VIRGINIA:

IN THE FAIRFAX COUNTY CIRCUIT COURT

DIETZ DEVELOPMENT, LLC, and CHRISTOPHER DIETZ Plaintiffs-counterclaim defendants, v. JANE PEREZ, Defendant-counterclaimant.	)	Case No. CL 2012-16249

DEFENDANT PEREZ' OPPOSITION TO MOTION TO SET ASIDE THE JURY'S VERDICT AND ORDER ADDITUR OR GRANT A NEW TRIAL ON DAMAGES

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Defendant-counterclaimant Jane Perez ("Perez") respectfully submits this memorandum in response to the motion by plaintiffs Dietz Development, LLC and Christopher Dietz (collectively "Dietz") to set aside the jury's verdict and order additur, or grant a new trial on damages.

INTRODUCTION AND SUMMARY

Fairfax juries are generally intelligent and fair minded. The jury in this case was quite attentive to the evidence throughout, and deliberated carefully and for several hours before returning its verdict. Upon reflection, the jury's collective determination that each side defamed the other, but that neither side sustained any damage, may be seen as not only sensible, but even wise. The jury could reasonably have concluded that both sides were carrying this dispute too far, that neither side suffered any real damages, and that the parties should have ended their dispute long ago instead of consuming the time of the Court and a jury. Its verdict should not be set aside.

We argue below that, under the applicable standard of review, a Court should not set aside a jury verdict unless it shocks the conscience of the Court. On a motion for a new trial or for an additur, the evidence must be viewed in the light most favorable to the party obtaining the verdict which is challenged. Since Perez received the verdict that Dietz suffered no damage, all of the evidence on Dietz' alleged damages must be viewed in the light most favorable to Perez. Viewed in the light most favorable to Perez – – indeed viewed in a light which favors neither side – – the evidence on damages supports the conclusion that Dietz was not only not harmed by Perez' posts, but on balance he gained from them. Dietz' tax returns show that, instead of declining, the amount of business he generated jumped markedly after Perez statements were posted. And the undisputed evidence shows that, instead of attempting to limit the circulation of Perez' posts, Dietz not only rebutted Perez' criticisms, but went on a smiling media campaign to publicize himself and his points of view. Further, Dietz relies heavily (mot., pp. 10-12) upon the assumption that the jury found at least one of Perez's statements was defamatory *per se*. This assumption is unwarranted. Not all of the statements Dietz challenged was defamatory *per se*, and the Court did not rule that all of

Perez' statements were *per se* defamatory. It is entirely possible that the jury found as defamatory only one statement that Perez made, which statement was not defamatory *per se*.

Dietz' argument that the Court should order a new trial on damages alone, while presumably instructing the jury that it should assume that each of Perez 40 or more posts is defamatory, also is unsound. If the jury in this case found that only one or a few minor statements was defamatory, it would be quite unfair to Perez if in a new trial the jury was bound to assume that all of the posts were defamatory. For similar reasons, additur is unwarranted.

At the March 14, 2014 hearing on Dietz' motion for a permanent injunction, the Court inquired whether Perez would be willing to agree to permanently remove her disputed posts, and not republish them. After careful consideration, Perez is willing to agree to keep her posts down permanently, provided Dietz is willing to do the same for his publications defaming Perez, and provided that such an agreement brings this case to an end. Perez is willing to accept the jury's decision, and move on with her life on these terms. But if Dietz is unwilling to resolve pending motions on these terms, and if the Court awards Dietz a new trial, then Perez intends to move for a new trial on the same grounds as Dietz has done.

STATEMENT OF FACTS

A. Evidence Relevant To The Finding Of Defamation. Here we specifically address the allegedly defamatory statements Dietz relies upon in his moving papers at pp. 2-5.

