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LIBEL DEFENSE RESOURCE CENTER
MODEL TRIAL BRIEF

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TABLE OF CONTENTS

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

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EDITOR'S NOTE:

Arguments contained in this brief are well supported by the authorities cited. Other supporting and contradicting authorities may also exist in some jurisdictions. For this reason, before filing a brief that incorporates any of these arguments, defense counsel should become familiar with all legal authorities in the applicable jurisdiction. The model brief does on occasion distinguish or otherwise deal with contrary authority, but does not do so in every case, nor in any case is treatment of contrary authorities exhaustive. If you have any questions, please feel free to contact the editor.

The term "actual malice" has been used in this model brief. You may wish to substitute the term "constitutional malice" to avoid any confusion with common law malice.

ARGUMENT

I.

EVIDENTIARY ISSUES: EXCLUSION OF PLAINTIFFS' EVIDENCE

Defendants move in limine to exclude the following evidence Plaintiffs propose to offer at trial: (1) Evidence of unrelated and irrelevant defamation actions brought against Defendants; (2) Testimony from a purported journalism expert concerning journalistic standards; (3) Testimony from a so-called "psycholinguistics" expert about how the average reader would understand the statements at issue; (4) Testimony from a second so-called "psycholinguistics" expert purporting to demonstrate that Defendants acted with actual malice; (5) Evidence concerning Defendants' refusal to retract the alleged defamatory statements; (6) Evidence of alleged emotional distress by Plaintiffs' relatives; and (7) Evidence of Defendants' editorial views and political beliefs. For the reasons set forth below, the evidence should be barred.

A.

EVIDENCE OF UNRELATED DEFAMATION ACTIONS AGAINST DEFENDANTS IS IRRELEVANT AND INADMISSIBLE AS CHARACTER EVIDENCE AND UNFAIRLY PREJUDICIAL

Plaintiffs propose to offer evidence of prior and pending defamation litigation brought against Defendants. Such evidence of claims wholly unrelated to this action is inadmissible under well-settled rules of evidence. Not only is such evidence irrelevant to any material fact at issue, it is a blatant attempt to put Defendants' "character" on trial. Even if the evidence were somehow relevant, it should

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nonetheless be excluded because it creates a substantial risk of prejudice.

1. Unrelated Defamation Actions Are Probative of No Material Fact at Issue.

Federal Rules of Evidence 402 establishes the basic rule of admissibility: "Evidence which is not relevant is not admissible." To be relevant, evidence must address some "fact that is of consequence to the determination of the action." Fed. R. Evid. 401.

The fact that Defendants may have been sued by other defamation plaintiffs for statements made at other times in other places says absolutely nothing about the questions at issue in this litigation: Whether *this* news story defamed *these* Plaintiffs and, if so, whether Defendants acted with **[Editors' Note: Insert actual malice/negligence]** in publishing the news story. Even if Defendants have been held liable in unrelated actions, such prior litigation is evidence only of their conduct at that time in those circumstances and remains wholly unconnected to their conduct here.

The rule excluding evidence of other litigation is long-established in defamation actions. *See Gariepy v. Pearson*, 120 F. Supp. 597, 598 (D.D.C. 1954) ("evidence of defamation committed by the defendant against third persons in no way connected with the suit is inadmissible"). Only when the alleged libel against the third party is contained in the same publication does it have any bearing on conduct relevant to the instant lawsuit. *Id*.

That is clearly not the case here. The evidence of other litigation proffered in this case arises from completely separate acts of reporting, involving different news stories, different subjects, and different reportorial methods all removed in time from any period that might be relevant to this litigation. *See Carter-Wallace, Inc. v. Hartz Mountain Indust., Inc.,* 1983 WL 1805 at, *5 (S.D.N.Y. 1983) (litigation over defendant's antitrust violations committed prior to time period of current litigation is irrelevant and inadmissible); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 555 F. Supp. 824 (D. Md. 1983) (same); *see also Vukadinovich v. Zentz*, 995 F.2d 750, 755 (7th Cir. 1993) (excluding from evidence in civil rights case other complaints of violations because they arose from dissimilar events and were filed for a number of different reasons). Exclusion is particularly appropriate where the other litigation is only threatened or remains pending and thus proves nothing more than "libel suits are an inherent risk in the publishing business." *McCoy v. Hearst Corp.,* 174 Cal. App. 3d 892 (1985), *rev'd on*

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other grounds, 42 Cal. 3d 835, 231 Cal. Rptr. 518, 727 P.2d 711 (1986), *cert. denied*, 481 U.S. 1041 (1987). Plaintiffs' proposed evidence of prior or pending defamation lawsuits should therefore be barred under Federal Rules of Evidence 402.

2. Evidence of Prior or Pending Litigation Is Inadmissible to Prove "Character" Rather Than Conduct.

Evidence of other crimes, wrongs, or acts is not admissible to prove character in order to show that a person acted in conformity with the character trait purported. Fed. R. Evid. 404(b). The logic behind that rule, as applied to tort cases, is obvious: The fact that a person may have acted without due care at some point in the past is not proof that he acted without due care on the day in question. *See Jones v. Southern Pacific R.R.*, 962 F.2d 447, 449 (5th Cir. 1992) (evidence of engineer's prior infractions inadmissible to show negligence on day of track wreck); *Lange v. B & P Motor Express, Inc.,* 257 F. Supp. 319, 322 (N.D. Ind. 1966) (citing "long-standing rule" excluding evidence of earlier, specific acts of negligence in negligence trial). Because evidence of unrelated litigation proffered by Plaintiffs here has no relevance to conduct at issue in this lawsuit, its only possible use by Plaintiffs is an impermissible one - to suggest that Defendants have a "propensity" to defame. *See Sullivan v. O'Leary*, 146 Mass. 322, 323, 15 N.E. 775, 777 (1888) (evidence of prior defamation improper because it "may have led the jury to believe that the defendant was accustomed to slander[ing] people and that he probably slandered the plaintiff").

Tavoulareas v. Piro, 93 F.R.D. 35, 43 (D.D.C. 1981), is directly on point. There, a defamation plaintiff sought to obtain and use evidence of other libel actions brought against *The Washington Post*. The district court granted a protective order, recognizing that plaintiffs' discovery request sought nothing more than evidence of unrelated prior acts inadmissible under Federal Rules of Evidence 404. *Id*.

Plaintiffs' attempt to use the evidence is also not saved by their reliance on Federal Rules of Evidence 406 which allows courts to admit evidence of "habit." Habit is "never to be lightly established," and evidence purporting to show it must be carefully scrutinized before admission. *Wilson v. Volkswagen of Am., Inc.,* 561 F.2d 494, 511 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020

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(1978). Courts have been particularly unwilling to find habit where the acts in question are intermittent torts occurring in a defendant's regular course of business over a period of years. *See, e.g., Thompson v. Boggs*, 33 F.3d 847, 855 (7th Cir. 1994), *cert. denied*, _ U.S. _, 115 S. Ct. 1692 (1995) (no habit of excessive force where there were five complaints against police officer but no evidence of total number of arrests he performed or number of contacts he had with public); *Jones v. Southern Pacific R.R.*, *supra*, 962 F.2d at 449 (nine violations in 29 years did not show engineer's habit of driving negligently). Such sporadic, unpredictable conduct fails to have the "invariable regularity" required for admissibility as habit under Rule 406. *See Meyer v. United States*, 638 F.2d 155, 159 (10th Cir. 1980). To the contrary, in the context of a defendant's repeated routine performance of a given task, the torts are the striking exception.

The same logic applies here. Even if true, the intermittent and irregular acts alleged in other defamation suits do not raise even a colorable claim of habit. Thus, the evidence of other defamation lawsuits is not allowed under either Federal Rules of Evidence 404 or 406.

3. Even if Evidence of Other Litigation Were Relevant, It Poses a Substantial Risk of Undue Prejudice and Confusion and Should Be Barred Under Fed. R. Evid. 403.

Were the Court to find evidence of unrelated litigation somehow relevant, exclusion would still be warranted under Federal Rules of Evidence 403. Rule 403 allows courts to bar even relevant evidence when its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay . . . ."

Application of Federal Rules of Evidence 403 is particularly appropriate in cases involving evidence of unrelated litigation. Such evidence necessarily brings into consideration not merely the underlying acts, but legal arguments, evidentiary rulings, and judicial determinations made in the prior lawsuits. As a result, the instant trial effectively becomes a re-litigation of prior actions by forcing the defense to limit the effect of the evidence and to place any adverse ruling into proper legal and factual context. That tangled intertwining of litigation is likely to cause "a significant departure" from the issues at hand and leave the jury "hopelessly confused." *United States v. Pollock*, 394 F.2d 922, 926 (7th Cir.), *cert. denied*, 393 U.S. 924 (1968) (barring evidence of prior civil suit in tax evasion case); *see*

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also Advanced Medical, Inc. v. Arden Medical Sys., Inc., 1990 WL 131072, at *3 (E.D. Pa.), *rev'd on other grounds*, 955 F.2d 188 (3d Cir. 1992) ("collateral search through [party's] other lawsuits . . . would likely cause the jury to be greatly confused and create an overall bias based upon factors external to the case"); *Federal Deposit Ins. Corp. v. Clark*, 768 F. Supp. 1402 (D. Colo. 1989), *aff'd*, 978 F.2d 1541 (10th Cir. 1992) (excluding evidence of settlement in another case as more confusing than probative on damages issue); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891, 910 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986), *cert. denied* 480 U.S. 910 (1987) (barring evidence of prior rulings made in cases involving subsidiary of party on basis of tendency to confuse).

Moreover, evidence of prior adverse decisions carries with it the official imprimatur of a court's decision, no matter how tangential the earlier decision may be to the litigation at hand. Consequently, it has the decided tendency to create an "aura of guilt" or imply "new wrongdoing from past wrongdoing." *United States Football League v. National Football League*, 1986-1 CCH Trade Case ¶ 67,075 at 62,538 (S.D.N.Y. 1986), *quoting International Shoe Machine Corp. v. United Shoes Mfg. Corp.,* 315 F.2d 449, 460 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963). The adversary's argument ceases to be just argument and appears in the eyes of jurors to possess the seal of judicial endorsement. For that reason, the Court in *United States Football League*, *supra*, an antitrust action, barred evidence of prior adverse antitrust decisions.

The same result is appropriate here. Defendants are entitled to have their conduct in this matter judged on its own merits, free of any taint that may unfairly emanate from prior litigation. Whatever probative value the prior litigation could have is slight and the danger of unfair prejudice is substantial. Exclusion under Federal Rules of Evidence 403 is thus proper.

B.

***[VERSION 1. (ACTUAL MALICE):]* EXPERT TESTIMONY ON A JOURNALIST'S PROFESSIONAL STANDARD OF CARE IS NOT PROBATIVE OF ANY FACT IN ISSUE WHERE ACTUAL MALICE IS THE TEST OF FAULT**

Plaintiffs propose to use testimony of a journalism expert, ostensibly to assist the jury in determining whether Defendants failed to act in compliance with professional standards. Such expert testimony is plainly inadmissible where Plaintiffs are concededly public figures and must show that

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Defendants acted with "actual malice." Actual malice is determined exclusively by reference to Defendants' actual beliefs about the truthfulness of their statements at the time of publication - not by their supposed failure to comply with professional standards of conduct. Thus, the proffered expert testimony will not help the jury "understand the evidence or determine a fact in issue" as required by Federal Rules of Evidence 702. It is simply irrelevant and should be excluded.

1. Actual Malice is Determined by a Subjective Standard of Defendants' Actual State of Mind, Not by an Objective Standard of Failure to Exercise Professional Due Care.

It is well-settled that defamation plaintiffs who are [***Editors Note: Insert public figures or officials***] must prove that the media defendants published the alleged libel with "actual malice" - that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Unlike negligence or professional malpractice, actual malice is not determined by comparing Defendants' conduct to some *objective* standard of due care. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Instead, to establish the reckless disregard required under the actual malice standard, Plaintiffs must show that Defendants "in fact entertained serious doubts" about the truth of the statements (*id*.) or published the statements with a "high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *see also Masson v. New Yorker Magazine, Inc*., _ U.S. _, 111 S. Ct. 2419 (1991). Put simply, the actual malice inquiry is concerned only with the *subjective* beliefs of Defendants at the time of publication.

The important distinction between actual malice and professional due care was emphasized in *Reuber v. Food Chemical News, Inc.,* 925 F.2d 703, 711 (4th Cir.), *cert. denied,* 501 U.S. 1212 (1991). There, the Fourth Circuit found that the trial court committed reversible error by instructing the jury that a publication's departure from professional standards was evidence of reckless disregard and actual malice. The appellate court correctly noted that the actual malice standard is subjective -determined solely by the defendant's actual beliefs about the truthfulness of the article - and not by how the defendant's conduct measured up to "professional norms."

2. Plaintiffs' Expert's Proffered Testimony Is Not Probative of Whether Defendants Acted with Actual Malice or Any Other Fact in Issue.

As Plaintiffs' expert conceded at deposition, she does not and cannot offer any evidence as to

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what Defendants were thinking at the time they investigated and published the allegedly libelous statements. To the contrary, she intends to offer only her opinion on whether Defendants acted in conformity with professional standards of care. That is not a matter at issue in this lawsuit. Indeed, it is entirely irrelevant and her testimony should be excluded under both Federal Rules of Evidence 702 and 402.

The U.S. District Court in *Harris v. Quadracci*, 856 F. Supp. 513 (E.D. Wis. 1994), *aff'd*, 48 F.3d 247 (7th Cir. 1995), was presented with precisely the same question. There, a public figure proposed to introduce an affidavit from an "expert journalist" to show that the writer of a magazine article "appears to have recklessly believed" the statements of a source used in preparing the story. 856 F. Supp. at 518-19. The *Harris* Court recognized the affidavit was, at best, an objective opinion that the writer's reporting did not conform with professional standards. *Id*. The Court concluded: "[E]xpert testimony generally is not helpful when determining actual malice against a subjective standard." 856 F. Supp. at 519; *see also Brueggemeyer v. American Broadcasting Companies, Inc.,* 684 F. Supp. 452, 466 (N.D. Tex. 1988) (expert's linguistic analysis of reporters' questions purporting to show a lack of neutrality is not probative of actual malice).

Expert testimony is properly excluded when it addresses facts not at issue in a trial (s*ee, e.g., United States v. One Parcel of Property*, 930 F.2d 139, 141 (2d Cir. 1991 *Traumann v. Southland Corp., 8*58 F. Supp. 979, 985 (N.D. Cal. 1994)); nor should expert testimony be admitted when the subject matter of the proffered testimony is within the understanding of the jury. *See, e.g., Brawn v. Heavy Indust., Ltd.,* 817 F. Supp. 184, 185 (D. Me. 1993); *State v. Roquemore*, 85 Ohio App. 3d 448, 454, 620 N.E.2d 110, 114 (Ohio App. 1993).

Here, the jury will be asked to decide whether Plaintiffs' proof establishes that Defendants knew the statements were false or entertained serious doubts about their truthfulness. That is not a determination requiring expert testimony on professional standards of care or, for that matter, the assistance of experts of any stripe. Such irrelevant testimony is inadmissible under both Federal Rules of Evidence 702 and 402, and Plaintiffs' expert should be excluded.

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3. Even Were the Expert Testimony Somehow Relevant, It Should Be Barred as Highly Prejudicial Under Fed. R. Evid. 403.

Expert testimony, like all other evidence, is subject to exclusion under Federal Rules of Evidence 403 if its probative value is substantially outweighed by the risk that it will create unfair prejudice or confusion. *United States v. Schmidt*, 711 F.2d 595, 598-99 (5th Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984). Indeed, because of its aura of special reliability and trustworthiness, expert testimony is particularly likely to be prejudicial. *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973).

Plaintiffs' expert conceded at deposition she has no first-hand knowledge of Defendants' state of mind during their reporting and publishing of the allegedly libelous statements. Thus, her testimony, if probative at all, is only remotely so. Weighed against that is the confusion and prejudice that will be engendered by her gratuitous testimony on professional standards. If allowed, she will testify that Defendants failed to comply with the standards of conduct of their profession. Such testimony cannot help but distract the jury from the real issue here: Did Defendants entertain actual doubts about the statements? Moreover, it needlessly calls into question Defendants' integrity and professional standing and creates the risk that jurors will come to view Defendants as deserving of punishment no matter what their liability may be as a matter of law. Moreover, the expert's status as an expert is likely to give the testimony weight with the jury that is far out of line with its probative value.

Federal Rules of Evidence 403 also authorizes exclusion of relevant evidence when its probative value is outweighed by "the danger of . . . confusion of the issues, or misleading the jury, or by considerations of undue delay [or] waste of time . . . ." The proffered testimony as to the standard of care, if admitted, will be rebutted by the conflicting testimony of defense experts as to the applicable standard, thus presenting a factual dispute on a complex but collateral issue - a "side show" likely to divert the jury's attention from the "circus." This will only result in distraction and confusion and will certainly be a waste of considerable time. Thus, exclusion under Federal Rules of Evidence 403 is appropriate.

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C.

[VERSION 2. (NEGLIGENCE):] **EXPERT TESTIMONY ON A JOURNALIST'S PROFESSIONAL STANDARD OF CARE IS NOT NEEDED BY THE JURY TO DETERMINE WHETHER DEFENDANTS ACTED WITH ORDINARY CARE**

Plaintiffs propose to use the testimony of an expert on journalism, ostensibly to assist the jury in determining whether Defendants failed to act in compliance with professional standards. Such opinion testimony should not be admitted under Federal Rules of Evidence 702, which allows expert testimony only if such testimony will help the jury "understand the evidence or determine a fact in issue." Because Plaintiffs are private individuals, and not public figures, Defendants will be judged by the standard routinely employed in negligence actions - ordinary care under the circumstances. Application of that standard to the facts of a case is quintessentially a task for the jury, requiring no special expertise. The expert' s testimony is thus unnecessary under the standards of Federal Rules of Evidence 702, and is likely to be unfairly prejudicial and confusing under Federal Rules of Evidence 403.

1. The Determination of Whether Defendants Acted with Ordinary Care Is Properly Left to the Judgment of the Jury, Requiring No Assistance from Experts.

Under the law of this jurisdiction, Plaintiffs, who are private figures, are required to show that defendants failed to act with ordinary care in publishing the allegedly libelous statements - *i.e.*, they failed to act like a reasonable person under the circumstances. *See, e.g., Brooks v. American Broadcasting Companies, Inc.,* 999 F.2d 167, 171, 173 (6th Cir.), *cert. denied, 510* U.S. 1015 (1993); (in private figure libel claim ordinary negligence, not professional/negligence, standard applied) *Kassel v. Gannett Co., Inc.,* 875 F.2d 935, 943 (1st Cir. 1989) ("a journalist must behave like a reasonable person under all the circumstances"); cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (requiring public figure plaintiffs to demonstrate "actual malice," not mere negligence). The standard of care relevant to this case will require the jury to decide only what juries routinely decide in matters alleging torts: Did Defendants act reasonably?

Plaintiffs seek to confuse this straightforward determination by interjecting into the case testimony about the professional standards of journalism. Such expert testimony may be necessary in jurisdictions that have adopted the "professional malpractice" model as the standard for fault in libel

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cases. *See Pearce v. E.F. Hutton Group, Inc.,* 664 F. Supp. 1490, 1509 (D.D.C. 1987) (noting that the Restatement (Second) of Torts adopts this approach with respect to media defendants, but holding that an ordinary negligence standard applies to non-defendants). In those jurisdictions, journalists are treated similarly to doctors and lawyers, and their conduct is judged not by the standards of "the ordinary reasonable person," but by the standards of conduct of their profession. That is not the law applicable here.

The duty of care owed by a reasonable person (the only standard relevant in this case) is a determination within the competence of jurors, not one necessitating the assistance of experts when the subject matter of the litigation is within the common knowledge of the layperson. *Bahamas Agricultural Industries Ltd. V. Owens-Innois, Inc.*, 526 F.2d 1174, 1177-78 (6th Cir. 1975). *See also Butera v. District of Columbia*, 235 F.3d 637, 689 (D.C. Cir. 2001); *Daskela v. District of Columbia*, 227 F.3d 433, 445 (D.C. Cir. 2000); *Transamerica Ins. Co. v. Keown*, 451 F. Supp. 397, 402 (D.N.J. 1978). Neither the business of journalism nor the subject matter of the alleged libel involves technical complexity. Indeed, in the specific context of defamation cases, courts have consistently held that expert testimony on the standard of ordinary care is not required and not helpful. *See Brooks v. American Broadcasting Companies, Inc.,* 999 F.2d at 173; *Kassel v. Gannett Co., Inc.,* 875 F.2d at 943; *Pearce v. E.F. Hutton Group, Inc.,* 664 F. Supp. at 1510. Thus, the expert testimony proffered here is properly excluded under Federal Rules of Evidence 702 as evidence that fails to meet the basic requirement of rendering assistance to the trier of fact.

2. Even If the Expert Testimony Were Admissible Under Fed. R. Evid. 702, It Should Nonetheless Be Barred as Highly Prejudicial Under Fed. R. Evid. 403.

Expert testimony, like all other evidence, is subject to exclusion under Federal Rules of Evidence 403 if its probative value is substantially outweighed by the risk that it will create unfair prejudice or confusion. *United States v. Schmidt*, 711 F.2d 595, 598-99 (5th Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984) (testimony of psycholinguistics expert offered by defendant in a criminal case was properly rejected). Indeed, because of its aura of special reliability and trustworthiness, expert testimony is particularly likely to be prejudicial. *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir.

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1973).

Testimony from Plaintiffs' expert is probative, if at all, only to the extent that evidence of journalists' professional standards sheds light on the standard of ordinary care. What is more likely to happen, however, is that the expert will testify to a standard that is either higher than that of the reasonable person or one that places importance on conduct that the reasonable person, left to his or her own devices, would find less probative of care. That cannot help but engender confusion among jurors as they try to reconcile the disparities between their own best judgments of reasonableness with the standard testified to under the guise of expertise. Moreover, the expert's status as an expert is likely to give her testimony weight with the jury that is far out of line with its probativeness, if not lead to a wholesale surrendering of the jury's own best judgment to hers. Such a result would clearly be prejudicial to Defendants; therefore exclusion under Federal Rules of Evidence 403 is fully warranted.

