Nos. 12-35238, 12-35319

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OBSIDIAN FINANCE GROUP, LLC; KEVIN D. PADRICK,

Plaintiffs-Appellees and Cross-Appellants

v.

CRYSTAL COX,

Defendant-Appellant and Cross-Appellee

On Appeal From the United States District Court
for the District of Oregon
No. 3:11-cv-00057-HZ
Honorable Marco A. Hernandez

OBSIDIAN FINANCE GROUP, LLC AND KEVIN D. PADRICK'S PETITION FOR REHEARING EN BANC

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WHY EN BANC CONSIDERATION IS NECESSARY

The panel decision conflicts with the express language of a federal rule of civil procedure and prior decisions of this Court regarding the preservation requirements for jury instruction errors. The panel decision also conflicts with existing decisions of the Supreme Court and this Court regarding the kinds of statements that are actionable in defamation under the First Amendment. Consideration en banc is necessary to secure and maintain the uniformity of the Court's decisions on these questions of exceptional importance.

In applying *de novo* review to an unpreserved instructional error, the panel decision eviscerates Federal Rule of Civil Procedure 51and creates a new, sweepingly broad "awareness" exception that swallows the rule and renders it meaningless. According to the panel, parties who do not comply with Rule 51 are not limited to "plain error" review—even though that is what Rule 51expressly provides since its 2003 amendment. Nor are they required to satisfy the three criteria for what was historically this Circuit's "sole" common law exception to Rule 51. Rather, the panel adopts an expansive new exception that is shockingly broad, unfair to trial judges and litigants, and opens the floodgates for unpreserved instructional errors. It not only changes the outcome of this case, but substantially lowers the bar for preservation of instructional errors in this Circuit.

The panel decision also improperly extends First Amendment protection to a type of speech that is *not* constitutionally protected under the Supreme Court's decision in *Milkovich v. Lorain Journal Co*., 497 U.S. 1 (1990). The panel decision, which holds public accusations of criminal conduct to be constitutionally protected "opinion," conflicts with *Milkovich* and this Court's own post-*Milkovich* decisions.

FACTS

This is a defamation action. Defendant Crystal Cox made numerous false statements about Kevin Padrick and Obsidian ("Plaintiffs") in online blogs, accusing them of criminal conduct in their business, then offered to remove them for, in the district court's words, the "small but tasteful sum" of $2,500 per month. The following facts are relevant to the issues presented for en banc consideration.

Padrick is a principal and owner of Obsidian, which provides advisory services to businesses, including businesses in distress. In December 2008, Obsidian was retained to provide services to the bankruptcy estate of an Oregon company called "Summit." (2-SER-94-98.) Padrick eventually became Summit's Chapter 11 trustee and, later, trustee of its liquidating trust. (Pls. Trial Ex. 30.) At all times, Padrick sought to recover the maximum amount possible for Summit's creditors, virtually all of whom were defrauded Summit clients because it turned

out the Summit principals had been running a Ponzi scheme and misappropriating client funds. (2-SER-68-70.) Padrick has recouped over 85% of the stolen money to date, an extraordinary result in a Chapter 11 case. (*Id.*) The Summit principals have been convicted of fraud. (2-SER-70.)

In 2010, Cox, a self-proclaimed "investigative blogger," with whom Plaintiffs had no prior relationship or contact, began posting false statements about Plaintiffs on various websites, including ethicscomplaint.com and bankruptcycorruption.com. (2-SER-155-187.) In her posts, Cox repeatedly calls Plaintiffs "criminals" who have committed "fraud," "tax fraud," "corruption," "deceit on the government," "money laundering," "defamation," "harassment," and other crimes, mostly related to Summit. (*Id.*) She asserts that Plaintiffs have bribed politicians and media (2-SER-161) and that "many" people have told her Padrick "is not above killing someone to shut them up" (2-SER-170).

Plaintiffs sent a cease-and-desist letter in December 2010, demanding Cox stop making false statements about them. (2-SER-119.) Cox immediately posted online that she would continue "exposing" Plaintiffs' crimes in her posts "in great detail and daily []...FOREVER." (2-SER-171.) On December 25, 2010, Cox again posted false statements on bankruptcycorruption.com ("the 12/25/10 post"), accusing Plaintiffs of tax fraud and other crimes. (2-SER-115.) Per Cox, this post

has gone "viral," is "everywhere," and, due to Cox's Internet skills, appears as a top search result—along with her other derogatory posts—whenever someone searches online for Padrick or Obsidian. (2-SER-103-110.)

Plaintiffs sued Cox for defamation. Almost immediately, Cox offered her "services" to Plaintiffs. (2-SER-123.) For $2,500 a month, Cox would take down her own posts, "protect" Obsidian's online reputation from people like her, and "promote" its business. (*Id.*) Plaintiffs rejected Cox's extortion attempt.

It is undisputed that Cox's derogatory statements about Plaintiffs are all completely false and that she made no effort to verify them. (*E.g.*, 2-SER-87-89.) Nonetheless, the district court allowed only one post to go to the jury—the 12/25/10 post, which appeared on a website that looked more legitimate to the court. (1-SER-33-35.) The court ruled on summary judgment that all of Cox's other false statements were constitutionally protected "opinion." (1-SER-49.) It noted that anything posted on an online blog is "inherently" unlikely to be actionable. (1-SER-9.)

