Nos. 17-1310, 17-1649 (Consol.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DANIEL RIVERA, et al.,

Plaintiffs-Appellees,

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 1:10-cv-01733
Hon. William T. Hart, Judge Presiding

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES DANIEL RIVERA, REBECCA SCHEUNEMAN, DEBORAH MEACOCK, and STEPHEN KENSINGER

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ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. 17-1310, 17-1649 (Consol.)

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.

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(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):

Daniel Rivera, Stephen Kensinger, Deborah J. Meacock, Rebecca Scheuneman

(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:

Jenner & Block LLP;

RDS Law n/k/a Sweeney & Scharkey LLC (new)

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

i) Identify all of its parent corporations, if any; and
N/A

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

Attorney's Signature s/ Michael T. Brody Date: August 10, 2017

Attorney's Printed Name: Michael T. Brody

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Attorney's Signature s/ Elizabeth Abbene Coleman Date: August 10, 2017

Attorney's Printed Name: Elizabeth Abbene Coleman

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Attorney's Signature s/ Robert D. Sweeney Date: August 10, 2017

Attorney's Printed Name: Robert D. Sweeney

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Attorney's Signature s/ Joanne H. Sweeney Date: August 10, 2017

Attorney's Printed Name: Joanne H. Sweeney

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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Attorney's Signature s/ John J. Scharkey Date: August 10, 2017

Attorney's Printed Name: John J. Scharkey

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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Table of Contents

Table of Authorities

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

Jurisdictional Statement

The Jurisdictional Statement of Defendant-Appellant Allstate Insurance Company ("Allstate") is complete and correct.

Statement of Issues

1. Should the jury's defamation verdict be affirmed where it is supported by substantial evidence that Allstate made false statements concerning Plaintiffs, which caused Plaintiffs substantial injury, and which were made with knowledge of their falsity or with reckless disregard of the truth?

2. Should the District Court's award under the Fair Credit Reporting Act ("FCRA") be affirmed where it is supported by substantial evidence that Allstate willfully violated the statute?

3. Should the District Court's award of attorneys' fees under FCRA be affirmed where it reflects a reasonable exercise of discretion?

Introduction

In February 2010, Allstate published in its Form 10-K that certain employees in Allstate's investment department had engaged in trading practices designed to enhance their individual bonus compensation. Allstate added that these practices damaged Allstate in the amount of $207 million. Allstate made similar statements in an email to all of the employees in its investment division.

Allstate's statements were false, and Allstate knew the methodology employed to compute the $207 million loss was unreliable. In fact, in letters to the Department of Labor (the "DOL"), Allstate conceded that "[n]o one [at Allstate] believed, then or now, that this was an accurate description of the activity on the

equity desk." Allstate further conceded to the DOL that the trading practices referenced in Allstate's Form 10-K had "virtually no effect on bonuses."

As those at Allstate and in Plaintiffs' field knew, Plaintiffs were the employees that were the subject of Allstate's defamatory statements. As a consequence of Allstate's defamation, Plaintiffs have suffered real and catastrophic damages. Once sought after by employers in the upper echelons of the investment industry, Plaintiffs were made virtually unemployable as a direct and proximate result of Allstate's statements.

The jury agreed and decided all fact questions in favor of Plaintiffs. The jury concluded that when Allstate publicly blamed "employees responsible for trading equity securities" for its $207 million loss, Allstate was referring to Plaintiffs, and Allstate made its statements with a reckless disregard for the truth. Moreover, based on substantial evidence, the jury concluded that Allstate's defamatory statements damaged Plaintiffs. The jury awarded lost wages commensurate with both sides' experts' reports, and punitive damages. Allstate does not challenge the amount of the jury awards.

Mindful of the significant burden it carries to overturn the jury's verdict, Allstate argues incorrectly that whether evidence supports the jury's verdict is a legal question. Allstate repeats the arguments the District Court and the jury rejected. The evidence supporting the jury's verdict was substantial, credible, compelling, and sufficient to support the verdict under Illinois law. For these reasons, outlined below, this Court should affirm.

Statement of the Case

A. Allstate Investments.

Allstate Investments, more than 350 employees that managed $110 billion of Allstate's assets, was a sophisticated financial services organization. Headed by Allstate's Chief Investment Officer ("CIO") Judith Greffin, Allstate invested Allstate's money across virtually all asset classes. Tr. 541-42.[1] The fixed income group managed approximately $100 billion. Tr. 545. The equity group managed approximately $5-10 billion. Tr. 546. From 2003 to 2009 the equities group was led by three separate directors, the last of which was Plaintiff Daniel Rivera. Tr. 411, 537. The equity group was divided into "teams," such as growth, value, quantitative ("quant") and convertibles. Tr. 249-50, 269, 344.

Rivera began working for Allstate in 2004 and by 2006, was in charge of the equity group. Tr. 537, 546. The other Plaintiffs comprised the "growth team." Rebecca Scheuneman joined Allstate in 1999 and became a growth team portfolio manager. Tr. 406, 409. Deborah Meacock joined Allstate in 2006 as a Senior Portfolio Manager and became growth team leader. Tr. 249–50. In 2007, Deborah Meacock hired Stephen Kensinger as a Growth Portfolio Manager. Tr. 80.

Plaintiffs took investment directions from two Allstate employees: David Walsh, who oversaw approximately $5 billion in the pension plans, and Mark

[1] Trial transcripts are found in the District Court docket at Dkts. 280; 306; 374–82; 396–97. Two volumes of transcript have not been uploaded to the District Court docket. We expect they will be loaded shortly with the next consecutive docket number. Plaintiffs cite the consecutively-numbered transcript by page.

Cloghessy, who oversaw approximately $105 billion of Allstate's assets. Tr. 545. Allstate managed no outside money. Tr. 544. Walsh and Cloghessy were the equity group's "clients." Tr. 545. On occasion, Walsh or Cloghessy would inform Rivera that the pension plans or Allstate needed funds – in the tens of millions or more – which required the sale of portions of the portfolio. Tr. 546–47. These "program trades" would entail the sale of hundreds of stocks in equal proportion to the amount of the reduction in the overall portfolio. Portfolio managers had no discretion to alter program trade sales, nor time them. Tr. 107–08, 557, 640. On occasion, Walsh and Cloghessy allocated large amounts of money to the equity portfolios, which the group invested in the same way. Tr. 546–47. The jury heard program trades resulted in the largest false positive or false negative impacts on performance under Allstate's system. Tr. 576.

Because of their experience, responsibility, and performance, Plaintiffs were well-compensated at Allstate. They received an annual salary and were eligible to earn additional bonus compensation. In the years prior to their termination, Plaintiffs received total annual compensation, depending on the Plaintiff, ranging from $165,000 to more than $1 million. PX-60.

Allstate's bonus plan changed over time. In 2007, for example, the equity group was entitled to a maximum bonus if its performance exceeded its benchmark by 115 basis points (1.15%). In fact, the group that year exceeded

its benchmark by up to 1,500 basis points (15%).[2] Tr. 96-97. In 2008, the bonus plan was made discretionary and bonuses were not linked to performance targets. Tr. 102.

B. Allstate's Use Of The Dietz Method.

This case involves the way Allstate measured its portfolio managers' performance. While there are expensive software programs to track performance of asset managers and their portfolios, Allstate was not required to use these products because it did not publicize its portfolio returns or solicit third party funds. Tr. 348. Allstate elected to use a less accurate measurement tool to gauge its portfolio managers' performance known as the "Dietz" method, named after the economist/mathematician Peter Dietz who created the equation. Appx. 8; Tr. 102.

The Dietz method calculates portfolio returns based on an average of cash flows over a given day. The formula allows a company to allocate a transaction gain or loss by selecting a point during the trading day at which the value for all assets is measured. Allstate calculated its algorithm manually each day based on mid-day stock prices with an Excel spreadsheet.[3] Appx. 8–10.

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[2] The equity group qualified for their maximum bonus well before year-end and could have locked in their bonus with a passive investment strategy. Instead, they continued to trade, profiting Allstate without bonus impact. Tr. 98–99.

[3] Allstate employee Deborah Rutzky ran the report every day, but her spreadsheet often required reconciliations "entered manually" to account for stock splits, dividends, and other corporate actions that would result in significant variances. Tr. 420–26.

Allstate knew the Dietz method did not provide a precise nor accurate performance measure. Appx. 9–10. For instance, if the market continued to rise after mid-day, any appreciation after the mid-day price could create excess return attributable to the portfolio manager's performance for that security. Appx. 9. In that case, the Dietz formula would incorrectly show the portfolio manager out-performed his or her benchmark. Conversely, had the market declined, the result would incorrectly show the manager under-performed the market. Appx. 9-10.

Allstate could track the Dietz "effect" (the difference between actual performance and the algorithm's calculation) on a daily basis through its Performance Measurement Group. Tr. 421–22. Deborah Rutzky's spreadsheet showed the Dietz effect on any trade and was circulated to multiple recipients in equities, and leadership in Allstate Investments. Tr. 422, 429, 432.

In addition, Allstate audited investment department performance to ensure equity trading transactions were proper. Tr. 999-1000. At various times, Allstate even considered whether to declare "performance moratoriums" on days on which the Dietz effect was especially profound due to large trades that would more significantly distort a portfolio manager's performance. Tr. 134–35; 575–76. The evidence established Allstate knew about the Dietz effect, could have eliminated it, but made the business decision to use the methodology, long before Plaintiffs joined Allstate. Tr. 35, 577-78.

Plaintiffs testified they did not "time" trades to achieve a positive Dietz effect to improve their bonus compensation. Appx. 15–16. They only tried to

sell securities when the market was up, and buy when the market was down, as Allstate instructed. *Id.*; Tr. 580–81. Evidence established Plaintiffs made major trades that greatly benefitted Allstate, even though the corresponding Dietz effect harmed the equity group's reported performance. Tr. 443–45. Moreover, many program trades, which had the greatest Dietz effect, took place at market close regardless of market movement and without the portfolio managers' involvement. Tr. 591–92; 107–08. The jury also heard Plaintiffs recommended in 2008 that Allstate hedge the entire portfolio before the financial collapse to insure against a market meltdown. While this would have eliminated Plaintiffs' ability to achieve a performance bonus, it would have protected Allstate. Allstate leadership rejected the recommendation. Tr. 100–01.

C. Allstate's Investigation.

In mid-2009, Allstate received a report from Peter Hecht in Allstate's Performance Management Group that portfolio managers may have timed trades to increase their bonuses. Tr. 664–65. Greffin directed Hecht and Trond Odegaard, who devised Allstate's performance measurement system in 1996, to conduct an investigation. Tr. 666.