D.

EXPERT "PSYCHOLINGUISTIC" TESTIMONY ON THE MEANING OF DEFENDANTS' STATEMENTS IS IRRELEVANT, UNRELIABLE AND HIGHLY PREJUDICIAL

Plaintiffs propose to call an expert witness who will purport to give "psycholinguistic" evidence as to how the average person interpreted the allegedly libelous statements made by Defendants. Such pseudo-scientific testimony has been routinely rejected by the courts, and should be rejected here because: (1) it addresses a topic about which jurors need no expert assistance, (2) its scientific validity is highly suspect, and (3) its undeserved aura of authority makes it particularly prejudicial.

1. The Issue of Admissibility of Expert Opinion is a Question of Law for the Court Under Fed. R. Evid. 104(a) and 702.

The determination of whether expert testimony is admissible is to be made by the court at the outset under Federal Rules of Evidence 104(a). *Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 592* (1993); *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137, 147 (1999); *Brueggemeyer v. American Broadcasting Cos., Inc.,* 684 F. Supp. 452, 465 n.15 (N.D. Tex. 1988). To be admissible, the testimony must meet the two-prong test established by Federal Rules of Evidence 702: Will the testimony assist the trier of fact in understanding or determining a fact in issue. Is the proffered evidence properly considered "scientific, technical, or other specialized knowledge"? *Daubert*, 509 U.S.

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at 592; *Kumho Tire Co.*, 526 U.S. at 147.

2. Courts Have Repeatedly Barred Psycholinguistic Testimony.

Psycholinguistic testimony of the sort Plaintiffs proffer here meets neither prong of Federal Rules of Evidence 702. In fact, attempts to introduce psycholinguistic evidence have been roundly rejected in litigation involving a host of issues and circumstances. *See McCabe v. Rattiner*, 814 F.2d 839, 843 (1st Cir. 1987) (expert testimony on the meaning of the word "scam" excluded in libel action); *James v. San Jose Mercury News, Inc.,* 17 Cal. App. 4th 1, 18, 20 Cal. Rptr. 2d 890, 900 (1993) (linguistic analysis to show impact of alleged defamation irrelevant in libel action); *Brueggemeyer v. American Broadcasting Cos., Inc.,* 684 F. Supp. at 465 (linguistic analysis to show actual malice excluded in libel action); *World Boxing Council v. Cosell,* 715 F. Supp. 1259, 1265 (S.D.N.Y. 1989) (same); *United States v. Evans*, 910 F.2d 790, 803 (11th Cir. 1990) (psycholinguistic analysis to show defendant's state of mind excluded in extortion prosecution); *United States v. Aguon*, 851 F.2d 1158, 1171 (Ninth Cir. 1988) (9th Circuit has "repeatedly upheld the exclusion of psycholinguistic expert testimony"); *United States v. Schmidt*, 711 F.2d 595, 598-99 (5th Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984) (psycholinguistic testimony to show state of mind excluded in false swearing case); *United States v. Clifford*, 543 F. Supp. 424, 430 (W.D. Pa. 1982) (psycholinguistic analysis to show authorship of letters excluded because it fails to meet test of accepted science). The same result is called for here.

3. The Jury Can Easily Judge for Itself How a Statement Is Read by the Average Person.

Plaintiffs' proffer is based on the misguided assumption that jurors must be told by experts how to read. To the contrary, "the defamatory effect of a writing is 'to be ascertained not from the viewpoint of a critic or language expert, but rather from that of a reader of reasonable intelligence who takes ordinary interest in the articles of a periodical but does not commonly subject them to careful scrutiny and analysis.'" *Newell v. Field Enterprises, Inc.,* 91 Ill. App. 3d 735, 743, 415 N.E.2d 434, 442 (1980) (quoting *Christopher v. American News Co.,* 171 F.2d 275, 278 (7th Cir. 1948)); *see also Afro-American Publishing Co. v. Jaffe,* 366 F.2d 649, 655 (D.C. Cir. 1966) ("What counts is not the painstaking parsing of a scholar in his study, but how the newspaper article is viewed through the eyes

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of a reader of average interest"). It is hard to imagine a determination more appropriately left to jurors than how people like themselves read news articles. Indeed, expert testimony is likely to lead jurors into doing precisely what they should *not* be doing - *i.e.*, engaging in an exaggerated hypertechnical parsing of each word, phrase, and sentence.

Expert testimony of any sort is properly excluded when the jurors, as persons of common understanding, are as capable of comprehending the facts and drawing the correct conclusions as witnesses possessed with a claimed expertise or training. *Salem v. U.S. Lines Co.,* 370 U.S. 31, 35 (1962). Where the subject matter is not complicated and the factual issue to be resolved is within the general knowledge of jurors, exclusion of expert testimony is appropriate. *United States v. Evans*, 910 F.2d at 803; *United States v. Schmidt*, 711 F.2d at 598.

Here, the psycholinguist's testimony is offered solely to establish that the average reader would find Defendants' statements defamatory. Those statements were published in stories of general interest about a topic of public concern and were intended to be read and understood by the public at large. Neither the subject matter nor the form of expression is complicated. The stories are, in every respect, routine news accounts of the sort people like the jurors encounter every day. The judgment required of the jurors - a determination of what the stories mean - is no different from the judgments they make freely and necessarily every time they read. No expert is needed to assist them in doing that, either in the living room or in the courtroom.

Concededly, there may be the rare case where the nature of the communication or its subject matter poses complexities or technicalities that warrant expert testimony. *See Weller v. American Broadcast Cos., Inc.,* 232 Cal. App. 3d. 991, 283 Cal. Rptr. 644 (1991). This is not such a case. But even if it were, the introduction of expert testimony couched in the rarefied jargon of psycholinguistics is more likely to obscure and confuse than to enlighten and assist.

Rudin v. Dow Jones & Co., Inc., 557 F. Supp. 535 (S.D.N.Y. 1983), is a striking example of the wastefulness of such testimony. There, plaintiffs' psycholinguistic evidence was met, as it will be here, by counter-testimony from a defense psycholinguist. At issue was the seemingly straightforward

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question whether a reference to a lawyer as a "mouthpiece" for Frank Sinatra was defamatory. Plaintiffs' expert asked people to rate their reaction to the terms "mouthpiece" and "spokesman" on so-called "dimensions" or "scales," which required the respondents to check one of seven spaces between sets of two adjectives (*e.g.*, "just/unjust," "clean/dirty," "advisor/puppet"). The expert claimed this demonstrated how the term "mouthpiece" made people feel about the plaintiff. Defendant's expert then conducted similar research, as well as a separate study to determine whether the adjectives used in the plaintiffs' research were the right ones. Both sides weighed in at length with evidence about their methodologies, their results, and the flaws in the other side's research. At the end of this extended and tangential foray into the obscurities of social science, the court was forced to conclude that the studies "provide ambiguous evidence at best" and "shed little light" on the question of how the word "mouthpiece" was interpreted by readers. *Id*. at 543-44.

This Court should not be similarly diverted by such an exercise in futility. *See McCabe v. Rattiner*, 814 F.2d at 843 (trial court acted properly in excluding expert testimony on meaning of the word "scam"); *James v. San Jose Mercury News, Inc.,* 20 Cal. App. 4th 1 at 18, 20 Cal. Rptr. 2d at 900 (linguistic analysis not necessary or helpful in determining whether newspaper column defamed attorney). The determination of what the articles at issue mean is fully within the comprehension of the jury without any assistance from outside experts.

4. The Proffered Psycholinguistic Evidence Fails to Qualify as Valid Scientific Knowledge.

The Supreme Court in *Daubert* offered four factors to guide a court in determining whether evidence qualified as "scientific knowledge" admissible under Federal Rules of Evidence 702: (1) whether the theory or technique "can be (and has been) tested"; (2) whether it has been subject to peer review and publication; (3) whether it has a known and acceptable rate of error; and (4) whether it enjoys "general acceptance" in its field. 509 U.S. at 593-94. None of these factors is present here.

[EDITORS' NOTE: INSERT FACTS SPECIFIC TO PROFFERED RESEARCH AND EXPERT RESEARCHER HERE.]

Similar psycholinguistic research was rejected under New Jersey's version of the *Frye* test in *State v. Conway*, 193 N.J. Super. 133, 472 A.2d 588 (App. Div.), *cert. denied*, 97 N.J. 651, 483 A.2d

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174 (1984). In *Conway*, the defendant sought to introduce evidence from a linguistic expert who had analyzed secretly taped conversations and was prepared to testify that they demonstrated an absence of criminal intent. The *Conway* Court noted there were no scientific or legal textbooks in the area of linguistic analysis of secret tape recordings, that only four other linguists were involved in such analyses, and that no court had ever accepted evidence from such an analysis. 193 N.J. Super. at 170, 472 A.2d at 609; *see also United States v. Hearst*, 563 F.2d 1331, 1350 (9th Cir. 1977) (psycholinguistic techniques to identify authorship fail to meet test for scientific admissibility); *United States v. Clifford*, 543 F. Supp. at 430 (same). For these same reasons, Plaintiffs' proffered psycholinguistic evidence fails to qualify as valid "scientific knowledge" and is inadmissible under Federal Rules of Evidence 702.

5. Even if the Evidence Were Otherwise Admissible, it Should be Barred as Highly Prejudicial and Confusing Under Fed. R. Evid. 403.

Under Federal Rules of Evidence 403, even relevant evidence is to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." As the Supreme Court has pointed out, expert evidence must be subjected to closer judicial scrutiny than testimony from lay witnesses because of the difficulties presented in evaluating it. *Daubert*, 113 S. Ct. at 2798. Further, because expert testimony comes with an aura of special reliability and trustworthiness, it is particularly likely to be given undue weight by jurors. *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973). That is of grave concern here where overblown pseudo-scientific testimony may "discourage the factfinder from using his own judgment on an issue for which a factfinder is amply suited to make his own judgment." *World Boxing Council v. Cosell*, 715 F. Supp. at 1264.

The question here is uncomplicated: Were Defendants' statements read as defamatory by the average reader? At best, expert testimony may supplement in some small way the jurors' own personal sense of the statements' meaning. Offsetting that, however, is the extreme likelihood that jurors will be led to believe that some close, quasi-scientific parsing of the statements is not only expected but required. Such a result is simply contrary to well-established principles of law. As one

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court has said: "[H]air splitting analysis of language has no place in the law of defamation, dealing as it does with the impact of communication between ordinary human beings." *Barger v. Playboy Enterprises*, 564 F. Supp. 1151, 1155 (N.D. Cal. 1983) (quoting *MacLeod v. Tribune Publishing Co.,* 52 Cal. 2d 536, 343 F.2d 36 (1959)), *aff'd*, 732 F.2d 163 (9th Cir.), *cert. denied*, 469 U.S. 853 (1984). What could be more confusing to the jurors than to compel them to listen to just such "hair splitting" from an expert and then require them not to follow suit in their own deliberations?

Moreover, as *Rudin*, *supra*, demonstrates, the admission of psycholinguistic evidence necessarily forces Defendants to respond not merely with evidence in kind, but also with testimony designed to impeach Plaintiffs' research. Social science methodology, rather than defamation, becomes the focus of the case, and the resources of the Court and the litigants are consumed by a secondary issue that will likely end, as with *Rudin*, in a pointless evidentiary standoff. There is no need for this litigation to proceed down that path when the question at hand is fully, and properly, within the discernment of the jurors. Indeed, if the jurors, with all due deliberation, cannot see defamation in these stories without the aid of an expert, it certainly calls into question whether Plaintiffs actually suffered any reputational harm at all when the stories were read - without the aid of expert guidance - by the public at large. Plaintiffs' desire to make defamatory meaning a matter for expert testimony is little more than a veiled attempt to push jurors away from the natural and reasonable reading of the stories and toward the extreme and strained construction necessary to Plaintiffs' case. Because such prejudice cannot be justified by the minimal probative value of the evidence, Plaintiffs' expert testimony should be excluded under Federal Rules of Evidence 403.

E.

EXPERT "PSYCHOLINGUISTIC" TESTIMONY PURPORTING TO SHOW WHETHER DEFENDANTS ACTED WITH ACTUAL MALICE IS IRRELEVANT, UNRELIABLE, AND HIGHLY PREJUDICIAL

Plaintiffs propose to call an expert witness who will purport to give "psycholinguistic" evidence showing that Defendants acted with actual malice. Such pseudo-scientific testimony has been routinely rejected by the courts for good reasons: (1) It mischaracterizes the issue of actual malice; (2) It addresses a subject for which the jury requires no assistance; (3) Its scientific validity is highly suspect;

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and (4) Its undeserved aura of authority makes it particularly prejudicial. The testimony should not be allowed.

1. The Issue of Admissibility of Expert Opinion is a Question of Law for the Court Under Fed. R. Evid. 104(a) and 702.

Whether expert testimony is admissible must be determined by the court at the outset under Federal Rules of Evidence 104(a). *Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 592* (1993); *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137, 147 (1999); *Brueggemeyer v. American Broadcasting Cos., Inc.,* 684 F. Supp. 452, 465 n.15 (N.D. Tex. 1988). To be admissible, the testimony must meet the two-prong test established by Federal Rules of Evidence 702: Will the testimony assist the trier of fact in understanding or determining a fact in issue. Is the proffered evidence properly considered "scientific, technical, or other specialized knowledge"? *Daubert*,509 U.S. at 592; *Kumbo Tire Co.*, 526 U.S. at 147. *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137, 147 (1999); *Brueggemeyer v. American Broadcasting Cos., Inc.,* 684 F. Supp. 452, 465 n.15 (N.D. Tex. 1988).

2. Courts Have Repeatedly Barred Psycholinguistic Testimony.

Psycholinguistic testimony of the sort Plaintiffs proffer here meets neither prong of Federal Rules of Evidence 702. In fact, attempts to introduce psycholinguistic evidence have been roundly rejected in litigation involving a host of issues and circumstances. *See Brueggemeyer v. American Broadcasting Cos., Inc.,* 684 F. Supp. at 465 (linguistic analysis to show actual malice excluded in libel action); *World Boxing Council v. Cosell,* 715 F. Supp. 1259, 1265 (S.D.N.Y. 1989) (same); *McCabe v. Rattiner,* 814 F.2d 839, 843 (1st Cir. 1987) (expert testimony on meaning of the word "scam" excluded in libel action); *James v. San Jose Mercury News, Inc.,* 17 Cal. App. 4th 1, 18, 20 Cal. Rptr. 2d 890, 900 (1993) (linguistic analysis to show impact of alleged defamation irrelevant in libel action); *United States v. Evans*, 910 F.2d 790, 803 (11th Cir. 1990) (psycholinguistic analysis to show defendant's state of mind excluded in extortion prosecution); *United States v. Aguon*, 851 F.2d 1158, 1171 (9th Cir. 1988) (Ninth Circuit has "repeatedly upheld the exclusion of psycholinguistic expert testimony"); *United States v. Schmidt*, 711 F.2d 595, 598-99 (5th Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984) (psycholinguistic testimony to show state of mind excluded in false swearing case); *United States v. Clifford*, 543 F. Supp. 424, 430 (W.D. Pa. 1982) (psycholinguistic analysis to show authorship of letters

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excluded because it fails to meet test of accepted science). The same result is called for here.

3. The Testimony Misconstrues the Issue of Actual Malice.

Plaintiffs' expert proposes to analyze tapes of reporters' interviews and the articles at issue to somehow find proof in the reporters' language that they acted with actual malice. Even if this research had some scientific legitimacy, which it does not, it would nonetheless be inadmissible because it addresses entirely the wrong issue - *i.e.*, whether the reporters knew their stories were false or acted with reckless disregard of the truth, and thus shows nothing whatsoever about actual malice.

This point is made clear by Plaintiffs' description of the research methodology upon which the proffered testimony is based. In a nutshell, the expert examines the reporters' language and purports to find "linguistic clues" exhibiting bias in the substance or tone of the message. *See World Boxing Council v. Cosell*, 715 F. Supp. at 1264; *Brueggemeyer v. American Broadcasting Cos., Inc.,* 684 F. Supp. at 464. The expert intends to show that the reporters' words lacked "linguistic neutrality" and "evenhandedness," and thus the reporters were not impartial. *Brueggemeyer v. American Broadcasting Cos., Inc.,* 684 F. Supp. at 466. But the failure of a reporter to be neutral is not proof of reckless disregard for the truth. *Id*. To the contrary, it may well reflect the reporter's considered belief, based on extensive research, that a particular source is not telling the truth and should not be trusted. Moreover, there is no legal requirement that a reporter not have an opinion or even that a reporter meet professional standards of journalistic objectivity. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 664 (1989) (departure from professional standards is not proof of actual malice). Put simply, the dispositive issue in actual malice is not the reporter's attitude toward the subject of the article or the interview, but his or her attitude toward the truth. *Reuber v. Food Chemical News, Inc., 925 F.2d 703, 711* (4th Cir.), *cert. denied*, 501 U.S. 1212 (1991). Because the expert's research methodology, even if it were valid, shows only the former and does not bear on the latter, the testimony is irrelevant and should be excluded.

4. The Jury Needs No Expert Assistance to Analyze Actual Malice.

Plaintiffs' proffer is further subject to exclusion because it is based on the misguided assumption that jurors need the assistance of experts to determine whether Defendants acted with reckless

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disregard. To the contrary, the determination of a defendant's state of mind is a matter routinely left to juries without the assistance of experts, whether in criminal cases, tort actions, or other types of litigation. *See United States v. Evans*, 910 F.2d at 803 (psycholinguist's expert testimony not needed to determine criminal intent); *United States v. Schmidt,* 711 F.2d at 598 (same); *Hanna v. Fletcher*, 261 F.2d 75, 77 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 912 (1959) (question of duty of care is within competence of lay persons).

Expert testimony of any sort is properly excluded when the jurors, as persons of common understanding, are as capable of comprehending the facts and drawing the correct conclusions as witnesses possessed with a claimed expertise or training. *Salem v. U.S. Lines Co.,* 370 U.S. 31, 35 (1962). Where the subject matter is not complicated and the factual issue to be resolved is within the general knowledge of jurors, exclusion of expert testimony is appropriate. *United States v. Evans*, 910 F.2d at 803; *United States v. Schmidt*, 711 F.2d at 598.

Here, the jurors will be asked to apply a subjective standard to defendants' conduct - that is, did Defendants, as a matter of fact, act with reckless disregard for the truth? They will not be required to gauge whether Defendants failed to meet some objective standard of care or the professional norms of journalism. *See Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. at 664. As a result, "expert testimony generally is not helpful when determining actual malice against a subjective standard." *Harris v. Guadracci,* 856 F. Supp. 513, 519 (E.D. Wis. 1994), *aff'd*, 48 F.3d 247 (7th Cir. 1995).

For these reasons, courts have consistently held that psycholinguistic evidence purporting to show state of mind does not assist the trier of fact. In *United States v. Evans*, 910 F.2d 790, a defendant charged with extortion sought to introduce a psycholinguistic analysis of incriminating taped conversations in order to show he had spoken without criminal intent. The court held that "the expert's testimony would not assist the jury because the subject matter of the testimony, conversation, was one which could be expected to be within the general knowledge of jurors." 910 F.2d at 803. The court went on to note: "The jury's task was to determine, on the basis of its collective experience and

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judgment, what Evans' state of mind was when he accepted the money . . . . We agree with the district court that expert testimony would not have aided the jury in performing this task." *Id*.

An identical conclusion was reached in *United States v. Schmidt*, 711 F.2d 595, where the defendant in a false swearing prosecution proposed to introduce psycholinguistic testimony to show that his falsehoods were not made knowingly. The Fifth Circuit agreed with the trial court that "the issue presented was not complex and that the jury was more than capable of examining and considering the context" of the defendant's false statements. 711 F.2d at 598; *see also United States v. Devine*, 787 F.2d 1086, 1088 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986) (linguistic analysis not needed where contents of tape were within average person's understanding); *United States v. DeLuna*, 763 F.2d 897, 912 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985) (linguistic analysis properly excluded).

Precisely the same principles have been applied in libel cases directly on point with this case. In *World Boxing Council v. Cosell*, the court rejected out of hand psycholinguistic testimony proffered to show actual malice: "A layman is perfectly capable of reading Cosell's book and comparing it with the articles he claims to have relied on, without the 'help' of a linguistics expert. . . . [The testimony] transforms a common sense issue into a technical one, and relies on virtually incomprehensible, pseudo-scientific jargon." 715 F. Supp. at 1264. In *Brueggemeyer v. American Broadcasting Cos., Inc.,* 684 F. Supp. at 465, the court found the proffered psycholinguistic analysis "too circumscribed to be reliable or to assist the jury." The court reasoned that the expert's analysis could not examine all the newsgathering done by defendants and thus failed to address adequately whether the defendants acted with due regard for the truth. 684 F. Supp. at 465-66.

The proffer in this case is indistinguishable from those excluded in both the criminal and libel cases cited above. Neither the articles at issue nor the information-gathering methods of the reporters are technical or complicated. Nothing more is required of the jury here than that it apply "its collective experience and judgment" to a "common sense issue" well within the understanding of a lay person. The jury will be asked to do precisely what juries do all the time without the aid of experts - *i.e.*, review the evidence and determine whether the necessary degree of intent or fault is shown. The proffered

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testimony thus plainly fails to meet the basic requirement of Federal Rules of Evidence 702 that it be of assistance to the trier of fact.

5. The Proffered Psycholinguistic Evidence Fails to Qualify as Valid Scientific Knowledge.

The Supreme Court in *Daubert* offered four factors to guide a court in determining whether evidence qualified as "scientific knowledge" and was therefore admissible under Federal Rules of Evidence 702: (1) Whether the theory or technique "can be (and has been) tested"; (2) Whether it has been subject to peer review and publication; (3) Whether it has a known and acceptable rate of error; and (4) Whether it enjoys "general acceptance" in its field. 113 S. Ct. at 2786. None of these factors is present here.

