**NOS. 17-1310 and 17-1649**

IN THE

# UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**DANIEL RIVERA, et al.,**

*Plaintiffs and Appellees,*

*v.*

**ALLSTATE INSURANCE COMPANY,**

*Defendant and Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
CASE NO. 10-CV-1733
THE HONORABLE WILLIAM T. HART, JUDGE

## APPELLANT'S CONSOLIDATED OPENING BRIEF AND REQUIRED SHORT APPENDIX

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# APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1310

Short Caption: Daniel Rivera, et al. v. Allstate Insurance Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Allstate Insurance Company

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Akin Gump Strauss Hauer & Feld LLP

Seyfarth Shaw LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Please see attached

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

---

Attorney's Signature: s/ Rex S. Heinke Date: February 21, 2017

Attorney's Printed Name: Rex S. Heinke

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Cozen O'Connor

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None

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Attorney's Signature: s/ Anneliese Wermuth Date: February 24, 2017

Attorney's Printed Name: Anneliese Wermuth

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

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None

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Attorney's Signature: s/ Paul R. Garry Date: February 24, 2017

Attorney's Printed Name: Paul R. Garry

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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None

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Attorney's Signature: s/ Jessica M. Weisel Date: 03/20/2017

Attorney's Printed Name: Jessica M. Weisel

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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**ALLSTATE INSURANCE COMPANY**
**CORPORATE DISCLOSURE STATEMENT**

Allstate Insurance Company is a wholly-owned subsidiary of Allstate Insurance Holdings, LLC, which is a Delaware limited liability company. Allstate Insurance Holdings, LLC is a wholly-owned subsidiary of The Allstate Corporation, which is a Delaware corporation. The stock of The Allstate Corporation is publicly traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation.

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## JURISDICTIONAL STATEMENT

The District Court had jurisdiction over claims under the Fair Credit Reporting Act ("FCRA"). 15 U.S.C. § 1681; 28 U.S.C. § 1331. It had supplemental jurisdiction over defamation claims. 28 U.S.C. § 1367.

Judgment was entered on June 21, 2016. Defendant and Appellant Allstate Insurance Company ("Allstate") filed a Motion for New Trial, a Motion for Judgment as a Matter of Law, and a Motion for Remittitur on July 19, 2016, which were denied on January 20, 2017. A Supplemental Judgment was entered the same day. Allstate appealed on February 13, 2017. 28 U.S.C. § 1291.

A Supplemental Judgment for attorney fees and costs in favor of Plaintiffs was entered on March 9, 2017. Allstate appealed on March 28, 2017. That award is appealable. *Tradesman Int'l, Inc. v. Black*, 724 F.3d 1004, 1007 (7th Cir. 2013).

On March 31, 2017, this Court consolidated the two appeals.

## STATEMENT OF ISSUES

**Defamation Issues.**

1. In claims for defamation *per quod*, where Plaintiffs offered no evidence that any prospective employer read the allegedly defamatory statements and declined to hire Plaintiffs because of the statements, did

Plaintiffs fail to prove, as they must, that the statements *caused* them special damages, i.e., actual, pecuniary damages?

2. In claims for defamation *per quod*, if the statements at issue refer only to "some employees" in a group of 20 plus employees, can the statements reasonably be understood by non-employees of Allstate to identify any particular Allstate employee?

3. In claims for defamation, are the statements in Allstate's 2009 Form 10-K and the Greffin memorandum true or, at a minimum, substantially true where they accurately reflected the results of investigations by independent experts?

4. Allstate's claims were qualifiedly privileged. Did Plaintiffs overcome that privilege by proving by clear and convincing evidence that Allstate acted with actual malice where the evidence established that Allstate believed the statements, which were based on extensive investigation and analysis by independent experts?

**FCRA Issues.**

5. When Plaintiffs already were aware of the investigation, knew the issues being investigated, were personally involved in the relevant interviews, and were told the reason for their terminations, did Allstate act objectively unreasonably and, thus, "willfully" violate its obligation under

FCRA to provide a "summary containing the nature and substance of the communication upon which [an] adverse action is based"?

6. Given Plaintiffs' knowledge of the nature and substance of the underlying investigation, did Allstate's alleged failure to provide a summary cause Plaintiffs an injury in fact sufficient to confer Article III standing on them?

**Attorneys' Fees Issues.**

7. If the FCRA award is reversed, must the attorneys' fees award also be reversed because FCRA is the only basis for that award?

8. If the FCRA award is affirmed, should the fees award be reversed because fees were awarded for time spent on the defamation claims?

## STATEMENT OF THE CASE

### A. Plaintiffs Were Employees In Allstate's Equity Division.

Before December 2009, plaintiffs and appellees Daniel Rivera, Stephen Kensinger, Deborah Joy Meacock, and Rebecca Scheuneman ("Plaintiffs") were employed in Allstate's Equity Division, which managed equity portfolios, including the Allstate pension plans. Appx.6-7.

At the time of Plaintiffs' termination, Rivera was the head of Allstate's Equity Division. Appx.7. Kensinger, Meacock, and Scheuneman managed portfolios of individual securities, including the Allstate pension plans. *Id.* Rivera reported to Allstate's Chief Investment Officer, Judy Greffin. *Id.*

Plaintiffs were not the only members of the Equity Division, nor did they manage all of the growth portfolios. R.T.498:9-500:20. Other groups in the Equity Division included trading, quantitative, value, and convertible securities. R.T.91:20-25. When Plaintiffs were terminated, there were between 20 and 25 employees in the Equity Division. R.T.144:3-6, 805:24-806:3.

Rivera, Kensinger, Meacock, and Scheuneman were paid annual salaries. They also were eligible for and received bonuses under Allstate's "pay-for performance" plan. Appx.7-8.

### B. Plaintiffs' Conduct Was Governed By A Code Of Ethics.

Because the Equity Division managed Allstate's pension plans, its members were fiduciaries, who had to "act only for the benefit of the beneficiaries" of the plans. R.T.1063:15-17, 1328:6-19.

Consistent with those obligations, Allstate's Code of Ethics prohibits conflicts of interest. R.T.807:10-12. A conflict of interest exists when an employee chooses between "personal interests and the best interests of the Company, customers, or shareholders . . . ." Appx.103.

### C. Allstate Used The "Dietz Methodology" To Calculate Performance Of Its Portfolios.

Allstate's "pay for performance" plan used an algorithm called the Dietz method to calculate the return performance of its various portfolios. R.T.1143:10-1145:3. The Dietz method was used to adjust the return of the

Allstate portfolios to account for cash flows going in and out of the portfolios. *Id.* Buying stocks takes cash out of the portfolio while selling stock adds cash to the portfolio. *Id.* The Dietz measure that Allstate used was the "mid-day Dietz" calculation, which calculates the return assuming that cash flows occurred at the trading day's mid-point. R.T.1145:21-1146:16.

The impact on performance yielded by the Dietz calculation is called the Dietz effect. In and of itself, the Dietz effect does not help or harm a portfolio's value. R.T. 1144:13-1145:3. Rather, it measures the performance of traders or portfolio managers as compared to the benchmark portfolio. R.T.1143:10-1145:17.

The mid-day Dietz formula could be manipulated. Under the mid-day formula, a purchase on a day the benchmark increases will make the return look less impressive because the Dietz calculation would adjust for cash flows into the portfolio and take in to account that there is more cash in the portfolio. R.T.1147:4-19. Thus, to take advantage of the Dietz effect, and make his or her performance look better as compared to the performance of others trading the same day, a trader or portfolio manager had an incentive to time his or her trades based on swings in the market. By delaying sales until an up day or purchases until a down day, a trader or portfolio manager could enhance his or her performance with a positive Dietz effect, or avoid the impact of a negative Dietz effect. R.T.1145:4-1146:16. Traders and portfolio

managers also could ensure a desired Dietz effect by waiting to decide whether or not to execute a trade at the end of a day in which the market changed direction.

Although this practice inflates the apparent return performance of the portfolio, it does not necessarily benefit the portfolio's value, and in some circumstances, can negatively impact the value of the portfolio. R.T.1063:10-1064:5, 1146:20-1148:18. Individual stocks do not always move in the same direction as the market. *Id.* So, if a trader or portfolio manager waits a day or several days to purchase a stock when the market as a whole is going up, and buys on the first "down" day, then the portfolio may have to pay more for the stock than if the trader or portfolio manager had not waited. *Id.* Similarly, if a trader or portfolio manager waits through several "down" days in the market to sell a stock, and then sells on the first "up" day in the market, the portfolio receives less of a return than if they had not waited through several down days before selling. *Id.* Thus, the trader or portfolio manager could benefit from inflated perceived return performance due to the Dietz effect, but harm the portfolio by paying more for the same stock (or gaining less from a sale) than he or she would have by buying or selling over the preceding days when there would have been a negative Dietz effect that would have hurt the trader's performance (but benefited the portfolio).

### D. Allstate Received Reports Of Improper Trading And Investigated Them.

In 2008, Peter Hecht, an Allstate employee, reported to Allstate's Chief Compliance Officer, Trond Odegaard, that he was concerned that Equity Division employees were timing trades to improve their bonuses, to the detriment of the Allstate pension plans. R.T.1048:11-1050:24. Hecht relayed several anecdotes about members of the Equity Division joking about "Santa Dietz" (who brought Christmas presents to the Equity Division) and "Queen Dietz" (a member of the group who had particular mastery over the process of manipulating Dietz). R.T.1049:2-18.

Odegaard reported the allegations to Greffin, who instructed him to investigate further. R.T.1050:25-1052:5. Over several weeks, Odegaard and others reviewed trading data and reported that, though trading patterns would cancel the Dietz effect over time, there were patterns consistent with manipulating Dietz. R.T.1052:8-1056:5; Appx.93-101. This included trading at the end of the day, when a trader would have "the most confidence" about how the market will finish and could "make the [Dietz] equation dance." R.T.1054:10-19. Odegaard also learned that employees asked about the impact of Dietz on performance and found one instance where the Equity Division had calculated the Dietz effect before employees asked. R.T.1058:25-1060:8. That suggested Dietz calculations were "an institutionalized endeavor

that they do for every trade." R.T.1059:11-18. As Odegaard noted, if "they're worried about [Dietz] hurting them, then they surely must know how to make it benefit them." R.T.1059:21-25.

Allstate's initial investigation also found emails suggesting that its traders were aware of the Dietz effect and took it into account in trading. *E.g.*, Appx.108 (noting that final numbers for one sector would be better than the number listed due to "a little dietz"); Appx.110 (email from Scheuneman to Kensinger cautioning that "there will be a Dietz hit for buying today"); Appx.115 (email from Meacock to Scheuneman and Kensinger stating "Remember we needed a down market to get a positive Dietz"); Appx.123 (Scheuneman to Meacock and Kensinger: "Dr. Dietz blessed us"). In one email thread, Rivera instructed the other employees to execute a trade "at the earliest opportunity," but Scheuneman cautioned Kensinger and Meacock that the trade would not be executed until the end of the day, because "[w]e don't want to absorb a negative Dietz effect, so they'll only sell if the market looks like it will close up on the day." Appx.114. Plaintiffs even maintained spreadsheets that automatically performed Dietz calculations to determine the impact a trade would have on a portfolio's performance. Appx.124-138; R.T.1151:1-1152:8.

The internal investigation raised three concerns about Dietz-motivated trading: (1) the Dietz manipulation might have harmed the portfolios; (2) it

might have affected bonus calculations; and (3) it might have led Allstate to report inaccurate financial information to the public. R.T.1063:20-1064:5, 1140:16-23, 1340:25-1341:16. However, while Odegaard outlined how Dietz could be manipulated and described evidence consistent with that, Appx.93-101, he cautioned: "At this stage, while we have considerable empirical evidence that is fully consistent with a gaming hypothesis, the data by itself doesn't prove knowledge or intent." Appx.96.

Allstate retained outside counsel, Steptoe & Johnson ("Steptoe"), to investigate the allegations further. In July 2009, attorneys from Steptoe and Allstate interviewed Rivera and Scheuneman. R.T.466:7-468:14, 601:18-603:8. Both were asked about Dietz. *Id.* Scheuneman also was asked about at least one of the emails that referred to Dietz. R.T.467:20-468:1.

Steptoe retained an independent economic consulting firm, NERA, to ascertain if the trading potentially harmed the portfolios. R.T.889:5-890:8, 1140:24-1141:22. If such trading occurred in the defined benefit plans, Allstate was required by law to make the plans whole. R.T.1163:12-20, 1349:23-1350:25.

NERA analyzed six years of trades, beginning with trades mentioned in emails that referred to Dietz or waiting for an up or down day. R.T.1149:24-1150:22. In one email dated August 14, 2007, Rivera directed traders to sell $70 million in equities. Appx.121. Of approximately 80 trades associated with

that email, NERA found 66 were traded at a collective loss of $614,373. R.T.1158:10-1159:11. In total, approximately $8 million in losses were attributable to trades described in the suspicious emails. R.T.1352:22-1353:4.

NERA also found emails mentioning Dietz that it could not tie to particular trades. R.T.1160:9-1165:3. Coupled with the spreadsheet suggesting that Dietz was routinely considered, Allstate concluded that it had to look beyond the emails for possible Dietz-related trades. R.T.1348:18-1349:22.

Therefore, to estimate the potential impact of Dietz-related trading, NERA created an algorithm that identified Dietz-favorable trades that occurred after a succession of days when such trades would have adverse Dietz results. R.T.1165:4-1166:9. NERA estimated that the maximum possible impact on all of the Allstate portfolios was a $116 million loss. R.T.1220:2-5; Appx.73. Of that, it estimated that the pension plans could have experienced up to $91 million in losses. *Id.*

### E. Allstate Outsourced Its Equity Division, Questioned Plaintiffs Further, And Terminated Them For Cause.

Even before it received the allegations and initiated its investigation, Allstate had been considering outsourcing the work of the Equity Division. R.T.776:17-780:4. In late summer 2009, Allstate decided to outsource the equity portfolios and disband the Equity Division. R.T.690:3-692:5, 1355:6-20.

Approximately 16 employees were terminated due to the outsourcing. R.T.1263:18-20.

On October 6, 2009, Allstate officials first told Rivera and, then the rest of the Equity Division, about the outsourcing decision. Appx.16, R.T.1355:21-1357:22. All employees in that group except the individuals who managed convertible portfolios were terminated effective December 31, 2009. Appx.16; R.T.700:11-13.

After the October 6 meeting, the Equity Division employees, including Meacock, Scheuneman, and Kensinger, were interviewed by lawyers from Steptoe. R.T.139:5-142:13, 281:5-283:15, 467:1-468:14, 1357:10-1358:21. Allstate's counsel asked Rivera to meet with Steptoe, but he refused. R.T.1357:1-7. Scheuneman was asked similar questions to those she was asked in July and understood she was being questioned about trading practices in the Equity Division. R.T.501:12-503:13. Kensinger and Meacock also understood that they were being questioned about their trading practices under the Dietz method. R.T.200:13-201:24, 282:19-284:10; *see also* R.T.142:25-143:10.