The parties were ordered to submit instruction requests and trial memoranda a week before trial. (Docket 39.) Cox did not request any instructions. In her memorandum, Cox argued that the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) applied because Plaintiffs

were "public figures." (Docket 81 at 4-6.) Separately, she argued two Oregon statutory defenses based on her being "media." (*Id*. at 1-4.) The district court rejected Cox's "public figure" argument, holding that Plaintiffs were not public figures. (1-ER-39-43.) It construed Cox's "media" argument to implicate *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which the Supreme Court adopted a negligence standard for media defendants in defamation actions, and explained why it was rejecting Cox's argument that she was "media." (1-ER-7; 1-ER-43.)

The case proceeded to trial. At the close of evidence, the court proposed instructions, including an instruction that knowledge and intent are not elements of defamation under Oregon law. (2-ER-181.) The court asked if the parties had any objections, and Cox said twice she did not. (2-SER-111-114). The court then gave the instructions. Recognizing the great damage Cox has caused to Plaintiffs' reputations, the jury awarded $2.5 million to Plaintiffs. (2-SER-56.)

After verdict, Cox obtained counsel, who moved for a new trial based on instructional error. Counsel made a host of new constitutional arguments, including that the "negligence" standard should be extended to non-media defendants like Cox. Delighted, Cox told the press: "I recommend that everyone go pro se and lawyer up for the appeal, this way you get to introduce more elements into the case." (Docket 115 Ex. 1.)

Until the new trial motion, the district court had never considered whether the "negligence" standard should be extended to non-media defendants. The only argument Cox had made was, "I am media." (1-ER-13 (new trial decision).) Her new trial motion raised "an entirely different argument"—that there is "no special First Amendment protection for 'media' defendants." (1-ER-14.) Applying Rule 51(d)(2), the court refused to revisit its instructions except for "plain error." (1-ER-5-7.) It noted that there was a common law exception to Rule 51 but that Cox did not meet its requirements. (*Id*.) Finding the law unsettled regarding extension of *Gertz* to non-media defendants, the court found no plain error in its instruction and denied a new trial. (1-ER-14-24.)

PRESERVATION REQUIREMENTS FOR INSTRUCTIONAL ERRORS IN THIS CIRCUIT

The panel's *de novo* review of an unpreserved instructional error is contrary to the express language of Rule 51, as amended in 2003. Moreover, the panel has taken what used to be a narrow historic common law exception to Rule 51, gutted its three requirements, and thereby created a hopelessly broad new exception that is impossible to apply in practice and will result in countless improper appeals and new trials. If the Court intends to keep the historic common law exception, notwithstanding the 2003 amendments to Rule 51, it is critical that the Court squarely address what is required to qualify for that exception and avoid

Rule 51. Otherwise, a flood of improperly preserved instructional errors will be submitted to the Court for *de novo* review.

I. Everyone Agrees That Cox Did Not Comply With Rule 51

When a case goes to trial, the jury instructions are the moment when the rubber meets the road. When the trial court informs the parties of its proposed instructions and asks for any objections, parties must decide what arguments to preserve for appeal. It is also the final opportunity for parties to make new arguments that might affect the instructions.

Rule 51 is very clear about the requirements to preserve instructional error. Rule 51(a)-(c) provides the procedures for parties to request instructions, for the court to propose instructions, and for parties to object to the proposed instructions, including "how" and "when" to object. If a party "properly objected" to "an instruction actually given," Rule 51(d)(1)(A) allows that party to "assign error" to the instruction. Otherwise, Rule 51(d)(2) limits review to "plain error."

Here, Cox assigns error to an instruction actually given.[1] It is undisputed that Cox did not comply with Rule 51, as the panel recognizes and Cox concedes. (Cox Op Brief 31.) Thus, under the plain text of current Rule 51, Cox is limited to "plain error" review. Nonetheless, the panel applied *de novo* review,

[1] Cox did not request any instructions so Rule 51(d)(1)(B), which addresses errors in failing to give an instruction that was "properly requested," is irrelevant.

citing an historic common law exception to Rule 51. (Panel Op. 7-8.)

Given that Rule 51 now expressly provides for "plain error" review of any instructional errors not preserved in accordance with Rule 51, the court should consider en banc whether the historic common law exception survives the 2003 amendments. *See, e.g., United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009) ("In the absence of a timely objection to the jury instructions, we review for plain error.") (citation omitted). If it does, the en banc court should conclusively address the scope of that exception. Otherwise, the panel has adopted an exception so sweeping that it renders Rule 51 meaningless in this Circuit, in contravention of prior case law recognizing a "sole," very "limited" exception.

II. The "Sole" Historic Common Law Exception

Before the 2003 amendments to Rule 51—which added "plain error" review for errors not preserved in accordance with Rule 51—this Circuit did not allow plain error review, making it "the strictest enforcer of Rule 51." *Voohries–Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713 (9th Cir. 2001). The Court recognized a "sole" exception to Rule 51, sometimes called the "pointless formality" or "futility" exception, which applied only if three requirements were met:

> (1) throughout the trial the party argued the disputed matter with the court;

> (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction; and
>
> (3) the party offered an alternative instruction.

Medtronic, Inc. v. White, 526 F.3d 487, 495 (9th Cir. 2008); *see also Gulliford v. Pierce Co*., 136 F.3d 1345, 1348 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998) (three requirements for "limited exception" to "strict interpretation of FRCP 51"); *Voohries–Larson*, 241 F.3d at 714 (three requirements); *United States v. Klinger*, 128 F.3d 705, 711 (9th Cir. 1997) (three requirements for "sole exception").

The panel purports to apply that common law exception here, but in fact adopts a much broader new exception because it is undisputed that Cox does not meet the criteria for the historic exception. (Panel Op. 7-8.) Cox *concedes* that she does not meet the third criterion—offering an alternative instruction. (Cox Reply 18.) Moreover, regarding the first and second criteria, Cox *never argued*, let alone throughout trial, that *Gertz* applied to non-media defendants, as the district court itself explained in denying a new trial. (1-ER-13-14.) All Cox ever said was, "I am media." The district court never considered whether the negligence standard might be extended to non-media defendants, and it certainly did not rule on that issue, because no one ever raised it. (*Id.*) The only issue the court considered (and ruled on) was whether Cox was "media."