Theft of Jewelry. Perez stated that "This is after filing my first ever police report when I found my jewelry missing and Dietz was the only one with a key." Ex. 201 and 202. (All "Ex." references are to trial exhibits on file with the Clerk). Perez also stated that her jewelry was "stolen," but did not explicitly say Dietz stole it. Ex. 201. Far from being defamatory, these statements are entirely true, as the evidence showed. The police report for the missing jewelry was admitted in evidence. Ex. 19. Perez' insurance company investigated Perez' claim, concluded that

the jewelry was in fact stolen, and paid Perez for it. Ex. 24 and 25. Further, Perez testified that Dietz was the only other person who had a key (Perez test., 1/28/2014, pp. 23, 70). Dietz never testified that he gave his key to anyone else, and while Dietz speculated that Perez' locksmith may have had a key (Ex. 43, Ans. To Interrogatory 8), Perez called the locksmith as a witness, and he testified that he and his company did not have a key. John Hardy testimony (not yet transcribed).

Trespass on Property. Perez stated that Dietz went "trespassing past 'no trespassing' signs showing up at [her] front door," Ex. 201, and that Dietz showed up at her front door "going right past the large no trespassing sign to the townhouse complex," id. The evidence shows the truth of these statements. There is a very large "No Trespassing" sign at the entrance to the only street to the Perez' townhouse complex. Ex. 26, second page. Dietz could not get into the complex without going past that sign; and he testified that he went into the complex some 12 to 15 times earlier while working on Perez' home. (Dietz test., 1/28/2014, p. 60). When Dietz claimed to have finished work on the job, Perez sent him an email telling him not to return to the property except to return the key, Ex. 23, first page. Yet he showed up unannounced with a hidden recording device months after he claims to have mailed Perez back her key. And Dietz admitted (cross examination, 1/28/2011, pp. 9-12) at trial that he was contractually obligated to comply with Perez' request that he not return to her house except to return the key. Contrary to Dietz' implication (mot. 3), Perez never stated that Dietz was arrested or convicted of the crime of trespassing. Instead, she simply said, correctly, that Dietz had trespassed past a No Trespassing sign.

Virginia Licensing Misdemeanor. Perez statement that Dietz committed the misdemeanor of performing unlicensed work in Virginia (Ex. 201) was based on statements to that effect that the VA DPOR made to Dietz, and is entirely true. Dietz admitted that he performed work allegedly worth over $9,000 at Perez' house in Virginia without a contractor's license. See e.g., Ex. 59, second page. It was the DPOR which first informed Dietz in a letter to him (Ex. 6) that performing

more than $1,000 of work without a license is a Class I misdemeanor which can result in a year in jail and/or a $2,500 fine. The DPOR's statement was true, as was Perez statement when she repeated what the DPOR said. Moreover, because Perez simply repeated what the expert agency of the state had already said, she could not have been negligent in making the statement even if DPOR's assertion was erroneous. And, contrary to Dietz' implication (mot. 3-4), Perez never said that Dietz was convicted of that crime.

It is true that long before the trial in this case, Perez came to a Magistrate in General District Court to swear out a warrant against Dietz for his admitted unlicensed work. Such statements to a judicial officer are absolutely privileged, and cannot form the basis for a defamation claim. Further, that warrant would have gone nowhere had Dietz not virtually asked to be arrested. In this case Dietz is represented by an able and distinguished criminal lawyer. Any lawyer, much less an experienced criminal lawyer, should know that a copy of an existing arrest warrant can be obtained by sending a messenger to the courthouse. Instead of using a paralegal or messenger, Dietz himself went into the magistrate's office, just before the trial instead of many months earlier, and was served with the warrant when he asked if he could get a "copy" of any warrant against him. Ex. 280, first page. Perez believes that Dietz took this extraordinary step so he could get himself arrested, and then testify to that effect before the jury in this case. And, contrary to Dietz' assertion (mot. 4), Perez did not wait in court for some three hours to "convince the prosecutor to convict" Dietz. Perez appeared not voluntarily but because she was subpoenaed by the prosecutor, see Ex. A attached hereto, and after some three hours of waiting by both parties the prosecutor informed first Perez, and then Dietz, that he was dismissing the charges not because they were unsound, but because the statute of limitations had run.

