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No. 12-0522

IN THE
SUPREME COURT OF TEXAS

WASTE MANAGEMENT OF TEXAS, INC.,

Petitioner, Cross-Respondent

v.

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,

Respondent, Cross-Petitioner.

WASTE MANAGEMENT, INC.'S POST-SUBMISSION BRIEF

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Argument

At oral argument, the Court questioned whether and what role defamation per se should play in the context of a business dispute. The Court also asked several questions about 1) the evidence supporting actual malice, 2) causation of damages, 3) the amount of damages, and 4) ambiguity. This post-submission brief elaborates on Waste Management's responses to those questions at oral argument and how those responses impact the disposition alternatives. Finally, this post-submission brief responds to TDSL's post-submission brief.

I. Business entity questions

A number of questions at oral argument concerned how, if at all, defamation per se should be applied to a corporate plaintiff. Defamation per se is constitutionally problematic in any circumstance, as evidenced by the number of high state court opinions struggling with the doctrine even in private-figure, private-speech cases. It becomes even more constitutionally problematic when applied to corporations—a context for which it was not originally designed.

A. Businesses cannot always be treated the same as people.

> JUSTICE BROWN: *A big issue at the ... other Supreme Court right now is what kind of rights corporations have: free speech rights, rights to religious expression. If we're going to treat corporations as people, shouldn't we just treat them as people?*

Many rights and remedies are available to natural person but not to corporations. Corporations can be fined, but not jailed. They can merge, but not marry. They can inherit, but not bequeath. They can be enjoined, but not falsely imprisoned. They can have trade secrets, but no rights of personal privacy. And more relevant here, there are certain injuries that natural persons can suffer but corporations cannot: pain, suffering, mental anguish, disfigurement, loss of consortium, loss of society, and other "hedonic damages." *See Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 763 (Tex. 2003) (listing non-economic damages).

Drawing a bright line limiting the tort of defamation per se to individuals, and not to businesses, would be consistent with privacy law. Although corporations can have secrets, corporations do not have a right to privacy. *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1185 (2011) ("The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations."); *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 769 (Tex. 1958) ("One who discloses or uses another's trade secrets, without a privilege to do so, is liable to the other ...." (quoting 4 RESTATEMENT OF TORTS § 757)). The line is drawn based on common sense: "we far more readily think of corporations as having 'privileged or confidential' documents than personally private ones." *FCC*, 131 S. Ct. at 1185.

Drawing a bright line limiting the tort of defamation per se to individuals, and not to businesses, would be consistent with this approach. In the defamation context, the common-sense line is that corporations should be able to recover provable economic damages, but not presumed non-economic damages, because corporations cannot suffer the psychic harms that presumed non-economic damages were designed to address.

B. Whether a business entity is separate from a natural person should be determined the same as in the corporate veil context.

> CHIEF JUSTICE HECHT: *So if it was a sole proprietorship, it would be different?*
>
> CHIEF JUSTICE HECHT: *But you, but you do think that if the plaintiff were solely owned like Dell at one time ... [it] could recover reputation damages or not?*

As Chief Justice Hecht recognized, there are situations where the distinction between an individual and a business are not as clear as here. But Texas law has already drawn a bright line between an individual and a business—the corporate veil. "A bedrock principle of corporate law is that an individual can incorporate a business and thereby normally shield himself from personal liability for the corporation's contractual obligations." *Willis v. Donnelly*, 199 S.W.3d 262, 271 (Tex. 2006). The reverse should be true as well. Not only would the corporate veil make the individual and the business distinct for liability purposes, but the

corporate veil would make the individual and the business distinct for purposes of recovering presumed damages for psychic harm.