Allstate's investigation proved portfolio managers sometimes were hurt by Dietz; other times they benefitted. Tr. 666–67. Odegaard summarized that result in his report to Greffin, who provided it to Allstate's ethics and compliance chief. Tr. 671. Allstate thereafter hired the law firm of Steptoe & Johnson ("Steptoe") to investigate. Tr. 1336. Steptoe lawyers interviewed Plaintiffs, other

members of the equity group, their supervisors, and others in the investment division. Appx. 11–12.

Steptoe hired NERA Economic Consulting ("NERA"), an economic consulting firm, to evaluate Allstate's 110,000 trades from 2003 to 2009 to determine if there was evidence of improper timing. Appx. 10–11; Tr. 1339. NERA identified approximately 49 "problematic trade[s]" for which it identified a delay between trade instruction and execution. Appx. 11. NERA determined that if those trades had occurred on the day the trade request was sent, Allstate would have made approximately $1.4 million more than it actually did. *Id.* At trial, Allstate focused on these trades and emails involving Plaintiffs that mentioned "Dietz." Allstate also examined the potential impact of these trades on bonuses. Allstate concluded the trades addressed in the emails had "virtually no effect on bonuses." PX-51. Nonetheless, based on its analysis of a limited number of trades which showed no effect on bonuses, NERA *assumed* that for the remaining 110,000 trades any sale on a market up day (preceded by a down day) or purchase on a down day (preceded by an up day) had been manipulated to increase a bonus. Appx. 12–13. This assumption formed the basis for NERA's report, which found its way into the 10-K. NERA's assumption was never reported or disclosed to anyone.

NERA's assumption was unproven. For example, Allstate focused at trial on transactions involving an August 14, 2008 sell order that was executed on August 16, an up day. Tr. 1152-61. Allstate presented demonstrative exhibits showing the time of the order, what the market did each day thereafter, and

comparing the stock price when the order was received and the stock sold. Cross-examination explained reasons for the delay. On August 14, there were suicide bombings in the Mid-East and two retailers announced they missed their earnings targets; the market fell substantially. On August 15, Countrywide announced deepening problems with its residential mortgage portfolio, producing another down day. Allstate's expert conceded those would be bad days to sell. Tr. 1211–12. The trade was executed on August 16; the market that day rose shortly before closing. The trade satisfied Allstate's "client" instruction that the trade be made "that week." Tr. 1211–15. This example showed that delaying trades for reasons unrelated to Dietz could benefit Allstate.

Using its assumption, NERA calculated the "total possible reimbursement" to the pension plans to be approximately $91 million. This estimate excluded trades where timing produced $38 million in gains to the portfolio. Appx. 13. Using the same methodology, NERA calculated a potential loss of $116 million to Allstate's portfolio. Tr. 1182.[4]

Allstate calculated the impact on the bonus pool. Based on the handful of actual trades it considered, there was "virtually no effect." PX-51. Even, assuming that every trade that could have been timed was timed, Allstate concluded the bonus pool impact was $1.2 million. There was great year-to-year variability. In 2003 and 2007, NERA concluded the Dietz effect benefitted the bonus pool. In 2004, it benefitted Allstate. In 2005 and 2006, the effect was *de*

[4] Allstate states the potential loss ranged from $91 to $116 million. Br. 44–45. This is error. The two numbers were hypothetical losses to different portfolios.

minimis. Tr. 918–19. In 2007, the year NERA found the greatest contribution to the bonus pool, Plaintiffs' actual bonuses reached their maximum early in the year because their performance exceeded their benchmark by a wide margin. *See supra* note 2.

Summarizing the evidence, the District Court concluded "[t]here 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 the portfolio." Appx. 16.

D. Allstate's Private Communications To The Department Of Labor.

In December 2009, before Allstate published its February 2010 Form 10-K, Allstate met with the DOL about the investigation. Tr. 849–50. Thereafter, Allstate and Steptoe wrote the DOL about the investigation. JX-4; PX-51; Appx. 72, 89. Allstate refused to produce the letters until the District Court ordered their production. Dkt. 103.

In its letter to the DOL, which contained a full-page FOIA confidentiality reservation to prevent its public disclosure, Allstate confessed the $91 million number was not accurate. Allstate explained "this amount, which assumes that nearly every trade was inappropriately delayed, overstates any actual economic disadvantage suffered by the plans." Appx. 85. Allstate explained that if NERA limited its analysis to the few trades for which there was evidence of timing, the total loss to the plans would have been $8.2 million. Appx. 86. Even that number was overstated, as it excluded trades that benefitted Allstate. Including the gains on potentially-timed trades, the net figure was $1.4 million. Allstate

further added that any effect of this trading on bonuses paid to the group was "minimal." *Id.*

Allstate explained to the DOL that the NERA algorithm was not reliable: "[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." Appx. 89. Allstate advised the DOL that the estimate of bonus impact was unreliable. Allstate explained "[j]ust 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." *Id.* Allstate added "the NERA algorithm is not reality; we have no proof that the returns resulting from that algorithm would ever have been realized." It concluded "the revised bonus calculations are speculative and may be vastly overstated as is the case with the calculation of potential portfolio impact." Appx. 90.

E. Allstate's Public Actions.

Allstate fires the equity group. Allstate fired members of the equity group in a manner that was well known within Allstate and the investment community. On October 6, 2009, Allstate outsourced the growth, value and quant portfolios to Goldman Sachs. Allstate retained the convertible team and their funds. Appx. 16.

After the decision was made, Allstate advised Rivera and the other members of the group that they would be let go but would continue to be paid

until year-end, would receive severance, and could use Allstate outsourcing. Appx. 16.

The same day, Allstate advised each member of the equity group that they should remain for an exit interview. The interviews were not exit interviews. Throughout the course of the day each employee was interviewed at an off-site hotel by Steptoe lawyers about Dietz issues and communications with Plaintiffs. Tr. 707-09. The employees were permitted to return to Allstate's offices, and permitted to discuss the interviews. Tr. 287, 708. The jury heard that the rumor mill was extremely active. Tr. 1006-08.

Steptoe did not produce a written report. Steptoe orally reported to Allstate to permit Allstate to maintain confidentiality. Tr. 1400–01. No interview summaries were prepared. Tr. 1406.

On December 3, 2009, Allstate advised each Plaintiff that their terminations were for cause, that Allstate declined to pay severance benefits, and that they would no longer have access to Allstate resources. Appx. 17; Tr. 1259–60. No other portfolio managers were terminated for cause. Allstate Human Resources director Brett Winchell communicated Allstate's decision to each Plaintiff. Winchell was unaware of the reasons for the decision. Tr. 1259–60. He was not involved in the investigation. *Id.*; Appx. 30. Winchell communicated only five high-level "bullet points" given to him by Allstate legal staff. Appx. 30.[5]

[5] Each Plaintiff was: (1) reminded there had been investigation into the pay-for-performance plan; (2) he or she had been interviewed; (3) he or she was being terminated for violating Allstate's code of ethics; (4) the decision was probably

Each Plaintiff asked Winchell for Allstate's reasons, a request they later put in writing. PX-78. Allstate never explained. The talking points, or "script," used by Winchell was not produced. Allstate maintains the script is privileged. Tr. 1273, 1277–78.

Allstate escorted Plaintiffs off the premises. Appx. 17. The next day, Allstate shut off Plaintiffs' email accounts, company access, and telephones. Other equity group employees continued to have access to the building, their telephones, and email accounts to support their job searches. Appx. 16–17.

Allstate's actions concerning Plaintiffs were well known within Allstate and to third parties who contacted the equity group. The dozens of Allstate employees who had been interviewed knew the investigation focused on the Growth Team and Rivera. Tr. 1006–07. Plaintiffs' removals from the premises were obvious and known to the 300+ employees in the investment division. Appx. 17. People outside Allstate, including the "sell-side brokers" who called on Allstate to persuade Allstate to purchase particular securities, were aware of Allstate's actions. *Id.*

Allstate made public statements. On February 25, 2010, Allstate filed its annual report on Form 10-K. JX-1. The 10-K contained statements found by the jury to be false. Allstate reported:

> In 2009, we became aware of allegations that some employees responsible for trading equity securities in certain portfolios of two AIC defined benefit pension plans and certain portfolios of AIC and an AIC subsidiary may have timed the execution of certain trades in

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not what the Plaintiff expected; and (5) Allstate was sorry that it had taken so long. Appx. 30.

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 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. 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. ... 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. 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.

Judith Greffin, CIO, reviewed the 10-K before it was published. She knew of the investigation and its assumptions. She thought none of the information or statements should have been included. Tr. 695-96.

On the day Allstate released the 10-K, Greffin sent an email to approximately 355 employees in Allstate investments. Appx. 102. She wanted them to "hear it from her," before they read about it in the 10-K. Tr. 698-99. Greffin advised staff that Allstate's 10-K contained "details around allegations regarding trading practices within our equity portfolios that came to light in the past year." Appx. 102. The email reminded recipients of the investigation and stated that Allstate paid the pension plans an amount disclosed in the 10-K ($91 million), so that those pension plans "properly reflected the portfolios' actual investment performance." She stated "[s]ituations 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're taking steps to improve our governance, compliance practices and training. We remain committed to the highest levels of ethics and integrity in the stewardship of Allstate's assets." Appx. 102.

Plaintiffs argued that Greffin's email and the 10-K published worldwide, in conjunction with the circumstances surrounding Plaintiffs' removal from Allstate, conveyed the message that unethical behavior occurred within the equity division and Plaintiffs were the employees that engaged in that behavior.

F. Allstate Purposefully Limited Its Investigation.

While Allstate's public statements addressed the equity portfolio managers, and Allstate limited Steptoe's and NERA's investigation to that area, Allstate was aware that Dietz-motivated trading occurred in other areas. In PX-1, an email between David Walsh (pension plan client) and Allstate's fixed income group (a separate group that managed ten times as much money as equities), Walsh directed the fixed income group to execute trades to minimize the Dietz effect. Supp. App. 1.[6] In PX-24, an email from Walsh to an outside money manager that Allstate used, Walsh directed the outside entity to make a trade (approximately $26 million) such that there was a positive Dietz effect. Supp. App. 6. Even Peter Hecht, whose report triggered the investigation, directed Rivera to place a trade on the "1st down day." PX-13, Supp. App. 2. Allstate chose, however, not to investigate these larger groups.

Allstate's Mary McGinn advised the DOL – incorrectly – that there was no proof of Dietz trading outside of equity. Appx. 89. Allstate did not show McGinn these emails. The first time McGinn saw the emails was one week before the trial. Tr. 881-82. Although Susan Rosborough, McGinn's supervisor, testified she was aware of emails showing Dietz-motivated trading in other areas, she did not direct the investigation into these areas. Tr. 1392–93. The NERA witness at trial testified that Allstate limited the scope of the investigation to equities. Tr. 1198–99.

[6] Citations to "Supp. App. _" are to the Supplemental Appendix bound with this brief.

