

**IN THE SUPERIOR COURT IN THE STATE OF DELAWARE**

BDO USA, P.C. (f/k/a BDO USA, LLP),	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N22C-12-063 KSM CCLD
	)	
JSCO ENTERPRISES, INC. (f/k/a	)	
EVERGLADE GLOBAL, INC.),	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION**

Date Submitted: March 20, 2025

Date Decided: August 14, 2025

Ashley R. Altschuler, Ethan H. Townsend, Kevin M. Regan, McDERMOTT WILL & EMERY LLP, Wilmington, Delaware; Michael J. Sheehan, McDERMOTT WILL & EMERY LLP, Chicago, Illinois; Russell Hayman, McDERMOTT WILL & EMERY LLP, Los Angeles, California; Alexander Kritikos, McDERMOTT WILL & EMERY LLP, Houston, Texas; Natasha L. Dobrott, McDERMOTT WILL & EMERY LLP, Boston, Massachusetts; *Counsel for Plaintiff BDO USA, P.C.*

James G. McMillan, III, Theodore A. Kittila; HALLORAN FARKAS + KITTLA LLP, Wilmington, Delaware; *Counsel for Defendant JSCo Enterprises, Inc.*

**McCORMICK, C.**<sup>1</sup>

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<sup>1</sup> Sitting as a Judge of the Superior Court of the State of Delaware by special designation of the Chief Justice of the Supreme Court of Delaware pursuant to Del. Const. Art. IV § 13(2).

On January 31, 2023, the court entered a default judgment for Plaintiff BDO USA, P.C. against Defendant JSCo Enterprises Inc. (f/k/a EverGlade Global Inc.)<sup>2</sup> as a sanction for Defendant’s spoliation and bad faith litigation conduct. That decision resolved the issue of liability. The only remaining issue was the appropriate remedy, which this decision resolves. The court awards Plaintiff \$1,920,000 plus post-judgment interest at the statutory rate.

## **I. FACTUAL BACKGROUND**

The background of this action is described in the court’s decision entering default judgment in favor of Plaintiff (the “Liability Opinion”).<sup>3</sup> This opinion recites only the facts necessary to award remedies. Unless otherwise noted, the following summary is drawn from the facts described in the Liability Opinion.<sup>4</sup>

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<sup>2</sup> On June 21, 2023, the court entered an order amending the case caption on the basis that EverGlade had changed its name to “JSCo Enterprises, Inc.” To be consistent with prior decisions in this action, this decision continues to refer to Defendant as EverGlade. See C.A. No. N22C-12-063 KSM CCLD (“Sup. Ct. Dkt.”) 32.

<sup>3</sup> *BDO USA, LLP v. EverGlade Glob., Inc.*, 2023 WL 1371097 (Del. Super. Ct. Jan. 31, 2023) [hereinafter, “Liability Op.”].

<sup>4</sup> This decision cites to: C.A. No. 2021-0244-KSJM docket entries (by “Ch. Ct. Dkt.” number); C.A. No. N22C-12-063 KSM CCLD docket entries (by “Sup. Ct. Dkt.” number); joint exhibits from the June 9–10, 2022 evidentiary hearing on sanctions (“Sanctions Hr’g JX-[]”); the June 9–10, 2022 sanctions hearing transcript (Ch. Ct. Dkts. 299–300) (“Sanctions Hr’g Tr.”); the May 31, 2024 damages hearing transcript (Sup. Ct. Dkt. 94) (“Damages Hr’g Tr.”); the March 20, 2025 post-hearing damages oral argument transcript (Sup. Ct. Dkt. 100) (“Post-Hr’g Damages Arg. Tr.”); the Expert Report of Tülin Erdem, Ph.D. (Sup. Ct. Dkt. 76, Ex. 5) (“Erdem Report”); the Expert Report of Maureen Chakraborty, Ph.D. (Sup. Ct. Dkt. 76, Ex. 7) (“Chakraborty Report”); the Expert Report of Jonathan Arnold, Ph.D. (Sup. Ct. Dkt. 75, Ex. D) (“Arnold Report”); the Expert Report of Ronald G. Quintero, CPA, CFA, ABV (Sup. Ct. Dkt. 75, Ex. E) (“Quintero Report”); and deposition transcripts as “[Last Name] Dep. Tr.” In connection with the sanctions hearing, Plaintiff lodged the deposition transcripts of the following witnesses: Eric Jia-Sobota, Julian Ackert, Paul Argy, Daniel Barak, Matthew Franz, Jerry Jia-Sobota, Daniel Roffman, Andrea Wilson,

### A. The Smear Campaign

BDO is a national public accounting, tax, and advisory firm with offices in over 60 locations throughout the United States. Non-party Eric Jia-Sobota is a former BDO partner who started a rival consulting firm, Defendant EverGlade, in the spring of 2020 while still at BDO.<sup>5</sup> Jia-Sobota was EverGlade's founder, controlling stockholder, CEO, and Board chair.<sup>6</sup>

After Jia-Sobota's departure from BDO, in May 2020, Plaintiff initiated arbitration, claiming that Jia-Sobota breached the BDO partnership agreement. Plaintiff also filed an action for injunctive relief in aid of arbitration in the Superior Court of the District of Columbia.<sup>7</sup> The arbitration and D.C. litigation placed significant financial pressure on EverGlade.<sup>8</sup> Jia-Sobota attempted to resolve those matters through negotiations with a BDO partner.<sup>9</sup> Those discussions began in late 2020 but broke down in January 2021.<sup>10</sup>

After settlement negotiations failed, BDO became the target of a social media smear campaign attacking the company and its senior leadership. The campaign

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and Defendant's Rule 30(b)(6) representative, Julie Roy. *See* Ch. Ct. Dkt. 297. Because Eric Jia-Sobota was deposed on four separate dates, the court cites to the transcripts of his depositions as "Jia-Sobota [Date] Dep. Tr."