Based on NERA's findings, particularly the $8 million in losses that NERA tied to trades mentioned in the emails, and the other evidence that had been developed, Allstate concluded that six employees had engaged in a

conflict of interest. R.T.1352:22-1353:4, 1359:8-22. Those employees were the Plaintiffs and two traders, Chris Fiorito and Chelsea Smith. R.T.1359:20-22.

On December 3, 2009, Plaintiffs were informed that they would not be receiving severance, because their terminations were for cause.[1] R.T.296:12-298:19, 476:13-477:4, 503:24-504:16, 611:12-23. They were told that their termination was because they had violated the conflict of interest policy in the Code of Conduct with respect to the Pay for Performance Plan. *Id.*; D.E.1 at ¶ 209; D.E.325 at ¶ 213. Plaintiffs understood that their termination was related to the investigation into the trading practices. R.T.504:14-16; D.E.1 at ¶¶ 104-19, 133-55, 177-205, 209.

### F. Three Months After Plaintiffs' Terminations, Allstate Reimbursed The Pension Plans And Issued The 10-K And Greffin Memo.

Based on the NERA estimate of the maximum impact that Dietz-related trading could have had on the pension plans, Allstate paid $91 million into those plans in December 2009. Appx.73.

Allstate was required by law to report to the SEC its conclusion that the portfolios were affected by Dietz-motivated trading. R.T.1353:16-1354:16. On February 25, 2010, three months after it terminated Plaintiffs, Allstate filed its annual Form 10-K. Appx.70. Pages 107 and 108 contained four

[1] Chris Fiorito also was terminated. R.T.1359:20-1360:5. Chelsea Smith had already left Allstate. R.T.1360:1-9.

paragraphs describing the allegations and investigation into Dietz-motivated trading:

> In 2009, we became aware of allegations that some employees responsible for trading equity securities in certain portfolios of two AIC [Allstate] defined benefit pension plans and certain portfolios of AIC and an AIC subsidiary may have timed the execution of certain trades in order to enhance their individual performance under incentive compensation plans, without regard to whether such timing adversely impacted the actual investment performance of the portfolios.
>
> We retained outside counsel who, in turn engaged an independent economic consulting firm to conduct a review and assist us in understanding the facts surrounding, and the potential implications of, the alleged timing of these trades from the period June 2003 to May 2009. The consulting firm reported that it was unable to determine from our records the precise amounts by which the portfolio performance might have been adversely impacted during that period. Accordingly, the economic consultant applied economic modeling techniques and assumptions reasonably designed to estimate the potential adverse impact on the pension plans and the company accounts, taking into account, among other things, the distinctions between the pension plans and the company portfolios.
>
> Based on their work, the economic consultants estimated that the performance of the pension plans' portfolios could have been adversely impacted by approximately $91 million (including interest) and that the performance of the company portfolios could have been adversely impacted by approximately $116 million (including interest) in the aggregate over the six-year period under review. . . .

> In December 2009, based on the economic consultant's modeled estimates, we paid an aggregate of $91 million into the two defined benefit pension plans. . . . Using the economic consultant's calculation of the potential adverse impact on the portfolios, we currently estimate that the additional compensation paid to all the employees working in the affected group was approximately $1.2 million over the six-year period as a result of these activities.

Appx.72-73.

That same day, Greffin sent a memorandum to Allstate employees, stating in relevant part:

> Allstate released its annual financial report on Form 10-K today. Within that filing, we disclosed details around allegations regarding trading practices within our equity portfolio that came to light in the past year. We took the matter very seriously and launched an investigation as soon as we became aware of the allegations.
>
> Outside counsel was retained to assist us in understanding the facts surrounding, and potential implications of, these activities. As part of their analysis, an independent economic consulting firm was retained to estimate the potential adverse impact to the performance of our portfolios. The consultant determined that the performance on some of our portfolios as well as our two pension plan portfolios, could have been adversely impacted by these activities. As a result, Allstate made a contribution to the pension plans during the 4th quarter which is disclosed in the 10-K.
>
> We believe that our financial statements and those of the pension plans properly reflected the portfolios' actual investment performance and the pension plans were adequately funded during this entire period.

> This matter did not affect the plans' ability to continue to provide benefits to plan participants.

Appx.102.

### G. Allstate Reported On Its Investigation To The Department Of Labor.

Because the allegations about Dietz-related trading affected pension portfolios, Allstate, through its counsel, contacted the Department of Labor ("DOL") to ask if the allegations and investigation needed to be reported. R.T.849:11-850:8. DOL told Allstate to submit a report. *Id.*

In a January 29, 2010 letter,[2] Allstate described the allegations and the investigation. In relevant part, that letter stated that employees denied trading for personal benefit, but some emails "could support a contrary conclusion." It explained that Allstate used the algorithm "to estimate potential disadvantage to the plans" but "[i]n our view, there is little question that the algorithm overstates any disadvantage that plans might have suffered." Appx. 75. In a footnote, Allstate stated that, "taking into account returns recalculated by NERA," it estimated that the impact of the trading on bonuses received by 25 members of the Equity Division between 2003 and 2008 was $1.2 million. Appx.75 n.1. Attached to that letter was a lengthy memorandum analyzing the allegations and detailing the investigation and algorithm. Appx.76-88.

[2] This letter was prepared after Plaintiffs' termination. R.T.855:16-857:4, 108:9-15.

In October 14, 2010 follow-up correspondence, Allstate further explained that the $1.2 million "roughly approximate[d] the potential increase in bonuses, if we assumed the algorithm used by NERA . . . reflected actual trading activity." Appx.89. Although NERA estimated "a possible maximum impact" of possible trading irregularities, "[n]o one believed, then or now, that this was an accurate description of the activity on the equity desk, nor that any actual impact on the portfolios was anywhere near the result produced by using the NERA algorithm." *Id.* If the only improper trades *were those mentioned in emails*, "there would have been virtually no effect on bonuses." *Id.* (emphasis added).

### H. Plaintiffs' Lawsuit.

#### 1. Plaintiffs Sue Allstate And Greffin.

Just three weeks after the 10-K and Greffin Memo, Plaintiffs sued Allstate and Judy Greffin for defamation, Allstate for violation of FCRA, and Greffin for tortious interference with prospective economic advantage. D.E.1. The Court dismissed the tortious interference claims. D.E.27. Plaintiffs filed an amended complaint, adding age discrimination claims against Allstate. D.E.29. They later voluntarily dismissed those claims and the defamation claims against Greffin. D.E.46.

### 2. The District Court Narrows The Issues.

Allstate moved for summary judgment on Plaintiffs' remaining defamation and FCRA claims. D.E.127. Allstate argued that Plaintiffs had pled only defamation *per se* claims, which were not viable because Allstate did not name the Plaintiffs. D.E.128 at 6; Appx.47. Allstate also argued that the defamation claims failed because: (1) the extrinsic facts Plaintiffs identified did not create reasonable inferences that the statements in the 10-K and Greffin Memo were about them; (2) the statements in those documents were true; (3) the statements were privileged; and (4) because the statements could be interpreted in a nondefamatory way, they were not actionable under Illinois' "innocent construction" rule applicable to defamation *per se*. D.E.128 at 6-13.

Allstate also objected to Plaintiffs' affidavits. D.E.160 at 3-5; Appx.49. Those affidavits were not dated and their signatures appeared to have been cut and pasted from discovery verifications. *Id.*

Judge Gary Feinerman granted summary judgment in favor of Allstate on Plaintiffs' defamation *per se* claims. Appx.49, 63. He found that "Plaintiffs have no admissible evidence to support their position, essential to their *per se* theory, that a reasonable person in their community would have understood the 10-K and Greffin Memorandum to refer to them." Appx.50.

Although Plaintiffs did not assert a defamation *per quod* theory, Judge Feinerman held that Plaintiffs could proceed on that theory, because they had raised triable issues about falsity and whether the investigation was conducted recklessly. Appx.50-57.

Regarding the FCRA claims, Judge Feinerman held that a triable issue existed as to whether Allstate provided Plaintiffs with a proper "summary" of its investigation. Appx.57-63.

### 3. The Jury Awards $27 Million To Plaintiffs.

Trial proceeded before Judge William T. Hart to whom the case had been transferred.

Although there was no claim for wrongful or discriminatory discharge, Plaintiffs tried this case as if they were suing for wrongful termination. They argued that it was unfair that they were terminated because: (1) minimizing Dietz was consistent with their goal of "buy low, sell high," i.e., they sold stocks on days when the market was up and bought when the market was down; and (2) they were scapegoated for Dietz-related trading that others also did. R.T.1563:4-1590:17. Plaintiffs were so focused on wrongful termination that their counsel did not mention defamation or FCRA, the only claims at issue, until the last few minutes of his hour-long closing. R.T.1560:3-9; 1594:12-1596:5.

Plaintiffs admitted that they timed trades to minimize Dietz. E.g., R.T.172:9-12, 192:12-25, 433:8-434:3, 491:8-495:25, 587:19-588:1; *see also* R.T.501:6-11, 179:18-22. Even though such timing was only relevant to their bonuses, Plaintiffs claimed that the statements in the 10-K and Greffin Memo were false because: (1) they implied Plaintiffs traded to improve their bonuses instead of to follow Allstate policy (D.E.1 at ¶ 205); (2) they did not detail the specifics of the NERA algorithm and the assumptions involved, so the amounts in the 10-K were inflated (*see, e.g.*, D.E.341 at 18-19); and (3) they were inconsistent with the two letters to the DOL (*id.*; R.T.1585:1-6, 1630:6-1631:15).

Although Plaintiffs claimed they lost income because they were unable to secure comparable new employment, Plaintiffs offered no evidence that any prospective employer had read the 10-K or Greffin Memo and refused to hire them because of the statements. Plaintiffs instead argued that they worked in a small community full of "rumors." R.T.482:3-6; 1007:18-1008:9. They claimed that, because their telephones were disconnected and their email accounts were closed immediately after they were terminated, brokers with whom they regularly communicated would have discovered that they had been terminated. R.T.24:16-26:17. Plaintiffs also claimed that those same brokers regularly read 10-Ks and, thus, when the Allstate 10-K was issued three months after their terminations (and months after the entire Equity

Division had been shut down), the brokers must have realized that the statements in the 10-K and Greffin Memo were about them. R.T.28:24-29:18, 332:3-5, 621:23-622:5.

Plaintiffs also offered testimony about the small number of jobs in their field (R.T.256:17-257:3, 624:625:2, 1636:3-6) and that employers do not hire applicants with "blemish[es]" on their resumes (R.T.633:8-11, 1486:19-24, 1635:3-7).

Plaintiffs called no witnesses who were involved in hiring decisions at companies to which they submitted resumes. Thus, Plaintiffs offered no testimony about: (1) any specific jobs for which they were rejected; (2) whether any prospective employer or other person involved in any hiring decision even read the 10-K or Greffin Memo; or (3) whether any job rejection was caused by a prospective employer reading the 10-K or Greffin Memo.

Nevertheless, the jury returned a verdict of approximately $27 million. Appx.1. On the defamation claims, Rivera was awarded $7,156,972 in special damages and $4,000,000 in punitives; Kensinger was awarded $2,913,531 in special damages and $2,000,000 in punitives; Meacock was awarded $3,602,317 in special damages and $3,000,000 in punitives; and Scheuneman was awarded $3,438,028 in special damages and $1,000,000 in punitives. *Id.* Each Plaintiff also was awarded $1,000 in statutory damages under FCRA,

but no actual damages. *Id.* The District Court subsequently awarded punitive damages on the FCRA claims of $3,000 to each Plaintiff. Appx.34.

#### 4. Post-Trial Motions Are Denied And Attorneys' Fees Are Awarded To Plaintiffs.

After entry of judgment, Allstate moved for judgment as a matter of law and for a new trial. D.E.310, 313. Both motions were denied. Appx.3.

Plaintiffs moved for attorneys' fees. D.E.358. They conceded that they could not recover the full $791,137.50 they claimed they had incurred and could only recover fees incurred in connection with FCRA. Appx.37. Plaintiffs sought $357,716.25 in fees for their FCRA claims. *Id.*

Allstate argued that very little time was devoted to the FCRA claims and identified many time entries reflecting matters unrelated to FCRA. D.E.370.

The District Court awarded the full amount sought. Appx.37-38.

## SUMMARY OF ARGUMENT

This is not an action for wrongful termination despite Plaintiffs' focus on that at trial. Plaintiffs' only claims at trial were for defamation *per quod* based solely on the 10-K and Greffin Memo and for violating FCRA.

Plaintiffs' defamation claims rest entirely on the 10-K and Greffin Memo, neither of which is defamatory for four independent reasons. First, to recover for defamation *per quod*, Plaintiffs were required to prove special damages, i.e., economic losses, directly caused by the defamatory statements.

Although Plaintiffs argued that they could not secure employment because of the statements in the 10-K and Greffin Memo, they offered no evidence that any prospective employer – or anyone else – read the 10-K or Greffin Memo, let alone that they rejected Plaintiffs for employment *because of* the statements in those two documents. Without such evidence, Plaintiffs' case fails, as this Court held in *Continental Nut Company v. Robert L. Berner Company*, 393 F.2d 283, 287 (7th Cir. 1968).

Second, a statement that refers to a group, but does not attribute the defamatory conduct to all members of the group, cannot be understood to defame any specific person. Neither document mentions Plaintiffs by name; they refer obliquely to "some employees" (10-K) or "trading practices in our equity portfolio" (Greffin Memo). The undisputed evidence established that the Equity Division consisted of at least 20 employees, and the 10-K and Greffin Memo do not suggest that all members of the group engaged in wrongdoing. Therefore, as a matter of law, the allegedly defamatory statements cannot be reasonably be construed to be "of and concerning" Plaintiffs.

Third, the statements in the 10-K and Greffin Memo are true and, at a minimum, substantially true. They accurately describe what Allstate did in response to allegations that its employees may have timed trades to improve their bonuses. Allstate never asserted conclusively that improper trading

occurred, but simply reported what its retained experts determined and what Allstate did in response to those findings. And even if the 10-K and Greffin Memo implied that improper trading occurred, that was substantially true. Plaintiffs admitted at trial that they timed trades and Allstate had reason to believe they did so to improve their bonuses. While the Plaintiffs argue that other Allstate employees also timed trades or that the actual losses were less than NERA's estimate, the 10-K and Greffin Memo are still substantially true.

Fourth, the statements were subject to a qualified privilege which Plaintiffs failed to overcome by clear and convincing evidence of actual malice. There was no actual malice, because the uncontroverted evidence shows Allstate believed Plaintiffs had timed trades to improve their bonuses. No evidence even suggests Allstate knew that this information was false or recklessly disregarded the truth.