C. The prevalence of internet commentary warns against extension of defamation per se.

> CHIEF JUSTICE HECHT: *[T]he fact that these cases are few and far between and this one itself is fairly unusual makes me wonder whether we haven't just gotten used to all of these comments about businesses.... [Y]ou get on the internet and you look at the reviews and the guy says, "well the food was cold, the service was terrible, and I hated the whole thing." And you ... think to yourself I'll probably go someplace else, but ... there ... you wouldn't have to prove actual malice ... because there's no public interest... [I]t's hard to see how, [defamation per se] if it really were extended, ... wouldn't be fairly far-reaching.*
>
> CHIEF JUSTICE HECHT: *In a case that didn't involve those [environmental] concerns, there wouldn't be actual malice.*

Not only have people gotten used to reading comments on the internet, people have gotten used to commenting about businesses on the internet. And, as Chief Justice Hecht correctly recognized, actual malice cannot be relied on to protect commentators from claims of defamation per se. The actual malice requirement does not apply in defamation per se cases involving a private plaintiff. *Hancock v. Variyam*, 400 S.W.3d 59, 65 n.7 (Tex. 2013) (clarifying that the standard of fault is "negligence if the plaintiff is a private, [and] actual malice if the plaintiff is a public or limited-purpose public figure"). Although the actual malice requirement should protect Waste Management in this case, a more

jurisprudentially sound way to address this case would be to categorically limit defamation per se. *See* Waste Mgmt. Br. at 17-19; Waste Mgmt. Reply Br. at 11-14; Media Organizations Amicus Br. at 7-19.

Waste Management submits that the concept of defamation per se is inappropriate for business plaintiffs, because (as far as Waste Management can imagine) businesses cannot suffer any ultimate harm that is measured in non-economic terms. Aside from the presumption that a plaintiff may recover "presumed general (noneconomic) damages," defamation per se offers no benefits to a claimant over defamation per quod. *See Hancock*, 400 S.W.3d at 65-66. Under either, special (economic) damages must still be proven. *Id.* As evidenced by the trial testimony in this case, even when TDSL was trying to present evidence of general damages from lost reputation, it could only express that alleged injury in economic terms: "TDSL would have been worth $10 million more." 3 RR 158. If a business cannot suffer non-economic harm, then it is illogical to presume that a business plaintiff has suffered general damages. Absent that presumption, there is no further justification for defamation per se. Categorically eliminating defamation per se in the business context would also do away with the loopholes that have kept this case alive long after juries twice awarded TDSL $0 in special damages.

Amici's proposed solution is more dramatic, but perhaps jurisprudentially better overall—the end of defamation per se altogether. The sole purpose for defamation per se is to allow presumed general damages, but those presumed general damages are still only nominal unless the plaintiff can prove some harm. *Salinas v. Salinas*, 365 S.W.3d 318, 320 (Tex. 2012) ("[T]he law does not presume any particular amount of damages beyond nominal damages."). Those nominal damages do not lead to anything else—they neither support attorney's fees (which are not available for defamation) nor exemplary damages. *See Hancock*, 400 S.W.3d at 66 ("In Texas, if only nominal damages are awarded, exemplary damages are not recoverable.").

Effectively, an entire cause of action exists to allow a plaintiff to recover a dollar. *See Hancock*, 400 S.W.3d at 65 ("We have defined nominal damages as a 'trifling sum,' such as $1."). But the same result can be accomplished in the absence of defamation per se merely by the tort of defamation, where nominal awards have an ancient and honored purpose. *See, e.g.*, *Monson v. Tussauds Ltd.*, (Eng.) 1 Q.B. 671 (1894) (one farthing); *Morrison v. Belcher*, (Eng.) 3 F. & F. 614 (1863) (one farthing). In trespass, for example, courts have awarded nominal damages without creating any doctrine of trespass per se. *See Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 12 n.36 (Tex. 2008). At the current intersection of constitutional imperatives and common-law torts, the old action of

defamation per se solves no problems and creates several. No principled advocate could justify its creation if it did not already exist. And since the genius of the common law has adopted Gratian's rule, *cessante ratione legis cessat ipsa lex* ("when the reason for the law ceases, the law itself ceases"), the time is ripe for the abolition of this hoary remedy.

