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 REPLY BRIEF ON THE MERITS

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Table of Contents

Index of Authorities

Cases

Statutes

Other Authorities

Summary of the Argument

This Court has recently addressed defamation per se claims by natural persons in *Hancock v. Variyam*, 400 S.W.3d 59 (Tex. 2013), and *Neely v. Wilson*, No. 11-0228, 2013 WL 3240040 (Tex. June 28, 2013). This case presents a complementary but different issue—how does defamation per se work when the plaintiff is a corporation? Courts and commentators across the country have debated several approaches that this Court should now consider.

The Court could do away with defamation per se altogether. The only reason to have defamation per se, in addition to defamation per quod, is to permit plaintiffs to recover presumed damages. In defamation per quod and all other contexts, Texas law requires proof of harm. Although this Court's opinion in *Hancock* appears to endorse defamation per se, other jurisdictions have concluded that it is a tort that has outlived its usefulness.

The Court could keep defamation per se for natural persons, but abolish it for corporations. Historically, defamation per se was developed by the ecclesiastical courts in order to deal with personal spiritual matters—not pecuniary damages such as those suffered by for-profit corporations. Instead, the tort of business disparagement was developed to protect the pecuniary interest of corporations. This Court could, consistent with its recent opinions, hold that defamation per se is only available to natural persons (such as a plaintiffs in

Hancock and *Neely*), while business disparagement is only available to corporations (such as Texas Disposal here).

The Court could keep defamation per se for corporations, but better define it. Defamation per se has traditionally applied to four categories of statements, but some of those categories are meaningless when applied to a corporation (*i.e.*, does the statement accuse the corporation of having a noxious disease?), while one is basically a tautology (*i.e.*, does the statement relate to the corporation's business?). This Court could create a modern definition of defamation per se that could reasonably apply to corporations. For example, the Nevada Supreme Court drew inspiration from this Court's opinion in *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762 (Tex. 1987) to hold that defamation per se only applies when statements are made about the corporation's qualifications, not the corporation's products.

In this Reply, Waste Management will address Texas Disposal's argument based on the continued validity of defamation per se, and demonstrate how this Court can address the realities of corporate plaintiffs in a jurisprudentially sound manner.

Argument

I. This Court should clarify whether and how the presumption of damages for defamation per se applies to corporations.

Texas Disposal argues that this case turns on "long-established standards" regarding the concepts of defamation per se and presumed damages. Texas Disposal Resp. Br. 43. However, Texas jurisprudence has not addressed the commercial circumstances of these concepts, as both of the court of appeals' two strained opinions show. Nor is Texas alone in that respect. Across the country, "considerably less thought has been devoted to applying these concepts to the entirely different setting of business relationships and corporate competition." *CMI, Inc. v. Intoximeters, Inc.*, 918 F.Supp. 1068, 1084 (W.D. Ky. 1995). Thus, courts and commentators continue to question the viability and application of defamation per se and presumed damages when applied to a corporation. This case allows this Court to address how defamation per se and presumed damages apply in a commercial context.

A. Other jurisdictions have recognized that corporations and natural persons have different reputational interests.

Courts and commentators recognize that natural persons and corporations both have reputations that are valued, but valued in different ways: "The value of a human being's favorable reputation is measured to a significant extent by one's assessment of one's self-worth, in a noneconomic sense. The corporation's

reputation is measured according to a different sort of self-worth—one of economic value." Arlen W. Langvardt, "A Principled Approach to Compensatory Damages in Corporate Defamation Cases," 27 AM. BUS. L.J. 491, 518 (Winter 1990).

Presumed damages for defamation per se were designed to compensate individuals for reputation damage that might not be susceptible to monetary proof. *See Synygy, Inc. v. Scott-Levin, Inc.*, 51 F.Supp.2d 570, 581 n.9 (E.D. Pa. 1999) ("The categories that make up defamation per se speak volumes about to whom the doctrine was intended to apply.").[1] Corporations, on the other hand, "do not have personalities that are hurt so intangibly." *CMI, Inc.*, 918 F.Supp. at 1084. For this reason, a growing number of courts have questioned whether the traditional construct of presumed damages for defamation per se has a proper place with regard to corporations:

[1] The court of appeals in this case stated that a defamatory statement that alleges that the plaintiff "committed a crime, has contracted a 'loathsome disease,' is "unchaste" or has committed serious sexual misconduct, or tends to injure a person in his office, profession, or occupation, the defamatory statement is considered defamatory per se, which means that the communication will support a cause of action for defamation without proof of actual pecuniary loss." *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, No. 03–10–00826–CV, 2012 WL 1810215, at *2 (Tex. App.—Austin May 18, 2012, pet. filed). Courts across the country typically recite the same four categories of statements.