The FCRA award should be reversed for three independent reasons. First and second, to award statutory damages, the jury was required to find that Allstate "willfully" violated the requirement that it provide Plaintiffs a "summary" of the "nature and substance of the communication" on which their terminations were based. But nothing in the statute or any interpretative guidance even suggests what a "summary" must include. Plaintiffs participated in the interviews, knew the nature of the

investigation, and were told that Allstate concluded that they had engaged in conflicts of interest. Given the absence of controlling case law or regulatory guidance regarding what a "summary" must entail, there is no basis to conclude that Allstate violated FCRA. And, in any event, Plaintiff did not show that Allstate's interpretation of what FCRA required was objectively unreasonable, which is required to prove a willful violation of FCRA.

Third, Plaintiffs lack Article III standing for their FCRA claims. Under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), a statutory violation alone does not confer Article III standing; Plaintiffs were required to show a "concrete injury" caused by the statutory violation. Because Plaintiffs knew about the nature and substance of the investigation, they cannot identify any concrete injury resulting from the alleged failure to provide them with a summary.

Finally, if the FCRA award is vacated, the award of attorneys' fees must be reversed because FCRA was the only basis for that award. But even if the FCRA award is affirmed, the District Court abused its discretion in awarding $357,716.25 for claims that turned on the very narrow question of what Plaintiffs knew and were told when they were terminated and whether that qualified as a "summary" under the statute. The attorneys' fees award includes time for discovery, trial preparation, and trial that is not even arguably related to the FCRA claims.

Accordingly, the judgment should be reversed in its entirety.

## STANDARD OF REVIEW

Although this is an appeal from a jury trial, most of the issues on appeal present questions of law that this Court reviews de novo.

First, whether Plaintiffs have satisfied their burden of proving special damages caused by the allegedly defamatory statements would normally be an issue of fact. However, where, as here, Plaintiffs offered no evidence of special damages, the issue is a matter of law. *E.g.*, *Continental Nut*, 393 F.2d at 287 (affirming order granting j.n.o.v. where plaintiff offered no evidence that defamatory statements caused plaintiff's alleged loss of customers).

Second, whether the statements in the 10-K and Greffin Memo could reasonably be understood to be "of and concerning" Plaintiffs is a question of law. "The Illinois courts have emphasized that the meaning of a statement is not a fact for the jury to find, but a 'question of law to be resolved by the court.'" *Lott v. Levitt*, 556 F.3d 564, 568 (7th Cir. 2009) (quoting *Tuite v. Corbitt*, 224 Ill. 2d 490, 866 N.E.2d 114, 122 (2006)). Whether the statements are susceptible to an interpretation that they are about Plaintiffs is a determination of their meaning. *Latimer v. Chicago Daily News, Inc.*, 330 Ill. App. 295, 71 N.E.2d 553, 555 (1947).

Third, although whether a statement is substantially true is normally a jury question, if no reasonable jury could find substantial truth has not been

established, the question is one of law. *Global Relief Found., Inc. v. N.Y. Times Co.*, 390 F.3d 973, 982 (7th Cir. 2004).

Fourth, whether a statement is privileged is a question of law. *Solaia Tech., LLC v. Specialty Publ. Co.*, 221 Ill. 2d 558, 852 N.E.2d 825, 842 (2006); *Layne v. Builders Plumbing Supply Co.*, 210 Ill. App. 3d 966, 569 N.E.2d 1104, 1106 (1991). Whether the privilege has been abused is a question of fact. *Kuwik v. Starmark Star Mktg. and Admin., Inc.*, 156 Ill. 2d 16, 619 N.E.2d 129, 133 (1993)

Fifth, whether the information Allstate provided Plaintiffs on their termination was a "summary" under FCRA and whether any violation was "willful" are questions of law. *United States v. Patel*, 778 F.3d 607, 613 (7th Cir. 2015); *Van Straaten v. Shell Oil Prods. Co. LLC*, 678 F.3d 486, 491 (7th Cir. 2012).

Sixth, "[w]hether a party has standing to bring suit is a question of law we review de novo." *Disability Rights Wis., Inc. v. Walworth Cty. Bd. of Supervisors*, 522 F.3d 796, 800 (7th Cir. 2008).

Finally, this Court reviews the District Court's award of attorney's fees for an abuse of discretion, but reviews de novo its methodology for calculating the award. *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010). An abuse of discretion occurs if the district court premises its holding "on a clearly erroneous assessment of the evidence." *Id.* (citation omitted).

# ARGUMENT

## I. THE DEFAMATION AWARD SHOULD BE REVERSED.

### A. Plaintiffs Failed To Prove That The 10-K or Greffin Memo Caused Them Special Damages.

The most glaring error below is that the District Court did not reject Plaintiffs' defamation *per quod* claims, because Plaintiffs failed to prove the allegedly defamatory statements caused them special damages.

#### 1. Plaintiffs were required to prove special damages.

To succeed on their defamation *per quod* claims, Plaintiffs had to prove the statements caused them "special damages," which are "actual damages of a pecuniary nature." *Maag v. Illinois Coalition for Jobs, Growth & Prosperity*, 368 Ill. App. 3d 844, 858 N.E.2d 967, 975 (2006).

A defamation *per quod* plaintiff must also offer specific evidence that the defamatory statements caused the pecuniary loss; speculation does not suffice. *Continental Nut*, 393 F.2d at 286 (jury cannot be "left to speculate as to . . . whether the libel caused the losses"; special damages "are not to be implied but are to be specifically proved"); *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 667 N.E.2d 1296, 1303-04 (1996) (allegation that plaintiff "has been damaged monetarily by losing gainful employment and wages" does not sufficiently allege special damages); *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 742 N.E.2d 425, 433 (2000) ("general allegations such as damage to one's

health or reputation, economic loss, and emotional distress are insufficient to state a cause of action for defamation *per quod*").

It is not enough for *per quod* plaintiffs to show that they had problems obtaining comparable employment or earned less; they must prove those problems were *caused by* the allegedly defamatory statements. *Anderson*, 667 N.E.2d at 1303-04; *accord Bryson v. News Am. Pubs., Inc.*, 174 Ill. 2d 77, 672 N.E.2d 1207, 1222 (1996); (plaintiff must prove "pecuniary loss resulting from the defamatory statement ('special damages') to recover"); *Continental Nut*, 393 F.2d at 286 (special damages must be "a necessary and proximate consequence of the publication involved").

*Continental Nut* is instructive. The plaintiff offered evidence that several of its customers – and nearly all of the brokers through which it sold nuts – saw an allegedly defamatory letter about plaintiffs' nuts. 393 F.2d at 284-85. Plaintiffs also offered evidence that approximately 140 of its previous customers did not purchase the nuts in the two years after the letter. *Id.* However, the plaintiff did not call any of those customers to testify, nor did it introduce any evidence that any particular customer stopped purchasing nuts *because* it read the letter. *Id.* at 285-86 ("the striking fact about the record in this case is that plaintiff has not produced the testimony of a single customer or former customer on these questions"). Because that evidence left the jury to speculate about causation, judgment for the defendant was required. *Id.* at

286-87. Because the plaintiff knew the identities of the prior customers and yet had failed to call even a single one to testify that they had stopped purchasing nuts because of the letter, the plaintiff had failed to prove "that specificity which shows the loss of profit attributable to patronage withheld by the particular customer and that such withholding was the result of the publication." *Id.*

Similarly, in *Taradash v. Adelet/Scott-Fetzer Co.*, 260 Ill. App. 3d 313, 628 N.E.2d 884 (1993), the plaintiff alleged that his employer "knowingly made defamatory remarks to third parties regarding his job performance." *Id.* at 885. He claimed the employer informed customers that the plaintiff was no longer employed because of "lack of performance" and, as a result, "customers refused to deal with him, . . . he was hindered from selling his product lines, and . . . he suffered lost commissions and income." *Id.* at 886-88. Affirming dismissal of this claim, the court held that the special damages were not adequately alleged:

> [P]laintiff has not alleged that "would be" clients advised him that their decision not to do business with him was based upon the statements made by defendant. Additionally, plaintiff has not pointed to any actual loss which resulted from the alleged injury.

*Id.* at 888.

Numerous other courts agree. *See*, *e.g.*, *Barry Harlem Corp. v. Kraff*, 273 Ill. App. 3d 388, 652 N.E.2d 1077, 1083 (1995) (medical clinic that alleged it lost patients due to the defendant's statements did not sufficiently plead special damages because it failed to allege that "any appointments were cancelled or that any patient who had consulted, but not yet made a decision, advised [plaintiff] that he or she would not proceed with [treatment] because of the commentary"); *Kapotas v. Better Gov't Ass'n*, 2015 IL App (1st) 140534, 39 N.E.2d 572, 594 (2015) ("the failure to obtain an interview or further inquiries from a recruiter would not sufficiently establish defamation *per quod*"); *Tamburo v. Dworkin*, 974 F. Supp. 2d 1199, 1220 (N.D. Ill. 2013) (granting summary judgment on defamation *per quod* claim because there was "no basis on which to link the alleged lost sales to the alleged defamation" and the plaintiff did not "point to any cancelled contracts that resulted from [defendant's] statements"); *Quinn v. Jewel Food Stores, Inc.*, 276 Ill. App. 3d 861, 658 N.E.2d 1225, 1233 (1995) (rejecting *per quod* claim where plaintiff pointed to "no evidence that the denial of the management position and the franchise was based upon the statements made by defendant"); *see also Maag*, 858 N.E.2d at 976 (plaintiff asserting *per quod* claim that defamatory statement caused him to lose election was properly dismissed where the plaintiff "did not identify any voter who was otherwise inclined to vote for him and failed to do so because of the flyer").

Moreover, where allegedly defamatory statements were made in conjunction with other circumstances that might influence third-parties' actions, it cannot be inferred that the statements caused a plaintiff's injury. For example, in *Moon v. Liu*, 2015 IL App (1st) 143606, 44 N.E.3d 1134 (2015), the plaintiff argued that he properly pled special damages because he alleged that his wife filed for divorce based on a statement contained in a memo issued by defendants – their church's leaders. *Id.* at 1140. The defendants' allegedly defamatory statement – that the plaintiff had threatened to report church members to the IRS – was only one of numerous statements that criticized plaintiff's conduct. *Id.* at 1137-38. The *Moon* court held that the plaintiff had failed to allege special damages. "[T]here is nothing in the record which would allow a trier of fact to infer that plaintiff's wife filed for divorce *because* defendants claimed that plaintiff threatened to turn in church members to the IRS, rather than any of plaintiff's other 'issues' with the church or alleged misconduct." *Id.* at 1141 (original emphasis).

**2. Plaintiffs offered no evidence that the 10-K or Greffin Memo caused them special damages.**

Plaintiffs' evidence below suffers from the same glaring omission as in *Continental Nut*, *Taradash*, and the other cited cases. Plaintiffs offered no evidence that they were denied employment by any employer *because of* the

statements in the 10-K or Greffin Memo. Indeed, they did not present any evidence that anyone in a position to hire them even read the 10-K or Greffin Memo. Consequently, Plaintiffs failed to prove special damages.

Like the plaintiff in *Continental Nut*, although Plaintiffs knew the identities of prospective employers, they offered no evidence about the reasons they were not hired. They did not call a single prospective employer – or other witness – to testify that their job applications or business opportunities were rejected because of the statements in the 10-K or Greffin Memo. In fact, they called no witnesses who testified that he or she even read the allegedly defamatory statements.

Instead, Plaintiffs pointed to evidence surrounding their December 2009 terminations that their phones were turned off, that emails were returned to brokers, and that they were not allowed to return to their offices. R.T.24:16-26:17, 234:17, 333:10-25, 621:23-622:3. They argued that, due to the tight-knit industry and the active rumor mill in their field, other employers would have connected their terminations to the statements made in the 10-K and Greffin Memo made three months later, in February 2010. R.T.28:24-29:18, 332:3-5, 482:3-6, 621:23-622:5, 1007:18-1008:9.

That is pure speculation that falls far below the evidentiary threshold for special damages. Plaintiffs merely offered evidence that they were not immediately hired for highly competitive, high-paying jobs and the

circumstantial evidence described above. That is precisely the speculative theory of special damages rejected in *Continental Nut*, *Taradash*, and the other cases discussed above.

Plaintiffs' theory of causation also suffers from another glaring problem. It requires the jury to infer that prospective employers in the tight-knit industry knew of the manner in which Plaintiffs were terminated. But the very fact that Plaintiffs were terminated in such a manner – that they were barred from returning to their offices and that their phones and emails were immediately disconnected – would, under Plaintiffs' theory, raise questions about their employment at Allstate even if prospective employers never read the 10-K or Greffin Memo. Thus, by Plaintiffs' own admissions, in this case, like *Moon,* the evidence presented did not allow a reasonable jury to divine whether any third parties' decisions affecting Plaintiffs were caused by the allegedly defamatory statements or by some other factor, such as their terminations.

Thus, no evidence supports Plaintiffs' speculation that statements in the 10-K or Greffin Memo were the actual cause of Plaintiffs' claimed inability to obtain comparable employment. As in *Continental Nut*, "the striking fact . . . in this case is that plaintiff[s] ha[ve] not produced the testimony of a single" employer or other third party that even read the 10-K or Greffin Memo. 393 F.2d at 285-86. If everyone in Plaintiffs' tight-knit

industry knew about the 10-K and Greffin memo, and therefore refused to hire Plaintiffs, why didn't Plaintiffs produce even one such witness?

**3. The testimony about a non-witness recruiter does not cure the absence of special damages evidence and was erroneously admitted.**

Plaintiffs have argued that they offered testimony that Meacock's recruiter stopped submitting her resume to potential employers. But the recruiter herself did not testify. Thus, not only should that "evidence" have been excluded as hearsay, such testimony about a recruiter's alleged statement does nothing to prove special damages.

At trial, Meacock was asked: "At some point after the 10K came out, did you learn that your resume was not being submitted for jobs that you might be qualified for?" Appx.67:7-9. As she began to respond "Ms. Graham [the recruiter] told me about[,]" Allstate's counsel objected on hearsay grounds. Appx.67:13-17. Rephrasing the question, the following colloquy took place:

> Q. Without telling me, Ms. Meacock, about anything Ms. Graham told you, I'm just right now asking you what the job was.
>
> A. The job was for a senior growth manager, and it was in the same category of level that I had been in. It was about a $500,000 a year job. They were looking to hire an entire team of people.
>
> Q. And this was after the 10K?
>
> A. Yes.

> * * * *
>
> Q. When you found out that Ms. Graham was not submitting your resume for that posting, did you talk to her about it?
>
> A. I did.
>
> Q. Okay. Now, without telling me anything that Ms. Graham said about anyone's reputations or anything in the conversation, did you learn after that conversation that Ms. Graham would not be submitting your resume to anyone else?
>
> A. Yes. Yes.
>
> MR. PAULING: Objection, your Honor. This is hearsay, and it's all subject to your. . . .
>
> THE COURT: Overruled, sir. She may answer. As I understand, Ms. Graham is going to be a witness here, so she can testify to what she said. Ms. Graham can testify.
>
> BY MR. SWEENEY:
>
> Q. Right.

Appx.67:19-68:20. Meacock then testified that she learned Graham would no longer submit her resume or work with her, so she was forced to seek jobs outside the country. Appx.68:20-69:16. Graham, however, was not called to testify.