According to the panel decision, the fact that Cox made one specific First Amendment argument before trial ("I am media"), which the trial court rejected, was sufficient to preserve for *de novo* appellate review *any and every* First Amendment argument she might ever make, even one that is contrary to the one she actually made. She does not have to comply with Rule 51. She does not have to meet the requirements of the historic common law exception, including making the "disputed" argument "throughout the trial" and offering an "alternative instruction." All she has to do is invoke "the First Amendment" and then wait and see whether she loses at trial, in which case she can make a host of new arguments to get a new trial. (Panel Op. 8.) The panel's expansive new exception to Rule 51 is inconsistent with past case law in this Circuit and puts a terrible burden on trial courts and opposing litigants.

III. *Loya* and *Dorn* Demonstrate Why En Banc Consideration Is Needed

The panel cites *Loya v. Desert Sands Unified School District*, 721 F.2d 279 (9th Cir. 1983) and *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183 (9th Cir. 2005) as authority for *de novo* review in this case. (Panel Op. 7-8.) Both cases were tried under the pre-2003 version of Rule 51. In *Loya*, 721 F.2d at 282, the district court imposed "limitations on the manner in which objections were to be placed on the record," and the appellant objected in the manner allowed. In

Dorn, 397 F.3d at 1189, the district court "warned" the appellant not to "rehash" any further an argument made throughout trial and repeatedly rejected by the court. Citing the common law exception, both panels found the alleged error preserved.

It is unclear whether the parties in *Loya* and *Dorn* actually satisfied the three requirements for the "sole" historic common law exception to Rule 51, or whether the panels meant to adopt a new "second" exception for cases in which the district court interferes with a party's ability to comply with Rule 51. If the latter, it certainly would have no relevance here, because the district court in no way interfered with Cox's ability to comply with Rule 51.

Regardless, the failure of panels of this Court to consistently recognize and apply the three specific requirements for the historic common law exception to Rule 51 is causing a disintegration of the preservation requirements for instructional errors in this Circuit, once the "strictest enforcer" of Rule 51. The fact that the panel purported to apply the exception here when it is undisputed that Cox did not meet its requirements shows how far the preservation requirements have deteriorated. The panel's broad new exception to Rule 51 should be rejected.

IV. The Standard of Review Determines the Outcome

The difference between *de novo* and "plain error" review is often outcome-determinative, including here. Cox could not obtain reversal on "plain

error" review because the panel is announcing new law on a "question of first impression" in this Circuit. (Panel Op. 3.) *See United States v. Anekwu*, 695 F.3d 967, 973 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2379 (2013) (stating that "plain error" is "clear or obvious, rather than subject to reasonable dispute"); *United States v. Dupas*, 419 F.3d 916, 924 (9th Cir. 2005) ("For an error to be plain, it must be 'clear' or 'obvious' under current law.").[2] While the panel is free to adopt a negligence standard for non-media defendants prospectively, there is no "plain error" in such circumstances. *E.g.*, *Kilbride*, 584 F.3d at 1255 (announcing new First Amendment rule prospectively, but affirming on "plain error" review of jury instructions because the law was previously unsettled).

<u>"OPINION" SPEECH AND THE FIRST AMENDMENT</u>

There is a second, equally important issue that warrants en banc consideration. Under the panel decision, anyone who makes false statements on matters of public concern—including criminal allegations (which the panel says are "generally" matters of public concern)—will only be subject to liability in this Circuit if they were at least negligent. The extension of the negligence standard to

[2] The Supreme Court has repeatedly declined to decide whether to extend the negligence standard to non-media defendants, and the few courts to address the issue are split, as Cox's own *amicus* explains. (Plaintiffs' Response Brief 31-36; Reporters Committee *Amicus* Brief 5-6.) No one could fairly claim that the law on this issue was clear, obvious, and not subject to reasonable dispute.

non-media defendants, who do not have editors or journalistic standards to worry about, makes the Supreme Court's decision in *Milkovich* more important than ever. Under *Milkovich*, any defamatory statement that a reasonable juror could find to imply a verifiable fact is actionable. The panel decision, holding that Cox's statements accusing Plaintiffs of various crimes are non-actionable "pure opinion," is inconsistent with *Milkovich* and post- *Milkovich* decisions of this Court.

In *Milkovich*, 497 U.S. at 3-5, a high school wrestling team had an altercation with a visiting team. After investigation, the athletic association censured the team's coach, Milkovich, and took disciplinary action against the team. Parents and wrestlers sued the association. Milkovich testified, suggesting under oath that he and his team were entirely innocent. The disciplinary action was subsequently overturned. A local reporter wrote an article about the lawsuit. Entitled "Maple beat the law with 'the big lie,'" the basic theme was that Milkovich had lied to obtain a favorable decision.

The Supreme Court held that this type of speech is *not* protected by the First Amendment. *Id*. at 21-22. It firmly rejected a separate constitutional privilege for "opinion." *Id*. at 18. It also made clear that couching statements in "opinion" language, such as "I think" or "in my opinion," is irrelevant. *Id*. "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts

which lead to the conclusion that Jones told an untruth." *Id.* The dispositive question is whether the speaker is seriously asserting or implying a "fact" susceptible of being proved true or false. *Id.* at 21-22. If so, it is actionable. *Id.* Thus, the statements in *Milkovich* were actionable because the reporter implied that Milkovich had committed the crime of perjury, an "objectively verifiable event" susceptible of being proved true or false. *Id.* It did not matter that the article was an editorial (a "well-recognized home of opinion and comment"), that the speaker had an apparent bias (the article was published in the visiting team's home newspaper), or that the "tone" of the article was "pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage." *Id.* at 31-33 (dissent). The statements implying facts were actionable. *Id.* at 21-22.