- "If a business is damaged, the damage is usually reflected in the loss of revenues or profits. Therefore, courts should be very cautious about labeling as defamation per se comments made about a corporation or its products." *CMI, Inc.*, 918 F.Supp. at 1084; *accord ATC Distrib. Group, Inc. v. Whatever it Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 716–17 (6th Cir. 2005) (quoting *CMI* and expressing reluctance to apply defamation per se to a business).
- "It is worth emphasizing that in the context of an allegedly defamatory statement lodged at a corporation, a per se analysis may be inapposite since any damage from the statement therefrom should be reflected in a pecuniary loss, and therefore be brought as a per quod action. In other words, damages for defamation per se aimed at a corporation must be proved, so the distinction between the two types of defamation is largely unimportant." *Jefferson Audio Visual Sys., Inc. v. Gunnar Light*, No. 3:12-CV-00019-H, 2013 WL 1947625, at *2 n.4 (W.D. Ky. May 9, 2013).

B. The Court should clarify how defamation, defamation per se, and business disparagement apply in actions by corporate plaintiffs complaining about speech of public concern.

Although the current standard for presumed damages under defamation per se in Texas may be workable in cases involving speech that is not of public concern regarding a private individual, as in *Hancock*, applying that same standard

to speech that is of public concern gives a jury unchecked latitude to punish unpopular speech. *See Hancock*, 400 S.W.3d at 64–65. Although this argument was central to Waste Management's brief on the merits, Texas Disposal entirely failed to address it in its Response Brief.

Although the United States Supreme Court has recognized that a state's interest in compensating individuals for defamatory statements may permit presumed damages upon a showing of malice, several states have nevertheless abolished presumed damages altogether. *See, e.g.*, *United Ins. Co. of Am. v. Murphy*, 961 S.W.2d 752, 756 (Ark. 1998); *Gobin v. Globe Publ'g Co.*, 649 P.2d 1239, 1243 (Kan. 1982); *Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 313 (Mo. 1993); *Smith v. Durden*, 276 P.3d 943, 948–49 (N.M. 2012); *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978); *see also Walker v. Grand Cent. Sanitation, Inc.*, 430 Pa. Super. 236, 634 A.2d 237, 243, 244 (1993) ("Allowing the plaintiff to submit a claim for redress upon the presumption that she was damaged, especially in a case such as this, where the record is patently clear that no harm was suffered, requires the court to blindly follow a rule of law without regard to the reality of the situation presented."). Still more courts consider presumed damages to be at most nominal damages. *See, e.g.*, *Ravnikar v. Bogojavlensky*, 782 N.E.2d 508, 511 (Mass. 2003); *Arnold v. Sharpe*, 251 S.E.2d 452, 455 (N.C. 1979); *W.J.A. v. D.A.*, 43 A.3d 1148, 1150 (N.J. 2012).

Given the First Amendment concerns at issue, recovering presumed damages for defamation per se should be more difficult when the speech is of public concern. By granting this petition, this Court could advance this jurisprudence by explaining how defamation and defamation per se apply to corporations and businesses when the speech is of public concern.

II. This Court should distinguish between statements regarding a corporation and statements regarding that corporation's products.

Because corporations and private individuals have different reputational interests, this Court should clarify which remedies are suited for protecting those different interests. Various jurisdictions have recognized that difference, and Texas Disposal acknowledges it as well. *See* Texas Disposal Resp. Br. 39 (disavowing that Texas Disposal's damages are analogous to damages suffered by a natural person).

A. The Court has guidance available from the other jurisdictions that have addressed this reputational difference, albeit in various ways.

Recognizing that the reputational interests of corporations and individuals differ, other courts have applied defamation per se differently in the commercial context.

1. Some jurisdictions have recognized a distinction between statements about a corporation and statements about a corporation's products.

First, some jurisdictions recognize a distinction between statements about a corporation (defamation per se) and statements about the corporation's products (business disparagement). This rule requires a statement to be more specifically targeted to assail the corporation's reputation rather than the corporation's products and services. This helps distinguish it from business disparagement.

For example, the Supreme Court of Nevada recently considered whether a corporation could pursue a defamation per se claim when the statements concerned a business's product as opposed to its reputation—apparently a question of first impression for that court. *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 213 P.3d 496, 504 (Nev. 2009). The court recognized that its previous opinions on defamation per se concerned only individuals and that the cause of action "primarily serves to protect the personal reputation of an individual." *Id.* Citing this Court's opinion in *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987), the Nevada high court also recognized for the first time the separate tort of business disparagement. *Id.* at 504. The court concluded that the two different torts apply in different situations: "if a statement accuses an individual of personal misconduct in his or her business or attacks the individual's business reputation, the claim may be one for defamation per se; however, if the statement is directed towards the quality of the individual's product or services, the claim is one for business disparagement." *Id.* As here, the statements at issue there concerned a corporation's product and services—not the reputation of an individual or even the reputation of the corporation itself. *Id.* The Nevada Supreme Court concluded that the appropriate claim was one of business disparagement and that presumed damages were not appropriate. *Id.*