The hearsay objection should have been upheld. Meacock was relaying out-of-court statements by Graham. That Meacock phrased her statement in terms of what she "learned" from Graham does not render that hearsay admissible. *United States v. Verrusio*, 803 F.2d 885, 893-94 (7th Cir. 1986)

(question asking "did you learn matters and facts" called for hearsay); *Rabin v. Provident Life & Accident Ins. Co.*, No. 98-C-1577, 2000 WL 1131944, at *7-8 (N.D. Ill. Aug. 9, 2000) (striking several paragraphs of affidavit stating what plaintiff had "learned"); *see also Snapt Inc. v. Ellipse Commc'ns Inc.*, 430 F. App'x 346, 352 (5th Cir. 2011) (district court properly struck as hearsay statement that "it was learned" that defendant had acquired a password to plaintiff's servers).

Even if Meacock's testimony was admissible, it does not provide substantial evidence that she lost employment because of the statements in the 10-K or the Greffin Memo. Plaintiffs offered no evidence to suggest the headhunter's decision was related to either document, except that it occurred after the documents were issued. But that is pure speculation. There is no evidence in the record that the recruiter even read either document. Instead of learning anything from them, the headhunter might have simply learned that Meacock was involuntarily terminated from another source – e.g., from a participant in the rumor mill that allegedly run rampant right after the Plaintiffs were terminated – or might have made the decision for reasons completely unrelated to either document. Thus, Plaintiffs cannot rely on Graham to prove special damages.

### B. The 10-K and Greffin Memo Are Not "Of And Concerning" Plaintiffs.

Plaintiffs' defamation claims suffer from another glaring flaw. To prevail in a defamation case, a plaintiff must establish that the defamatory statements are about the plaintiff, *i.e.*, the statements are "of and concerning" the plaintiff. Neither the 10-K nor the Greffin Memo identifies Plaintiffs by name and their general statements referring to some members of the Equity Division cannot be reasonably understood to be about Plaintiffs.

In its seminal decision, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court explained the "of and concerning" doctrine. The plaintiff was an elected official of Montgomery, Alabama. An ad in the New York Times claimed that "police" in Montgomery had harmed civil rights demonstrators. Although the official was not named, he contended that because he supervised the Montgomery police department, the descriptions of police misconduct could be imputed to him. Indeed, he offered testimony from various individuals who claimed they understood the statements to be about him.

The Supreme Court found this evidence "constitutionally defective," holding that it "was incapable of supporting the jury's finding that the statements were made 'of and concerning'" the official. *Id.* at 288.

Consistent with *Sullivan*, under Illinois law, statements made about a group – even a group with a small number of people – are not "of and concerning" a specific member of that group unless the statement "can be said with certainty to include every individual within the group." *Brewer v. Hearst Publishing Co.*, 185 F.2d 846, 849 (7th Cir. 1950); *see also Latimer*, 71 N.E.2d at 554-55. In *Latimer*, the defendant published an article about a trial involving 30 defendants "where the scum of political gangsterdom . . . are represented by as craven a group of lawyers as I've seen, not excluding the nickel and dime shysters who used to hang around the racket court on S. State St. . . ." *Latimer*, 71 N.E.2d at 554. It also stated that "[t]here are despicable characters among the defendants." *Id.* Nine of the 23 attorneys for the defendants sued, alleging they were defamed by the article, but the court dismissed their action.

The appellate court affirmed, holding that the statements could not be libelous, because the article did not identify which of the defendants were "scum" or which of the lawyers represented those defendants. *Latimer*, 71 N.E.2d at 555. When the allegedly defamatory statements were read in context, the article "would clearly indicate that the writer did not mean to brand all of the defendants as 'despicable' [or] 'the scum of political gangsterdom.'" *Id.* Because it was impossible from the article to determine which of the defendants were referred to, the court said "we cannot with any

more certainty determine who were the lawyers representing the defendants included in that term." *Id.*

Similarly, in *Crosby v. Time, Inc.*, 254 F.2d 927 (7th Cir. 1958), the plaintiff was a union official from Portland, Oregon, who sued over an article that alleged that "top Western officials" of the union had conspired with gamblers to control law enforcement and establish gambling in Portland. This Court affirmed dismissal, holding that, even if it assumed that plaintiff was a "top Western official," he "could not prevail, under Illinois law, in the absence of a showing that all of such officials were accused of wrongdoing." *Id.* at 930.

Likewise, in *Vantassell-Matin v. Nelson*, 741 F. Supp. 698 (N.D. Ill. 1990), the plaintiffs, husband and wife, were passengers on an international American Airlines flight. After the flight, the airline, while not naming the plaintiffs, told the media that a married couple had sex during the flight. *Id.* at 709. The court held that plaintiffs could not show that the airline had made a statement "of and concerning" them because "[n]o reasonable individual reading those statements would be able to identify them with [the plaintiffs], as distinguished from any other married couple on any American Airlines international flight." *Id.* at 710.

These cases compel reversal of the judgment. Neither the 10-K nor Greffin Memo can reasonably be read to be "of and concerning" Plaintiffs.

They do not identify Plaintiffs by name and no witness testified that they read those statements and concluded they were describing Plaintiffs.

Although the testimony was not clear on precisely how many people fell within the descriptions, evidence indicated that at least 20 people were members of the Equity Division during the six years that were reviewed. R.T.144:3-6, 805:24-806:3.

The documents, at most, contained oblique references that suggested possible misconduct by "some" of these employees. For instance, the Greffin Memo refers to "allegations regarding trading practices within our equity portfolios" and states that "the performance on ***some*** of our portfolios, as well as our two pension plan portfolios, could have been adversely impacted . . . ." Appx.102 (emphasis added). Similarly, the 10-K refers only to "***some employees*** responsible for trading equity securities in ***certain*** portfolios" from June 2003 to May 2009. Appx.72 (emphases added).

Those statements cannot reasonably be read to suggest that all members of the Equity Division participated in the trading practices described. Nor do they provide any clue as to which specific members in the Equity Division engaged in those trading practices.

Even if the language in the 10-K were read, as Plaintiffs argued, to be limited to portfolio managers and traders employed at the time of Plaintiffs' termination, they conceded that at least 11 employees were "responsible for

trading equity securities in certain portfolios of two AIC defined benefit pension plans and certain portfolios of AIC and an AIC subsidiary." D.E.341 at 16; *see also* R.T.481:10-15, 827:10-22. Nothing in the statements can reasonably be understood to suggest that all 11 or 22 people engaged in wrongdoing.

Plaintiffs nonetheless argued below that there was evidence from which a person *could* ascertain that the 10-K and Greffin Memo were about them. No witness testified that he or she read the statements and believed they were about the Plaintiffs. Nor could they. Linking that evidence to the statements requires so many leaps of logic and assumptions that it cannot possibly reflect the understanding of a reasonable reader of the 10-K or Greffin Memo.

For example, Plaintiffs maintain that the circumstances surrounding their termination on December 9, 2009 would lead a reasonable reader to conclude that the 10-K and Greffin Memo issued in February 2010 were "of and concerning" them. They argue that because brokers calling them in December 2009 would have learned their phone numbers were deactivated and emails to them would have bounced back to the senders, they knew Plaintiffs had been terminated. The 10-K and Greffin Memo issued three months later purportedly provided the explanation for their terminations.

That is pure supposition because, despite the fact that the Plaintiffs claim that theirs was a tight-knit small community, Plaintiffs did not present a single broker to testify that he or she knew the Plaintiffs were terminated, subsequently read the 10-K or Greffin Memo, and concluded they were about Plaintiffs. It also ignores the fact that, by the time the 10-K and Greffin Memo were issued, the entire Equity Division had been shut down and its work outsourced. R.T.805:9-806:15. To connect the 10-K and Greffin Memo to Plaintiffs, not the other Equity Division employees, a reader would have needed specific information about Plaintiffs' and others' terminations to know Plaintiffs were treated differently from other employees who were terminated. No witness testified to having such knowledge.

Moreover, for a reader to make the leaps of logic necessary to conclude the statements were about Plaintiffs, readers would have to believe that Plaintiffs executed trades. But each testified that they did not actually engage in trading. R.T.86:20-87:14, 264:4-265:8, 412:2-10, 553:4-15. By contrast, the other two employees to engage in the described trading practices – Fiorito and Smith – were, in fact, traders. R.T.185:10-1826:2. Therefore, readers would not assume that Plaintiffs were the "employees responsible for trading equity securities" who "may have timed the execution of certain trades" described in the 10-K.

Plaintiffs also contend that they could be identified because their portfolios were the only ones outsourced to Goldman Sachs. D.E.341 at 16. But the undisputed testimony was that not just the growth team's portfolios were outsourced; so were the value and qualitative portfolios, which also were managed by members of the Equity Division. R.T.805:9-806:15. Again, because outsourced portfolios were handled by employees other than Plaintiffs, that reference cannot reasonably be understood to be "of and concerning" them. "[W]here a speaker is meticulous enough to preserve the anonymity of an individual . . . the speaker should not be exposed to liability for defamation. . . ." *Vantassell-Matin*, 741 F. Supp. at 710.

Accordingly, because Plaintiffs failed to show that the statements were of and concerning them, the award on their defamation claims should be reversed.

### C. The Statements In The 10-K and Greffin Memo Are Substantially True.

A statement is not defamatory if it is true. *Sullivan*, 376 U.S. at 279; *Altman v. Amoco Oil Co.*, 85 Ill. App. 3d 104, 406 N.E.2d 142, 144 (1980); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993). To establish substantial truth, the defendant need only show the truth of the "gist" or "sting" of the statements. *Haynes*, 8 F.3d at 1227 ("if the gist of a defamatory statement is true, if in other words the statement is substantially

true, error in detail is not actionable"); *Cianci v. Pettibone Corp.*, 298 Ill. App. 3d 419, 698 N.E.2d 674, 678-79 (1998) ("defendant need only show the truth of the 'gist' or 'sting' of the defamatory material"). Plaintiff had the burden of proving that the gist and sting of the statements were false. *Global Relief*, 390 F.3d at 989.

**1. The 10-K and Greffin Memo contained no false statements.**

Kensinger admitted that he could identify no false statements in the Greffin Memo (R.T.222:9-12), and none of the other Plaintiffs testified that it was false. Nor could they. The Greffin Memo merely describes how the 10-K "disclosed details around allegations regarding trading practices within our equity portfolio"; states that Allstate investigated the allegations; retained outside professionals to investigate the "potential implications" and estimate the "potentially adverse impact" of the activities; the consultants concluded performance "could have been adversely impacted"; and, as a result, Allstate made a contribution to the pension funds. Appx.102. All of those statements are undeniably true – and Plaintiffs conceded as much.

The same is true of the 10-K. It describes: how Allstate became aware of allegations that employees were timing trades to benefit themselves; it correctly stated that Allstate retained outside counsel, who engaged an independent economic consulting firm to assist Allstate "in understanding the potential implications of the alleged timing" of trades; unable to

determine the precise amounts by which the portfolios were affected, the economic consultants employed economic modeling to estimate that the pension plans and all portfolios "could have been adversely impacted" by approximately $91 million and $116 million, respectively, over the six years; based on those estimates, Allstate paid $91 million into the pension plans; and using that estimate of "potential adverse impact," Allstate estimated employees received $1.2 million in additional compensation as a result of those activities. Appx.73. Nothing in those statements is false.

**2. The statements are substantially true even if read to imply that Plaintiffs timed trades.**

Even giving the statements the implied meaning claimed by Plaintiffs – that the 10-K and Greffin Memo assert that Plaintiffs timed trades to improve their bonuses, resulting in $91 million in portfolio losses – the statements are substantially true. The "gist" and "sting" of such implied statements is that the employees timed trades to benefit themselves, even if it resulted in losses to the portfolios.

That "gist" and "sting" is not false, because Plaintiffs and others freely admitted that trades in the portfolios they managed were timed in a manner consistent with manipulating Dietz. R.T.491:2-493:1 (discussing email asking traders to coordinate "to mitigate Dietz effect" and how she wanted positive Dietz to offset trades with negative Dietz), 587:19-588:11 (Rivera explaining

plan in email to time sale for an up day to "avoid the possible negative Dietz"); *see also* R.T.192:12-25, 433:18-434:3; Appx.105-139.

Plaintiffs spend much time saying that market timing is not a bad thing and that a trader that buys low and sells high is just doing his or her job. But that testimony and the emails refer to days when the *market* was up or down, not days when the target stock's prices were up or down. As NERA's analysis showed, buying on a down day for the market is not necessarily consistent with buying a particular stock at a low price. Because the purchase would occur after one or more up days, the target stock's price could be higher than it was on the first day the trade could have been made. In other words, waiting for an up day to buy did not necessarily mean the portfolio received the lowest price for that stock.

To the contrary, Dietz served only one consistent purpose – to provide a measure for comparing one portfolio's performance against other portfolios. The only plausible reason for timing trades to manipulate Dietz, which Plaintiffs admitted they did, was to improve the appearance of the portfolio's performance. And because manipulating Dietz could reduce the portfolio's actual gains, timing trades created a conflict of interest between the employees trading and managing the portfolio and the beneficiaries. Thus, Plaintiffs' own testimony confirms that the gist and sting of the 10-K and Greffin Memo are true.

Further, Plaintiffs cannot prove falsity by arguing that, though they timed trades, they did not do so to improve their personal bonuses. That fails for two reasons.

First, neither the 10-K nor Greffin Memo supports that inference. The 10-K only describes allegations regarding whether employees timed trades "to enhance their individual performance under incentive compensation plans," but says nothing further about whether it found those allegations to be true. Appx.72. Its remaining statements are couched in language reflecting that Allstate was not stating with certainty either that the allegations were completely accurate or that it could determine precisely the effect of timed trading on the portfolios. They cannot reasonably be read as a statement about Plaintiffs' actual motivations. And the Greffin Memo says nothing about bonuses whatsoever. Appx.102.

Second, that Plaintiffs deny that they timed trades for the improper motive of improving their bonuses does not support a finding that the statements were substantially false. Enough evidence in the record – e.g., the emails and Plaintiffs' admission that they timed trades to manipulate Dietz – supports Allstate's conclusion that Plaintiffs timed trades to improve their performance. *Haynes*, 8 F.3d at 1226-29 (statements in book implying that plaintiff left one woman for another for financial reasons were not actionable because, where facts established that plaintiff left a poor woman for a less

poor one, motivations "can never be known for sure (even by [the plaintiff]) and anyone is entitled to speculate on a person's motives from the known facts of his behavior").

Indeed, the only purpose Dietz served was to provide a measure of portfolio performance. Thus, the only plausible reason for timing trades to manipulate Dietz – which Plaintiffs admitted they did – was to improve the appearance of the portfolio's performance, which affected bonuses. Thus, even if the 10-K and Greffin Memo implied that Plaintiffs acted with an improper motive of improving their bonuses, that implication is substantially true.