The jury heard that Allstate chose to close only parts of the equity group, and transfer its portfolio to Goldman Sachs. Tr. 692.[7]

G. Effect Of Allstate's Statements On Plaintiffs.

Starting October 6, 2009, Plaintiffs sought new employment. They reached out to employers as a group and individually. Tr. 173, 318–19, 618. Plaintiffs were aided in this effort by investment professionals they knew. For example, outside brokers seeking to raise capital for a company would solicit the portfolio managers at Allstate. Tr. 419. The sell-side brokers who had worked with Plaintiffs at Allstate continued to communicate with Plaintiffs about potential job openings or opportunities and invited them to events and conferences. *E.g.*, Tr. 288–90, 417–19, 474–77.

After Allstate's public announcements accused Plaintiffs of wrongdoing, Plaintiffs' job search became "very difficult." Tr. 482. A head hunter who had offered to recommend Deborah Meacock for a position did not do so. Tr. 319–22. While Plaintiffs continued to seek employment, their efforts were unsuccessful, and they turned to different tactics, including searching for employment outside the country, Tr. 322, 626, and through non-business contacts, such as at church. Tr. 482.

With the exception of a period of employment at an investment company in Bermuda paying a small fraction of what he made at Allstate, Rivera has been

[7] The pervasive awareness of the Dietz effect at Allstate is reminiscent of the scene in the movie *Casablanca* in which Inspector Renault (Claude Rains) expresses shock at the existence of gambling at the nightclub, while accepting his gambling winnings.

unemployed since Allstate's actions despite applying for positions at much lower pay levels than he had previously held. Tr. 623–30. Kensinger found that top echelon jobs were no longer available to him and instead sought lower level employment. Tr. 175–76. He was unsuccessful, explaining he could not defend himself against Allstate's statements, and was "dead in the water." Tr. 173. Meacock engaged in extensive efforts to find employment. She retained Kathy Graham, a head hunter. After the 10-K was published, she learned that her resume was no longer being submitted for jobs. Tr. 319–22. She stopped working with Graham. *Id.* Unsuccessful at finding employment within the United States, Rivera recommended Meacock to the Bermuda firm, also at a small fraction of what she made at Allstate. Tr. 323. Scheuneman was only able to find a job, at a much lower pay level with a solo practitioner, through someone she knew from her church. Tr. 482.

H. Proceedings Below

On March 18, 2010, Plaintiffs sued Allstate alleging that Allstate's public statements had defamed Plaintiffs and that Allstate's unexplained termination violated the FCRA. Dkt. 1.

Plaintiffs brought libel claims under two theories: libel *per se* and libel *per quod*. Under a libel *per se* claim, certain categories of statements are presumed defamatory and plaintiffs may recover presumed damages. A libel *per se* claim requires the defamatory meaning to be evident from the defamatory statement. A fact finder may not go outside the "four corners" of the statement. Moreover, statements subject to an "innocent construction" are not libel *per se*. Judge

Feinerman invited Plaintiffs to submit affidavits to support a *per se* claim to pursue that claim. Plaintiffs elected not to and Judge Feinerman permitted Plaintiffs to go to trial on the *per quod* and FCRA claims. Appx. 45, 50, 63. Under the *per quod* theory, proof of defamation may go beyond the four corners of the statement. Appx. 63.

In June 2016, after a three-week trial, the jury concluded Allstate had defamed each Plaintiff. The jury awarded lost wages and punitive damages to each Plaintiff. Appx. 1. The jury found Allstate had willfully violated the FCRA and awarded each Plaintiff the maximum statutory damages. *Id.*

The District Court entered judgment on the jury verdict and later denied Allstate's post-trial motions. Appx. 4–33. The District Court separately concluded that Allstate willfully violated the FCRA, entitling Plaintiffs to punitive damages which he determined to be $3,000 per Plaintiff. Appx. 3. Exercising its discretion, the District Court awarded Plaintiffs some of their attorneys' fees under the FCRA claim. Appx. 37–38.

Allstate appealed the jury's verdict and the District Court's rulings. The Court consolidated the two appeals.

Summary Of Argument

Allstate's appeal presents no contested legal issues. Allstate simply disagrees with the factual findings of the jury, which were supported by evidence and may not be challenged here.

The jury heard evidence that Plaintiffs suffered actual injury as a result of Allstate's defamation. Plaintiffs presented evidence demonstrating their injury

was directly and substantially caused by Allstate's statements. Allstate's other challenges to the jury's defamation verdict fail as well. The jury heard evidence demonstrating that when Allstate referred to wrongdoing in equity trading, it was clear to potential employers and referrers that Allstate was referring to Plaintiffs. The jury heard extensive evidence that Allstate's statements were false. Each Plaintiff denied timing trades for personal benefit and the jury heard evidence that Allstate's statements were incorrect. In addition, the jury heard evidence that Allstate made its statements knowing them to be false, or with reckless disregard as to their truth. In roughly contemporaneous disclosures to the DOL, Allstate acknowledged that "[n]o one believed" the numbers Allstate put in the 10-K and that Allstate had been unable to demonstrate any link to bonus compensation.

Allstate's other challenges to other aspects of the judgment are groundless. The jury's verdict, and the District Court's finding, that Allstate willfully violated FCRA are supported by evidence. The District Court's award of attorneys' fees reflects a reasonable exercise of discretion.

Each of the contested issues in this case was decided at trial by a properly instructed jury. Allstate's factual challenges fail to overcome this Court's deferential standard of review. The verdict should be affirmed.

Argument

I. THE JURY'S DEFAMATION VERDICT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Verdict Should Be Affirmed If Any Evidence Supports It.

Unable to articulate any legal error that supports reversal of the jury's verdict, Allstate attempts to recast its factual disputes into the claim that Plaintiffs' proof was insufficient as a matter of law. Allstate's arguments were rejected by three district judges—Judges Grady, Feinerman, and Hart—and the jury, and are not supported by Illinois law.

This Court, in reviewing a jury verdict, views the evidence in the light most favorable to, and draw all inferences in favor of, the prevailing party, *Wisconsin Alumni Research Foundation v. Xenon Pharmaceuticals Inc.*, 591 F.3d 876, 885-86 (7th Cir. 2010), and will overturn a jury verdict "only when there is a complete absence of probative facts to support the conclusion reached." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). *See Crompton v. BNSF Railway Co.*, 745 F.3d 292, 295-96 (7th Cir. 2014). This Court will reverse a jury verdict only if "no rational jury could have found for the prevailing party." *Bogan v. City of Chi.*, 644 F.3d 563, 572 (7th Cir. 2011). Allstate cannot carry that burden.

B. Substantial Evidence Supports Plaintiffs' Claim.

1. Substantial And Uncontroverted Evidence Shows Allstate's Statements Damaged Plaintiffs.

Allstate first argues that the jury verdict should be overturned because there was no evidence from which a jury could find Allstate's defamatory statements caused Plaintiffs' injuries. The District Court, which heard the

evidence, rejected Allstate's argument, Appx. 25, 32, and the jury, who heard and considered the evidence, found Allstate's false and defamatory statements in fact caused Plaintiffs significant pecuniary damage. Appx. 1.

a. The record contains substantial evidence that Allstate's defamatory statements caused Plaintiffs' special damages.

"Special" damages are distinguished from "general" damages, which are presumed to flow from reputational injury. *Brown v. Farkas*, 158 Ill. App. 3d 772, 777 (1st Dist. 1986). In a *per quod* case, a plaintiff may recover actual pecuniary damages caused by the defamatory statement, which go beyond the general damages presumed in *per se* cases. *Chang Hyun Moon v. Kang Jun Liu*, 2015 IL App (1st) 143606, ¶ 14. This case was tried to the jury as a *per quod* case.

Allstate does not contest on appeal that Plaintiffs suffered actual pecuniary loss. Plaintiffs' expert, Melissa Bennis, determined the pecuniary loss each Plaintiff suffered from Allstate's false statements ranged, depending on certain assumptions, from approximately $2.5 million to over $7.5 million. *See* Tr. 934–71; PX-60. Allstate's expert, Christopher Haan, quantified Plaintiffs' total pecuniary loss as $11.2 million. DX-75. Allstate argues, instead, that Plaintiffs failed to present sufficient evidence that Allstate's defamatory statements caused this pecuniary loss. This argument is meritless.

Illinois law requires, as the jury was instructed in this case, that the defamatory statement be "a substantial factor in bringing about the harm." Restatement (Second) of Torts, § 622A (1977) ("Restatement"); *Missner v. Clifford*, 393 Ill. App. 3d 751 (1st. Dist. 2009) (adopting Restatement); Dkt. 303 at 23

(jury instruction). Causation is a question of fact, not law. *Fleck Bros. Co. v. Sullivan*, 423 F.2d 155, 156 (7th Cir. 1970).

Plaintiffs presented substantial evidence that their pecuniary losses were caused by Allstate's defamatory statements. Plaintiffs presented unrebutted evidence concerning the structure of the financial industry and the particular sector of that industry in which they worked. Plaintiffs worked in a specialized and highly-competitive field. Tr. 256–57. Plaintiffs each received the "Chartered Financial Analyst" ("CFA") designation. Tr. 78, 245, 479-80, 531. CFA societies maintain statistics on the compensation levels of CFAs. Plaintiffs' jobs at Allstate were first-quartile jobs, meaning they ranked in the top 25% of CFA compensation. Tr. 541. Portfolio manager positions are often filled through word of mouth. Plaintiffs testified they had moved to new jobs throughout their careers, including to Allstate, but only in response to direct invitations and recruitment from other employers – they did not apply. Tr. 534. Given the nature of the positions and the credentials required to manage billions of dollars, as well as the high salaries and bonuses paid for such jobs, there was fierce competition to obtain any of the available first-quartile jobs. Tr. 633.

The evidence further established that Allstate's false statements were communicated throughout the investment community. There was a well-developed communications network facilitated by "sell-side" brokers, who visited Plaintiffs and other portfolio managers to persuade them to invest in securities offered by the sell-side brokers. Sell-side brokers walked the halls at Allstate regularly, met with portfolio managers, and invited Allstate portfolio managers,

and others, to events and programs. Tr. 417-19. The circumstances surrounding Plaintiffs' terminations as well as the 10-K were quickly disseminated within this network. Given the highly-public nature of the 10-K, the false statements Allstate made became quickly and widely known. In the investment community, public securities filings received great attention. Appx. 17. CFAs and others scour public statements, announcements, and filings for information and Allstate's statements regarding Plaintiffs received similar attention. Tr. 331.

