**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

**CIVIL TRIAL DIVISION**

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| HEMISPHERX BIOPHARMA, INCORPORATED | **:** JULY TERM, 2000 |
| Plaintiff | **:** No. 3970 |
| v. | **:** Commerce Program |
| MANUEL P. ASENSIO, ASENSIO & COMPANY, INC., and ASENSIO.COM., INC., | **:** |
| Defendants | **: Superior Court Docket Nos. 2161EDA2002** |
| | **: 2389EDA2002** |

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# O P I N I O N

**ALBERT W. SHEPPARD, JR., J. ..... October 22, 2002**

This Opinion is submitted relative to the appeals of this court's Order of July 2, 2002, denying plaintiff's request for Judgment Notwithstanding the Verdict ("JNOV") on its claims against defendants for defamation and disparagement but granting plaintiff's Post Trial Motion, in the Alternative, for a New Trial on all issues related to plaintiff's claims against defendants for defamation and disparagement. This Opinion will also address the appeals of both parties of various court rulings, including Orders *in Limine*, evidentiary rulings made during trial, and the denial, in part, of plaintiff's Motion to Amend its Complaint to conform to the evidence at trial.

Defendants filed a 1925(b) Statement on July 18, 2002. Plaintiff filed a 1925(b) Statement on August 12, 2002. This Opinion addresses too, those matters complained of in the respective 1925(b) Statements.

The Order granting plaintiff's request for a new trial was based predominantly on the prejudicial misconduct of defendant, Manuel P. Asensio, manifested by his complete disregard for this court's authority and basic courtroom etiquette, which included his repeated violations of Orders *in Limine*, and extreme disrespect shown to this court and to opposing counsel in the presence of the jury.

## BACKGROUND[1]

This matter originated in the federal court system in 1998. It was transferred to this court on July 31, 2000, pursuant to 42 Pa.C.S.A. § 5103, following the dismissal by the federal court for lack of subject matter jurisdiction after the federal claims were dismissed and/or withdrawn.

Plaintiff, Hemispherx Biopharma, Inc. ("HBI"), a Delaware corporation with its principal place of business in Philadelphia, Pennsylvania, is engaged in the business of researching, developing and testing experimental pharmaceutical compounds and drug technologies for regulatory approval and sale. Specifically, HBI's primary focus has been the development and clinical testing of the anti-viral compound known as Ampligen for the possible treatment of viral afflictions, including AIDS, cancer, chronic hepatitis and chronic fatigue syndrome ("CFS"). Dr. William A. Carter ("Dr. Carter"), HBI's founder and chief executive officer, has been the primary developer of Ampligen. HBI has never sold Ampligen on the open

[1]The facts listed in this section are derived from a distillation of the trial record, the relevant pleadings and voluminous exhibits. Additional facts and specific references to certain facts will be addressed in the discussion section of this Opinion.

market because, since the 1980s through today, the clinical testing of Ampligen continues and final approval to market continues to be sought from the Food and Drug Administration ("FDA"). HBI continues to raise capital for these developmental activities through the sale of securities. Its common stock is currently traded on the American Stock Exchange.

Defendant, Asensio & Company, Inc. ("ACI"), a Delaware corporation with its principal place of business in New York, New York, is a registered broker and investment banking firm that publishes and distributes analytical research reports regarding publicly-traded companies and trades securities of those companies for its own account. Defendant, Asensio.Com, Inc. ("Asensio.Com") purportedly owns 100% of the shares of ACI, maintains ACI's accounts and provides the necessary capital for ACI to conduct its business, including proprietary trading and short-selling[2] of securities. Manuel P. Asensio ("Asensio"), a citizen of New York, is the founder and chairman of ACI. He engages in short-selling on behalf of ACI, researches publicly-traded companies and produces research reports on these companies, including the allegedly disparaging research reports concerning HBI and its experimental drug compound, Ampligen.

The gravamen of this action stems from defendants' alleged scheme to short-sell and manipulate the price of HBI's common stock through defendants' publication of allegedly defamatory statements in a series of research reports and/or press releases regarding HBI and its development of Ampligen. Specifically, in September 1998, these statements, which appeared in "research reports" on ACI's website,

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[2]"'Short-selling' takes place when a speculator sells stock he does not own, in anticipation of a fall in the price prior to his covering purchase of those shares." Hemispherx Biopharma, Inc. v. Asensio, No.Civ.A. 98-5204, 1999 WL 144109, at *1 n.1 (E.D.Pa. March 15, 1999).

as well as articles in Business Week and The Philadelphia Inquirer, included the following:

- Ampligen is "toxic";
- Ampligen has "no medical or economic value";
- Ampligen "is medically useless and an obsolete drug";
- Ampligen is "off patent";
- HBI has made "fraudulent misrepresentations about Ampligen's FDA filing status and CFS earnings claims";
- HBI's Phase II clinical trial of Ampligen for use as a possible treatment for CFS was "neither placebo-controlled nor double blind" and "failed";
- There is "no legitimate medical or business purpose for [HBI's] continuing attempts to test Ampligen for treatment of CFS and other diseases";
- HBI "is not and has never been engaged in any long term project to create a new drug";
- HBI has "purposefully cultivated" false claims regarding Ampligen "in order to defraud investors";
- HBI "is promoting futile projects simply in order to enable insiders to sell their otherwise worthless stock to the public."

See Second Amended Complaint, ¶ 15(a)-(j); Trial Exhibits P-1, P-2, P-3, P-4, P-5, P-30a, P-30b, P-115, P-116. Additional statements which had been published through ACI's website and selected third parties, including the FDA, the American Stock Exchange, the Securities and Exchange Commission ("SEC") and Business Week are:

- HBI's "insiders have been constant sellers since the IPO."
- CFS "is not a disease" and there is "no reason for HBI's continuing promotion of CFS and Ampligen except to defraud investors."
- HBI is engaged in "fraudulent stock rigging activities and the systematic dissemination of material fraudulent information, including the dissemination of absurd and misleading patent information."
- HBI's Third Quarter 1998 Form 10-Q reveals an "insider 'pump and dump' operation . . . [HBI's] insiders realized between $14,132,888 and $12,026,311 in profit in the third quarter from [HBI's] stock promotion."
- HBI's stock promotion is "perhaps the most blatant fraud that exists in [the] U.S. securities market today."
- HBI is "one of America's most offensive, deliberate and visible stock frauds."

See Second Amended Complaint, ¶ 17 (a)-(f); Trial Exhibits P-1, P-2, P-3, P-4, P-5, P-30a, P-30b, P-

115, P-116. HBI alleges that these publications caused, and were intended to cause, the drop in the price of its stock. Prior and subsequent to the publication of these statements, defendants accumulated short positions in HBI's common stock and engaged in short selling in order to profit from the drop in the price of HBI's stock.

Plaintiff's Second Amended and Supplemental Complaint stated claims for defamation, disparagement, intentional interference with existing and prospective business relations, and civil conspiracy. After extensive and contentious motion practice, the matter went to trial which lasted over the course of three and one-half weeks.

At the conclusion of plaintiff's case-in-chief, defendants moved for a non-suit on each of plaintiff's claims, which the court examined in sequence. 2/12/02 p.m. N.T.[3] 17-60. The court granted defendants' motion on the claim for tortious interference with existing or prospective contractual relations, finding that evidence did not establish a sufficient causal nexus between the complained of conduct and the actual legal damages. 2/12/02 p.m. N.T. 21-22, 27-28; 2/13/02 a.m. N.T. 6-7. The court denied the motion for a non-suit as to the civil conspiracy, defamation and disparagement claims, finding that the uncontradicted evidence and all inferences derived therefrom were sufficient to go to the jury on these claims. 2/12/02 N.T. p.m. 28-60; 2/13/02 N.T. a.m. 7-8.

Defendants also moved for a non-suit on behalf of Mr. Asensio personally. 2/12/02 p.m. N.T. 85-99. The court denied this motion. 2/13/02 a.m. N.T. 8-9.

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[3]"N.T." refers to notes of testimony taken during the trial. The notation "pm" or "am", when made, refers to the time of day that testimony was taken when transcripts were separated.

At the conclusion of defendants' case-in-chief, defendants moved for a directed verdict on the conspiracy claim based on plaintiff's failure to establish a conspiracy to defame plaintiff between Mr. Asensio and Dr. Judy Stone of Quilcap or between Mr. Asensio and another short seller of stock. 2/20/02 p.m. N.T. 28-35. The court granted a directed verdict in favor of defendants on the conspiracy charge. 2/20/02 p.m. N.T. 32-35.