Here, Cox has repeatedly asserted that Plaintiffs are "criminals" engaged in various specific crimes, including tax fraud, corruption, deceit on the government, money laundering, defamation, harassment, fraud against the government, and solar tax credit fraud. (2-SER-155-187.) She says Plaintiffs have bribed politicians and media. (2-SER-161.) She claims "many" people have told her Padrick "is not above killing someone to shut them up." (2-SER-170.)

The panel's conclusion that these statements are protected by the First Amendment cannot stand under *Milkovich*. The panel either misapplies *Unelko*

Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990), creating confusion in this Circuit, or reveals through its application of *Unelko* that current Ninth Circuit standards for protected speech under the First Amendment conflict with *Milkovich*.

Whether a defamatory statement is actionable under *Milkovich* turns solely on whether the statement was made seriously and could be found by a reasonable juror to imply a "fact" susceptible of being proved true or false. *Milkovich*, 497 U.S. at 21. Here, it is readily apparent that Cox does not mean her accusations in any loose, figurative, or hyperbolic sense. She is *literally* and *seriously* accusing Plaintiffs of committing crimes, which is susceptible of being proved true or false, as any government prosecutor will attest.[3] The Supreme Court did not hesitate to find the perjury accusation in *Milkovich* actionable. Cox's general tenor and writing style may make more discerning readers (such as federal judges) question her reliability as an information source, but it does not negate the impression that she is *seriously* asserting and implying *facts*. Indeed, Cox touts herself as an "investigative blogger" who tells the "truth" and "facts" to "expose" corruption, give consumers "knowledge," and reveal the "truth." (*E.g.,* 2-SER-155-156; 2-SER-166-168; 2-SER-178.) She assures readers she has "only posted

[3] Plaintiffs did not seek to impose liability for statements that *are* loose or figurative, and unverifiable, such as calling Plaintiffs "thugs," "evil doers," and "assholes."

truth" and has "tons of proof."[4] (*E.g.*, 2-SER-187; 2-SER-161; 2-SER-168.)

These statements are actionable under *Milkovich*. They are also actionable under post-*Milkovich* decisions in this Circuit. *See Unelko*, 912 F.2d at 1053 (recognizing that *Milkovich* "effectively overruled" earlier Ninth Circuit decisions). In *Unelko*, 912 F.2d at 1049, Andy Rooney's statement that Rain-X "didn't work," made during a "humorous and satirical" broadcast about products people had sent him, was held actionable because it was intended as a statement of fact, even though Rooney often made rhetorical and hyperbolic statements. In *Rodriguez v. Panayiotou*, 314 F.3d 979, 987 (9th Cir. 2002), George Michael's use of "colorful and humorous language" to describe a police officer engaging in lewd acts while arresting him did not negate the impression that he was "seriously" alleging lewd conduct occurred, which was susceptible to being proved true or false. In *Manufactured Home Communities, Inc. v. County of San Diego,* 544 F.3d 959 (9th Cir. 2008), saying someone "lied" to county officials and implying they had a "reputation for driving out elderly tenants" was actionable. Regardless, Cox's statements are actionable under *Milkovich*, so, to the extent this Court's law

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[4] The panel's suggestion that no reasonable person would take Cox's posts seriously because of her writing style, even though she *means* them seriously, has no basis in law or fact. (*See* Pls. Response Brief 65-66.) In reality, even the most discerning readers tend to believe there must be *some* truth to Cox's allegations. Where there is smoke, there must be fire.

conflicts with *Milkovich*, it must be put back in line with *Milkovich*.

Finally, the panel's implicit focus on their own assessment of Defendant's credibility, rather than the serious and objectively verifiable nature of her defamatory statements, creates a perverse incentive for bloggers and others to make false statements in as loud and bombastic a manner as possible to attain maximum constitutional protection. This is particularly troubling when the panel has also said that criminal allegations are generally "matters of public concern." (Panel Op. 13.) The resulting message is that if you are going to defame someone, do it by accusing them of a crime, then mix in name-calling and exclamation marks to get complete constitutional immunity.

That is not the law. Over the past five decades, the Supreme Court has struck a very difficult and delicate balance between the First Amendment and state defamation laws. *See Milkovich*, 497 U.S. at 23 ("We believe our decision in the present case holds the balance true."). Failing to faithfully apply *Milkovich* while simultaneously extending *Gertz* throws off that balance entirely. The Supreme Court has recognized many times that there are two sides to the equation.

> The numerous decisions [] establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the important social values which underlie the

> law of defamation, and recognized that society has a pervasive and strong interest in preventing and redressing attacks upon reputation. * * * The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

Id. at 22-23 (internal quotation marks and citations omitted).

Online speech has no more constitutional protection than any other kind of speech. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011). False statements published online certainly are no less damaging. To the contrary, because "the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communications with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored." *Cohen v. Google, Inc.*, 887 N.Y.S.2d 424, 428 (N.Y. Sup. Ct. 2009) (ordering Google to identify anonymous blogger who posted defamatory statements); *see also*, *e.g.*, *Fodor v. Doe*, No. 3:10-CV-0798, 2011 WL 1629572 *1(D. Nev.) (regarding blog posting that implicated plaintiff in "criminal activity to defraud investors").