The notion that the statements in Allstate's 10-K filing were not read by those in the investment community was refuted at trial and rejected by the jury. Specifically, Greffin, Allstate's CIO, testified she sent her email concerning the 10-K filing to the entire investment division so that the employees would hear it from her first. In her email, she stated that "disclos[ure] in the 10-K ... reflect[s] poorly on our organization," recognizing news of the 10-K would quickly spread through the entire investment community. Allstate elected to make a preemptive statement to the investment department, Tr. 698–99, or, as the jury found, to make sure everyone knew that Allstate blamed Plaintiffs, not Allstate's policies.

The statements Allstate made in the 10-K are inextricably linked to the pecuniary loss suffered by Plaintiffs. The jury heard evidence that Allstate's false statements were fatal to Plaintiffs' employment prospects. Before Allstate's decision to publish the false statements, Plaintiffs received ongoing support and assistance from sell-side brokers, anxious to see Plaintiffs back in positions where the brokers could continue to solicit them. After the 10-K was published,

however, the job search became "very difficult." Tr. 482. The same was true with CFA-sponsored recruiter Kathy Graham. Graham did not submit Meacock's name for a first-quartile position after the 10-K was issued. In fact, she stopped working with Meacock and Rivera altogether.[8] Tr. 320–21. Plaintiffs were neither interviewed for positions for which they were qualified nor hired for positions for which they were leading candidates. Tr. 374–75.

Expert testimony confirmed Allstate's statements were fatal to Plaintiffs' employment prospects. Rivera testified as an expert. His testimony regarding hiring practices for first-quartile jobs was disclosed before trial in Rule 26(a)(2) disclosures, and admitted without objection. He testified that he was responsible for reviewing candidates, resumes and hiring portfolio managers for first-quartile positions. Tr. 247-49; 632-33. He testified as an experienced investment professionals who hired portfolio managers that, based on the Greffin email and the statements in the 10-K, Plaintiffs were no longer eligible for a first-quartile CFA job. Tr. 632–33. He testified that he regularly scoured 10-Ks and other public statements and, based on his experience in the field, highly-compensated

[8] Allstate erroneously asserts this testimony was hearsay. Br. 34–36. First, Meacock's testimony that she retained Graham and Graham assisted with her job search before Allstate published the 10-K, but that after the publication, her resume was not submitted for jobs for which she was qualified is not hearsay. Tr. at 319–21. Second, Allstate did not object to this testimony (only later lodging an objection), and accordingly waived any objection. *United States v. Lane*, 591 F.3d 921, 926 (7th Cir. 2010). Third, as to what Graham said (to which Allstate objected), the trial court admitted the testimony because it understood Graham would testify. Tr. at 320–21. Because Allstate failed to move to strike Meacock's testimony after it became apparent Graham would not testify, Allstate waived its hearsay objection. *United States v. Dougherty,* 895 F.2d 399, 403–04 (7th Cir. 1990).

jobs managing billion dollar portfolios are not available to individuals accused of and publicly terminated for manipulating trades for personal gain, and that no prospective employer would assume that risk. Tr. 632–33.

The link between Allstate's statements and Plaintiffs' loss was buttressed by Allstate's expert witness, Dr. Christopher Haan. Based on Allstate's pretrial disclosures, Plaintiffs took the unusual step of adopting and disclosing Haan as a witness on causation issues. Dkt. 256. Allstate did not object. Plaintiffs elicited testimony from Haan regarding the damaging and lasting effects of defamation on a CFA's employment prospects.

Haan corroborated Plaintiffs' evidence that the stigma from Allstate's defamation persisted. Haan agreed with Plaintiffs' expert that a highly-qualified first-quartile CFA would expect to be re-employed at comparable earnings within a short time. Tr. 946–47. Haan acknowledged that an article he relied upon – "*Front Pay Damage Assessment: A Summary of Vocational and Psychological Considerations*," written by Dr. Michael Shahnasarian and published in the Journal of Forensic Economics, a peer-reviewed journal, was of the type generally relied upon in his field and was authoritative. Tr. 1457.

Under Federal Rule of Evidence 803(18), an article acknowledged as authoritative is admissible as substantive evidence. *See, e.g., Allen v. Safeco Ins. Co. of Am.*, 782 F.2d 1517, 1519–20 (11th Cir.), *on reh'g,* 793 F.2d 1195 (11th Cir. 1986). Haan acknowledged statements in the authoritative article were correct, or recognized that on relevant topics, Dr. Shahnasarian was "the expert." Among other things, Haan accepted or agreed with the following facts:

> In some cases, a less than harmonious ending of an employment relationship can stigmatize an individual among peers and employers. PX-55 p.180; Tr. 1458:10–17.
>
> This is more likely the case when the individual is well known within a business community or industry, information pertaining to allegations associated with the dispute become public, or the industry … has a strong formal or informal communication network. PX-55 p.180; Tr. 1458:24–59:10.
>
> Stigmatization can surface as a vocational handicap that suppresses future earnings long after a former plaintiff has resolved an employment dispute. An image of a whistle-blower, racist, or harasser-again, rightfully or unjustly-for instance, may be difficult to overcome and adverse to future career development. PX-55 p.181; Tr. 1462:17–63:1.
>
> Employers recruiting for sensitive positions or jobs pertaining to public trust typically more closely scrutinize blemishes on an individual's employment record, and look askance at pejorative character references. *It's better to be safe than sorry* is the mantra many employers adopt when confronted with a staffing decision involving a job candidate associated with controversy. PX-55 p.181; Tr. 1463:7–64:9.
>
> Related to stigmatization is the adverse impact potentially caused by unfair employment references and defamation-regardless of whether these activities rise to legal standards. Informal communication networks are more prevalent, accurate and powerful in some business environments than others. Negative communications may occur unbeknownst to a present or former litigant. Although best qualified among a cadre of candidates vying for a job or position, a bad or unfair job reference can subvert earnest efforts to mitigate earnings damages. PX-55 p.181; Tr. 1464:10–25.

Haan's testimony, admitted without objection, and unrebutted, buttressed the testimony of Plaintiffs, also admitted without objection and unrebutted, that Allstate's statements severely diminished Plaintiffs' employment prospects and earnings power and impeded their ability to achieve gainful employment. Haan's testimony further showed that the stigmatization from Allstate's defamation,

communicated through informal communications networks in a close industry, would be expected to continue to affect Plaintiffs' ability to obtain employment.

Finally, the jury heard evidence demonstrating the defamation's dramatic effect on Plaintiffs. Though Plaintiffs were expected to achieve comparable re-employment by July 2010, Tr. 946-47, none achieved comparable employment by the date of trial. Plaintiffs' similar experiences undermine any argument that Plaintiff's results were due to individual factors. Each Plaintiff's inability to obtain employment was not an isolated experience.

b. Plaintiffs' evidence of causation and damages is sufficient under Illinois law.

The jury concluded that the widespread dissemination of Allstate's defamatory statements caused Plaintiffs' pecuniary damages. Plaintiffs offered testimony that they had been employable in first-quartile jobs, yet after the publication of Allstate's defamatory statements, Plaintiffs were virtually unemployable. This evidence was reasonable under the circumstances and thus satisfies Illinois law.

Allstate argues Plaintiffs failed to prove pecuniary loss because they offered no evidence that they were denied specific employment because of Allstate's statements. Br. 31–33. Under Illinois law, proof of specific employers who refused to hire Plaintiffs was not required. The evidence to establish a defamatory statement caused special damages varies based on the circumstances; testimony from particular prospective employers (or customers, in analogous contexts) is unnecessary to establish defamation damages where the claim is based on general lost opportunity.

The importance of context, and the ability to prove special damages when a publication is widely disseminated, was made clear in *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 367 Ill. App. 3d 48 (1st Dist. 2006), *reversed on other grounds*, 227 Ill. 2d 381 (2008). Imperial and Cosmo were discount clothing store competitors. Cosmo published an allegedly defamatory newspaper advertisement that Imperial claimed harmed its sales. In the weeks following publication, Imperial's sales decreased. Cosmo argued that Imperial needed to demonstrate particular customers were deterred from patronizing Imperial because of the defamatory publication. The trial court agreed and dismissed the claim. The appellate court reversed, holding that where there was "wide dissemination of the disparaging material to persons unknown and the plaintiff is in the business of offering goods for sale to the general public, it is obviously impossible for such a plaintiff to specifically identify the potential customers" who did not purchase goods as a result of the defamatory statements. *Id.* at 59. As for the quantum of proof required to show special damages, the appellate court concluded "a plaintiff is only obligated to be as specific as it is reasonable to require." *Id.* Relying on principles of tort law, the appellate court held that where the plaintiff claims a decline in business caused by a defamatory statement, "special damages are sufficiently alleged by asserting a decline in sales as compared to prior periods." *Id.*

The principle of *Imperial Apparel* applies here.[9] Plaintiffs do not complain of particular lost jobs. They were unaware of jobs they were not invited to pursue, as they were never contacted. As the jury learned from Haan, and read in the "learned treatise" (admitted and provided to the jury for use in deliberation, without objection), informed communications networks are very powerful in business environments and "[n]egative communications may occur unbeknownst" to a litigant. PX-55 p.181; Tr. 1464. Thus, where, as here, the defamation was published broadly, the resulting injury is broader in context. Plaintiffs' obligation to demonstrate special damages can be proven with similar testimony. *See Imperial Apparel,* 367 Ill. App. at 59, *citing* W. Keeton, *Prosser and Keeton on The Law of Torts*, § 128 at 972-73 (5th ed. 1984). Indeed, Plaintiffs have a stronger causation argument than Imperial given that all four defamed Plaintiffs, who were readily employable at all times before the defamation, suffered the same damage, making it more likely true that the defamatory statements caused their losses.

The Illinois Appellate Court reached a similar conclusion in *Tunca v. Painter*, 2012 IL App (1st) 093384. In *Tunca*, plaintiff, a surgeon, alleged other doctors in his hospital had falsely stated that he harmed a patient. *Id.* ¶¶ 3-4. The complaint alleged referrals decreased after the defamatory statement. The

[9] Although *Imperial Apparel* was decided on a motion to dismiss, because Illinois requires fact pleading rather than notice pleading, that ruling establishes that the facts alleged, "if proved, would entitle the plaintiff to relief." *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 193 (1995). Thus, the ruling demonstrates the evidence needed to prove the claim.

trial court dismissed the claim, and the appellate court reversed. Two principles applied in *Tunca* also apply here. First, the court inferred that doctors would hear and act on the defamatory statement even in the absence of allegations that particular doctors heard the defamatory statement. The "natural and probable consequence[]" of the defamation was that "it would be repeated to other doctors in that hospital." *Id.* ¶ 75. In this case, that inference has been proven through Allstate's CIO's testimony that she sent her email so that "all 300" of Allstate's investment personnel would "hear it from [her]" before its inevitable communication from others, Tr. 698, and testimony from multiple sources that the industry was close and sell-side brokers facilitated communication throughout the industry.

