IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

WORLD WIDE ASSOCIATION OF SPECIALTY PROGRAMS, Plaintiff, vs. PURE, INC., PURE FOUNDATION, INCL, SUE SCHEFF, Defendants.	ORDER DENYING MOTION FOR NEW TRIAL Case No. 2:02 CV 10 PGC

Plaintiff World Wide Association of Specialty Programs has moved for a new trial in the above-captioned matter upon a finding of no liability after a five-day jury trial. Because the court concludes that the jury was properly instructed on the presumption of deception and the burden of proof in a defamation case, and because the court properly found plaintiff to be a public figure and properly admitted all media and disgruntled parent evidence, it DENIES plaintiff's motion for a new trial.

A. Presumption of Deception

In its motion for a new trial, World Wide argues that Jury Instruction No. 25, regarding the presumption of confusion or deception in a false advertising claim under the Lanham Act,

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was incorrect. The jury instruction as given stated:

> Regarding the third element of plaintiff's false advertising clam, you are charged with determining whether such statements are likely to cause confusion of mistake to consumers.
>
> You are instructed that should you find PURE's advertising or promotion was literally false, then plaintiff is entitled to a presumption that consumers and prospective consumers were deceived by such advertising or promotion.
>
> The defendant may rebut this presumption by appropriate evidence.[1]

World Wide argues that the instruction should have contained this additional language:

> You are further instructed that should you find defendants deliberately made materially misleading statements as an important part of their marketing efforts, even if such statements were literally true, then plaintiff is also entitled to the presumption that consumers and prospective customers were deceived by such advertising.

World Wide argued at the jury instruction conference and again in its motion for a new trial that this additional language is proper under the Ninth Circuit's and Eighth Circuit's respective rulings in *U-Haul International, Inc. v. Jartran*[2] and *Porous Media Corp. v. Pall Corp.*[3] However, as the court noted during the conference, neither of the cases cited by World Wide in support of its proposed instruction justifies the inclusion of the phrase "even if such statements were literally true." In *U-Haul*, for example, the presumption of deception arose only upon proof of the "publication of *deliberately false comparative claims*."[4] In *Porous*, the Eighth Circuit approved an instruction on the presumption in circumstances in which "false or misleading

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[1]Jury Instruction 25.

[2]793 F.2d 1034 (9th Cir. 1986).

[3]110 F.3d 1329 (8th Cir. 1996).

[4]793 F.2d at 1040 (emphasis added).

statements of fact"[5] were made. But no further clarifying language regarding the literal truthfulness of these statements was included in the *Porous* instruction, unlike the instruction urged by World Wide here.

Even if the Eighth Circuit's ruling in *Porous* would impliedly allow the inclusion of language such as "even if the statements are not literally true," it would only do so in a context in which the jury was instructed that misleading statements, and not just false statements, can also form the basis of a Lanham Act claim. And this is indeed how the jury was instructed in *Porous.* But this is not how the court instructed the jury on the Lanham Act claim in the present case. Instead, the court instructed that to establish a claim under the Lanham Act, World Wide must first show

> that defendant made material false representations of fact in connection with the commercial advertising or promotion of its goods and services, or concerning a competitor's goods, services, or commercial activities.[6]

Neither party objected to this instruction on the first element of a Lanham Act claim allowing claims only for "materially false" representations and the court views it as a correct statement of the law based on the Tenth Circuit's recent ruling in *Cottrell v. Biotrol.*[7] In light of this instruction, World Wide's proposed language about "misleading" statements would have directly conflicted with the Lanham Act requirement that defendant made "material false representation

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[5]110 F.3d at 1332.

[6]Jury Instruction 18.

[7]191 F.3d 1248 (10th Cir. 1999).

of fact"[8] and thus, the court's refusal to adopt World Wide's instruction was proper.

World Wide additionally points to the jury's questioning during deliberations as a basis for its argument that its requested instruction would have altered the result in this case. The jurors asked:

What is meant by "literally false" in the second paragraph?

The court responded, with no objection from the parties:

A representation that is actually false.

The court finds that this question simply reflects the jury's difficulty with the core factual issue in this case. Ms. Scheff repeatedly used statements that were not literally false about herself and PURE on her website. The verdict implies that the jury found Ms. Scheff's statements to be either true or immaterial, the requisite element of the Lanham Act. While these findings could be debated, there was certainly substantial evidence in the trial to support them.

B. Media Account Evidence

World Wide argues that PURE's use of newspaper clippings and television reports on World Wide unrelated to this case was highly prejudical and should have been excluded. However, the newspaper and television stories about World Wide were not admitted for the truth of the matter asserted but rather to demonstrate that World Wide's lost profits could have been due to these media reports instead of Ms. Scheff. At trial World Wide chose to prominently use a chart that showed generally increasing revenues (as reflected in student enrollment) across all World Wide programs with a slight decline during the time frame of Ms. Scheff's emails and

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[8]Jury Instruction 18.

other actions.[9] A copy of this chart is reprinted on the following page.