Here, the panel decision hits defamed citizens with a double whammy. If publicly accused of a crime, you not only must prove at least "negligence" to obtain relief, but you will have no relief at all if the speaker uses run-on sentences, mixes in name-calling, and publishes the defamatory statements on a "non-

professional" website. (Panel Op. 17.) That is not the law under *Milkovich*, and this Court must conform its case law to *Milkovich*. Otherwise people like Cox, who do not hesitate to broadcast to the world false statements about other people, will do so with impunity in the Ninth Circuit.

DATED this 7th day of February, 2014.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rules 35-4 and 40-1, this petition for rehearing en banc is proportionally spaced, has a typeface of 14 points or more, and contains 4,199 words (petitions must not exceed 4,200 words).

By: *s/ Robyn Ridler Aoyagi*

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CERTIFICATE OF E-FILING AND SERVICE

I hereby certify that on February 7, 2014, I electronically filed the foregoing **OBSIDIAN FINANCE GROUP, LLC AND KEVIN D. PADRICK'S PETITION FOR REHEARING EN BANC** with the Clerk of the Court for the Ninth Circuit by using the appellate CM/ECF system.

I certify that parties of record to this appeal who are registered CM/ECF users, have registered for electronic notice, or have consented in writing to electronic service will be served through the appellate CM/ECF system.

DATED this 7th day of February, 2014.

TONKON TORP LLP

By: *s/ Robyn Ridler Aoyagi*

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ATTACHMENT A

Nos. 12-35238, 12-35319

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OBSIDIAN FINANCE GROUP, LLC; KEVIN D. PADRICK, *Plaintiffs-Appellees*, v. CRYSTAL COX, *Defendant-Appellant*.	No. 12-35238 D.C. No. 3:11-cv-00057-HZ
OBSIDIAN FINANCE GROUP, LLC; KEVIN D. PADRICK, *Plaintiffs-Appellants*, v. CRYSTAL COX, *Defendant-Appellee*.	No. 12-35319 D.C. No. 3:11-cv-00057-HZ OPINION

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernandez, District Judge, Presiding

Argued and Submitted
November 6, 2013—Portland, Oregon

Filed January 17, 2014

Before: Arthur L. Alarcón, Milan D. Smith, Jr., and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Hurwitz

SUMMARY*

Defamation

The panel affirmed in part and reversed in part the district court's judgment awarding compensatory damages to a bankruptcy trustee on a defamation claim against an Internet blogger.

The panel held that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (holding that the First Amendment required only a "negligence standard for private defamation actions"), is not limited to cases with institutional media defendants. The panel further held that the blog post at issue addressed a matter of public concern, and the district court should have instructed the jury that it could not find the blogger liable for defamation unless it found that she acted negligently. The panel held that the bankruptcy trustee did not become a "public official" simply by virtue of court appointment, or by receiving compensation from the court. The panel remanded for a new trial on the blog post at issue, and affirmed the district court's summary judgment on the other blog posts that were deemed constitutionally protected opinions.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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OPINION

HURWITZ, Circuit Judge:

This case requires us to address a question of first impression: What First Amendment protections are afforded a blogger sued for defamation? We hold that liability for a defamatory blog post involving a matter of public concern cannot be imposed without proof of fault and actual damages.

I.

Kevin Padrick is a principal of Obsidian Finance Group, LLC (Obsidian), a firm that provides advice to financially distressed businesses. In December 2008, Summit Accommodators, Inc. (Summit), retained Obsidian in connection with a contemplated bankruptcy. After Summit

filed for reorganization, the bankruptcy court appointed Padrick as the Chapter 11 trustee. Because Summit had misappropriated funds from clients, Padrick's principal task was to marshal the firm's assets for the benefit of those clients.

After Padrick's appointment, Crystal Cox published blog posts on several websites that she created, accusing Padrick and Obsidian of fraud, corruption, money-laundering, and other illegal activities in connection with the Summit bankruptcy. Cox apparently has a history of making similar allegations and seeking payoffs in exchange for retraction. *See* David Carr, *When Truth Survives Free Speech*, N.Y. Times, Dec. 11, 2011, at B1. Padrick and Obsidian sent Cox a cease-and-desist letter, but she continued posting allegations. This defamation suit ensued.

A.

The district court held that all but one of Cox's blog posts were constitutionally protected opinions because they employed figurative and hyperbolic language and could not be proved true or false. *Obsidian Fin. Grp., LLC v. Cox*, 812 F. Supp. 2d 1220, 1232–34 (D. Or. 2011). The court held, however, that a December 25, 2010 blog post on bankruptcycorruption.com made "fairly specific allegations [that] a reasonable reader could understand . . . to imply a provable fact assertion"—i.e., that Padrick, in his capacity as bankruptcy trustee, failed to pay $174,000 in taxes owed by Summit. *Id.* at 1238. The district judge therefore allowed that single defamation claim to proceed to a jury trial. The jury found in favor of Padrick and Obsidian, awarding the former $1.5 million and the latter $1 million in compensatory damages.

B.