D. The extension of defamation per se is not necessary to cover an unaddressed harm.

> CHIEF JUSTICE HECHT: *Well, but it seems to me that in this day of freewheeling speech on the internet where people are, businesses are marketing, ways to cure your reputation, you know, losing business because all these people have maligned your business—not the product—just the business, and it seems to me that to encourage that by removing this one remedy would make it even a worse situation.*

Waste Management's position is not that a plaintiff, business or otherwise, should be left without a remedy to address harm. If a business suffers actual, provable harm (*i.e.*, losing business because people maligned the company), the torts of defamation and business or product disparagement already provide a remedy. But this case concerns a scenario when a business cannot prove damages, but would still like to recover substantial money damages based on an outmoded and inexplicable presumption of non-economic general damages for a business.

II. Actual malice questions.

A number of questions at oral argument focused on actual malice, particularly whether TDSL had met its burden of showing actual malice by clear

and convincing evidence. Because there is no dispute that TDSL is a public figure and that the Action Alert was a matter of public concern, judgment must be rendered for Waste Management unless Mr. Martin and Mr. Erwin wrote the Action Alert with actual malice—*i.e.*, actual knowledge of falsity or a reckless disregard for the truth.

In its post-submission brief, TDSL refers to actual malice as a "substantial limitation on awards of presumed damages." TDSL Post-Sub. Br. at 1. If this statement is true, then actual malice must be a meaningful requirement—not a *pro forma* assumption that if a statement turns out not to be true, then the speaker surely must have known it was not true. Also, if the First Amendment concerns that underlie the Supreme Court's heightened procedural requirements for defamation suits by public figures are to be more than empty formalism, then the threshold for establishing a fact by clear and convincing evidence must exceed the normal requirements for raising an issue of material fact.

Under these principles, Plaintiff presented no evidence that either Mr. Martin or Mr. Erwin thought that the statement in the Action Alert about the TDSL landfill were not true. Hence, there is no evidence on this record of actual malice.

A. Actual malice can be negated by personal belief and reliable sources.

QUESTION BY JUSTICE LEHRMANN: *But didn't two juries find actual malice?*

If actual malice is the "substantial limitation" on runaway damage awards that TDSL claims, then this Court must conduct the "much higher" standard of review that the Constitution requires. *See Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000) (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984)). The record must be *independently* examined to determine whether the judgment is supported by clear and convincing evidence that the statement was made with actual malice. *Id.*

Under Texas law, Waste Management negated actual malice, at least in the first instance, merely through the testimony of Mr. Martin and Mr. Erwin that they believed the Action Alert was accurate. *See Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 420 (Tex. 2000) ("A libel defendant can negate actual malice as a matter of law by presenting evidence that he or she did not publish the statement with knowledge of its falsity or reckless disregard for its truth."). It then became TDSL's affirmative burden to negate that testimony. *Id.* The record, however, does not contain clear and convincing evidence controverting Mr. Martin's and Mr. Erwin's testimony. *See* 6 RR 110; 5 RR 171-72.

Rather, the evidence showed that that authors, Mr. Martin and Mr. Erwin, relied on their conversations with TNRCC engineers, three of whom strongly believed that TDSL's liner design failed to comply with Subtitle D requirements.

See 6 RR 121-22; 9 RR 7, 11-13; *see also* Waste Mgmt. Br. § III.B (discussing improperly excluded evidence that would have further collaborated the lack of actual malice). Reliance on a neutral government agency negates actual malice. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 287-88 (1964) (evidence of reliance on statements by persons known to the author as responsible and having a good reputation "is constitutionally insufficient to show the recklessness that is required for a finding of actual malice"); *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 124 (2d Cir. 2013) ("[W]here reporters' false statements in an article were based on reliable sources, the defendants could 'hardly be accused of gross negligence, much less actual malice.'"). Under the necessary independent review, the evidence thus negates any actual malice as a matter of law. *See Turner*, 38 S.W.3d at 120.