**3. The Department of Labor letters and evidence of other employees timing trades do not prove falsity.**

Plaintiffs also argued that the statements in the 10-K and Greffin Memo are false because they purportedly contradict statements in Allstate's letters to the Department of Labor. Plaintiffs have pointed to the language that the estimated $91 million "overstates any actual economic disadvantage suffered by the plans" and "[n]o one believed, then or now, that this was an accurate description of the activity on the equity desk . . . ." *See, e.g.*, D.E.341 at 18; R.T.1632:14-17 (closing rebuttal that 10-K and Greffin Memo "don't say anything about it not being vastly overstated" and "don't say that it's a worst-case scenario. They do not say that no one believed then or now that the

numbers were accurate."). This, Plaintiffs argued to the jury, was "half the story." R.T.1632:12-13.

Plaintiffs are wrong. On its face, the Greffin Memo says nothing about the amounts paid to pension plans, while the 10-K never declares that it calculated the $91 million with precision. To the contrary, the 10-K states that NERA "was unable to determine from our records the precise amounts by which the portfolio performance might have been adversely impacted . . . ." Appx.73. The 10-K explains that NERA used an economic model to "estimate the potential adverse impact" and concluded that the pension plans "could have been adversely impacted" by approximately $91 million. *Id.*

That statement clearly conveys that Allstate was relying on estimates by outside experts because it could not calculate with any reasonable precision the "potential" impact from the "alleged timing" of trades. No reasonable reader of the 10-K would conclude that Allstate was stating conclusively that the pension plans actually lost $91 million.

Moreover, the exact amount of the losses is irrelevant to whether the 10-K was substantially true. Whether those trades resulted in losses to the portfolios of $91 million, the $8 million NERA connected to the suspect emails, or the $614,373 that NERA connected to the single August 14, 2007 email (R.T.1158:21-1159:11), it was substantially true that some employees timed trades to minimize the Dietz effect, that those trades could have been

better timed to benefit the portfolio, and that based on the finding of the experts it retained, Allstate paid an additional $91 million to the pension funds.

Nothing in the DOL letters changes that analysis. The statements that the algorithm "overstates any disadvantage" to the plans or "the NERA algorithm was a way . . . to estimate a possible maximum impact of any potential 'Dietz' motivated equity trading. No one believed, then or now, that this was an accurate description of the activity" plainly refer to the calculation of the impact; those statements do not suggest that Dietz-motivated trading did not occur or that Allstate did not pay $91 million to account for any possible loss due to Dietz manipulation. Appx.74-75, 89.

Equally unavailing is Plaintiffs' attempt to point the finger at others at Allstate. Even if other Allstate employees – even Plaintiffs' supervisors – encouraged Plaintiffs to trade in a manner that minimized Dietz, it does not render the statements in the 10-K or Greffin Memo false. The description of the trading in the Equity Division and the resulting investigation is substantially true. That the alleged wrongdoing may have been more widespread is irrelevant.

Moreover, even if Plaintiffs were just "following instructions" to manipulate Dietz as they claim, they still engaged in the conduct that was the "gist" and "sting" of the allegedly defamatory statements.

### D. The 10-K And Greffin Memo Are Privileged.

The parties agreed that the statements in the 10-K and Greffin Memo were privileged, so the jury was instructed that Allstate could not be liable unless Plaintiffs proved by ***clear and convincing evidence*** that the statements were made with actual malice. R.T.1646:2-14; *see also Kuwik*, 619 N.E.2d at 133; *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070, 987 N.E.2d 864, 882 (2013). As discussed above, the allegedly defamatory "gist" and "sting" of the 10-K and Greffin Memo is that Plaintiffs timed trades in violation of their duty to act only for the benefit of the plans' beneficiaries. Plaintiffs offered no evidence that Allstate acted with actual malice, i.e., it believed the statements were false or acted with reckless disregard for their truth.

Nor could they. Allstate had evidence adduced by both internal and outside investigations that Plaintiffs timed trades to minimize Dietz – specifically, the numerous emails referring to Dietz and discussing the timing of trades (Appx.105-139); Odegaard's analysis showing a pattern of trading on certain days and at the end of the trading day (R.T.1054:10-19); the spreadsheet used to track Dietz effects (Appx.125-138); and Plaintiffs' admissions that they timed trades (R.T.172:9-12, 192:12-25, 433:8-434:3, 491:8-495:25, 587:19-588:1). That evidence provided a reasonable basis for the investigators to conclude that Plaintiffs had a conflict of interest. R.T.1352:22-1353:4, 1359:13-17.

Plaintiffs can point to nothing to suggest that Allstate knew that conclusion was false or recklessly disregarded its truth. In fact, Kensinger admitted that he understood that "Allstate must have thought that people were trying to game the Dietz performance system" and "must be trying to increase their bonuses." R.T.149:6-12. Neither Kensinger nor any other witness testified that Allstate did not have that belief or doubted that it was correct.

Nor, for the reasons set forth above, can Plaintiffs rely on the alleged "false" statements that they relied upon below – the DOL letter's statement that the $91 million repayment was overstated and the alleged nondisclosure of other employees timing trades. They do not prove actual malice.

Accordingly, the record contains no evidence to satisfy Plaintiffs' burden to overcome the conditional privilege for the allegedly defamatory statements.

## II. THE FCRA AWARD SHOULD BE REVERSED.

### A. Allstate Did Not Willfully Violate FCRA.

Plaintiffs' sole claim under FCRA, is that, because Allstate used outside investigators to investigate the allegations of Dietz-motivated trading and took "adverse action based in whole or in part" on communications with those investigators, Allstate was required to furnish them with a "summary containing the nature and substance of the communication upon which the

adverse action is based . . . ."[3] 15 U.S.C. § 1681a(y)(2). Moreover, the statutory damages that were awarded are available only if Allstate "willfully" failed to comply with FCRA. 15 U.S.C. § 1681n(a) (authorizing statutory damages for willful violation); 15 U.S.C. § 1681o(a) (permitting only actual damages for negligent violation). Willfulness exists only if a defendant's failure to comply with FCRA was "objectively unreasonable." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 62 (2007). Allstate's conduct does not come close to satisfying that standard.

In *Safeco*, the Supreme Court considered FCRA's requirement that consumers be advised whenever there is an "increase" in an insurance charge. 551 U.S. at 53. The defendants interpreted "increase" as applying only to existing customers, rather than new customers, believing that it would be impossible to "increase" the rates or charges of those who had never before been charged. *Id.* at 60-61. Therefore, the defendants did not provide notice of increases to new customers. *Id.* Although the plaintiffs' "reading has the better fit" with the statute, the Supreme Court concluded that defendants had not "willfully" violated FCRA because their interpretation of the law was not "objectively unreasonable." *Id.* at 62, 69-70; *accord Van Straaten*, 678 F.3d at 489 ("only a reading [of FCRA] that is 'objectively unreasonable' can

[3] The summary does not have to disclose its sources, 15 U.S.C. § 1681a(y)(2), and does not have to be in writing, 2 Littler's The National Employer § 19.2 (2014) (FCRA "permit[s] an oral summary").

be deemed a 'willful' violation"); *Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 726-27 (7th Cir. 2008) (affirming summary judgment for defendant, because even if defendant's interpretation of FCRA was wrong, its interpretation was not "objectively unreasonable").

The Supreme Court has instructed courts to look at two primary factors when determining whether a defendant's action was "objectively unreasonable." *Safeco*, 551 U.S. at 70; *see also Van Straaten*, 678 F.3d at 489-91. First, courts should determine whether there is any judicial or regulatory guidance concerning the meaning of the statutory requirement at issue. *Safeco*, 551 U.S. at 70. Second, courts should determine whether the statute is clear as to what is required or if it is capable of multiple interpretations. *Id.* Without clear and unambiguous text and/or authoritative guidance, a defendant does not "willfully" violate FCRA even if its "construction of the statute turns out to be mistaken." *Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794, 803 (7th Cir. 2010).

*Safeco* compels reversal of the FCRA award. No judicial or agency guidance exists that even suggests the level of detail an employer must provide in a "summary." Where there is a "dearth of guidance" on a particular FCRA requirement, a company's interpretation of that obligation is not "objectively unreasonable." *Safeco*, 551 U.S. at 70 ("no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the

FTC"); *see also Shlahtichman*, 615 F.3d at 803 (affirming judgment for the defendant on willfulness when "[t]o date, there [had] been no contrary opinion from a court of appeals or federal agency suggesting that the company's understanding of the statute [was] wrong").

Indeed, even if another court of appeals had provided guidance, a defendant's interpretation of the FCRA is not "objectively unreasonable" until this Court addresses the issue. *Nicaj v. Shoe Carnival, Inc.*, No. 13-7793, 2014 WL 184772, at *3 (N.D. Ill. Jan. 16, 2014) ("the simple fact that the [Third Circuit] in [another case] had a contrary interpretation does not render [defendant's] belief objectively unreasonable" in this case); *Murray v. GMAC Mortg. Corp.*, 532 F. Supp. 2d 938, 944 (N.D. Ill. 2007) (entering judgment for defendant in spite of conflicting authorities "in light of the importance *Safeco* placed on judicial agreement as proof of reasonableness").

Allstate's interpretation of the "summary" requirement does not come close to meeting the standard of being objectively unreasonable. Plaintiffs already knew that outside counsel were conducting an investigation that focused on Dietz-motivated trading. R.T.200:13-201:24, 282:19-284:10,466:7-468:14, 601:18-603:8. When they were terminated, they were told they had violated the conflict of interest provision in Allstate's Code of Ethics in connection with the "Pay for Performance plan." D.E.1 at ¶ 209. Together with what they already knew, it was not objectively unreasonable for Allstate

to believe that Plaintiffs had been furnished with a sufficient summary of the investigation.

In fact, the only "communications" that arguably contributed to Allstate's conclusion that Plaintiffs had engaged in a conflict of interest were Plaintiffs' own interviews with Steptoe (of which they were undoubtedly aware) and NERA's analysis of trading patterns that were consistent with Dietz manipulation. The nature and substance of the Steptoe interviews were known to Plaintiffs. Nothing in FCRA nor the administrative guidance suggests an employer must provide an employee with a summary of communications in which the employee took part.

Nor was it objectively unreasonable for Allstate to refrain from detailing the NERA analysis. That was work-product, performed under the auspices of counsel, which was designed to ascertain the impact of possible misconduct on the pension plan portfolios. R.T.856:25-857:5. Nothing in FCRA suggests that an employer must disclose privileged communications or work-product as part of a "summary."

Moreover, it is doubtful if NERA's analysis even qualifies as "communication" subject to disclosure under 15 U.S.C. § 1681a(y)(2). Section 1681a(y) was enacted in 2004 in response to the FTC's 1999 conclusion that the use of outside attorneys to "investigate suspected workplace misconduct, such as sexual or racial harassment or workplace violence, constitutes an

'investigative consumer report' under the FCRA." H.R. Rep. No. 108-263, at 27 (2003). An "investigative consumer report" is defined in FCRA as a "consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living *is obtained through personal interviews* with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information." 15 U.S.C. § 1681a(e) (emphasis added). Thus, the type of "communications" that Congress was addressing in 15 U.S.C. § 1681a(y)(2) were interviews with victims and witnesses of harassment or other employee wrongdoing, not expert analysis of company data.

That understanding of "communications" is further underscored by the reason Congress amended FCRA in 2004. When the FTC interpreted investigations by outside counsel to fall within the scope of FCRA, the result was that employers using outside counsel had to comply with FCRA's notice and disclosure requirements before the investigation. H.R. Rep. No. 108-263, at 27. Giving such notice, however, could deter victims or witnesses from reporting workplace misconduct.

With that understanding of its origins, it is clear that the amended Section 1681a(y) is designed to apply to interviews with witnesses. It provides that an employer's retention of outside investigators no longer

triggers advance notice and disclosure to the employee who is the subject of the investigation. Instead, the employer must provide a summary of communications (without revealing the sources) only if an adverse action is taken. 15 U.S.C. § 1681a(y)(2). That allows an employer to perform its investigation in secrecy and protects victims and witnesses from possible intimidation, but also ensures that an employee who is disciplined or terminated as a result of the investigation – of which he or she might have no prior knowledge – receives basic information about the nature of the investigation.

There is no reason to believe that Congress intended for section 1681a(y) to apply to an analysis like NERA's, overseen by counsel, of computer data. That is particularly true when the analysis is not directed to the conduct of any individual employee, but is analyzing the conduct of larger groups of employees over many years.

Given the language and history of FCRA, Allstate reasonably concluded that it only needed to divulge the conclusion of its investigation when it terminated Plaintiffs. It had no obligation to detail NERA's analysis, because that was not the type of communication FCRA contemplates. And even if this Court were to conclude otherwise, the language, history, and guidance is not so clear that Allstate's interpretation of what it was required to provide Plaintiffs was objectively unreasonable.

Plaintiffs argued that they should have received Steptoe's written reports to Allstate or Allstate's letter to the DOL, but those documents did not exist at the time of Plaintiffs' termination. *E.g.*, R.T.855:16-857:4, 1408:9-15; Appx.74-92. Nothing in FCRA suggests an employer has a continuing obligation to furnish post-termination materials to a terminated employee.

Because Allstate did not violate FCRA, let alone do so willfully, this Court should direct the District Court to enter judgment in Allstate's favor on those claims.

### B. Plaintiffs' Lack Standing Under FCRA

Plaintiffs' FCRA claims also fail because they suffered no injury in fact from Allstate's alleged failure to provide a "summary." Under *Spokeo*, the bare fact of a statutory violation does not give a plaintiff standing under Article III. The plaintiff must still plead and prove an injury-in-fact. 136 S. Ct. at 1548. Plaintiffs failed to do so.

In *Spokeo*, the Supreme Court ruled that an allegation that the plaintiff's rights under FCRA were violated did not, by itself, give the plaintiff standing. 136 S. Ct. at 1548-49. To have standing, "plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 560 (1992)). That showing must be made even when the plaintiff alleges the

defendant violated his or her statutory rights. *Id.* A plaintiff may not "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.*

This Court's recent decision in *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909 (7th Cir. 2017), followed *Spokeo*, holding that a plaintiff lacked standing despite alleging that the defendant cable company had violated a statute requiring that it destroy personally identifiable information about him. *Id.* at 910-12. The plaintiff lacked standing because he failed to allege how the retention of his information caused him any harm. *Id.* That the retention of information created a risk of his information being given away or leaked did not create an actual, concrete injury. *Id.*

By the same logic, Plaintiffs have failed to show any concrete injury from the alleged failure to provide a summary. At trial, they argued that if they were given a summary, they would have said, "I didn't do anything wrong." R.T.45:19-24. But the undisputed evidence establishes that Allstate knew of Plaintiffs' explanations based on their interviews with Steptoe, and had still decided to terminate Plaintiffs without severance. R.T.142:25-143:10, 200:13-201:24, 282:19-284:10, 466:7-468:14, 504:14-16, 601:18-603:8; D.E.1 at ¶ 209.