EDITORS' NOTE: [Insert facts specific to proffered research and researcher.]

A nearly identical analysis was rejected under New Jersey's version of the *Frye* test in *State v. Conway*, 193 N.J. Super. 133, 472 A.2d 588 (App. Div.), *cert. denied*, 97 N.J. 651, 483 A.2d 174 (1984). In *Conway*, the defendant sought to introduce evidence from a linguistic expert who had analyzed secretly taped conversations and was prepared to testify that the defendant's speech demonstrated an absence of criminal intent. The *Conway* court noted that there were no scientific or legal textbooks in the area of linguistic analysis of secret tape recordings, that only four other linguists were involved in such analyses, and that no court had ever accepted evidence from such an analysis. 193 N.J. Super. at 170, 472 A.2d at 609; *see also United States v. Hearst,* 563 F.2d 1331, 1350 (9th Cir. 1977) (psycholinguistic techniques to identify authorship fail to meet test for scientific admissibility); *United States v. Clifford*, 543 F. Supp. at 430 (same). Plaintiffs' proffered psycholinguistic evidence thus fails to qualify as valid "scientific knowledge" and is inadmissible under Federal Rules of Evidence 702.

6. Even if the Evidence Were Otherwise Admissible, It Should Be Barred as Highly Prejudicial and Confusing Under Fed. R. Evid. 403.

Under Federal Rules of Evidence 403, even relevant evidence is to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." As the Supreme Court has pointed out, expert evidence must be subject to

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closer judicial scrutiny than testimony from lay witnesses because of the difficulties presented in evaluating it. *Daubert*,509 U.S. at 595. Further, because expert testimony comes with an aura of special reliability and trustworthiness, it is particularly likely to be given undue weight by jurors. *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973). That is a grave concern here where overblown pseudo-scientific testimony may well displace jurors' reliance on their own sound judgment.

Courts considering psycholinguistic testimony repeatedly have held that it must be rejected as prejudicial under Federal Rules of Evidence 403. Directly on point is *World Boxing Council v. Cosell*, where the court held that psycholinguistic testimony to show actual malice "is more confusing than probative . . . and would discourage the factfinder from using his own judgment on an issue for which a factfinder is amply suited to make his own judgment." 715 F. Supp. at 1264; *see also United States v. Evans*, 910 F.2d at 803 (psycholinguistic testimony "presented a risk that the jury would allow the judgment of the expert to substitute for its own"). Moreover, the jargon-ridden nature of the proposed testimony has enormous propensity to confuse the issues and mislead jurors. *World Boxing Council v. Cosell,* 715 F. Supp. at 1264; *United States v. Evans,* 810 F.2d at 803; *United States v. Schmidt*, 711 F.2d at 598.

In addition, the admission of psycholinguistic evidence would necessarily compel Defendants to respond not merely with evidence in kind but also with testimony designed to impeach Plaintiffs' research. Social science research methodology, rather than defamation, would become the focus of the case, and the resources of the Court and the litigants would be consumed by a secondary issue that would likely end in a pointless evidentiary standoff.

Rudin v. Dow Jones & Co., Inc., 557 F. Supp. 535 (S.D.N.Y. 1983), is a striking example of the wastefulness of such testimony. At issue in *Rudin* was the seemingly straightforward question of whether a reference to a lawyer as a "mouthpiece" for Frank Sinatra was defamatory. Plaintiff' s psycholinguistic evidence was met, as it would have to be here, by counter-testimony from a defense psycholinguist. Plaintiffs' expert asked people to rate their reaction to the terms "mouthpiece" and "spokesman" on "dimensions" and "scales," which required the respondents to check one of seven

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spaces between sets of two adjectives (*e.g.,* "just/unjust," "clean/dirty," "advisor/puppet"). Defendant's expert then conducted similar research, as well as a separate study, to determine whether the adjectives used in plaintiffs' research were the right ones. Both sides weighed in at length with evidence about their methodologies, their results, and the flaws in the other side's research. At the end of this extended and tangential foray into the obscurities of social science, the court was forced to conclude that the studies "provide ambiguous evidence at best" and "shed little light" on the question of how the word "mouthpiece" was interpreted by readers. 557 F. Supp. at 543-44.

There is no need for this litigation to proceed down that path when the question at hand - Defendants' state of mind - is fully, and properly, within the discernment of the jurors, as courts have frequently held. Whatever slight probative value psycholinguistic analysis might have is overwhelmingly offset by the prejudice and confusion the evidence will engender. The expert testimony should be excluded under Federal Rules of Evidence 403.

F.

EVIDENCE THAT DEFENDANTS DID NOT RETRACT THE ALLEGED LIBELS IS NOT PROBATIVE OF ACTUAL MALICE AND SHOULD BE EXCLUDED FROM THE LIABILITY PHASE OF THIS TRIAL

In *New York Times v. Sullivan*, *supra*, the Supreme Court held that the newspaper's failure to retract the allegedly libelous statements was not adequate evidence of actual malice and then expressed doubt "whether or not a failure to retract may ever constitute such evidence." 376 U.S. at 286. In the aftermath of that groundbreaking decision, courts have resolved the question left unanswered in *Sullivan* by holding that the failure to retract is not probative of actual malice. *New York Times Co. v. Connor*, 365 F.2d 567, 577 (5th Cir. 1966); *Connelly v. Northwest Publications, Inc.,* 448 N.W.2d 901, 905 (Minn. Ct. App. 1989). As those cases instruct, evidence demonstrating the absence of a retraction is properly excluded during the liability phase of this trial as irrelevant under Federal Rules of Evidence 402 and prejudicial under Federal Rules of Evidence 403.

The decisions in *Connor* and *Connelly* are based on a sound reading of both the law of evidence and the law of libel. The constitutional element of actual malice has a temporal element: It requires a showing that Defendants had actual knowledge that the story was false or entertained

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serious doubts about its truthfulness *at the time of publication*. *See Bose Corp. v. Consumers Union of the United States, Inc.,* 466 U.S. 485, 512 (1984); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964). The decision not to retract obviously falls outside the relevant time frame; it reflects the state of mind of Defendants *following* publication. Plaintiffs would obviously object were Defendants to introduce evidence of a post-publication investigation and then argue that the care they showed in investigating the story after it was published should somehow excuse their reckless disregard for the truth before publication. Evidence showing a failure to retract is no different and is identically lacking in probative value as to actual malice.

Moreover, the failure to retract is a decision based on information not available at the time of publication, including presumably Plaintiffs' demand for retraction. That Defendants chose not to print a retraction after receipt of new information post-publication is simply not probative of what was in Defendants' mind at the time of publication. "It is self-evident that information acquired after the publication of defamatory material cannot be relevant to the publisher's state of mind of his alleged malice at the time of publication." *Herbert v. Lando,* 781 F.2d 298, 305-06 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986). Indeed, the failure to retract is so lacking in probative value that it could just as easily be construed as evidence that defendants truly believed in their statements and thus did not act with actual malice. *Connelly v. Northwest Publications, Inc.,* 448 N.W.2d at 905.

(EDITORS' NOTE: Continue with the remaining paragraphs if bifurcation of liability from damages or punitive damages (Section III.C., infra) appears feasible.)

Nor should Plaintiffs be given carte blanche to introduce evidence of the failure to retract simply because such evidence might become relevant in determining punitive damages in the event actual malice is established. *See Hinerman v. Daily Gazette, Inc.,* 188 W. Va. 157, 177-78, 423 S.E. 560, 580-81 (1992). Whatever the relevance of that evidence to the damages question, it continues to be irrelevant, prejudicial, and confusing to the jury's threshold determination of whether there was actual malice at the time of publication.

In that regard, it is not unlike evidence of a defendant's wealth. While wealth may at times be

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admissible on the issue of punitive damages, "[d]efendant's wealth should not be a weapon to be used by plaintiff to enable him to induce the jury to find the defendant guilty, thus entitling plaintiff to punitive damages." *Rupert v. Sellers*, 48 A.D.2d 265, 272, 368 N.Y.S. 2d 904, 912 (1975); *see also Campen v. Stone*, 635 P.2d 1121 (Wyo. 1981); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994). The *Rupert*, *Campen*, and *Texas Transportation* courts required the trials to be conducted on a bifurcated basis, with liability and damages determined separately - a procedure that has been followed frequently in federal libel cases. *See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F. Supp. 1240, 1245 (N.D. Ill. 1986); *Guccione v. Hustler Magazine, Inc.,* 632 F. Supp. 313, 315 (S.D.N.Y. 1986); *Machleder v. Diaz*, 618 F. Supp. 1367, 1369 (S.D.N.Y. 1985). Like wealth, the failure to retract has no bearing on liability, but is likely to color the jury's determination of whether Plaintiffs should receive damages. Accordingly, evidence of the failure to retract should be excluded from the liability phase of this trial under Federal Rules of Evidence 402 and 403.

G.

EVIDENCE CONCERNING EMOTIONAL DISTRESS PURPORTEDLY SUFFERED BY PLAINTIFFS' RELATIVES IS IRRELEVANT TO THIS ACTION AND HIGHLY PREJUDICIAL

Plaintiffs further propose to introduce irrelevant and prejudicial testimony from family members who claim to have suffered emotional harm as a result of the alleged libels. None of those family members has joined in this action. Instead, Plaintiffs seek to interject those claims into this litigation either on behalf of the family members or as damage claims to which Plaintiffs themselves are entitled. Both theories are plainly contrary to established law. Any evidence of alleged injuries to others is both irrelevant to this action and prejudicial to Defendants and should not be admitted.

1. Evidence of Others' Injuries is Irrelevant to These Plaintiffs' Defamation Claim.

It is fundamental to the law of libel that an action for defamation is personal to the party defamed. *McBeth v. United Press Intl., Inc.,* 505 F.2d 959, 960 (5th Cir. 1974), *cert. denied* 421 U.S. 976 (1975); *Davis v. Costa-Gavras*, 619 F. Supp. 1372, 1376 (S.D.N.Y. 1985); *Coulon v. Gaylord Broadcasting,* 433 So. 2d 429, 431 (La. Ct. App.), *cert. denied*, 439 So. 2d 1073 (1983); *see* W. Prosser, *The Law of Torts* § 111 (1995 Ed.). Two important lessons flowing from this principle are

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relevant here.

First, Plaintiffs have no right to recover for derivative injuries that may have been sustained by others as a result of the defamation that Plaintiffs themselves suffered. The only basis upon which an action for defamation may be grounded is damage to one's own reputation. *Hughes v. New England Newspaper Publishing Co.,* 312 Mass. 178, 179, 43 N.E.2d 657, 658-59 (1942); *accord Carr v. Mobile Video Tapes, Inc.,* 893 S.W. 613, 619 (Tex. Ct. App. 1994); *Lee v. Weston,* 402 N.E.2d 23, 27-28 (Ind. Ct. App. 1980). While a person maintaining an action for defamation may be entitled to recompense for consequential damages, those damages do not include injuries suffered by others no matter how close the relationship. *See Talbot v. Johnson Newspapers Corp.,* 124 A.D.2d 284, 286, 508 N.Y.S.2d 80, 83 (1986) (defamed plaintiff cannot recover for spouse's injuries caused by the defamation of plaintiff). As one court has articulated the rule: "A person who is injured by reason of the fact that someone is libeled has no right of recovery. Any detriment he sustains is *damnum absque injuria*." *Fowler v. Curtis Publishing Co.,* 78 F. Supp. 303, 304 (D.D.C. 1948), *aff'd*, 182 F.2d 377 (D.C. Cir. 1950); *accord Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 900 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981); *see also Geddes v. Princess Properties Int'l, Ltd.,* 88 A.D.2d 835, 451 N.Y.S.2d 150, 151 (1982) (spouse of defamed person has no cause of action for mental anguish and suffering). For instance, in *Wildstein v. New York Post Corp.,* 40 Misc. 2d 586, 589, 243 N.Y.S. 2d 386, 390 (N.Y. Sup. 1963), *aff'd*, 24 A.D.2d 559, 261 N.Y.S. 2d 254 (1965), a husband alleged that he suffered humiliation and anguish when a newspaper suggested that his wife was engaged in an adulterous relationship. The court dismissed the cause of action, saying: "Necessarily, there will be persons, such as husbands or close relations of a person libeled, who will feel its impact. But that is not actionable, unless it can be shown that the article was also published of and concerning them." *Accord Carr v. Mobile Video Tapes, Inc.*, 893 S.W. at 619 (wife has no independent claim for damages nor recovery through husband's defamation action).

Thus, even if Plaintiffs' family members were properly plaintiffs in this action, which they are not, they would have no grounds for recovery. The publications in question were not "of and concerning

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them." Plaintiffs here are not allowed to do indirectly what the family members could not do directly - obtain derivative damages for injuries caused by the defamation of another.

Second, a plaintiff has no right to maintain a cause of action for the defamation of another party. Thus, even if the family members' claims of injury here are read to be allegations of direct reputational harm to themselves, those claims are not properly before the court. The rule barring others from bringing third-party defamation claims has been applied consistently in courts across the country. *See, e.g., Wehling v. Columbia Broadcasting Sys.,* 721 F.2d 506, 509 (5th Cir. 1983) (wife has no cause of action for husband's defamation); *Gruschus v. Curtis Publishing Co.,* 342 F.2d 775, 776 (10th Cir. 1965) (no cause of action for children of defamed decedent); *Flamand v. American Int'l Group, Inc.,* 876 F. Supp. 356 (D.P.R. 1994) (wife cannot maintain defamation action where husband was subject of defamation; *Andrews v. Stallings*, 892 P.2d 611, 623 (N.M. Ct. App. 1995) (no cause of action for defamation of spouse); *Gugliuzza v. K.C.M.C., Inc.*, 606 So.2d 790, 791 (La. 1992) (no cause of action for defamed decedent's relatives); *Smith v. Long Island Youth Guidance, Inc.*, 181 A.D.2d 820, 821-22, 581 N.Y.S.2d 401, 402 (1992) (mother has no cause of action for defamation of daughter). That sound result is not a special rule of defamation but simply an application of basic tenets of tort law. As one court has explained: "Relatives, no matter how devoted they may be, have no right to recover for the defamation of another, anymore than they would have the right to recover for the assault of another or the battery of another." *Coulon v. Gaylord Broadcasting*, 433 So. 2d at 431.

In sum, evidence of the alleged harm suffered by others has no bearing of any sort on "any fact that is of consequence" to this action. *See* Fed. R. Evid. 401. It neither gives rise to liability that defendants must answer for here, nor sheds light on damages to which Plaintiffs might be entitled. It is irrelevant and should be excluded under the plain terms of Federal Rules of Evidence 402.

2. Evidence of Others' Purported Injuries is Highly Prejudicial to Defendants and Should Be Barred Under Fed. R. Evid. 403.

Even if Plaintiffs were able to show some marginal relevance to the proffered testimony, its probative value would be far outweighed by the prejudice it is bound to engender. Allowing such testimony into evidence would open the door to emotionally charged testimony by persons with deep

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loyalty to Plaintiffs. They could be expected to feel personal pain whenever a family member is subject to negative media attention, no matter whether the story is true or not and no matter whether it was published with due care or not. Consequently, such testimony would be of dubious value and would introduce intangible emotional injuries not easily challenged on cross-examination or disproved by other evidence. Further, even though the testimony would address no material issue of fact, its emotion and drama would likely give it weight that goes far beyond any marginal probative value. It is testimony designed to paint the Defendants as inflictors of pain and suffering, even though defendants have no liability as a matter of law for that pain and suffering. Under these circumstances, invocation of Federal Rules of Evidence 403 to exclude the evidence is justified.

H.

EVIDENCE OF DEFENDANTS' EDITORIAL VIEWS AND POLITICAL BELIEFS IS IRRELEVANT AND PREJUDICIAL IN THIS ACTION AND WOULD RAISE SERIOUS FIRST AMENDMENT CONCERNS

Plaintiffs propose to introduce evidence concerning the editorial policies and political beliefs of Defendants. They intend to do so under the guise of establishing that Defendants had a "motive" for defaming them. The proffered evidence is irrelevant to any fact at issue in this litigation and extremely prejudicial to Defendants. Plaintiffs' attempt to make the media's beliefs and editorial stances a subject of this litigation is, in fact, a misguided effort aimed at chilling free expression and punishing defendants for taking political positions at odds with those espoused by Plaintiffs. Such blatant politicization of this trial should not be tolerated and the evidence should be excluded.

1. Evidence of Defendants' Beliefs and Editorial Policies Are Not Probative of Actual Malice or Any Other Fact at Issue.

Actual malice in a defamation action is shown only by proof that the Defendants acted with actual knowledge that the alleged libels were false or with reckless disregard for the truth. *Harte-Hanks Communications, Inc.,* 491 U.S. at 667. Reckless disregard will be found only if the Defendants acted with a high degree of awareness that the statements were false or had serious doubts about the statements' truthfulness. *Id*. It is *not* shown by demonstrating "ill will or 'malice' in the ordinary sense of the term." *Id*. at 666-667. Thus, while *Harte-Hanks* recognized that evidence of motive may sometimes be probative of actual malice, the Supreme Court expressly warned courts against

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improperly relying on such evidence. *Id*. at 668. The Court was careful to note that only certain kinds of motives were relevant - *i.e.*, motives to act with a reckless disregard for the truth. *Id*. at 667.

The motive issue in an actual malice case is thus *not* whether the defendants had ill will towards the plaintiffs or disagreed with them or even whether they intended to cause them harm; the narrow, specific motive issue is whether the defendants had a motive to disregard the truth. Evidence Plaintiffs seek to introduce here sheds no light whatsoever on that question and is irrelevant and inadmissible.

The governing principle was set forth clearly in *Saenz v. Playboy Enterprises, Inc.,* 653 F. Supp. 552 (N.D. Ill. 1987), *aff'd*, 841 F.2d 1309 (7th Cir. 1988). There, the plaintiff attempted to show not merely that the author of an article was politically hostile to the plaintiff, a former government official, but that he had intended to harm the ex-official's reputation. The court held: "[T]he evidence misses the point. It is the publisher's attitude toward the truth, not toward the plaintiff - his intent to publish something false, not any evil motives he may have harbored - which matters for proof of constitutional malice." *Id*. at 571.

The *Saenz* decision is fully in line with the Supreme Court's decision in *Henry v. Collins*, 380 U.S. 356 (1965). In *Henry*, the Court overturned a libel verdict on the grounds that the trial court's instructions to the jury implied that only the "intent to inflict harm, rather than the intent to inflict harm through falsehood," was sufficient proof of malice. *Id*. at 357. Here, not even the "intent to harm," let alone the proper standard, is shown or implied by Defendants' editorial policies and beliefs.

The teaching of these cases is clear: Evidence of political or personal differences between Defendants and Plaintiffs standing alone is not evidence of a motive to publish falsehoods recklessly or knowingly. *See Walker v. Pulitzer Publishing Co.,* 394 F.2d 800, 806 (8th Cir. 1986) (complaint that newspaper advanced a political point of view in its reports does not allege actual malice); *Fogus v. Capital Cities Media, Inc.*, 111 Ill. App. 3d 1060, 1064, 444 N.E.2d 1100, 1103 (1982) (mere grudge against police officer is not sufficient to show deliberate or reckless attempt to damage him through falsehoods). Instead, to be relevant, the proffered evidence must show that the publisher's editorial viewpoint somehow corrupted the reporting and publishing done on the articles or broadcasts in

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question. Requiring such proof is particularly inappropriate in the context of litigation involving corporate media defendants, where there will often be only an attenuated connection, if any, between those who set editorial policies and those who actually reported, edited, and disseminated the article at issue.

In *Med-Sales Associates, Inc. v. Lebhar-Friedman, Inc.,* 663 F. Supp. 908 (S.D.N.Y. 1987), the plaintiffs attempted to use evidence of the defendant magazine's editorial slant to prove that the magazine's reporter had acted grossly irresponsible in publishing certain statements. The court ruled that the existence of an editorial viewpoint was insufficient to establish fault, saying: "[Plaintiffs] have not adequately explained how [the magazine's] viewpoint might have corrupted [the reporter] into gross irresponsibility." *Id*. at 914. The court pointed out that while the editorial policy had long been in effect, no other complaints of inaccuracy as a result of that policy had ever been made. *Id.*

There is, of course, nothing unusual, let alone sinister, about the fact that a media outlet has a viewpoint that may not be shared by all. *See Reuber v. Food Chemical News, Inc.,* 925 F.2d 703, 716 (4th Cir.), *cert. denied*, 501 U.S. 1212 (1991). Indeed, the First Amendment was premised on the notion that there would be opposing voices in the marketplace of ideas. Plaintiffs' proffered evidence shows nothing more than Defendants and Plaintiffs both exercised their rights to express themselves in that marketplace and disagreed more often than not. Such evidence does not demonstrate in any way a reckless disregard for the truth.

The motivation to disagree is not *per se* the motivation to lie or act recklessly toward the truth any more than the motive to seek profits is the motive to lie in order to do so. *See Harte-Hanks*, 491 U.S. at 667 ("If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases . . . would be little more than empty vessels"). Proof that Defendants are political opponents of plaintiffs is different, for instance, from proof that editors directly pressured a newspaper staff to do certain stories and to do them quickly - circumstances that might engender carelessness. *See Harte-Hanks Communications, Inc. v. Connaughton,* 842 F.2d 825 (6th Cir. 1988).

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Here, by contrast, Plaintiffs seek to introduce evidence of editorial policies and beliefs that have no logical or necessary connection to the actual conduct at issue in this lawsuit - *i.e.*, the conduct of those journalists who produced the articles. Plaintiffs cannot make such a connection. As such, the evidence demonstrates nothing more than the unexceptional fact that Defendants took certain editorial stances at certain times. It lacks any probative value and is properly excluded under Federal Rules of Evidence 402.