General District Court Case. Dietz complains about Perez' statement that his General District Court ("GDC") case had "no merit." First of all, characterizing a lawsuit as having "no

merit" is a matter of legally protected opinion, not a potentially actionable statement of fact. And even if "no merit" is a factual statement, the GDC entered a Final Order granting summary judgment to Perez because Dietz failed to file a bill of particulars. Ex. 5. To a lay person like Perez, the entry of an order granting her summary judgment can be understood as meaning that his case had "no merit." Moreover, Perez was entitled to infer that Dietz' claim had no merit when he was either unable or unwilling to explain the detailed basis for his claim as required by law. In any case, Dietz brought this same breach of contract claim before the jury in this case, and after hearing Perez explain that she had to pay other contractors more than the amount Dietz quoted for doing the work on her house, the jury concluded that while Perez breached the contract, Dietz suffered no damage as a result. If the jury found this statement to be defamatory – – and it may have been the only Perez statement the jury found defamatory – – then its verdict of no damages on the defamation claim is fully correct.

DPOR Sanctions. Perez stated that "[g]iven Dietz false online posts that [the DPOR] investigation did/found nothing, DPOR imposed further sanctions on Dietz." Ex. 201. Dietz's statement that DPOR did and found nothing is demonstrably untrue. DPOR explicitly found, and explicitly told Dietz, that he had committed a misdemeanor by performing unlicensed work at Perez' home. Ex. 6, first page ("such violations constitute a Class I misdemeanor"). And, as Sherell Queen testified at trial, after reviewing the case she told Dietz that he could either go the compliance route, by getting a license, or face the possibility of prosecution. (Queen test., 1/28/2014, pp. 224-25). Further, after Dietz chose to go the compliance instead of prosecution route, Judy Duff of DPOR wrote Perez that Dietz "is now under an obligation to become licensed in Virginia and being monitored to do so." Ex. 94. This is far from doing nothing. When, after DPOR put Dietz under an obligation to get a Virginia license, Perez responded to Dietz' demonstrably false claims by saying Dietz had been "sanctioned," she made a statement which is true in a layperson's terms, and

Dietz could not have been damaged by it.

B. Evidence Showing Dietz Proved No Damages.

The undisputable evidence at trial showed that Dietz gained business, instead of losing it, after Perez' posts. Specifically Dietz' tax returns, which he sought to exclude from evidence, show that in 2010 Dietz gross receipts were $47,520 (Ex. 144, Sch. C, line 1), and in 2011 they were $85,000 (Ex. 145, Sch. C, line 1). For all of 2012, after Perez' January 2012 postings, Dietz revenues jumped to $110,500 (Ex. 146, Sch. C, line 1), and Dietz testified that his 2013 gross revenues were at least as high as those for 2012. (Dietz test., 1/28/2014, pp. 73-76). This evidence conclusively establishes that Dietz gained business instead of losing it after Perez' posts, and if anything was benefitted instead of harmed by them.

Although he claimed to have lost work because of Perez' postings, Dietz produced not a single contract or document from any of his company's files to support that alleged claim. Dietz' motion argues that the testimony of two witnesses to support his lost business claim, but neither argument withstands scrutiny. Contrary to the brief's assertion (at p. 7), at page 121 of the transcript Sevan Topjean did not testify that a customer he had tried to refer to Dietz had read "online reviews by Defendant." He said only that this potential referral had read "the online reviews" -- hearsay testimony at best, and far too general and unconnected to bolster Dietz' damages claims. Nor did Topjean testify that the online reviews had any impact on the customer's decision.

