engaged in corrupt behavior, had not paid off the media or politicians, and had not committed tax fraud. (Docket No. 29 at ¶ 6.) Cox did not offer any admissible evidence to the contrary, so falsity was established.

The district court not only denied Padrick's and Obsidian's motion, it *sua sponte* granted summary judgment for Cox. The Court concluded that Cox's statements about Padrick and Obsidian were so extreme and hyperbolic that, in context, any reasonable reader would consider them assertions of opinion, not verifiable fact, and therefore shielded by the First Amendment. (1-SER-49; 1-SER-28-35.) The only posting that survived summary judgment was the 12/25/10 post, which the court concluded a reasonable reader could view as containing or implying assertions of fact, especially since it was posted on a website that appeared more "legitimate" on its face. (1-SER-28-35.)

The defamation claim therefore went to trial solely on the 12/25/10 post. According to Cox, this post has gone "viral," has gone "everywhere," and is available on numerous websites, including most or all of her own websites. (2-SER-103-104; 2-SER-73-74.) Cox readily admits that she has used her Internet skills and certain proprietary software to ensure that the post appears at the top of any search results if someone searches online for Padrick or Obsidian. (2-SER-109-110.) Indeed, Cox has done so for all of her posts about Padrick and Obsidian because, in her words, "Anything else would just be ridiculous, really." (*Id.*) Cox also admits that she could take down her posts about Padrick and Obsidian "probably within a day," if she wanted. (2-SER-105.)

The case was tried to a jury over one day. Plaintiffs called three fact witnesses, a tax expert, and a marketing expert. Padrick testified that he has never engaged in any tax fraud and that Cox's statements are completely false. (2-SER-71-72.) The tax expert testified that Padrick's handling of Summit's taxes has been entirely consistent with federal tax law. (2-SER-87-89.) The marketing expert testified that Padrick and Obsidian are in a high risk business in which reputation and trustworthiness are extremely important (2-SER-82-85); that it is extremely probable that anyone considering doing business with Obsidian or Padrick will begin with an Internet search (2-SER-83); and that it is highly probable that anyone who does such a search will see Cox's post (2-SER-86). Padrick and Brown testified about the negative impact of Cox's post on their business. (*E.g.*, 2-SER-72-78; 2-SER-99-101.) Cox did not call any witnesses and chose not to testify at trial, but the jury saw excerpts of her video deposition testimony, and Cox gave opening and closing statements and cross-examined the witnesses. (2-SER-59.)

Cox did not propose any jury instructions. (1-ER-5.) When asked at the appropriate time, she stated that she had no objection to Padrick's and Obsidian's proposed instructions or to the district court's proposed instructions (2-SER-111-114). The district court then instructed the jury under current Oregon law, including that knowledge and intent are not elements of the claim. (2-ER-51.)

After deliberation, the jury returned a verdict in favor of Padrick and Obsidian, awarding Padrick $1.5 million in damages and Obsidian $1 million in damages. (2-SER-56-57.) Cox moved for a new trial, which motion was denied.

SUMMARY OF ARGUMENT

The Court should affirm the district court's denial of Cox's motion for a new trial. Cox did not properly preserve any alleged error in the jury instructions given at trial, so the Court's review is limited to "plain error," and the district court did not commit plain error. Moreover, in her new trial briefing, and now again on appeal, Cox has made numerous arguments that she never made in the district court before the jury returned its verdict. Arguments made for the first time after the jury returns an unfavorable verdict are not a proper basis for a new trial, nor are they a proper basis for reversal on appeal.

FRCP 51 provides how and when a party must object to jury instructions if the party wishes to challenge their legal correctness on appeal. If a party fails to follow that procedure, as Cox did in this case, the Court's review is limited to "plain error," *i.e.*, error that is "clear" and "obvious" under "settled law." The district court did not commit "plain error" in this case. The constitutional issues being raised involve the difficult intersection of state defamation laws and First Amendment freedoms of speech and press—an area in which the Supreme

Court itself has struggled mightily for decades and in which the law is unsettled. As such, even if this Court were inclined to reach a different conclusion than the district court on one or more of these legal issues, the district court did not commit "plain error" in its instructions.

Indeed, the district court did not commit error at all. Under current Supreme Court jurisprudence, states are permitted to apply whatever standards they deem appropriate in defamation cases, including strict liability, except in the specific situations identified by the Supreme Court as requiring higher standards due to First Amendment concerns. Thus, under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), speech about official conduct by public officials is subject to a high degree of First Amendment protection in defamation actions, as is, under *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), speech about public figures on matters of public concern. Speech by media defendants regarding matters of public concern also is subject to First Amendment protection in defamation actions, albeit a lesser degree of protection, as described in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Padrick's and Obsidian's defamation claim against Cox does not implicate *Sullivan*, *Curtis*, or *Gertz*. Cox previously argued that Padrick and Obsidian are "public figures" but has dropped that argument on appeal. Now Cox

argues that they are "public officials." They are not. A bankruptcy trustee for a private company who is paid by the bankruptcy estate and subject to court supervision is not a "public official." As for the *Gertz* standard, *Gertz* itself applies only to media defendants, and the Supreme Court has repeatedly declined to consider whether *Gertz* should be extended to nonmedia defendants. As such, even if the error had been preserved, the district court correctly instructed the jury under current Oregon law. Until and unless the Supreme Court decides to extend it, *Gertz* is limited to media defendants, and Cox is not a media defendant under the district court's test or any other reasonable test. Moreover, Padrick's trustee service and the tax treatment of Summit's liquidating trust are not matters of "public concern," which is an additional reason that *Gertz* does not apply.

In any event, any alleged error in the jury instructions was harmless and did not affect Cox's substantial rights. Based on the undisputed evidence at trial, Cox's statements were made negligently and with reckless disregard of their truth or falsity. Cox repeatedly published extremely derogatory statements about Padrick and Obsidian based solely on unverified statements by a single individual with an obvious bias. Cox "flippantly" continued to publish these statements even after Padrick's and Obsidian's lawyers told her they were false and defamatory and demanded she stop. After months of derogatory postings, Cox then tried to extort

money from Padrick and Obsidian by offering to take down the defamatory posts in exchange for a $2,500 monthly fee. On these facts, any alleged error in instructing the jury under Oregon's strict liability standard rather than the *Gertz* or *Sullivan* standard was more probably than not harmless, did not affect Cox's substantial rights, and would not require reversal.

Finally, the jury's verdict is not excessive. There is ample evidence to support the award as compensatory damages, let alone presumed damages. The district court did not abuse its discretion, and the verdict should not be disturbed.

Turning then to the cross-appeal, there are two issues that do merit correction by this Court. Most importantly, the district court should have allowed Padrick and Obsidian to proceed to trial on all of Cox's defamatory statements, not only the 12/25/10 post. All of the proffered statements are actionable defamation. The district court improperly invaded the province of the jury when it concluded, as a matter of law, that all but one of the statements were "opinion" rather than verifiable fact and thus shielded by the First Amendment. In fact, the proffered statements are provably false assertions of implied fact, susceptible to defamatory interpretation, and therefore should have gone to the jury. The district court's grant of summary judgment to Cox as to all of the proffered statements except the 12/25/10 post should be reversed.

One evidentiary ruling also should be corrected to the extent it is relevant after resolution of the other issues on appeal. The district court should have allowed plaintiffs' expert witness to testify regarding the influence of derogatory statements in online search results on buyers. This testimony is particularly relevant to damages and should have been allowed.

ARGUMENT

RESPONSE TO COX'S OPENING BRIEF

Cox is not entitled to a new trial. The district court thoroughly and correctly addressed each of Cox's arguments in its order denying the motion for new trial. (1-ER-1-34.) The judgment should be affirmed as to the 12/25/10 post.

I. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON PLAINTIFFS' DEFAMATION CLAIM

The district court correctly instructed the jury on the elements of a defamation claim under current Oregon law, including that Cox's subjective knowledge and intent are not relevant to her liability for making false and defamatory statements about Padrick and Obsidian. Cox did not properly preserve any alleged error in the jury instructions at trial, so the Court's review is limited to "plain error," and the district court did not commit plain error. However, even if *de novo* review applied, the result would be the same.

A. Standard of Review

When an appellant argues that a jury instruction misstated the law, the standard of review depends upon whether the appellant "properly objected" to the instruction at trial. FRCP 51(d)(1). If so, the Court reviews *de novo*. *Dream Games of Arizona, Inc. v. PC Onsite*, 561 F.3d 983, 988 (9th Cir. 2009). If not, the Court reviews for "plain error." FRCP 51(d)(2); *Hunter v. County of Sacramento*, 652 F.3d 1225, 1230 (9th Cir. 2011). In this case, Cox did not properly object to the jury instruction she now challenges, so plain error review applies.

B. Cox Did Not Preserve The Alleged Error As Required By FRCP 51

Pursuant to FRCP 51(d)(1)(A), a party may only assign error to a jury instruction actually given at trial if the party "properly objected" to the instruction. The requirements for a proper objection are stated in FRCP 51(c). Regarding "how" to object, FRCP 51(c)(1) requires that the party state the objection to the instruction "on the record, stating distinctly the matter objected to and the grounds for the objection." Regarding "when" to object, FRCP 51(c)(2)(A) requires that the party make the objection "at the opportunity provided under Rule 51(b)(2)," *i.e.*, when the district court informs the parties of its proposed instructions and "give[s] the parties an opportunity to object on the record and out of the jury's hearing before the instructions and [closing] arguments are delivered." FRCP

51(b)(2).[1] If a party does not preserve any alleged error in an instruction in the manner "required by Rule 51(d)(1)," the Court may still review the instruction but only for "plain error." FRCP 51(d)(2); *Hunter*, 652 F.3d at 1230.