2. Evidence of Editorial Viewpoints and Political Beliefs Will Be Highly Prejudicial to Defendants and Cause Confusion of Issues for the Jury and Should Be Barred Under Fed. R. Evid. 403.

Even if evidence of editorial and political viewpoints could be deemed relevant to this litigation, its unquestionable capacity for creating prejudice and confusion dictates its exclusion under Federal Rules of Evidence 403. Whether by intention or design, such evidence could have a devastating effect on the conduct of this trial. It provides Plaintiffs with the opportunity they seek to "put the media on trial" for beliefs that Plaintiffs find unacceptable and to confuse the issue of actual malice. Whatever probative value the evidence has is outweighed by such wholesale prejudice.

Twenty-five years after establishing the actual malice standard in *New York Times Co. v. Sullivan,* the Supreme Court continued to find it "worth emphasizing" that actual malice for purposes of defamation was not the same as common law malice. *Harte-Hanks,* 491 U.S. at 666. Even for judges and attorneys, the concept of actual malice can remain illusive. For the layperson, it can be nearly impossible unless the proof at trial is relentlessly focused, as it should be, on whether the defendants acted with appropriate concern for the truth. Evidence that suggests ill will, hostility, or differences of opinion between the defendants and the plaintiffs - precisely the evidence at issue here - shifts the jury's focus away from actual malice in the constitutional sense and toward malice as it is more commonly understood. That not merely confuses the issue, it provides Plaintiffs with the chance to prevail on a decidedly easier and constitutionally impermissible standard of proof. The obstacle which Plaintiffs appropriately face in attempting to prove that the journalists acted without the requisite degree of care for the truth is rendered moot if they can get away with showing only political discord between the parties - proof that is easy to come by given that Defendants are in the business of airing their

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beliefs.

Of even greater concern is the near certainty that Plaintiffs will use their introduction of Defendants' editorial viewpoints to put the media on trial for taking unpopular political stances. The evidence not only gives Plaintiffs the opportunity to play on the political biases of the jury, it also forces Defendants to shoulder the burden of defending those opinions, their good-faith belief in them, and the decision-making that gave rise to them. This is not the forum for holding the media socially accountable for what they believe and say. In the words of one court: "Defamation judgments do not exist to police [publications'] objectivity; the First Amendment presupposes that a veritable medley of opposing voices is better suited to the search for truth." *Reuber,* 925 F. 2d at 716. Yet, by appearing to put Defendants' opinions at issue, the evidence proffered here does in fact invite the jury to "police" Defendants and find liability premised on what they perceive to be defendants' unfairness or lack of objectivity or unacceptable viewpoints.

At best, the proffered evidence is a distraction, taking the jury far away from the issues that must be decided. At worst, it is part of a calculated attempt to prevent defendants from having a fair trial on the facts. In either event, it should be excluded under Federal Rules of Evidence 403.

3. Plaintiffs' Proffered Evidence Raises Serious First Amendment Concerns.

Admitting the proffered evidence would thrust the Court unnecessarily into the center of a First Amendment dispute that would raise difficult and time-consuming issues mid-trial. It remains to be seen precisely what evidence Plaintiffs will decide to introduce and how they will use it. But as *New York Times v. Sullivan*, *supra*, itself made clear, private litigation is not free from the dictates of the United States Constitution and the First Amendment. Courts have properly barred on First Amendment grounds discovery into political and associational activities of a party involved in a political controversy. *See Britt v. Superior Court*, 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766 (1978). The *Britt* court held that such discovery, even when warranted, had to be conducted as narrowly as possible.

The First Amendment concerns are apparent here. Plaintiffs' evidentiary proffer seeks to explore critical aspects of Defendants' editorial decision-making. It necessarily raises questions about the degree to which the media can be compelled in the context of civil litigation to disclose editorial

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decision-making and to be held accountable generally for opinions that contain none of the allegedly defamatory statements. Forcing media representatives to answer for the editorial choices they have made can be justified only in compelling circumstances, and even in the context of private libel litigation, "[c]ourts must be slow to intrude into the area of editorial judgment." *See Janklow v. Newsweek Inc.,* 788 F.2d 1300, 1306 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986).

Defendants should not be forced to surrender their rights under the First Amendment to fishing expeditions that serve no legitimate purpose in this litigation and are designed solely to advance Plaintiffs' political agenda. While Plaintiffs unquestionably have the right to prosecute their defamation cause of action, their tangential efforts to force Defendants to disclose beliefs, political associations, and other protected activities or face legal liability must be scrutinized and justified under the First Amendment. *See Elrod v. Burns*, 424 U.S. 347, 357 (1976) ("Political belief and association constitute the core of those activities protected by the First Amendment"). Because these issues will turn on the specific facts of the testimony sought and the purposes for which it is to be used, they will necessarily be ripe for adjudication only as trial proceeds.

The First Amendment considerations raised here counsel strongly against admitting the evidence. It has no probative value and will substantially adversely affect the trial. The evidence will require the Court to divert time and attention away from the central issues of the case and toward the inevitable First Amendment conflicts that the evidence is bound to prompt. Under Federal Rules of Evidence 403, that is an adequate ground for excluding evidence of such a limited probative value.

I.

EVIDENCE OF DEFENDANTS' DEVIATION FROM THEIR OWN INTERNAL STANDARDS IS IRRELEVANT AND HIGHLY PREJUDICIAL

The jury must determine whether Defendants, in publishing the allegedly false statements in the report, departed from the objective standard of care or published the statements with knowledge of falsity or substantial awareness of probable falsity. Defendants' internal standards do not provide a basis for this determination and the jury should be so instructed.

This principle was recognized by the court in *Westmoreland v. CBS, Inc.*, 601 F. Supp. 66

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(S.D.N.Y. 1984). There, the plaintiff sought to introduce into evidence an internal report about the broadcast in dispute. Among other things, the report addressed whether the broadcast was "fair and balanced," and whether those who supported the plaintiff in the controversy depicted in the broadcast had been given fair opportunity to respond to the charges of others. The court excluded those portions of the report that addressed these questions and the application of the Defendants' internal rules, stating: "The fact of the violation of rules is not relevant to any issue in the lawsuit . . . . Even if some marginal relevance can be found, it is far outweighed by the potential for misunderstanding, confusion and prejudice." *Id*. At 69.

While the Plaintiff in *Westmoreland* was required to establish actual malice, the exclusion of such evidence is equally appropriate where the standard of fault is negligence. A publisher or broadcaster's internal standards cannot be the measure of liability because it would permit the defendant to set its own standards, which might be lower than the standard of ordinary care. *Troman v. Wood*, 340 N.E.2d 292, 298-99 (Ill. 1975); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 418 (Tenn. 1978). The reverse is true as well. A libel Plaintiff must establish that the Defendant failed to act like a reasonable person under the circumstances, and a media Defendant's internal standards are irrelevant in this analysis.

Just as Defendants cannot lower the threshold for liability with internal rules, Plaintiff cannot seek to impose liability by presenting evidence of such rules. The jury should thus be instructed not to consider Defendants' internal standards in deciding whether Defendants acted with the requisite fault.

J.

EVIDENCE OF SPECIFIC LOSSES OR DAMAGES SHOULD BE EXCLUDED UNLESS PLAINTIFFS ELECT NOT TO SEEK PRESUMED DAMAGES

When specific monetary losses or other special damages are claimed, they must be shown to have been directly and discretely caused by the defamation. *See, e.g., Continental Nut Co. v. Robert L. Berner Co.,* 393 F.2d 283, 286 (7th Cir.), *cert. denied*, 393 U.S. 923 (1968); *Astro Music, Inc. v. Eastham,* 564 F.2d 1236, 1238 (9th Cir. 1977); *Tosti v. Ayik*, 476 N.E.2d 928, 938-39 (Mass. 1985), *cert. denied*, 484 U.S. 964 (1987). When a plaintiff relies upon the common law defamation doctrine of

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presumed damages, he or she may not offer proof of specific losses or damage. The reason is plain: "[T]o presume damages is not to measure damage but to despair of doing so." 2 D. Dobbs, *Law of Remedies* § 7.2(5) (2d ed. 1993).

Absent competent proof of causation, a plaintiff may not offer evidence of specific losses or of calculations of damages because to do so creates the appearance of precision in a damage calculation that is inherently speculative. *Sunward Corp. v. Dun & Bradstreet, Inc.,* 811 F.2d 511, 538-39 (10th Cir. 1987). Such evidence "convey[s] a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." *Id.,* 811 F.2d at 541, quoting *Maheu v. Hughes Tool Co.,* 569 F.2d 459, 476 (9th Cir. 1977). Accordingly,

> In considering presumed general damages it is usually permissible, as a matter of background only, to show a general decline in sales and a general diminution of profits without the necessity of naming particular customers or proving why customers are not purchasing the plaintiffs' product. *See Cook v. Safeway Stores, Inc.,* 266 Or. 77, 511 P.2d 375, 378-79 (1973) (quoting Newell, *Slander and Libel* § 751 at 839 (4th ed. 1924)); *see also* C. McCormick, *Damages* § 116 (1935); *cf. Vojak v. Jensen*, 161 N.W.2d 100, 108 (Iowa 1968) (diminution of business may be shown to prove general damages, but preliminary foundation required).
>
> However, absent proof of causation, it is not permissible to suggest the loss of specific customers, orders, profits or other specific pecuniary loss. *See, e.g., Vojak*, 161 N.W.2d 100; *DeLashmitt v. Journal Publishing Co.*, 166 Or. 650, 114 P.2d 1018 (1941). *See also Maheu v. Hughes Tool Co.,* 659 F.2d 459 (9th Cir. 1977); *Continental Nut Co.,* 393 F.2d at 286.

Sunward Corp., 811 F.2d at 539. In holding that damage calculations by a plaintiffs' expert should have been excluded, the *Sunward* court explained:

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> [T]his evidence impermissibly crossed the line between presumed general damage and proof of special damage. The jury was led to infer that the "lost profits" were proximately caused by the credit reports, and represented special damages resulting from those reports. Thus, Sunward attempted to accomplish indirectly what it openly and consciously elected not to do directly, that is prove that the credit reports caused it identifiable pecuniary loss. Presumed general damages must be approached in an entirely different and, by definition, more general manner.

Id. at 541. *See also Robertson v. McCloskey*, 680 F. Supp. 414 (D.D.C. 1988).

If Plaintiffs elect to seek presumed damages and general background information concerning Plaintiffs' alleged loss is permitted, "the jury must be cautioned that [lost business information] is to be used as background only, and that they are not to assume either causation or amount of damage from those figures." *Sunward*, 811 F.2d at 542.

II.
EVIDENTIARY ISSUES:
ADMISSIBILITY OF DEFENDANTS' EVIDENCE

A.
THIS COURT SHOULD ADMIT EVIDENCE OF SPECIFIC INSTANCES OF PLAINTIFFS' MISCONDUCT

[EDITORS' NOTE: This section of the brief presents arguments and authorities on the admissibility of evidence of specific instances of misconduct by Plaintiffs on the issues of truth/falsity, reputation, and mitigation of damages. Although it is beyond the scope of this section, we note that a closely related issue is whether evidence of specific acts by Plaintiffs are admissible as relevant to either the fault defense or to mitigate a claim for punitive damages. There is ample authority for the proposition that defendants can offer such evidence if they lay a proper foundation showing that defendants actually were aware of this evidence and took it into account before making the allegedly defamatory statements.

Defendants move in limine for a pre-trial ruling that evidence of specific instances of Plaintiffs' conduct relating to the allegedly defamatory imputation at issue is relevant and admissible for two reasons: (1) It bears on whether the allegedly defamatory imputations are substantially true; and (2) It is relevant to mitigate damages Plaintiffs' claim resulted from the alleged defamatory imputations.

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1. Evidence of Plaintiffs' Specific Misconduct is Relevant to the Issue of Falsity.

The First Amendment requires Plaintiffs to bear the burden of proving that allegedly defamatory statements are false. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). ***[EDITORS' NOTE: Cite Local Cases On Substantial Truth.]*** As a matter of constitutional law, plaintiffs who fail to prove falsity cannot prevail as truth is an absolute bar to recovery in a defamation action.

An allegedly defamatory statement does not have to be literally true, or true in all of its details, to defeat a defamation claim. It must only be substantially true - *i.e.,* the gist or sting of the defamatory imputation must be true. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17 (1991) ("The common law of libel . . . concentrates upon substantial truth. . . . Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge can be justified.'"). A statement is substantially true unless the alleged defamatory statement would have a different effect on the reader than the alleged truth. *See id*. at 517; *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1228 (7th Cir. 1993). The law in this state is in accord. ***[EDITORS' NOTE: Cite Local Cases On Substantial Truth]***

a. Substantial Case Law Supports Admitting Such Evidence.

Evidence of specific instances of Plaintiffs' misconduct relating to the allegedly defamatory imputation is admissible to prove substantial truth. *See* Rodney Smolla, *The Law of Defamation* § 9.10[4][c] (2d Ed. 1992) (stating "evidence of bad acts relating directly to the defamatory charges at issue are always admissible as part of the truth defense"). The proffered evidence need only show that the *gist* of the alleged defamatory statement is true; it need not establish literal truth. *See, e.g., Davis v. Wendy's Int'l, Inc.*, No. 98-5037, 1999 U.S. App. LEXIS 17972, at *17 n.3 (6th Cir. 1999); *Haynes*, 8 F.3d at 1228.

In *Davis*, the plaintiff sold can lining for Amcel, a plastics manufacturer. The plaintiff later co-founded American Custom Packaging Corp. ("ACPC"), a company that wrapped Amcel's plastic cutlery in plastic bags. According to the plaintiff, Amcel failed to provide enough plastic cutlery for ACPC to wrap under the contract so he secretly began selling can lining made by other manufacturers. Amcel's

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president told the president of another plastics company that the plaintiff was "an unsavory character." The plaintiff filed suit, including a claim for defamation. Amcel moved for summary judgment arguing the statement was substantially true. Amcel's president offered as evidence of truth court findings in a related case that the plaintiff had engaged in unfair and deceitful conduct. *See Davis*, 1999 U.S. App. LEXIS 17972, at *15-16. The district court admitted the evidence of unlawful conduct and granted the motion. *See id.* at *15. The Court of Appeals for the Sixth Circuit affirmed, reasoning that even if the plaintiffs' unlawful conduct did not prove precisely his "unsavory character," it did prove the gist of the alleged defamatory statement to be true. *See id.* at *17 n.3.

Similarly in *Haynes*, the Court of Appeals for the Seventh Circuit considered the plaintiff's prior acts of misconduct in deciding that the defendant's statements about the plaintiff in a book were substantially true, albeit not literally true. *See* Hayes, 8 F.3d at 1229. The plaintiff alleged that three statements in the book were defamatory: (1) That he had left his children alone at night; (2) That he lost jobs due to his drinking; and (3) That he spent money on a car that he should have used to buy shoes for his children. *See id.* at 1226. The defendant contended the book was substantially true. In analyzing "substantial truth," the court considered the plaintiff's deposition testimony which revealed he had engaged in misconduct not even discussed in the book. The plaintiff admitted to drinking heavily, getting arrested and jailed for assaulting a policeman after drinking, and leaving his children and failing to support them. *Id.* at 1227-28. Based on these incidents, the court ruled that "the alleged falsehoods in the book pale . . . [and] do not exhibit him in a worse light than a recitation of the uncontested facts about his behavior . . . . *Id.* at 1228. The court held that the book was thus substantially true, reasoning that the "details . . . would not if corrected have altered the picture the true facts paint, because 'substitut[ing] the true for the false . . . the damage to [plaintiff's] reputation would be no less.'" *Id.* at 1228. While acknowledging that not "every discreditable act that the plaintiff may have committed" is admissible, the court nonetheless held that damaging facts are admissible to show substantial truth where they relate to the alleged false and defamatory statements. *Id.*

In *Desnick v. ABC*, 44 F.3d 1345, 1351 (7th Cir. 1995), the Court of Appeals for the Seventh

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Circuit also recognized that evidence of a plaintiffs' prior misconduct is probative on the issue of substantial truth. The plaintiffs, an ophthalmology clinic and certain ophthalmologists, alleged they were defamed by the implication in a news report that they tampered with a cataract screening device to provide false positive test results for Medicare patients. *See id.* at 1348-49. The district court granted a motion to dismiss. The Court of Appeals reversed, noting that the defendant might later be entitled to summary judgment, even though the alleged defamatory statement proved untrue, if the plaintiff engaged in related misconduct. The court stated, "it may turn out either that the machine was indeed tampered with or that, even if it was not, the plaintiffs did so many other bad things in the line of Medicare fraud that the tampering fades into insignificance." *Id.* at 1351. The court implied that the gist of the report was that the doctors committed Medicare fraud, and if shown true by "other bad things," tampering with the cataract machine was a minor inaccuracy that would not defeat a substantial truth defense.

The decision in *Sharon v. Time, Inc.*, 609 F. Supp. 1291 (S.D.N.Y. 1984), is also instructive. *Time* magazine published an article reporting the findings of an Israeli commission that investigated the massacre of Palestinians by Phalangists at refugee camps in Lebanon. The commission report criticized Ariel Sharon, the Israeli defense minister, for not taking into account that the Phalangists were likely to enter the camps and commit atrocities. The commission concluded, however, that Sharon did not intend or assent to any such harm. *Time*'s article, however, allegedly depicted Sharon as having actually encouraged the Phalangists to massacre the Palestinians and implied the government report had made a secret finding that he had encouraged or condoned the massacre. Sharon filed a libel suit against *Time*, alleging he did not know that innocent people would die as a result of his decisions. *Time* asserted that its article was substantially true.

Time sought to offer expert testimony regarding Israeli/Lebanese relations and conditions in the Mideast. According to *Time*, the testimony was relevant to its substantial truth defense because it would show that Sharon must have known the consequences of allowing the Phalangists to enter the camps and that this knowledge constituted encouragement or condonation of the massacre. *See id.* at

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1292-93. Sharon opposed admission of the expert testimony on the grounds it would show only that Sharon should or must have known that a massacre would ensue, and not that he, in fact, knew a massacre would ensue, which the published statement allegedly implied. The court held the expert evidence admissible (*see id.* at 1299), even though it was not probative on Sharon's knowledge (*see id.* at 1293), reasoning that the inferences the testimony created were sufficiently related to the gist of the alleged libelous statement. *See id.* at 1294. Rejecting Sharon's assertion that such testimony should be excluded as prejudicial, the court noted that the defendants could use "any proper evidence helpful to *Time* in establishing [substantial truth] . . . as the prejudice caused by proper evidence would not be 'unfair.'" *Id.* at 1294. The court specifically held that the "[d]efendant is permitted to prove the substantial truth of this statement by establishing any other proposition that has the same "gist" or "sting" as the original libel - that is, the same effect on the mind of the reader." *Id.* (emphasis added).

Other courts have admitted evidence of specific instances of the plaintiffs' prior misconduct based on similar reasoning. *See, e.g.*, *Walkon Carpet Corp. v. Klapprodt*, 231 N.W.2d 370 (S.D. 1975) ("Since damage to reputation was at least part of [counter-plaintiffs'] claim, evidence of his reputation or past misdeeds was admissible both in establishing truth, and in mitigating damages") (citations omitted); *Moore v. Davis*, 27 S.W.2d 153, 157 (Tex. Com. App. 1930) (allowing evidence of the plaintiffs' misconduct that occurred after the alleged defamatory publication to prove substantial-truth). Implicit in these decisions is the principle that a defendant is entitled to assert "incremental harm" and substantial truth defenses, and to present evidence of the plaintiffs' specific acts that show the true facts about the plaintiffs' conduct would injure the plaintiffs' reputation as much as the allegedly defamatory statements - *i.e.*, evidence of misconduct related to the allegedly defamatory statements is admissible to show the gist or sting of the publication is substantially true even if the particular details in the publication are inaccurate. As stated in *Desnick*, "if a false accusation cannot do any incremental harm to the plaintiffs' deserved reputation because the truth if known would have demolished his reputation already, he has not been harmed *by the false accusation*, and therefore has no remedy." *Desnick*, 44 F.3d at 1350 (emphasis in original).

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Defendants do not suggest that all evidence of Plaintiffs' prior misconduct is admissible. Rather, the evidence of misconduct that Defendants seek to offer here is admissible because it relates directly to the allegedly defamatory imputation that Plaintiffs' claim arose from the article. The gist or sting of the publication is that ***[EDITORS' NOTE: Insert facts re plaintiff was dishonest or engaged in criminal conduct or engaged in misconduct during business affairs].*** Defendants should be permitted to submit evidence to the jury of other specific acts of Plaintiffs' misconduct that show that the allegedly defamatory imputation is substantially true.

b. Fed. R. Evid. 405 Also Supports Admitting Such Evidence.

Moreover, Federal Rules of Evidence 405(b) supports admitting evidence of Plaintiffs' prior misconduct. It provides that "in cases in which character or a trait of character is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct." Here, Plaintiffs' complaint places their good character in issue. They bear the burden of proving that the allegedly defamatory imputation about character is false. *Hepps*, 475 U.S. at 776. Thus, Defendants are entitled to prove through evidence of Plaintiffs' misconduct that it is true.

Schafer v. Time, Inc., 142 F.3d 1361, 1372 (11th Cir. 1998), is illustrative. In *Schafer*, a magazine mistakenly published a photograph of the plaintiff with an article that implied the person in the photograph was involved in a terrorist bombing of an airplane. During the plaintiff's libel suit, the magazine offered evidence regarding several specific acts by the plaintiff, including testimony by him "about a felony conviction, a possible violation of his subsequent parole, convictions for driving under the influence, an arrest for writing a bad check, failure to file tax returns, failure to pay alimony and child support, and evidence concerning [his] efforts to change his name and social security number." *Id.* at 1371. The plaintiff challenged the admissibility of this evidence on appeal. The Court of Appeals for the Eleventh Circuit affirmed that Federal Rules of Evidence 405(b) permits such evidence. *See id.* at 1372. The court stated: "Since the plaintiffs' character is substantively at issue in a libel case under Georgia law, Rule 405(b) permits the admission of evidence regarding specific instances of the plaintiffs' conduct on that issue." *Id.* at 1372.