<sup>5</sup> Liability Op. at \*1.

<sup>6</sup> *Id.* at \*2.

<sup>7</sup> *Id.* at \*1; *see also BDO USA, LLP v. Eric Jia-Sobota, et al.*, 2020 C.A. 002600 B (D.C. Super. Ct. May 26, 2020).

<sup>8</sup> Liability Op. at \*1 (citing Sanctions Hr'g Tr. at 81:02–82:21 (Jia-Sobota)).

<sup>9</sup> *Id.* at \*2 (citing Sanctions Hr'g JX-222 (email exchange between BDO partner and Jia-Sobota between January 11 and 13, 2021)).

<sup>10</sup> *Id.* (citing Sanctions Hr'g Tr. 83:3–85:1 (Jia-Sobota)).

comprised no fewer than 50 YouTube videos and 40 Tweets accusing BDO partners of racism, bigotry, homophobia, sexual harassment, corruption, and fraud, among other things.<sup>11</sup> The campaign also used fake LinkedIn accounts to impersonate BDO executives and email accounts to disseminate defamatory content directly to BDO clients.<sup>12</sup> The campaign occurred from February 13 through around April 5, 2021.<sup>13</sup>

## **B. The Chancery Action**

Upon discovering the campaign, BDO “took steps to mitigate the damage by reaching out to affected clients directly, circulating and amplifying blog posts and press releases about firm values, and taking steps to remove the fake news from social media.”<sup>14</sup> BDO “spent approximately 10 weeks diverting their efforts away from the general course of business” to address fallout from the campaign, leaving the company “unable to develop and implement a follow up campaign for its year-end client and prospect event[.]”<sup>15</sup>

BDO also filed suit in the Delaware Court of Chancery on March 22, 2021. BDO sought injunctive relief and damages in connection with the smear campaign.<sup>16</sup> On March 29, BDO amended its complaint to add claims for deceptive trade practices

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<sup>11</sup> *Id.* (citing Sup. Ct. Dkt. 1 (“Am. Compl.”) ¶¶ 32–172; Sanctions Hr’g JXs-218–220 (smear campaign videos)).

<sup>12</sup> *Id.* (citing Am. Compl. ¶¶ 169–171, 173–181).

<sup>13</sup> *Id.* (citing Sanctions Hr’g JX-158 ¶ 10).

<sup>14</sup> Erdem Report ¶ 85.

<sup>15</sup> *Id.* ¶ 87.

<sup>16</sup> *See* Ch. Ct. Dkt. 1.

and trade libel.<sup>17</sup> In January 2022, Plaintiff moved for default judgment on the basis that Defendant had engaged in pervasive spoliation.<sup>18</sup> In response to the motion for default judgment, Defendant moved to dismiss the Chancery action for lack of subject matter jurisdiction.<sup>19</sup> During a March 16, 2022 hearing, the court instructed the parties to use the days it had reserved for trial for an evidentiary hearing on Defendant's spoliation.<sup>20</sup> That hearing took place on June 9, and 10, 2022 (the "Sanctions Hearing").<sup>21</sup>

On November 29, 2022, to address Defendant's argument that the court lacked subject matter jurisdiction, the Chancellor requested that she be cross-designated to sit as a Judge in the Superior Court to preside over the remainder of the case.<sup>22</sup> On December 1, 2022, the Delaware Supreme Court entered an order cross-designating the Chancellor to sit as a Judge on this court.<sup>23</sup>

### **C. The Superior Court Action**

On December 5, 2022, Plaintiff sued Defendant in the Superior Court, filing a complaint substantively identical to the amended complaint in the Chancery action (the "Amended Complaint"). In the Amended Complaint, Plaintiff alleges defamation per se, tortious interference with business relations, civil conspiracy, violation of the

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<sup>17</sup> Sup. Ct. Dkt. 7.

<sup>18</sup> Ch. Ct. Dkt. 227.

<sup>19</sup> Ch. Ct. Dkt. 261.

<sup>20</sup> Ch. Ct. Dkt. 272 at 62:18–63:2.

<sup>21</sup> Ch. Ct. Dkt. 298.

<sup>22</sup> Ch. Ct. Dkt. 314.

<sup>23</sup> Ch. Ct. Dkt. 315.

Delaware Deceptive Trade Practices Act (“DTPA”), and trade libel.<sup>24</sup> The Amended Complaint seeks monetary and injunctive relief, including treble damages under the DTPA, “attorneys’ fees, interest, and costs on all causes of action,” and “such other relief that this Court deems just and proper.”<sup>25</sup>

On January 31, 2023, the court issued a decision finding that Defendant had participated in “egregious acts of spoliation.”<sup>26</sup> As a remedy, the court entered default judgment in Plaintiff’s favor and granted Plaintiff attorneys’ fees and expenses in an amount to be determined.<sup>27</sup> The court also requested that the parties report to the court whether any unresolved issues remained, including with respect to damages.<sup>28</sup>

On February 14, 2023, in a joint letter to the court, Plaintiff submitted that “in addition to the equitable relief that BDO is seeking . . . , the quantum of damages (if any), including punitive damages and statutory fee shifting owed by defendant . . . remains an unresolved issue in this action.”<sup>29</sup> After that submission, the court instructed the parties to brief what issues remained.<sup>30</sup>

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<sup>24</sup> See Am. Compl. at ¶¶ 183–218.