B. Intent to injure does not show actual malice.

> CHIEF JUSTICE HECHT: *The troubling thing here though is it was so deliberate. I mean, its very purpose was to injure it seems like; otherwise, why would you put it out? You're not touting your competitor. You're trying to, to hurt him, to keep him from getting business so it seems that if it's not injurious, it's only because, the publisher messed up.*

Waste Management's intent to compete with TDSL cannot constitute clear and convincing evidence of actual malice. First, intent to injure is not an element of "actual malice," which is a term of art which, as this Court appreciates, bears

little in common with "malice" as understood in common parlance or at common law. "Actual malice" is about truth, not desired effect. *See Neely v. Wilson*, ___ S.W.3d ___, No. 11-0228, 2013 WL 3240040, at *12 (Tex. June 28, 2013) ("Actual malice means the defendant made the statement with knowledge that it was false or with reckless disregard of whether it was true or not; and reckless disregard means the defendant in fact entertained serious doubts as to the truth of his publication." (internal quotes omitted)).

Second, to alter the definition of "actual malice" in cases involving competitors would essentially eliminate the need to prove actual malice in that class of defamation cases—a modification of First Amendment jurisprudence neither sanctioned by the United States Supreme Court nor by sound legal analysis. Indeed, such a modification would contravene public policy—it would make every "comparative" business pitch or paid advertisement a potential malicious tort unless the speaker deliberately set out to be unpersuasive. *See, e.g., Foretich v. Am. Broad. Cos.*, No. CIV.A. 93-2620, 1997 WL 669644, at *8 (D.D.C. Oct. 17, 1997) ("All broadcasters and publishers—at some level—must have economic goals in mind, and this Court refuses to hold that such considerations would indicate actual malice on the part of these entities.").

C. Covert publication does not show actual malice.

> JUSTICE GREEN: *Well, is it the matter ... that it was done covertly? ... [W]hat if some high-profile lobbying firm was hired to help gain the contract and ... go to the city councilmen and ... whisper in their ear ... ? ... Would you have a claim had this all been done openly?*

The distinction posited by Justice Green is not outcome-determinative. Indeed, defamation law has primarily been built on cases where the statements at issue were made openly. *See, e.g.*, *Bose*, 466 U.S. at 487 (1984) (magazine); *New York Times*, 376 U.S. at 256 (newspaper); *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 148-49 (Tex. 2004) (newspaper); *Bentley v. Bunton*, 94 S.W.3d 561, 567 (Tex. 2002) (television show); *Turner*, 38 S.W.3d at 111-12; *Huckabee*, 19 S.W.3d at 419 (same); *Casso v. Brand*, 776 S.W.2d 551, 552 (Tex. 1989) (radio advertisements). Thus, regardless of the forum for the statements, a court must independently determine that the elements of defamation were satisfied.

In other words, TDSL does not automatically win merely because the statements were made covertly—anonymity does not mean that the speaker was lying. A speaker could prefer anonymity because of a fear that the message will not be taken seriously. For example, a city council might disregard an otherwise-valid environmental warning because it was viewed as advertising or an attempt to bad-mouth a competitor. Or, a speaker could prefer anonymity because of a fear of retaliation, as with whistleblowers. Or, especially pertinent to social media and the

internet, the speaker may just want privacy. For example, someone may want to leave a restaurant review without providing more information for profiling by advertisers. None of these motives tends to show that the speaker is lying, or that the speaker's opinions are not genuine, or that the speaker has a reckless disregard for the truth. The decision not to put the Action Alert on Waste Management letterhead is no evidence of actual malice.

III. Damages questions

A number of questions at oral argument concerned whether the evidence at trial actually showed any damages being caused by the Action Alert, and if so, how those damages should be categorized.

A. The evidence failed to show that anyone believed the Action Alert.

> JUSTICE GUZMAN: *The last point that Mr. Roach closed with was the causation evidence and whether ... you proved that the recipients of the communication believed that?*
>
> JUSTICE GUZMAN: *But it's an anonymous communication and there are anonymous communications that show up all over the place and so the question is, did you prove that they believed the contents of that anonymous communication or that it carried that weight to change their opinion?*

TDSL offered Lauren Ross and Brigid Shea—both recipients of the Action Alert—to testify, but both confirmed that they did not take any action against TDSL because of it, nor even change their favorable opinions of TDSL. In fact,

both subsequently went to work for TDSL because it was an "outstanding operation":

> Q. Did you take any action on the Action Alert, so to speak?
> A. No.
> ...
> Q. [I]f you follow along on the bottom, it suggests that you contact the San Antonio mayor. And you didn't do that?
> A. I did not.
> Q. And you didn't contact the San Antonio city council?
> A. No.
> ...
> Q. Now, you eventually did go to work for Mr. Gregory, did you not?
> A. I did.