Cox did not object to the district court's jury instructions at all, let alone in the manner required by FRCP 51. The district court asked Cox twice during the FRCP 51(b)(2) conference whether she had any objections to the proposed instructions, and both times Cox replied that she did not. (2-SER-111-114.) Cox admits this was a mistake. (Cox Op. Brief at 34.) She argues that the Court should nonetheless engage in *de novo* review, however, invoking the "futility" exception to FRCP 51. That argument must be rejected because Cox does not meet the requirements for that exception.

C. The "Futility" Exception Does Not Apply On These Facts

It is true that there is a narrow exception to FRCP 51 that may fairly be called a "futility" exception. However, that exception has three specific requirements, as described in *Medtronic, Inc. v. White*, 526 F.3d 487, 495 (9th Cir.

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[1] The rule also contains alternative procedures in certain circumstances that do not apply here. *See* FRCP 51(c)(2)(B) (alternative procedure for "when" to object if a party is unaware of the ruling on an instruction until after the FRCP 51(b)(2) conference); FRCP 51(d)(1)(B) (alternative procedure for objecting to failure to give a requested instruction—which does not apply here because Cox did not request any instructions (1-ER-5)).

2008), and it is undisputed that Cox cannot satisfy the third requirement:

> Although this court has enjoyed a reputation as the strictest enforcer of Rule 51, we recognize a limited exception where the district court is aware of a party's concerns and further objection would be unavailing. The exception is available when (1) throughout the trial the party argued the disputed matter with the court, (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and (3) the party offered an alternative instruction.

(Internal alterations and citations omitted; emphasis added.)

Having failed to satisfy the third requirement—offering an alternative instruction—Cox cannot rely on the "futility" exception to FRCP 51. Cox tries to get around the third requirement by arguing that *Medtronic*, the case the district court cited in its opinion (1-ER-5-7), identifies only "one situation" in which the exception applies. (Cox. Op. Brief at 35-36.) However, such assertion is belied by *United States v. Klinger*, 128 F.3d 705 (9th Cir. 1997), in which the Court identified the same three-part test as the "sole exception" to the "requirement of a formal, timely, and distinctly stated objection." *Klinger*, 128 F.3d at 711; *see also, e.g.*, *Jules Jordan Video Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1160 (9th Cir. 2010) (example of Court always describing the test with three requirements). Indeed, given the nature of the first two requirements, Cox's argument would effectively eliminate the third requirement in every case.

The cases cited by Cox—*Loya*, *Mukhtar*, and *Dorn*—are distinguishable. First, it is important to note that all of these cases were tried prior to 2003, when there was more flexibility in the application of FRCP 51. Prior to 2003, FRCP 51 was less specific about how and when a party had to object to jury instruction to preserve alleged errors. *See* FRCP 51 (2002); *e.g., Maheu v. Hughes Tool Co.*, 569 F.2d 459, 470 (9th Cir. 1977) (applying rule flexibly). Moreover, prior to 2003, the Ninth Circuit did not allow any "plain error" review of civil jury instructions, let alone have a rule codifying when "plain error" review applies. *E.g., Voohries–Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713-14 (9th Cir. 2001) ("[W]e have consistently declared that there is no 'plain error' exception in civil cases in this circuit.").

Due to the 2003 amendments, FRCP 51 now (1) provides exactly how and when a party must object to instructions to preserve error; and (2) provides for plain error review if a party fails to object in the manner required by FRCP 51. *See* FRCP 51 (2012). "[T]he 2003 amendment abrogated the rule set out in our pre–2003 decisions." *Hunter*, 652 F.3d at 1230 n.5.

With this in mind, the cases cited by Cox are distinguishable. In *Loya v. Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 282 (9th Cir. 1983), the Court appears to have concluded that the plaintiff complied with FRCP 51 (as it

existed at that time) by objecting to the jury instructions in the manner the court allowed for such objections. *Loya*, 721 F.2d at 282 (stating, without discussion, that the plaintiff's "objections to the instructions were adequate in the face of the court's imposition of limitations on the manner in which objections were to be placed on the record"). Similarly, in *Mukhtar v. California State Univ.*, 299 F.3d 1053, 1062 (9th Cir. 2002), *amended on other grounds*, 319 F.3d 1073 (9th Cir. 2003), the Court concluded that the plaintiff properly preserved its objection to admission of certain expert evidence by complying with FRE 103.

Dorn v. Burlington N. Santa Fe R.R. Co., 397 F.3d 1183 (9th Cir. 2005) is similar to *Loya* in that it also involved a situation in which the district court limited a party's ability to object to jury instructions. The court resolved a certain legal issue on motions in limine, after which the defendant requested reconsideration once or more during trial, at which point the judge "warned" the defendant that he was not inclined to "rehash" the issue any further. *Id.* On appeal, the Court concluded that the defendant had sufficiently preserved its objection, given the district court's "definitive ruling" and "subsequent warning about rehashing the issue." *Id.* There is no comparable situation here. To the

extent *Dorn* created a second exception under the former version of FRCP 51[2]—for situations in which the district court restricts a party's ability to preserve an objection—such exception is of no assistance to Cox, even assuming it applies equally to the current version of FRCP 51. The district court did nothing to prevent Cox from complying with FRCP 51.

The Court should not create a new exception to FRCP 51 for Cox's benefit. Although the Ninth Circuit is no longer the strictest enforcer of FRCP 51, new exceptions should not be adopted ad hoc. *Cf. Ji v. Bose Corp.*, 626 F.3d 116, 125-26 (1st Cir. 2010) (strictly applying FRCP 51 and refusing to adopt even the Ninth Circuit's "futility" exception). Having failed to preserve the alleged error in the jury instructions as required by FRCP 51, and being unable to satisfy the "futility" exception in *Medtronic*, Cox may ask the Court to review the jury instructions but only for "plain error." FRCP 51(d)(2).

D. The District Court Did Not Commit "Plain Error"

Given the nature of Cox's arguments on appeal, the district court could not and did not commit plain error by instructing the jury under current Oregon law.

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[2] The truck-train collision at issue in *Dorn* occurred in 1999, *see Dorn*, 397 F.3d at 1186, and, according to public records available on PACER, the case was tried in 2002, so the former version of FRCP 51 applied.

Plain error occurs when "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Anekwu*, 695 F.3d 967, 973 (9th Cir. 2012). The fourth factor makes reversal for plain error "discretionary." *United States v. Tran*, 568 F.3d 1156, 1163 (9th Cir. 2009).

In order to be "plain," an error must be "clear or obvious, rather than subject to reasonable dispute." *Id*. Plain error "is error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection." *United States v. Gonzalez–Aparicio*, 663 F.3d 419, 428 (9th Cir. 2011) (citation omitted). If the issue is not entirely settled under current law, then, as a matter of law, the error cannot be "plain." *United States v. Olano,* 507 U.S. 725, 734 (1993) (stating that appellate courts cannot correct error as "plain error" unless the error "is clear under current law"); *Gonzalez–Aparicio*, 663 F.3d at 428 (stating that an error "cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results");

United States v. Dupas, 419 F.3d 916, 924 (9th Cir. 2005) ("For an error to be plain, it must be 'clear' or 'obvious' under current law.").

The issues that Cox has raised in her new trial motion and now this appeal—but did not raise before the jury was instructed—involve difficult constitutional questions and would require an extension of existing First Amendment law. Since 1964, the Supreme Court has struggled to strike the right balance between state defamation laws and the First Amendment freedoms of speech and press. *E.g., Gertz*, 418 U.S. at 325 ("This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort.") The Supreme Court justices have had great difficulty reaching agreement in this area of the law, with nearly every opinion on the issue being accompanied by multiple concurrences and dissents, representing a remarkably diverse set of individual views as to what the law should be. *See, e.g., Gertz*, 418 U.S. at 325 (majority), 353 (Blackmun, J., concurring), 354 (Burger, C.J., dissenting), 355 (Douglas, J., dissenting), 361 (Brennan, J., dissenting), 369 (White, J., dissenting).

With regard to the question whether the *Gertz* standard should remain limited to "media" defendants (as some courts have held) or whether it should be extended to everyone (as some other courts have held and Cox now argues), the Supreme Court has long recognized this unsettled question but, to date, repeatedly declined to resolve it. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 n.6 (1990) ("In *Hepps* the Court reserved judgment on cases involving nonmedia defendants, [] and accordingly we do the same."); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.4 (1986) (declining to "consider what standards would apply if the plaintiff sues a nonmedia defendant"); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 752 (1985) (noting trial court's "doubt" on this issue but not addressing it); *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979) (stating that the Court "has never decided the question" whether the *Sullivan* standard "can apply to an individual defendant rather than to a media defendant"). As a result, the law on this issue is unsettled and the lower courts split, as the Reporters Committee for Freedom of the Press ("RCFP") frankly admits in its *amicus curiae* brief in support of Cox. (RCFP Amicus Brief at 6.)

The questions regarding who is a "public official" under *Sullivan*, who is a "public figure" under *Curtis*, and what is a matter of "public interest" under *Gertz* also are complex questions. *See Hutchinson*, 443 U.S. at 119 n.8 ("The

Court has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees, however."); *id.* at 134 (stating that *Gertz* provided a "general definition of 'public figures'"); *Gertz*, 472 U.S. at 786 (Brennan, J., dissenting) (stating that the majority opinion "provide[s] almost no guidance as to what constitutes a protected 'matter of public concern'").