Second, the court held that when a plaintiff asserted defamation caused him to lose business, plaintiff need not specify how third parties became aware of the defamation or how they interpreted it. *Id.* ¶ 66; *Windsor Lake, Inc. v. Wrok*, 94 Ill. App. 2d 403, 406–08 (2d Dist. 1968) (same). Plaintiffs need not do so here.

Significantly, a recent Illinois case demonstrates that trial evidence very similar to the evidence in this case is sufficient to establish defamation caused special damages. In *Leyshon v. Diehl Controls North America, Inc.,* 407 Ill. App. 3d 1 (1st Dist. 2010), an executive fired "for cause" sued, claiming the statement that he was fired "for cause" precluded his future employment. Although plaintiff pursued a libel *per se* claim, the Illinois Appellate Court analyzed his damage claim under the standards of libel *per quod.* It addressed whether plaintiff had presented proof sufficient to show the statement caused special

damages, beyond the presumed damages that would otherwise attach to support a $2 million lost wage claim. *Id.* at 13.

The Illinois Appellate Court upheld the $2 million special damages award. As here, Leyshon testified he suffered pecuniary loss: he became unemployable. Leyshon's causation testimony was less abundant, but similar to the proof in this case. Leyshon testified his repeated attempts to seek employment were unsuccessful. He supported his claim with opinion testimony that someone in his position "would not be considered for a comparable position because of the implications" of the defamation. As with the sell-side brokers in this case, Leyshon's "contacts in the industry no longer returned his calls." *Id.* at 4, 11. There was no testimony of specific lost jobs, or from employers explaining why they did not hire Leyshon. The Illinois Appellate Court nonetheless held plaintiff's proof of damages was sufficient under Illinois law to sustain the jury's award of special damages. The evidence the jury heard in the instant case regarding causation came from more sources, and was more compelling than that found sufficient in *Leyshon*.

Leyshon, Imperial, and *Tunca* show the evidence of causation in this case was sufficient to sustain the jury's verdict. Illinois permits a plaintiff to recover damages in a *per quod* case where the proof of causation is appropriate to the context of the claim. If the claim is that plaintiff lost particular, identified opportunities, plaintiff may be required to present evidence about particular lost customers. In contrast, where the claim is that a defamatory publication was widely disseminated to persons a plaintiff could not even know and stigmatized

plaintiff, plaintiff may present corresponding proof of loss of opportunity. Here, Plaintiffs have shown through expert and fact testimony that Allstate's statements led to Plaintiffs' lost opportunities, which was sufficient under Illinois law.[10]

Allstate relies on inapposite cases, notably *Continental Nut Co. v. Robert L. Berner Co.*, 393 F.2d 283 (7th Cir. 1968), to assert Plaintiffs must identify particular lost jobs. When *Continental Nut* was decided nearly 50 years ago, this Court noted that at the time no Illinois appellate court had opined on special damages in a "fully tried" libel *per quod* action. *Id.* at 286. In the five decades since, Illinois appellate courts have laid out the relevant causation standard in *Imperial* and *Tunca* and applied that standard in a "fully tried" case in *Leyshon*. This Court now has a clear statement of Illinois law and should apply that standard here.

Continental Nut supports Plaintiffs' view that the required proof depends upon the context and dissemination of the defamation. The claim in *Continental Nut* was that a defamatory letter was distributed to three particular customers. Evaluating that claim, this Court noted the plaintiff, knowing the identity of those customers, with records of the previous purchases by those customers, and without proof of wider dissemination, had an obligation to show the "loss of

[10] Illinois's contextual approach is consistent with general principles of defamation law. Special harm sufficient to sustain an award of damages is supported by proof that the defamation "has caused [the plaintiff] a particular loss of the general type usually incident to a defamatory publication." Restatement § 622. The Restatement establishes the context of the statement defines the nature of proof necessary to sustain it.

profit attributable to patronage withheld by the particular customer and that such withholding was the result of the publication." *Id.* at 286. The Court addressed context: in a *per quod* case "based on loss of customers, where, … the plaintiff knows the identity of the customers it claims to have lost and has a record of the previous purchases of each," special damages "must be proved with that specificity" as to the particular lost customers. *Id; see also Babb v. Minder*, 806 F.2d 749, 759 (7th Cir. 1986) (explaining special damages showing in *Continental Nut* was insufficient because "plaintiff allegedly lost profits from specific customers but did not introduce evidence" "of the lost accounts" or "whether the defamation actually caused the loss"). The testimony of plaintiff's president in *Continental Nut* undermined causation: he did not know which customers plaintiff lost as a result of the statement, if any at all. In the context of a claim that the libel deterred specific customers, there was a failure of proof.

Continental Nut supports the proposition that proof of causation and damage depends upon context. In a case like *Continental Nut*, unlike this one, where the claim is that particular customers with established relationships went elsewhere because of defamation, the plaintiff must prove that proposition.

The other case Allstate relies on (Br. 29), *Taradash v. Adelet/Scott-Fetzer Co.*, 260 Ill. App. 3d 313 (1st Dist. 1993), is similarly distinguishable. As in *Continental Nut*, the *Taradash* plaintiff alleged specific lost customers with whom he formerly had business relationships. *Id.* at 315. Yet, the *Taradash* plaintiff failed even to plead special damages in his complaint. *Id.* at 318.

The claim here is very different. Before Allstate's publication, Plaintiffs were employed in highly-compensated positions. They were not seeking employment and did not have particular prospects for future employment under consideration. Plaintiffs did not know which potential positions were open to them. Allstate's defamation was disseminated worldwide and injured each Plaintiff in the marketplace generally, unlike *Continental Nut* and *Taradash*, where it was claimed that the defamation cost the plaintiffs specific customers. Here, it is unknown, and unknowable, which employers were seeking CFAs for first-quartile jobs. Plaintiffs could not identify the particular employers who chose not to call them due to Allstate's defamation. Plaintiffs proved Allstate's falsehood excluded them from a job market they previously occupied.

2. Substantial Evidence Shows Allstate's Statements Were "Of And Concerning" Plaintiffs.

The jury was instructed, consistent with Illinois law, that to be actionable, a defamatory statement must concern Plaintiffs. Dkt. 303 at 19. Allstate claims that the jury verdict should be reversed because there is no evidence to support the conclusion that the defamatory statements were "of and concerning" Plaintiffs. Br. 37–43.

Whether a defamatory statement concerns the plaintiff is a fact question to be decided by the jury. *Chapski v. Copley Press*, 92 Ill. 2d 344, 352 (1982). Illinois law permits defendants to be held liable even if the plaintiff is not identified by name. *Bryson v. News Am. Publ'ns, Inc.*, 174 Ill. 2d 77, 96–98 (1996); Dkt. 303 at 19 (jury instructions). As the Restatement provides, not everyone who reads a defamatory statement must conclude that it is about the

plaintiff. "[I]t is enough that any recipient of the communication reasonably so understands it." Restatement § 564 cmt. b.

Where a statement refers to a group, all members of the group can be found to be defamed. The Restatement gives the example of a report that "the officers of a corporation have embezzled its funds." *Id.* at § 564A. In that circumstance, each of the four corporate officers can recover. *Id.*; *see also Missner*, 393 Ill. App. 3d at 768 (defendant's statement accusing "one or more" of three attorneys of perjury was of and concerning each of the three attorneys). The same is true if the defamatory statement makes clear that only some of the group are involved: each can be found to be defamed because "the suspicion attached to him by the accusation." Restatement § 564A.

Whether a statement that *could be* about the plaintiff *is* about plaintiff is a question of fact. In a *per quod* case, extrinsic facts may demonstrate the statement refers to a particular individual. In *Brown & Williamson Tobacco Corp. v. Jacobson,* 644 F. Supp. 1240, 1246 (N.D. Ill. 1986), *aff'd in part, rev'd in part on other grounds*, 827 F.2d 1119 (7th Cir. 1987), the District Court upheld a jury verdict that a commentary was about the plaintiff, even though its name was never mentioned. The broadcast concerned plaintiff if viewers of the broadcast reasonably understood the statement to refer to it. The statement need not mention plaintiff by name, nor was it necessary that all people hearing the broadcast would make the connection. *Id.* at 1246.

There was sufficient evidence to prove Allstate's defamatory statements were about Plaintiffs. The 10-K identified as suspect individuals the "employees

responsible for trading equity securities in certain portfolios of two [Allstate] defined benefit pension plans and certain portfolios of" Allstate and a subsidiary. JX-1. Allstate terminated the employment of the portfolio managers in the growth, value, and quantitative analysis teams and outsourced those portfolios. Allstate computed losses to Allstate and the pension plans based on trades in the growth, value and quant teams only. Plaintiffs were the "employees responsible for trading equity securities" in the "adversely impacted" portfolios that were transferred to "an independent investment firm to conduct portfolio management and trading." JX-1.

Allstate's known punitive action towards Plaintiffs made it more certain the 10-K's statements were about them. Unlike other equity portfolio managers, Allstate turned off the email accounts of Plaintiffs, a fact known to people outside Allstate who continued to attempt to reach Plaintiffs yet whose emails to Plaintiffs were returned as undeliverable. Likewise, Plaintiffs' telephones were disconnected, return calls were unavailable, and voicemails shut down. Only Plaintiffs were escorted from the offices, refused access, denied severance and outplacement services, and forced to have other Allstate employees retrieve their belongings and deliver them to a loading dock. Tr. 479. The circumstances of their termination made clear to the recipients of the 10-K that when Allstate identified "employees responsible for trading equity securities" in "adversely impacted" portfolios transferred to Goldman, those statements were of and concerning Plaintiffs. This question of fact is committed to the discretion of the jury, whose verdict is supported by substantial evidence.

Allstate's cases (Br. 38–43) are inapplicable. *All* of Allstate's cases are *per se* cases, which, unlike this libel *per quod* case, may not consider evidence beyond the four corners of the defamatory statement. *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 267 (7th Cir. 1983). Here, that the statements concerned Plaintiffs is proven by evidence beyond the statement.

Allstate's cases are also distinguishable on other grounds. In *Brewer v. Hurst Publishing Co.*, 185 F.2d 846 (7th Cir. 1950), the defendant published photographs of an unnamed individual's hands, leg, and foot. Nothing identified the plaintiff or suggested the body parts pertained to him. *Id.* at 848.

Likewise, in *Latimer v. Chicago Daily News, Inc.*, 330 Ill. App. 295 (1st Dist. 1947), the defamatory statement referred to "despicable characters" among defendants in a case represented by "as craven a group of lawyers as I've seen." *Id.* at 296–98. The trial had 30 defendants, represented by 23 lawyers. The court concluded that the article did not brand the entire group as despicable or craven. *Id.* at 297–98.