<sup>25</sup> *Id.* at 37–38 (Prayer for Relief).

<sup>26</sup> Liability Op. at \*1.

<sup>27</sup> *Id.* at \*17.

<sup>28</sup> *Id.*

<sup>29</sup> Sup. Ct. Dkt. 13.

<sup>30</sup> Sup. Ct. Dkt. 22 at 10:10–18.

The court held a hearing on the outstanding issues the parties raised on June 30, 2023.<sup>31</sup> On August 8, 2023, the court issued two letter opinions.<sup>32</sup>

In the first letter opinion, the court stated that the parties had presented argument on:

(i) whether [the court] should empanel a jury to resolve the damages BDO may receive; (ii) whether BDO may pursue a claim for punitive damages now that the matter has been transferred to the Superior Court; (iii) whether BDO is entitled to treble damages and fee-shifting under the Deceptive Trade Practices Act, 6 *Del. C.* § 2532 et seq.; (iv) whether, after resolving the damages issues, this matter should be transferred back to the Court of Chancery so that BDO may pursue permanent injunctive relief; (v) whether the testimony of BDO's damages expert, Dr. Maureen Chakraborty, should be excluded as unreliable, and (vi) whether BDO's fee amount is reasonable.<sup>33</sup>

The court addressed the first two issues, stating that it was “not convinced that a damages jury [was] required[,]” but noting that it would empanel a jury if Plaintiff elected to pursue punitive damages.<sup>34</sup> The court left the remaining issues open, to be addressed “depending on BDO's next step.”<sup>35</sup> Ultimately, Plaintiff did not pursue

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<sup>31</sup> See Sup. Ct. Dkt. 37.

<sup>32</sup> See *BDO USA, LLP v. JSCo Enterprises, Inc.*, 2023 WL 5206150 (Del. Super. Ct. Aug. 8, 2023) [hereinafter, “Outstanding Issues Decision”]; *BDO USA, LLP v. JSCo Enterprises, Inc.*, 2023 WL 5191146 (Del. Super. Ct. Aug. 8, 2023) [hereinafter, “Fee Decision”].

<sup>33</sup> Outstanding Issues Decision at \*1.

<sup>34</sup> *Id.* at \*10.

<sup>35</sup> *Id.* at \*12.

punitive damages, and the court scheduled an evidentiary hearing on damages for December 7, 2023.<sup>36</sup>

In the second letter opinion, the court awarded Plaintiff \$5,236,972.77 in attorneys' fees.<sup>37</sup> The court ordered Defendant to pay Plaintiff this amount by August 22, 2023.<sup>38</sup> Defendant failed to do so, resulting in Plaintiff filing two motions for contempt in August and October 2023.<sup>39</sup>

On November 9, 2023, Defendant filed a Suggestion of Bankruptcy and Notice of Automatic Stay, indicating that EverGlade had filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Eastern District of Texas.<sup>40</sup> As a result, on November 30, the court informed the parties that it had removed the December 7 hearing from its calendar.<sup>41</sup> On January 22, 2024, at the request of the parties, the court rescheduled the damages hearing.<sup>42</sup>

Before the one-day damages hearing, the parties submitted expert reports and pre-hearing briefing.<sup>43</sup> The hearing occurred on May 31, 2024 (the "Damages Hearing"). Only Plaintiff's two experts presented live testimony.<sup>44</sup> The court heard

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<sup>36</sup> See Sup. Ct. Dkt. 56.

<sup>37</sup> Fee Decision at \*1.

<sup>38</sup> See Sup. Ct. Dkt. 39 (Order granting fees and expenses).

<sup>39</sup> Sup. Ct. Dkts. 40, 52.

<sup>40</sup> Sup. Ct. Dkt. 58.

<sup>41</sup> See Sup. Ct. Dkt. 64.

<sup>42</sup> Sup. Ct. Dkt. 70.

<sup>43</sup> See generally, Erdem Report, Chakraborty Report, Arnold Report, and Quintero Report; see also Sup. Ct. Dkts. 75–76.

<sup>44</sup> See generally, Damages Hr'g Tr.



post-hearing oral argument on March 20, 2025, before which the parties submitted additional briefing.<sup>45</sup>

## II. LEGAL ANALYSIS

Plaintiff seeks two forms of relief. Plaintiff requests an injunction “compelling EverGlade to remove any and all defamatory and violative statements from any website EverGlade maintains.”<sup>46</sup> This request came as a surprise to the court, given that EverGlade ceased the smear campaign early in the case.<sup>47</sup> In any event, this court lacks the power to issue injunctive relief. That request is therefore denied for lack of subject matter jurisdiction.