In a pretrial memorandum, Cox—then representing herself—raised two First Amendment arguments concerning the liability standards that should govern this case. First, Cox argued that because the December 25 blog post involved a matter of public concern, Padrick and Obsidian had the burden of proving her negligence in order to recover for defamation, and that they could not recover presumed damages absent proof that she acted with *New York Times Co. v. Sullivan* "actual malice"—that is, that she knew the post was false or acted with reckless disregard of its truth or falsity. *See* 376 U.S. 254, 280 (1964). Cox alternatively argued that Padrick and Obsidian were public figures, and thus were required to prove that Cox made the statements against them with actual malice. *Id.*

On the day before trial, the district court rejected both arguments in an oral decision. In a written decision, issued two days later, the judge explained that Padrick and Obsidian were not required to prove either negligence or actual damages because Cox had failed to submit "evidence suggestive of her status as a journalist." *Obsidian Fin. Grp., LLC v. Cox*, No. 3:11-cv-00057-HZ, 2011 WL 5999334, at *5 (D. Or. Nov. 30, 2011). The district court also ruled that neither Padrick nor Obsidian was an all-purpose public figure or a limited public figure based upon Padrick's role as a bankruptcy trustee, finding that they had not injected themselves into a public controversy, but rather that Cox had "created the controversy . . . ." *Id.* at *4.

After closing arguments, the district court instructed the jury that under Oregon law, "Defendant's knowledge of whether the statements at issue were true or false and

defendant's intent or purpose in publishing those statements are not elements of the claim and are not relevant to the determination of liability." The court further instructed that the "plaintiffs are entitled to receive reasonable compensation for harm to reputation, humiliation, or mental suffering even if plaintiff does not present evidence that proves actual damages . . . because the law presumes that the plaintiffs suffered these damages." The jury verdicts in favor of Padrick and Obsidian followed.

Cox—now represented by counsel—moved for a new trial. In its order denying that motion, the district court acknowledged that Cox had argued that "she was entitled to certain First Amendment protections, including requiring plaintiffs to establish liability by proving that [she] acted with some degree of fault, whether it be negligence or 'actual malice.'" *Obsidian Fin. Grp., LLC v. Cox*, No. 3:11-cv-00057-HZ, 2012 WL 1065484, at *7 (D. Or. Mar. 27, 2012). But, the judge again rejected Cox's arguments that Padrick and Obsidian "were public figures, and that the blog post referred to a matter of public concern," and thus concluded that a showing of fault was not required to establish liability, and that presumed damages could be awarded. *Id.* at *4.

Cox appeals from the denial of her motion for a new trial. Obsidian and Padrick cross-appeal, contending that their defamation claims about the other blog posts should have gone to the jury. We have jurisdiction over both appeals pursuant to 28 U.S.C. § 1291. We reverse the denial of a motion for a new trial if the district court has made a mistake of law. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007). We "review de novo whether a jury instruction misstates the law." *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 988 (9th Cir. 2009) (quotation marks and

citation omitted). And we review a grant of summary judgment de novo. *Doe No. 1 v. Reed*, 697 F.3d 1235, 1238 (9th Cir. 2012).

II.

Cox does not contest on appeal the district court's finding that the December 25 blog post contained an assertion of fact; nor does she contest the jury's conclusions that the post was false and defamatory. She challenges only the district court's rulings that (a) liability could be imposed without a showing of fault or actual damages and (b) Padrick and Obsidian were not public officials.

A.

After the district court's orders on the issues raised in her pretrial memorandum, Cox—then still representing herself—did not propose specific jury instructions. When asked by the district court whether she wished to do so, she stated that she had no objection to the court's proposed jury instructions, which were consistent with its earlier First Amendment rulings. Padrick and Obsidian argue that Cox therefore waived any First Amendment objections to the jury instructions.

We disagree. To preserve an argument about a jury instruction for appeal, a party generally must make a specific contemporaneous objection to the instruction "on the record, stating distinctly the matter objected to and the grounds for the objection." Fed. R. Civ. P. 51(c)(1). But, "when the trial court has rejected plaintiff's posted objection and is aware of the plaintiff's position, further objection by the plaintiff is unnecessary." *Loya v. Desert Sands Unified Sch. Dist.*, 721

F.2d 279, 282 (9th Cir. 1983) (citing *Brown v. Avemco Inv. Corp.*, 603 F.2d 1367 (9th Cir. 1979)); *see also Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1189 (9th Cir. 2005) ("In light of its definitive ruling on a motion in limine and subsequent warning about rehashing the issue, the district court was fully informed of Burlington's position on the jury instructions . . . .").

The district court here was fully informed before trial of Cox's First Amendment arguments and had rejected them definitively before the close of evidence. "[A]ny further objection would have been superfluous and futile . . . ." *Dorn*, 397 F.3d at 1189. Indeed, in denying Cox's new trial motion, the district judge specifically noted that he had instructed the defendant to raise her legal arguments in her trial memorandum, and that he understood those arguments to be that "she was entitled to certain First Amendment protections, including requiring plaintiffs to establish liability by proving that defendant acted with some degree of fault, whether it be negligence or 'actual malice.'" *Obsidian Fin. Grp., LLC v. Cox*, 2012 WL 1065484, at *7. In ruling on the new trial motion, the district court initially suggested that Cox had waived those arguments by not objecting to the jury instructions, but in the end again treated them on the merits and rejected them. Under the facts of this case, Cox preserved the issues raised in her motion for new trial for review.

B.

The Supreme Court's landmark opinion in *New York Times Co. v. Sullivan* began the construction of a First Amendment framework concerning the level of fault required for defamation liability. 376 U.S. 254. *Sullivan* held that

when a public official seeks damages for defamation, the official must show "actual malice"—that the defendant published the defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. A decade later, *Gertz v. Robert Welch, Inc.*, held that the First Amendment required only a "negligence standard for private defamation actions." 418 U.S. 323, 350 (1974). This case involves the intersection between *Sullivan* and *Gertz*, an area not yet fully explored by this Circuit, in the context of a medium of publication—the Internet—entirely unknown at the time of those decisions.

1.