In *Crosby v. Time, Inc.*, 254 F.2d 927 (7th Cir. 1958), the defamatory statement accused Teamsters officials of having conspired with gamblers. The plaintiff was a Teamsters official from Oregon. *Id.* at 927. The Court concluded it was not discernable how an ordinary reader would believe the article, which referred to activities in Seattle, referred to an official in Oregon. *Id.* at 929.

Finally, in *Vantassell-Matin v. Nelson*, 741 F. Supp. 698 (N.D. Ill. 1990), the publication referred to a married couple having sex on an airplane. Because the story did not identify the married couple, "[n]o reasonable individual reading

those statements would be able to identify them," "as distinguished from any other married couple on any American Airlines international flight." *Id.* at 710.

Beyond being a *per quod* rather than a *per se* case, the evidence here is entirely different. As juries may, the jury made a reasonable inference, supported by evidence, that the defamatory statements concerned Plaintiffs.

3. Substantial Evidence Shows Allstate's Statements Were False.

Allstate next claims that its statements are "substantially true." This is a defense. Allstate must prove the gist of its defamatory statement is true. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993). Whether a defamatory statement is substantially true is a jury question. *Id.* at 1228 (Illinois law). Here, Allstate makes the same arguments the jury rejected, as did the District Court on post-trial motions. Appx. 24.

On review, the question is whether a reasonable jury could have rejected Allstate's substantial truth defense. *See Gist v. Macon Cty. Sheriff's Dep't*, 284 Ill. App. 3d 367, 371 (4th Dist. 1996). In evaluating substantial truth, the jury, and on review this Court, looks to the "gist" or "sting" of the defamation. The defamatory gist of the statements was that Plaintiffs timed trades to benefit themselves by approximately $1.2 million, at the expense of their portfolios. Allstate asserted Plaintiffs' breach of duty caused Allstate to pay $91 million to the pension plans and cost Allstate another $116 million from its portfolio.

When evaluating defamation, a publication is evaluated in its entirety. Where the publication creates a defamatory implication "by omitting or strategically juxtaposing key facts," that "publication may be actionable" even if

particular statements in the publication are true, when viewed in isolation. *See Martin v. Hearst Corp.*, 777 F.3d 546, 552 (2d Cir. 2015). *See also* Dan B. Dobbs, *The Law of Torts*, § 566 (2d ed. 2017) (defamatory meaning can be determined from implication of publication).

There is ample evidence that Allstate's statements are false. Each Plaintiff testified the statements were false. Appx. 15-16. As the District Court concluded, "[t]here is no evidence in the record that contradicts plaintiffs' testimony." Appx. 16. That ends the inquiry: if the jury credited Plaintiffs' testimony, as is its prerogative, there is ample proof of falsity.

Undeterred, Allstate argues the statements are true because Allstate used conditional language, such as referring to "estimate[s]" of losses that "'could have"' resulted. Br. 44, 49. Allstate's argument fails, however, because Allstate omitted material facts necessary to assess the statements it made. Allstate omitted that "[n]o one believed, then or now, that this was an accurate description." Appx. 89. Allstate's statement that the portfolio managers improved their bonuses omitted the actual conclusion, that there was "virtually no effect on bonuses." *Id.* While Allstate's conditional language may immunize minor imprecision, it does not excuse Allstate's statements. If there was an actual pension loss of $89 million, a disclosed loss of $91 million might be "substantially" true. Instead, Allstate confessed that "[n]o one believed" any of the figures Allstate published, revealing the statements were not substantially true. *Id.* Finally, Allstate made its statements in a securities filing, which is subject to strict standards of truth. Companies go to lengths to qualify such

statements. Allstate's disclosure that it repaid the pension funds $91 million removes all ambiguity. Allstate stated – falsely – that Plaintiffs engaged in wrongdoing. As Greffin testified, there was too much detail. If Allstate was going to make the statements it did, it needed to make a complete statement.

Allstate's statements omitted additional critical facts needed to understand their context. Allstate failed to disclose: (a) trading to minimize the Dietz effect on program trades was an unwritten policy at Allstate, practiced in larger portfolios, such as fixed income, directed by the head of the pension plans to portfolio managers in equity, fixed income, and even outside Allstate; (b) the NERA methodology was based on the unproven assumption that every trade for six years by every portfolio manager on a Dietz beneficial day following a Dietz-harmful day was manipulated; (c) it assumed trades executed "at market on close," as was done by most institutions every day, were manipulated simply because they were executed at the end of the day; (d) many of the so-called timed trades benefitted Allstate – it even withheld that the pension funds made $38 million on the "suspicious" trades; and (e) the equity group was headed by three leaders during the six years at issue, who would have had to have agreed to a scheme to jeopardize their careers and seven-figure incomes to obtain – in most years – no bonus benefit.

Next, Allstate argues the statements are substantially true even if they are read to imply that Plaintiffs timed trades. Br. 45–48. Allstate's argument misstates the defamatory gist, which is that Plaintiffs timed trades to benefit themselves at the expense of the portfolios they managed. Allstate asserts such

statements are true because Plaintiffs were aware of the Dietz effect. Allstate only proved what was known throughout Allstate: the timing of trades made a difference to results of some trades, as was inherent in the Dietz methodology. The defamatory sting, however, was that trades were timed in violation of a duty, benefitting Plaintiffs at the expense of Allstate. No evidence supports the claim that trades were timed to harm the portfolios by $207 million.

Finally, Allstate argues the DOL letters and other evidence do not prove falsity. Br. 48–50. Again, Allstate's argument is based on an improper narrowing of the defamatory implication of the statements. If Allstate had reported truthfully that its investigation may have shown: (a) a handful of timed trades in the equity group, consistent with Allstate practice, (b) timed trades in other Allstate divisions, which (c) Allstate could not conclude harmed Allstate or its pension funds or benefitted the traders, and (d) which could be explained based on Allstate's policy, and decision not to purchase systems to track actual portfolio performance, the statements would not have been defamatory. Instead, Allstate reported that the equity group engaged in improper trading to benefit themselves and to harm portfolios by $207 million. The DOL letters buttress Plaintiffs' testimony that these defamatory statements were false.

4. Substantial Evidence Shows Allstate Abused Its Conditional Privilege.

Finally, Allstate claims the evidence was insufficient to show Allstate made statements with actual malice. Br. 51–52. Plaintiffs agree they were required to prove Allstate made the defamatory statements knowing them to be false, or with reckless disregard as to their truth. Allstate does not deny the instructions

correctly advised the jury of the elements of actual malice. Dkt. 303 at 22. Instead, Allstate rehashes factual arguments the jury rejected.

There is substantial evidence demonstrating constitutional malice. Prior to issuing its public statements, Allstate knew Plaintiffs denied timing trades for personal benefit, the Dietz effect was well known among Allstate investment management and clients, and the investigation was based on unproven assumptions. At the same time Allstate was advising the investing public that Plaintiffs' actions had cost Allstate and the pension funds $207 million, Allstate was privately advising the DOL that these numbers were unreliable. Allstate explained to the DOL that "[n]o one believed, then or now," that these numbers were accurate. Similarly, Allstate advised the investing public that Plaintiffs had acted improperly in order to benefit their personal bonus pool. When making those statements, Allstate knew that the impact on bonuses was unproven and possibly nonexistent. Allstate also advised the investing public that the portfolio managers considered Dietz in connection with their work. Allstate's investigation, however, proved that many within Allstate were aware of the Dietz effect, directed the trades be timed in order to minimize the dislocation caused by the Dietz effect, and thought nothing of it.

Based on the totality of the evidence presented at trial, the jury's conclusion that Allstate acted with actual malice is amply supported by the evidence.

II. THIS COURT SHOULD AFFIRM THE JURY'S VERDICT AND THE DISTRICT COURT'S FINDING THAT ALLSTATE WILLFULLY VIOLATED FCRA.

A. The Jury's Verdict May Only Be Reversed If There Is No Evidence Supporting It; The District Court's Finding May Only Be Reversed For Clear Error.

The jury determined, and the District Court separately found, Allstate's FCRA violations were willful. Appx. 29, 32; Dkt. 303 at 32. This Court reviews with extreme deference the jury's verdict that Allstate willfully failed to provide Plaintiffs a summary of communications with third-parties that provided a basis for their termination. The Court may overturn the jury verdict "[o]nly when there is a complete absence of probative facts to support the conclusion reached." *Lavender*, 327 U.S. at 653. This Court reviews the District Court's ruling for clear error. *Crompton,* 745 F.3d at 295–96; *Trovare Capital Grp., LLC v. Simkins Indus., Inc.*, 794 F.3d 772, 779 (7th Cir. 2015).

Allstate asserts that whether it willfully violated FCRA is a question of law, Br. 26, but the case it cites provides that "willfulness" *can* be decided as a matter of law on summary judgment where the facts are undisputed, not that it is a question of law in other circumstances. *See Van Straaten v. Shell Oil Prods. Co.*, 678 F.3d 486, 490–91 (7th Cir. 2012).

B. Substantial Evidence Supports The Jury's Verdict And The District Court's Finding That Allstate Willfully Violated FCRA.

FCRA requires an employer to provide a summary of its communications with third parties that provide a basis for adverse action against an employee. FCRA's text could not be clearer: after an "adverse action in whole or in part" based on a "communication," the employer shall disclose "a summary containing

the nature and substance of the communication upon which the adverse action is based." 15 U.S.C. § 1681a(y)(2). A neighboring provision defines "communication" to include statements made to an employer in connection with an investigation of "suspected misconduct" or compliance with "written policies of the employer." 15 U.S.C. § 1681a(y)(1). A "summary" is "a short, clear description that gives the main facts or ideas about something." *Cambridge English Dictionary*, Cambridge University Press (2017), http://dictionary.cambridge.org/dictionary/english/summary.

Brett Winchell, Allstate's Human Resources Director, notified each Plaintiff of his or her termination. Appx. 30. Winchell did not disclose a summary of Steptoe's and NERA's investigation. *Id.* In support of its conclusion that Allstate willfully violated FCRA, the District Court found Winchell's communications were limited to "five bullet points," none of which satisfied FCRA's requirements. *Id.*; *see supra* note 5. The District Court found Allstate failed to disclose important facts about the investigation: "[n]o mention was made to any plaintiff of a specific delayed trade timed to enhance a bonus" or "of any specific adverse effect from any trade." Appx. 30. When asked if he was "provided any sort of summary of the results" of the investigation, Winchell answered "No." Tr. 1270–71.

Based on these facts, the jury correctly concluded Allstate's failure to provide a summary of the investigation was "willful." Appx. 31. In *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), the Supreme Court held that a company that acts in "reckless disregard" of FCRA commits a "willful"

violation. If the company's reading of the statute is "'objectively unreasonable,"' the statutory violation can be "deemed a 'willful' violation." *Van Straaten*, 678 F.3d at 489 (quoting *Safeco*, 551 U.S. at 69). A company acts in "reckless disregard" even without knowledge that it is violating FCRA's terms. *Id.* at 68 n.18; *Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 725–26 (7th Cir. 2008).