Plaintiff also requests money damages and argues for one of three alternatives: (i) actual damages to reputational harm in the amount of \$31 to \$35 million, trebled under the DTPA, plus attorneys’ fees; (ii) presumed damages to reputational harm in the amount of \$5 million, trebled under the DTPA, plus attorneys’ fees; or (iii) mitigation damages in the amount of \$640,000 plus attorneys’ fees, trebled under the DTPA.<sup>48</sup>

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<sup>45</sup> See Sup. Ct. Dkt. 99 (Judicial Action Form for March 20, 2025 hearing); *see also* Sup. Ct. Dkts. 86 (“Pl.’s Post-Hr’g Damages Opening Br.”), 87 (“Def.’s Post-Hr’g Damages Opening Br.”), 91 (“Pl.’s Post-Hr’g Damages Answering Br.”), 92 (“Def.’s Post-Hr’g Damages Answering Br.”).

<sup>46</sup> Pl.’s Post-Hr’g Damages Opening Br. at 37 (quoting Am. Compl. ¶ 201).

<sup>47</sup> Liability Op. at \*3 (“No further action to continue the smear campaign occurred after April 5, 2021.”).

<sup>48</sup> See Post-Hr’g Damages Arg. Tr. at 21:7–22:9.

“A plaintiff bears the burden of proving damages by a preponderance of the evidence.”<sup>49</sup> “One who is liable for a defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed.”<sup>50</sup> “Once liability is established, a plaintiff seeking recovery of damages in a tort action must establish causation and consequential damage.”<sup>51</sup> “[I]n order for a plaintiff to proceed on defamation per se without proof of special damages, plaintiff . . . must provide evidence of diminution in reputation.”<sup>52</sup> To establish causality, a plaintiff must show that “[t]he defamatory statement . . . caused plaintiff’s standing in the community to be ‘grievously fractured.’”<sup>53</sup> “A business defamation plaintiff must show some prejudice to its business or that the defamation deterred others from dealing with it.”<sup>54</sup> “In the absence of proof of general damages, nominal damages may be awarded.”<sup>55</sup>

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<sup>49</sup> *Maverick Therapeutics, Inc. v. Harpoon Therapeutics, Inc.*, 2021 WL 1592473, at \*9 (Del. Ch. Apr. 23, 2021).

<sup>50</sup> *Preston Hollow Capital LLC v. Nuveen LLC*, 2022 WL 2276599, at \*3 (Del. Super. Ct. June 14, 2022) (quoting Restatement (Second) of Torts § 621 (Am. Law Inst. 1977)).

<sup>51</sup> *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1188 (Del. 2000).

<sup>52</sup> *Preston Hollow*, 2022 WL 2276599, at \*4; *see also Kanaga*, 750 A.2d at 1184 (noting a plaintiff presented evidence of reputation injury in lieu of special damages where the defamatory statements maligned the plaintiff’s trade, business, or profession).

<sup>53</sup> *Preston Hollow*, 2022 WL 2276599, at \*4 (quoting *Q-Tone Broad., Co. v. Musicradio of Maryland, Inc.*, 1994 WL 555391, at \*4 (Del. Super. Ct. Aug. 22, 1994)).

<sup>54</sup> *Id.* (quoting *Q-Tone*, 1994 WL 555391, at \*4) (cleaned up).

<sup>55</sup> *Id.* (citing *Del. Exp. Shuttle, Inc. v. Older*, 2002 WL 31458243, at \*22 (Del. Ch. Oct. 23, 2002)).

**A. BDO Is Not Entitled To Damages For Actual Harm To Its Reputation.**

To show that it suffered actual harm to its reputation and the quantum of damages due as a consequence, Plaintiff introduced expert testimony.

Plaintiff called marketing expert Tülin Erdem, Ph.D., to testify that BDO suffered harm to its brand image because of the social media smear campaign. Erdem is impressive. She is a marketing professor at the Stern School of Business at New York University with over 25 years of experience teaching empirical market research, branding, brand and product management, marketing management, international marketing, consumer choice, and market modeling.<sup>56</sup>

Erdem offered the following four opinions:

- a. Violations of expectations regarding the values, conduct, and ethics of firms or organizations will influence perception and engagement with the affected firm or organization.
- b. The social media smear campaign violates expectations of BDO, conveyed through BDO's brand promise of 'helping people thrive, every day' and the brand pillars of relationships, resources, and responsiveness.
- c. The social media smear campaign was positioned squarely at BDO's 'relationships' brand pillar, causing a divergence between BDO's brand identity and brand image, harming BDO's brand reputation, brand equity, and brand loyalty.
- d. The social media smear campaign was directed to a broad audience as well as to targeted clients, making it

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<sup>56</sup> Erdem Report ¶¶ 1, 5.

difficult to pinpoint the extent and duration of the relationship-based harm to BDO.<sup>57</sup>

Erdem’s analysis begins with the premise that because BDO offered professional “business to business” services, “trust in [BDO’s] brand [was] extremely important” to the company’s success.<sup>58</sup> Erdem explained that it can be difficult for clients of professional services firms to “measur[e] the quality of services provided to them, as they often do not have the expertise and knowledge needed to accurately assess the services.”<sup>59</sup> Accordingly, businesses like BDO “rely heavily on trust, reputation, referrals, and relationships between themselves, partner firms, and clients.”<sup>60</sup> BDO thus crafted its “brand identity” or “the way BDO sees and presents itself” to inspire confidence and create long-lasting client relationships.<sup>61</sup> BDO’s “brand pillars” were “relationships, resources, and responsiveness.”<sup>62</sup>

Erdem opines that, BDO’s brand identity and its “brand image,” or how the company was “actually perceived by its clients, customers, and/or potential customers” were aligned before the smear campaign.<sup>63</sup> “[C]onsistency between an organization’s brand identity and brand image . . . leads to credibility . . . and

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<sup>57</sup> *Id.* ¶ 16.