In *Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336, 342-43 (3d Cir. 2005), the Third Circuit, applying the plain error standard, held that an alleged instruction error regarding presumed damages in a defamation case "[could] not constitute a fundamental error resulting in a miscarriage of justice, if it was error at all," because, *inter alia*, Pennsylvania law was "unsettled." In *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009), this Court announced its interpretation of a particular First Amendment issue but, applying the plain error standard, denied any relief in the individual case because the law was previously unsettled. "While our holding today follows directly from a distillation of the various opinions in *Ashcroft* [*v. ACLU*, 535 U.S. 564 (2002)], our conclusion was far from clear and obvious to the district court." *Kilbride*, 584 F.3d at 1255. "Hence, we conclude that the district committed no reversible error in its [] jury instructions." *Id.*

By contrast, both of the cases cited by Cox as finding plain error involved settled law and obvious errors. In *Garcia-Rivera*, the district court's ambiguous jury instruction and subsequent failure to poll the jury violated well-established constitutional requirements for jury unanimity. *See United States v. Garcia-Rivera*, 353 F.3d 788, 792 (9th Cir. 2003) (beginning analysis with statement of undisputed law on jury unanimity requirements). In *Brown*, the district court's imposition of a supervised release condition barring the defendant from wearing anything that "may connote affiliation with" various gangs was, on its face, so vague and open to interpretation that it violated the well-established test for unconstitutional "vagueness" in legal prohibitions. *See United States v. Brown*, 223 Fed. App'x. 722, 724 (9th Cir. 2007) (not selected for publication) (stating and applying established legal test). These cases bear no similarity to the present case.[3]

Whether this Court takes the exact same view as the district court on the various constitutional issues now under discussion, the district court did not commit "plain error" in its jury instructions. At a minimum, these issues are "subject to reasonable dispute," not "clear or obvious" points of settled law. *Anekwu*, 695 F.3d at 973. If the Court wishes to clarify the law in this area, it is of

[3] To the extent Cox suggests that the "plain error" standard for jury instruction errors somehow varies depending how much the party said about the issue in other contexts, even if the alleged instruction error was not preserved, that is inaccurate. (Cox Op. Brief at 37.) There is only one standard for "plain error" review.

course free to do so, but it should not disrupt the district court's decision in this case where the issue was not properly preserved and the district court did not commit plain error. *Cf. Kilbride*, 584 F.3d at 1255 (announcing the Court's view on particular First Amendment issue based on existing Supreme Court caselaw, concluding that jury instruction was erroneous, but holding that the error was "far from plain" given the previously unsettled law, and therefore refusing to reverse).

E. The District Court Did Not Commit Error At All—It Correctly Applied *Dun & Bradstreet, Gertz,* and *Sullivan*

Although the law in this area is subject to reasonable dispute, the district court's conservative approach to extending First Amendment law is the better approach and should be upheld to the extent the Court reaches this issue.

1. First Amendment Protection Is The Exception, Not The Rule, In Defamation Cases

Before 1964, state defamation laws were largely if not entirely immune from federal constitutional challenge, based on a general understanding that the Constitution does not protect libelous statements. *See Sullivan*, 376 U.S. at 268. That changed in 1964 when the Supreme Court decided *Sullivan*, holding "for the first time [] that the First Amendment limits the reach of state defamation laws." *Dun & Bradstreet*, 472 U.S. at 755.

Sullivan itself was confined to a very narrow category of libelous statements: defamatory statements about public officials regarding their official conduct, specifically in connection with "one of the major public issues of our time," the 1960's civil rights movement. *Sullivan*, 376 U.S. at 268, 271. The Supreme Court concluded that a public official could not recover damages for a defamatory statement about his official conduct unless the statement was made with "'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id*. at 279-80. This is a specialized definition of "actual malice" specific to this area of law.

Since *Sullivan*, the Supreme Court has repeatedly revisited the intersection between state defamation laws and the First Amendment freedoms of speech and press, each time "struggling" to balance these legitimate competing interests. *E.g*., *Hepps*, 475 U.S. at 768 ("This case requires us once more to struggle to define the proper accommodation between the law of defamation and freedoms of speech and press protected by the First Amendment.") (alterations and citation omitted). This struggle is particularly evident in the numerous concurring and dissenting opinions accompanying most of the Court's decisions in this area, revealing not only "disagreement about the appropriate result in that case" but, more fundamentally, "divergent traditions of thought about the general problem of

reconciling the law of defamation with the First Amendment." *Gertz*, 418 U.S. at 333 (discussing one particularly fractious decision).[4]

What is clear is that each of the Supreme Court's decisions since *Sullivan* has consciously decided whether to extend First Amendment protection for false speech beyond the protection first recognized in *Sullivan*, making First Amendment protection of false speech the exception, not the rule. Specifically, in 1967, the Supreme Court extended *Sullivan* to "public figures" involved in "issues in which the public has a justified and important interest." *Curtis*, 388 U.S. at 134. In 1971, a highly fractured Court suggested in a plurality opinion in *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971) that *Sullivan* should be extended to any statements involving a "matter of public or general interest." *Dun & Bradstreet*, 472 U.S. at 755 (discussing *Rosenbloom*). Three years later, however, the Court disavowed that suggestion, holding in *Gertz* that "the protections of [*Sullivan*] did not extend as far as *Rosenbloom* suggested." *Id.* at 756. "The extension of the [*Sullivan*] test proposed by the *Rosenbloom* plurality would abridge [the]

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[4] Individual members of the Court have expressed a great diversity of views, from Justice Black's view that all speech regarding public officials and public affairs should be subject to complete immunity (*see Sullivan*, 376 U.S. at 293 (Black, J., concurring)) to Justice White's belief that false statements should have little or no First Amendment protection, even as to public officials (*see Dun & Bradstreet*, 472 U.S. at 765-74 (White, J., concurring)).

legitimate state interest [in defamation laws] to a degree we find unacceptable." *Gertz*, 418 U.S. at 346.

Gertz created its own new standard. The issue in *Gertz* was "whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure" may invoke the First Amendment to avoid or limit liability for resulting injury. *Id*. at 332. Weighing First Amendment concerns against states' legitimate interests in protecting their private citizens' reputations, the Supreme Court concluded that a new standard was warranted. With respect to compensatory damages, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id*. at 347. This standard "recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." *Id*. As to presumed and punitive damages, however, the *Sullivan* standard applies. *Id*. at 349-50. In other words, under *Gertz*, a media defendant cannot be held strictly liable for defamation, but rather may be held liable for compensatory damages only upon a showing of negligence and for

presumed and punitive damages only upon a showing of actual malice (*i.e.*, knowledge of falsity or reckless disregard of truth or falsity). *See id.*

Since deciding *Gertz*, the Supreme Court has continued to explore and define the relationship between state defamation laws and the First Amendment. The Court has not, however, further extended the *Sullivan* rule as it did in *Curtis* and *Gertz* (and almost did in *Rosenbloom*), nor has it extended the *Gertz* rule. To the contrary, *Dun & Bradstreet*, 472 U.S. at 756-57 & n.4 rejected an expansive interpretation of *Gertz* as applying to speech on all matters. The Supreme Court also has repeatedly declined to consider whether *Gertz* should be extended to nonmedia defendants, despite acknowledging the uncertainty in this area among lower courts. *See Milkovich*, 497 U.S. at 20 n.6; *Hepps*, 475 U.S. at 779 n.4; *Dun & Bradstreet*, 472 U.S. at 752; *Hutchinson*, 443 U.S. at 133 n.16. It is with this background that we turn to the specific arguments made by Cox in this appeal.

2. The Court Should Not Consider Cox's Arguments Regarding Extending *Gertz* to Non-Media Defendants and Speech on Private Matters

The Court should not extend *Gertz* to non-media defendants (as Cox requests) or matters of private concern (as Cox requests). Cox never made these arguments in the district court until her new trial motion filed after the jury returned its verdict against her. Even if the Court were to disregard Cox's failure to

preserve the alleged error in the jury instruction as required by FRCP 51, Cox should at least be limited on appeal to arguments that she made before the jury returned its verdict. *See Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002) (discussing rationales for plain error review, including "courts' concern that allowing a party to wait to raise the error until after the negative verdict encourages that party to sit silent in the face of claimed error"). Cox never argued before or during trial that *Gertz* applied regardless of whether she is a media defendant, nor did she ever argue that *Gertz* applied regardless of whether her statements involved a matter of public concern.

Until the jury returned its verdict, Cox always based her First Amendment defense on her assertion that she was "media" writing on a matter of public concern. (2-ER-63-64; 1-ER-43; 1-ER-7.) The Oregon Supreme Court views *Gertz* as applying only to media defendants. *Bank of Oregon v. Indep. News, Inc.*, 693 P.2d 35, 41 (Or. 1985), *cert. denied*, 474 U.S. 826 (1985). It was only after trial, and after she retained a lawyer who specializes in the First Amendment,[5] that Cox suddenly argued that it did not matter whether she was

[5] *See, e.g.,* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012) (law review article by Cox's attorney discussing "debate" over proper interpretation of First Amendment protection for "the press" and arguing for press-as-technology interpretation).

"media" or whether she was speaking on a matter of public concern because *Gertz* applies to all speakers on all subjects. (1-ER-13-14.) Cox should not be allowed after losing at trial to make cutting-edge constitutional arguments that are entirely different than the arguments she made before the verdict. She should not be granted a new trial based on arguments that she only raised after losing at trial.

3. *Gertz* Applies Only To Media Defendants, and Cox Is Not a Media Defendant

If the Court does reach Cox's new arguments on the merits, then, on its face, *Gertz* applies only to media defendants. Not only did *Gertz* involve a media defendant, the majority opinion in *Gertz* is replete with references to "the media," "the news media," "the communications media," "a newspaper or broadcaster," and "the press and broadcast media." *Gertz*, 418 U.S. at 332, 333, 337, 340, 341, 343, 345, 348, 350. *Gertz*'s rationale also relies heavily on balancing the need to avoid "self-censorship by the news media" with the competing societal values reflected in defamation laws. *Id*. at 341. "Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury." *Id*. at 342.