Numerous other cases are in accord. *See, e.g., United States v. Piche*, 981 F.2d 706, 713 (4th

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Cir. 1992), *cert. denied*, 508 U.S. 916 (1993) (stating that Rule 405(b) limits evidence of specific conduct "to instances in which character is in issue 'in the strict sense' . . . such as plaintiffs' reputation for honesty in a defamation action"); *Government of the Virgin Islands v. Grant*, 775 F.2d 508, 511 n.4 (3d Cir. 1985) ("Fed. R. Evid. 405(b) permits the introduction on direct examination of evidence regarding specific acts when character is an essential element of a claim, charge or defense. One illustration would be a defamation case where the plaintiffs' claim is that the defendant's defamatory statements [harmed] his reputation for good character. In such cases, character is said to be 'in issue'; *Longmire v. Alabama State University*, 151 F.R.D. 414, 419 (M.D. Ala. 1992) ("Because [the plaintiff] has placed his character 'in issue' by filing a defamation action, his good or bad character may be proven by specific instances of his conduct."); *Pierson v. Robert Griffin Investigations, Inc.*, 555 P.2d 843, 844 (Nev. 1976) (holding that the plaintiff's criminal convictions, although more than ten years old, were admissible under a Nevada rule of evidence (almost identical to Rule 405(b)) because the defendants put the plaintiff's character in issue by alleging a truth defense).

Federal Rules of Evidence 405(b) likewise permits evidence of specific acts to show character in this case. Plaintiffs contend that the publication falsely attacks their general character, depicting them as ***[EDITORS' NOTE: Insert facts re dishonesty, lying, or lacking integrity]***. Plaintiffs have made character an essential element of their libel claim. Therefore, Federal Rules of Evidence 405(b) permits evidence of Plaintiffs' specific acts of misconduct relevant to the character trait at issue. Defendants must be allowed to defend against Plaintiffs' claim that the publication was false by introducing evidence showing that it is substantially true.

2. Evidence of Plaintiffs' Specific Misconduct Is Also Relevant to the Issue of Damages.

Defendants also are entitled to present evidence of Plaintiffs' specific misconduct to rebut Plaintiffs' claim that they have been damaged by Defendants' conduct to the extent alleged. The leading defamation treatise explains, "[a]lthough proof that a plaintiff committed a wrongful act different from that alleged in the offending communication will not establish truth, it will be admissible in mitigation to demonstrate that had the truth been published instead of the false charge, the plaintiffs'

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reputation would also have been injured . . . . Similarly, proof that a statement is partly true will tend to mitigate damages." Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 10.5.5.1 (3d ed. 1999). Another treatise similarly states, "[c]ourts will consider, in mitigation of damages caused by the publication of a false defamatory statement, the fact that the publication of the truth also would have resulted in damage to the plaintiffs' reputation." M. Minzer, et al., *Damages In Tort Actions* § 45.23[2], 45-72 (__ Ed. 1991).

Numerous courts throughout the nation have allowed evidence of a plaintiffs' misconduct to mitigate the damages from an alleged defamation. *Bularz v. Prudential Insurance Co. of America,* 93 F.3d 372 (7th Cir. 1996) is illustrative. In *Bularz*, the plaintiff filed a defamation suit against his former employer alleging that several former co-workers made defamatory remarks about his business practices. During trial, the district court admitted evidence of the plaintiff's reputation and business practices. *See id.* at 376. The jury found the co-workers' statements were not defamatory, so the district court entered a judgment for the plaintiff's former employer. *See id.* at 377, 379. The plaintiff appealed, arguing evidence of his reputation and business practices was inadmissible. The Court of Appeals failed to rule on the admissibility issue, but noted: "The challenged evidence was also relevant to determining whether [the plaintiff] reputation was already compromised at the time [his former employer] allegedly defamed him, and thus to the jury's computation of damages." *Id.* at 379.

Likewise, in *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), the plaintiff sued for libel based on statements in an article suggesting that (1) he was guilty of participating in drug transactions for which he had only been indicted and (2) the charges against him were dropped because he had cooperated with the prosecution. *See id.* at 1077. Although the court rejected the defendant's claim that the plaintiff could not maintain any libel action, the court noted it was proper for the jury to consider specific examples of the plaintiff's misconduct that were not published in the article because such evidence was "a factor to mitigate the level of compensatory damages." *Id.* at 1079 (citing *Corabi v. Curtis Publ'g Co.*, 273 A.2d 899, 920 (Pa. 1971)).

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In a recent case, a New York appellate court reversed a lower court decision because the court did not allow the defendants in a libel case to introduce evidence of the plaintiffs' misconduct to mitigate damages. See *Gatz v. Otis Ford, Inc.*, 71 1 N.Y.S.2d 467, 467-68 (N.Y. App. Div. 2000). In *Gatz*, the defendants prevailed on a counterclaim for defamation per se. The lower court refused evidence of the defendants' misconduct except for their testimony during cross-examination. *See id.* at 467. The appellate court reversed and remanded the case for a new trial on damages, stating: "Although the existence of compensatory damages is presumed [for a claim of defamation per se], the quantum of such damages is not, and the party who made the defamatory statement and/or publication must be permitted to rebut that presumption and disprove the amount of damages sought to be recovered." *Id.* at 468.

Similarly, in *Crane v. New York World Telegram, Corp.*, 126 N.E.2d 753, 757 (N.Y. 1955), the court stated that certain evidence of specific misconduct by the plaintiff was inadmissible to prove truth because it was "totally unrelated to the truth" of the allegedly defamatory statement. Nonetheless, the court stated: "Well settled is the basic rule that the amount of plaintiffs' recovery may be reduced by proof of facts 'tending but failing to prove the truth' of the libel's charge." *Id.* at 757. Indeed, such evidence may reduce compensatory damages "on the theory that, if the actual facts 'gave some color of verity to the statements contained in the published article, plaintiff would not be entitled to receive the same damages as if his reputation was beyond unfavorable criticism or comment." *Id.*; *accord Sharon v. Time*, *Inc.*, 103 F.D.R. 86, 91-93 (S.D.N.Y. 1984) (permitting discovery about events similar to the alleged libel because plaintiffs' "specific misconduct" may be admissible if it "tends, but fails, to prove the truth of the libel's charge").

The court in *Lackey v. Metropolitan Life Insurance Co.*, 174 S.W.2d 575 (Tenn. Ct. App. 1943), applied the same principles. In *Lackey*, the plaintiff sued for slander, alleging that the defendant's agent called him "crazy" and imputed that he was insane. The plaintiff claimed the defamation caused mental anguish and injury to his reputation. At trial, the defendant offered evidence of the plaintiff's mental history, including his past confinement in mental health facilities, his beliefs about a conspiracy

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against him, and specific threats of suicide and violence toward others. While the defendant did not establish its truth defense, the court held the evidence was admissible, stating: "Any evidence tending to prove the truth of words, or a substantial part of them, is relevant and admissible on the question of damages." *Id.* at 580. The court noted that the plaintiff's words and conduct tending to prove he had mental problems were important facts "which the defendant was entitled to have the jury take into consideration in fixing the damages claimed by plaintiff." *Id.*

At least one court has also decreased the damages award based on evidence admitted to show the plaintiff's misconduct. In *Lawlor v. Gallagher President's Report, Inc.*, 394 F. Supp. 721 (S.D.N.Y. 1975), *remanded without opinion*, 538 F.2d 311 (2d Cir. 1976), the plaintiff, head of personnel at a large company, sued for libel based on a report that implied he took kickbacks from job applicants for placing executives with the company. The plaintiff alleged the erroneous report injured his reputation, precluded him from obtaining additional employment, and caused him pain and mental anguish. The court concluded that the particular statements in the report were untrue (*see id.* at 733), but that the plaintiff had not been free from wrong. *Id.* at 735. Based on the plaintiff's misconduct, the court decreased the damages awarded, explaining that, "if [the report] had printed the truth about [the plaintiffs'] involvement . . . his reputation would have been tarnished." *Id.* at 734 n.26.

This rule is well-grounded in concepts of common sense and fundamental fairness. A plaintiff should be allowed to recover damages only for an injury caused by a falsehood above and beyond the injury that would have been caused by the truth. The plaintiff in a defamation action typically suggests to the jury that he has an untarnished reputation because he has done nothing in his life to sully it and that he should be awarded significant damages because of the alleged harmful impact of the defendant's publication on that reputation. Absent evidence to the contrary, a jury will be led to believe that the plaintiff has an outstanding and unblemished reputation where that simply may not be the case. The defendant should be entitled to inform the jurors who the plaintiff really is, and what questionable acts relating to the alleged libel he has committed, to rebut the natural conclusion (sometimes supported by an instruction on the presumption of a good reputation and damages) that the defamatory

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statements had dramatic consequences for the plaintiff's reputation. A ruling that would deprive Defendants of the opportunity to debunk the notion that Plaintiffs have suffered reputational or emotional injury would be highly prejudicial.

The Federal Rules of Evidence also contemplate that evidence of Plaintiffs' specific acts of misconduct is admissible. Under Federal Rules of Evidence 403(a), a defendant is entitled to attack testimony from the plaintiff or his witnesses suggesting that the plaintiff has a good reputation by cross-examining witnesses about "relevant specific instances of [the plaintiff's] conduct." As noted in the court's discussion of a defamation counterclaim in *Meiners v. Moriarity*, 563 F.2d 343 (7th Cir. 1977), a libel defendant should be allowed to question a plaintiff regarding events that resulted in adverse publicity" and to allow "inquiry into relevant specific instances of conduct in all cases where character evidence is admissible," including a defamation case where "reputation is relevant at least as to damages." *Id.* at 351.

B.

EVIDENCE OF PRIOR PUBLICATIONS CONCERNING PLAINTIFFS' SPECIFIC MISCONDUCT IS RELEVANT

Defendants move in limine for a pretrial ruling that evidence of publications and broadcasts concerning Plaintiffs disseminated prior to or contemporaneous with the publication at issue is admissible. Evidence of these related publications is relevant to show that the publication upon which Plaintiffs base their libel claims did not cause all of the damage alleged.

Numerous cases have considered evidence of prior publications about Plaintiffs in considering whether they are entitled to recover at all, or whether to limit their recovery. Some courts have considered this evidence in the context of whether the plaintiff was libel-proof, *i.e.,* the plaintiff's reputation was so damaged by prior or contemporaneous publications on the character trait at issue that the plaintiff cannot recover anything as a matter of law because the publication could not have damaged plaintiff's already worthless reputation.

1. Evidence of Prior Publications May Show the Article Caused No Harm.

In *Guccione v. Hustler Magazine, Inc.,* 800 F.2d 298 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987), the plaintiff sued *Hustler* magazine based on an editorial which accused the plaintiff of

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committing adultery. By the time the article was published, the plaintiff had long since divorced his wife and had been married for four years to the woman referred to in the article with whom he had had a 13-year affair. In holding that the statement about adultery was substantially true, the court considered extensive prior news coverage about the plaintiff's adultery, stating: "The damage to [plaintiff's] reputation occurred a decade before *Hustler* published its November 1983 article, and stemmed from truthful reporting of facts freely admitted to by [plaintiff himself]. Any subsequent reporting accusing [plaintiff] of adultery prior to his 1979 divorce could not further injure his reputation on the subject." *Id*. at 304.

Similarly, in *Wynberg v. National Inquirer, Inc.,* 564 F. Supp. 924 (C.D. Cal. 1982) (applying California law), the plaintiff sued *National Enquirer* for libel based on an article that allegedly accused the plaintiff of using his 14-month marriage to Elizabeth Taylor for financial gain. In granting summary judgment to the *Enquirer*, the district court found that, among other factors, there had been numerous prior news articles discussing the plaintiff's relationship with Elizabeth Taylor and those similar articles had rendered him essentially libel proof on the issue of taking financial advantage of Taylor. *Id*. at 928-29.

Other courts have considered evidence of prior publications about a plaintiff offered to show that a defendant's publication did not cause harm or that it would be impossible to distinguish the harm the publication may have caused from the harm caused by other similar publications. In *McDonald v. Time, Inc.*, 554 F. Supp. 1053 (D.N.J. 1983), the plaintiff filed suit based on an article in *Life* magazine asserting the plaintiff "hastily resigned his post when his name was publicly linked to the FBI's Abscam investigation . . ." *Id*. at 1053. The prior Abscam investigation and the plaintiff's indictment by a grand jury had already received wide-spread publicity prior to the publication of the article. *Id*. at 1054. The court held these publications were admissible to show that the plaintiff could not attribute his reputational injury to the defendant's article. *Id*. at 1060.

The court in *Warren v. Pulitzer Publishing Co.,* 78 S.W.2d 404 (Mo. 1934), reached essentially the same conclusion. As in *McDonald*, the court considered prior publicity about the plaintiff, stating:

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> The Post-Dispatch was not "telling them" anything in Durand, Illinois, in November, 1927, about the Warren case. It had been in the [local papers], and more than that it had been a topic of village conversation ever since May. It would be a strained and far-fetched inference, rather than a reasonable inference, that the attitude of the people in the community toward Warren was changed when defendant's article was published . . .

Id. at 420. *See also Hartman v. American News Co.,* 171 F.2d 581, 586 (7th Cir. 1948), *cert. denied*, 337 U.S. 907 (1949) (defendant "may offer like publications if published at the time of the alleged injury as possible causes for the damage complained of by his publication"); *Sharon v. Time, Inc.,* 103 F.R.D. 86, 90 (S.D.N.Y. 1984) (permitting defendant to discover and introduce evidence of other media coverage of events in issue as relevant to the issue of injury to the plaintiffs' reputation); *Sharon v. Time, Inc.,* 609 F. Supp 1291, 1297 (S.D.N.Y. 1984) (noting that "plaintiff faces formidable obstacles to recovering substantial compensatory damages" because his reputation "has been scarred by the Commission Report and other less respectable commentary" prior to the article in *Time* at issue in the case).

2. Evidence of Prior Publications May Also Mitigate Damages.

Courts have also allowed evidence of prior publications in mitigation of compensatory damages. For example, in *Marcone v. Penthouse International Magazine for Men,* 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), the plaintiff claimed that a *Penthouse* article discussing the involvement of attorneys with respect to a substantial increase in the American marijuana trade was defamatory. *Id*. at 1076. While rejecting the applicability of the libel-proof doctrine to the facts of that case, the court determined that other newspaper articles linking the plaintiff to a location notorious for motorcycle gangs and illegal activities were admissible to mitigate compensatory damages by showing the plaintiffs' reputation already was tarnished. *Id*. at 1079.

Similarly, in *Schiavone Construction Co. v. Time Inc.,* 847 F.2d 1069 (3d Cir. 1988), the plaintiff construction company complained that an article published by *Time* was defamatory because it linked the plaintiff to organized crime, Jimmy Hoffa's murder, and corruption. *Id*. at 1072. The court reviewed

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prior publications accusing the plaintiff of similar activities and held they were admissible to mitigate compensatory damages. *Id*. at 1079-81. The court reasoned it was up to the jury to decide whether the *Time* article had the same sting as the previous publications. *Id.*

In *Williams v. District Court*, 866 P.2d 908 (Col. 1993), the court held that a defendant in a defamation action may present any evidence which tends to mitigate damages, including "any publications by third persons dealing with the same subject, made before or at about the same time as the date of the publishing by the defendant." *Id*. at 911-12; *see also Corabi v. Curtis Publishing Co.,* 273 A.2d 899, 920 (Pa. 1971) ("[I]f that reputation is already bad, evidence of this fact is admissible and should be considered in mitigation of damages. For the same purpose, proof that the defendant was merely repeating what others have said is also admissible".).

III.
TRIAL MANAGEMENT ISSUES

A.
TO PREVENT JURY CONFUSION ON A CRITICAL CONSTITUTIONAL ISSUE, THE COURT SHOULD INSTRUCT THE JURY BEFORE AND DURING TRIAL ON THE MEANING AND APPLICATION OF THE ACTUAL MALICE REQUIREMENT

Although the Supreme Court established the actual malice rule to protect core First Amendment values (*New York Times v. Sullivan*, 376 U.S. 254, 269-75, 279-81 (1964)), that protection is lost, and the threat of an unconstitutional libel verdict is manifest, unless the jurors understand and correctly apply the actual malice standard. As the Supreme Court has recognized, the term actual malice "can confuse as well as enlighten." *Masson v. New Yorker Magazine Co.,* 501 U.S. 496, 511 (1991). Now-Justice Ginsburg has cautioned: "The risk is considerable that jurors will not comprehend the difference between reckless disregard and mere neglect or carelessness, or will confuse or blend the separate issues of falsity and actual malice." *Tavoulareas v. Piro*, 817 F.2d 762, 806 (D.C. Cir. 1987) (Ginsburg, J., concurring); *accord Sullivan*, 376 U.S. at 293 (malice "is an elusive, abstract concept, hard to prove and hard to disprove") (Black, J., concurring); *id*. at 298 n.2 ("The requirement of proving actual malice or reckless disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the court recognizes not to be an adequate safeguard" for First Amendment rights).

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Unfortunately, "[e]xperience supports the intuition that jurors have considerable trouble distinguishing actual malice from mere negligence." *Tavoulareas*, 817 F.2d at 807 (Ginsburg, J., concurring) (internal quotation omitted). In the words of Judge Bork, "[t]he evidence is mounting that juries do not give adequate attention to limits imposed by the first amendment and are much more likely than judges to find for the plaintiff in a defamation case." *Ollman v. Evans*, 750 F.2d 970, 1006 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985). "In the libel area, particularly, it is not a large exaggeration to suggest that jurors 'can easily misunderstand more law in a minute than the judge can explain in an hour.'" *Tavoulareas*, 817 F.2d at 808 (Ginsburg, J., concurring) (quoting Sunderland, *Verdicts, General and Special*, 29 Yale L.J. 253, 259 (1920)).

The First Amendment, then, imposes on trial judges the important burden of taking steps necessary "to reduce the risk that the protective benefits of the *Sullivan* rule [will become] mythical." *Tavoulareas*, 817 F.2d at 808. Among the most useful methods to reduce this risk is for the trial judge to "instruct[] the jury, in plain English, at the opening of the case and at appropriate times during trial, as well as at the close of the case," on the meaning and application of, and the heavy burden on the plaintiff imposed by, the actual malice rule. *Id.* (footnote omitted). Justice Ginsburg urged this approach in actual malice cases:

> [I]nstructions should not be reserved exclusively for the trial's finale. Enlightenment from the judge at the outset fosters intentional learning; by informing the jurors initially of the inquiries they are ultimately to undertake, early instructions may stimulate or facilitate the mental process involved in connecting up issues and key items of evidence. . . . Mid-stream instructions may be useful as well. They can serve as definers of difficult-to-grasp law at the moment that law bears on evidence produced. . . . The very repetition of instructions on elusive concepts should lessen the jury's sense of insecurity or discomfort in dealing with those concepts.

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Id. at 808 (quotation and citations omitted); *accord, e.g.*, Note, *Jury Instructions v. Jury Charges*, 82 W. Va. L. Rev. 555, 562 & n.37, 565-67 (1980).

Both before and, more often, after Justice Ginsburg's affirmation of the importance of pre-trial and mid-trial instructions, trial courts throughout the country have agreed to do so in several actual malice cases. *See, e.g., Harrison v. Hartford Courant*, No. 0044131 (Conn. Super. Ct. 1993); *Parsons v. Time, Inc.,* No. 83-1070-15 (D.S.C. 1984); *Godbehere v. Phoenix Newspapers*, No. C-575532 (Az. Super. Ct. 1988). Defendants therefore respectfully request that the Court instruct the jury, both before and at pertinent points during the trial, on the meaning and application of the actual malice rule in the "plain English" form attached hereto as Exhibit "__."

B.

TO FACILITATE THE JURORS' UNDERSTANDING OF THE COMPLICATED CONSTITUTIONAL AND STATE LAW CONCEPTS AT ISSUE, THE COURT SHOULD ALLOW COUNSEL TO BRIEFLY ADDRESS THE JURY DURING TRIAL

Recognizing that the traditional format of opening statement, evidence, and summation does not serve the jury, the parties or the First Amendment well in many cases, the federal judge who presided over one of the most high-profile libel cases in recent years allowed counsel for both sides to present throughout trial "interim summations," or "intsums," to the jury. *Westmoreland v. CBS*, No. 82-7913 (S.D.N.Y. Order of Oct. 3, 1984) (per Judge Leval) (copy attached hereto as Exhibit "__"). Now-Justice Ginsburg also endorsed this approach in her concurrence in *Tavoulareas*, 817 F.2d at 807 n.2.

As Judge Leval explained after the *Westmoreland* trial, he devised this trial management technique primarily as an aid to the jury:

> In a long and complicated trial, there will be much that the jury will not understand. There is only so much that counsel can communicate effectively in the opening statement . . . much of what was will, in any event, soon be forgotten. The jury will have little likelihood of catching the confirmatory or contradictory relationships between different pieces of evidence.

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Leval, *From the Bench: Westmoreland v. CBS,* 12 Litigation 7, 8, 66 (1985) (copy attached hereto as Exhibit "__"). Consequently, Judge Leval concluded: "The jury could be made better aware of the significance of the evidence and of its relationship to the complex issues of a libel trial if counsel were permitted to speak to the jury from time to time." *Id.* at 66.

Judge Leval's pretrial order in *Westmoreland* limited each side to 120 minutes of "intsums" for the entire trial. *Id.; Tavoulareas*, 817 F.2d at 807 n.2. Each side used about 100 minutes, averaging about 2½ minutes, when the case settled after 62 days of trial. Counsel used the intsums to "explain the significance, strength, or weakness of proof; to point out confirmation or contradiction of other evidence; to introduce new themes; to respond to opposing arguments; and to challenge the adversary's ability to prove his contentions." Leval, *supra*, at 66; *see Tavoulareas*, 817 F.2d at 807 n.2.