Diane Brannand, whose testimony should have been excluded as conjectural and hypothetical, did not testify that she failed to contract with Dietz because of anything Perez said. Instead, she admitted that she did not contract with Dietz because he could not meet her insurance company's software requirements. Tr., 1/28/2014, pp. 187-88. She also testified that she had no idea whether the online reviews critical of Dietz she saw were posted by Perez, or instead by others wholly independent of Perez, and that she had no idea whether the work Dietz did at Perez' house

was good or bad. Id., pp. 188, 193. During her cross examination, she began to testify about her awareness of on specific statement by Perez, but it was not any of the statements whose alleged falsity was featured in Dietz new trial brief as having been false – – it was instead a statement about the quality of Dietz' work for Perez. Tr., 193. The fact that Dietz did not produce a single witness at trial who testified that he or she failed to contract with Dietz because of anything Perez said further shows that Dietz was not damaged by any of Perez' postings.

ARGUMENT

I. THE COURT CANNOT ORDER A NEW TRIAL OR ADDITUR UNLESS, VIEWING ALL THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PEREZ, THE VERDICT SHOCKS THE CONSCIENCE OF THE COURT.

Under Va. Code §§ 8.01-383 and 383.1(B), the Court has the power to order a new trial where it concludes the damages are too shall, or to order additur. However, it is a power which is to be used sparingly. As the Virginia Supreme Court has repeatedly stated:

> * * * We have repeatedly held that a jury's award of damages may not be set aside by a trial court as inadequate or excessive unless the damages are so excessive or so small as to shock the conscience and to create the impression that the jury has been influenced by passion or prejudice or has in some way misconceived or misinterpreted the facts or the law which should guide them to a just conclusion. E.g., Poulston v. Rock, 251 Va. 254, 258, 467 S.E.2d 479, 481 (1996) (excessive verdict); Johnson v. Smith, 241 Va. 396, 400, 403 S.E.2d 685, 687 (1991) (inadequate verdict).
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> These principles presuppose that a trial court will not set aside a verdict either as inadequate or as excessive merely because the court may have awarded a larger or smaller sum had it been the trier of fact. See Reel v. Ramirez, 243 Va. 463, 467-68, 416 S.E.2d 226, 228 (1992) (allegedly excessive and inadequate successive verdicts); Raisovich v. Giddings, 214 Va. 485, 489, 201 S.E.2d 606, 609 (1974) (allegedly inadequate jury award); Edmiston v. Kupsenel, 205 Va. 198, 202, 135 S.E.2d 777, 780 (1964) (allegedly excessive verdict).

Downer v. CSX Transp., Inc., 256 Va. 590, 507 S.E.2d 612, 614-15 (1998).

As the Virginia Supreme Court also has repeatedly stated, when determining whether to set aside a verdict or order additur, a court must "view the evidence of damages in the light most

favorable to the validity of the verdict." Id., 507 S.E.2d at 615. Accord, Baldwin v. McConnell, 273 Va. 650 643 S.E.2d 703, 705 (2007) (court must consider verdict in light most favorable to party which received verdict); and Shepard v. Capitol Foundry of Va., Inc., 262 Va. 715, 720-21, 554 S.E.2d 72, 75 (2001) (same). Perez received the verdict of no damage to Dietz that he challenges, and all of the evidence on the alleged damages Dietz sustained must be viewed in the light most favorable to Perez. Further, at trial Dietz claimed that at least 40 different publications by Perez defamed him. The instructions the Court gave to the jury allowed it to find for Dietz if it found that only one of these publications was defamatory. The jury may have determined that only one of Perez publications defamed Dietz, and it almost certainly did not find that each and every one of the 40 or more publications defamed him. In these circumstances, a rew trial on damages alone, where the jury is told that all of 40 or more statements are defamatory, would be not only unjustified but extremely unfair to Perez.

II. THE JURY'S VERDICT SHOULD BE AFFIRMED FOR SEVERAL REASONS, AND NO NEW TRIAL SHOULD BE GRANTED.

A. The Jury's Verdict Is Supported By The Unique Nature Of The Online Forums In Which Perez' Comments, And Dietz' Responses, Were Made.