Allstate willfully violated FCRA by failing to provide any summary of its communications with Steptoe and NERA. Allstate withheld the nature of the investigation and NERA's conclusions presumably because it would highlight the failings of its assumptions, conclusions, and public statements. Only a single bullet point of Winchell's script – referencing the "Code of Ethics" – was related to the investigation and no NERA or Steptoe evidence indicated they communicated about Allstate's Code of Ethics. Tr. 1260-61; Appx. 30. Winchell provided *nothing* approaching a summary of the *results* of the investigation Allstate was statutorily required to summarize. Winchell did not disclose the "main facts" Allstate and NERA conveyed. Later, Plaintiffs requested a summary of the investigation. PX-78; Appx. 31. None was given. Appx. 31. At that point, Allstate's willful FCRA violation became *knowing*.

In other contexts, this Court has held the recitation of subject-matter is not a summary. In *United States v. Duvall*, 272 F.3d 825, 828 (7th Cir. 2001), this Court interpreted what is now Federal Rule of Criminal Procedure 16(a)(1)(G), which requires the government to provide "a written summary" of expert testimony. This Court held the government must disclose "what opinion

the expert would offer," rather than "a list of the general subject matters to be covered." A "list of topics" is insufficient. 272 F.3d at 828. Here, Winchell disclosed only the most general subject of the investigation, not the findings Steptoe and NERA communicated to Allstate. Nor could he, as Allstate limited Winchell to delivering the five-bullet script. It was "doubtful [that] Winchell was aware of a summary of the investigation." Appx. 30. Winchell "just arranged meetings," "wasn't involved in the actual investigation," did not have an understanding of the "nature of the investigation," and did not know Steptoe or NERA were involved. Appx. 30; Tr. 1248–49, 1274.

Allstate's arguments are unavailing. *First*, Allstate contends that the lack of guidance on what "level of detail" an employer must provide renders Allstate's interpretation of FCRA objectively reasonable. Br. 54. Allstate concedes guidance is unnecessary when the statute is clear, *id.*, and FCRA is clear. Allstate must summarize the results of the investigation Steptoe and NERA reported. Because Allstate failed to provide *any* detail, the precise required level of detail is immaterial.

Second, Allstate asserts Plaintiffs knew counsel was investigating Dietz-motivated trading and that knowledge, combined with Winchell's statements, provided Plaintiffs an adequate summary. Br. 55–56. FRCA required Allstate to provide a summary of the *results* of the investigation as communicated to Allstate "upon which the adverse action[s] [were] based." 15 U.S.C. § 1681a(y)(2).

Third, for the first time on appeal, Allstate claims it is "doubtful" NERA's analysis qualifies as a "communication" under 15 U.S.C. § 1681a(y)(2). Br. 56–

57. Allstate waived this issue by failing to raise it below. *See Weigel v. Target Stores*, 122 F.3d 461, 464 (7th Cir. 1997).

Even on the merits, Allstate erroneously contends the results of the investigation communicated to Allstate do not constitute "consumer report[s]." *See* Br. 56–57. Allstate argues Section 1681a(y)(2) only covers "interviews with victims and witnesses of harassment or other employee wrongdoing, not expert analysis of company data." Br. 57. Not so. FCRA defines an "investigative consumer report" to include a report "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." 15 U.S.C. § 1681a(e) Here, Steptoe conducted "personal interviews" with "associates" of Plaintiffs, which resulted in Steptoe's and NERA's report to Allstate. Those communications are within an "investigative consumer report." *See, e.g.,* Merrick T. Rossein, *Disclosure of investigations—The Fair Credit Reporting Act*, 2 Emp. L. Deskbook Hum. Resources Prof. § 25:16 (Dec. 2016 update) (after the 2003 amendment to FCRA, "a communication between an outside investigator and an employer" must be disclosed to an employee "after [the employer has] taken adverse action based on the report").[11]

[11] To the extent Allstate asserts the relevant "communications" are the interviews, Br. 57, Allstate is incorrect. 15 U.S.C. § 1681a(y)(2) provides "the sources of information acquired solely for use in preparing … an investigative consumer report" "need not be disclosed." The communication to be summarized is the "consumer report." *Id.*

FCRA's history supports this reading. FCRA was amended in 2003 to "clarify that communications to an employer by outside third parties hired to investigate employee misconduct … will not be considered to be 'consumer reports' and will not require advance notice or authorization." But the amendments provide "[i]f any adverse action is taken based on the communication, as here, the employer generally is required to disclose to the employee a summary containing the nature and substance of the communication." *FCRA Amendments Will Facilitate Employee-Misconduct Investigations Letter No. 730 Issue No. 1348*, Empl. Prac. Guide 7221815, 2004 WL 7221815 (Jan. 8, 2004).

Fourth, Allstate asserts that it was not required to provide a summary because the analysis was attorney work-product. Br. 56. Again, Allstate waived this argument by not raising it below. Even on the merits, the attorney-work product doctrine only "protects documents prepared by attorneys in anticipation of litigation for the purpose of analyzing and preparing a client's case." *Sandra T.E. v. S. Berwyn Sch. Dist. 100,* 600 F.3d 612, 618 (7th Cir. 2010). Allstate does not contend, and did not prove, NERA's analysis was in anticipation of litigation.

Fifth, contrary to Allstate's implication, Br. 57, the jury and District Court awarded damages for Allstate's failure to disclose Steptoe's and NERA's "oral reports to Allstate counsel" *before* Winchell's December 2009 conversations with Plaintiffs. *See* Appx. 30. The District Court properly instructed the jury that Allstate must have failed to disclose a summary of a "communication of suspected misconduct on which [Allstate] relied in taking any adverse action

against a plaintiff." Dkt. 303 at 24. Allstate only could "rel[y]" on communications that occurred before it took adverse action against Plaintiffs. Allstate does not challenge the jury instructions and this Court "assume[s] the jury follows the instructions given." *United States v. Ajayi*, 808 F.3d 1113, 1123 (7th Cir. 2015). Allstate fails to "overcome that presumption." *Id.*

C. Plaintiffs Suffered A Concrete And Particularized Harm.

Allstate argues Plaintiffs did not suffer an injury-in-fact from Allstate's failure to provide them with a summary. Br. 59–61. Allstate is incorrect.

To establish injury-in-fact, plaintiffs must show they suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (citation omitted). "[T]he risk of real harm" can satisfy this requirement even if the harm "may be difficult to prove or measure." *Id.* at 1549.

The District Court found facts establishing the concrete risk of harm. The court found that had Allstate complied with FCRA, it

> would have revealed [to Plaintiffs] 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.

Appx. 31. Plaintiffs would have been able to show the investigation did not prove Plaintiffs violated the ethics code, undermining the stated basis for their termination. Plaintiffs testified that, if they had the summaries, they could defend themselves to potential employers who knew of Allstate's publication. Tr. at 172–73. Without a summary, Plaintiffs were hampered from defending

themselves before Allstate or potential employers. This constitutes actual, concrete, and particularized harm. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (failure to obtain information that "would help them" constitutes "injury in fact"); *Groshek v. Time Warner Cable, Inc.*, No. 16-3355, 16-3711, 2017 WL 3260080, at *3-4 (7th Cir. Aug. 1, 2017) (defendant's failure to provide information that must be disclosed pursuant to a statute that seeks to protect plaintiff from the kind of harm plaintiff alleges suffices for standing).

Allstate asserts it already "knew of Plaintiffs' explanations" from their interviews. Br. 60. As shown above, Plaintiffs did not know the results of the investigation and so were unable to respond to Steptoe's and NERA's findings or bring it to the attention of other management or concerned shareholders. Plaintiffs immediately retained counsel to obtain an explanation so they could defend themselves, seek reconsideration from Allstate, or show that Allstate had improperly paid $91 million to the pension funds. Plaintiffs later proved to the jury's satisfaction that Allstate's charges were false.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEYS' FEES.

A. This Court Reviews The Attorneys' Fees Award For Abuse Of Discretion.

This Court "give[s] a district court's fee decision great deference because of the court's familiarity with the case." *Wachovia Sec., LLC v. Banco Panamericano, Inc.*, 674 F.3d 743, 759 (7th Cir. 2012). By virtue of that familiarity, "the district court certainly is in a much better position than" the court of appeals "to determine the number of hours reasonable expended."

Spegon v. Catholic Bishop of Chi., 175 F.3d 544, 551 (7th Cir. 1999) (internal quotation marks and citation omitted). A fee award is reviewed "under a 'highly deferential' version of the abuse-of-discretion standard." *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010) (citation omitted).

B. The District Court Did Not Abuse Its Discretion In Awarding Fees.

Allstate concedes Plaintiffs are entitled to fees for work on the FCRA claims and claims "related" to the FCRA claims. Br. 61–62. Claims are "related" when they "arise out of a common factual core or are based on related legal theories." *Zabkowicz v. W. Bend Co., Div. of Dart Indus.*, 789 F.2d 540, 551 (7th Cir. 1986). Even claims "based on distinct legal theories" are related if they "involve a common core of facts." *Id.*

The District Court here made a factual finding that "[t]here was a substantial overlap of the [FCRA and defamation] claims requiring time and attention to discovery and trial efforts." Appx. 37. The court also made a factual finding – not a legal conclusion as Allstate maintains, Br. 62, that "[t]he central issue in the case – the investigation of possible employee misconduct – related to all of the claims." *Id.* The District Court approved Plaintiffs' fee request, which sought less than half of the fees Plaintiffs' attorneys incurred and only included work on or related to the FCRA claims. Appx. 37–38.

Allstate challenges these factual findings. Despite continuing to dispute the FCRA claim, Allstate contradictorily contends that it was easy to establish the claim. It asserts Plaintiffs only needed to show "what Plaintiffs were told (or given) at their … termination" and what "they understood about the underlying

investigation from their previous meetings with Steptoe." Br. 62. Allstate is incorrect: Plaintiffs also had to demonstrate what Allstate was required to summarize. To do so, Plaintiffs had to understand the investigation, its results, and what was communicated to Allstate. *See supra*. Exemplifying the overlap of the defamation and FCRA claims, understanding the investigation allowed Plaintiffs to prove Allstate defamed Plaintiffs and to prove Allstate failed to summarize Steptoe's and NERA's investigation.

Only after learning about the nature and results of the investigation could Plaintiffs prove Winchell's disclosures violated FCRA because they did not include a "summary" under 15 U.S.C. § 1681a(y)(2). The District Court accordingly did not abuse its discretion by awarding fees for time spent on the motion to bar the testimony of Jordan Milev, the NERA consultant who headed the investigation. Nor did it abuse its discretion by awarding fees for deposing witnesses about communications between Allstate and Steptoe and NERA, among other relevant topics for FCRA purposes. Br. 63–64. The nature and results of that investigation were integral to Plaintiffs' FCRA claims.