Like Judge Leval and Justice Ginsburg, Defendants believe the use of interim summations will help the jury understand the law and the facts as they are developed over the course of what promises to be a long, complex trial. Defendants therefore respectfully request that the court enter a pretrial order similar to that entered by Judge Leval in *Westmoreland*, allowing interim summations by both sides.

C.

**[VERSION 1 - BIFURCATION OF LIABILITY AND DAMAGES-
PRIVATE FIGURE]**

THE TRIAL SHOULD BE BIFURCATED INTO LIABILITY AND DAMAGE PHASES TO INSURE A FAIR TRIAL AND AVOID PREJUDICING DEFENDANTS' FIRST AMENDMENT INTERESTS, AND TO FURTHER JUDICIAL ECONOMY

As a result of the constitutionalization of state libel law that began with *New York Times Co. v. Sullivan* , 376 U.S. 254 (1964), the jury in this case is faced with tasks not present in most tort trials. For example, the jury will be required to apply one standard of fault to determine liability and a *different*, higher standard of fault to determine whether certain damages can be awarded. *See Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 332 (1974). And the jury will be required to evaluate other First Amendment protections that often preclude liability even though an article may have caused some damage. Plaintiffs' emotional testimony about damages could persuade the jury to ignore these constitutional

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protections and impose liability simply out of sympathy. Thus, asking the jury to determine liability and damages at the same time runs the substantial risk of jury confusion and resulting prejudice to the defendants. Bifurcating liability and damages remedies these problems and furthers judicial economy as well. For these reasons, bifurcation has been used successfully on many occasions.

1. The Standard for Bifurcation.

Federal Rules of Civil Procedure 42(b) authorizes this Court to bifurcate any issues for trial "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy . . . ." The Court is to consider whether the issues sought to be tried separately are significantly different, whether separate trials will avoid prejudice, and whether separate trials will further judicial economy. *See Beauchamp v. Russell,* 547 F. Supp. 1191, 1199 (N.D. Ga. 1982).

2. Bifurcation Is Necessary to Ensure a Fair Trial.

Liability and damage issues are commonly bifurcated, and it is particularly appropriate to do so in cases raising First Amendment issues. *See, e.g., Guccione v. Hustler Magazine*, 800 F.2d 298, 300 (2d Cir. 1086), *cert. denied*, 479 U.S. 1091 (1987) (liability and damages bifurcated in libel action); *Franklin Music v. American Broadcasting Co.,* 616 F. 2d 528, 538 (3d Cir. 1980) (same in action for trade libel and related claims); *Brown & Williamson Tobacco Co. v. Jacobson*, 644 F. Supp. 1240, 1245 (N.D. Ill. 1986) (liability and damages bifurcated in libel action); *Sharon v. Time Inc.,* 103 F.R.D. 86, 95 (S.D.N.Y. 1984) (trifurcation of liability phases and damages).

a. Liability and Damages Raise Separate and Distinct Issues.

The two predominant questions in this action - whether Defendants published an actionable article and whether Plaintiffs were injured - raise separate and distinct factual issues. *See Lo Cicero v. Humble Oil & Refinery Co.,* 52 F.R.D. 28, 30 (E.D. La. 1971) ("the testimony concerning quantum of damages is readily separable from what may concern liability"). Each involves different proof and evidence. Indeed, there is virtually no overlap between the **[#]** witnesses who will testify on liability and the **[#]** witnesses, including **[#]** experts, who will testify on damages.

b. Bifurcation Will Avoid Prejudice and Facilitate Proper Jury Application of Constitutionally Required Standards.

Defendants will be substantially prejudiced if liability is not bifurcated from damages for several

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reasons. First, the jury could be swayed by Plaintiffs' emotional damage testimony and impose liability out of sympathy, rather than on the grounds set forth in the Court's instructions. *See Beeck v. Aquaslide 'n' Dive Corp.,* 562 F.2d 537, 542 (8th Cir. 1977); *Beauchamp*, 547 F. Supp. at 1199-1200.

Second, the jury could easily misapply a critical constitutional protection against damages because the jury must apply one standard of fault to determine liability and a different *higher* standard of fault to determine whether presumed damages and punitive damages can be awarded. *See Gertz*, 418 U.S. at 349-50. Because states cannot impose liability for defamation without fault (*Gertz*, 418 U.S. at 347), this state requires a private plaintiff suing the media for defamation to first establish the defendants were [***EDITORS' NOTE: Insert fault standard and state law cite to support it.***] But under the First Amendment, Plaintiffs cannot recover the presumed or punitive damages sought here without *also* proving an additional, higher standard of fault - *i.e.*, actual malice. *Id.* at 349. These two standards are extremely different and easily confused by the jury. The [***negligence***] standard merely requires Plaintiffs to show that Defendants *objectively* should have known the published report was false. The actual malice standard, however, requires Plaintiffs to prove Defendants either *knew* the statements were false or acted in *reckless disregard* of whether they were false or not. *Id*. This latter standard is a *subjective* test, requiring Plaintiffs to prove Defendants "in fact entertained serious doubts as to the truth of [their] publication" and published "with a `high degree of awareness of . . . probable falsity.'" *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (citations omitted).

Juries have a very difficult time separating these two standards:

> Experience supports the intuition that jurors have considerable trouble 'distinguishing actual malice from mere negligence.' . . . As Judge Bork has observed, 'the evidence is mounting that juries do not give adequate attention to limits imposed by the first amendment . . . .' In the libel area particularly, it is not a large exaggeration to suggest that jurors 'can easily misunderstand more law in a minute than the judge can explain in an hour.' (Citations omitted.)

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Tavoulareas v. Piro, 817 F.2d 762, 807-08 (D.C. Cir.) (Ginsburg, J., concurring), *cert. denied*, 484 U.S. 870 (1987). The only way to insure the jury properly separates and applies these different standards is to bifurcate liability and damages. Any other approach will inevitably confuse the jury and thereby prejudice the defendant's constitutional rights.

3. Bifurcation Furthers Judicial Economy and May Obviate the Need for Days of Damage Testimony.

Before Plaintiffs can recover damages they must prove the challenged statements were false, defamatory, and made negligently. [***EDITORS' NOTE: Insert state law cite.***] In addition, Plaintiffs must overcome the defenses to liability including [***EDITORS' NOTE: Insert applicable defenses***]. If Plaintiffs fail to prove a single element or overcome a single defense, the case is over.

Absent bifurcation, the Court could waste ***[#]*** jury days hearing testimony from ***[#]*** experts and ***[#]*** lay witnesses on reputation, business, and emotional damage, which may be entirely unnecessary. The potential savings in Court and jury time, as well as that spent resolving disputes over damage instructions and evidentiary issues, in addition to longer jury deliberations, make bifurcation economical and worthwhile. Bifurcation has the added benefit of allowing the jury to decide the issues logically and methodically, without confusing liability and damage issues in a manner that could lead to error or motions to set aside the verdict.

D.

[VERSION 2 - BIFURCATION LIABILITY AND DAMAGES - PUBLIC OFFICIAL OR FIGURE]

THE TRIAL SHOULD BE BIFURCATED INTO LIABILITY AND DAMAGES PHASES TO INSURE A FAIR TRIAL AND AVOID PREJUDICING DEFENDANTS' FIRST AMENDMENT INTERESTS AND TO FURTHER JUDICIAL ECONOMY

As a result of the constitutionalization of state libel law that began with *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), this jury will be required to apply a higher standard of fault than is typical in tort trials. For example, because Plaintiffs are [***EDITORS' NOTE: Insert public figures or officials***], they must prove not only that the report is false (*Philadelphia Newspaper, Inc. v. Hepps,* 475 U.S. 767, 775-77 (1986)), but that Defendants published the report with actual malice - that is, with knowledge it was false or in reckless disregard for whether it was false or not. *Gertz v. Robert Welch,*

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Inc., 418 U.S. 323, 332 (1974).

These constitutional protections are necessary to insure that liability is not imposed on speech protected by the First Amendment. Unfortunately,

> [a]s Judge Bork has observed, `the evidence is mounting that juries do not give adequate attention to limits imposed by the first amendment . . . .' In the libel area particularly, it is not a large exaggeration to suggest that jurors `can easily misunderstand more law in a minute than the judge can explain in an hour.' (Citations omitted.)

Tavoulareas v. Piro, 817 F.2d 762, 807-08 (D.C. Cir.) (Ginsburg, J., concurring), *cert. denied*, 484 U.S. 870 (1987).

This risk of confusion is compounded if the jury hears damage testimony at the same time as liability testimony. Indeed, there is a substantial risk that emotional testimony by Plaintiffs and others about the alleged consequence of the report - *i.e.*, the Plaintiffs' damages - may sway the jury into ignoring constitutional protections and imposing liability simply out of sympathy. Bifurcating liability and damages will reduce this risk of prejudice to defendants and will also further judicial economy. For these reasons, bifurcation has been used successfully on many occasions and should be utilized here.

1. The Standard for Bifurcation.

Federal Rules of Civil Procedure 42(b) authorizes the Court to bifurcate any issues for trial "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy . . . ." The Court is to consider whether the issues sought to be tried separately are significantly different, whether separate trials will avoid prejudice, and whether separate trials will further judicial economy. *See Beauchamp v. Russell,* 547 F. Supp. 1191, 1199 (N.D. Ga. 1982).

2. Bifurcation is Necessary to Insure a Fair Trial.

Liability and damage issues are commonly bifurcated, and it is particularly appropriate to do so in cases raising First Amendment issues. *See, e.g., Guccione v. Hustler Magazine,* 800 F.2d 298, 300 (2d Cir. 1086), *cert. denied*, 479 U.S. 1091 (1987) (liability and damages bifurcated in libel action);

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Franklin Music v. American Broadcasting Co., 616 F. 2d 528, 538 (3d Cir. 1980) (same in action for trade libel and related claims); *Brown & Williamson Tobacco Co. v. Jacobson*, 644 F. Supp. 1240, 1245 (N.D. Ill. 1986) (liability and damages bifurcated in libel action); *Sharon v. Time Inc.,* 103 F.R.D. 86, 95 (S.D.N.Y. 1984) (same).

a. Liability and Damages Raise Separate and Distinct Issues.

The two predominant questions in this action - whether Defendants published an actionable article and whether Plaintiffs were injured - raise separate and distinct factual issues. *See Lo Cicero v. Humble Oil & Refinery Co.,* 52 F.R.D. 28, 30 (E.D. La. 1971) ("the testimony concerning quantum of damages is readily separable from what may concern liability"). Each involves different proof and evidence. Indeed, there is virtually no overlap between the ***[#]*** witnesses who will testify on liability and the ***[#]*** witnesses, including ***[#]*** experts, who will testify on damages.

b. Bifurcation Will Avoid Prejudice and Facilitate Proper Jury Application of Constitutionally Required Standards.

Defendants will be substantially prejudiced if liability is not bifurcated from damages because the jury could easily misapply critical constitutional protections. In particular, the jury could be swayed by Plaintiffs' emotional damage testimony and impose liability out of sympathy, ignoring the court's legal instructions. *See Beeck v. Aquaslide 'n' Dive Corp.,* 562 F.2d 537, 542 (8th Cir. 1977); *Beauchamp*, 547 F. Supp. at 1199-1200. In a case such as this, where liability issues are of constitutional import, the potential for irrevocable harm to Defendants is manifest. Bifurcation can ensure that the jury's deliberations on liability are free from any improper influence of the emotion generated by intangible damage evidence relating to reputation and emotional distress.

3. Bifurcation Furthers Judicial Economy and May Obviate the Need for Days of Unnecessary Testimony.

Before Plaintiffs can recover damages, they must prove the challenged statements were false, defamatory, and made with actual malice. In addition, Plaintiffs must overcome the defenses to liability including [***EDITORS' NOTE: Name applicable defenses***]. If Plaintiffs fail to prove a single element or overcome a single defense, the case is over.

Absent bifurcation, the court could waste ***[#]*** jury days on testimony by ***[#]*** experts and ***[#]*** lay witnesses on reputational, business, and emotional damage that may be entirely unnecessary. This

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potential savings in court and jury time, as well as the time spent resolving disputes over damage instructions and evidentiary issues, in addition to longer jury deliberations, make bifurcation economical and worthwhile. Bifurcation has the added benefit of allowing the jury to decide the issues logically and methodically, without confusing liability and damage issues in a manner that could lead to error or motions to set aside the verdict.

E.

[VERSION 3 - TRIFURCATION - PUBLIC OFFICIAL OR FIGURE:] TRIFURCATION OF THE TRIAL INTO THREE PHASES - FALSITY, FAULT AND DAMAGES - WILL PROTECT AGAINST JURY CONFUSION AND PREJUDICE TO DEFENDANTS AND FURTHER JUDICIAL ECONOMY

Under the First Amendment, Plaintiffs bear the burden of proving the challenged statements in the article are false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-77 (1986). Because Plaintiffs are [***EDITORS' NOTE: Insert public figures or officials***], they also bear the burden of proving by clear and convincing evidence that Defendants published the article with the requisite fault. In this case, this means Plaintiffs must establish Defendants acted with actual malice - *i.e.*, that Defendants knew the article was false or entertained serious doubts as to its falsity. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 332 (1974); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

As a result of this constitutionalization of state libel law, which began with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), defamation trials against the media involve three distinct parts: The jury first must decide whether the disputed statements were false and conveyed a defamatory meaning, then whether the defendant acted with the requisite degree of fault, and finally whether the plaintiff was damaged. Trifurcating the trial into these phases insures the jury will properly apply the relevant constitutional standards at each stage:

> The significant differences in the evidence that will be admissible on truth or falsity . . . and on [actual] malice or damages . . . and the complications and likely inability of the jury to avoid giving improper consideration to some potentially prejudicial evidence . . . makes a bifurcated trial seem more efficient and just than a single-stage trial.

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Sharon v. Time Inc., 103 F.R.D. 86, 95 (S.D.N.Y. 1984) (discussing three-part trial). This approach not only avoids prejudicing Defendants' constitutional rights, but benefits the court and jury by providing a logical sequence to the trial, saving unnecessary trial time if Plaintiffs fail to prove each required element. For these reasons, trifurcation has been used successfully and should be utilized in this case. *See Sharon v. Time Inc.*, 103 F.R.D. at 95.

1. The Standard for Trifurcation.

Under Fed. R. Civ. Proc. 42(b), the Court has the discretion to bifurcate any issues for separate trial "in the furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy . . . ." In applying this Rule, courts consider whether the issues are significantly different from one another to be bifurcated, whether bifurcation will avoid prejudice that might otherwise result from a single trial, and whether bifurcation will further judicial economy by making the proceeding more efficient. *See Beauchamp v. Russell,* 547 F. Supp. 1191, 1199 (N.D. Ga. 1982). Each factor weighs heavily in favor of trifurcation in this case.

2. Falsity, Fault, and Damage Involve Entirely Separate Factual and Legal Issues.

Segmenting the trial into falsity, fault, and damage phases creates a logical framework that enables the jury to better understand and apply the constitutional principles involved. Under this approach, the *first* phase of the trial focuses on the disputed statements: What was said about plaintiff? Was it defamatory? Was it false? The *second* phase takes up the next, but entirely separate, question of whether defendants acted with fault. Did they know the statements were false? Did they publish in reckless disregard of whether the statements were false or not? The *third* and final phase, if reached, determines the effect of the disputed statements: Was plaintiff damaged? If so, in what way, and to what extent? Should punitive damages be awarded?

Each phase raises distinct factual issues. For example, the jury can determine whether the statements were defamatory and false without also hearing testimony about Defendants' states of mind (*i.e.*, fault) or the resulting damage to plaintiffs. The witnesses for each phase are also largely distinct: The first phase would involve testimony from [***EDITORS' NOTE: Name or describe witnesses***]; the second from [***EDITORS' NOTE: Name or describe witnesses***]; and the third from [***EDITORS' NOTE:***

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Name or describe witnesses], as well as ***[#]*** damage experts.

3. Trifurcation Will Avoid Prejudice by Insuring Proper Jury Application of Constitutional Protections.

One of the most important constitutional protections for the media is the First Amendment's bar against imposing liability on speech without evidence that Defendants acted with some degree of fault. *Gertz*, 418 U.S. at 332. In a case such as this, where Plaintiffs are [***EDITORS' NOTE: add public figures or officials***], this means Plaintiffs must prove by clear and convincing evidence that defendants acted with actual malice. *Id.; St. Amant*, 390 U.S. at 731.

Unfortunately, juries have a difficult time properly applying this actual malice rule and often wrongfully conclude that if a statement is false and injured the plaintiff, there must be liability. In doing so, they fail to properly apply the constitutional principles:

> As Justices Black and Goldberg anticipated, `the risk is considerable that jurors will not comprehend the difference between reckless disregard and mere neglect or carelessness, or will confuse or blend the separate issues of falsity and actual malice.'
>
> * * *
>
> As Judge Bork has observed, `the evidence is mounting that juries do not give adequate attention to limits imposed by the first amendment . . . .'
>
> * * *
>
> In the libel area particularly, it is not a large exaggeration to suggest that jurors 'can easily misunderstand more law in a minute than the judge can explain in an hour.' (Citations omitted.)

Tavoulareas v. Piro, 817 F.2d 762, 806, 807-08 (D.C. Cir.) (Ginsburg, J., concurring), *cert. denied*, 484 U.S. 870 (1987).

The court in the *Sharon v. Time* libel trial "trifurcated" falsity, fault, and damages for these very reasons:

> Perhaps the most important consequence of structuring the jury's

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> consideration and decision of the issues was that the jury was thereby encouraged to treat the issues of falsity and actual malice as separate matters, with separate legal standards and evidence. Justices Black and Goldberg had predicted in *New York Times v. Sullivan*, 376 U.S. 254 (1964), that juries would inevitably confuse these questions, and tend to disregard the actual malice standard. . . . The high rate at which libel verdicts for plaintiffs have been set aside by trial and appellate courts during the last two decades indicated that these observations may have substance.

Hon. A. Sofaer, "*Jury Management in Sharon v. Time Inc.,* 8 U. Bridgeport L. Rev. 445, 446, 448 (1987). This trial should be trifurcated in the same manner to insure that the jury properly evaluates falsity and fault and correctly applies the relevant constitutional protections.

4. Trifurcation Will Also Further Judicial Economy.

Trifurcation furthers judicial economy by protecting against prejudicial jury error and by potentially saving countless trial days. Trifurcation is particularly appropriate here because there is a substantial likelihood Plaintiffs will *not* prevail on [***EDITORS' NOTE: Insert falsity, fault, or another ground and describe why, given facts of specific case***]. Absent trifurcation, the Court could spend ***[#]*** jury days hearing testimony from ***[#]*** witnesses on defendants' alleged fault, which would be unnecessary if the jury fails to find falsity, or hearing ***[#]*** experts and ***[#]*** lay witnesses on reputation, business, and emotional damage, which would be unnecessary if the jury fails to find defendants acted with fault. The potential savings in court and jury time, as well as time spent resolving disputes over additional evidentiary issues and jury instructions plus longer jury deliberations, makes trifurcation economical and worthwhile.

F.

THE COURT SHOULD SUBMIT TO THE JURY SPECIAL VERDICT INTERROGATORIES REQUIRING A SEPARATE DETERMINATION AS TO EACH STATEMENT IN ISSUE

Defendants have tendered special verdict forms that ask the jury to determine defamatory

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meaning, falsity, and constitutional malice separately as to each statement which remains in issue when the case is submitted. Fed. R. Civ. Proc. 49(a) provides:

> Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each and every issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.

In libel cases - where "jurors 'can easily misunderstand more law in a minute than the judge can explain in an hour' "- Justice Ginsburg has noted that the special verdict "may be a particularly useful check against jury misconstruction or misapplication of a standard as uncommon as actual malice." *Tavoulareas v. Piro*, 817 F.2d 762, 808 (D.C. Cir.), (Ginsburg, J., concurring), *cert. denied*, 484 U.S. 870 (1987). *See also* Parker, *Free Expression and the Function of the Jury,* 65 B.U.L. Rev. 483, 550-56 (1985) ("[c]ases involving free expression are precisely the type of cases that demand the use of several verdicts with interrogatories of Rule 49(b)"). It is for that reason that special verdicts are routinely used in defamation actions. *E.g., Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); *Tacket v. Delco Remy Div. of Gen. Motors Corp.,* 937 F.2d 1201, 1203 (7th Cir. 1991); *Wang v. Hsu*, 1991 U.S. Dist. LEXIS 4398 at *80 (N.D. Cal. 1991); *Newton v. National Broadcasting Co.,* 930 F.2d 662, 667 (9th Cir. 1990); *Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F. Supp. 1240, 1245 (N.D. Ill. 1986), *modified*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988); *Sharon v. Time, Inc.,* No. 83-4660 (S.D.N.Y. 1985); *Machleder v. Diaz*, 618 F. Supp. 1367, 1369 (S.D.N.Y. 1985), *modified*, 801 F.2d 46 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

In this case, the special verdict form on each particular statements is not only useful in guiding the jury, but is also helpful to this Court, and to any reviewing appellate court, in applying the doctrine of

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independent review to the jury's findings. *See Kushner v. Hendon Constr., Inc.,* 81 F.R.D. 93, 97 (N.D. Pa. 1979) ("such questions are normally helpful to the jury in clarifying the specific issues to be determined by them and the jury's answers to specific questions are often helpful to appellate courts in the consideration of issues on appeal"). Accordingly, special verdict forms requiring the jury to deliberate on each element of libel separately as to each statement on issue should be given.

G.