5 RR 6-7, 10 (Ross).

> Q. So when you thought this Action Alert came from George Cofer and you took it as fact, you rushed right out and did exactly what George was telling you to do or what you thought George was telling you to do, correct?
> A. No. I didn't rush right out.
> ...
> Q. Okay. And despite that fact and despite your position as an environmentalist, you agreed to go to work for Mr. Gregory and TDSL, correct?
> A. Yes, because I think they have an outstanding operation.

5 RR 58-59, 62 (Shea).

At oral argument, TDSL added George Cofer to Mr. Ross and Mr. Shea as the three people that believed the Action Alert. However, the evidence shows that, rather than believing the Action Alert, Mr. Cofer sent out a reply fax rebutting the Action Alert. 20 RR 156.

Additionally, people involved with the landfill negotiations testified that the Action Alert did not cause any delays. Both Sally Farris, the City of San Antonio's lawyer, and John German, the San Antonio Public Works Director, testified that the Action Alert had no impact on negotiations. 6 RR 20-21 (Farris); 10 RR 94, 104 (German). Rather, the contract was complex, requiring protracted and difficult negotiations. 6 RR 25-27; 10 RR 95. Indeed, any abnormal or avoidable delays were caused by TDSL, not the Action Alert. TDSL was "nickel and diming this contract to death," failed to provide information, and tried to go over the heads of the negotiating staff to Mayor Peak. 10 RR 100, 103, 17 RR DX 25, p. 6.

B. The evidence showed that the TNRCC concerns were ongoing and continued to affect TDSL.

> JUSTICE GUZMAN: *[B]ut what about the TNRCC because we're talking about what was going on at the time.*

Although TDSL indicated that the TNRCC concerns were "over on November 17th, 1994," the undisputed evidence indicated otherwise. *See* 7 RR 68-69. The permit issued on November 16 that supposedly ended TDSL's TNRCC-related expenses listed several exceptions that required further attention. 3 RR 293 (At this time we cannot approve your final cover design as currently permitted.... Further consideration will be given to the TDS proposed thickened performance-based final cover design."). Additionally, Mr. Martin testified that

the TNRCC process was still ongoing. 5 RR 172, 219-20; *see also* 8 RR 158-59 (offer of proof of additional excluded evidence).

Accordingly, it was improper for TDSL to claim that its consultant charges—which referenced TNRCC permit issues—were solely attributable to the Action Alert, while failing to address the logical alternate source of those charges—the various controversies in the ongoing TNRCC permitting process.

C. Lost reputation is distinct from economic damages such as lost profits.

> JUSTICE WILLETT: *Mr. Roach says those are special damages akin to lost profits and ... they're completely different from general loss of reputation damages.*

The terms "special" and "general" damages are unfortunate relics of defamation law, since there are much clearer equivalent terms—special damages are economic damages, while general damages are non-economic damages. *See Hancock*, 400 S.W.3d at 65. Economic damages are damages that are pecuniary or "of or pertaining to money." *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 531 (Tex. 2002). Non-economic damages are non-pecuniary and compensate for damages that cannot be easily distilled to a number via accounting or other economic calculation.

As explained by the United States Supreme Court, reputation damages are inherently non-economic: "The right of a man to the protection of his own

reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966); *cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977) (analogizing privacy to "reputation, with the same overtones of mental distress as in defamation.").

This case illustrates the incompatibility of businesses and lost reputation as understood by the Supreme Court. Unlike natural persons, businesses have no sense of dignity or self-worth to offend, as evidenced by the testimony offered by TDSL. Neither Mr. Gregory nor anyone else testified that TDSL felt a loss of dignity or self-esteem, nor could anyone plausibly have done so. Rather, Mr. Gregory could testify only in economic terms—that he felt TDSL would be worth $10 million more had the Action Alert never been sent.