2. Some jurisdictions have created a new definition of defamation per se, tailored to corporations.

Second, some jurisdictions have applied defamation per se to corporations, but only under some modified definition of defamation per se, tailored to corporations. These special definitions often require a statement to suggest fraud or financial insolvency in order to be defamatory per se. *See, e.g.*, *Chicago Conservation Ctr. v. Frey*, 40 Fed. Appx. 251, 255 (7th Cir. 2002) (recognizing a line of Illinois cases that require a corporate defamation per se plaintiff to show that the statements "assail a corporation's financial or business methods or accuse it of fraud or mismanagement"); *Fedders Corp. v. Elita Classics*, 268 F.Supp.2d 1051, 1065 (S.D. Ill. 2003) (same); *Veteran Med. Prods., Inc. v. Bionix Dev. Corp.*, No. 1:05-cv-655, 2009 WL 891724, at *8 (W.D. Mich. Mar. 31, 2009) (quoting *Heritage Optical Ctr., Inc. v. Levine*, 359 N.W.2d 210, 213 (Mich. Ct. App. 1984) (describing libel per se as a statement that "contains an imputation upon a corporation in respect to its business, its ability to do business, and its methods of doing business")); *Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co.*, 378 F.2d 377, 383 (5th Cir. 1967) (same, applying Florida law). New York requires corporate defamation per se plaintiffs "to establish that the publication injured its overall business reputation or its credit standing." *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F.Supp.2d 489, 551 n.23 (S.D.N.Y. 2011)

(citing *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 39–40, 925 N.Y.S.2d 407 (1st Dep't 2011)).

3. Some jurisdictions require corporations to prove general damages in order to recover any damages.

Still other jurisdictions have adopted the Restatement's position that "[o]ne 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). The jurisdictions thus "requir[e] a plaintiff in a defamation *per se* action to make a showing of general damage, i.e., proof of reputational harm." *Synygy, Inc.*, 51 F.Supp.2d at 581–82. Missouri and Arkansas, for example, require proof of actual damages in all defamation cases, having eliminated the distinction between defamation and defamation per se altogether. *Arthaurd v. Mut. of Omaha Ins. Co.*, 170 F.3d 860, 862 (8th Cir. 1999) (citing *Nazeri*, 860 S.W.2d at 313); *United Ins. Co.*, 961 S.W.2d at 756.

B. This Court's recent refinement regarding what types of statements "tend to injure a person in his office, profession, or occupation" does not address statements about a corporation's products or services.

This Court's recent *Hancock* opinion focused on whether the plaintiff was injured in his office, profession, or occupation by being accused of "lacking a peculiar or unique skill that is necessary for the proper conduct of the profession." *Hancock*, 400 S.W.3d at 67. If not, the plaintiff cannot recover for defamation per

se. *Id.* This "lacking the necessary skill" requirement is most consistent with an approach that distinguished between disparaging the qualities of a company's product and disparaging the quality of the company itself. *See, e.g.*, *Kirby v. Wildenstein*, 784 F.Supp. 1112, 1115 (S.D.N.Y. 1992) (product disparagement actions differ from libel actions in that they deal with "words or conduct which tend to disparage or reflect negatively on the quality, condition or value of a product or property").

As discussed on pages 58 through 61 of Waste Management's brief on the merits, "product disparagement and defamation are distinct torts." *Peaceable Planet, Inc. v. Ty, Inc.*, 362 F.3d 986, 993 (7th Cir. 2004). This Court's opinion in *Hancock* illustrates why the two torts must be distinct—because statements about a product do not necessarily implicate the necessary skills of the company. Even a skilled company can produce a defective product. If it were otherwise, simply producing a defective product could constitute proof that a company lacks the necessary skills to conduct business, so that it could be held grossly negligent per se. Texas law is predicated on the contrary assumption, imposing strict product liability with no consideration of the company's fault or qualifications and requiring far more to prove gross negligence. *See* TEX. CIV. PRAC. & REM. CODE § 82.005.

Because of this distinction between a company and its products, it has been a long-standing principle in other jurisdictions that "where the publication on its face is directed against the goods or product of a corporate vendor or manufacturer, it will not be held libelous per se as to the corporation." *Nat'l Ref'g Co. v. Benzo Gas Motor Fuel Co.*, 20 F.2d 763, 771 (8th Cir. 1927) (applying Missouri law); *see also U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 924 (3d Cir. 1990) (applying Pennsylvania law) (quoting *Nat'l Ref'g*); 5 McCarthy on Trademarks and Unfair Competition § 27:101 (4th ed.) ("[W]hile a defamation claim deals with injury to the reputation of a person, disparagement deals with commercial damage to a product."). The Restatement of Torts similarly reflects that "the common law has always distinguished between statements which impugn a person's reputation and those which disparage a product and it has always given the owner or marketer of a product very limited rights against the publisher of statements which disparage the product." *Melaleuca, Inc. v. Clark*, 66 Cal. App. 4th 1344, 1362, 78 Cal. Rptr. 2d 627, 637 (Cal. Ct. App. 1998) (contrasting RESTATEMENT (2D) OF TORTS §§ 623A & 626 (1977)).