This chart expressly opened the door for Ms. Scheff to argue other competing explanations for World Wide's declining revenues. To respond to these far-reaching claims, Ms. Scheff introduced media to demonstrate that any damage she may have caused with her website and emails was a "drop in the bucket" compared to the wealth of negative stories in prominent newspapers and nationally-distributed television programs about World Wide during the relevant time frames.

To ensure the jury handled this information appropriately, the court gave multiple cautionary instructions to the jury. Because the court repeatedly told the jury that the media was only used to illustrate how much damage was in fact caused by Ms. Scheff, its admission was not error.

Finally, the media used by Ms. Scheff was countered by media introduced by World Wide. Indeed, in its rebuttal closing argument, World Wide chose to do little more than play a television program *praising* its programs. The conflicting media stories largely cancelled each other out. There is no ground here for a new trial.

C. Public Figure

In an earlier motion for summary judgment, this court concluded that World Wide was a public figure. The court found that World Wide sought positive media attention regarding its teen help programs in numerous national television interviews. Ken Kay and Robert Litchfield – the faces of World Wide – used the media to portray the World Wide schools as a successful

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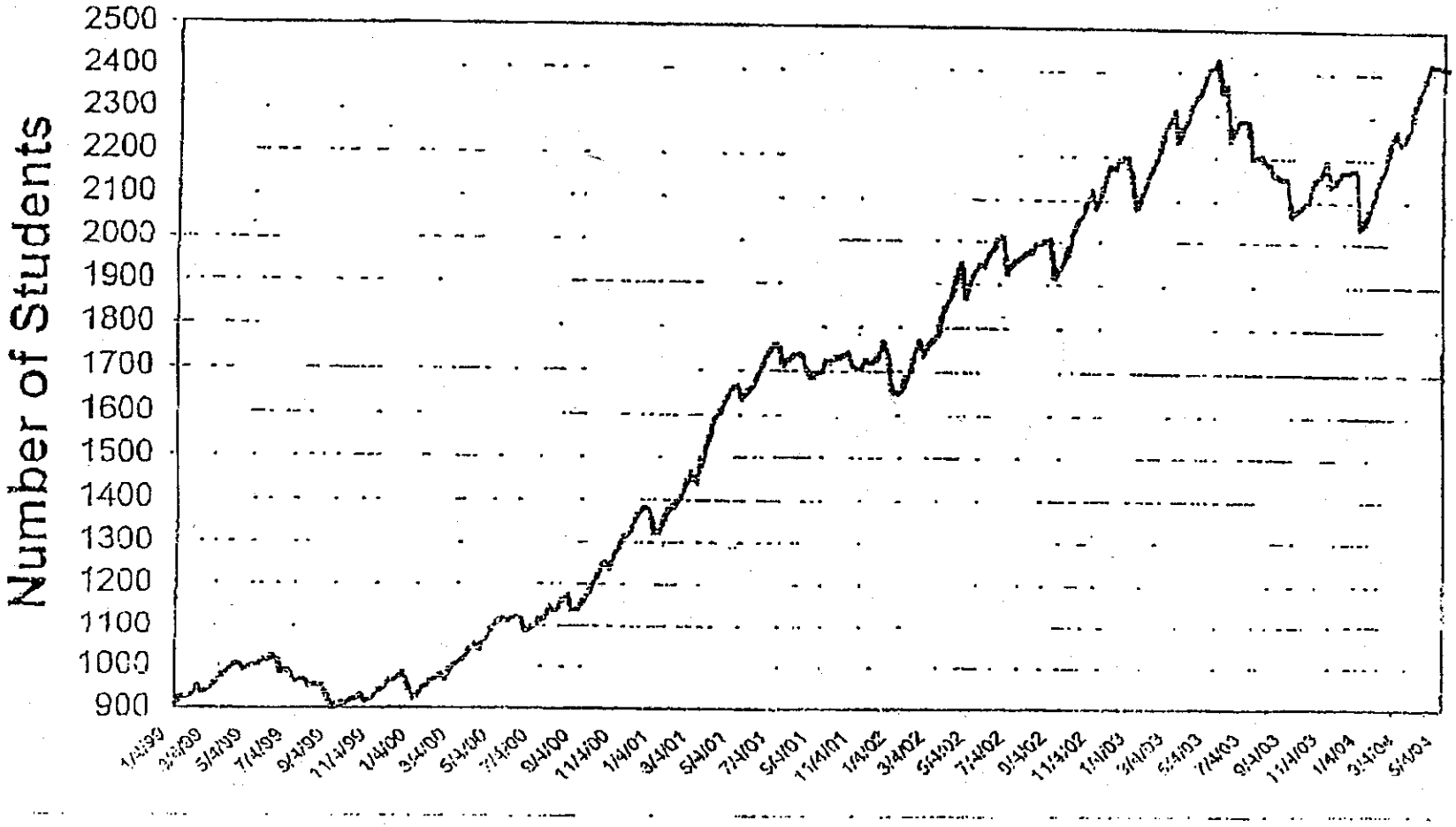
[9]Plaintiff's Exhibit 3.