The Supreme Court has never addressed whether the First Amendment protections in *Gertz* should be extended to nonmedia defendants. The Supreme Court has acknowledged this as an outstanding question of First

Amendment law, but it has consistently declined to address it, which alone defeats any suggestion that the issue is resolved by existing caselaw or is an obviously necessary extension of First Amendment law. *See Milkovich*, 497 U.S. at 19 n.6; *Hepps*, 475 U.S. at 779 n.4; *Dun & Bradstreet*, 472 U.S. at 752; *Hutchinson*, 443 U.S. at 133 n.16.

The Supreme Court has continued to emphasize the media aspect of its defamation cases since *Gertz*, underscoring its position (or lack thereof) on nonmedia defendants. *E.g.*, *Hepps*, 475 U.S. at 777 ("[W]e hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."); *Milkovich*, 497 U.S. at 19-20 ("*Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved.").

It is noteworthy that, in *Hepps*, Justice Brennan wrote a concurring opinion for the sole purpose of expressing his view that media and nonmedia defendants should be treated the same—and only Justice Blackmun joined it. *Hepps*, 475 U.S. at 780 (Brennan, J., concurring). A year earlier, in *Dun & Bradstreet*, Justice Brennan had argued in a dissenting opinion, joined by three

justices, that media defendants deserve no greater constitutional protection than nonmedia defendants, 472 U.S. at 774 (Brennan, J. dissenting), and Justice White wrote a concurring opinion in which he agreed on that point but argued that *Gertz* should be overruled altogether to return to the rule that there is no constitutional privilege for defamation of persons who are not public officials or public figures, *id*. at 765 (White, J., concurring). The following year in *Hepps*, however, the Court described its holding in terms of a "media defendant," and only two justices addressed the media/non-media distinction in a concurring opinion.

The Supreme Court's citation to the *Hepps* dissenting and concurring opinions in *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S. Ct. 876, 905 (2010), is not a *de facto* extension of *Gertz* to all defendants in defamation cases. That certainly would be an odd and circumspect way for the Supreme Court to address an issue that it has consciously avoided resolving for many years. *Citizens United* involved the constitutionality of an "outright ban, backed by criminal sanctions" of political speech by corporations, except media corporations, during the 30-60 day period immediately prior to an election. 130 S. Ct. at 897. Such speech is at the core of the First Amendment. *Id*. at 898. ("The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.") (citation omitted). That is a very different

analysis than the careful balancing necessary at the intersection of state defamation laws and the First Amendment.

It is possible that the Supreme Court may someday extend *Gertz* to nonmedia defendants. The Fourth and Eighth Circuits have stated that they will treat media and nonmedia defendants the same under *Gertz*,[6] while the Second Circuit has taken the view that nonmedia defendants are entitled to some but not all of the constitutional privileges enjoyed by media defendants.[7] This Court has never extended *Gertz* from media defendants to all speakers,[8] and it should be reluctant to encroach so substantially on the protections afforded by states to their citizens who are victims of defamation, especially when the Supreme Court has

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[6] *See Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011) (no discussion of this issue); *In re IBP Confidential Bus. Docs. Litig.*, 797 F.2d 632, 642 (8th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987). Other circuits have addressed the issue only under *Sullivan*. *See Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975); *Avins v. White*, 627 F.2d 637, 649 (3d Cir. 1980); *Garcia v. Bd. of Educ.*, 777 F.2d 1403, 1410 (10th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986).

[7] *Flamm v. Am. Assoc. of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000).

[8] In *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 694-95 (9th Cir. 1998), this Court rejected a defamation claim for failure to satisfy a required element. In a footnote, the Court noted in dicta that there was a strong argument that the plaintiff was a "public figure," such that the *Sullivan* standard would apply, but that it did not need to reach that issue. *Id.* at 694 n.4. The Court did not address the media/nonmedia distinction under *Sullivan*, let alone *Gertz*. (The case involved one media and one nonmedia defendant).

repeatedly declined to do so, belying any suggestion that it is an obvious and inevitable extension of First Amendment law. The Court should be particularly reluctant to do so in a case in which the defendant first made the argument after the jury rendered its verdict.

As for the argument that Cox did make below (albeit not in connection with the jury instructions)—that she is media—the district court applied a reasonable definition of "media," looking at a number of appropriate factors to assess whether Cox is "media" and ultimately concluding that she is not. (1-ER-43.) The district court never suggested that the medium of publication determines whether someone is "media" (*id.*) and expressly denied that view in its new trial opinion (1-ER-13-14).[9]

The interests that courts must balance in reporter's privilege cases are different than those in defamation cases so Plaintiffs disagree that the test should necessarily be the same. *See Shoen v. Shoen*, 5 F.3d 1289, 1292–93 (9th Cir. 1993) (stating that the journalist's privilege balances a party's rights to pretrial discovery against the public interest in protecting the integrity of the newsgathering process

[9] For example, no one would dispute that the Wall Street Journal is "media" whether published on large sheets of newsprint or at www.wallstreetjournal.com. Nor does it seem seriously disputable that SCOTUSblog.com is "media," applying the factors considered by the district court or any other reasonable factors. (See SCOTUSblog.com Amicus Brief at 3-7.)

and the free flow of information). There is no need to craft an exclusive or precise test for "media" in this case, however, because Cox does not meet any reasonable definition of "media." The non-exclusive factors that the district court considered, *none* of which Cox satisfies, are reasonable. (1-ER-43; 1-ER-14.) Indeed, the court could have applied, and to some extent did apply, a much simpler test: someone who spreads lies about you, refuses to investigate or desist after being told they are false, and then offers to rescind them in exchange for, as the district court put it, a "small but tasteful monthly fee" of $2,500 is not media. (1-ER-14.)

4. *Gertz* Applies Only To Matters of Public Concern, and This Is Not a Matter of Public Concern

The district court also correctly concluded that Padrick's service as Summit's bankruptcy trustee and payment of the liquidating trust's taxes is not a matter of "public concern." This is an additional reason that *Gertz* does not apply.

Whether speech addresses a matter of public concern is determined by its "content, form, and context as revealed by the whole record." *Dun & Bradstreet*, 472 U.S. at 761 (alterations and citation omitted). Cox's argument that any allegations of criminal conduct are necessarily a matter of public concern does not reflect existing law, nor would adopting such a rule be desirable.

Allegations of political decisions or business conduct that may pose a direct threat to public safety are matters of public concern. *See, e.g., Gilbrook v.*

City of Westminster, 177 F.3d 839, 850, 866 (9th Cir. 1999) (firefighter-union's statement that child's fire-related death was caused by city officials "placing politics above the safety of the people"); *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1293 (11th Cir. 2008) (city official's statement in press conference announcing lawsuit against gun dealers that gun dealers were violating federal gun laws, causing numerous illegally purchased guns to enter New York City).[10]

The same is true of allegations that local companies or professionals are preying on vulnerable citizens. *See, e.g., Manufactured Home Cmtys., Inc. v. County of San Diego*, 544 F.3d 959, 965 (9th Cir. 2008) (county supervisor's statement that owner of three local mobile home parks was "preying upon elderly tenants"); *Flamm*, 201 F.3d at 150 (statement to effect that lawyer had engaged in unethical solicitation of gender discrimination victims).

Allegations of fraud, illegality, or corruption in a particular consumer industry also have a direct impact on the public. *See, e.g., Hepps*, 475 U.S. at 769 (statements that store franchise had links to organized crime that it used to

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[10] *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), in which a state statute barring the release of rape victims' names was held unconstitutional, is inapt but also involved public safety. In that case, a newspaper that publishes summaries of police reports was found civilly liable for naming a rape-and-robbery victim. Applying a specific balancing test, the Court struck down the law, focusing on the fact that the published information was truthful, obtained lawfully from the police, and on a matter of public concern. *See id*. at 537-40.

influence government officials, particularly one state legislator); *Gardner v. Martino*, 563 F.3d 981, 984 (9th Cir. 2009) (consumer complaint about jet ski dealer discussed in "consumer problems" segment of radio talk show);[11] *Boule v. Hutton*, 328 F.3d 84, 91 (2d Cir. 2003) (fraud in the art market); *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1493 (11th Cir. 1988) (corruption in the American jai alai industry). That is fundamentally different than specific allegations of fraud and illegal conduct leveled against a single individual (and his company) regarding a single bankruptcy that affects the debtor and its creditors but has no significant impact on the general public. (1-ER-10-13.) Cox's statements evince a personal attack on Padrick and Obsidian (or "personal vendetta" as the district court put it (1-SER-25)), in an effort to extort money from them, not something to protect the public from a safety risk, an unlawful consumer practice, or the like.

The mere act of accusing someone of a crime is not inherently a matter of public concern. The Supreme Court has never recognized any constitutional value in encouraging free and open discourse regarding any and all accusations of criminal and illegal conduct that anyone might make against anyone

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[11] *Gardner* has no precedential value on this issue anyway because the plaintiff conceded the existence of "an issue of public interest" in that case, so the Court never discussed whether there actually was one, let alone "found" one (Cox Op. Brief. at 19). *Gardner*, 563 F.3d at 986 & n.7. *Weeks v. Boyer*, 246 F.3d 1231, 1233 (9th Cir. 2001) is also inapt because it discussed "public concern" in a substantially different context, related to public employers, not defamation.

else. If someone legitimately believes a crime may have been committed, it may be reported to the proper authorities for investigation and prosecution as warranted. Similarly, civil misconduct may be redressed through civil enforcement actions and civil lawsuits. There is no need to ensure a "free flow" of criminal accusations against one's fellow citizens.