Applying that principle here, the Action Alert at most alleges that Texas Disposal's landfill was defective or of safety concern to the community. *See* 13 RR Pl. Exh. 1 ("There are no restrictions on the types of waste that may be disposed of at the TDS landfill, with the exception of hazardous waste . . . . TDS's

landfill applied for and received an exception to the EPA Subtitle D . . . ."). The Action Alert never accuses Texas Disposal of lacking the necessary skills to operate a disposal business. *See generally id.* For example, the Action Alert never urged readers to challenge Texas Disposal's license to operate as a waste disposal company; the Action Alert only urged readers to question a particular, unique landfill. TDSL provided no evidence that Waste Management criticized its *reputation*, only one of its landfills. Absent an improper blurring of the distinction between a company and its products, there is no basis under *Hancock* to conclude that the Action Alert's statements about Texas Disposal's landfill can support a defamation per se claim.

C. Nothing in the Action Alert rises to the level of accusing Texas Disposal of lacking a necessary skill.

Even assuming that Texas were to blur the distinction between statements about a company's product and statements about the company itself, Texas Disposal still cannot recover in light of *Hancock*. The implications from the Action Alert do not accuse Texas Disposal of "conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession." *See Hancock*, 400 S.W.3d at 66–67 (quoting RESTATEMENT (SECOND) OF TORTS § 573 (1977)). For comparison, this Court held in *Hancock* that even accusing a doctor of fraud was not defamation per se. *Id.* at

67 ("The statements that Variyam lacked veracity and dealt in half truths in the context they were made are not defamatory per se because they do not injure Variyam in his profession as a physician.").

Admittedly, a comprehensive bright line cannot be drawn, and under the right circumstances accusing a doctor of fraud could potentially be defamation per se. *See id*. at 68 n.10 (raising the example of a doctor that publishes research rather than treating patients). Other jurisdictions have also recognized the difficulty in trying to draw a bright line in every circumstance. *See, e.g.*, *Nat'l Ref'g*, 20 F.2d at 771 (permitting a defamation per se claim based on statements about a product if "by fair construction and without the aid of extrinsic evidence it imputes to the corporation, fraud, deceit, dishonesty, or reprehensible conduct in its business in relation to said goods or product."). However, these exceptions are abnormalities, not the rule. "The courts will not stretch to find a personal or corporate defamation in every allegedly false statement criticizing a product." *See* McCarthy § 27:101. None of the statements in the Action Alert require a departure from the general rule of *Hancock*, because none of the statements in the Action Alert even indirectly accuse Texas Disposal of lacking the necessary skills to operate a disposal business.

Rather, the statements in the Action Alert can be grouped into two general types:

1) Texas Disposal did and would continue to do what waste companies do—dispose of waste.	"TDS may bring municipal solid waste, commercial waste, special waste, construction waste, roll-off containers, and sludge and liquid waste to Travis County . . . ." 13 RR Pl. Exh. 1.
	"There are no restrictions on the types of waste that may be disposed of at the TDS landfill, with the exception of hazardous waste." *Id.*
	"And the City has specifically placed no upper limit on the amount of waste that may be processed through the transfer station." *Id.*
2) Texas Disposal successfully navigated state and federal regulations to secure a competitive advantage.	"TDS's landfill applied for and received an exception to the EPA Subtitle D environmental rules . . . ." *Id.*
	"TDS requested and received state approval to use only existing clay soils as an approved 'alternative liner' system, rather than use an expensive synthetic liner over the clay." *Id.*

None of those statements, nor any other statements from the Action Alert, accuse Texas Disposal of "lacking a peculiar or unique skill that is necessary for the proper conduct of the profession." *See Hancock,* 400 S.W.3d at 67. Nor do the statements either directly or by necessary implication accuse Texas Disposal of an impropriety (for example, illegally disposing of hazardous waste or of bribing TNRCC officials in order to secure approvals). Rather, the statements raise the question of whether citizens wanted increased waste disposal in their backyard, especially when the design had never before been tested in practice.

Accordingly, because nothing in the Action Alert accuses Texas Disposal of lacking a peculiar or unique skill, but instead highlighted that Texas Disposal was

exercising the skills of a waste disposal company, Texas Disposal's defamation per se claim should be reversed under *Hancock*.

III. Even assuming that presumed reputation damages were appropriate here, they would entitle Texas Disposal to at most nominal damages.