Allstate challenges particular time entries on appeal as unrelated to FCRA. Allstate fails to appreciate that "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Indeed, "[w]here several claims arise out of a common factual core … 'separating out the legal services rendered with respect to these overlapping claims would be an exercise in futility.'" *Zabkowicz*, 789 F.2d at 551 (citation omitted). Yet Allstate

contends that, though the District Court only awarded Plaintiffs' fees for half the hours their attorneys expended on trial, such an award constituted an abuse of discretion because counsel did not spend half its trial time "on the FCRA claims." Br. 64. In light of the overlap between the FCRA and defamation claims, classifying trial time as either falling exclusively into the FCRA or defamation bucket would constitute such "an exercise in futility."

Conclusion

The jury's verdict on the defamation and FCRA claims and the District Court's findings on the FCRA claim and the award of fees should be affirmed in their entirety.

August 10, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,908 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 12-point Bookman Old Style font for the main text and footnotes.

Dated: August 10, 2017

s/Michael T. Brody
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CIRCUIT RULE 30(e) STATEMENT

Michael T. Brody, an attorney, certifies that the materials described in Circuit Rule 30(e) are bound with this brief.

August 10, 2017

s/Michael T. Brody
Michael T. Brody

CERTIFICATE OF SERVICE

Michael T. Brody, an attorney, hereby certifies that on August 10, 2017, I caused the **Response Brief of Plaintiffs-Appellees Daniel Rivera, et al.** to be electronically filed 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 this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I further certify that pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I will cause 15 copies of the above named brief to be transmitted to the Court via hand delivery within seven days of that notice date.

Dated: August 10, 2017

s/Michael T. Brody
Michael T. Brody

SUPPLEMENTAL APPENDIX
Table of Contents

Outlook E-mail

From: Walsh, David
Sent: 11/9/2004 12:07:44 PM
To: O'Connor, William K.
Subject: ARP Govie sales for the week
Importance: High

Bill,

I've taken a look at the APP and ARP portfolios and to bring the duration of the ARP portfolio down to the level of the APP portfolio will require that the $55.6Mil in sales that are done have a duration that is 0.17 years higher than the duration on the 6.125's of 11/15/27. I'd prefer doing the trades on an up day to minimize any Dietz effects. I am indifferent as to how you want to structure a sales program, only that it raise approx $55.6Mil and get close to the desired duration level.

David Walsh

Confidential ALLPRIV0001162.053

Outlook E-mail

From: Rivera, Daniel
Sent: 12/6/2007 11:34:30 AM
To: Fiorito, Chris; Pincombe, Cynthia; Smith, Chelsea; Kensinger, Stephen; Meacock, Deborah; Scheuneman, Rebecca; Mian, Zia; Christie, Peter; Vitek, Michael
Subject: FW: Equity Plan: Dan R. will be putting to work $200MM in the cash market (this has been self-funded from previous weeks). I'm assuming this will take place soon (1st down day) as I adjust the futures position. Dan will keep us in the loop. Pete

---

Commitment to Concentrated from Core.

Dan

Daniel J. Rivera, CFA

Managing Director Equities

Allstate Investments, LLC

847-402-6118

From: Hecht, Peter
Sent: Thursday, December 06, 2007 10:34 AM
To: Cloghessy, Mark; Rivera, Daniel
Subject: Equity Plan: Dan R. will be putting to work $200MM in the cash market (this has been self-funded from previous weeks). I'm assuming this will take place soon (1st down day) as I adjust the futures position. Dan will keep us in the loop. Pete

Equity Plan: Dan R. will be putting to work $200MM in the cash market (this has been self-funded from previous weeks… transition plan). I'm assuming this will take place soon (1st down day) as I adjust the futures position. Dan will keep us in the loop. Pete

ALL0028591

Outlook E-mail

From: Walsh, David
Sent: 12/18/2007 11:30:47 AM
To: Follmer, Stephan (Inv)
Subject: RE: INTECH cash flows to be wired into APP and ARP

I will be buying approx $11Mil in govies in APP and $37Mil in ARP...no plans on the remaining cash.

David

-----Original Message-----
From: Follmer, Stephan (Inv)
Sent: Tuesday, December 18, 2007 9:40 AM
To: Walsh, David
Subject: RE: INTECH cash flows to be wired into APP and ARP

David,

Thanks for the heads up. Will you be buying govies with these funds? If not, any thoughts on how long I'll have the cash?

Regards,

Steve

Stephan Follmer
Intermediate Portfolio Manager - Short Term Investments
Allstate Investments, LLC
847-402-8945
sfollmer@allstate.com
-----Original Message-----
From: Walsh, David
Sent: Tuesday, December 18, 2007 9:35 AM
To: Follmer, Stephan (Inv); Maloney-Knauff (Inv.Law), Patrice
Subject: INTECH cash flows to be wired into APP and ARP
Importance: High

Patrice,

Patrice,

The reports I get from OPS shows that the following amount of cash will be hitting the APP and ARP cash accounts for INTECH tomorrow (Wednesday). Please wire the following amounts on Wednesday Dec 19 from the APP and ARP accounts with INTECH to the general cash accounts.

Wires to APP from INTECH cash account of $25,100,000
Wires to ARP from INTECH cash account of $87,100,000

David Walsh

-----Original Message-----
From: Gina McBriar [mailto:gmcbriar@intechjanus.com]
Sent: Friday, December 14, 2007 9:06 AM
To: Walsh, David
Cc: jtrow@intechjanus.com; operations@intechjanus.com
Subject: RE: INTECH Transaction Request Confirmation (I0359LG Allstate Pens Pl & I0346LG Allstate Ret Pln) / RE: YE withdrawals for Allstate

Good Morning Mr. Walsh:

I can confirm that we will raise cash today, Market on Close order.

Regards,
Gina McBriar
Cash Flow Coordinator
INTECH
2401 P.G.A Boulevard, Suite 100
Palm Beach Gardens, FL 33410
Direct: 561-776-2203
Fax: 561-775-1150
operations@intechjanus.com
www.intechjanus.com

-----Original Message-----
From: Walsh, David [mailto:DWALSH@allstate.com]
Sent: Friday, December 14, 2007 9:55 AM
To: Gina McBriar
Cc: jtrow@intechjanus.com
Subject: RE: INTECH Transaction Request Confirmation (I0359LG Allstate Pens Pl & I0346LG Allstate Ret Pln) / RE: YE withdrawals for Allstate

Jason or Gina,

Will the sales noted below be occurring in the portfolio today? If so, do you plan on executing over the course of the day or will you be doing it on the close?

David Walsh
Allstate

-----Original Message-----
From: Gina McBriar [mailto:gmcbriar@intechjanus.com]
Sent: Monday, December 10, 2007 4:12 PM
To: Walsh, David; Maloney-Knauff (Inv.Law), Patrice
Cc: operations@intechjanus.com; jtrow@intechjanus.com
Subject: INTECH Transaction Request Confirmation (I0359LG Allstate Pens Pl & I0346LG Allstate Ret Pln) / RE: YE withdrawals for Allstate

Good Afternoon Mr. Walsh & Patrice:

We have received your notice of a scheduled withdrawal from your INTECH account Allstate Investment Management Company Agents Pension Plan, I0359LG, Bank of New York custodian account 107707. We will have ($25,100,000.00) available for withdrawal on 2007-12-19 as requested.

AND

We have received your notice of a scheduled withdrawal from your INTECH account Allstate Investment Management Company Retirement Plan, I0346LG, Bank of New York custodian account 131038. We will have ($87,100,000.00) available for withdrawal on 2007-12-19 as requested.

If you have any questions or concerns, feel free to call or email me at the address below. Please let us know immediately if you disagree with any details of the transactions listed above.

Regards,

Gina McBriar
Cash Flow Coordinator
INTECH
2401 P.G.A Boulevard, Suite 100
Palm Beach Gardens, FL 33410
Direct: 561-776-2203
Fax: 561-775-1150
operations@intechjanus.com
www.intechjanus.com

-----Original Message-----
From: Maloney-Knauff (Inv.Law), Patrice [mailto:PKNAUFF@allstate.com]
Sent: Monday, December 10, 2007 2:51 PM
To: Gina McBriar
Cc: operations@intechjanus.com; Walsh, David
Subject: RE: YE withdrawals for Allstate

Gina:

Pursuant to David Walsh's email dated December 7th, please be advised that Allstate will withdrawal funds from the accounts on December 19, 2007 in the following amounts:

APP Account # 107707 $25,100,000
ARP Account # 131038 $87,100,000

I intend to move the funds first thing on Wednesday morning on December 19th; see attached Redemption Letter.

Please acknowledge your receipt of this email notification. Thanks.

Patrice Maloney-Knauff
Counsel
Allstate Investments, LLC
3075 Sanders Road, Suite G5A
Northbrook, Illinois 60062
847.402.4231 (ph)
847.402.6639 (fx)
pknauff@allstate.com

-----Original Message-----
From: Gina McBriar [mailto:gmcbriar@intechjanus.com]
Sent: Monday, December 10, 2007 1:10 PM
To: Maloney-Knauff (Inv.Law), Patrice
Cc: operations@intechjanus.com
Subject: FW: YE withdrawals for Allstate
Importance: High

Good Afternoon Patrice:

We have received the notice below from Mr. Walsh.

Please provide the INTECH/Janus or Custodian Bank account numbers so we may process the requests.

Thank you,
Gina McBriar
Cash Flow Coordinator
INTECH
2401 P.G.A Boulevard, Suite 100
Palm Beach Gardens, FL 33410
Direct: 561-776-2203
Fax: 561-775-1150
operations@intechjanus.com
www.intechjanus.com

..... Forwarded Message .....
From: "Walsh, David"
To: "Jason Trow"
Cc: "Maloney-Knauff (Inv.Law), Patrice"
Date: Fri, 7 Dec 2007 14:21:19 -0600
Subj: YE withdrawals for Allstate

Jason,

The pension plan portfolios are taking down the equity exposure significantly this month across both the internally and externally managed funds. I am also taking off some of the growth overweight that I have had on all year. As a result of the dual effect of reducing overall exposure and reducing the growth bet you are being more adversely impacted than the value funds. I would like to have the following amounts sold sometime next week but no later than next Friday December 14'th, so that we can wire cash out of the account on December 19'th (3 days settlement).

The Allstate Agents Pension plan will be withdrawing $25,100,000

The Allstate Retirement plan will be withdrawing $87,100,000.

I have left you a voicemail as well. My attorney (Patrice Maloney-Knauff) will be sending you the notice, but I wanted to give you a heads up. From a performance measurement standpoint it would be preferable if you did the sales program on an up day since this is a large percentage of the total portfolio (slightly over 50%).

David Walsh