Except for a handful of allegedly defamatory statements which Perez made to the VA DPOR, which are addressed below, the vast majority of Perez' statements were posted on Yelp and Angies' List. Yelp and Angies' List (and other similar websites) have a significant feature which makes them very different from almost any other form of published expression. Subject to requirements of registration and moderation, any member of the public can use the forum to express his or her point of view about a vendor. And the vendor (or anyone else) who disagrees with something that is said on a message board for any reason -- including the belief that a statement contains false or misleading information -- can respond to that statement immediately, at no cost. Yelp and Angies List enable any merchant whose services are subject to consumer reviews to place the vendor's reply

directly under the review to which it is replying. Both sides are free to publish their views about a disputed issue. Thus both the consumer's criticisms, and the vendor's response, are available to be seen by the audience which reviews the posts. These internet forums are therefore quite unlike newspapers, or radio or television broadcasters, who cannot be required to publish responses to criticisms. E.g., Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

With respect to the comparatively fewer statements Perez made to the VA DPOR, Dietz was able to respond to them promptly, and in fact did so. Ex. 8. In addition to responding to the DPOR, Dietz also went online and posted his rebuttals there. Ex. 79 and 89, first pages. Thus Dietz was given a opportunity to respond to the DPOR statements, and took advantage of that opportunity both to the DPOR and online.

Accordingly, in this case, unlike a case where an entity publishes a statement without giving the complaining party an equal opportunity to respond, Dietz was allowed to fully present his side in response to each of Perez' criticisms. And in fact, by giving some 10 or 15 television or radio interviews (Dietz test., 1/28/2014, pp. 83-84), Dietz was able to reach a far larger audience with his views than was Perez, who never gave any media interviews.

This would be a quite different case if Perez' criticisms were widely published, and Dietz was not given the opportunity to respond equally. In this case, Dietz has taken full advantage of the opportunity to respond to each of Perez' criticisms. See., e.g., Ex. 117. And each of his responses -- at least some of which the jury found to be defamatory -- has been available to any reader who reads the criticisms and the responses. Our jury was intelligent, very attentive throughout the trial, and deliberated for some time before reaching its verdict. Its verdict on publications about which Dietz was allowed to fully express his views, and in which he did so robustly, was supported by the evidence, and should not be set aside.

B. The Evidence Supports The Jury's Verdict That Dietz Suffered No Damage.

As noted above, the evidence supports the conclusion that Dietz suffered no damage from Perez' postings and that, if anything, on balance he benefitted from them. Dietz' tax returns show that, instead of decreasing, his gross revenues jumped considerably after Perez' postings. And despite ample opportunity to do so, Dietz produced not a single document from his company's files ––not one––showing that he lost work or a job because of any of Perez' posts. Further, Dietz did not produce at trial a single witness ––not one––who testified that he or she failed to do business with Dietz or enter into a contract with him because of anything Perez said or did.

Further, unlike Perez, who gave no media interviews, and published her statements only on Yelp and Angies' List (and to DPOR), Dietz went on a media campaign to publicize the dispute and voluntarily gave some 10 to 15 television or radio interviews to broadcast his views. (Dietz test., 1/28/2014, pp. 83-84). The jury was entitled to conclude that if Dietz was harmed by anything, it was by his statements in his media campaign instead of anything Perez said.

When Dietz voluntarily gave a public CNBC interview, the broadcaster began by asking Dietz whether he was harming himself by filing a $700,000 lawsuit against his former client, and whether this has prompted even more negative reviews from some who say they wouldn't hire a contractor who sues his clients. Ex. 105, first page. While Dietz denied that he was shooting himself in the foot by widely publicizing his suit against his client, id., the jury was entitled to conclude otherwise. Dietz went on to assert that "the majority of those false comments or negative comments are coming from certain groups, public groups out there," and that '[w]ithout a doubt" these criticisms from other groups have "created negative publicity for [his] company to the point where [it] lost work as a result." Id. The jury may have reasonably concluded that if Dietz suffered any damage, it was caused by these outside groups instead of Perez, and by the fact that Dietz had appeared on television to discuss his $700,000 lawsuit [actually the suit was for $750,000] Dietz brought against his former client. Significantly, while one or more of Dietz' witnesses testified that