If the Court holds that defamation per se is applicable to corporations, the Court must also address the issue of what presumed damages a plaintiff is entitled to—substantial damage, or just nominal damages? *See* Waste Mgmt. Br. 12–13, 19–23.

A. Contrary to Texas Disposal's assertion, the Restatement does not endorse the recovery of substantial unproven damages.

Texas Disposal relies on the Restatement (Second) of Torts for the proposition that corporations are not required to prove special damages and may recover substantial unproven presumed damages.[2] *See* Texas Disposal Resp. Br. 40 (quoting RESTATEMENT (SECOND) OF TORTS § 561 cmt. b (1977)) ("A corporation for profit has a business reputation and may therefore be defamed in this respect. Thus a corporation may maintain an action for defamatory words that discredit it and tend to cause loss to it in the conduct of its business, without proof of special harm resulting to it."). Although the Restatement allows a corporation to "maintain an action for defamatory words . . . without proof of special harm," the Restatement does not endorse the recovery of presumed damages for unproven

[2] Section 561 will be part of the upcoming Restatement (Third) of Torts: Intentional Torts to Persons, a draft of which is schedule to be discussed by American Law Institute Advisors working on the project at a September 2013 meeting.

harm to reputation. RESTATEMENT (SECOND) OF TORTS § 621. Instead, section 621 and the comments that follow acknowledge that a defendant is "liable for the proved, actual harm caused to the reputation of the person defamed" but explicitly takes "no position on whether the traditional common law rule allowing recovery in the absence of proof of actual harm." Although the "no-position" caveat technically "leav[es] open" the question of whether recovery without evidentiary proof of reputational harm is unconstitutional if malice is shown, the comments express their skepticism. *Id.* at cmt. a, Reporter's Note, (noting that presumed damages "afford[] little control by the court over the jury in assessing the amount of damages"). As discussed in section IV of Waste Management's brief on the merits and in section IV of this reply, Texas Disposal has not presented legally sufficient evidence of any actual harm caused to its reputation.

B. Other jurisdictions have recognized the problem with recovering substantial presumed damages.

As discussed in Waste Management's Brief at page 20, if a statement is defamatory but causes no actual damage, the logically appropriate remedy would be a judgment that is vindicatory but provides no substantial compensation. Beyond that remedy, the award serves to punish rather than compensate; punishment is the role of punitive damages, not presumed damages. *See Salinas v. Salinas*, 365 S.W.3d 318, 320 (Tex. 2012); *Bentley v. Bunton*, 94 S.W.3d 561, 605

(Tex. 2002). For this reason, jurisdictions such as Illinois do not permit presumed damages to be "substantial." *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 734 (7th Cir. 2004) (recognizing that "[b]y definition, presumed damages are speculative in nature, and this limitation on presumed damages protects a defamation defendant from being subjected to an astronomical award based upon a jury's guess about the plaintiff's unproven harm" and reducing a presumed damage award against a corporation from $3.36 million to $1 million); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1142 (7th Cir. 1987) (remitting a $3 million presumed damage award to $1 million, while recognizing that the "very inexact and somewhat arbitrary process" of reviewing a presumed damage awards "is inherent in the doctrine of presumed damages").

Additionally, the situation of two competitors vying for the same contract illustrates another potential problem with presumed damages for defamation per se. *See Mid-Am. Food Serv., Inc. v. ARA Servs., Inc.*, 578 F.2d 691, 698 (8th Cir. 1978). In *Mid-America Food*, the plaintiff corporation won the contract, as Texas Disposal did here. The plaintiff thus failed to prove that it suffered any actual damage from the competitor's per se defamatory statements. Yet, the Eighth Circuit concluded that the presumption of damage for the per se defamatory statements met the actual damage predicate for exemplary damages. *Id.* (concluding that a plaintiff that showed it was entitled to presumed damages for

defamation per se "thereby established actual damages . . . sufficient under Kansas law to support the jury's punitive damage award, notwithstanding the absence of an award of actual damages). In addition to being contrary to Texas punitive damage law, this ruling would prevent a court from evaluating the relationship between the an actual damage award and any exemplary damage award, as required by the United States Supreme Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996), and later in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). *See also Bennett v. Reynolds*, 315 S.W.3d 867, 873 (Tex. 2010).

Because substantial presumed damages raise important constitutional concerns, the Court should grant this petition for review and hold that a defamation per se plaintiff who cannot prove that it suffered harm is entitled to only nominal damages.

IV. Even assuming that presumed reputation damages were appropriate here, Texas Disposal's perversion of the evidentiary review proscribed by *Bentley* is inconsistent with Texas common law and the United States Constitution.