Plaintiffs could claim that the failure to provide an adequate summary caused an "informational injury"; however, they learned the substance of the

information that they claim should have been provided, so no concrete injury resulted. *See, e.g.*, *Vera v. Mondelez Global LLC*, No. 16-C-8192, 2017 WL 1036509, at *2 (N.D. Ill. Mar 17, 2017) ("when the disclosure is made in the incorrect form, yet no pecuniary, bodily, reputational, or other harm results, it is hard to see why such a circumstance should be legally actionable").

Accordingly, because Plaintiffs suffered no concrete injury from the alleged failure to furnish a "summary," their FCRA claims should be dismissed for lack of standing.

## III. The Attorneys' Fees Award Should Be Reversed.

Plaintiffs conceded below that they could recover attorneys' fees only for work incurred in connection with the FCRA claims. Appx.37. If this Court reverses the judgment on those claims, the attorneys' fees award must be reversed. But even if the FCRA award is affirmed, this Court should reverse the fees award.

When a party pursues multiple claims, only some of which are subject to fee-shifting, a court may award fees only for the fee-shifting claims. *See, e.g.*, *Silva v. Karlsen*, 43 F. App'x 486, 488 (3d Cir. 2002) (district court properly excluded fees for "successful claims on issues for which fees are generally not awarded (i.e., civil conspiracy and defamation)").

A district court may also award fees for time expended on other claims if they are "related." *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 434-35,

440 (1983) (where plaintiff otherwise could recover fees only for time expended on successful claim, holding fees also may be awarded for related claims). Fees, however, cannot be recovered for claims "for different relief, based on different facts and legal theories." *Smith v. Robinson*, 468 U.S. 992, 1015 (1984), *superseded by statute on other grounds as stated in Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017); *Entm't Research Grp. v. Genesis Creative Grp.*, 122 F.3d 1211, 1230 (9th Cir. 1997) (holding that fees are not available where the claims "involved completely different legal theories and questions").

The District Court reasoned that the full amount of Plaintiffs' requested fees should be awarded, because "[t]he central issue in the case - the investigation of possible employee misconduct - related to all of the claims." Appx.37. That was a misstatement of law.

The sole, narrow question under FCRA was whether Plaintiffs received an adequate "summary." Section II(A), above. Proving their claims did not require extensive discovery or a detailed exploration of Allstate's investigation. It merely required establishing what Plaintiffs were told (or given) at their December 2009 termination, and what, if anything, they understood about the underlying investigation from their previous meetings with Steptoe. That required little more than Allstate's and Plaintiffs' depositions on this point, particularly when Plaintiffs' Complaint contained

detailed judicial admissions about their meetings with the Steptoe attorneys. D.E.1 at ¶¶ 108-118, 139-155. Indeed, Plaintiff's entire FCRA-related argument in closing consisted of one paragraph that asserted that Allstate's "bullet point" at the December meeting "didn't satisfy" FCRA. R.T.1596:9-14.

By contrast, the issues surrounding the defamation claims had literally nothing to do with whether the summary given to Plaintiffs at their termination was sufficient. As detailed above, those issues focus on whether the statements caused special damages, whether the statements identified Plaintiffs, and whether the statements were true or privileged. None of these issues is even close to relevant to whether Plaintiffs were given a sufficient summary at their termination.

Nonetheless, the District Court awarded substantial time to Plaintiffs' attorneys dealing with these defamation issues. For example, Plaintiffs sought and were awarded fees for nearly 17 hours incurred on a motion to bar the testimony of Jordan Milev, who headed NERA's investigation and testified about how it analyzed trades. D.E.358 at 31-32, 47. Milev's testimony had no bearing on whether Plaintiffs received a summary when they were terminated.

Similarly, Plaintiffs were awarded fees for hundreds of hours preparing for, attending, and summarizing depositions of witnesses who had no possible knowledge of the facts relevant to the FCRA claims. *See*, *e.g.,* D.E.358 at 32-

45. They also requested 50% of all fees incurred for trial, i.e., 60 hours (50% of 120 hours) of time that counsel billed for attending the trial.[4] *Id.* at 46-50. Plaintiffs' counsel spent nowhere close to 60 hours on the FCRA claims at trial.

The District Court's erroneous conclusion – that Plaintiffs could recover for time expended on the defamation claims because both those and the FCRA claims involved the "investigation of employee misconduct" – resulted in Plaintiffs being awarded tens, if not hundreds of thousands of dollars in attorneys' fees for claims that resulted in an award of $16,000. Awarding $357,716.25 in fees (out of total fees of $791,137.50) on such a minor part of the case, when the overwhelming amount of time was expended on the defamation claims – which were not subject to fee-shifting – was an abuse of discretion.

[4] They sought equally substantial fees for trial preparation. D.E. 358 at 45-50.

## CONCLUSION

Accordingly, the judgment should be reversed with directions to enter judgment for Allstate.

Respectfully submitted,

Dated: May 30, 2017

**AKIN GUMP STRAUSS HAUER & FELD LLP**

**SEYFARTH SHAW LLP**

**COZEN & O'CONNOR**

By s/ *Rex S. Heinke.*
Rex S. Heinke

**Attorneys For Defendant and Appellant Allstate Insurance Company**

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Seventh Circuit Rule 32(c). The brief contains 13,998 words (as calculated by the word processing system used to prepare this brief), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the type face requirements of Seventh Circuit Rule 32(b) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) and Circuit Rule 32. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook style font, with the text in 12-point size and the footnotes in 11-point size.

Dated: May 30, 2017

s/ *Rex S. Heinke*
Rex S. Heinke

## CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users.

Dated: May 30, 2017

s/ *Rex S. Heinke*
Rex S. Heinke

# REQUIRED SHORT APPENDIX

## CIRCUIT RULE 30(d) STATEMENT

All materials required by Circuit Rule 30(a) and (b) are included in the appendix.

## REQUIRED SHORT APPENDIX TABLE OF CONTENTS

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS**

| | | |
|---|---|---|
| Daniel Rivera, et al.<br>Plaintiffs | ) | Case No: 10 C 1733 |
| v. | ) | Judge William T. Hart |
| Allstate Insurance Company<br>Defendant | ) | |

**ORDER**

Jury verdict entered against defendant Allstate Insurance Company and in favor of plaintiffs Daniel Rivera in the amounts of $7,156,972 for Defamation Damages, $1,000 for FCRA Damages and $4,000,000 in Punitive Damages, Stephen Kensinger in the amounts of $2,913,531 for Defamation Damages, $1,000 for FCRA Damages and $2,000,000 in Punitive Damages, Deborah Joy Meacock in the amounts of $3,602,317 for Defamation Damages, $1,000 for FCRA Damages and $3,000,000 in Punitive Damages, Rebecca Scheuneman in the amounts of $3,438,028 for Defamation Damages,$1,000 for FCRA Damages and $1,000,000 in Punitive Damages. Judgment is entered on the jury verdict.

Date: 6/21/2016 /s/ Judge William T. Hart

ILND 450 (Rev. 10/13) Judgment in a Civil Action

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE**
**NORTHERN DISTRICT OF ILLINOIS**

| | | |
|---|---|---|
| **Daniel Rivera, et al.** | ) | |
| Plaintiff(s) | ) | Case No. 10 C 1733 |
| | ) | |
| v. | ) | |
| | ) | |
| **Allstate Insurance Company** | ) | |
| Defendant(s) | ) | |

# JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☒ in favor of plaintiff(s) Daniel Rivera, Stephen Kensinger, Deborah Joy Meacock and Rebecca Scheuneman
and against defendant(s) Allstate Insurance Company
in the amounts of $7,156,972 for Defamation Damages, $1,000 for FCRA Damages and $4,000,000 in Punitive Damages to plaintiff Rivera, in the amounts of $2,913,531 for Defamation Damages, $1,000 for FCRA Damages and $2,000,000 in Punitive Damages to plaintiff Kensinger, in the amounts of $3,602,317 for Defamation Damages, $1,000 for FCRA Damages and $3,000,000 in Punitive Damages to plaintiff Meacock, and in the amounts of $3,438,028 for Defamation Damages, $1,000 for FCRA Damages and $1,000,000 in Punitive Damages to plaintiff Scheuneman.

to e

which ☐ includes pre–judgment interest.
☒ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

---

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

---

☐ other:

---

This action was *(check one)*:

☒ tried by a jury with Judge William T. Hart presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☐ decided by Judge on a motions for

Date: 6/21/2016

Thomas G. Bruton, Clerk of Court

/s/ Carol Wing,, Deputy Clerk

**UNITED STATES DISTRICT COURT**
**FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1**
**Eastern Division**

Daniel Rivera, et al.
Plaintiff,

v. Case No.: 1:10−cv−01733
Honorable William T. Hart

Allstate Insurance Company, et al.
Defendant.

## NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, January 20, 2017:

MINUTE entry before the Honorable William T. Hart: Defendant's motions for judgment as a matter of law [296, 310], for a new trial [313], and for remittitur [316] are denied. Plaintiffs' motions for FCRA punitive damages [320] and costs and attorney fees [322] are granted. The Clerk of the Court is directed to enter a supplemental judgement in favor of plaintiffs Daniel Rivera, Stephen Kensinger, Deborah Joy Meacock, and Rebecca Scheuneman in the amount of $3,000 each against defendant Allstate Insurance Company as punitive damages imposed as a result of wilful violations the Fair Credit Reporting Act. By January 30, 2017, plaintiffs shall submit their bill of costs. Consolidated answer to fee and cost petitions is to be filed by February 13, 2017. Reply is due February 21, 2017. (For further details see Opinion and Order)Mailed notice(clw, )

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| DANIEL RIVERA, STEPHEN KENSINGER, DEBORAH JOY MEACOCK, and REBECCA SCHEUNEMAN, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. 10 C 1733 |
| ALLSTATE INSURANCE COMPANY, | ) | |
| Defendant. | ) | |

# OPINION AND ORDER

Before the court are post-trial motions after the return of jury verdicts totaling $27,114,848 in favor of four plaintiffs based on claims of defamation and violations of the Fair Credit Reporting Act ("FCA"),15 U.S.C. § 1681a(y)(2). Jurisdiction of the court is based on the FCA. The defamation claims are governed by Illinois law.

Plaintiffs Daniel Rivera, Stephen Kensinger, Deborah Meacock, and Rebecca Scheuneman, formerly employed by defendant Allstate Insurance Company ("Allstate") as professional security analysts, each claim that Allstate

made false statements in a 10-K public report to the Securities and Exchange Commission and in a memorandum issued to its employees. Each plaintiff also claims that Allstate violated the FCA by failing to provide a summary of the communication on which it based its decision to terminate each of them for violation of its code of ethics.

A tortuous interference claim was previously dismissed. *See* ***Rivera v. Allstate Ins. Co.***, 2010 WL 4024873 (N.D. Ill. Oct. 13, 2010) (Grady, J.). Plaintiffs voluntarily dismissed claims against defendant Judy Greffin and dismissed an age discrimination claim against Allstate. Defendant's subsequent motion for summary judgment was denied. ***Rivera v. Allstate Ins. Co.***, 140 F. Supp. 3d 722 (N.D. Ill. 2015) (Feinerman, J.).

The jury was instructed[1] with respect to the defamation claims that each plaintiff was required to prove that any published statement identified and pertained to such plaintiff. In recognition of Allstate's qualified privilege of publication, the jury was instructed that malice--defined as with knowledge that the statement was false or in reckless disregard of whether it was false--must be

[1]The jury instructions are Entry 303 on the docket.

proven by clear and convincing evidence. Because the case was submitted as *per quod* claims, plaintiffs were required to prove actual damages.

Also, the jury was instructed that to prove a violation of the FCA, each plaintiff was required to prove that, at the time of termination, Allstate, "having received a communication in connection with an investigation of suspected misconduct relating to employment," "failed to disclose the nature and substance of the communication" when each plaintiff was fired. The jury was told that to award statutory damages, the failure must be found to be willful.

The motions before the court are Allstate's motions for judgment as a matter of law, or for a new trial and for a remittitur. Plaintiffs' motions, pursuant to the FCRA, are for punitive damages and for attorney fees.

**The Evidence**

Allstate is engaged in the property, casualty, life insurance, retirement and investment products business. It is the second largest company in the United States engaging in such business, having assets in excess of $132 billion. Plaintiffs are professional security analysts who were employed as buy-side portfolio managers in the equity division of the Allstate investment department. During the relevant time period, the equity division was managing and investing

approximately $10 billion in capital-growth and capital-value portfolios, including two pension security portfolios.

Each of the plaintiffs has attained a C.F.A. designation, Chartered Financial Analyst or Charterholder. All of the plaintiffs have undergraduate degrees and each, other than Deborah Meacock, has an M.B.A. degree. Stephen Kensington is also a C.P.A. and a Certified Market Technician. According to the C.F.A. Society, which gathers such information, plaintiffs were compensated in the top quadrille of professional security analysts.

Daniel Rivera joined Allstate in 2004. At the time of his termination, he was managing director of the 19-employee equity division and reported to Judy Greffin, Allstate's chief investment officer. Rebecca Scheuneman joined Allstate in 1999. She became an equity portfolio manager and was assigned to the growth team. Deborah Meacock joined Allstate in 2006. At the time of her termination, she was a senior equity portfolio manager on the growth team. Stephen Kensinger joined Allstate in 2007. At the time of his termination, he was an equity portfolio manager on the growth team.

Plaintiffs were paid an annual salary and eligible to earn additional bonus compensation under Allstate’s "pay-for-performance" plan. Rivera and

Scheuneman earned a bonus in 2005, 2006, and 2007; Meacock in 2006 and 2007; and Kensinger in 2007. The plan included a cap. In certain years the bonuses also included a subjective amount, at the discretion of senior management. All pay-for-performance compensation was suspended in 2008. Bonuses were discretionary in that year. Starting in 2009, Allstate changed its pay-for-performance measure from a relative return to an absolute return on portfolio values.

In June 2009, Allstate's chief risk and investment compliance officer received an anonymous report that equity division employees might be timing trades to inflate their bonuses. Suspicions focused on an algorithm called the "Dietz method," which had been used by Allstate since the mid-1990s to estimate daily portfolio returns. Owners of security portfolios that have multiple daily cash flows use this formula because it is impractical to use a true time-weighted return to recalculate a portfolio's value when there is a high volume of cash flows.[2] The formula was also used to calculate security analysts' bonuses.

Implementing the Dietz formula requires the selection of a factor, which establishes an assumption regarding the point during the day when cash flows

[2]Peter O. Dietz created this formula in 1966, as explained in his book on performance measurement, *Pension Funds, Measuring Investment Performance.*

occur or peak. The Dietz factor used by Allstate assumed that the portfolio's net cash flow occurred at mid-day, to provide a rough average of cash flows occurring throughout the day. The Dietz formula used by Allstate was as follows:

**Return = (EMV - BMV) - (P - S) / BMV + DF(P - S)**.

EMV is the market value of the portfolio at the end of the day; BMV is the market value of the portfolio at the beginning of the day; P is purchases; S is sales; and , DF is the Dietz factor. In Allstate's formula, the Dietz factor was .5, which produces a mid-day return value. A Dietz factor of .0, for example, will measure return at the end of the day.