Padrick and Obsidian first argue that the *Gertz* negligence requirement applies only to suits against the institutional press. Padrick and Obsidian are correct in noting that *Gertz* involved an institutional media defendant and that the Court's opinion specifically cited the need to shield "the press and broadcast media from the rigors of strict liability for defamation." 418 U.S. at 348. We conclude, however, that the holding in *Gertz* sweeps more broadly.

The *Gertz* court did not expressly limit its holding to the defamation of institutional media defendants. And, although the Supreme Court has never directly held that the *Gertz* rule applies beyond the institutional press, it has repeatedly refused in non-defamation contexts to accord greater First Amendment protection to the institutional media than to other speakers. In *Bartnicki v. Vopper*, for example, in deciding whether defendants could be held liable under a statute banning the redistribution of illegally intercepted telephone conversations, the Court expressly noted that "we draw no distinction between the media respondents and" a non-

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institutional respondent. 532 U.S. 514, 525 & n.8 (2001). Similarly, in *Cohen v. Cowles Media Co.*, the Court held that the press gets no special immunity from laws that apply to others, including those—such as copyright law—that target communication. 501 U.S. 663, 669–70 (1991). And in *First National Bank of Boston v. Bellotti*, a case involving campaign finance laws, the Court rejected the "suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by" non-institutional-press businesses. 435 U.S. 765, 782 n.18 (1978); *see also Henry v. Collins*, 380 U.S. 356, 357 (1965) (per curiam) (applying *Sullivan* standard to a statement by an arrestee); *Garrison v. Louisiana*, 379 U.S. 64, 67–68 (1964) (applying *Sullivan* standard to statements by an elected district attorney); *Sullivan*, 376 U.S. at 286 (applying identical First Amendment protection to a newspaper defendant and individual defendants).

The Supreme Court recently emphasized the point in *Citizens United v. Federal Election Commission*: "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." 558 U.S. 310, 352 (2010) (internal quotations omitted). In construing the constitutionality of campaign finance statutes, the Court cited with approval, *id.*, the position of five Justices in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, that "in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals engaged in the same activities." 472 U.S. 749, 784 (1985) (Brennan, J., dissenting); *id.* at 773 (White, J., concurring in the judgment) ("[T]he First Amendment gives no more protection to the

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press in defamation suits than it does to others exercising their freedom of speech.").[1]

Like the Supreme Court, the Ninth Circuit has not directly addressed whether First Amendment defamation rules apply equally to both the institutional press and individual speakers.[2] But every other circuit to consider the issue has held that the First Amendment defamation rules in *Sullivan* and its progeny apply equally to the institutional press and individual speakers. *See, e.g.*, *Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011) ("Any effort to justify a media/nonmedia distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the 'media.'"); *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000) (holding that "a distinction drawn according to whether the defendant is a member of the media or not is untenable"); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986); *Garcia v. Bd. of Educ.*, 777 F.2d 1403, 1410 (10th Cir. 1985); *Avins v. White*, 627 F.2d 637, 649 (3d Cir. 1980); *Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975).

We agree with our sister circuits. The protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went

[1] *Dun & Bradstreet* held that presumed and punitive damages are constitutionally permitted in defamation cases without a showing of actual malice when the defamatory statements at issue do not involve matters of public concern. *See* 472 U.S. at 763.

[2] *But cf. Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 694 n.4 (9th Cir. 1998) (citing *Gertz* in a defamation case in which the lead defendant was not a member of the institutional media).

beyond just assembling others' writings, or tried to get both sides of a story. As the Supreme Court has accurately warned, a First Amendment distinction between the institutional press and other speakers is unworkable: "With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred." *Citizens United*, 558 U.S. at 352. In defamation cases, the public-figure status of a plaintiff and the public importance of the statement at issue—not the identity of the speaker—provide the First Amendment touchstones.

We therefore hold that the *Gertz* negligence requirement for private defamation actions is not limited to cases with institutional media defendants. But this does not completely resolve the *Gertz* dispute. Padrick and Obsidian also argue that they were not required to prove Cox's negligence because *Gertz* involved a matter of public concern[3] and this case does not.

2.

The Supreme Court has "never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern." *Dun & Bradstreet*, 472

[3] *Gertz* dealt with a libel claim brought by a Chicago lawyer who had been accused by the magazine of the John Birch Society of taking part in a Communist campaign to discredit local law enforcement agencies. *See Dun & Bradstreet*, 472 U.S. at 756.

U.S. at 757 (plurality opinion).[4] But even assuming that *Gertz* is limited to statements involving matters of public concern, Cox's blog post qualifies.

The December 25 post alleged that Padrick, a court-appointed trustee, committed tax fraud while administering the assets of a company in a Chapter 11 reorganization, and called for the "IRS and the Oregon Department of Revenue to look" into the matter. Public allegations that someone is involved in crime generally are speech on a matter of public concern. *See, e.g., Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1298 (11th Cir. 2008) (noting that accusations of "alleged violations of federal gun laws" by gun stores were speech on "a matter of public concern"); *Boule v. Hutton*, 328 F.3d 84, 91 (2d Cir. 2003) (holding that allegations of "fraud in the art market" involve "a matter of public concern"). This court has held that even consumer complaints of non-criminal conduct by a business can constitute matters of public concern. *See Gardner v. Martino*, 563 F.3d 981, 989 (9th Cir. 2009) (finding that a business owner's refusal to give a refund to a customer who bought an allegedly defective product was a matter of public concern); *Manufactured Home Cmtys., Inc. v. Cnty. of San Diego*, 544 F.3d 959, 965 (9th Cir. 2008) (treating claim that a mobile home park operator charged excessive rent as a matter of public concern).