<sup>58</sup> *Id.* ¶ 25.

<sup>59</sup> *Id.* ¶ 26.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* ¶ 54.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* ¶¶ 20, 53.

reputation . . . as well as increased trust, brand equity, and brand loyalty.”<sup>64</sup> “Brand equity” refers to the added value that a brand endows a product or service.<sup>65</sup> “[M]isalignment between the brand identity and brand image of a company has short-term and long-term consequences.”<sup>66</sup>

According to Erdem, the smear campaign attacked one of the core values of BDO’s brand identity—its relationships.<sup>67</sup> The campaign “attempted to create the belief that BDO actively transgressed important norms and values by accusing BDO of corruption, secret payoffs, fraud, racism and sexual harassment.”<sup>68</sup> Erdem argues the damage to BDO’s relationships was heightened by the fact that the defamatory messages were not merely spread over social media, but the campaign also “sent targeted emails to several of BDO’s clients, providing links to these posts” and accusing BDO of engaging in fraud and audit rigging.<sup>69</sup>

The result of the campaign, Erdem posits, was both short-term harm arising from remediation efforts and long-term harm to BDO’s reputation. Harm from remediation efforts is easily proven and quantified, as discussed below. Harm to reputation is less tangible.

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<sup>64</sup> *Id.* ¶ 20 (internal citations omitted).

<sup>65</sup> *Id.* ¶ 20 n.19.

<sup>66</sup> *Id.* ¶ 40.

<sup>67</sup> *Id.* ¶ 70.

<sup>68</sup> *Id.* ¶ 71.

<sup>69</sup> *Id.* ¶ 72.

Erdem notes that although BDO acted quickly to stop the campaign, “such actions do not fully prevent the same or related rumors from remaining in the minds of targeted clients or from resurfacing in the future.”<sup>70</sup> Erdem’s report states that it is “impossible to know with certainty who or how many people see a social media post” and that even old or removed posts have the ability to “resurface in the future.”<sup>71</sup>

As an example of harm resulting from a fracture between brand image and brand identity, Erdem pointed to Steve Wynn, co-founder and former CEO of Wynn Resorts.<sup>72</sup> In 2018, Wynn “was accused of decades of sexual misconduct towards Wynn Resort employees,” resulting in his departure from the company, lawsuits, and investigations into Wynn Resorts, which begat a \$20 million fine from the Nevada Gaming Commission and a \$35 million fine from the Massachusetts Gaming Commission.<sup>73</sup> Erdem asserted that “Wynn Resorts is still suffering” from the reputational damage caused by the 2018 allegations.<sup>74</sup>

Defendant did not proffer an expert report to rebut Erdem’s testimony. Instead, Defendant focuses on what it argues is the speculative nature of the harm Erdem identified, noting that her report only stated that a split between brand identity and brand image “*can* be detrimental to a brand . . . has the *potential* to cause reputational damage . . . [and] *tends* to affect BDO’s reputation and credibility in

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<sup>70</sup> *Id.* ¶ 88.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* ¶ 89.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

*unknowable ways.*”<sup>75</sup> At the Damages Hearing, Erdem testified that she was unaware if BDO lost clients, whether remaining clients reduced their business with BDO, or whether prospective clients decided not to do business with BDO because of the smear campaign.<sup>76</sup> Erdem did not interview any BDO clients, employees “other than three marketing people (whose jobs depended on their ability to defend BDO’s reputation), or any members of the community.”<sup>77</sup>

Erdem’s report supplies a helpful framework for thinking about reputational damages. But it does not supply any bases for concluding BDO suffered actual harm to its reputation.

A defamation plaintiff must show some evidence of actual harm, as this court explained in *Preston Hollow*. There, this court found that a plaintiff alleging defamation per se “failed to present evidence demonstrating a genuine issue of material fact concerning reputational loss” where:

[T]he record evidence [did] not include the testimony of any witnesses that their opinions were changed as a result of Defendant’s Statements. There are no documents in the . . . record that support a finding of reputational loss. There are no: third-party witnesses; witnesses not affiliated with Plaintiff; or documents reflecting reputational loss to Plaintiff—demonstrating that the opinion about Plaintiff was changed in the community as a result of the defamatory statements.<sup>78</sup>

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<sup>75</sup> Def.’s Post-Hr’g Damages Opening Br. at 17 (quoting Erdem Report ¶ 70) (emphasis in original).

<sup>76</sup> *Id.* at 22 (quoting Damages Hr’g Tr. at 28:4–23 (Erdem)).

<sup>77</sup> *Id.* (quoting Damages Hr’g Tr. at 31:10–33:21 (Erdem)).

<sup>78</sup> 2022 WL 2276599, at \*6.