Texas Disposal acknowledges that *Bentley* requires "some evidence to justify the amount awarded," Texas Disposal Resp. Br. 35 (emphasis in original). Texas Disposal does not, however, provide a workable definition of what "some evidence" is:

- Can a plaintiff prove only a fraction of the award and yet have "some evidence" to justify the entire award? Under Texas law the answer is clearly "no." *See ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 880 (Tex. 2010) (reversing because "competent evidence exists to establish some reasonably certain amount of lost profits—just not the particular amount awarded by the trial court"); *Bentley*, 94 S.W.3d at 605 ("[W]hile the record supports Bentley's recovery of some amount of mental anguish damages, it does not support the amount of those damages found by the jury"); *see also Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 124 (Tex. 2009); *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 777 (Tex. 2009); *Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007); *Formosa Plastics Corp. USA v. Presidio Engineers &*

Contractors, Inc., 960 S.W.2d 41, 51 (Tex. 1998); *Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 739 (Tex. 1997).

- Can a plaintiff present only legally deficient evidence and yet have "some evidence" to justify an award? Again, the answer is clearly no. In *Saenz*, for example, this Court reversed the entire mental anguish award because the plaintiff's proof of "worry, anxiety, vexation and anger" did not satisfy the legal standard for mental anguish. *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996); *see also Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 258 (Tex. 2004) ("[E]ven if the data Riley used is the type generally relied on by petroleum engineers to estimate production, and even if the underlying facts and data Riley used are accurate, there is simply too great an analytical gap between the data and Riley's conclusions for the conclusions to be reliable and therefore some evidence.").

If Texas Disposal's evidence was not cloaked by the currently enigmatic defamation law, there would be little difficulty in reversing the reputation damage award. This Court should clarify the law to make clear that the same standard that governs appellate review of every other compensatory damages award also applies to defamation suits by corporate plaintiffs.

A. Evidence that Texas Disposal spent money for the asserted purpose of remediation is not proof that damage had actually been caused.

Texas Disposal's assertion that reputation damages is proved by "substantial sums devoted by Texas Disposal to countering Waste Management's false statements" turns remediation law on its head. *See* Texas Disposal Resp. Br. 36. Normally, evidence of the damage must be used to show that the remediation efforts were "reasonable and necessary." *McGinty v. Hennen*, 372 S.W.3d 625, 627 (Tex. 2012); *see also Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 200 (Tex. 2004). Texas Disposal here attempts the reverse—to use evidence of the remediation efforts to prove that its claim of reputation damage was reasonable.

This Court has already rejected that reasoning. For example, extensive evidence that medical expenses were incurred does not prove causation of a personal injury claim. *Guevara*, 247 S.W.3d at 669 (holding that "the bills are not evidence of what all the conditions were nor that all the conditions were caused by the accident"). Reasoning that is logically fallacious in the personal injury context does not become legally sound merely because it is employed in a defamation context.

B. The potential risk of a loss does not prove that any loss occurred.

Texas Disposal similarly deviates from contract interference law when it asserts that reputation damages are proved by "the value of contracts put at risk by Waste Management's maliciously false 'Action Alert,'" and "Waste Management's stated purpose of the Action Alert – to impugn Texas Disposal's environmental integrity with the hopes of obtaining the multi-million-dollar Austin and San Antonio contracts for itself." *See* Texas Disposal Resp. Br. 36; *see also* p. 38. Normally, a plaintiff must show that it lost a contract that it otherwise would have gotten.[3] *See Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 590 (Tex. App.—Austin 2007, pet. denied) (citing *Bradford v. Vento*, 48 S.W.3d 749, 757 (Tex. 2001)). After the court of appeals precluded Texas Disposal's tortious interference claim for contracts it actually obtained, Texas Disposal abandoned its tortious interference claim. Nevertheless, Texas Disposal here attempts to turn evidence of a mere possibility of a loss into evidence that an actual loss was caused.

This Court has also already rejected that reasoning. For example, a plaintiff that was exposed to asbestos but not actually caused harm cannot recover because

[3] As an aside, Waste Management notes a distinction between showing that contracts were lost and showing that profits were lost. Because lost profits are not the only possible measure of contract damages, damages resulting from a lost contract can be shown in other ways. *See, e.g.*, *Sandare Chem. Co. v. WAKO Int'l, Inc.*, 820 S.W.2d 21, 23 (Tex. App.—Fort Worth 1991, no writ) (disgorgement).

of the mere potential of asbestosis. *Temple-Inland Forest Products Corp. v. Carter*, 993 S.W.2d 88, 93 (Tex. 1999). There is no reason for defamation law to be otherwise. When this Court said "actual injuries" were compensable, the plain meaning of those words should preclude compensation based on potential injuries. *See Bentley*, 94 S.W.3d at 605.

C. A mere estimate, unsupported by figures or data, is not proof of the amount of harm caused by a defendant.

Texas Disposal similarly deviates from damage law when it relies on its CEO's "estimate that his company suffered $10 million in reputation damages due to the decreased value of its business." *See* Texas Disposal Resp. Br. 36. Normally, opinions of lost profits must be based on "objective facts, figures, or data." *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994); *cf. Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) ("An interested witness' affidavit which recites that the affiant 'estimates,' or 'believes' certain facts to be true will not support summary judgment."). Here, Texas Disposal's estimate was not based on facts or figures but rather insubstantial assertions such as "the 'priceless' nature of having a good environmental reputation." *See* Texas Disposal Resp. Br. 36.