Defendants also moved for a directed verdict as to Asensio.Com, asserting that there was no evidence to indicate that it, as the parent company, acted in the alleged misconduct. 2/20/02 p.m. N.T. 36, 39-42. The court granted the directed verdict and dismissed the claims against Asensio.Com, based on a finding that the evidence was insufficient to pierce the corporate veil and was insufficient to show that this entity participated in the alleged misconduct. 2/20/02 p.m. N.T. 45.

At this time, plaintiff renewed its motion for a directed verdict on the remaining claims based on the repeated violations of the defendant, Asensio, during the trial. 2/20/02 p.m. N.T. 46-48. The court refused this request, finding it to be a "draconian" measure and finding it unclear that the controversial conduct and testimony were fatal to the hope for a fair verdict. 2/20/02 p.m. N.T. 46, 48.

Plaintiff also moved to conform the pleadings to the evidence with respect to additional defamatory statements, made beyond September-October, 1998, and to add Asensio Capital Management, Inc. as a party. 2/20/02 p.m. N.T. 48-51. The court denied the motion to join Asensio Capital Management on the basis that the party had never been served and had no opportunity to defend itself against any claim. 2/20/02 p.m. N.T. 51. With regard to the amendment to add additional alleged defamatory statements, the court engaged in a lengthy discussion with counsel. 2/20/02 p.m. N.T. 52-64. Defense counsel agreed that the sixteen alleged defamatory statements elicited in the Complaint were testified about either directly

or inferentially. 2/20/02 p.m. N.T. 61. Following a careful review of the pertinent materials, the court granted the motion to amend, in part, to add thirty-one statements which were contained in paragraph 16 of the proposed amendment and derived from the September 17, 1998 Business Week article, the September 22, 1998 research report, or the September 23, 1998 Philadelphia Inquirer article. See Pl. Mem. in Support of Its Motion to Amend Compl. to Conform to Evidence, ¶¶ k-ee; 2/21/02 N.T. 4. The Court denied the motion as to paragraph 18 of the proposed amendment insofar as it sought to add statements which occurred after those dates. 2/21/02 N.T. 4; Pl. Mem. in Support of Its Motion to Amend Compl. to Conform to Evidence, ¶¶ (g)-(s).

Ultimately, the case was submitted to a jury upon plaintiff's claims against defendants for defamation and disparagement. The jury's verdict sheet listed sixteen separate questions aimed at determining (i) whether defendants, ACI and Asensio, were liable for defamation and disparagement (questions listed as numbers 1, 2, 3, 8, 9 and 10); and (ii) if so, whether such defamation or disparagement was a substantial factor in causing HBI harm (questions listed as numbers 11 and 12); (iii) whether the statements were made with actual malice and whether punitive damages against Asensio are to be awarded (questions listed as numbers 13 and 14); and (iv) if so, in what amount HBI should be compensated for that harm (questions listed as numbers 15 and 16).

After one day of deliberations, the jury returned a defense verdict.

Thereafter, HBI filed its Motion for JNOV, or in the Alternative, for a New Trial. By stipulation, the parties agreed to a briefing schedule. Defendants filed an additional brief - - Brief in Support of its Cautionary Cross-Motion for Issue Preservation. On June 20, 2002, the court heard oral argument. On July 2, 2002, the court issued an Order, denying the Motion for JNOV but granting the Motion for a New

Trial on all issues relating to the defamation and disparagement claims as to defendants, Asensio and ACI.[4] The Court held plaintiff's request for costs and attorney fees incurred in connection with the original trial under advisement.

**DISCUSSION**

The plaintiff and the two remaining defendants have all appealed. For purposes of clarity the court will first address the appeal of the Order, denying the Motion for a JNOV and granting the Motion for a New Trial. Thereafter, the court will discuss certain other rulings and Orders *in Limine* being appealed.

I. PLAINTIFF'S MOTION FOR JNOV ON THE LIABILITY ISSUES WAS DENIED BECAUSE THE EVIDENCE IS NOT SUCH THAT NO TWO REASONABLE MINDS COULD DISAGREE AND A JNOV IS NOT THE ONLY APPROPRIATE SANCTION FOR DEFENDANTS' MISCONDUCT.

In support of its Motion for JNOV, plaintiff argued that the verdict was contrary to the weight of the evidence because defendants' statements constituted defamation per se, plaintiff proved beyond reason the elements for defamation set forth in 42 Pa.C.S.A. § 8343(a), and plaintiff also proved the elements for commercial disparagement. Alternatively, plaintiff asserted that the entry of JNOV is the only appropriate sanction for defendants' misconduct in this case. This court was not persuaded by either argument.

A. <u>The Trial Evidence Did Not Clearly Entitle Plaintiff to Judgment as a Matter of Law Such That No Two Reasonable Minds Could Find Otherwise</u>.

The Pennsylvania Supreme Court recently espoused the standard in reviewing a motion for a JNOV:

...[W]e must determine whether there was sufficient competent evidence to sustain the

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[4]At oral argument, 6/20/02 N.T. 2, counsel for plaintiff stated that the dismissal of Asensio.Com. was not part of the appeal. Thus, Asensio.Com does not remain in the case.

> verdict . . . We view the evidence in the light most favorable to the verdict winner and give him or her the benefit of every reasonable inference arising there from while rejecting all unfavorable testimony and inferences . . . Moreover, "[a] judgment n.o.v. should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner." . . . Finally, "a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury . . . " . . . A court may not vacate a jury's finding unless "the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant.". . .

Birth Center v. St. Paul Companies, Inc., 567 Pa. 386, 397-98, 787 A.2d 376, 383 (2001) (internal citations omitted). Further, the Court emphasized that "[w]hile a judge may disagree with a verdict, he or she may not grant a motion for J.N.O.V. simply because he or she would have come to a different conclusion. Indeed, the verdict must stand unless there is no legal basis for it." Id. at 398-99, 787 A.2d at 384. See also, Rohm & Haas v. Continental Cas. Co., 566 Pa. 464, 471-72, 781 A.2d 1172, 1176 (2001)(noting two bases for JNOV: (1) "the movant is entitled to judgment as a matter of law, and/or (2) the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant.")("[t]o uphold JNOV on the first basis, we must review the record and conclude 'that even with all the factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second [we] review the evidentiary record and [conclude] that the evidence was such that a verdict for the movant was beyond peradventure'.").

Implicit in these principles is the notion that a jury's verdict is held to be sacrosanct absent a compelling reason to overturn it and grant judgment in favor of the non-verdict winner. Notwithstanding the admittedly unusual circumstances of this case, this court did not find the evidence overwhelmingly in favor of plaintiff or the extreme misconduct of defendant, Asensio, sufficiently compelling to overturn the verdict.

At trial, plaintiff's burden of proof on its defamation claim, as codified at 42 Pa.C.S.A. § 8343, was as follows:

> **(a) Burden of plaintiff.**–In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:
>
> (1) The defamatory character of the communication.
> (2) Its publication by the defendant.
> (3) Its application to the plaintiff.
> (4) The understanding by the recipient of its defamatory meaning.
> (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
> (6) Special harm resulting to the plaintiff from its publication.
> (7) Abuse of a conditionally privileged occasion.

Id. at § 8343(a). Further, the publication had to have been maliciously or negligently made by the Defendant(s). 42 Pa.C.S.A. § 8344.

A communication is defamatory if it is intended to harass the reputation of another so as to lower him or her in the estimation of the community or if it tends to deter third parties from associating or dealing with him or her. Walker v. Grand Central Sanitation, Inc., 430 Pa.Super. 236, 243, 634 A.2d 237, 240 (1993)(citations omitted). See also, Constantino v. The University of Pittsburgh, 766 A.2d 1265, 1270 (Pa.Super.Ct. 2001)("[a] communication is . . . defamatory if it ascribes to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his proper business, trade or profession."). Statements by a defendant imputing to the plaintiff a criminal offense, punishable by imprisonment, or conduct incompatible with plaintiff's business constitute defamation *per se*. Brinich v. Jencka, 757 A.2d 388, 397 (Pa.Super.Ct. 2000). See also, Restatement (Second) of Torts § 570 (a), (c); § 573 (discussing imputations affecting business); § 561 (discussing defamation of a corporation). However, mere expressions of opinion are non-actionable unless the opinion implies undisclosed facts

which are capable of a defamatory meaning. Constantino, 766 A.2d at 1270.