It was speculated that, when the mid-day Dietz formula is used, analysts had the ability to do better than the daily measurement by waiting to know whether the market will end up or down. Delaying trading is a market technique used by all professional security analysts, and it is not alone improper conduct. If the market is going down, they may execute buy transactions and if the market is going up, they may execute sell transactions which may be more favorable than the daily calculation. While it is reasonably assumed that all portfolio managers seek to sell on an up day and buy on a down day, if that timing calculation does not take into account the adverse effects in the market of waiting through several

down days to sell or several up days to buy in order to obtain a performance bump, the portfolio could be disadvantaged. However, when it was adopted Allstate considered that the way the bonus system worked, realized gains or losses on a particular day would offset over time.

When the report of possible improper timing of trades occurred, Allstate became concerned that its public reports to the Securities and Exchange Commission could be inaccurate and that its fiduciary obligations to the pension funds governed by the Employee Retirement Income Security Act, under the oversight of the Department of Labor ("DOL"), could have been violated. Allstate hired the law firm of Steptoe & Johnson LLP to conduct an investigation of trading practices. The law firm hired NERA Economic Consulting ("NERA"), an economic consulting firm to aid in the investigation. An attorney for Allstate testified that the results of the investigation were not submitted to Allstate in writing but reported only orally. However, after meeting with DOL attorneys in December 2009, Steptoe & Johnson submitted a letter and memorandum to the DOL providing details of the investigation.[3]

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[3]The letter was ordered produced during discovery over the objection of Allstate.

It was reported to the DOL that none of the anecdotal information provided the parameters of potential disadvantage to the pension plans. A search was made through almost two million e-mails from or to 26 individuals working in Allstate's equity investment management and trading group for the period from May 2003 to May 2009. Only a half dozen e-mails were uncovered which seemed problematic. NERA then analyzed 1,511 trading days during this period which consisted of over 110,000 trades for the pension plans. The report states that there was no evidence that e-mails captured all trading instructions.

NERA used the e-mails to identify 24 instances of delayed trading for one pension plan and 25 instances of delayed trading for the other plan. NERA calculated that the plans' disadvantage from these e-mails indicated delays costing as much as $8.2 million. However, some delays produced gains to the plans of about $6.8 million, resulting in an estimate of a possible net disadvantage of approximately $1.4 million. In addition, for four of the e-mails, tracking the data showed that the trades were made on the same day as the e-mail, which eliminated the trade from the problematic trade group.

The equities group personnel and their supervisors were interviewed by Steptoe & Johnson lawyers. No interviews were reduced to writing. The equities

group understood how the Dietz factor affected its bonuses. No one suggested that the Dietz effect was the only reason or even the primary reason for the timing of a trade. It was, apparently, only one of a few factors used to determine when to execute a trade. Information from the interviews was reported to Allstate's inside counsel orally.

Allstate wanted to be sure that other violations of the law did not occur, such as cross trading, or principal trading. NERA searched for trades where a security with the same identifier would have been bought and sold in the same amount in the same day. No such trades were discovered. Tests were run to determine if the equities group was engaging in any "round trip" transactions--selling a security, only to buy it back, in order to obtain a performance "bump," or buying a security and then selling it out promptly. No such trades were uncovered.

NERA created an algorithm, an analysis assuming that any sale executed on a market up day (if it was preceded by a down day) and all purchases occurring on a market down day (if preceded by an up day) could have been improperly delayed trades. Looking back to the next preceding day it was assumed that if the instruction had been received on that day, the trade would have been executed on

that day. Based on these assumptions, a calculation was made to determine what a purchase would have cost the plan had it been executed on the first down day after the next preceding up day. If the amount was greater than the actual trade results, it was assumed that the difference should be reimbursed. (The converse analysis was made for sales.)

Using the stated assumptions, it was reported that the disadvantage to one plan was $61.5 million and for the other about $17 million. Adding DOL underpayment rates brought the total possible reimbursement to approximately $91 million for the two plans. However, this calculation ignored all delayed trades that produced gains to the portfolios which would have reduced the $91 million figure to at least $53 million.

The conclusion of the report states:

> We believe that this amount, which assumes that nearly every trade was inappropriately delayed, overstates any actual economic disadvantage suffered by the plans for several reasons. It is unlikely, based on the interviews, that small trades were delayed. Nonetheless, no de minimis exclusion was used. The figures do not exclude the trades made prior to midday, even though the Dietz motivation would have assumed late afternoon trading. No time related exclusion was used. In addition, during the past several years of equity market volatility, a very large amount of trading throughout the markets occurred near the end of the day and it is not unreasonable to assume that the Allstate traders were acting in

> a similar manner, regardless of any Dietz factor motivation. And, as noted above, there was no netting of "gain days" against "loss days." That netting would have reduced the $91 million to about $53 million. Finally, as discussed earlier, the economic disadvantage calculation was not limited to those trades for which we had clear e-mail indication of Dietz motivation. If we limited the reimbursement to the trades for which we had e-mails showing such motivations the reimbursement would have been $8.2 million and with netting, $1.4 million.
>
> We want to emphasize that the effect of this trading on the total bonuses paid to this group was minimal over the six-year period. Allstate, taking account returns recalculated by NERA, estimated the impact of this trading to the 25 employees who were in the equity group for some or all of 2003 through 2008 as an increase in the aggregate bonuses for the entire group of 25 employees over those years of approximately $1.2 million.

On October 14, 2010, the Vice President, Secretary, and Deputy General Counsel of Allstate wrote, in response to an inquiry from DOL, as follows:

> [T]he NERA algorithm was a way for counsel and Allstate to estimate a possible maximum impact of any potential "Dietz" motivated equity trading. No one believed, then or now, that this was an accurate description of the activity on the equity desk, nor that any actual impact on portfolios was anywhere near the result produced by using the NERA algorithm. Just as we wanted to see a possible maximum portfolio impact, we wanted to estimate the corresponding impact on bonuses. If one looked only at the

> actual e-mails that arguably could demonstrate bad motivation, there would have been virtually no effect on bonuses

The letter also states, in part:

> Bonuses for the year 2008 were discretionary, and not a result of a formulaic calculation based on equity returns.
>
> * * *
>
> Again, as noted above, the NERA algorithm is not reality; we have no proof that the returns resulting from the algorithm would ever have been realized. Thus, while we asked NERA to rerun the bonus calculations as if the algorithm actually reflected trading activity, the revised bonus calculations are speculative and may be vastly overstated as is the case with the calculation of potential portfolio impact.

Plaintiffs testified at trial of their intent to sell securities when the market was up and to buy securities when the market was down. They denied that their transactions were motivated by an intent to obtain a bonus bump. They did not deny that they were aware of whether or not the Dietz effect was favorable to their bonuses. Plaintiffs stated that their ability to time trades was limited. With the exception of Rivera, plaintiffs did not control the trading desk. Plaintiffs could select securities for purchase and sale, but the trading desk specialists decided the time for the trades. Rivera had the authority to decide when to go into or out of

the market, but he denied he used the authority, leaving that judgment to the trading specialists.

There is no evidence in the record that contradicts plaintiffs testimony. No specific transaction has been traced to any plaintiff to show that a trade was timed or delayed which benefitted a bonus but caused a loss to a portfolio.

On October 6, 2009, Greffin called a meeting of the equity division to announce that Allstate had decided to close the division and outsource the management of the equity portfolios, other than the convertible portfolios managed by two employees, to Goldman Sachs. Seventeen employees, including plaintiffs, were told that they were redundant. The employees were told that severance payments would be made; they could remain in the Allstate office until the end of 2009; and Allstate would provide assistance to them in obtaining new employment.

Immediately after the termination announcement, plaintiffs hired an executive recruiter and also turned to the sell-side brokers, who had been calling on Allstate buy-side brokers, for information about security analyst opportunities. There is evidence that the members of the C.F.A. community of top professional security analysts are acquainted and that the group is not large. Also, there is a

C.F.A. Society information network available to prospective employers. Among other annual questions asked of each C.F.A. member is if the member has been accused of any ethics violation and, if so, how it was resolved.

On December 3, 2009, while plaintiffs were in their offices at Allstate, each was called to an individual meeting with the human resources director Winchell and immediately terminated for cause, without severance benefits, for violation of Allstate's ethics code. No details of any specific violation was provided. Plaintiffs were immediately escorted from the premises and told that would not be allowed to return to the premises without a company escort. Plaintiffs' removals from the premises were immediately obvious and known to the employees of the staff of over 300 in the investment division as well as by sell-side brokers calling on Allstate. Plaintiffs' phones and communication systems were stopped.

On February 25, 2010, Allstate filed its 2009 annual report on Form 10-K with the Securities and Exchange Commission. Under the topic Pension Plans, it was reported, in part, as follows:

**PENSION PLANS**

> In 2009, we became aware of allegations that some employees responsible for trading equity securities in certain

portfolios of two AIC [Allstate Insurance Company] defined benefit pension plans and certain portfolios of AIC and an AIC subsidiary may have timed the execution of certain trades in order to enhance their individual performance under incentive compensation plans, without regard to whether such timing adversely impacted the actual investment performance of the portfolios.

We retained outside counsel, who in turn engaged an independent economic consulting firm to conduct a review and assist us in understanding the facts surrounding, and the potential implications of, the alleged timing of these trades for the period from June 2003 to May 2009 The consulting firm reported that it was unable to determine from our records the precise amounts by which portfolio performance might have been adversely impacted during that period. Accordingly, the economic consultant applied economic modeling techniques and assumptions reasonably designed to estimate the potential adverse impact on the pension plans and the company accounts, taking account among other things, the distinctions between the pension plans and the company portfolios.

Based on their work, the economic consultants estimated that the performance of the pension plans' portfolios could have been adversely impacted by approximately $91 million (including interest) and that the performance of the company portfolios could have been adversely impacted aby approximately $116 million (including interest) in the aggregate over the six-year period under review. We believe that our financial statements and those of the pension plans properly reflected the portfolios' actual investment performance results during the entire period that was reviewed.

In December 2009, based on the economic consultant's modeled estimates, we paid an aggregate of $91 million into

> the two defined benefit pension plans. These payments had no material impact on our reported earnings or shareholders' equity, but reduced our assets, operating cash flows, and unfunded pension liability to the plans. At December 31, 2009, our total assets, operating cash flows and shareholders' equity were $132.65 billion, $4.30 billion and $16.69 billion, respectively. At all times during this period, the plans were adequately funded pursuant to applicable regulatory and actuarial requirements. As a result of these additional funds in the plans, our future contributions to the plans, based on actuarial analysis, may be reduced. Using the economic consultant's calculation of adverse impact on the portfolios, we currently estimate that the additional compensation paid to all the employees working in the affected group was approximately $1.2 million over the six-year period as a result of these activities. In late 2009 we retained an independent investment firm to conduct portfolio management and trading activity for the specific portfolios impacted by these activities. We have reported this matter to the U.S. Department of Labor and the U.S. Securities and Exchange Commission and have advised both agencies that we will respond to any questions they might have.

The same day that Allstate filed its 10-K, Greffin sent a memorandum to the investment department, consisting of over 300 employees, stating:

> Allstate released its annual financial report on Form 10-K today. Within that filing, we disclosed details around allegations regarding trading practices within our equity portfolios that came to light in the past year. We took this matter very seriously and launched an investigation as soon as we became aware of the allegations.
>
> Outside counsel was retained to assist us in understanding the facts surrounding, and the potential

> implications of, these activities. As part of their analysis, an independent economic consulting firm was retained to estimate the potential adverse impact to the performance of our portfolios. The consultants determined that the performance on some of our portfolios, as well as our two pension plan portfolios could have been adversely impacted by the activities. As a result, Allstate made a contribution to the pension plans during the 4th quarter which is disclosed in the 10-K.
>
> We believe that our financial statements and those of the pension plans properly reflected the portfolios' actual investment performance and the pension plans were adequately funded during the entire period. This matter did not affect the plans' ability to continue to provide benefits to plan participants.
>
> Situations like this can be unsettling and can reflect poorly on our organization. However, I believe organizations are also defined by how they respond to events like this. We were transparent in reporting this matter to the U. S. Department of Labor and the S.E.C., and disclosed to our investors. We're taking steps to improve our governance practices and training.
>
> We remain committed to the highest levels of ethics and integrity in the stewardship of Allstate's assets.

10-K reports are read by the financial community as well as by professional security analysts. After the issuance of the February 10-K report, the recruiter that plaintiffs hired stopped looking for new positions for them. Since then, none of the plaintiffs have been able to find positions comparable to their

positions at Allstate. Meacock and Rivera began looking for lower-paying work outside the United States. Scheuneman and Kensinger could not do that. Scheuneman took a much lower paying unrelated position and Kensinger is still unemployed as a security analyst.

**Motion for Judgment as a Matter of Law**

Judgment as a matter of law in favor of a defendant is appropriate only when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). The court must construe the evidence strictly in favor of the party who prevailed before the jury and examine the evidence only to determine whether the jury's verdict could reasonably be based upon the evidence. ***Passananti v. Cook County***, 689 F.3d 655, 659 (7th Cir. 2012). The court does not make credibility determinations and must disregard evidence favorable to the moving party that the jury was not required to believe.

Allstate argues that plaintiffs have not proven that any statement identified the plaintiffs; denies that any statement was false and defamatory; states that there was no clear and convincing evidence that Allstate acted with malice so

as to overcome the defense of qualified privilege; and states that plaintiffs have not proved damages.

Defamation can occur even if the name of the person defamed is not mentioned if it is clear that the persons to whom the statement is published would reasonably understand that the statement identified the plaintiff. ***Bryson v. News Am. Publ'ns, Inc.***, 672 N.E.2d 1207, 1218 (Ill. 1996). *See also* Jury Instr. at 19.

The jury had before it abundant evidence that the 10-K and the Greffin memorandum referred to the plaintiffs. The open termination of plaintiffs from the equity division was followed by the reference in the 10-K to "employees responsible for trading equity positions in certain portfolios of two AIC defined benefit pension plans and certain portfolios of AIC and an AIC subsidiary." The 10-K described the transfer of portfolios to an "independent investment firm to conduct portfolio management and trading activity for the specific portfolios impacted by these activities." The Greffin memorandum to the investment department calls attention to the 10-K and repeats the information. This conduct and the publications provided substantial support for the jury to find that the 10-K and the Greffin memorandum identified and referred to the plaintiffs.

To overcome the defense of qualified privilege to publish the 10-K, plaintiffs were required to prove that the statement was made with knowledge of its falsity or in reckless disregard of whether it was false or true. ***Mittelman v. Witous***, 552 N.E.2d 973, 981 (Ill. 1989) (adopting **Restatement (Second) of Torts** § 600, cmts. a, b (1977)). *See also* Jury Instr. at 22. Reckless disregard is defined as proceeding to publish defamatory matter despite having an awareness of probable falsity, or serious doubts as to the truth of the publication. ***Id.*** (quoting ***Harte-Hanks Commc'ns, Inc. v. Connaughton***, 491 U. S. 657, 667 (1989)).