Texas Disposal's notion that a reputation is "priceless" (*i.e.*, that it would theoretically support an unlimited damage award) is contrary to sound Texas

jurisprudence. A plaintiff could just as easily, and more accurately, say that his mental health and well-being is "priceless." Yet, this Court has rejected such mental anguish claims as excessive and unsupported by actual evidence. *See Bentley*, 94 S.W.3d at 606–07. There is no rational justification for freeing reputation awards from the same evidentiary requirements as mental anguish awards.

Texas Disposal attempts to fortify its damage estimate by referring to corporate goodwill as "an actual, existing asset." *See* Texas Disposal Resp. Br. 38. Texas Disposal even admits that "goodwill is 'not easily assigned a dollar value.'" *Id.* (quoting *Graham v. Mary Kay, Inc.*, 25 S.W.3d 749, 753 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)). Evidentiary requirements are not eliminated merely because something is hard to prove. *Cf. Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006) (noting the difficulty with proving fraud). Here, Texas Disposal made no attempt to assign a dollar value to goodwill, even though an expert would be capable of doing so—specifically an accountant familiar with valuation under the Generally Accepted Accounting Principles. Contrary to the authority it cites, Texas Disposal would have this Court treat goodwill not as "difficult to measure," but rather as effortless to measure—such as through an offhand remark by an interested lay witness. *See* Texas Disposal Resp. Br. 39.

D. Additionally, the evidence presented at trial demonstrates as a matter of law the lack of any actual harm caused by a defendant.

Even if presumed reputation damages were appropriate here, the presumption must be rebuttable. *See Swate v. Schiffers*, 975 S.W.2d 70, 74 (Tex. App.—San Antonio 1998, pet. denied) ("Although courts have been willing to presume injury to reputation as the result of libel per se, the defendants rebutted any such presumption in this case." (internal citation omitted)). The danger with applying an irrebuttable presumption standard is that it would be inconsistent with this Court's existing defamation per se jurisprudence.

The presumption could not be irrebuttable, because an irrebuttable presumption will by its nature lead to a result contrary to reality. Thus, irrebuttable presumptions arise only when a compelling public interest trumps a desire to find the truth. For example, when a lawyer changes firms and the new firm is opposed to the lawyer's former client, an "irrebuttable presumption arises—that the lawyer has shared the client's confidences with members of the second firm." *In re Guar. Ins. Servs., Inc.*, 343 S.W.3d 130, 134 (Tex. 2011). In actuality, the lawyer may have scrupulously guarded his former client's confidences, but 1) public interest favors not taking any chances, and 2) public interest favors avoiding even the appearance of impropriety. Similarly, "[r]ecorded instruments in a grantee's chain of title generally establish an irrebuttable presumption of notice." *Aston Meadows,*

Ltd. v. Devon Energy Prod. Co., 359 S.W.3d 856, 859 (Tex. App.—Fort Worth 2012, pet. denied). In actuality, the property purchaser may not have known about the instrument, but public interest favors "stability and certainty regarding titles." *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 887 (Tex. 1998).

In defamation per se cases, this Court's jurisprudence demonstrates a public policy in favor of finding the truth, not disregarding it. *See Bentley,* 94 S.W.3d at 605 (expressing a desire to "ensure that any recovery only compensates the plaintiff for actual injuries"). There is no apparent public policy contradicting a desire for finding the truth in defamation per se cases. Thus, even if presumed reputation damages were appropriate, Texas jurisprudence must afford a defendant the opportunity to rebut that presumption.

"When a rebuttable presumption exists, the burden of producing evidence shifts to the party against whom the presumption operates." *Miranda v. Byles*, 390 S.W.3d 543, 556 (Tex. App.—Houston [1st Dist.] 2012, pet. filed). Here, the evidence at trial affirmatively demonstrated that the Action Alert did not cause any harm:

- Texas Disposal won both the Austin Contract and the San Antonio Contract. 3 RR 149.

- The Action Alert did not delay the award of the San Antonio contract. 6 RR 20–21, 25–27; 10 RR 94–95, 104. Rather, the delay resulted through Texas Disposal "nickel and diming this contract to death," 17 RR DX 25, p. 6, failing to provide information, 10 RR 100, and trying to go over the heads of the negotiating staff to Mayor Peak, 10 RR 103.
- Texas Disposal lost no customers. 3RR 182.
- Texas Disposal suffered no adverse action by anyone. 3 RR 183.