Our Superior Court has stated:

> When a communication constitutes slander *per se*, a plaintiff is not required to prove special harm, i.e., pecuniary loss. Rather, "a defendant who publishes a statement which can be considered slander *per se* is liable for the proven actual harm the publication causes. . . . Actual harm includes "'impairment of reputation and standing in the community, . . . personal humiliation, and mental anguish and suffering. . . .

Brinich, 757 A.2d at 397 (citations omitted). See also, Walker, 430 Pa.Super. at 246-251, 634 A.2d at 242-244 (requiring proof of general damages in a slander *per se* action and comparing common law definitions of slander *per se* with the statutory elements for defamation); Restatement (Second) of Torts § 621 ("[o]ne who is liable for a defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed."); ROBERT D. SACK, SACK ON DEFAMATION § 2.8 (3d ed. 2002) (discussing slander and libel per se which do not need the proof of special damages).

On the other hand, the defendant bears the burden of proving the following: (1) the truth of the defamatory communication; (2) the privileged character of the occasion on which it was published or (3) the character of the subject matter of defamatory comment is of public concern. 42 Pa.C.S.A. § 8343(b). As stated by our Superior Court:

> Communications made on a proper occasion, from a proper motive, in a proper manner, and based upon reasonable cause are privileged. . . . " 'An occasion is conditionally privileged when the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that facts exist which another sharing such common interest is entitled to know.' " . . . Thus, proper occasions giving rise to a conditional privilege exist when (1) some interest of the person who publishes defamatory matter is involved; (2) some interest of the person to whom the matter is published or some other third person is involved; or (3) a recognized interest of the public is involved. . . . Once a matter is deemed conditionally privileged, the plaintiff must establish that the conditional privilege was abused by the defendant. . . .Abuse of a conditional privilege is indicated when the publication is actuated by malice or

> negligence, is made for a purpose other than that for which the privilege is given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, or includes defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose.

Miketic v. Baron, 450 Pa.Super. 91, 101-02, 675 A.2d 324, 329 (1996)(citations omitted).

The tort of commercial disparagement is a similar claim which requires the plaintiff to prove (1) that the statement is false; (2) that the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) that pecuniary loss does in fact result; and (4) that the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity. Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 761 A.2d 553, 555-56 (Pa.Super.Ct. 2000)(citing Restatement (Second) of Torts § 623A). See also, Menefee v. Columbia Broadcasting Sys., Inc., 458 Pa. 46, 53-54, 329 A.2d 216, 219-20 (Pa.1974)(the requirements for a commercial disparagement claim are: (1) that the disparaging statement of fact is untrue or that the disparaging statement of opinion is incorrect; (2) that no privilege attaches to the statement; and (3) that the plaintiff suffered a direct pecuniary loss as the result of the disparagement.).

Though the two tort actions are similar, each protects different and distinct interests. Pro Golf Mfg., Inc., 761 A.2d at 556. The tort of defamation seeks to protect against damage to one's reputation, while the tort of commercial disparagement protects one's economic interest against pecuniary loss. Id. (citations omitted).

Here, plaintiff argued that it proved the elements of defamation and disparagement beyond reason and established judgment as a matter of law. Further, plaintiff maintained that defendant Asensio's statements were defamatory *per se.* Defendants, in turn, argued that the weight and credibility of the

evidence amply supports the verdict in their favor on both the defamation and disparagement claims. Defendants also asserted that Asensio's statements were mere opinions and were not actionable.

Examining the record in its entirety, taking all the inferences in favor of defendants as the verdict winners, it is not clear that there was insufficient evidence to sustain the verdict of no liability on the disparagement and defamation claims. During the trial, there was conflicting testimony and documentary evidence regarding the statements made by defendants in the September 1998 research report and appearing in Business Week, especially as to the safety and efficacy of Ampligen and HBI's testing of its product. Further, Asensio's testimony, regarding whether his statements were opinions, were fact-based opinions or were facts in and of themselves, was self-contradictory. This court deems it inappropriate to parse out which statements would qualify as defamation *per se* because it is nearly impossible to segregate the statements from one another in the context in which they were written and certain statements could be open to interpretation as to whether they are defamatory. This court did include a jury instruction on defamation *per se* and properly left if for the jury to determine if defendants did in fact defame plaintiff. See 2/21/02 N.T. 207-209.

It is a jury's role to assess the evidence, accept or reject conflicting testimony, weigh the credibility of the witnesses and make factual determinations. See Brandon v. Peoples Natural Gas Co., 417 Pa. 128, 132, 207 A.2d 843, 846 (1965); Axilbund v. McAllister, 407 Pa. 46, 180 A.2d 244 (1962); Smith v. Bell Telephone Co. of Pennsylvania, 397 Pa. 134, 138-39, 153 A.2d 477, 479-80 (1959); Farmers' Northern Market Co. v. Gallagher, 392 Pa. 221, 224, 139 A.2d 908, 910 (1958); In the Interest of J.F., 714 A.2d 467, 473 (Pa.Super.Ct. 1998); Dawson v. Fowler, 384 Pa.Super. 329, 333, 558 A.2d 565, 567 (1989); Ludmer v. Nernberg, 433 Pa. Super. 316, 322, 640 A.2d 939, 942 (1994). Even if testimony is

uncontradicted, the jury is not required to accept everything or anything a party presents. Dawson, Id. at 333, 558 A.2d at 567. The courts should not use judgment notwithstanding the verdict to invade that province. Ludmer, 433 Pa.Super. at 322, 640 A.2d 942.

Here, this court could not grant plaintiff's Motion for JNOV because crucial determinations depended on weighing conflicting testimony and other evidence and this task was within the province of the jury. This court should not substitute its judgment for that of the jury's.

B. Entry of JNOV in Favor of Plaintiff is Not an Appropriate Sanction to Remedy Defendants' Misconduct Despite the Egregious Nature of the Conduct

Plaintiff, in the alternative, urged that the entry of a JNOV is the only appropriate sanction to remedy defendants' misconduct. In support of the argument, plaintiff relied on cases which involved sanctions for discovery violations during the pre-trial stage or pre-verdict stage of the case. This court found no Pennsylvania case which would support this proposition.

First, Plaintiff cited to Behr v. Behr, 548 Pa. 144, 149, 695 A.2d 776, 778 (1997), which emphasized a court's power to maintain courtroom authority. Plaintiff also relied upon Croydon Plastics Co. v. Lower Bucks Cooling & Heating, 698 A.2d 625 (Pa.Super.Ct. 1997); Stewart v. Rossi, 452 Pa.Super. 120, 681 A.2d 214 (1996); Miller Oral Surgery v. Dinello, 416 Pa.Super. 310, 611 A.2d 232 (1992); Lawrence v. General Medicine Association, Ltd., 412 Pa.Super. 163, 602 A.2d 1360 (1992); Mulartrick v. Heimbecker, 34 Pa. D.& C.4th 432 (C.P. Montgomery Cty. Oct. 2, 1996), for the proposition that a court's power to control the courtroom includes the power to enter judgment against a party who willfully failed to comply with order of the court. However, none of these Pennsylvania cases involved the entry of a judgment notwithstanding the verdict as a sanction.

For example, in Croydon Plastics, the plaintiff had repeatedly failed to comply with the court's orders to respond to discovery requests and furnish an expert report. 698 A.2d at 627-28. The court precluded plaintiff from presenting expert testimony and this preclusion prompted defendant's motion for summary judgment which was granted. Id. at 628. Thereafter, plaintiff settled with a different defendant, which terminated plaintiff's causes of action against both of the original defendants. Id. Plaintiff appealed the trial court's preclusion of expert testimony as a sanction. Id. Our Superior Court used a heightened review of this order, finding that it was tantamount to dismissal because it led to the summary judgment being granted against the sanctioned party. Id. The court stated as follows:

> Since the dismissal of an action is the most severe sanction which a trial court may impose, the court must carefully balance the equities of the particular case and 'dismiss only where the violation of the discovery rules is willful and the opposing party has been prejudiced.' . . .

Id. at 629 (citing Stewart, 452 Pa.Super. at 125, 681 A.2d at 217). Applying certain factors announced in Stewart, the Croydon Plastics court found no error in the granting of summary judgment against plaintiff. Id. at 631.