Here too Plaintiff has failed to establish, through third-party fact witnesses, witnesses not affiliated with Plaintiff, documentary evidence, or otherwise that the smear campaign contributed to any reputational harm. At the post-Damages Hearing argument, Plaintiff attempted to distinguish *Preston Hollow* on the basis that “[t]here was no expert testimony” in that case, arguing that “we do have evidence of harm. . . . We have . . . Dr. Erdem.”<sup>79</sup> But Erdem’s report established a theoretical premise only—that dissonance between brand identity and brand image *can* cause a company harm.<sup>80</sup> This theory is well-supported by Erdem and academic literature. But it does not demonstrate any actual harm in this case.<sup>81</sup>

The lack of any apparent harm to BDO’s reputation is a good thing for BDO. But it is bad for BDO’s damages case, because it forecloses BDO’s claim for \$31 to \$35 in actual damages.

There are independent reasons to doubt the \$31 to \$35 million damages figure. Plaintiff introduced expert testimony from Maureen Chakraborty, Ph.D., a Managing Principal at Analysis Group, Inc., to quantify damages to BDO’s reputation.<sup>82</sup>

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<sup>79</sup> Post-Hr’g Damages Arg. Tr. at 44:6–17.

<sup>80</sup> See Erdem Report ¶¶ 46–52.

<sup>81</sup> Plaintiff responds that it “did not seek to identify clients that stopped doing business because of the smear campaign, as surveying clients to obtain that information would only exacerbate the harm caused by the smear campaign.” Pl’s. Post-Hr’g Damages Opening Br. at 17 (citing Damages Hr’g Tr. at 107:6–22). Deciding to avoid gathering evidence from current or former clients for that reason is a valid business decision. But it leaves the court without a record. In all events, client testimony is only one example of the type of evidence that could have supported a finding of actual reputational harm.

<sup>82</sup> Plaintiff introduced Chakraborty primarily to quantify damages, but aspects of her analysis could be construed as evidence that BDO suffered harm to its reputation.



Chakraborty earned her doctorate in economics and has an extensive background in finance, accounting and valuation.<sup>83</sup> Chakraborty is impressive. She has served as an expert witness and a consultant in matters involving valuations, solvency, fraudulent conveyance, securities, trade secrets and misappropriation, and economic damages.<sup>84</sup>

Chakraborty offered the following four opinions:

a. A firm's reputation is an intangible asset that has economic value because it conveys financial benefits to the firm and is a signal of social and/or business responsibility. Damage from harm to reputation manifests in a loss in value of the firm's goodwill and may not be observed in the direct form of a loss in income. . . .

b. Harm to reputation impairs a firm's value. This is evidenced by the quantifiable decline in stock prices immediately following announcements of reputational harm. . . .

c. Because (i) damage to BDO's goodwill may not be observed in the direct form of a loss in income and (ii) BDO is not a publicly traded company (and therefore the damage to BDO's reputation cannot be derived from an analysis of its stock price movements), I measure the damage arising from the harm to BDO's reputation and client relationships using standard, generally accepted options models. . . . [T]he application of an option framework allows me to quantify the cost to avoid the risk of a loss in the value of BDO's goodwill created by the EverGlade Campaign. The cost of the option therefore represents the damage to BDO in this matter.

d. Based on the models, inputs, and calculations discussed [in my report], I determine that the harm to BDO from the

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<sup>83</sup> Chakraborty Report ¶ 1.

<sup>84</sup> *Id.*

EverGlade Campaign is approximately \$31 to \$35 million.<sup>85</sup>

Chakraborty's analysis centers on a standard Black-Scholes put option model.<sup>86</sup> "To isolate the cost to avoid the risk of value loss caused specifically by the EverGlade Campaign, [Chakraborty] measure[d] the incremental cost of a [BDO] put option before and after the campaign started. The difference is the monetary equivalent of damage to BDO from reputational harm caused by the campaign."<sup>87</sup>

This methodology has four key inputs: (i) BDO's pre-harm equity value, (ii) the length of the campaign, (iii) a risk-free rate that matches the duration of the option period (*i.e.*, the length of the campaign), and (iv) the expected volatility of BDO's equity value.<sup>88</sup> Chakraborty calculates the hypothetical post-harm put option using the same variables, except BDO's equity value is adjusted to reflect the expectation that following the campaign, BDO's reputation and client and affiliate relationships were subject to higher risk, causing the option to be more expensive.<sup>89</sup>

Defendant argues that Chakraborty's pre-harm valuation of BDO is flawed because it is based on "revenue multiples drawn from public companies and precedent transactions that are not comparable."<sup>90</sup> Defendant argues that using the "one-day drop in stock prices of seven not-comparable companies that experienced reputational

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<sup>85</sup> *Id.* ¶ 9.

<sup>86</sup> *Id.* ¶ 32.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* ¶ 36.

<sup>89</sup> *Id.* ¶ 37.

<sup>90</sup> *Id.* at 5.

events that were not comparable” does not accurately reflect any alleged harm to BDO.<sup>91</sup> And Defendant argues that Chakraborty erred in “taking the four percent decline in the stock price of one such company and ‘adjusting’ that percentage based on a comparison of two hypothetical ‘real’ options,” which caused the “price of the hypothetical option, and hypothetical damages, [to] go up.”<sup>92</sup>

Defendant makes many sound points. Chakraborty’s analysis relies on a series of dependent assumptions about the likeness of BDO to large public companies and the likeness of the smear campaign to other reputational harm events.<sup>93</sup> Defendant raises legitimate questions about how similar these proxies are to what they attempt to approximate.<sup>94</sup> And Plaintiff cites no other instance where a similar combination of methods has been used to show or calculate reputational harm due to defamation.<sup>95</sup>

To be sure, Chakraborty’s analysis is creative and ambitious. And she undertook an exceptionally difficult task: calculating the economic value of the

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *See id.* ¶¶ 40–46 (estimating BDO’s value based on revenue multiples derived from precedent transactions and comparable public companies, where she calculated the comparable companies’ enterprise value by using 12-month historical and 12-month forward looking revenues), 47–49 (estimating the volatility to BDO’s value by analyzing the volatility of “publicly traded companies that have businesses that generally overlap with BDO”), 55–57 (deriving the “value at-risk from the EverGlade Campaign based on [a] review of the market penalties imposed on publicly traded firms’ stock prices following announcements of sexual and racial misconduct”).