Moreover, speaking to the public is not the same as speaking on matters of public concern. Yelling something defamatory in the public square or posting something defamatory on a public space on the Internet makes the statement "public" in the sense of publicizing it, but it does not transform it into a matter of "public concern." As the district court aptly described:

> [W]hile presumably Summit's collapse generated news stories, the content of the statements at issue here concern Padrick's role as a bankruptcy trustee. There is no evidence that any public attention was paid to the Summit bankruptcy proceedings other than the attention defendant gave to the issue. Thus, although defendant made her statements in a forum available to the general public, without more, her statements regarding Padrick's conduct in his role as a bankruptcy trustee in the bankruptcy proceedings of a private corporation, are not statements made on a matter of public concern.

(1-ER-46.) *See also Hutchinson v. Proxmire*, 443 U.S. at 135 ("Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure").

As with the media/nonmedia issue, Cox has changed her argument on the "public concern" issue since losing at trial, arguing in her new trial motion and now on appeal that it does not matter whether her speech was on a matter of public concern because *Gertz* applies to all speech of all types. This argument should be rejected without consideration as untimely. Before verdict, Cox never suggested that the "public concern" aspect of *Gertz* was irrelevant. (1-ER-14.)

The argument also lacks merit. In 1985, the dissenting justices in *Dun & Bradstreet* argued that *Gertz* applied to all speech regardless of whether it was on a matter of public concern. *Dun & Bradstreet*, 472 U.S. at 757 n.4. The plurality disagreed (as did two concurring justices), stating in no uncertain terms that the Court had never before considered whether the First Amendment protected defamatory speech on matters not of public concern. *Id*. As such, Cox is incorrect that *Gertz* prohibits strict liability in all defamation cases. (Cox Op. Brief at 24.)

Cox relies on a footnote in *Newcombe v. Adolf Coors Co.*, 157 F.3d 686 (9th Cir. 1998), to argue that the Ninth Circuit interprets *Gertz* as applying to all speech, not only speech on matters of public concern. The *Newcombe* footnote is dicta noting an argument that the Court did not reach, specifically a "strong argument" that the plaintiff was a "public figure" and thus subject to the *Sullivan* "actual malice" standard. 157 F.3d at 694 n.4. In briefly summarizing the holdings

of *Sullivan*, *Curtis*, and *Gertz*, the Court did misstate *Gertz*, but *Gertz* was not relevant to the substance of the footnote, let alone the decision, so the description of *Gertz* is dicta in its purest form.

The other cases Cox cites as barring strict liability in specific circumstances, mostly criminal, also are distinguishable. (Cox Op. Brief at 24-25.) None of these cases suggest that the First Amendment categorically excludes strict criminal or civil liability for any conduct involving speech. Indeed, if that were the case, the law would be exceedingly simple and would not require the case-by-case analysis in which courts in fact engage.

With regard specifically to the cases Cox cites as evincing a general "prohibition on strict liability [] in civil cases," (Cox Op. Brief at 25), the cited cases do not support that proposition. *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 492-93 (1962), involved a federal statute that imposed both criminal and civil liability for the act of mailing "obscene" materials but applied different state-of-mind standards, which the Court found untenable and constitutionally suspect. A state tort action is not comparable to a federal statute creating parallel civil and criminal liability. In *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034-36 (9th Cir. 1991), this Court declined to extend products liability law to books, holding that books generally are not a "product" but rather an intangible collection of ideas.

While the Court made general reference to some constitutional concepts, its decision was based on products liability law, not the First Amendment. Finally, in *Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 138-39 (2d Cir. 1984), the Second Circuit concluded that the plaintiff was a "public figure," that the same First Amendment standards should apply to public figures suing media defendants for "false light" as they do for defamation, and that the *Sullivan* standard therefore applied to the plaintiff's claims. The court never suggested that strict liability is generally constitutionally prohibited. *See id.*

Neither the Supreme Court nor this Court has ever recognized a general prohibition on strict liability for conduct involving speech, regardless of whether it is a matter of public concern. The Supreme Court has in fact rejected that interpretation of *Gertz*. *See Dun & Bradstreet*, 7742 U.S. at 757 n.4. The Court should not engage in such a radical extension of First Amendment law, particularly where the argument was made for the first time after the jury reached its verdict.

5. *Sullivan* Does Not Apply Because Padrick and Obsidian Are Not "Public Officials"

Like the *Gertz* standard, the *Sullivan* standard also does not apply, albeit for different reasons.

Both "public officials" and "public figures" are subject to the *Sullivan* standard, as extended by *Curtis*. Before trial, Cox argued that Padrick and Obsidian were "public figures" and therefore subject to *Sullivan*'s "actual malice" standard for all types of damages. The district court correctly rejected this argument (1-ER-39-43), and Cox has dropped her "public figure" argument on appeal. (Cox Op. Brief at 26-31.)

Instead, Cox now argues, as she did in her new trial motion, that Padrick and Obsidian are "tantamount to public officials with respect to plaintiff Padrick's activity as bankruptcy trustee." (Cox Op. Brief at 26.) This new argument should not be considered. (1-ER-9.) "Public figures" are a distinct category from "public officials." *See, e.g., Gertz*, 418 U.S. at 344-45, 351. It is common for courts to cite *Sullivan* when referencing the "actual malice" standard applicable to public figures because *Sullivan* is the case that created and still defines that standard, not because *Sullivan* is the standard for who is a "public figure," which it plainly is not. The "public official" argument is untimely and should not be considered.

In any event, Padrick is not a "public official." He is not an elected official. *See Sullivan*, 376 U.S. at 283 n.23 (stating that elected city commissioner was "clearly" a public official). He is not a governmental employee at all, let alone

one with sufficient authority to qualify as a "public official." *See id.* ("We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule * * *."); *Hutchinson*, 443 U.S. at 119 n.8 ("The Court has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees, however."). He does not have "any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy." *Curtis*, 388 U.S. at 154.

The court-appointed psychologist in *HBO v. Harrison*, 983 S.W.2d 31(Tex. App. 1998) was deemed a "public official" because he was granted sole authority by the family court to decide parental visitation in a child custody dispute, 983 S.W.2d at 37 & n.3, making his authority the same as "that of a judge," *id.* at 39. By contrast, Padrick's trustee service was subject to "tremendous oversight" by the bankruptcy court, the United States Trustee, and the Creditors Committee. (2-SER-68.) Moreover, the *HBO* decision relied in part on the Texas constitution, which the court explained was "broader than the First Amendment," thus allowing the psychologist to be treated as a "public official" under Texas law regardless of whether he would be under federal law. *See id.* at 39 n.4.

Cox's quote from *Press, Inc. v. Verran*, 569 S.W.2d 435, 441 (Tenn. 1978), in which a state social worker was found to be a "public official," is out of context as it is discussing how to determine whether the "occupant of [a] position in [a] branch of government" is a public official, *i.e.*, it is discussing "employees" of the government, not "employees" in some generic sense. Finally, *Bandelin v. Pietsch*, 563 P.2d 395 (Idaho 1977) involved a public figure, not a public official. In that case, the Idaho court concluded that a prominent lawyer and former state representative who was the pivotal figure in a controversial probate case (in which the judge criticized the plaintiff's conduct as negligent and referred him for prosecution) was a "public figure." 563 P.2d at 398. The court never even considered, let alone ruled, that he was a "public official." *See id.*

Padrick is an attorney and private citizen appointed by the local bankruptcy court to serve as trustee in the bankruptcy of a private company, to be supervised by the United States Trustee and the bankruptcy court and to be paid for his services out of the debtor's bankruptcy estate. 11 U.S.C. § 326(a). While that may make him an officer of the court, it does not make him a "public official" under *Sullivan*. *See Gertz*, 418 U.S. at 351 (rejecting argument that a lawyer who appeared at a coroner's inquest was a "de facto public official" because, *inter alia*,

that would "sweep all lawyers under the [*Sullivan*] rule as officers of the court and distort the plain meaning of the 'public official' category beyond all recognition").[12]

Nor is there any basis to treat Obsidian as a "public official." The district court correctly ruled that Padrick and Obsidian are not "public officials," an issue that it did not even need to consider, and that this Court should not consider, since Cox did not argue it until after the jury reached its verdict.

F. In Any Event, Any Alleged Error In The Instructions Was Harmless And Did Not Affect Cox's Substantial Rights

Whether review is for "plain error" or *de novo*, a misstatement of the law in a jury instruction only requires reversal if it more likely than not affected the outcome of the district court proceeding. In the plain error context, this is described as an error affecting the appellant's "substantial rights"—"which in the ordinary case means it affected the outcome of the district court proceedings." *Anekwu*, 695 F.3d at 973. In the *de novo* context, it is described as an error that is not "harmless error." An error in a civil jury instruction does not require reversal if it is "more probably than not harmless." *Gambini v. Total Renal Care, Inc.*, 486

[12] While bankruptcy trustees have duties specific to their roles, so do all attorneys who act under direction from the courts. If supervision by or assistance to the court in fulfilling a judicial function were sufficient to make a bankruptcy trustee a public official for defamation purposes, every attorney who issues a subpoena as an officer of the court, accepts an appointment as court-appointed counsel, or brings an action to obtain the court's assistance in seeking redress for a client would become a public official.

F.3d 1087, 1093 (9th Cir. 2007); *see also, e.g., Gulliford v. Pierce Co.*, 136 F.3d 1345, 1350 (9th Cir. 1998), *cert. denied*, 525 U.S. 828 (1998) (applying standard to alleged First Amendment error in jury instruction).