The factors announced in Stewart for imposing a sanction which would result in the dismissal of the case are as follows: the nature and severity of the discovery violation, the defaulting party's willfulness or bad faith, prejudice to the opposing party, the ability to cure prejudice, and the importance of the precluded evidence in light of the failure to comply. 452 Pa.Super. at 125, 681 A.2d at 217. However, the court developed these factors from cases involving the dismissal of cases prior to trial because of discovery violations. Id. See also, Miller, 416 Pa.Super. at 315-18, 611 A.2d at 235-36 (upholding default judgment entered against defendant for discovery violations); Lawrence, 412 Pa.Super. at 169-171, 602

A.2d at 1363-64 (judgment of non pros entered against plaintiff for violation of discovery rules); Mulartrick, 34 Pa. D. & C. 4th at 441-42 (entry of default judgment for failure to comply with discovery orders).

Plaintiff also relied on out-of-state federal cases which involved severe sanctions but did not concern judgment notwithstanding a verdict. For example, in Livingston v. Isuzu Motors, Ltd., 910 F.Supp. 1473 (D.Montana 1995), the district court examined the defendants' violation of an order *in limine* precluding mention of one of the plaintiff's failure to use a seat belt where defense counsel placed an exhibit before the jury demonstrating an "unbelted" driver and containing the plaintiff's name. 910 F.Supp. at 1479. Plaintiffs moved for sanctions, including judgment on the liability with the trial to proceed on the issue of damages only, or for a mistrial with defendants to incur all costs or for a cautionary jury instruction at the least. Id. The court struck the defendants' defenses and sent the case to the jury at that point. Id. The jury found the defendants liable. Defendants appealed the court's sanction, arguing it rose to the level of a dismissal or default judgment and was too severe given the lack of wilfulness or bad faith in defendants' violation of the court's order. Id. at 1483. In weighing whether a dismissal is an appropriate sanction, the court examined five factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the opposing party; (4) the availability of less drastic sanctions; and (5) the public policy favoring disposition of cases on their merits. Id. (citations omitted). Applying these factors, the Livingston court held that the prejudicial effect upon plaintiffs' case and the extent of resources extended by the parties and the court warranted the sanction of precluding defendants from presenting their defenses. Id. at 1486. See also, Malone v. United States Postal Service, 833 F.2d 128, 130-31 (9th Cir. 1987)(holding that declaration of mistrial was justified by plaintiff's

counsel's lack of preparedness and violation of pretrial order); Briggs v. City of Norfolk, Civ. A. Nos. 2:98cv288, 2:99cv83, slip op. at 15, 30-31 (E.D. Va. July 26, 2000)(dismissing case during the trial but prior to going before the jury for a verdict after *pro se* plaintiff's repeated violations of orders *in limine*, failure to follow pretrial orders and procedures and other misconduct before and outside of the presence of the jury).[5]

None of the cases cited by plaintiff ever reached the point of having a verdict rendered by the jury. Notwithstanding defendant Asensio's repeated violations of Orders *in Limine*, his failure to show respect for this court's authority in front of the jury, and his verbal attacks on plaintiff and plaintiff's counsel from the witness stand,[6] this court allowed the matter to proceed to the jury. The court, however, believed its jury charge and the pertinent curative instructions would be sufficient to permit the jury to take the case.

The court, then, could not overturn that verdict as a sanction and grant judgment in favor of Plaintiff despite Stewart and its progeny or the other cases cited by plaintiff. Rather, this court believed the more appropriate remedy was the grant of a new trial.

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[5]A copy of the unpublished Briggs opinion was attached at Tab J of Plaintiff's Appendix to its Mem. in Support of its Motion for JNOV and/or New Trial.

[6]This Court will discuss the specific examples of this misconduct in addressing the granting of a new trial. See Discussion at Part II, *infra*.

II. A NEW TRIAL ON THE DEFAMATION AND DISPARAGEMENT CLAIMS WAS MANDATED BASED ON THE PREJUDICE TO PLAINTIFF ARISING FROM DEFENDANT ASENSIO'S BLATANT MISCONDUCT OCCURRING IN THE PRESENCE OF THE JURY INCLUDING HIS ATTACK ON THE COURT'S INTEGRITY AND OPPOSING COUNSEL'S INTEGRITY, AS WELL AS HIS REPEATED VIOLATIONS OF ORDERS IN LIMINE, WHICH WERE FURTHER EXACERBATED BY OTHER DEFENSE WITNESSES.

In support of its Motion for a New Trial, plaintiff advanced several grounds including, *inter alia*, defendant Asensio's violations of Orders *in Limine*, which were emphasized indirectly by other defense witnesses, defendant Asensio's questioning of this court's rulings in front of the jury, his prejudicial characterization of plaintiff, its management and plaintiff's counsel, and defendant Asensio's other disruptive and prejudicial behavior while on the witness stand. Moreover, plaintiff asserts that the court made several erroneous rulings which warranted the grant of a new trial, including the failure to sanction defendants, not permitting patients to testify, directing a verdict for defendants as to the civil conspiracy and intentional interference claims and not allowing plaintiff to amend its Complaint to add statements made after September, 1998 or to add Capital Asset Management Corporation as a defendant.

Defendants, in turn, argued that plaintiff had waived its right to ask for a new trial and the court had correctly precluded the patients' testimony, properly denied the motion to amend, properly directed a verdict in favor of defendants on the civil conspiracy and tortious interference claim and properly precluded evidence of sanctions against defendant Asensio by the NASD.[7]

Primarily, this court granted a new trial based on defendant Asensio's misconduct in front of the jury which this court genuinely believed to have prejudiced plaintiff. The discussion will focus on the

[7]The acronym "NASD" stands for the National Association of Securities Dealers.

misconduct and then address the various rulings.

Rule 227.1 of the Pennsylvania Rules of Civil Procedure ("Pa.R.Civ.P.") authorizes the court to grant a new trial on any or all of the issues if raised during "pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial." Pa.R.Civ.P. 227.1(a)(1), (b)(1). Our Supreme Court has stated that:

> Trial courts have broad discretion to grant or deny a new trial . . . 'The grant of a new trial is an effective instrumentality for seeking and achieving justice in those instances where the original trial, because of taint, unfairness or error, produces something other than a just and fair result, which, after all, is the primary goal of all legal proceedings.' . . . Although all new trial orders are subject to appellate review, it is well-established law that, absent a clear abuse of discretion by the trial court, appellate courts must not interfere with the trial court's authority to grant or deny a new trial.

Harman v. Borah, 562 Pa. 455, 465, 756 A.2d 1116,1121-1122 (2000) (internal citations omitted). Further, "[w]hen deciding to grant or deny a new trial, the trial court must first engage in a two-part analysis: (1) whether a mistake occurred at trial; and (2) whether the mistake was prejudicial to the moving party." Slappo v. J's Development Assoc., 791 A.2d 409, 414 (Pa.Super.Ct.2002) (citing Harman, 562 Pa. at 467, 756 A.2d at 1122).

To determine whether a reasonable likelihood of prejudice exists, a trial court should look, in part, at "1) whether the extraneous influence relates to a central issue in the case or merely involves a collateral issue; 2) whether the extraneous influence provided the jury with information they did not have before them at trial; and 3) whether the extraneous influence was emotional or inflammatory in nature." Carter v. U.S. Steel Corp., 529 Pa. 409, 421-22, 604 A.2d 1010, 1017 (1992). Thus, the burden of establishing a reasonable likelihood of prejudice is a relatively severe one. See also, Fishman v. Suen, 672 So.2d 644, 645-46 (Fla. Ct. App. 4th May , 1996)(proposing that "where an order granting a pretrial motion in limine

has been established, a subsequent egregious violation of that order by one party entitles the other party to a new trial.")(involving an accusation by a defense witness that plaintiff told him to 'basically to commit medicare fraud' where the credibility of the two parties was central to the issues); Young v. Washington Hosp, 761 A.2d 559, 565 (Pa.Super.Ct. 2000)(noting that remarks by counsel do not often require a new trial depending on the circumstances in which the statements were made, the precaution taken by the court and counsel to prevent the prejudicial effect, but that there are "certain instances where the comments of counsel are so offensive or egregious that no curative instruction can adequately obliterate the taint.").

A. Plaintiff Did Not Waive Its Claim for a New Trial By Not Asking For A Mistrial Immediately After Defendant Asensio's Misconduct But Instead Sought Other Remedies Which Were Denied and Then Asked for a Mistrial The Day Before the Matter Was Submitted to the Jury.