JURY INSTRUCTIONS

[***EDITORS' NOTE: For a compendium of useful jury instructions, see LDRC 1995 JURY INSTRUCTIONS MANUAL and updates. This section of the Model Brief is intended to cover miscellaneous points not covered in the manual that may be useful for jury instructions or argument in support of a motion for directed verdict.***

[*EDITORS' NOTE: In most cases, counsel will have requested a special verdict form that requires the jury to microfocus upon each defamatory statement within the defendants' publication that remains in issue when the case is submitted. This is consistent with the requirement that the determination of liability in a constitutional defamation case requires scrutiny of the particular statements in issue, as well as the circumstances under which they are made. New York Times v. Sullivan, 376 U.S. 254, 285 (1964). It is also helpful to the court and any reviewing appellate court in applying the doctrine of independent review to the jury's findings. Id. See Section III.G. If the jury finds liability as to some but not all of the statements in issue, the actionable statements may be merely subsidiary to a broader but truthful (or privileged) defamatory charge, and therefore not sufficient to materially advance the "sting" of the publication as a whole. Counsel should then request an additional instruction that addresses the issue of falsity and the defamatory meaning of the publication as a whole in light of the nonactionable statements.*]

1. [*Substantial Truth - Multiple Defamatory Statements Within a Single Publication:*] Defendants Are Entitled to a Determination of the Issue of Substantial Truth in Reference to the Article as a Whole.

In this case, the statements in issue are but a small part of a larger article, most of which is undisputedly true. Although special findings on each particular statement in issue are helpful, that still cannot answer the more basic question of whether any arguable falsity in the article is so significant that the publication in its entirety would have a materially different effect upon the mind of the reader than the truth of the matter. *Gomba v. McLaughlin*, 180 Colo. 232, 504 P.2d 337, 339 (1973); **[*EDITORS' NOTE: Add applicable local authority*]**. The exact same test is mandated by the First Amendment. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991).

As the Seventh Circuit recently stated in *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222 (7th Cir. 1993):

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> Falsehoods that do not harm the plaintiffs' reputation more than a full recital of the true facts about him would do are thus not actionable. The rule making substantial truth a complete defense and the constitutional limits on defamation suits coincide.

And quoting *Herron v. King Broadcasting Co.,* 776 P.2d 98, 102 (Wash. 1989), the *Haynes* court added, "A news report that contains a false statement is actionable only when 'significantly greater opprobrium' results from the report containing the falsehood than would result from the report without the falsehood." *Id.* This is consistent with the general rule that the actionable character of a published statement should be determined in reference to the publication as a whole. *NBC Subsidiary (KCNC), Inc. v. The Living Will Ctr.,* 879 P.2d 6, 10 (Colo. 1994).

Accordingly, the jury should be instructed that in order to find liability, it must find that the substance of the article as a whole is not substantially true. The jury should be further instructed that this issue turns upon whether any false statements in the article are such as to materially change the effect of the article upon the mind of the average reader.

In the case of *Smiley's Too, Inc. v. The Denver Post Corp.*, 935 P.2d 39, 42 (Colo. Ct. App. 1996), the Colorado Court of Appeals approved the following charge to the jury as to the element of falsity of an article that contained multiple defamatory statements, some of which were not actionable:

> In order for the plaintiff, *Smiley's Too, Inc.*, to recover from the defendants on its claim of libel, you must find that both of the following have been proven, by clear and convincing evidence, as to one or more of the above statements:
>
> 1. The substance or gist of the statement was false at the time the article was published, and the falsity was such that the article as a whole would produce a materially more damaging effect upon the reader than the truth of the matter . . .

An alternative and more readily understood formulation of this instruction was approved by

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Judge Posner in *Haynes v. Alfred A. Knopf, Inc., supra*:

> The substance or gist of the statement was false at the time the article was published, and the falsity was such that the article as a whole produced a significantly more damaging effect upon the reader than would result from the article without the statement.

In this case, the article, when read in its entirety, has no materially different effect upon the mind of the reader than the truth. [***EDITORS' NOTE: Insert discussion regarding why.]*** Accordingly, the requested instruction should be given.

[EDITORS' NOTE: Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1568 n.6 (D.C. Cir. 1984), vacated on other grounds, 477 U.S. 242 (1986) (Scalia, J.), and Desnick v. American Broadcasting Companies, Inc., 44 F.3d 1345, 1350 (7th Cir. 1995), suggest that defamatory falsehoods contained in a publication can be justified by other statements in the publication only if they are related to the defamatory charges in issue. However, whether a defamatory charge in issue is sufficiently unrelated to the other nonactionable damaging statements in the publication to convey an incremental "sting" should be a question for the jury unless the separate and distinct nature of the charge in issue is "clear." See Colorado Jury Instructions-Civil 4th, Instruction 22:1, Notes on Use (1999).]

[EDITORS' NOTE: The foregoing argument is based upon authorities that apply the doctrine of "substantial truth" as distinguished from the barely distinguishable doctrine of "incremental harm." See Smolla, Law of Defamation § 5.08[3]. The latter should also be utilized if available in the jurisdiction. Where the statements in issue are merely subsidiary to more fundamental allegations, a narrower argument and instruction may be appropriate. See Church of Scientology Int'l v. Time Warner, Inc., 932 F. Supp. 589, 593-94 (S.D.N.Y. 1996); see also AIDS Counseling and Testing Centers v. Group W Television, Inc., 903 F.2d 1000, 1004 (4th Cir. 1990); Herbert v. Lando, 781 F.2d 298 (2d Cir.), cert. denied, 476 U.S. 1182 (1986); Foretich v. CBS, Inc., 619 A.2d 48, 63 (D.C. App. 1993).]

2. [*Causation/Damages - Multiple Potentially Damaging Statements Within a Single Publication:*] Plaintiffs Must Prove Their Damages, if Any, Were Caused By the Actionable Statements, as Distinct From Nonactionable Statements, Within Defendants' Publication.

Defendants' publication contains multiple statements concerning Plaintiffs, some of which have potential for injury to Plaintiffs' reputations that have not been placed in issue by the Plaintiffs or have been ruled not actionable as a matter of law by the Court. In proving damages, it is not enough to show that Plaintiffs suffered losses or injuries as a result of the article. For evidence of injuries to be admissible, it must be shown that the injuries were the result of the actionable statements in the article, as distinct from those which are admittedly true or are otherwise not actionable. For the same reason,

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the jury must be instructed that in order for Plaintiffs to recover actual damages, they must prove that the injury was caused by the statements for which liability is found, as distinct from other non-actionable statements in the publication. *AIDS Counseling and Testing Centers v. Group W Television, Inc.,* 903 F.2d 1000, 1004 (4th Cir. 1990); *Foretich v. CBS, Inc.,* 619 A.2d 48, 63 (D.C. App. 1993). *See also Maheu v. Hughes Tool Co.,* 659 F.2d 459, 477 (9th Cir. 1977); *Chapin v. Greve*, 787 F. Supp. 557, 562 (E.D. Va. 1992); T. Kelley & S. Zansberg, *Why Courts Should Require Plaintiffs Claiming Losses to Prove That Falsity Caused Them*, Vol. 15, No. 3, Communications Lawyer 8 (1997) (available on WESTLAW).

3. [Implied or Nonliteral Meaning:] The Court Should Require a Jury Finding That Defendants Published With a Knowing or Reckless State of Mind as to the False Meaning That Would Be Conveyed by Their Publication.

[EDITORS' NOTE: In some cases the meaning intended by the defendants is true, but the meaning claimed by the plaintiffs is not only untrue but known by the defendants and arguably by the reader, viewer, or listener to be untrue. Examples are fiction, satire, and rhetorical hyperbole which the publishers know are untrue but not intended to be taken as factual references to any individual. In other cases, the plaintiffs claim that the defendants' words convey a defamatory meaning which the defendants deny was intended. In such cases, the usual formulation of constitutional malice in terms of knowledge of falsity, or reckless disregard for whether the statement is true or not, will not adequately protect the defendants. [EDITORS' NOTE: This section of the brief assumes a case in which the plaintiffs' claims are based upon an allegation of implied meaning with respect to a purportedly factual account. See generally Thomas Dienes & L. Levine, Implied Libel Law, Defamatory Meaning, and State of Mind: The Promise of New York Times v. Sullivan; 78 Iowa L. Rev. 237 (1993); Marc A. Franklin & Daniel J. Bussel, The Plaintiffs' Burden in Defamation: Awareness and Falsity, 25 Wm. & Mary L. Rev. 825 (1984). In cases of fiction or satire, a similar but refocused argument should be made.]

In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986), the Supreme Court held that where a media defendant publishes information of public concern, the plaintiff - whether a private or public figure - bears the burden of demonstrating that the publication is false. Although forcing plaintiffs to "bear the burden of proving falsity [will result in some cases where] plaintiffs cannot meet their burden despite the fact that the speech is false[,]" the Court held "the Constitution requires us to tip [the scales] in favor of protecting true speech . . . . " *Id.* Moreover, when the alleged libel is based upon an implied meaning, the element of actual malice requires proof that the defamatory "statements were made with knowledge of their false implications, or reckless disregard for the truth." *Milkovich v. Lorraine Journal Co.,* 497 U.S. 1, 3 (1990).

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As discussed below, courts faced with claims of libel by implication have applied these and similar Supreme Court decisions and held that, at least where the publication involves a matter of public concern, the plaintiffs cannot recover based upon an alleged implied meaning unless he or she demonstrates the defendants actually *intended* to convey that implication. Although many of these cases have involved public figures or officials, the Louisiana Supreme Court recently held that implication claims by even private figures must fail where there was no proof that the defendants intended to convey the implied meaning the plaintiff complained about. *Sassone v. Elder*, 626 So. 2d 345, 22 Media L. Rep. 1049 (La. 1993) (plaintiff required to prove the implication he complained about was the "principal inference . . . intended by the publisher").

Similarly, in *Woods v. Evansville Press Co.,* 791 F.2d 480 (7th Cir. 1986), the court required proof of intent in implication cases on grounds that fully apply to both private and public figure cases:

> [R]equiring a publisher to guarantee the truth of all the inferences a reader might reasonably draw from a publication would undermine the uninhibited, open discussion of matters of public concern. *A publisher reporting on matters of general or public interest cannot be charged with the intolerable burden of guessing what inferences a jury might draw from an article and ruling out all possible false and defamatory innuendoes that would be drawn from the article*.

791 F.2d at 487-88 (emphasis added). *See also Masson v. The New Yorker Magazine, Inc.,* 1993 WL 359871, at *8-9 (N.D. Cal. 1993) (the plaintiff must demonstrate that the defendants intended to publish a defamatory implication; it is not the law that "media defendants would be held liable regardless of their intent"); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093-94 (4th Cir. 1993) ("[A] libel-by-implication plaintiff must make an especially rigorous showing where the express facts are literally true. The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference"). *Newton v. NBC*, 930 F.2d 662, 681 (9th Cir. 1990) (despite the jury's finding that the alleged defamatory implication was "clear

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and inescapable," and therefore that defendants "intended" to publish that implication, plaintiffs' implication claim was dismissed; *the approach advocated by plaintiff would impose liability "not only for what was not said, but also for what was not intended to be said")* (emphasis added); *White v. Fraternal Order of Police*, 909 F.2d 512, 520, 526 (D.C. Cir. 1990) (implication claim not actionable unless the plaintiff demonstrates the defendant "intends or endorses the defamatory inference"); *Fong v. Merena*, 655 P.2d 875, 876 (Haw. 1982) (no actual malice in the absence of evidence that defendant intended his ambiguous message to be construed in a false manner); *Good Government Group of Seal Beach v. Superior Court*, 22 Cal. 3d 672, 684, 586 P.2d 572, 578, 150 Cal. Rptr. 258, 264 (1978), *cert. denied*, , 441 U.S. 961 (1979) (charge of "blackmail and extortion" in context, even if capable of conveying literal meaning, was not published with actual malice unless the "defendant either deliberately cast his words in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or . . . knew or acted in reckless disregard of whether his words would be interpreted by the average reader as defamatory statements of fact.").

Here, the jury should be required to find that Defendants published with a knowing or reckless state of mind the false meaning Plaintiffs' claim was conveyed by the article. ***[EDITORS' NOTE: Insert factual discussion regarding why.]***

4. The Court Should Instruct the Jury That Evidence of Material Omitted by Defendants From the Publication Is of Limited Relevance.

Defendants have no obligation to include facts in the news story that would be considered favorable to Plaintiff. Nor is there any requirement that the report be "objective," "unbiased," or present favorable and unfavorable facts equally. Liability can be predicated only on the publication of false facts. It cannot rest on the Defendants' editorial decision not to publish other facts, and the jury should be instructed accordingly.

This rule is rooted in the First Amendment. Free speech would be chilled if judges and juries were permitted to impose liability by second-guessing editorial decisions, and what information can be included in the very limited space available in a newspaper or in a broadcast. The Constitution does not permit "intrusion into the function of editors." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241,

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258, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974). "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and the treatment of public issues and public officials-whether fair or unfair-constitute the exercise of editorial control and judgment." *Id*.

Thus, Plaintiff's contention that the news story would not have been false if Defendants had included additional information, thereby making the report more objective or balanced, cannot survive. Advocacy, which includes the presentation of a particular viewpoint with selected facts, is part of our nation's heritage. While Defendants aspire to present readers and viewers with a fair presentation of the facts - and they believe they did here - they have no legal duty to Plaintiff to publish or broadcast what Plaintiff would consider to be "an objective account." *Reader's Digest Assn. V. Superior Court*, 37 Cal. 3d 244, 259 (1984).

In *Machleder v. Diaz*, 801 F.2d 46 (2d Cir. 1986), the plaintiff asserted that a news report portrayed him falsely because it did not include those portions of an interview that would have explained his behavior. The Second Circuit Court of Appeals reversed the jury verdict for the plaintiff, stating:

> A court cannot substitute its judgment for that of the press by requiring the press to present an article or broadcast in what the court believes is a balanced manner. It may only assess liability when the press so oversteps its editorial freedom that it contains falsity and does it with the requisite degree of fault.

Id. at 55; *accord Reader's Digest*, 37 Cal. 3d at 259 (no liability where defendants published article reflecting only their views of plaintiff).

Similarly, in *NBC Subsidiary (KCNC-TV), Inc. v. Living Will Center*, 879 P.2d 6 (Colo. 1994), the plaintiff asserted that a news report critical of its "living will" packet was inaccurate because the report did not describe all of the packet's features. The Colorado Supreme Court dismissed the action because the "limited, though accurate, information about the packet" was not defamatory. *Id.* at 15.

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Accord Peter Scalamandre & Sons v. Kaufman, 113 F.3d 556, 563 (5th Cir. 1997) (reversing jury verdict for plaintiff where plaintiff contended that television report was defamatory in its selective presentation of interviews; "TV Nation was entitled to edit the tape it shot to fit into the short time frame allotted to the sludge segment."); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1306 (8th Cir. 1986) (*en banc*) (affirming summary judgment for defendant where plaintiff alleged that chronology would have been more fair if it included additional facts; "Accounts of past events are always selective, and under the First Amendment the decision of what to select must almost always be left to writers and editors. It is not the business of government."); *Engler v. Winfrey*, 201 F.3d 680, 689 (5th Cir. 2000) (citing *Scalamandre* and rejecting disparagement claim based on editing of interview); *Goodrich v. Waterbury Republican-American, Inc.*, 448 A.2d 1317, 1331 (Conn. 1982) (affirming directed verdict for defendant where plaintiff argued that additional facts should have been included).

Thus, the jury should be instructed that its determination of falsity and fault must focus on the *published* statements alone, and there can be no finding of liability based on the defendants' selection (and omission) of facts for publication.

IV.
OTHER ISSUES

A.
[*CAUSATION:*] PLAINTIFFS MAY RECOVER ONLY THOSE DAMAGES THEY CAN PROVE RESULTED FROM THE FALSE STATEMENTS IN ISSUE.

Where an article contains several defamatory comments, only some of which are false, the only recoverable damages are those resulting from the false statements in issue. The Restatement provides that "one who is liable for a defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed." Restatement (Second) of Torts § 621 (1977). *See also Bell Publ'g Co. v. Garrett Eng'g Co.*, 141 Tex. 51, 65, 170 S.W.2d 197, 206 (1943) ("where some of the defamatory charges in a publication are found to be true and others false, the jury should be instructed to consider only such damages as resulted from the false [charges]"); *Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1206 (N.D. Ill. 1984), aff'd mem., 757 F.2d 1291 (7th Cir. 1985) (the plaintiff must allege which statements caused which damages and the amount of such damages). *But see Kassel v.*

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Gannett Co., Inc., 875 F.2d 935, 946-47 (1st Cir. 1989) (court ruled that damages did not have to be linked to specific defamatory sentence because defamatory sentence tainted the rest of the accurately reported comments by the plaintiff and gave them a negative connotation not intended by the plaintiff).

The First Amendment mandates that where a publication contains some actionable and some nonactionable defamatory statements, the plaintiffs cannot recover for the effects of the nonactionable statements. Therefore, the court must eliminate those damages to avoid burdening protected speech. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 102 S. Ct. 3409, 3427, 73 L. Ed. 2d 1215 (1982) (in case involving boycott protesting racial segregation, no damages can be awarded for economic losses caused by protected expression; presence of constitutionally protected activity in a case seeking recovery for unprotected actions "imposes a special obligation on [the] Court to examine critically the basis on which liability was imposed"); *Philadelphia Newspapers, Inc., v. Hepps*, 475 U.S. 767, 777, 106 S. Ct. 1558, 1564, 89 L. Ed. 2d 783 (1986) (a private figure "must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant"). Accordingly, Plaintiffs may recover only those damages they can prove resulted from the false statements. ***[EDITORS' NOTE: Insert factual discussion regarding why.]***

B.

[*REPUTATIONAL HARM:*] PLAINTIFFS CANNOT PROVE BY COMPETENT EVIDENCE THE FALSE STATEMENTS ACTUALLY HARMED THEIR REPUTATION

1. [*Causation:*] Plaintiffs' Have Suffered No Harm to Their Reputations as a Result of the False Statements.

Plaintiffs' injury must have been caused by the false statements, not the true or otherwise nonactionable statements, to be compensable. *AIDS Counseling & Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990); *Foretich v. CBS, Inc.*, 619 A.2d 48, 63 (D.C. App. 1993). A state's only interest in compensating private individuals for injury to reputation is to compensate them for their "actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49, 94 S. Ct. 2997, 3011, 60 L. Ed. 2d 323 (1979). "More to the point, the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury . . . . [A]ll awards must be supported by competent evidence concerning the injury." *Id.* at 349-50.

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Increasingly, courts are requiring real proof of actual injury. *See, e.g.*, *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1144 (7th Cir. 1985) (new trial granted, *inter alia*, because court found compensatory damage award "absurd" and far in excess of comparable awards), *cert. denied*, 475 U.S. 1094, 106 S. Ct. 1489, 89 L. Ed. 2d 892 (1986); *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 85-86 (Tex. Ct. App. 1982) (award reduced because not supported by sufficient competent evidence where the plaintiff offered no evidence, other than his own testimony, of actual injury to his reputation or of any loss because of embarrassment or humiliation; the plaintiff also offered no evidence of emotional or physical reaction to the articles).

Courts have held that where there is insufficient evidence that the plaintiffs' reputations were injured by allegedly defamatory statements, nominal damages are sufficient to vindicate any possible reputational injury. *See, e.g.*, *Airlie Found. Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421, 431 (D.D.C. 1972); *Buckley v. Littell*, 539 F.2d 882, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062, 97 S. Ct. 785, 50 L. Ed. 2d 777 (1977) (without proof of special damages or harm to reputation, plaintiff entitled to only $1); *Lewis v. Elliott*, 628 F. Supp. 512, 523 (D.D.C. 1986) (nominal recovery of $100 for reputation injury appropriate because "award is intended to compensate plaintiff, not punish defendants"). *See also Newton v. National Broad. Co., Inc.*, 677 F. Supp. 1066 (Nev. 1987), rev'd on other grounds, 930 F.2d 662 (9th Cir. 1990) ($5 million recovery for injury to the plaintiff's reputation reduced to $50,000 by district court; entire verdict later reversed on appeal).

Here, Plaintiffs cannot prove any harm to their reputations caused by the false statements in issue. [***EDITORS' NOTE: Insert facts and lack of causation discussion here.]***

2. [*Admissible Evidence - Proof of Plaintiffs' Reputation*: Evidence Establishing Plaintiffs' Reputations Both Before and After the Publication Should Be Admitted to Prove the Extent of Damages, If Any.

a. Proof of Plaintiffs' Good Reputations May Be Allowed Even Absent an Attack on Reputation.

[EDITORS' NOTE: The traditional approach prevents evidence of good reputation absent attack, while the modern approach allows evidence of reputation before and after the publication to prove the extent of any damage. Counsel may wish to choose between the approaches.]

(1) Traditional Approach

The good reputations of libel plaintiffs were presumed under the common law. *Roper v. Mabry*,

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15 Wash. App. 819, 824, 551 P.2d 1381, 1385-86 (1976). Accordingly, the traditional rule was that because the plaintiffs' good reputations were presumed, "affirmative evidence of good reputation in advance of any attack on it by defendant is inadmissible . . . ." *Davis v. Hearst*, 160 Cal. 143, 185, 116 P. 530, 548 (1911); *see also Codner v. Toone*, 224 Kan. 531, 533, 581 P.2d 387, 389 (1978) ("[E]vidence of good reputation and character is not admissible in the plaintiff's case-in-chief in an action for libel or slander unless the reputation or character of the plaintiff has first been attacked by the defendant"). If the defendants' answer denies an allegation of the plaintiffs' good reputations, that may be sufficient to place the plaintiffs' reputations "in issue" and to open the door to affirmative proof. *Sloneker v. Van Ausdall*, 106 Ohio St. 320, 326, 140 N.E. 121, 123 (1922). This rule has been disregarded when the defamation concerns a plaintiff's professional capacity. *Scott v. Times-Mirror Co.*, 178 Cal. 688, 174 P. 312 (1918).