If a jury instruction was legally incorrect, prejudice is presumed, and the prevailing party must "demonstrate that it is more probable than not that the jury would have reached the same verdict had it been properly instructed." *Medtronic*, 526 F.3d at 493 (citation omitted). The prevailing party is not entitled to have disputed factual questions resolved in its favor. *Gambini*, 486 F.3d at 1093. However, if undisputed evidence would have caused the jury to reach the same result with a correct instruction as it did with the incorrect instruction, that is an appropriate way to establish harmlessness. *See id*. at 1097.

In this case, it is more probable than not that the jury would have reached the same verdict if it had been instructed under *Gertz* or *Sullivan* as it did instructed under Oregon law, because Cox's undisputed conduct establishes negligence and a reckless disregard for the truth or falsity of the statements in her 12/25/10 post.

Cox had no factual basis for her statements that Padrick and Obsidian had committed tax fraud in connection with Summit. Cox admits that her only source of information was Stephanie Studebaker—the daughter of one of the four

Summit principals under criminal indictment, who has a clear bias, an incentive to provide false information, and herself benefitted from the money stolen from Summit's clients. (2-SER-61; 2-SER-79.) Cox conducted no investigation before making the statements. (2-SER-61.)

Since Cox began her campaign to destroy Padrick's and Obsidian's reputations, they have repeatedly told her that her allegations are false, including in the cease-and-desist letter sent in December 2010 (2-SER-119); in the complaint filed in January 2011 (Docket No. 1); in declarations filed by Padrick in April 2011 and July 2011 (Docket Nos. 11, 29); and in fact and expert testimony at trial (2-SER-71; 2-SER-87-89.) Cox's response to the cease-and-desist letter was, in her own words, "flippant" (2-SER-106-108), as has been her response to the entire lawsuit. Only six minutes after receiving the cease-and-desist letter, Cox responded with a snide email (2-SER-121), and three days later she posted the 12/25/10 post now at issue. (2-SER-115.)

Indeed, on the day before trial, after nearly a year of Cox refusing to take down her posts and nearly a year of active litigation over the posts, Cox was asked at deposition whether she knew the correct tax treatment for a liquidating trust like Summit's, given that she kept insisting Padrick had committed tax fraud, and she admitted, "No, I do not." (2-SER-106.)

While unwilling to take down the posts because they were false, Cox was willing to take them down for money. After posting defamatory statements about Padrick and Obsidian for months and refusing to take them down despite being told they were false, Cox suddenly offered to "protect" Obsidian's online reputation and "promote" its business in exchange for a $2,500 monthly fee. (2-SER-123.) This course of conduct, culminating in her extortion attempt, is clear evidence of reckless disregard for the truth or falsity of her defamatory statements.

Given this undisputed evidence, any error in the district court giving a strict liability instruction under Oregon law, rather than a negligence or "actual malice" instruction under *Gertz* or *Sullivan*, was "more probably than not harmless," *Gambini*, 486 F.3d at 1093, and did not affect Cox's "substantial rights," *Anekwu*, 695 F.3d at 973. It more probably than not did not affect the outcome of the trial, even under the highest "actual malice" standard. *See Flowers v. Carville*, 310 F.3d 1118, 1129 (9th Cir. 2002) (discussing reckless disregard in making false statements in the face of a "clear warning sign" regarding their accuracy).

It should also be noted, to the extent plain error review applies, that Cox willfully disobeyed a court order by refusing to produce documents relevant to whether she had acted negligently or with malice, the very issues that she now claims should go to a jury. (2-SER-126-128; 2-SER-60.) In addition to all the

other reasons the judgment should be affirmed, Cox should not be granted a new trial to present evidence and arguments regarding her supposed investigation and state of mind when she willfully refused to provide documents on those issues when ordered to do so by the district court. Even where plain error occurs, the Court does not reverse unless the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Anekwu*, 695 F.3d at 973. In this case, it is reversing under such circumstances that would seriously affect the fairness, integrity, or public reputation of judicial proceedings.

II. THE VERDICT IS NOT EXCESSIVE

The district court did not abuse its discretion in denying Cox's motion for a new trial or remittitur based on an allegedly excessive verdict. There is ample evidence to support the verdict, as described in detail in the district court's opinion denying a new trial. (1-ER-27-33.)

A. Standard of Review

Orders upholding jury damages awards and denying new trials are reviewed for abuse of discretion. *Skyride Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1110 (9th Cir. 2012). "We will not disturb an award of damages on appeal unless it is clearly unsupported by the evidence." *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760 (9th Cir. 1985). The court "may not grant a new trial simply

because it would have arrived at a different verdict." *Silver Sage Partners v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001). Viewing the evidence concerning damages in the light most favorable to the prevailing party, *Fenner v. Dependable Trucking Co.*, 716 F.2d 598, 603 (9th Cir. 1983), the jury's award "must be affirmed unless it is 'grossly excessive' or 'monstrous' or 'shocking to the conscience.'" *Chalmers*, 762 F.2d at 760.

If a verdict is held to be excessive, remittitur may be used to reduce the award to the maximum amount sustainable by the proof, as an alternative to granting a new trial. *D&S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982).

B. The Jury's Award Is Supported By The Evidence

The jury's damages award in this case is not excessive given the evidence presented at trial. In determining plaintiffs' actual damages under Oregon law, the jury was correctly instructed to consider: (1) harm to plaintiffs' property, business, trade, profession, or occupation; (2) loss of plaintiffs' earning capacity; (3) harm to plaintiffs' personal or business reputations; and (4) humiliation or mental suffering. (2-ER-52.) Oregon Unif. Civ. Jury Instruction No. 53A.11. Moreover, even if actual damages are not proven, a defamed plaintiff is "entitled to

receive reasonable compensation for harm to reputation, humiliation, or mental suffering," because the law presumes such damages. *Id*.

In this case, the evidence presented to the jury regarding the 12/25/10 post included:

- Cox's post accuses Padrick and Obsidian of serious criminal conduct in connection with a professional engagement. (2-SER-115-118.)
- Cox's allegations are totally false. (2-SER-71-72; 2-SER-87-89.)
- Cox has used her Internet skills and proprietary software to ensure that, when someone searches online for information about Padrick or Obsidian, her post appears at the top of the search results. (2-SER-109-110.)
- The post has gone "viral" and is "everywhere." (2-SER-102-104; 2-SER-73-74.)
- Padrick and Obsidian are in a high risk business in which reputation and trustworthiness are extremely important. (2-SER-83-86; 2-SER-91-92.)
- It is extremely probable that anyone considering doing business with Padrick or Obsidian will conduct an Internet search before committing to hire or work with them. (2-SER-83.) It is highly probable that they will see Cox's post at that time. (2-SER-86; 2-SER-109-110.)
- Clients and others have in fact commented to Padrick and Obsidian about Cox's post and expressed serious concerns. Padrick is aware of specific instances of losing clients and business as a result of Cox's post. (2-SER-72-78; 2-SER-99-101.)
- A typical advisory engagement generates $100,000 to $5,000,000 in revenues. (2-SER-73.) In the current economy, Obsidian would

normally have a large amount of advisory work. (2-SER-73-77.) However, since Cox's post, the advisory business has dropped to almost nothing (2-SER-73), with Obsidian only securing one new advisory engagement in the 11 months between the post and trial. (2-SER-77.) Revenues from advisory work are down $1,000,000 from prior year. (2-SER-80.) The damage also has spilled over to the investment business. (2-SER-72.)

- Even after she was on notice of the falsity of her allegations, Cox refused to remove the 12/25/10 post, which was still posted on the morning of trial (2-SER-73-74), so Padrick and Obsidian will continue to suffer damages for the indefinite future. (2-SER-76; 2-SER-80.)

- Having refused to take down the post for legitimate reasons, Cox offered to do so in exchange for money—offering to "protect" Obsidian's online reputation and "promote" its business for a $2,500 monthly fee (2-SER-123)—demonstrating that she herself understands the financial impact of online reputation.

This evidence supports the jury's damages award as compensatory damages, let alone presumed damages.[13] Cox's argument that Padrick and Obsidian did not prove what damages flowed specifically from the 12/25/10 post, as opposed to her other defamatory posts (Cox Op. Brief at 38-40), has several problems. First, due to the summary judgment ruling, the only defamatory post that the jury ever saw was the 12/25/10 post. There is no reason to believe that the jury intended to award damages for other posts. Second, Cox's proposed standard would place an extraordinarily high burden on a defamed party, requiring a degree

[13] The verdict form does not specify the type of damages. (2-SER-56.)

of specificity in proving damages that almost no plaintiff would ever be able to satisfy (and which the law does not require). Third, if the district court is correct that any reasonable reader would view Cox's other posts as pure opinion, implying no objective facts, then any damages suffered by Padrick and Obsidian must have flowed from the 12/25/10 post.