As stated by our Supreme Court, "in order to preserve a trial objection for review, trial counsel is required to make a timely, specific objection during trial." Takes v. Metropolitan Edison Co., 548 Pa. 92, 98, 695 A.2d 397, 400 (1997)(citing Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 260, 322 A.2d 114, 117 (1974)). This requirement of a timely specific objection ensures that the trial judge has a chance to correct alleged trial errors." Id.

The scope of the waiver doctrine was examined in McMillen v. 84 Lumber Inc., 538 Pa. 567, 649 A.2d 932 (1994), a case heavily relied upon by defendants here. In McMillen, a product liability action, the trial judge had granted appellees' motion *in limine*, which precluded the introduction of the effect that warning labels complied with industry standards or government regulations. Id. at 569, 649 A.2d at 933. During trial, despite the order and the judge's explicit instructions, appellant's counsel had elicited information from a witness which violated the order. Id. at 570, 649 A.2d at 933. Appellee's counsel did

interpose an objection which the trial court sustained. Id. However, appellees' counsel did not ask for a mistrial on the apparent gamble that they could still win before the empaneled jury as opposed to incurring the expenditure of time and money which would occur if a mistrial were granted and a new trial ordered. Id. Appellees lost before the jury. Id. Then, in post-trial motions, appellees asked for a new trial which was denied on the grounds that the right to a new trial had been waived for failure to make a timely request for a mistrial. Id. at 570, 649 A.2d at 934. The Superior Court found an exception based on a strong public interest, but the Supreme Court disagreed and found that the waiver doctrine did apply especially where the case was a routine civil case. Id. at 571-72, 649 A.2d at 934.

A case distinguishable from McMillen and more akin to the present case is Factor v. Bicycle Technology, Inc., 550 Pa. 500, 707 A.2d 504 (1998). In that case, involving a bicycle accident, an expert witness testified to a matter which was not in his pretrial expert report regarding the examination a bicycle wheel which was not the actual wheel involved in the accident. Id. at 502-03, 707 A.2d at 505-06. Appellants moved to strike the expert testimony and that the jury be instructed to disregard it. Id. at 503, 707 A.2d at 506. The trial court denied the motion and allowed counsel to ask for a mistrial if he so desired. Counsel did not do so. Id. at 504, 707 A.2d at 506. On appeal, in reliance on McMillen, appellee maintained that appellants waived their right to a new trial by failing to move for a mistrial. Id. The Factor court found McMillen to be distinguishable because the "trial court's refusal to grant the lesser remedy of sustaining the Factors' objection and striking [the expert's] testimony relieved the Factors of a duty to move for the greater remedy of a mistrial, while, in McMillen, the objection to the evidence had been sustained and no evidentiary issue was pending." Id. at 505, 707 A.2d at 506.

Here, unlike McMillen, where no request for a mistrial was ever made, plaintiff did eventually ask for a mistrial two days before the case went to the jury for its verdict. 2/20/02 a.m. N.T. 20. Moreover, like Factor, many of plaintiff's requests for sanctions for violations of evidentiary rulings were denied; thereby, relieving plaintiff of the obligation to demand a mistrial. During the course of defendant Asensio's testimony, plaintiff's counsel repeatedly asked for lesser sanctions, including taking defendant Asensio off the stand after repeated violations of orders *in limine* and repeated warnings by the court to Mr. Asensio, striking Mr. Asensio's testimony, holding Mr. Asensio in contempt, precluding defendants from calling plaintiff's witnesses in defendants' case-in-chief, moving for a directed verdict in favor of plaintiff, or giving a curative instruction. The court did sustain certain objections to testimony and struck the offending testimony because the "proverbial cat was out of the bag." McMillen, 538 Pa. at 570, 649 A.2d at 933. However, plaintiff's other requests were denied and defendants were allowed to put on their defense in order that the jury could hear the entire case. See 2/13/02 a.m. N.T. 101-08, 139-44; 2/13/02 p.m. N.T. 103-05, 113-121; 2/14/02 a.m. N.T. 5-11, 63-66, 101, 105-06, 142-44; 2/14/02 p.m. N.T. 4-6, 89-91.

Under these circumstances, and in light of the many objections made during the trial, it is clear that plaintiff did not waive its right to ask for a new trial, even though its request for a mistrial did not take place directly after or during defendant Asensio's testimony and plaintiff's counsel had specifically stated that: "I don't want to start over . . . because the same thing is going to happen the second time around . . . ." 2/19/02 a.m. N.T. 54. The record clearly reflects that plaintiff made timely and specific objections in compliance with Pa.R.Civ.P. 227.1(b)(1).

B. Defendant Asensio's Repeated Violations of Orders In Limine Which Were Exacerbated by Other Defense Witnesses Warranted a New Trial Because The Proper Forum For Complaining About Those Orders is Through the Appellate Process and Not By Directly Violating Those Orders and Incessantly Airing One's Disagreement with These Rulings.

On January 28, 2002, this court granted a number of plaintiff's motions *in limine* which sought to preclude evidence of certain matters.[8] The primary basis for the court's preclusion of certain evidence was Rule 403 of the Pennsylvania Rules of Evidence ("Pa.R.Evid."), in that the probative value of the evidence was outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. See Orders of January 28, 2002; 1/29/02 N.T. 27-60. As the court repeatedly stated throughout the trial, it did not want to have a trial within a trial which would inevitably confuse the jury, especially where no final conclusions had been made by various government agencies. Notwithstanding the unambiguous rulings by this court precluding certain evidence, and clarification throughout the trial, defendants directly violated those rulings on many occasions. Plaintiff's counsel objected each time defendants testified or presented evidence to matters which were excluded and the court sustained the objections, but the violations continued. For purposes of clarity, the court will separately address each of the rulings, coupled with defendants' violations.

[8]The Court, however, denied each party's respective motion to preclude the other party's expert from testifying. Specifically, defendants were permitted to call Marvin B. Roffman as an expert and plaintiff was allowed to call John D. Finnerty as its expert, as well as Robert W. Lowry or Martin J. Weinstein. However, no expert was permitted to offer a legal conclusion regarding defendants' alleged violations of federal securities law or securities dealer rules or regulations (i.e., NASD rules), but could only explain certain conduct or speak of alleged violations.

(i) Testimony About Plaintiff's Underwriters

First, the court ordered that "defendants are precluded from introducing at trial any evidence of the past regulatory and criminal history of the underwriters utilized by plaintiff in connection with its initial public offering ("IPO") of stock." The underwriters or investment banking firms involved with HBI's IPO , which occurred in 1995, were Stratton Oakmont, Biltmore Securities and Monroe Parker Securities. Defendant Asensio directly violated this order by characterizing the underwriters as "convicted felons that are in the business of selling stock to the public" and implying that they are not "legitimate" intermediaries. 2/13/02 a.m. N.T. 129-30. See also, Plaintiff's Appendix to Mem. in Support of JNOV or New Trial, at Tab A. He frequently mentioned plaintiff's lead underwriter, Stratton Oakmont by name. See 2/13/02 a.m. N.T. 117, 119, 131, 134. He testified that HBI's "1995 Prospectus was written by Stratton Oakmont. Their standards are much different than the other standards and they had to sell it to the public so they chopped [certain] language." 2/13/02 p.m. N.T. 28-29. He also explained that HBI "was controlled by the underwriter at the time it was taken public," 2/19/02 a.m. N.T. 48. He stated that "Stratton Oakmont and Biltmore are not legitimate investment bankers . . . [but] are illegitimate investment bankers and it says so in the [HBI 1995 Prospectus]." 2/13/02 a.m. N.T. 119-120. Defendant Asensio also implied that HBI's underwriters were "career stock swindlers" with whom William Carter did "dirty deals," and "convicted federal prisoners." 2/13/02 a.m. N.T. 50, 94, 99. See also, 2/12/02 p.m. N.T. 8.

In addition, defendants' final fact witness, Parker L. Quillen ("Quillen"), the president of Quilcap, was permitted to testify with regard to his "short" position in HBI stock and whether anything was discussed with Mr. Asensio as to this position. But, he was not to testify as to how the stock market worked. 2/15/02 N.T. 5-9. In explaining his reasons for taking a "short" position in HBI stock, Quillen

stated: "[t]here are a lot of reasons . . . The underwriter would be an important consideration in analyzing any company. In this case, with Stratton Oakmont as the underwriter. . . ." 2/20/02 p.m. N.T. 11. At this point, plaintiff's counsel objected and the Court struck this reference. Id. Nonetheless, the impermissible reference to Stratton Oakmont was again emphasized before the jury.