The 10-K asserts that responsible employees "may have timed the execution of certain trades to enhance their individual performance under incentive compensation plans without regard to whether such timing adversely impacted the actual investment performance of the portfolios." It is stated that losses to the pension plans were estimated to be as much as $91million. The performance of the company portfolio "could have been adversely impacted by approximately $116 million." Additional bonus compensation from timed trades was estimated to be approximately $1.2 million over a six year period. It is further stated in the 10-K that an investigation was undertaken, the portfolios were

transferred to an investment firm, and the SEC and DOL were informed of serious misconduct.

The 10-K recited a serious charge of timed trading resulting in substantial losses and unearned bonuses. However, based on the evidence, the jury could find the loss statements to be false, unproven as to the plaintiffs and, because of their nature, seriously defamatory as to plaintiffs.

The plaintiffs testified that they did not time trades to enhance their bonuses. No specific documentary or testimonial evidence was offered to dispute their testimony as to any trade. The $91 million loss to the funds was admittedly incorrect if not unfounded. It was not adjusted for, among other things, instances in which the funds benefitted by delayed trades. Such adjustment, or the acknowledgment of the propriety of such adjustment, would have significantly reduced the alleged estimate of loss to the funds and would have eliminated the $1.2 million bonus overcompensation estimate.

Counsel for Allstate told the DOL that "[i]f one looked only at the actual e-mails that arguably could demonstrate bad motivation, there would have been virtually no effect on bonuses." The jury could well find that there was knowledge of the falsity of the 10-K.

There is clear and convincing evidence that the statements in the 10-K were false and made in reckless disregard of their defamatory affect on the reputations of the plaintiffs.

That plaintiffs were unable to obtain comparable re-employment was shown by the evidence. There was ample evidence of damage to plaintiffs' reputation which provided proof of damages.

Allstate's motion for judgment as a matter of law must be denied.

**The Motion for a New Trial**

Allstate seeks a new trial pursuant to Fed. R. Civ. P. 59, claiming that plaintiffs improperly introduced evidence and arguments surrounding the unfairness of their terminations; that the court erred in refusing to instruct the jury concerning plaintiffs' failure to make timely production of job search documents; and testimony concerning the conduct of a job search recruiter should have been excluded.

Allstate's argument that the evidence relating to terminations of plaintiffs was not proper proof overlooks that the proof was appropriate to show that readers of the 10-K would know of the circumstances surrounding their firing when reading the 10-K, and know that the 10-K referred to them. Moreover, the

related FCRA claims in this case had to do with circumstances of plaintiffs' terminations. An abrupt termination was a factor to be considered when deciding whether there has been a willful failure to provide a summary of the investigation on which the action was taken at the time of the termination.

Plaintiffs failed to make a timely production of job search documents. As a consequence, it was ruled that neither plaintiffs nor their expert could rely on the material. Defendant claims that their untimely production prevented an investigation of the validity of the material. The delay of production did not impact the trial or have any impact on any of the proof.

Plaintiff Meacock testified that executive recruiter Cathy Graham stopped looking for positions for the plaintiffs after the 10-K was issued. Meacock was not allowed to testify to any conversations with Graham, who was on the plaintiffs' witness list. Ultimately, plaintiffs were unable to call Graham. Meacock's statement that Graham stopped looking for employment for plaintiffs was allowed to stand as non-verbal conduct not considered to be hearsay within the meaning of Fed. R. Evid. 801.

Allstate's motion for a new trial will be denied.

**Remittitur**

Allstate argues that the compensatory and punitive damages awarded are excessive and must be reduced. Both sides introduced damages evidence. The court's analysis is guided by three factors: whether the award is monstrously excessive; whether there is no rational connection between the award and the evidence; and whether the award is roughly comparable to awards in similar cases. The court must review the record in the light most favorable to the verdict. ***G. G. v. Grindle***, 665 F.3d 795, 798 (7th Cir. 2011); ***Farfaras v. Citizens Bank & Trust***, 433 F.3d 558, 566-67 (7th Cir. 2006); ***Adams v. City of Chicago***, 798 F.3d 539, 543 (7th Cir. 2015).

The jury verdict entered against Allstate was as follows: Daniel Rivera $7,156,972 defamation damages, $4,000,000 punitive damages, and $1,000 FCRA damages; Deborah Meacock $3,602,317 defamation damages, $3,000,000 punitive damages, and $1,000 FCRA damages; Stephen Kensinger $2,913,531 defamation damages, $2,000,000 punitive damages, and $1,000 FCRA damages; and Rebecca Scheuneman $3,438,028 defamation damages, $1,000,000 punitive damages, and $1,000 FCRA damages.

Both sides in this case introduced expert damages evidence which included the experts' reports as joint exhibits. The jury awarded approximately $17.1 million in compensatory damages to the four plaintiffs. Plaintiffs' expert computed damages of approximately $21 million. Allstate's expert found that, if liability existed, damages would be in the range of $11.1 million.

The jury was not without guidance from the parties, and it did not deviate from the range of damages found by the experts. Also, there has been no showing by Allstate that the awards exceed damages in similar cases. Accordingly, there is no basis to set aside the compensatory damage verdicts.

With respect to punitive damages, the jury was instructed, in part, that it may assess punitive damages if it found that the "defendant was malicious or in reckless disregard of a particular plaintiff's rights." Jury Instr. at 33. On this record, the jury could make such a finding. The amount of punitive damages awarded, $10 million, approximately 60% of the compensatory damages, was not out of proportion with appropriate standards for the award of such damages. ***BMW of N. Am., Inc. v. Gore***, 517 U.S. 559, 574-85 (1996); ***State Farm Mut. Auto Ins. Co. v. Campbell***, 538 U.S. 408, 417 (2003).

Allstate's motion for a remittitur of compensatory and punitive damages will be denied.

**FCRA Punitive Damages and Attorney Fees**

Plaintiffs have moved for a determination by the court of punitive damages under 15 U.S.C. § 1681n(a)(2), which provides for punitive damages for willful noncompliance with the FCRA.

The jury made a separate determination that Allstate's violations of the FCRA were willful. Allstate opposed the submission to the jury of the issue of the amount of punitive damages. The language of the statue -- "such amount of punitive damages as the court may allow" -- is open to the interpretation that the issue is for the court and not for the jury. The issue was reserved and is now before the court.

Allstate argues that it complied with § 1681a(y)(2) which requires, after taking any adverse action based on "a communication made to an employer in connection with an investigation of suspected misconduct," the employer shall disclose "the nature and substance of the communication." Alternatively, it contends that the statute is unclear as to what is required and, because it has not been construed, Allstate should not be liable.

Brett Winchell, the director of human resources for the investment division of Allstate, notified each plaintiff of termination. He was not involved in the trading investigation and did not speak to the lawyers or consultants who made oral reports to Allstate counsel.

Winchell testified that his conversations with plaintiffs were based on a script which included five bullet points. The first was to remind them that there had been an investigation of the pay-for- performance plan; second, that they had been interviewed once or several times by attorneys; third, the decision had been made to terminate the employee for cause immediately, without severance benefits, for violation of the conflict-of-interest policy of the Allstate Code of Ethics; fourth, that the decision was probably not what the employee expected; and fifth, an apology was made for the length of time it took to provide this information. No mention was made to any plaintiff of a specific delayed trade timed to enhance a bonus. No mention was made of any specific adverse affect from any trade. It is doubtful whether Winchell was aware of a summary of the investigation.

Later, when counsel for the plaintiffs requested a summary of the investigation, counsel for Allstate replied that there was no written summary and, accordingly, there was nothing to provide.

Allstate argues that there is no requirement in the statute for a written summary and it isn't clear what is required by he statute. The argument is unreasonable. The statue is clear without construction. It is intended to provide an employee with the information, oral or written, when an "adverse action," (firing) is based, on a "communication made to an employer in connection with an investigation of suspected misconduct relating to employment." That is what happened in this case. Compliance in this case would have revealed that, after an extensive investigation, Allstate did not have proof that any delayed trade by any of the plaintiffs was a timed trade intended to enhance a bonus at the expense of a portfolio security. Had there been compliance with the statute, the termination conversation, as intended by the statute, would not have been only one-way. There is ample evidence to support the jury finding of a willful violation of the statutory duty.

The FCRA provides for the imposition of punitive damages for willful noncompliance of any requirement of the act. On the facts of this case, it is

appropriate to observe that the jury awarded full compensatory and significant punitive damages to the plaintiffs on the defamation claims, and plaintiffs are allowed to claim costs and attorney fees. Accordingly, the court will award each plaintiff, as punitive damages, triple the $1,000 statutory damages awarded by the jury. The plaintiffs' claims for punitive damages of greater sums are denied.

In the event of willful noncompliance of the FCRA, a defendant is liable for the costs of the action together with reasonable attorney fees as determined by the court. 15 U.S.C. § 1681n(a)(3). Plaintiffs' motion for the allowance of costs and attorney fees will be granted.

IT IS THEREFORE ORDERED AS FOLLOWS:

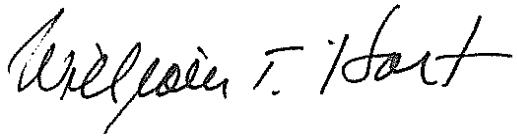
(1) Defendant's motions for judgment as a matter of law [296, 310], for a new trial [313], and for remittitur [316] are denied.

(2) Plaintiffs' motions for FCRA punitive damages [320] and costs and attorney fees [322] are granted.

(3) The Clerk of the Court is directed to enter a supplemental judgement in favor of plaintiffs Rivera, Kensinger, Meacock, and Scheuneman in the amount of $3,000 each against defendant Allstate Insurance Company as punitive damages imposed as a result of wilful violations the Fair Credit Reporting Act.

(4) By January 30, 2017, plaintiffs shall submit their bill of costs. Consolidated answer to fee and cost petitions is to be filed by February 13, 2017. Reply is due February 21, 2017.

ENTER:



UNITED STATES DISTRICT JUDGE

DATED: JANUARY 20, 2017

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE**
**NORTHERN DISTRICT OF ILLINOIS**

**Daniel Rivera, et al.**,
Plaintiff(s),

v.

**Allstate Insurance Company**
Defendant(s).

Case No. 10 C 1733
Judge William T. Hart

**SUPPLEMENTAL JUDGMENT IN A CIVIL CASE**

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $ ,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

---

☐ in favor of defendant(s)
and against plaintiff(s)
Defendant(s) shall recover costs from plaintiff(s).

---

☒ other: Supplemental judgment is entered in favor of plaintiffs Daniel Rivera, Stephen Kensinger, Deborah Joy Meacock and Rebecca Scheuneman in the amount of $3,000 each against defendant Allstate Insurance Company as punitive damages imposed as a result of wilful violations of the Fair Credit Reporting Act.

---

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge William T. Hart.

Date: 1/20/2017

Thomas G. Bruton, Clerk of Court

/s/ Carol Wing, Deputy Clerk

**UNITED STATES DISTRICT COURT**
**FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1**
**Eastern Division**

Daniel Rivera, et al.

Plaintiff,

v. Case No.: 1:10−cv−01733
Honorable William T. Hart

Allstate Insurance Company, et al.

Defendant.

**NOTIFICATION OF DOCKET ENTRY**

This docket entry was made by the Clerk on Thursday, March 9, 2017:

MINUTE entry before the Honorable William T. Hart: Plaintiffs' petition for fees and costs [358], as modified, is granted.The Clerk of the court is directed to enter a Supplemental Judgment in favor of plaintiffs Daniel Rivera, Stephen Kensinger, Deborah Meacock and Rebecca Scheuneman jointly and against defendant Allstate Insurance Company in the amount of $357,716.25 for attorney fees and $24,143.25 for court costs. (For further details see Opinion and Order)Mailed notice(clw, )

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| DANIEL RIVERA, STEPHEN KENSINGER, DEBORAH JOY MEACOCK, and REBECCA SCHEUNEMAN, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. 10 C 1733 |
| ALLSTATE INSURANCE COMPANY, | ) | |
| Defendant. | ) | |

# OPINION AND ORDER

Plaintiffs Rivera, Kensinger, Meacock, and Scheuneman have moved for allowance of attorney fees and costs. The jury returned a finding of willful noncompliance with the Fair Credit Reporting Act 15 U.S.C. § 1681n ("FCRA") which authorizes the imposition of such fees and costs. This matter was considered in the opinion and order entered on January 20, 2017 [461].

In compliance with Local Rule 54, the parties have engaged in discussion and analysis of the extensive time entries recorded during the six years

this case has been pending. Plaintiffs' counsel have agreed with defendant's counsel that only those fees arising under the FCRA are compensable. Defendant does not contest the hourly rates of the plaintiffs' attorneys. Plaintiffs incurred fees of $791,137.50 for 2,206.75 hours of work performed. Defendant incurred attorney fees for 10,282.6 hours incurred in defense of the claims.

Plaintiffs have reduced their claim for fees so as to relate only to the FCRA claim. The amount they seek is $357,716.25. Defendant contends that the reduction should be to $45,488.48. There was a substantial overlap of the claims requiring time and attention to discovery and trial efforts. The central issue in the case - the investigation of possible employee misconduct - related to all of the claims. Plaintiffs' reduction of their total fees so as to be applicable only to the FCRA claim is fair and reasonable and does not warrant any further reduction. Plaintiffs' fees request will be allowed.

Plaintiffs have not disputed the defendant's request that certain costs be disallowed. Defendant's proposed adjustments will be allowed.

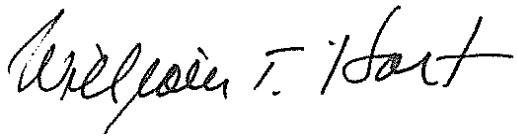
IT IS THEREFORE ORDERED AS FOLLOWS:

1. Plaintiffs' petition for fees and costs [358], as modified, is granted.

2. The Clerk of the court is directed to enter a Supplemental Judgment in favor of plaintiffs Daniel Rivera, Stephen Kensinger, Deborah Meacock and

Rebecca Scheuneman jointly and against defendant Allstate Insurance Company in the amount of $357,716.25 for attorney fees and $24,143.25 for court costs.

ENTER:



UNITED STATES DISTRICT JUDGE

DATED: MARCH 9, 2017

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE**
**NORTHERN DISTRICT OF ILLINOIS**

**Daniel Rivera, et al.**,
Plaintiff(s),

v.

**Allstate Insurance Company**
Defendant(s).

Case No. 10 C 1733
Judge William T. Hart

**SUPPLEMENTAL JUDGMENT IN A CIVIL CASE**

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $ ,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

---

☐ in favor of defendant(s)
and against plaintiff(s)
Defendant(s) shall recover costs from plaintiff(s).

---

☒ other: Supplemental judgment is entered in favor of plaintiffs Daniel Rivera, Stephen Kensinger, Deborah Joy Meacock and Rebecca Scheuneman jointly and against defendant Allstate Insurance Company in the amount of $357,716.25 for attorney fees and $24,143.25 for court costs.

---

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge William T. Hart.

Date: 3/9/2017

Thomas G. Bruton, Clerk of Court

/s/ Carol Wing, Deputy Clerk