D. Although corporations can prove economic damages in a variety of ways, TDSL failed to do so.

> JUSTICE WILLETT: *For the sake of argument, assuming we disagree and believe a corporation can under appropriate circumstances assert and prove reputation damages, how might a corporation do that? How might they quantify them?*
>
> JUSTICE LEHRMANN: *Well, what about the testimony that the base business growth slowed in the years following the Action Alert?*

> JUSTICE WILLETT: *Mr. McKetta, can you flesh out your earlier mention ... of ... evidence that you believe helped quantify, put a price tag on damage to TDS's reputation ... ?*
>
> JUSTICE WILLETT: *Are those three exhibits the sum total of evidence to quantify the reputation damage?*

A corporation can do exactly what TDSL tried to do: A corporation can prove that the damage to its reputation caused economic harm (*i.e.*, lost profits, decreased stock price, or additional expenses).

a. The jury rejected TDSL's claim for lost profits.

TDSL unsuccessfully tried to prove that it lost business and suffered economic harm because of damage to its reputation caused by the Action Alert. The jury awarded $0, rejecting TDSL's arguments that the evidence proved lost profits. The jury's answer on this issue was entirely correct, and the zero lost profits finding is unchallenged here, because the evidence shows that:

- TDSL won both the Austin Contract and the San Antonio Contract. 3 RR 149.
- TDSL lost no customers. 3RR 182.
- There was no adverse action taken against TDSL by anyone. 3 RR 183.
- In the four years following the Action Alert (1997-2000), TDSL's revenues increased 141%, from $6.4 million to $15.4 million. 20 RR DX 68.
- TDSL profits increased 62%, from $876,000 to $1,422,000. 20 RR DX 69.
- TDSL stockholders equity increased 251%, from $657,000 to $2,314,000. 20 RR DX 70.

But after finding that TDSL suffered no lost profits, the jury nevertheless awarded $5 million in "presumed damage to reputation" after being instructed that

no evidence damage to reputation was required. This award became the basis of the majority of a $25 million punitive damage verdict.

b. TDSL's claim for increased expenses is not supported by the evidence.

The only economic damage recognized by the jury was the $450,952.03 award for consultant fees it claims were required to remediate the harm to its reputation caused by the Action Alert. But even this award is supported by legally insufficient evidence as to the amount awarded and to causation. TDSL identifies the invoices in Exhibit 4 in support of the $450,952.03 for consultant expenses. That's the exact amount the jury wrote in for remediation expenses. TDSL claims, without any record reference, that these were not "ordinary expenses." Most of the invoices are not sufficiently specific to the Action Alert to constitute legally sufficient evidence that the charges were caused by the Action Alert or Waste Management. For example:

- The title of the Kier invoices openly references the ongoing regulatory activity required to obtain and maintain its landfill permit: "miscellaneous tasks related to compliance with subtitle d and the receipt of special waste at the TDSL facility." Exh. 4.
- For 3 years, many entries were simply "provide assistance on alternate liners."
- The Armbrust & Brown invoices repeatedly describe revisions to the San Antonio contract. Only in April 1997 do a few entries reference "WMI comparison/issues" and WMI litigation. The entries describing contract revisions and negotiation continued.

The nature of the professional, legal, and technical consulting services described in TDSL's own proof are consistent with a company in the midst of a contract procurement period. The fact that some of the invoices contain redacted portions shows that many of the services were, in fact, "ordinary expenses" incurred as part of TDSL's regular business. Most of the non-redacted entries, however, do not differentiate between these types of "ordinary expenses" and those associated with remediating TDSL's reputation. TDSL does not identify any testimony supplementing the information in Exhibit 4 to prove that those generic entries were in fact related only to remediating reputational harm caused by the Action Alert.

Finally, some of the fees included in the jury's award pre-dated the Action Alert:

- The March 1997 Kier invoice contains at least one geology consulting charge incurred on January 6, 1997.
- The Strasburger invoice begins with a January 6, 1997 telephone conference with B. Gregory regarding "San Antonio meeting and contract issues"; none of the entries on that invoice reference the Action Alert.