Cox's allegations in this case are similarly a matter of public concern. Padrick was appointed by a United States Bankruptcy Court as the Chapter 11 trustee of a company that had defrauded its investors through a Ponzi scheme. That company retained him and Obsidian to advise it shortly

[4] *Dun & Bradstreet* dealt only with the *Gertz* rule on presumed damages, not the *Gertz* negligence standard. *See* 472 U.S. at 754–55.

before it filed for bankruptcy. The allegations against Padrick and his company raised questions about whether they were failing to protect the defrauded investors because they were in league with their original clients.

Unlike the speech at issue in *Dun & Bradstreet* that the Court found to be a matter only of private concern, Cox's December 25 blog post was not "solely in the individual interest of the speaker and its specific business audience." 472 U.S. at 762 (plurality opinion). The post was published to the public at large, not simply made "available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further . . . ." *Id.* And, Cox's speech was not "like advertising" and thus "hardy and unlikely to be deterred by incidental state regulation." *Id.*

Because Cox's blog post addressed a matter of public concern, even assuming that *Gertz* is limited to such speech, the district court should have instructed the jury that it could not find Cox liable for defamation unless it found that she acted negligently. *See Gertz*, 418 U.S. at 350. The court also should have instructed the jury that it could not award presumed damages unless it found that Cox acted with actual malice. *Id.* at 349.

C.

Cox also argues that Padrick and Obsidian are "tantamount to public officials," because Padrick was a court-appointed bankruptcy trustee. She contends that the jury therefore should have been instructed that, under the *Sullivan* standard, it could impose liability for defamation only if she

acted with actual malice.[5] *See* 376 U.S. at 279–80. We disagree.

Although bankruptcy trustees are "an integral part of the judicial process," *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096, 1097 (9th Cir. 1986), neither Padrick nor Obsidian became public officials simply by virtue of Padrick's appointment. Padrick was neither elected nor appointed to a government position, and he did not exercise "substantial . . . control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). A Chapter 11 trustee can be appointed by the bankruptcy court for cause or when the best interests of the estate or creditors dictate. 11 U.S.C. § 1104(a). But, an appointed trustee simply substitutes for, and largely exercises the powers of, a debtor-in-possession. 11 U.S.C. § 1107(a). No one would contend that a debtor-in-possession has become a public official simply by virtue of seeking Chapter 11 protection, and we can reach no different conclusion as to the trustee who substitutes for the debtor in administering a Chapter 11 estate.

We also reject Cox's argument that Padrick and Obsidian were "tantamount to public officials" because they received compensation from the court for their efforts. In *Gertz*, the Supreme Court held that there is "no such concept" as a "de facto public official," 418 U.S. at 351, and that a lawyer who had served briefly on several housing committees appointed by the mayor of Chicago, but who had never held "any remunerative governmental position," could not be

[5] Cox argued in her pretrial memorandum that Padrick and Obsidian were public figures, but contended in her motion for a new trial that Padrick was a public official. She raises only the public official argument on appeal.

considered a public official. *Id.* Bankruptcy trustees do not receive remuneration from the government. Their compensation is drawn from the assets of the Chapter 11 estate they administer. *See* 11 U.S.C. § 326(a). They are not rendered public officials by virtue of that compensation, any more than is an expert witness compensated by the estate.

III.

Padrick and Obsidian argue on cross-appeal that the district court erred in granting Cox summary judgment as to her other blog posts. Among other things, those posts accuse Padrick and Obsidian of engaging in "illegal activity," including "corruption," "fraud," "deceit on the government," "money laundering," "defamation," "harassment," "tax crimes," and "fraud against the government." Cox also claimed that Obsidian paid off "media" and "politicians" and may have hired a hit man to kill her.

In *Milkovich v. Lorain Journal Co.*, the Supreme Court refused to create a blanket defamation exemption for "anything that might be labeled 'opinion.'" 497 U.S. 1, 18 (1990). This court has held that "while 'pure' opinions are protected by the First Amendment, a statement that 'may . . . imply a false assertion of fact' is actionable." *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995) (quoting *Milkovich*, 497 U.S. at 19). We have developed a three-part test to determine whether a statement contains an assertion of objective fact. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990). The test considers "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is

susceptible of being proved true or false." *Partington*, 56 F.3d at 1153.

As to the first factor, the general tenor of Cox's blog posts negates the impression that she was asserting objective facts. The statements were posted on obsidianfinancesucks.com, a website name that leads "the reader of the statements [to be] predisposed to view them with a certain amount of skepticism and with an understanding that they will likely present one-sided viewpoints rather than assertions of provable facts." *Obsidian Fin. Grp.*, 812 F. Supp. 2d at 1232. The district judge correctly concluded that the "occasional and somewhat run-on[,] almost 'stream of consciousness'-like sentences read more like a journal or diary entry revealing [Cox's] feelings rather than assertions of fact." *Id.* at 1233.

As to the second factor, Cox's consistent use of extreme language negates the impression that the blog posts assert objective facts. Cox regularly employed hyperbolic language in the posts, including terms such as "immoral," "really bad," "thugs," and "evil doers." *Id.* (quoting blog posts). Cox's assertions that "Padrick hired a 'hit man' to kill her" or "that the entire bankruptcy court system is corrupt" similarly dispel any reasonable expectation that the statements assert facts. *Id.*

And, as to the third factor, the district court correctly found that, in the context of a non-professional website containing consistently hyperbolic language, Cox's blog posts are "not sufficiently factual to be proved true or false." *Id.* at 1234. We find no error in the court's application of the *Unelko* test and reject the cross-appeal.

IV.

We reverse the district court's judgment against Cox concerning the December 25, 2010 blog post and remand for a new trial consistent with this opinion. We affirm the district court's summary judgment on Cox's other blog posts. All parties are to bear their own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.