In *Purgess v. Sharrock*, 33 F.3d 134, 142 (2d Cir. 1994), the court affirmed a $3.5 million award of compensatory damages on a defamation claim, where the defamed anesthesiologist offered evidence that the average annual salary for an anesthesiologist in his area was approximately $500,000 and that, as a result of the defamation, he was unemployed for seven months and then only able to obtain a job paying $130,000 annually. "It was not unreasonable for the jury to conclude that [plaintiff] would have earned substantially more in future years had he not been defamed." *Id.* Accordingly, there was sufficient evidence to support the $3.5 million compensatory damages award. *Id.*

In *Osorio v. Source Enterprises, Inc.,* No. 05-Civ-10029, 2007 WL 683985 *10 (S.D.N.Y.), another court also affirmed a $3.5 million award of compensatory damages in a defamation case. The plaintiff was well-known in her industry and the defamatory statement, in her words, had "branded her as a criminal in the industry." *Id*. Although "undoubtedly substantial," the $3.5 million

award was held to be "within a reasonable range for a case involving a defamatory statement that harms an individual's reputation." *Id.*

In *WJLA-TV v. Levin*, 564 S.E.2d 383 (Va. 2002), the court affirmed a $2 million award of damages in a defamation case. The plaintiff doctor, who was defamed by allegations of unprofessional and potentially criminal conduct, presented evidence of $900,000 of actual damages, and the court viewed the balance of the award as appropriate "compensation for the injury to his reputation and the humiliation and mental anguish he suffered as a result of [the defendant's] defamatory conduct." *Id.* at 396. The court noted that the trial court was entitled to a large measure of discretion, having seen and heard the witnesses. *Id.* While the defendant had criticized the plaintiff's evidence of actual damages in closing, it had not rebutted that evidence. *Id.* Given the "grave nature of the unfounded allegations" and "the inevitable damage caused to his professional reputation," the award was not excessive. *Id.*

Finally, in *Harper v. City of Los Angeles*, 533 F.3d 1010, 1028 (9th Cir. 2008), this Court affirmed a $15 million award to three police officers as compensation for "impairment of reputation, personal humiliation, and mental anguish and suffering" in a § 1983 action. The Court rejected the defendants' argument that the award was excessive because the officers had not offered any

evidence of specific monetary damages, concluding that the officers' testimony about the emotional and professional impact of the defamation was sufficient to support the award. *Id*. at 1030.

The jury's award in this case is not excessive. The district court did not abuse its discretion, and its order denying a new trial on the 12/25/10 post should be affirmed.

OPENING BRIEF ON CROSS-APPEAL

The district court should have allowed all of Cox's defamatory posts to go to trial, not only the 12/25/10 post. To the extent it is relevant, the district court also should have permitted plaintiffs' expert witness to testify regarding the influence of derogatory statements in online search results on buyers. Padrick and Obsidian raise these issues by cross appeal.

I. THE DISTRICT COURT SHOULD HAVE ALLOWED COX'S OTHER DEFAMATORY STATEMENTS TO GO TO TRIAL

The district court erred in limiting plaintiffs' claim against Cox to the single 12/25/10 post. All of Cox's posts "convey a false factual imputation," *Manufactured Home,* 544 F.3d at 963, and therefore are actionable defamation, not protected "opinion."

A. Standard of Review

The Court reviews a grant of summary judgment *de novo*. *Doe No. 1 v. Reed*, 697 F.3d 1235, 1238 (9th Cir. 2012). Whether statements "convey a false factual imputation" is ordinarily a question of law. *Manufactured Home,* 544 F.3d at 963. However, if the challenged statements "are reasonably susceptible of an interpretation which implies a provably false assertion of fact, then they may be considered by the jury to determine whether such an interpretation was in fact conveyed." *Id*. (internal quotation marks and citation omitted).

B. Preservation

This error was preserved in Padrick's and Obsidian's Opposition to *Sua Sponte* Motion for Summary Judgment. (Docket No. 27 at 2-13.)

C. There Is No Constitutional "Opinion" Privilege—Provably False Assertions of Implied Fact Are Actionable

In the introduction to its analysis in *Gertz*, the Supreme Court made a statement that it appears to have believed at the time was innocuous:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the

> careless error materially advances society's interest in 'uninhibited, robust, and wide open' debate on public issues.

Gertz, 418 U.S. at 339-40 (citation omitted).

This statement would seem to suggest a bright-line distinction between "opinion" and "false statements of fact," with the former enjoying complete constitutional protection and the latter enjoying no constitutional protection. In fact, however, that is not the law. In *Sullivan* and subsequent cases, including *Gertz* itself, the Supreme Court has made clear that false statements of fact do enjoy some constitutional protection in some circumstances, in order to avoid chilling truthful speech. Meanwhile, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Supreme Court has made clear that the First Amendment does not categorically protect speech containing "opinion."

Milkovich was a high school wrestling coach whose team had an altercation with a visiting team that resulted in injuries. 497 U.S. at 3-4. Following an investigation, the state's high school athletic association censured Milkovich, placed his team on probation, and declared the team ineligible for a state tournament. *Id*. at 4. Several parents and wrestlers sued the athletic association. *Id*. In that litigation, Milkovich testified about the altercation under oath, essentially suggesting that he and his team were innocent of any wrongdoing. *Id*. The court subsequently overturned the probation and ineligibility orders. *Id*.

A local reporter wrote an article about the lawsuit (for a newspaper published in the visiting team's home county) entitled "Maple beat the law with 'the big lie'." *Id.* As the title suggests, the primary theme of the article was that Milkovich had perjured himself to obtain a favorable decision. *Id.* at 4-5 & n.2.

The Supreme Court held that the reporter's statements were not protected by the First Amendment. It clarified the dicta in *Gertz*, which it recognized had been misunderstood as suggesting a general constitutional privilege for "opinion," explaining that a statement may be actionable even if it only implies facts and even if it is couched in the language of opinion, such as saying "I think" or "In my opinion" before saying something derogatory. *Id.* at 19-21.

The Court again recognized that while First Amendment protections are important so too are the core principles behind the concept of defamation.

> The numerous decisions discussed above establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the important social values which underlie the law of defamation, and recognized that society has a pervasive and strong interest in preventing and redressing attacks upon reputation.

Id. at 22 (internal quotation marks and citation omitted).

The Supreme Court concluded that a reasonable factfinder could find that the reporter's statements implied that Milkovich had actually committed the

crime of perjury, which was an "objectively verifiable event" susceptible of being proved true or false. *Id.* at 21-22. The First Amendment therefore did not preclude Milkovich's defamation claim, even though the article also contained the reporter's personal views. *See id.*; *see also Unelko Corp. v. Rooney,* 912 F.2d 1049, 1052-53 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991) (stating that *Milkovich* rejected a separate constitutional privilege for "opinion" and "effectively overruled" several post-*Gertz* Ninth Circuit decisions).

D. The District Court Should Not Have Granted Summary Judgment to Cox Regarding Her Other Defamatory Posts

In this case, the district court improperly invaded the province of the jury in granting summary judgment to Cox as to all of her defamatory posts about Padrick and Obsidian except the single 12/25/10 post.

Cox's posts on which the district court granted summary judgment are in the record at 2-SER-155-187. Among other things, Cox accuses Padrick and Obsidian of being "criminals" engaged in "illegal activity" and "fraud," including "corruption," "fraud," "deceit on the government," "money laundering," "defamation," "harassment," "tax crimes," "fraud against the government," and "solar tax credit fraud." (2-SER-155; 2-SER-162; 2-SER-166-69; 2-SER-171; 2-SER-176.) She claims that Padrick and Obsidian have "broken many laws in the last 2 years to do with the Summit 1031 case." (2-SER-168.) She states that

Padrick and Obsidian have paid off "media" and "politicians." (2-SER-161.) She also asserts that Padrick and Obsidian may have hired a hitman to kill her and that "many" people have told her that Padrick "is not above killing someone to shut them up." (2-SER-170.) These statements are on websites owned by Cox that purport to "expose" corruption, give consumers "knowledge," and reveal the "truth." (2-SER-155-187.) Indeed, Cox claims that she has "only posted truth on Obsidian Finance LLC and the Corrupt Bankruptcy Trustee Kevin Padrick" and that "The Truth is the Truth." (2-SER-168.) Her posts even conclude: "Proudly and Truthfully Posted by Crystal L. Cox." (*E.g.,* 2-SER-156.)

Under *Milkovich*, 497 U.S. at 21, if a reasonable factfinder could conclude that a statement implies an assertion of objective fact, then the First Amendment does not shield the speaker from a defamation claim. The Ninth Circuit uses a three-part test derived from *Milkovich* to make that determination: (1) whether the general tenor of the entire work negates the impression that the defendant is asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement is susceptible of being proved true or false. *Partington v. Bugliosi,* 56 F.3d 1147, 1153 (9th Cir. 1995).

Applying those factors here, Cox's statements that Padrick and Obsidian had committed numerous crimes should have gone to the jury, not been resolved on summary judgment. As to the first factor, the general tenor of Cox's statements does not negate the impression that she is asserting objective facts. To the contrary, her claims that she is "exposing" corruption, giving consumers "knowledge," and revealing the "truth" create that impression. Cox claims to be an "investigative" blogger. (*E.g.*, 2-SER-155.) She repeatedly reminds readers that her statements are the "truth" and "facts." (*E.g.,* 2-SER-155-156; 2-SER-166; 2-SER-168; 2-SER-178.) She suggests in one post that the fact Padrick has not (yet) sent her a "cease and desist" letter shows that he is guilty. (2-SER-158.) She says in another post that there is "tons of proof." (2-SER-187.) These statements all create, not negate, the impression that Cox's assertions are statements of fact.

As to the second factor, there are certainly instances in the proffered posts in which Cox uses "figurative or hyperbolic language," but it is not figurative or hyperbolic language that negates the impression that she is asserting facts. *See Partington,* 56 F.3d at 1153. Like the article in *Milkovich*, the primary and overarching theme of Cox's posts is to steadfastly accuse Padrick and Obsidian of committing criminal acts. (2-SER-155-187.) There is nothing figurative or hyperbolic about these accusations. *Cf. Fodor v. Doe*, No. 3:10-CV-0798, 2011

WL 1629572 at *4-5 (D. Nev.) (holding that blog posts accusing plaintiff of theft, fraud, and other crimes were not protected by the First Amendment where the statements were not sardonic and likely would be taken seriously by investors who saw them in online search results).[14]

Mixing fact-based statements with non-fact-based statements does not preclude liability. *Manufactured Home,* 544 F.3d at 963; *see also, e.g., Chapman v. Journal Concepts, Inc.*, Civil No. 07-00002, 2008 WL 5381353 at *11-13 (D. Hawaii) (holding that some statements in a surfing magazine implied objective facts about the plaintiff capable of verification, even though the article also contained substantial "narrative, figurative language, and inclusion of opinion"). Otherwise, defaming someone and calling them names would be more protected than defaming them alone. Nor does the use of strong language preclude liability. The reporter in *Milkovich* used strong language. *See Milkovich*, 497 U.S. at 5 n.2.