(ii) Testimony About Prior Unrelated Litigation

The court also granted plaintiff's motion *in limine* ordering that evidence about prior unrelated lawsuits involving plaintiff was precluded from being introduced at trial. As such, no evidence was to be mentioned with regard to prior litigation between HBI and DuPont, HBI and Dr. Carter,[9] or HBI and Peter Frost. Defendants directly and frequently violated this exclusionary order through impermissible allusions and specific references. See Plaintiff's Appendix to Mem. in Support of JNOV or New Trial, at Tab B. For example, in a thinly-veiled hypothetical which was clearly directed at HBI, as the "target" company who engaged in the alleged "pump and dump scheme," Asensio testified as follows:

> XYZ Company has failed at everything they have done. There's been litigation. There's been accusations of fraud, securities fraud, litigation fraud. It's worthless. No one wants to do business with these people. These people are scoundrels. . . . There's two processes in the pump and dump . . . Generally a group of corrupt doctors that have failed and sued for fraud and everything else. . . .

2/13/02 a.m. N.T. 63-65. In testifying as to his investigation of HBI, Asensio testified that "[t]here was a great deal of litigation surrounding William Carter . . . . [w]e obtained all of the documents concerning what litigation we found, the litigation record of Carter, Franceski and Walsh working as a team."[10]

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[9]The Court modified this order slightly by allowing the introduction of evidence as to the fact that Dr. Carter's employment had been terminated by HBI, then known as HEM Research, Inc., in 1988 and that Dr. Carter was reinstated in 1989 and the terms of that reinstatement. 2/11/02 N.T. 24.

[10]David C. Franceski, Jr. and Michael A. Walsh are Plaintiff's counsel in this matter.

2/13/02 a.m. N.T. 102. He continued to state: "[t]hey sued everyone that said anything about this man [Dr. Carter] including the man he stole a million dollars from and he got charged for it. [a]n AIDS patient came to him after the treatment . . . ." 2/13/02 a.m. N.T. 102-03. Asensio further explained that "the only legitimate partner had sued [HBI] for scientific fraud . . . ." 2/13/02 a.m. N.T. 124. Asensio made specific references to DuPont, testifying that:

> When the trial failed, William Carter rushed out - I think there's language in here that says I just this very second discovered why the trial failed, because it was in plastic bottles. Oh, by the way, guess who manufactured the plastic bottle? DuPont. Conspiracy. . . . DuPont is in the Prospectus in the litigation. . . .

2/13/02 p.m. N.T. 65. In answering a question regarding why the AIDS trial of Ampligen was halted by the FDA, Asensio made many references to DuPont and specifically stated that "Carter was sued for having manipulated the patient data . . . [w]e have the lawsuit from DuPont and the expert testimony from DuPont that he rigged the numbers." 2/14/02 a.m. N.T. 114-15. Moreover, these violations were heightened when defendants' expert witness, Marvin B. Roffman, testified that "I certainly would be interested in whether or not the senior people running the company had any problems legally." 2/15/02 N.T. 49.

(iii) Evidence About HBI's Violations of FDA Regulations

The court also granted plaintiff's motion *in limine* which sought to preclude any evidence related to whether HBI promoted Ampligen in violation of FDA regulations. Defendants did violate these exclusionary orders. See Plaintiff's Appendix to Mem. in Support of JNOV or New Trial, at Tab C. Specifically, Asensio testified that: "it's illegal for them to say their drug is safe and effective. They cannot say that. The FDA prohibits them, and every time they said it, the FDA has sanctioned them for it.

2/13/02 p.m. N.T. 8-9. The next day, Asensio testified that: "I would like to show [the jury] more than that. I would like to show them the FDA infraction. I would like to show how [Dr. Carter] stole money . . . ." 2/14/02 a.m. N.T. 83. Further, in cross-examining one of plaintiff's witnesses, Dr. Strayer, defense counsel attempted to put up a letter, dated October 15, 1998, on the screen before the jury, which was the FDA letter to HBI charging a violation of FDA's anti-promotion regulation. 2/6/02 a.m. N.T. 137-39; Exhibit D-48. The court did not permit defendants to continue with this line of inquiry and had a colloquy with counsel outside of the jury's hearing. 2/6/02 a.m. N.T. 140-157. Defense counsel did not press the issue in the afternoon session. 2/6/02 p.m. N.T. 12-13.

(iv) Testimony About the SEC Investigation of HBI

The court also granted plaintiff's motion *in limine*, seeking to preclude any evidence related to any SEC investigation of HBI. Once again, defendants violated this exclusionary order. See Plaintiff's Appendix to Mem. in Support of JNOV or New Trial, at Tab D. Asensio explicitly testified that HBI "is under investigation by the SEC" for fraud. 2/14/02 a.m. N.T. 140. In explaining that his company had analyzed the makeup of HBI's IPO, Asensio testified that "the authorities also did that and we agree with their opinion." 2/19/02 N.T. 20. He also explained that "[t]he government looked at it [i.e., HBI's Prospectus] and said they defrauded the public, and that's on the record." 2/13/02 p.m. N.T. 36. It is unclear whether the term "government" meant the FDA or the SEC, but the impermissible allusion was evident. Mr. Asensio further admonished plaintiff's counsel for mentioning an SEC filing, stating that "[y]ou're going into a very dangerous area." 2/14/02 p.m. N.T. 53.

(v) Testimony About a Congressional Investigation of HBI

In addition, the court granted plaintiff's motion *in limine*, precluding any evidence involving Representative John Dingell[11] from being introduced at trial. Notwithstanding this ruling, Asensio violated it by testifying about "the congressional investigation of this company." 2/14/02 a.m. N.T. 42.

(vi) Indirect Violations of Orders *In Limine*

Besides the direct violations, Asensio continually emphasized to the jury that evidence had been precluded and that the jury was not hearing the full story. See also, Plaintiff's Appendix to Mem. in Support of JNOV or New Trial, at Tab E. For example, Asensio testified that "[t]his is very important for the jury to know that [Dr. Carter] stole a million dollars from an AIDS patient." 2/13/02 a.m. N.T. 104. In another instance, Asensio asked, "I can't say what's in the document." 2/13/02 a.m. N.T. 125. And again, Asensio stressed the importance of a document while the court found no basis for the document's authenticity with respect to HBI. 2/13/02 p.m. N.T. 79. In front of the jury, Asensio questioned these rulings, stating that "[the jury] is in shock at these rulings that don't allow me to speak and talk about the things that support the language that I'm being accused of being defamatory." 2/13/02 p.m. N.T. 80. At another point, Asensio stated, "[t]he jury hasn't gotten the facts, Your Honor. You haven't allowed me to testify to the facts and show them the documents." 2/14/02 a.m. N.T. 88-89. Also, he directly confronted the court, in front of the jury, and stated, "You've taken out enough of this. This is one of the few pieces that are left in this case for the jury to hear how I based ...". 2/14/02 a.m. N.T. 37-38.

[11]According to plaintiff, Representative Dingell is a member of the United States Congress who had expressed an interest in plaintiff as a result of receipt of certain letters and information from defendants. See Plaintiff's Mem. in Support of JNOV or New Trial, at 19.

Applying the factors listed in Carter, 529 Pa. at 421-22, 604 A.2d at 1017, for finding a substantial likelihood of prejudice, it is very likely that plaintiff was prejudiced by the enumerated violations of the orders *in limine*, coupled with the continual mantra that "the jury was not hearing the whole story." This prejudice was further exacerbated by Mr. Asensio's practice of directly arguing with the court while on the witness stand, despite the fact that he was represented by counsel. Many of the statements made by Mr. Asensio were not merely collateral but were central to the case because many of them related to the statements upon which defendants were being sued. Notwithstanding the court's exercise of patience and attempts to keep the trial fair or defense counsel's attempts at controlling their client, Mr. Asensio's diatribes while on the witness stand were beyond anyone's control.

C. Defendant Asensio's Attack on this Court's Integrity and Opposing Counsel's Integrity, as well as His Failure to Comply with Courtroom Etiquette Also Mandated Granting a New Trial Because of the Unmistakable Prejudice to Plaintiff and the System of Justice as a Whole.

While on the witness stand, defendant Asensio continually questioned this court's rulings and engaged in behavior which was improper, lacked basic courtroom etiquette, was contumacious and formed the basis for this court's granting of a new trial because his misconduct can only be construed as extremely prejudicial to the plaintiff.[12] See Plaintiff's Appendix to Mem. in Support of JNOV or New Trial, at Tab F.