<sup>94</sup> *See* Def.’s Post-Hr’g Damages Opening Br. at 4–21.

<sup>95</sup> *See* Damages Hr’g Tr. at 121:1–4 (“THE COURT: I haven’t seen this [defamation damages analysis] done before, this combination of analyses. Have you? THE WITNESS [Chakraborty]: So in combination—this specific combination I would have to say no.”).

reputational harm done to a private company due to a social media smear campaign. The result is academically interesting. But it not convincing in the end. And it is also irrelevant given the lack of any factual basis for concluding that BDO suffered any actual harm to its reputation, in the amount of \$31 to \$35 million or otherwise.

**B. Plaintiff Is Not Entitled To Presumed Damages.**

Plaintiff argues that if the court finds that it is not entitled to damages in the amount calculated by Chakraborty, then it should award Plaintiff \$5 million on “presumed damages” on its defamation per se claim.<sup>96</sup>

Plaintiff pulls its definition of presumed damages from a 7th Circuit Court of Appeals case, *Brown & Williamson Tobacco Corp. v. Jacobson*, which states, “presumed damages is an estimate, however rough, of the probable extent of actual loss a person had suffered and would suffer in the future, even though the loss could not be identified in terms of advantageous relationships lost.”<sup>97</sup>

Plaintiff bases its \$5 million figure on *Jacobson* as well. There, the court awarded \$1 million dollars in presumed damages to a corporation after it succeeded on its defamation per se claim.<sup>98</sup> Plaintiff argues that the defamatory conduct at issue in *Jacobson* was less egregious because it involved “defamatory statements made one night in a 10:00 p.m. local news broadcast by one individual,” while the smear campaign against BDO was a multi-front attack sustained over several

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<sup>96</sup> Pl.’s Post-Hr’g Damages Opening Br. at 28–31.

<sup>97</sup> *Id.* at 28 (quoting *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1138 (7th Cir. 1987)).

<sup>98</sup> *See Jacobson*, 827 F.2d at 1142.

weeks.<sup>99</sup> Plaintiff reasons that “[o]ne million dollars in presumed damages forty years ago for lesser conduct shows that \$5 million in presumed damages for the harm caused by the smear campaign is reasonable.”<sup>100</sup>

The faults in Plaintiff’s claim to \$31 through \$35 million similarly infect Plaintiff’s claim to presumed damages. Even on a successful claim of defamation per se, this court still requires Plaintiff to establish actual harm to its reputation to award damages. The wisdom of *Preston Hollow* applies: “in order for a plaintiff to proceed on defamation per se without proof of special damages, plaintiff still must provide evidence of diminution in reputation.”<sup>101</sup>

For the reasons stated above, Plaintiff has failed to prove actual harm to its reputation.<sup>102</sup> Accordingly, Plaintiff’s request for \$5 million in presumed damages on its defamation per se claim is denied.

Where a plaintiff claiming defamation per se fails to provide “proof of general damages, nominal damages may be awarded.”<sup>103</sup> The court declines to award nominal damages here because, as explained below, Plaintiff has established that it is entitled to special damages in the form of repayment of the expenses it occurred in addressing and remediating the effects of the smear campaign.

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<sup>99</sup> Pl.’s Post-Hr’g Damages Opening Br. at 29.

<sup>100</sup> *Id.*

<sup>101</sup> *Preston Hollow*, 2022 WL 2276599, at \*4.

<sup>102</sup> *See supra* Part II.A.

<sup>103</sup> *Preston Hollow*, 2022 WL 2276599, at \*4.

**C. Plaintiff Is Entitled To Damages For Costs Incurred In Remediation Efforts.**

Plaintiff last argues that it is entitled to the expenses it incurred “to mitigate the harm cause by EverGlade’s tortious social media campaign.”<sup>104</sup> According to Plaintiff, those expenses comprise: BDO’s direct out-of-pocket costs to mitigate the impact of the campaign in the amount of \$640,000, and BDO’s attorneys’ fees and costs incurred to enjoin the campaign and prevent the campaign from happening again.<sup>105</sup>

Plaintiff is entitled to an award of the direct costs it incurred in responding to the smear campaign. Unlike injury to its reputation, Plaintiff has created a record supporting the conclusion that it endured actual harm by having to devote time and resources to stop the campaign and deal with its aftereffects.<sup>106</sup> Defendant does not

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<sup>104</sup> Pl.’s Post-Hr’g Damages Answering Br. at 20.

<sup>105</sup> Pl.’s Post-Hr’g Damages Opening Br. at 31.