In fact, after the Action Alert was published, Texas Disposal suffered a dramatic increase in revenues and profits:

- In the four years following the Action Alert (1997–2000), Texas Disposal's revenues increased by 141%, from $6.4 million to $15.4 million. 20 RR DX 68.
- Texas Disposal's profits increased by 62%, from $876,000 to $1,422,000. 20 RR DX 69.
- Texas Disposal's stockholder's equity increased by 251%, from $657,000 to $2,314,000. 20 RR DX 70.

Those dramatically increased numbers demonstrate just how spurious Mr. Gregory's assertion of $10 million in reputation damages actually was. It is little surprise that Texas Disposal did not produce a licensed accountant to testify that

Texas Disposal's reputation somehow dwarfed its annual profits and stockholder equity by a factor of over ten.

Accordingly, this Court should grant review, hold that defamation per se is governed by the same evidentiary rules as other causes of action, and reverse the opinion of the court of appeals.

V. Despite devoting most of its brief to the characterization of evidence, Texas Disposal fails to identify any legally sufficient evidence to support the jury's findings on substantial truth.

This case presents an opportunity to further clarify a doctrine recently addressed by this Court—the substantial truth of allegedly defamatory statements. *See Neely*, 2013 WL 3240040, at *7–10. As this Court explained, a publication "may nevertheless convey a substantially false and defamatory impression by omitting material facts or suggestively juxtaposing true facts, even though all the story's individual statements considered in isolation were literally true or non-defamatory." *Id.* at *7 (quoting *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000)). Under *Neely*, Texas Disposal's evidence of falsity and malice is legally insufficient—the statements in the Action Alert were literally true and no material information available to the authors that would have left a false impression was omitted.

A. The evidence is legally insufficient to support the jury's finding of falsity.

Waste Management will not belabor legal sufficiency arguments already made on pages 29–36 of its brief on the merits, but, to illustrate the application of *Neely*, will briefly address by example the key implication at issue here—the "implication that the TDSL facility is environmentally less protective than other area landfills, including WMT's Austin Community Landfill." *See* CR 47. That

statement, which does not appear in the Action Alert but was allegedly implied by the document as a whole, is substantially true. No material information was available at the time that the Texas Disposal facility was equally environmentally protective. To the contrary:

- Geotechnical studies and EPA literature support "the prevailing view" that the standard composite liner is superior to compacted clays alone. 8 RR 73.
- TNRCC engineers were seriously concerned about Texas Disposal's permit in terms of leachate generation, side wall leakage and incorrect computer data, and those concerns were "common knowledge." 9 RR 7, 10–13.
- A 2002 EPA study of 175 landfills showed composite liners outperformed other designs. As a result, the EPA made no change to its recommendation for the components in the composite liner design. 8 RR 79.
- EPA technical manuals refer to composite liners as "more effective," and "more efficient." 8 RR 87, 93.

Texas Disposal asserts that the Action Alert should have mentioned "low permeability clay" and Texas Disposal's "site selection process" as counterarguments showing that its landfill was safe. Texas Disposal Resp. Br. 61. However, neither of those facts was material. The EPA and TNRCC were aware of the clay, and the TNRCC was aware of the site selected by Texas Disposal, yet

those agencies drew the same negative inference about the landfill. If those facts did not prevent the EPA or TNRCC (agencies that would understand the impact of those facts) from reaching a negative conclusion, there is no reason to believe the facts would have created a more "truthful" implication for an ordinary person. *See Neely*, 2013 WL 3240040, at *9 ("We examine whether the gist was more damaging to the plaintiff's reputation, in the mind of a person of ordinary intelligence, than a truthful statement would have been.").

B. The evidence is legally insufficient to support the jury's finding of actual malice.

Texas Disposal asserts that the author of the Action Alert should have also "contact[ed] Texas Disposal first for comment." Texas Disposal Resp. Br. 61. However, defamation law does not create a duty to investigate. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) ("As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."); *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968) ("Failure to investigate does not in itself establish bad faith."). Neither Mr. Martin nor Mr. Erwin—who got their information from the TNRCC—would have had reason to suspect that Texas Disposal had additional material information. To the contrary, it would be logical to conclude that Texas Disposal had already disclosed all favorable information to

the TNRCC, since Texas Disposal was at the time trying to overcome the TNRCC's reluctance to permit the landfill.

The Action Alert was thus substantially true because it created in the reader's mind the same concerns that would have existed had the reader independently investigated the landfill and contacted the TNRCC. Although Texas Disposal complains that the Action Alert is not substantially true with the benefit of hindsight, public interest would not have been furthered by stifling public debate about whether an unproven landfill design would ultimately be effective.

Conclusion

Accordingly, Waste Management urges this Court to grant its Petition for Review, 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 Compliance

This document contains 7,255 of a permissible 7,500 words as defined by TEX. R. APP. P. 9.4(i).

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Certificate of Service

On August 12, 2013, a copy of this Reply was served on counsel for all parties by electronic service.

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