Thus, although corporations like TDSL may suffer reputational harm that can be quantified, TDSL failed to meet its burden to show that the Action Alert caused the damages TDSL alleges.

IV. Ambiguity questions

> JUSTICE GUZMAN: *This document though, did you have to resort to extrinsic evidence though to prove the defamatory nature of it in a per se context?*
>
> JUSTICE WILLETT: *Ambiguous, ambiguous to whom? Certainly not to ... the environmental activists as they were described who received it. It wasn't ambiguous.*

Both court of appeals' opinions held that the Action Alert was, in fact, ambiguous. *See Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, No. 03-10-00826-CV, 2012 WL 1810215, at *5 (Tex. App.—Austin May 18, 2012, pet. filed) ("Again, allowing the jury to answer what would ordinarily be a legal question is proper where, as here, there are underlying ambiguities that require resolution."); *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 582 (Tex. App.—Austin 2007, pet. denied) ("Although defamation per se is generally a legal question, in this case there were underlying ambiguities that could not be decided as a matter of law and needed to go to the jury."). Those holdings were necessary for the courts of appeals to justify the submission of defamation per se—a question of law—to the jury. *See* CR 52 (asking the jury whether the Action Alert "tend[ed] to affect an entity injuriously in its business").

As discussed in Waste Management's brief on the merits, the ambiguity inherent in the Action Alert required days of testimony from multiple experts. *See* Waste Mgmt. Br. at 28-29. TDSL needed that testimony in order to attribute a

negative impression to otherwise bland and factually-correct statements such as "TDS's landfill applied for and received an exception to the EPA Subtitle D environmental rules that require a continuous synthetic liner at the landfill...." Even the environmentally-aware recipients were unable to reach a conclusion based solely on the Action Alert:

> Q. And so you didn't turn a cold shoulder on TDSL and refuse to help them after this Action Alert came out, did you?
>
> A. Quite a bit of time passed, and I learned a lot more about TDSL in the interim and determined that they were an outstanding landfill operator.

5 RR 62-63 (Shea). Because a negative impression could be attributed to the Action Alert only through extrinsic evidence, it could not by definition be defamatory per se (*i.e.*, defamatory "in itself"). *See KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 691 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) ("To be defamatory per se, the defamatory nature of the challenged statement must be apparent on its face without reference to extrinsic facts or 'innuendo.'").

V. Response to TDSL's post-submission brief

In its post-submissions brief, TDSL faults *Amici* and Waste Management for not citing "the most recent state high court to address the issue, *Bierman v. Weier*, 826 N.W.2d 436 (Iowa 2013)." TDSL Post-Sub. Br. pp. 1-2. Notably, as a public figure, TDSL would lose this case under *Bierman* as a matter of law: "libel per se

is available only when a private figure plaintiff sues a nonmedia defendant for certain kinds of defamatory statements that do not concern a matter of public importance." *Id.* at 448.

Additionally, TDSL faults *Amici* and Waste Management for relying on a "20-year-old Missouri case, *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. 1993)." TDSL Post-Sub. Br. at 1. More recent high state court opinions are also cited by both *Amici* and Waste Management, of course. *See, e.g.*, Amicus Br. at 10, 18 (citing *Smith v. Durden*, 273 P.3d 943 (N.M. 2012), and *W.J.A. v. D.A.*, 43 A.3d 1148 (N.J. 2012)); Waste Mgmt. Br. at 6 (same). Moreover, *Nazeri* was cited not because it was the only case on-point, but because it is a seminal case that traced defamation per se law from its origin in the ecclesiastical courts of England through *Gertz* and its progeny. *See id.* at 308-10. As such, *Amici* and Waste Management felt its discussion strongly merited the Court's attention.

Conclusion & Prayer

Accordingly, Waste Management urges this Court to reverse the judgment of the court of appeals and render judgment as requested in Waste Management's Brief on the Merits.

Respectfully submitted,

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Certificate of Service

On February 27, 2014, a copy of this Brief was served on counsel for all parties by electronic service.

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