<sup>106</sup> See Damages Hr’g Tr. at 22:19–23:7 (Erdem) (Plaintiff “redirected the efforts of ten full-time marketing employees from their regular responsibilities to do various things, such as repositioning materials from websites to counter EverGlade’s smear campaigns, the Google search results, et cetera, prepare talking points to the BDO clients who were targeted and received those emails, monitor content and search results. And also because of the opportunity costs of time, they were unable to do and implement a very important follow-up campaign after their year-end event for their current and prospective clients because of these diverted resources.”); Erdem Report ¶¶ 85–86 (detailing the same efforts); Chakraborty Report ¶ 24 n.57 (“BDO also incurred direct costs of approximately \$640,000 as a result of the EverGlade Campaign, including those from creating new marketing materials and running Google search campaigns, among other things.”) (citing “Conversation with BDO Partner Andrea Wilson, January 18, 2022”); Wilson Dep. Tr. at 123:2–8 (describing the campaign and the need for Plaintiff to respond to it as “incredibly disruptive”).

argue against this premise, but it asserts that Plaintiff has not proven the amount of its direct costs, \$640,000.<sup>107</sup>

The \$640,000 number comes from Chakraborty's report, which cites a conversation that Chakraborty had with BDO's Rule 30(b)(6) representative and partner, Andrea Wilson.<sup>108</sup> This is an admittedly light evidentiary record. But in this limited circumstance where any traditional factfinding was been cut off because of Defendant's egregious acts of spoliation, the court finds Plaintiff has satisfied its burden. Plus, Defendant did not probe this aspect of the record in the litigation. Defendant did not ask to re-depose Wilson to determine the bases for the amount. Defendant did not call Wilson as a witness at the Damages Hearing. The sum went largely unaddressed except for a few paragraphs in Defendant's briefing.<sup>109</sup> BDO is entitled to special damages of \$640,000.<sup>110</sup>

Plaintiff is not entitled to attorneys' fees as a form of mitigation damages.<sup>111</sup> Plaintiff relies on *Ramada Inns, Inc. v. Dow Jones & Co.*, where this court held as a matter of law that the plaintiff could seek amounts incurred in attorneys' fees as

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<sup>107</sup> See Def.'s Post-Hr'g Damages Opening Br. at 24–25.

<sup>108</sup> Chakraborty Report ¶ 24 n.57.

<sup>109</sup> See Def.'s Post Hr'g Opening Br. at 24–25; Def.'s Post Hr'g Answering Br. 25–27.

<sup>110</sup> Were special damages not appropriate, then this the ultimate damages award would be an appropriate award of nominal damages.

<sup>111</sup> Plaintiff argues that Defendant's expert Dr. Arnold "admitted" during his deposition that mitigation costs include litigation costs to enjoin the social media smear campaign. Pl.'s Post-Hr'g Damages Opening Br. at 32–33. But that opinion does not bind the court.

special damages for a claim for defamation.<sup>112</sup> There, plaintiffs sued the publisher of the *The Wall Street Journal* for libel. The defendant moved for summary judgment on the plaintiffs' claim for special damages for the cost of defending stockholder suits filed as a result of the *Journal* articles. The court denied the motion. In reaching this conclusion, the court cited Section 914(2) of the Restatement (Second) of Torts.<sup>113</sup> Section 914(2) provides that:

One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.<sup>114</sup>

The facts of *Ramada* “fell squarely within the language of § 914(2),” according to the court, because the attorneys’ fees at issue were incurred in connection with a suit brought by someone other than the defendant.<sup>115</sup> By contrast, here, Plaintiff seeks as damages what is in essence fee shifting. Plaintiff offers no legal authority for this approach and thus has not proven entitlement to this aspect of its damages amount.

Plaintiff, however, is entitled to treble damages. Under Section 2533(c) of the DTPA, “[i]f damages are awarded to the aggrieved party . . . , such damages awarded shall be treble the amount of the actual damages proved.”<sup>116</sup> The court entered a

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<sup>112</sup> 543 A.2d 313 (Del. Super. 1988).

<sup>113</sup> *Id.* at 330–31.

<sup>114</sup> Restatement (Second) of Torts § 914(2) (1979).

<sup>115</sup> *Ramada Inns*, 543 A.2d at 331.

<sup>116</sup> 6 *Del. C.* § 2533(c).



default judgment on Plaintiff's DTPA claim. And Plaintiff has proven entitlement to \$640,000 in damages. Plaintiff is thus entitled to treble the amount of \$640,000.

The DTPA also provides that "in exceptional cases" the court "may award reasonable attorneys' fees to the prevailing party."<sup>117</sup> Unlike treble damages, attorneys' fees under the DTPA are discretionary. Plaintiff argues "EverGlade's default [judgment] concedes the allegations about EverGlade's exceptional and willful conduct entitling BDO to attorneys' fees."<sup>118</sup> But this court has already exercised its discretion to award fees based on Defendant's litigation conduct.<sup>119</sup> That is sufficient, in the court's view.

### **III. CONCLUSION**

Plaintiff is awarded damages of \$1,920,000 plus post-judgment interest at the statutory rate. Within 20 days from the date of this decision, the parties shall submit a proposed form of final judgment that incorporates the court's award.

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<sup>117</sup> 6 *Del. C.* § 2533(b).

<sup>118</sup> Pl.'s Post-Hr'g Damages Opening Br. at 35.

<sup>119</sup> *See generally*, Fee Decision (awarding Plaintiff over \$5 million in attorneys' fees).