(2) Modern Approach

The current legal trend permits both sides to offer evidence of the plaintiffs' reputations before and after the publication because such evidence tends to prove the extent of damages. *See, e.g.*, *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 304 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091,107 S. Ct. 1303, 94 L. Ed. 2d. 158 (1987); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F. 2d 1072, 1079 (3d Cir.), *cert. denied*, 474 U.S. 864, 106 S. Ct. 182, 88 L. Ed. 2d 151 (1985); *Hartmann v. American News Co.*, 171 F.2d 581, 586 (7th Cir. 1948), *cert. denied*, 337 U.S. 907, 69 S. Ct. 1049, 93 L. Ed. 1719 (1949); *Sharon v. Time, Inc.*, 103 F.R.D. 86, 90 (S.D.N.Y. 1984); *MacDonald v. Time, Inc.*, 554 F. Supp. 1053, 1060 (D.N.J. 1983); *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 927-29 (C.D. Cal. 1982); *Williams v. District Court*, 866 P.2d 908, 911-12 (Colo. 1993); *Warren v. Pulitzer Publ'g Co.*, 336 Mo. 184, 212, 78 S.W.2d 404, 420 (1934). Here, evidence of Plaintiffs' reputations before and after the publication should be admitted at trial. ***[EDITORS' NOTE: Insert factual discussion showing why.]***

[***EDITORS' NOTE: Plaintiff's problem: It is difficult to find witnesses who know plaintiff (and his or her reputation) who will testify that they believed the defamatory statement and, as a consequence, thought less of the plaintiff. Defendant's problem: Trying to limit testimony by plaintiff regarding negative statements made to him or her, and evidence of unverifiable claims by plaintiff that he or she experienced ostracism.***]

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b. Proof of Plaintiffs' Bad Reputation, Including Other "Bad Acts," Should Be Allowed to Establish Plaintiffs' Reputations in the Community.

[EDITORS' NOTE: Regardless of the theory of admissibility, local practice may require that proof of specific conduct other than that alleged in the defamation at issue should be pleaded in the answer. Littlejohn v. Piedmont Publ'g, 7 N.C. App. 1, 171 S.E.2d 227 (1969). See also Fed. R. Civ. Proc. 8(c). Under modern practice, the chances of having the evidence admitted increase when there is no element of surprise.]

[EDITORS' NOTE: Although the tort is often referred to as "defamation of character," it has been said the issue in a libel action is the plaintiff's reputation rather than actual character. Gobin v. Globe Publ'g Co., 229 Kan. 1, 5, 620 P.2d 1163, 1166-67 (1980). The common law tradition was that good or bad reputation is proven by a witness who lays a foundation that he is or was familiar with the plaintiff's reputation in the community and then provides a lay opinion that the reputation was good or bad for a particular trait. The witness was not allowed to testify to opinions concerning the plaintiff's character or about specific good or bad acts bearing upon that character; nor was the witness permitted to testify to what others said about the plaintiff, even though such hearsay formed the basis of the opinion testimony. Butts v. Curtis Publ'g Co., 225 F. Supp. 916 (N.D. Ga. 1964), aff'd, 351 F.2d 702 (5th Cir. 1965), aff'd, 388 U.S. 130 , 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). The rationale for excluding evidence of specific acts was that it tends to demonstrate, not the reputation that the plaintiff has, but the one he deserves. See, e.g., Butts v. Curtis Publ'g Co., 225 F. Supp. at 921 ("the only tendency of such proof is to show, not that the plaintiff's reputation is bad, but that it ought to be bad"); Daugherty v. Kuhn's Big K Store, 663 S.W.2d 748, 750 (Ky. Ct. App. 1983) (evidence of bad character may not include specific acts of plaintiff's conduct); Sun Printing & Publ'g Ass'n v. Shenck, 98 F. 925, 929 (2d Cir. 1900) ("[i]t is not a defense to a libel or slander that the plaintiff has been guilty of offenses other than those imputed to him, or of offenses of a similar character; and such facts are not competent in mitigation of damages"); Gobin v. Globe Publ'g Co., 229 Kan. at 5, 620 P.2d at 1166-67 ("[r]eputation is what others say or think about a person, . . . [c]haracter, on the other hand, denotes those moral qualities which a person possesses, one's moral fiber . . . it is reputation, not character, which is the fact in issue [in a libel case]"); Boyles v. Mid-Florida Television Corp., 431 So. 2d 627, 640 (Fla. Dist. Ct. App. 1983), aff'd, 467 So. 2d 282 (1985) (particular instances of misconduct inadmissible on issue of reputation); Vojak v. Jensen, 161 N.W.2d 100, 110 (Iowa 1968) (same).

[EDITORS' NOTE: Some courts have also relied on the likelihood of prejudice as a basis for excluding evidence of specific instances of uncharged misconduct. See, e.g., Daugherty v. Kuhn's Big K. Store, 663 S.W.2d at 750 ("[i]f compelled to defend specific acts the focus of the trier of fact would be diverted from the issue of one's reputed character onto the resolution of the specific acts. While one can be expected to defend his general reputation, it would be manifestly unfair to compel him to defend a lifetime of specific acts"); Boyles v. Mid-Florida Television Corp., 431 So. 2d at 640 (tarnished reputation must relate to subject on which libel rests, and homosexuality is not relevant to defamation concerning rape and child abuse and is too inflammatory to be admissible); Himango v. Prime Time Broad., Inc., 327 Wash. App. 259, 265-66, 680 P.2d 432, 437-38 (1984) (evidence of extramarital affairs in defamation involving an allegation of forcing unwanted sexual attention on another properly excluded on grounds of undue prejudice); Frisk v. News Co., 361 Pa. Super. 536, 546-49, 523 A.2d 347, 352-53 (1986) (probative value of specific acts of misconduct outweighed by undue prejudice).]

Evidence of Plaintiffs' character, including specific instances of misconduct (particularly if they are publicly known), is relevant to the issue of reputation under Federal Rules of Evidence 401.

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Because Plaintiffs' "character" is in issue in a defamation case, inquiry into specific instances of misconduct for purposes of that issue is proper. *See, e.g.*, *Schafer v. Time Inc.*, 142 F.3d 1361, 1372 (11th Cir. 1998); *United States v. Piche*, 981 F.2d 706, 713 (4th Cir. 1992), *cert. denied*, 508 U.S. 916, 113 S. Ct. 2356, 124 L. Ed. 2d 264 (1993); *Longmire v. Alabama State Univ.*, 151 F.R.D. 414, 419 (M.D. Ala. 1992); *Collins v. Retail Credit Co.*, 410 F. Supp. 924, 930-31 (E.D. Mich. 1976). *See also Wilson v. Scripps-Howard Broad. Co.*, 642 F.2d 371, 376 (6th Cir. 1981) ("That the lawsuits [accusing plaintiffs of the bad conduct in issue] had been filed does not tend to prove that plaintiff's standing in the community had been harmed unless there was also evidence that the lawsuits were known to the public").

Accordingly, proof of Plaintiffs' bad reputation, including other "bad acts," should be allowed to establish Plaintiffs' reputations in the community. [***EDITORS' NOTE: Insert proposed evidence and why it should be admitted.]***

C.

[EMOTIONAL DISTRESS:] PLAINTIFFS CANNOT PROVE THE FALSE STATEMENTS IN ISSUE CAUSED EMOTIONAL DISTRESS

Emotional distress awards must be supported by the record. *See, e.g.*, *Burnett v. National Enquirer*, 7 Med. L. Rptr. 1321, 1324 (1981), *aff'd*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983) (jury awarded a plaintiff $300,000 in general damages based on a false news report that portrayed her as being "drunk, rude, uncaring and physically abusive" at a restaurant; although the trial court found the plaintiff was a credible witness who did not exaggerate her complaints and that she had "every right to suffer anxiety reactions," it found the $300,000 award was clearly excessive and not supported by substantial evidence; the court reduced the award to $50,000, "a more realistic recompense for plaintiff's emotional distress and special damage"); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d at 1144 (court granted a new trial based on a similar conclusion in a false light/privacy action, saying, "$300,000 for emotional distress is an absurd figure. Though distressed . . . Douglass suffered no severe or permanent psychiatric harm - nothing more than transitory emotional distress. . . . We have repeatedly emphasized . . . we will not allow plaintiffs to throw themselves on the generosity of the jury;

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if they want damages they must prove them. . . . Modest compensatory damages are, as they should be, the norm in these cases"). *Accord Simon v. Shearson Lehman Brothers*, 895 F.2d 1304, 1318-20 (11th Cir. 1990) (applying California law, court reduced $1 million compensatory award to $250,000, even though evidence demonstrated that the plaintiff had suffered reputational damage, humiliation, and mental anguish); *Lewis v. Elliot*, 628 F. Supp. 512 (D.D.C. 1986) (jury's award of $470,940 for the plaintiff's mental anguish and physical pain reduced to $50,000, despite physician's evidence that plaintiff suffered anguish); *A.H. Belo v. Rayzor*, 644 S.W.2d at 74 (jury award of $1 million reversed, and the plaintiff ordered to take nothing because there was no evidence of emotional or physical harm).

Causation must be proved within a reasonable medical probability based on competent expert testimony. *See, e.g.*, *Jones v. Ortho Pharm. Corp.*, 163 Cal. App. 3d 396, 403, 209 Cal. Rptr. 456, 460 (1985); *Hines v. Indust. Accident Comm'n*, 215 Ca. 177, 187-88, 8 P.2d 1021, 1026 (1932). A plaintiff, as a lay person, is not competent to render an opinion regarding causation. *Vaden v. Holmes*, 39 Cal. App. 2d 580, 582-83, 103 P.2d 1002 , 1003 (1940).

Here, Plaintiffs cannot prove they suffered any emotional distress as a result of the false statements in issue. ***[EDITORS' NOTE: Insert facts regarding Plaintiffs' failure to designate a competent medical expert or lack of evidence to show causation.]***

D.

[ECONOMIC LOSSES:] PLAINTIFFS' CANNOT PROVE THE FALSE STATEMENTS IN ISSUE CAUSED THEM ECONOMIC HARM.

1. Plaintiffs' Economic Harm Was Not Caused By the False Statements.

To recover economic damages, Plaintiffs must prove that the subject defamatory language proximately caused their injury. *Brown v. Petrolite*, 965 F.2d 38, 43 (5th Cir. 1992); *Simon v. Shearson Lehman Bros. Inc.*, 895 F.2d at 1318 (no causation for the plaintiff's termination following slanderous remark because "[n]o evidence in this case shows that [the employer] specifically considered the slanderous statement in terminating [the plaintiff]"); *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 539 (10th Cir. 1987) ("absent proof of causation it is not permissible to suggest the loss of specific customers, orders, profits, or other specific pecuniary loss"); *Continental Nut Co. v. Robert L. Berner Co.*, 393 F.2d 283, 286-87 (7th Cir.), *cert. denied*, 393 U.S. 923, 89 S. Ct. 254, 21 L. Ed. 2d 259 (1968)

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(business lost allegedly as result of libel not compensable where "plaintiff has not produced the testimony of a single customer or former customer" as to the reasons for the loss of business "although all [the customers] were known to plaintiff . . .; the jury was left to speculate"); *Electric Furnace Corp. v. Deering Milliken Research Corp.*, 383 F.2d 352 (6th Cir. 1967), *cert. denied*, 390 U.S. 949 (1968) (mere showing that business declined after publication of letter to plaintiff's customers containing alleged defamatory statements insufficient to establish causation); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d at 1144 (plaintiffs may not "throw themselves on the generosity of the jury; if they want damages, they must prove them"). Here, Plaintiffs cannot prove any economic loss was caused by the false statements.

[EDITORS' NOTE: Insert factual discussion regarding lack of causation.]

2. Plaintiffs' Special Damages Were Not Caused By the False Statements.

Many courts hold that special damages require proof that specific transactions were not carried out because of the defamatory statement. *See, e.g.*, *Continental Nut Co. v. Robert L. Berner Co.*, 393 F.2d 283. *Cf. O'Hara v. Storer Communications, Inc.*, 231 Cal. App. 3d 1101, 1108, 282 Cal. Rptr. 712, 719 (1991) (reduced business income resulting from psychic injury and distress constitutes special damages). Here, none of the special damages claimed by plaintiffs were caused by the false statements.

[EDITORS' NOTE: Insert factual discussion regarding lack of causation.]

[EDITORS' NOTE: Compare special damages to actual damages, which include reputational harm and which can be awarded without evidence of an "actual dollar value." Gertz v. Robert Welch, Inc., 418 U.S. at 350, 94 S. Ct. at 3012.]

3. Speculative Damages Are Not Allowed.

Purported lost profits cannot be recovered unless "their nature and occurrence can be shown by evidence of reasonable reliability." *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 494, 186 Cal. Rptr. 114, 127 (1982). Courts have rejected as impermissibly speculative claims based on untested products, businesses, or vague marketing or business plans. *See, e.g.*, *Alder v. Drudis*, 30 Cal. 2d 372, 382, 182 P.2d 195, 201 (1947) (damage for loss of dividends from corporation created to market newly patented device "too speculative and conjectural for estimation, particularly in view of the

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evidence of uncertainty as to the commercial possibilities of the [device]"); *Engle v. City of Oroville*, 238 Cal. App. 2d 266, 274, 47 Cal. Rptr. 630, 635 (1965) (recovery of lost profits from proposed motel denied where plaintiff did not have a contract to build); losses stemming from contingencies - such as decisions by third parties - unrelated to the defamatory statement are too conjectural).

Here, Plaintiffs' speculative damages should not be allowed. [***EDITORS' NOTE: Insert factual discussion regarding why the damages are speculative.]***

4. Plaintiffs Cannot Recover Damages Based Upon Evidence Impossible to Contest Because of a Privilege.

Plaintiffs should not be permitted to pursue a damage claim where the unavailability of necessary evidence renders it impossible to prove or disprove the claim. *See, e.g.*, *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985) (government's assertion of state secrets privilege results in dismissal of defamation claim). Here, necessary evidence to rebut Plaintiffs' damage claims is unavailable.

[EDITORS' NOTE: Insert factual discussion as to why evidence is unavailable.]

E.

PUNITIVE DAMAGES ARE NOT ALLOWED IN THIS CASE AS PLAINTIFFS CANNOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT DEFENDANTS ACTED WITH ACTUAL MALICE

[EDITORS' NOTE: Briefing of the First Amendment and due process issues raised by a given state's punitive damage scheme is beyond the scope of this project. No punitive damage case should be tried without raising the arguments that the state interest in compensating for speech tort injuries is not present when the plaintiff is seeking such damages. Gertz v. Robert Welch, Inc., 418 U.S. at 350; Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. at 766. Due process raises different and stronger concerns when the case involves a right incorporated by the due process clause of the Fourteenth Amendment, including free speech rights. Pacific Mut. Life Ins. Co. v. Hazlitt, 499 U.S. 1, 38-39 (1991) (Scalia, J., concurring). For an exhaustive treatment of the theories and case law rendered as of July 1994, see Samuel E. Klein, H. Geoffrey Moulton, Jr., Thomas B. Kelley, John R. Mann, and Mark J. Prak, "Punitive Damages," in the course book, Libel Litigation 1994 (PLI).]

1. The First Amendment Precludes an Award of Punitive Damages Absent Clear and Convincing Evidence of Actual Malice.

In lawsuits involving public officials or public figure plaintiffs, or private plaintiffs where the subject communication relates to a matter of public concern, no plaintiff may recover punitive damages absent a showing of actual malice, if at all. *Gertz v. Robert Welch*, 418 U.S. at 349, 94 S. Ct. at 3011

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("states may not permit recovery . . . [of] punitive damages at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth" (emphasis added)); *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (the only substantial state interest in defamation cases is compensation for actual injury to reputation; where the subject speech is "at the core of First Amendment concern" (*i.e.*, involves matters of public concern) "the state interest in awarding . . . punitive damages . . . [i]s not 'substantial'").

[EDITORS' NOTE: Gertz's limitations on recovery of punitive damages do not apply to private figure cases where the subject speech relates to purely private concerns. Dun & Bradstreet, Inc., 472 U.S. at 760-61, 105 S. Ct. at 2946 (1985).]

Here, Plaintiffs have no evidence, much less the clear and convincing evidence required, to show actual malice and they cannot recover punitive damages.

[EDITOR' NOTE: Insert factual discussion regarding why.]

2. State Law Also Bars or Limits an Award of Punitive Damages.

Some states flatly bar punitive damages in speech cases. *See, e.g.*, *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975) (citing *Ellis v. Brockton Publishing Co.*, 198 Mass. 538, 84 N.E. 1018 (1908)); *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979). Other state courts have applied state constitutional speech protection provisions to forbid punitive damage awards in speech cases unless the plaintiffs prove, not only constitutional actual malice, but also common law malice or outrageous conduct by the defendants. *See, e.g.*, *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325 (5th Cir. 1993) (applying Texas Constitution); *Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y. 2d 466, 626 N.E.2d 34 (1993) (common law). Common law malice also is required by some state statutes. *See, e.g.*, *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 869-71, 727 P.2d 711, 735-37 (1986), *cert. denied*, 481 U.S. 1041, 107 S. Ct. 1983, 95 L. Ed. 2d 822 (1987) (Cal. Civ. Code § 48a requires proof of ill will in addition to constitutional actual malice). Here, state law [***bars/limits***] an actual award of punitive damages to Plaintiffs.

[***EDITORS' NOTE: Insert legal/factual discussion regarding why.]***

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F.

PRESUMED DAMAGES ARE INCOMPATIBLE WITH THE FIRST AMENDMENT

[EDITORS' NOTE: Presumed damages are defined as damages that compensate a defamation plaintiff without proof of actual loss. The existence of injury is presumed from the fact of publication.]

Some states have abolished presumed damages in speech cases, given its fundamental importance to society. *See, e.g., Gobin v. Globe Publishing Co.*, 229 Kan. at 5, 649 P.2d at 5, 1243-44 (1982). In *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349-50, 94 S. Ct. at 3011, the United States Supreme Court held the common law rule permitting presumed damages in defamation actions is incompatible with the First Amendment, at least as long as constitutional actual malice is not proven. It said,

> [T]he States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury . . . . It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury. (Emphasis added.)

Thus, absent proof of actual malice, even a private figure plaintiff cannot recover presumed damages for speech about matters of public concern. Presumed damages are disfavored because the jury has "largely uncontrolled discretion . . . to award damages where there is no loss," creating the potential of inhibiting "the vigorous exercise of the First Amendment freedoms." *Id.* at 349.

[***EDITORS' NOTE: However, in private figure cases where the subject speech concerns purely private matters, Gertz's limitations on presumed damages do not apply. Dun & Bradstreet Inc. v. Greenmoss Builders, Inc., 472 U.S. at 760-61, 105 S. Ct. at 2936.***]

Gertz did not decide whether presumed damages are unconstitutional even in cases where actual malice is present, but other courts have done so. *Mitchell v. Globe International Publishing, Inc.*, 773 F. Supp. 1235, 1237 (W.D. Ark. 1991) (no presumed damages allowed in defamation actions

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involving a "media defendant"; private figure plaintiff "must establish actual damage to . . . reputation"); *Tosti v. Ayik*, 394 Mass. 482, 476 N.E.2d 928, 937-39 (1985) (private figure plaintiffs not entitled to presumed damages even where defendants acted with actual malice, at least where the matter at issue is of public concern).

Further, when a plaintiff relies on the common law defamation doctrine of presumed damages, he or she may *not* offer proof of specific losses or damage. The reason is that, "[T]o presume damages is not to measure damage but to despair of doing so." Dan B. Dobbs, *Law of Remedies* § 7.2(5) (2d ed. 1993).

These principles result in an inequity. Absent competent proof of causation, a plaintiff may not offer evidence of specific losses nor of calculations of damages because to do so creates the appearance of precision in a damage calculation that is inherently speculative. *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d at 538-39. Such evidence "convey[s] a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." *Id.* at 541, quoting *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 476 (9th Cir. 1978). Yet a plaintiff who offers no evidence might be able to punish the defendant in unlimited amounts, at the same time he is relieved of the burden of offering proof of actual damage and causation. Thus, rather than general damages (of which presumed damages traditionally have been a part), presumed damages are essentially punitive, and *Gertz*, by requiring actual malice, treats them as such.

In accordance with these legal principles, Plaintiffs are not entitled to presumed damages.

[EDITORS' NOTE: Insert factual/legal discussion regarding why.]

[***EDITORS' NOTE: (Proof of Absence of Harm When Plaintiff Relies Upon a Presumption of Harm.) There is a split of authority as to whether a defendant may attempt to prove that plaintiff's reputation was not harmed - including by testimony of recipients of the defamation that they did not believe it - in cases where harm to reputation is presumed. Compare Clay v. Lagiss, 143 Cal. App. 2d 441, 447, 299 P.2d 1025, 1030 (1956) ("[E]vidence tending to show lack of injury to the reputation is inadmissible"; when the statement at issue is libelous per se and damage to reputation is presumed, the extent of damage is to be determined by the jury from the content and circulation of the defamation and not by witnesses) with Williams v. District Court, 866 P.2d 908 (Colo. 1993) (presumption of harm to reputation in a per se case is rebuttable, and evidence tending to prove, as well as mitigate, reputational damage is admissible).***]

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G.

DAMAGE CHECKLIST

[EDITORS' note: The following is a checklist of the arguments that should be made/preserved]:

- State analogue to Eighth Amendment "excessive fines" clause
- Due process clause of the Fourteenth Amendment (Fifth Amendment should also be cited when challenge is in a federal court and relates to a procedural issue)
- State constitution analogue to due process clauses
- First Amendment
    - Improper punishment and deterrence of protected speech
    - Overbreadth, *i.e.*, remedy beyond that needed to accommodate the states' legitimate interest in affording redress for actual injury to reputation
    - "Heightened scrutiny" of:
        - Due process concerns over size of award (generally not available until after award)
        - Vagueness of criteria for permitting punitive damages and for assessment of the amount
    - Specific defects in requirements in trial procedure, jury charge, and post-verdict review
        - Failure to provide for bifurcation of trial
        - Lack of specific standards and meaningful proportionality requirements in jury charge and post-verdict review
        - Evidence or consideration of financial status of defendant
        - Employer liable on the basis of vicarious liability without complicity or ratification
        - Burden of proof
        - Independent review
- Requirement of proof of common law malice in addition to constitutional malice