Number of Students 99-04



method of helping troubled teens. Indeed, it is instructive to recall that World Wide is a *marketing* arm of the various programs–that is, one designed to get publicity.

World Wide now renews its argument that it is not a public figure. Ironically, while this claim was pending before this court, the *Salt Lake Tribune* ran a Sunday front-cover story on World Wide and its programs around the world and its connection to political leaders throughout Utah.[10] The article–although written after the suit–suggests at least two "public controversies" that World Wide inserted itself into during the last two years–tuition tax-credits and regulation of boarding schools.

But the court will not rely on this after-the-fact information. There was ample evidence of World Wide's public activities in matters of public controversy. World Wide misdescribes the public controversy as "child abuse." The allegations of child abuse are tangential to the larger controversy of how to deal with troubled teens. World Wide claims it has the answer to this societal problem in its unique use of behavior modification techniques and it chose to place itself in the national spotlight advocating this method. Individuals at World Wide have been giving public television and newspaper interviews about the successes at their schools for years. The more recent interview may have responded to allegations of abuse, but these interviews again repeated claims of numerous benefits from placing a child at a World Wide school. For example, Kay and Litchfield's repeated portrayal of World Wide as "the" haven for troubled teens went far beyond a simple denial of abuse allegations.

In addition, World Wide admits in its motion for a new trial that it created its

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[10] *Salt Lake Tribune, Utah Clan has Clout in Politics*, September 19, 2004.

"purerebuttal" website to "*impugn the source* of many of the allegations of abuse - Sue Scheff." Aggressively attacking Ms. Scheff on a prominent website goes far beyond responding to media allegations of abuse. In the "purebuttal" website, World Wide did not merely defend itself; instead it attacked Sue Scheff. None of these actions were improper–to the contrary, they were completely appropriate. However, World Wide cannot now plausibly claim that it was dragged out of its anonymous corporate offices only to respond to media allegations of abuse. World Wide was plainly a public figure.

D. Disgruntled Parents

World Wide argues that it was improper for the court to allow disgruntled parents who had placed their children in various World Wide schools to testify at trial, as evidence of specific prior bad acts is not admissible in a defamation case on the issue of damages. But the court allowed this testimony for the express limited purpose of showing that defendant Sue Scheff had a reasonable belief in the truth of the statements she made about World Wide–a central issue in the trial. In other words, the testimony went directly to defendant's "truth defense" to a claim of defamation. Admission of the testimony for this limited purpose was plainly proper.

E. Defamation Burden of Proof

World Wide argues that even if the court correctly determined that it was a public figure, the court improperly instructed the jury that it needed to find all of the elements of defamation by clear and convincing evidence.

Only two Circuits have directly addressed this issue, and both concluded that actual

malice did not need to be proven by clear and convincing evidence.[11] The court, however, is not bound by either of these decisions. Instead, the court derived its defamation instruction from a Fifth Circuit opinion which concluded that *New York Times v. Sullivan* implicitly imposed the clear and convincing standard to all elements of defamation.[12]

Even assuming that this instruction was inaccurate, it plainly had no bearing on the outcome of the case. World Wide's case on false advertising was significantly stronger than its defamation case. The elements of the Lanham Act are simpler and more directly connected to the evidence in this case. Moreover, the standard of proof on all the elements of the Lanham Act claim was the lower– preponderance of the evidence. If the jury could not find for World Wide on the easier-to-prove Lanham Act claim, a jury instruction on a peripheral part of the defamation claim could not have affected the outcome of the trial.

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[11] *See Goldwater v. Ginzberug,* 414 F.2d 324, 341 (2nd Cir. 1959); *and Rattray v. City of Nat'l City,* 51 F.3d 793, 802 (9th Cir. 1994).

[12] *Fireston v. Time, Inc.,* 460 F.2d 712 (5th Cir. 1982) (J.Bell Concurrence).

Conclusion

As the court properly instructed the jury in this case, properly concluded plaintiff to be a public figure and properly admitted the media and disgruntled parent evidence, plaintiff's motion for a new trial is hereby DENIED.

SO ORDERED.

Dated this 17th day of ~~October~~ November, 2004.

Judge Paul G. Cassell
United States District Court

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United States District Court
for the
District of Utah
November 18, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cv-00010

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