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[14] This case bears no similarity to ones in which courts have shielded satire, parody, figurative speech, and the like from defamation claims. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (advertisement parody); *Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974) (figurative use of "traitor" to describe union scabs); *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970) (figurative use of "blackmail" to describe negotiating position); *Kneivel v. ESPN*, 393 F.3d 1068 (9th Cir. 2005) (slang use of "pimp" in photo caption). The statements by SCOTUSblog.com referenced in its amicus brief, for example, all appear to be statements not "susceptible of being proved true or false," including statements in this category. (*See* SCOTUSblog.com Amicus Brief at 7-12.)

Finally, as to the third factor, Cox's defamatory statements are susceptible of being proved true or false. Padrick and Obsidian either did or did not commit the various crimes alleged by Cox. *Cf. id*. at 21-22 (statement that Milkovich committed perjury was susceptible of being proved true or false); *Manufactured Home,* 544 F.3d at 964 (statements that plaintiff lied to county officials and had reputation for driving out elderly tenants were susceptible of being proved true or false).

The district court should not have granted summary judgment for Cox regarding the statements in 2-SER-155-187. A reasonable factfinder could conclude that Cox is alleging actual criminal conduct by Padrick and Obsidian. At a minimum, the challenged statements are "reasonably susceptible" of that interpretation so it is the jury who should have decided "whether such an interpretation was in fact conveyed." *Manufactured Home,* 544 F.3d at 963; *see also Point Ruston, LLC v. Pac. Nw. Reg'l Church of the United Brotherhood of Carpenters & Joiners of Am.*, No. C09-5232, 2010 WL 3732984 at *8 (W.D. Wash.); *see generally Samuels v. Holland Am. Line–USA, Inc.*, 656 F.3d 948, 952 (9th Cir. 2011) ("In considering a motion for summary judgment, we must draw all reasonable inferences in favor of the nonmoving party.").

In concluding otherwise, the district court appears to have relied in part on a perception that Cox's statements do not appear particularly credible, at least to him. (1-SER-24-26; 1-SER-34.) However, that is precisely the type of assessment that should be left to the jury. The district court also suggests that reasonable readers will view blogs as inherently less reliable than other sources of information (1-SER-9-10), but that is not necessarily a reasonable assumption and again should have been left to the jury to weigh. *See, e.g.,* Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. Miami L. Rev. 137, 256-58 (2008) (discussing the "myth" of the Internet as a "low authority" medium); Steven A. Banning & Kaye D. Sweetser, *How Much Do They Think It Affects Them and Whom Do They Believe: Comparing the Third-Person Effect and Credibility of Blogs and Traditional Media*, Communication Quarterly, Vol. 55, No. 4, at 451 (Nov. 2007) (Docket No. 28-2).

Blog posts are as capable of defamatory content as any other statements and are subject to the same legal standard. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) ("online speech stands on the same footing as other speech"); *Kneivel*, 393 F.3d at 1073-75 (applying normal defamation analysis to online statements). Moreover, online statements can do remarkable damage with very little effort on the part of the speaker, which makes

them more dangerous, not less. *E.g., Cohen v. Google, Inc.*, 887 N.Y.S.2d 424, 428 (N.Y. Sup. Ct. 2009) (rejecting argument that Internet blogs are simply "a modern day forum for conveying personal opinions, including invective and ranting," and stating, to the contrary, "In that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communications with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored."); *Fodor*, 2011 WL 1629572 at *4 ("blogs posted on the Internet are potentially published to billions or more users daily").

II. PLAINTIFFS' EXPERT SHOULD HAVE BEEN ALLOWED TO TESTIFY REGARDING INFLUENCE ON BUYERS

The district court also should have allowed Robert Madrigal ("Madrigal") to give expert testimony regarding the influence of derogatory statements in online search results on buyers. To the extent this issue is relevant, after disposition of other issues, plaintiffs ask the Court to address it.

A. Standard of Review

A district court's decision to exclude expert testimony is reviewed for abuse of discretion. *Samuels*, 656 F.3d at 952. The district court "has broad discretion in assessing the relevance and reliability of expert testimony." *Id.* (citation omitted).

B. Preservation

Plaintiffs timely filed Madrigal's expert report before trial, describing his qualifications and intended testimony. (2-SER-129-152.) The district court ruled that it would not allow Madrigal to testify regarding the negative influence of derogatory statements in online search results on buyers. (1-SER-2-4.) This preserved the error. *See Heyne v. Caruso*, 69 F.3d 1475, 1481 (9th Cir. 1995).

C. The Testimony Should Have Been Allowed

Expert testimony is admissible if specialized knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue." FRE 702. In this case, Madrigal has extensive training, experience, and expertise in marketing, including having conducted academic research on buyer psychology. (2-SER-130; 2-SER-137-151.)

Madrigal testified at trial as a marketing expert that Padrick and Obsidian are in a high risk business in which reputation and trustworthiness are extremely important (2-SER-82-85); that it is extremely probable that anyone considering doing business with Obsidian or Padrick will begin by conducting an Internet search (2-SER-83); and that it is highly probably that anyone doing such a search will see Cox's derogatory post (2-SER-86).

Madrigal was not allowed to testify, however, that potential buyers of Padrick's and Obsidian's services likely would be negatively influenced by the presence of derogatory statements online. (2-SER-132.) This included not being allowed to testify that even the mere perusal of a search engine results page containing website descriptions and titles derogating Padrick and Obsidian negatively impacts a potential buyer's "first impression" and creates a "high probability that in such cases [the] potential buyer would simply cease any further search of Mr. Padrick or Obsidian and move on to other alternatives." (2-SER-135 (emphasis added).)

The district court disallowed this testimony as "invad[ing] the province of the jury" and necessarily "speculative." (1-SER-3-4.) According to the court, "[y]ou're going to be asking the jury to be speculating – the witness as well as the jury to be speculating on that." (1-SER-3.) However, the entire purpose of offering the testimony was to aid the jury in avoiding speculation. Based on his experience and expertise, Madrigal should have been allowed to testify on this subject, which goes directly to damages.

As long as the Court does not disturb the jury's award (in ruling on Cox's appeal), this particular error likely was harmless and the Court need not reach it. However, if the Court does reach it, the district court should not have

excluded competent evidence directly relevant to damages, especially in a case in which actual damages are necessarily difficult to prove with great specificity.

III. INNOCENT PARTIES MUST HAVE MEANINGFUL LEGAL RECOURSE AGAINST SPEAKERS WHO DEFAME THEM ON THE INTERNET

As Justice Stewart explained almost 50 years ago, and as the Supreme Court reiterated in *Milkovich*:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.
>
> * * * *
>
> The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

Rosenblatt, 383 U.S. at 92-93 (Stewart, J., concurring); *Milkovich*, 497 U.S. at 22-23 (quoting same).

If the Court accepts Cox's view of the First Amendment, citizens defamed by outright lies posted about them on the Internet will have little practical recourse against those who seek to destroy their reputations. The more widespread the defamation, the more outrageous it is, the more likelihood it will be deemed constitutionally protected. And if you are an officer of the court, are appointed by

the court to serve in any role in a legal proceeding, or are otherwise acting with any governmental authority at all, then, even if you can overcome the "opinion" hurdle to bring the claim at all, the very highest constitutional standard will apply to protect those who lie about you, making it much more difficult to obtain recourse and much less desirable to take on those roles. Finally, to make matters even more discouraging, you had better have really specific proof of the financial consequences of the damage to your reputation—even though that is very difficult given the very nature of the harm done to you. This is not a proper interpretation of the First Amendment.

Cox suggests injunctions against future defamatory statements and criminal and civil remedies for extortion as alternative "avenues of redress for defamation" if a defamation claim is unavailable or severely limited. (Cox Op. Brief. at 40-42.) These suggestions are illusory. Even if an injunction against future speech were available, which is highly debatable as Cox's own cited authorities demonstrate, an injunction would not undo the damage already done or compensate for existing losses. As for extortion, most defamation is not accompanied by extortion, criminal prosecution is outside the victim's control, and any civil extortion remedies available would focus on the extortion, not the defamation and damages caused by the defamation itself.

The Supreme Court has recognized that the states have a "strong and legitimate" interest in protecting their citizens' reputations, which must never be forgotten in any First Amendment analysis. Cox's arguments in support of reversal do not provide adequate protection of that interest. The district court's limitation of the trial to a single defamatory post also does not provide adequate protection of that interest and misapplies the balance struck in *Milkovich*.

CONCLUSION

For all of the foregoing reasons, the district court's denial of the new trial motion regarding the 12/25/10 post should be affirmed. The district court's grant of summary judgment regarding Cox's other defamatory posts should be reversed, however, and the matter remanded for further proceedings on those posts.

DATED this 7th day of December, 2012.

Respectfully Submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Obsidian Finance Group, LLC and Kevin D. Padrick do not know of any related cases pending in this court.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 28.1(e)(2) because this brief contains 16,270 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in size 14 font and Times New Roman style.

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CERTIFICATE OF E-FILING AND SERVICE

I hereby certify that on December 7, 2012, I electronically filed the foregoing **RESPONSE BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL** with the Clerk of the Court for the Ninth Circuit by using the appellate CM/ECF system.

I certify that parties of record to this appeal who are registered CM/ECF users, have registered for electronic notice, or have consented in writing to electronic service will be served through the appellate CM/ECF system.

DATED this 7th day of December, 2012.

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