he or she was generally aware of negative publicity about Dietz, in his motion papers Dietz does not cite to the testimony of any witness who stated that the negative things that witness heard about Dietz came from Perez instead of these much larger outside groups. And Dietz did not make any attempt to distinguish the alleged harm caused by these outside groups from that allegedly caused by Perez. Nor, indeed, did any of the testimony that Dietz offered in support of his claims of lost business tie the alleged lost business to any specific statement properly found to be a false and actionable statement of fact. Business lost because of true statements by Perez, or because of her statements made without negligence, or because of her protected statements of opinion, or from outside groups independent of Perez, cannot form the basis for an award of damages. This is yet another reason why the jury's verdict of no damage should be affirmed.

In his motion (at p. 6), Dietz cites his testimony that he was humiliated and embarrassed because some of the little girls he coaches watch the news with their parents, and they have "seen the reviews, the articles referencing the case." For one thing, it was Dietz, not Perez, who went on a media campaign to make news and publicize his suit against Perez. For another, when Dietz testified before the jury, especially on cross examination, far from appearing humiliated, he was smiling, and pleased with himself. The jury watching Dietz' demeanor on the stand would have been fully justified in concluding that, far from being humiliated or embarrassed by Perez' limited postings, Dietz was basking in and relishing the publicity he generated for himself.

In this connection, after Perez posted her criticisms on Yelp, Dietz responded by posting on Yelp several scathing criticisms of Perez, and even accusations that Perez committed torts and crimes. Dietz asserted that Perez's statements that the Better Business Bureau ("BBB") recommended that Dietz be investigated by the VA DPOR were "false;" that the DPOR "found no basis" for Perez' complaints; that Dietz was never allowed to remove his "materials and tools/ equipment having a value over $2,000.00;" that the police investigated Perez' missing jewelry claim

"but found no grounds for her claim nor did they believe her statements;" and that if theft was made, it was Perez "stealing" services and money from me." Ex. 116. And Dietz published his defamatory statements far more widely than Perez ever did. Perez published her statements only on Yelp and Angies' List, and gave no media interviews. By contrast, Dietz sought out wide publicity for his statements, and basked in the publicity he generated for himself. Dietz went on to a builder's blog to accuse Perez of making "lies, proven lies," (Ex. 118), and even gave some 10 to 15 television and/or radio interviews to widely circulate his views.

There is persuasive, and even undisputable, evidence that most or all of these accusations are false. Ex. 31, first page, which is undisputable, shows that the BBB explicitly told Perez that she should bring her concerns about Dietz to the attention of the VA DPOR. The DPOR did find a basis for Perez' complaints, and sent Dietz a letter telling him that he committed the misdemeanor of unlicensed work. Ex. 6. Dietz was allowed to remove all of his materials and equipment, as he acknowledged in written communications to Perez, and never identified anything "missing" except for a few opened paint cans he chose to leave behind. The falsity of Dietz' allegation that the Fairfax police found no grounds for Perez' claim about missing jewelry is shown by the testimony of Officer Whildin (not yet transcribed), who testified that when he came to investigate it never even "crossed his mind" that the jewelry was not missing or that Perez was making false statements about it; and further by the fact that Perez' insurer, after thoroughly investigating the claim, paid Perez for her stolen jewelry claim, Ex. 25. And the falsity of Dietz' claim that Perez was "stealing services and money" from him is shown by the jury's verdict, which concluded that Dietz had suffered no damages at all from Perez' breach of the building contract. The jury was entitled to conclude that if Dietz suffered any cognizable damage at all, it was because of these demonstrably false statements he made instead of anything Perez said.

In sum, the jury had good reason to conclude that, instead of being harmed by one or more

statements Perez made, Dietz was better off in several ways as a result of them.