[12]While this court's grant of a new trial was based on misconduct occurring in front of the jury, there were several instances of this misconduct outside of the jury's hearing. An example is an instance that occurred shortly before Mr. Asensio's testimony and concerned his disagreement with the court's rulings. 2/13/02 am N.T. 10-16.

First, Asensio repeatedly questioned this court's rulings in front of the jury. See 2/13/02 a.m. N.T. 54 ("I don't understand why we can't see the first column . . . I guess that's a ruling by the Judge, we can't see the first column"); 2/13/02 a.m. N.T. 102 ("How can it not be part of the case? They're sitting right here. How can it not be part of the case?"); 2/13/02 a.m. N.T. 103 ("There are rulings that are against facts, sir. This is important for the jury to hear. Just because you don't allow me to speak to the jury does not mean that it's correct."); 2/13/02 p.m. N.T. 43-44 (Following the sustaining of an objection and the court's instruction to move on, Mr. Asensio states "I'm not finished with that question."); 2/13/02 p.m. N.T. 60 ("what's the problem now, Your Honor? I'm trying to speak, and this is the freedom of speech case . . . the rules is that I shouldn't even be here because I have a freedom to give my opinions; and I live in New York, and you don't even have jurisdiction over me."); 2/14/02 a.m. N.T. 39 ("Now you're interrupting my testimony? First you don't allow me to talk about things. Now you're interrupting my testimony?"). These statements by Asensio were improper and inflammatory. The proper forum for airing his disagreement with these rulings would have been to file an appeal and not by showing a complete disregard for the court's authority.

Mr. Asensio also explicitly accused the court of bias in front of the jury. See 2/13/02 a.m. N.T. 97 ("I wonder why Carter is it looking at the Judge so happily. . . . Is there some connection here I don't understand?"); 2/13/02 a.m. N.T. 104 ("I wouldn't be so angry if you hadn't continuously been ruling this way since October."); 2/14/02 a.m. N.T. 51 ("very prejudicial to my case, Your Honor, the way you're treating me in front of this jury. Very prejudicial."); 2/14/02 a.m. N.T. 88 (Asensio: "Let's have a fair trial;" The court: "That's what I'm trying to do." Asensio: "No, Your Honor, you're not doing that. You're totally biased and it's obvious."); 2/14/02 a.m. N.T. 99 ("The unfair treatment of my lawyers . . . I believe

my lawyers have been very unfairly treated here, Your Honor."); 2/14/02 N.T. 120 ("How is he allowed to use [a document] when I couldn't . . .").

Further, Mr. Asensio directly attacked plaintiff's counsel and tried to implicate them in some alleged fraud and/or crime being perpetrated by plaintiff. See 2/12/02 p.m. N.T. 10 (". . .this man has been harassing us for three and a half years because we spoke out against what he and his clients do."); 2/12/02 p.m. N.T. 8-9 ("I'm talking about Dr. Carter and [HBI], who do business with criminals, convicted criminals, felons . . . and yourself [plaintiff's trial counsel], who have been with them for about fifteen years, protecting them as society has been trying to save itself from this criminal activity."); 2/13/02 a.m. N.T. 97 ("And I wonder why Walsh is looking at me this way, Your Honor?"); 2/13/02 a.m. N.T. 102 ("We obtained all of the documents concerning what litigation we found, the litigation record of Carter, Franceski and Walsh working as a team.").[13]

In addition, Mr. Asensio failed to follow basic courtroom etiquette. He would not answer questions when directly asked by plaintiff's counsel, his own attorneys or the court. He would not follow any of the court's instructions. One cogent example was when Mr. Asensio confronted plaintiff's counsel during questioning before the jury. He stated:

> Now he is interfering with me, and you gave me an instruction to talk to you. When are you going to tell this man to behave himself, Your Honor? When are you going to tell Mr. Walsh to behave himself? I am talking, Mr. Walsh. Do not interrupt me. . . .

2/13/02 p.m. N.T. 92. Further, Asensio contended that he despised plaintiff's counsel and that his

[13]Mr. Asensio and other defense witnesses also either explicitly or implicitly attacked plaintiff's character in a repetitive and inflammatory manner. However, it is not necessary to list every instance since this attack was not the basis for this Court's granting a new trial.

deposition testimony was the product of duress. 2/14/02 p.m. N.T. 59-60. Another example of Mr. Asensio's disdain for plaintiff's counsel and his refusal to answer questions is demonstrated by the following excerpt:

> Q: Let's focus on the question, Mr. Asensio because I do think it's something we ought to understand. It's fair to say –
>
> A. The title –
>
> Q. Let me finish the question.
>
> A. The title to it, Ampligen treatment IND withheld.
>
> Q. I know it says that. That doesn't say –
>
> A. You're so corrupt that you're trying to create an issue out of something minor.
>
> The Court: Mr. Asensio, enough. Mr. Goldfein, may I see you at sidebar, sir Mr. Walsh.

2/14/02 a.m. N.T. 98. He also criticized plaintiff's counsel for taking his deposition, contending that it constituted harassment and duress because of the length of it. 2/14/02 p.m. N.T. 57-60.

During the trial, this court continually warned Mr. Asensio and attempted to persuade him to behave, with a view to preclude a mistrial. Despite repeated warnings, there was no way to prevent his misconduct. The court ultimately, announced that it would hold a contempt hearing, but decided to await conclusion of this appeal process. Based on this record, it is apparent to this court that plaintiff suffered prejudice because of defendants' misconduct. To not grant a new trial would be a miscarriage of justice.

D. A New Trial Could Not Be Granted on the Tortious Interference Claim or the Civil Conspiracy Claim Because the Evidence Failed to Establish a Causal Nexus Between the Complained of Conduct and the Alleged Damages and No Conspiracy to Defame Plaintiff was Established.

(i) The Tortious Interference with Contract Claim

Plaintiff argued that this court erred in granting defendants' motion for a directed verdict on plaintiff's claim for intentional interference with existing and prospective contractual relations.The court's ruling on the directed verdict was based on its finding that evidence did not establish a sufficient causal nexus between the complained of conduct and the actual legal damages. 2/12/02 p.m. N.T. 21-22, 27-28; 2/13/02 a.m. N.T. 6-7.

The elements of a cause of action for tortious interference with contractual or prospective contractual relations are as follows:

(1) the existence of a contractual, or prospective contractual relation between the complainant and a third party;
(2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;
(3) the absence of privilege or justification on the part of the defendant; and
(4) the occasioning of actual legal damage as a result of the defendant's conduct.

Hess v. Gebhard & Co., Inc. 769 A.2d 1186, 1194-95 (Pa.Super.Ct. 2001)(citations omitted). "One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for (a) the pecuniary loss of the benefits of the contract or the prospective relation; (b) consequential losses for which the interference is a legal cause; and (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference." Id. at 1195 (citing Restatement (Second) of Torts § 774A).

Plaintiff asserted that it presented uncontradicted and overwhelming evidence that defendants interfered with several of HBI's existing and prospective contractual relationships and disrupted its business opportunities. In support of this argument, plaintiff relies on Dr. Carter's testimony that Mr. Asensio's statements "made it very, very difficult if not impossible for us to raise capital or cash to continue to conduct our clinical trials and when we have been able to raise money, it's been much more costly to us than it was before." 2/11/02 N.T. 100-01. Dr. Carter also testified that one transaction HBI had completed in 2000 took nearly three and one half years to complete; that HBI has been unable to issue its stock through private placements and that he could not obtain investments from Europe because he was confronted with Mr. Asensio's statements. Id. at 102-04. Notwithstanding Dr. Carter's testimony, plaintiff did not specifically identify any third party with which plaintiff had a contract or a prospective contract to raise capital or invest in HBI.

In addition, plaintiff asserted that it met its burden of establishing its tortious interference claim through the example of Dr. Gordon Douglas, who was to join the board of directors of HBI in August 2000. 2/12/02 a.m. N.T. 129-139. Following HBI's announcement on or about August 7, 2000 that Dr. Gordon would be joining HBI's board, Mr. Asensio contacted Dr. Douglas, though it is unclear exactly what Mr. Asensio said to Dr. Douglas. Id. at 135-139. However, on August 10, 2000, Dr. Douglas wrote to Dr. Carter, stating, in pertinent part, that:

> . . .a number of prior commitments resulting in unanticipated workload has materialized making it impossible for me to accept the position at [HBI] . . . As a result of this decision, I ask you not to use my name in any way related to Hemispherx. In addition, since you have already publicly disclosed my position with Hemispherx, you must now issue notification to the contrary.