III. A NEW TRIAL ON DAMAGES ALONE IS NOT WARRANTED.

As noted above, since Dietz is the party challenging the jury's award of no damages, the Court must view all of the evidence on damages in the light most favorable to Perez. For the reasons stated above, the evidence on damages supports the conclusion that, on balance, Dietz benefitted more than he was harmed by the defamation, and no new trial, much less a new trial limited only to damages, should be ordered.

Dietz relies upon (mot. 12) Rawle v. Mcilhenny, 163 Va. 735, 748, 177 S.E. 214 (1934), for the proposition that a court has the ultimate power to order a new trial on the issue of damages alone "in cases in which the evidence is insufficient to find the defendant not liable." A court might properly do so in a simple case, such as a one count case where a party sues to recover for damage negligently caused in a car accident, and the defendant is clearly liable but the damages are far too low. But it would be unreasonable to order a new trial on damages alone where a plaintiff brings a multi count case and the jury returns a simple verdict without indicating whether it found the defendant liable on only one count, or more than one. It would be even more unsound to order a new trial limited to damages where the jury may have found only one of Perez' 40 or more disputed statements to be defamatory.

In this connection, Perez notes that she is entitled to the same rulings on identical issues as is Dietz. The jury found that Perez defamed Dietz, without specifying which of the statements at issue was defamatory, and awarded Dietz no damages. The jury also found that Dietz defamed Perez, without specifying which of the statements at issue was defamatory, and awarded Perez no damages. If the Court awards Dietz a new trial on damages alone, Perez intends to move for the same relief -- a new trial for her on damages alone -- and she should be awarded that same relief. Instead of bringing this case to a close, as the jury intended, and enabling the parties to move on with their lives, a new trial would require much more litigation.

IV. ADDITUR IS NOT APPROPRIATE HERE.

As Dietz acknowledges (mot. 13), the imposition of an additur which increases the jury's verdict by a specified amount is "rare." There is no basis for additur here. There is no satisfactory way, viewing the evidence of damages in the light most favorable to Perez, that the Court can set the damages at any specific amount.

V. PEREZ WILL AGREE NOT TO RE-POST ANY OF HER PUBLICATIONS, PROVIDED THAT AGREEMENT BRINGS THIS CASE TO AN END.

At the March 14, 2014 hearing on Dietz' motion for a permanent injunction, the Court inquired whether Perez would be willing to agree to permanently remove her disputed posts, and not republish them. The Court seemed to imply that, if Perez so agreed, the Court would either deny the motion for an injunction or dismiss it as moot. After careful consideration, Perez is willing to agree to keep her posts down permanently, provided Dietz is willing to do the same for his publications defaming Perez, and provided that such an agreement brings this case to an end.

Perez' grounds for opposing a Court ordered injunction against further speech are quite strong. Among several other reasons, the Virginia Supreme Court, when summarily reversing this Court's preliminary injunction in this very case, made the explicit finding that Dietz "[has] an adequate remedy at law." Supreme Court Order, December 28, 2012. That controlling ruling by the Supreme Court rules out a permanent injunction, which cannot issue when there is an adequate remedy at law. However, Perez is willing to give up her position on this issue – – and give Dietz the essential result he seeks from an injunction motion which in our view is legally unsound – – provided that her agreement not to re-post brings this case to an end. In Perez' view, it is not fair to her to require her to give up her legal position on an injunction, while still having to continue litigating other issues.

Significantly, the offer Perez now makes is one which Dietz has publicly stated would satisfy him. In a television interview on the night of the jury's verdict, Dietz stated that: "It was never about the money, it was about clearing my name and taking the false statements down." WJLA posting, January 31, 2014; a copy is attached hereto as Ex. B. The offer Perez now makes would permanently take down the posts, and enable each side to claim victory. It would give Dietz a result he publicly stated that he wanted. Dietz should accept it, and agree to bring this case to an end.

CONCLUSION

For these reasons, the motion for a new trial or for additur should be denied.

Respectfully submitted,

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