Exhibit P-71. This letter, coupled with Mr. Asensio's contradictory testimony, showed an insufficient

causal connection between Dr. Douglas' decision to not join HBI's board and Mr. Asensio's conduct.

Moreover, plaintiff's evidence of damages was presented through its expert witness, John D. Finnerty ("Dr. Finnerty"). His testimony of HBI's damages related to the decline in the price of HBI's stock following the September 1998 statements by Defendants. 2/11/02 N.T. 121-135. Dr. Finnerty did testify that the "damage has never been eliminated . . . [but] is continuing." 2/11/02 N.T. 135. He further stated that "[t]he company today is worth substantially less than it would have been had these disparaging remarks never been published." Id. at 135. It was not clear from this testimonial evidence that Dr. Finnerty's damage assessment was connected to the tortious interference claim.

On the record presented, even taking all of the inferences in favor of plaintiff, this court could not find a sufficient causal connection between defendants' conduct and the plaintiff's damages. It, therefore, granted the directed verdict in favor of defendants on this claim. 2/12/02 p.m. N.T. 21-22, 27-28; 2/13/02 a.m. N.T. 6-7. This claim should not be revived in a new trial.

(ii) The Civil Conspiracy Claim

Plaintiff also argued that it presented uncontradicted and overwhelming evidence of its conspiracy claim. This court disagreed.

A claim for civil conspiracy requires a plaintiff to establish: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage. McKeeman v. CoreStates Bank, N.A., 751 A.2d 655, 660 (Pa.Super.Ct. 2000).

Plaintiff asserted that the co-conspirators consisted of Dr. Judy Stone, Parker Quillen of Quilcap and Michael Wilkins, who, at the time they spoke with Mr. Asensio about HBI, had each taken substantial

short positions in anticipation of the fall in the price of HBI's stock. See 2/8/02 N.T. 101-02, 107-08; 2/20/02 p.m. N.T. 6-8.

The court granted the directed verdict in favor of defendants, finding that the evidence did not establish a conspiracy to defame plaintiff. Rather, the court found that the only conspiracy, if any, could have been an agreement to short sell HBI's stock on the premise that it was overvalued. 2/20/02 p.m. N.T. 32-33. The act of short-selling, in and of itself, is not sufficient to establish a civil conspiracy claim. Therefore, no new trial should be granted on the civil conspiracy claim.

E. This Court's Denial of Plaintiff's Motion to Amend Its Complaint to Conform to Evidence at Trial Was Not Grounds for Granting A New Trial.

Plaintiff argued that this court erred in denying plaintiff's Motion to Amend its Complaint to add additional statements made by defendant Asensio after September 1998 and in failing to add Asensio Capital Management, Inc. as a defendant.

Rule 1033 permits a party to amend his complaint "to conform the pleading to the evidence offered or admitted." Pa.R.Civ.P. 1033. "Amendments are to be liberally permitted except where surprise or prejudice to the other party will result, or where the amendment is against a positive rule of law." Burger v. Borough of Ingram, 697 A.2d 1037, 1041 (Pa.Commw.Ct. 1997)(citation omitted)

This court's denial of plaintiff's motion was based primarily on the fact that the proposed amendments either denied defendant[14] the opportunity to prepare a defense, were beyond the one-year statute of limitations for a defamation claim,[15] or were substantially similar to the statements complained of

[14]Asensio Capital Management, Inc.

[15]42 Pa.C.S.A. § 5523.

and were not necessary to resolution of the ultimate issue. The court stated its reasons on the record for its denial. 2/20/02 p.m. N.T. 51-64; 2/21/02 N.T. 4. Specifically, plaintiff was not permitted to join Asensio Capital Management on the basis that the party had never been served and had no opportunity to defend itself against any claim. 2/20/02 p.m. N.T. 51. As to the additional statements, the court permitted thirty-one of the statements to be added which derived from the same sources as the original statements. 2/21/02 N.T. 4. As to the other statements, defendants either did not have sufficient notice to defend against them, the one-year statute of limitation had already run on those statements, or they were merely re-stating the subject matter as the original statements and were merely cumulative.

F. The Court's Precluding Patients' Testimony is Not Grounds For Granting A New Trial Where Such Testimony Could Have Been Misleading and/or Overly Prejudicial While Allowing Doctors to Give Factual Testimony of Their Observance of Ampligen's Effectiveness Was Permitted and Did Not Constitute Expert Testimony.

Plaintiff argued that this court's preclusion of patients' testimony was error which warrants a new trial. However, this ruling was not the basis for the court's granting a new trial. Rather, the patients were precluded from testifying because plaintiff offered this testimony to show patients for whom the drug had purportedly worked, while defendants did not have the opportunity to present testimony from patients for whom Ampligen did not work. Therefore, plaintiff's offer of proof was deemed to violate Pa.R.Evid. 403 because the purported testimony could have been overly prejudicial and/or misleading. See 2/4/02 N.T. 129-145.

On the other hand, the court did allow physicians to give factual testimony on their observations of various patients' responses to Ampligen, seeking to establish its safety and/or effectiveness. See 2/1/02 N.T. 5-20. The court made clear that the doctors could only testify to what he/she observed but could not

explain it to establish a legal or medical conclusion. Id. at 13. Contrary to defendants' position, this testimony was not expert testimony. Therefore, this court did not err in failing to conduct a Frye hearing.

G. Defendants' Reference to the "Snake Oil" Document in Their Closing Was Not Grounds for Granting the New Trial

Plaintiff argued that this court's failure to strike references to the "Snake Oil" document and its refusal to give a curative instruction to the jury warranted a new trial. This court disagreed.

During the cross-examination of Dr. Carter by defense counsel, Dr. Carter was shown Exhibit D-320, which represented an article, dated November 19, 2001, called "Smallpox Treatment or Snake Oil." 2/19/02 p.m. N.T. 49-53. Specifically, Dr. Carter was asked whether he said certain things about Ampligen which were referred to in the article. Id. at 50-51. Plaintiff's counsel generally objected, without stating its reasons for the objection. Id. at 51. The court sustained the objection as to the form of the question. Id. Plaintiff's counsel did not press a different objection and Dr. Carter continued to give testimony as to certain statements in the article. Id. at 51-52. As such, the record does not demonstrate that this article was inadmissible hearsay.

For this reason, defense counsel's reference to the article in his closing was not grounds for granting a new trial.

III. THE ISSUE OF DEFENDANT ASENSIO'S PERSONAL LIABILITY WENT TO THE JURY BECAUSE PENNSYLVANIA LAW HOLDS THAT CORPORATE OFFICERS ARE PERSONALLY LIABLE FOR THE ALLEGED TORTIOUS CONDUCT OF THE CORPORATION IF THEY PERSONALLY TOOK PART IN THE TORT.

Defendants, in their Cautionary Cross-Motion for Issue Preservation, contend that this court erred in not granting a nonsuit as to the personal liability of defendant Asensio. It is well established in Pennsylvania that "corporate officers are personally liable for the alleged tortious conduct of the corporation

if they personally took part in the commission of the tort, or if they specifically directed other officers, agents or employees of the corporation to commit the act." Babich v. Karsnak, 364 Pa.Super. 558, 567, 528 A.2d 649, 654 (1987)(quoting Donner v. Tams-Witmark Music Library, 480 F.Supp. 1229, 1233 (E.D.Pa. 1979). See also, Moy v. Schreiber Deed Security Co., 370 Pa.Super. 97, 103, 535 A.2d 1168, 1171 (1988)(stating "the law of Pennsylvania has long recognized that a corporate officer who participates in wrongful, injury-producing conduct can be personally liable.")(citing Pennsylvania cases). The record is replete with evidence that defendant Asensio authored the allegedly defamatory statements and that he stands behind those statements. To not find that he personally took part in this conduct would be contrary to the evidence. Therefore, the court allowed the issue of Asensio's personal liability to go to the jury.

**CONCLUSION**

For the reasons stated, this court granted plaintiff's Motion, in the Alternative, for a New Trial on its claims for defamation and commercial disparagement.[16]

**BY THE COURT,**

**ALBERT W. SHEPPARD, JR., J.**

[16]Both parties appealed certain other rulings by this court which were not the basis for granting the new trial. The record, including other Orders and Opinions in this case, sufficiently demonstrates the reasoning for those other rulings. This court need not revisit them in this Opinion.