

# No. 09-0199

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## In the Supreme Court of Texas

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**CONEX INTERNATIONAL CORPORATION**

*Petitioner,*

v.

**FLUOR ENTERPRISES, INC. F/K/A FLUOR DANIEL, INC.  
AND LESLIE ANTALFFY**

*Respondents.*

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On Petition for Review from the  
Ninth Court of Appeals  
09-07-00100-CV

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### **CONEX'S BRIEF ON THE MERITS AS RESPONDENT**

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October 20, 2009

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## STATEMENT OF THE CASE

*Nature of the case:*

This is a commercial and business-torts dispute. Conex sued Fluor and its project manager, Les Antalffy, for tortious interference and business disparagement after Fluor interjected itself into a 2001 turnaround construction project at the Atofina Refinery in Port Arthur.

*Trial Court:*

60th Judicial District Court, Jefferson County;  
(Honorable Gary Sanderson, presiding)

*Trial Court's Disposition:*

Rendered judgment for Conex, on the verdict. The jury deliberated for approximately three days, and it returned a verdict for Conex, finding:

Liability: (1) Fluor and Antalffy intentionally interfered with the contract between Conex and Fina, causing damage to Conex; (2) Fluor and Antalffy disparaged Conex's business; (3) Fluor and Antalffy intentionally interfered with prospective business relations between Conex and Fina and such conduct was independently tortious because of fraud and business disparagement; and (4) by clear and convincing evidence, the injury to Conex resulted from a specific intent to cause substantial injury to Conex on the part of Fluor.

Damages: (1) \$1.8 million in past contract damages; (2) \$8.5 million in past lost profits; (3) \$8.5 million in future lost profits; and (4) \$50 million for lost profits related to the Atofina Deep Conversion Project. In addition to these actual damages, the jury awarded a total of \$30 million in punitive damages. CR 496-519; Tab A.

*Court of Appeals Opinion:*

Ninth Court of Appeals, Beaumont;  
(McKeithen, C.J., and Kreger, J., author – majority)  
(Gaultney, J., dissenting)

*Fluor Enters., Inc. v. Conex Int'l Corp.*, 273 S.W.3d 426 (Tex. App.—Beaumont 2008, pet. filed) (No. 09-07-100-CV); Tab B.

*Court of Appeals' Disposition:*

Reversed and remanded for a new trial, on factual sufficiency grounds.

Charles Kreger, J., joined by McKeithen, C.J., held: (1) the evidence was factually insufficient to establish liability on the business disparagement claim; (2) the evidence was factually insufficient to establish liability on the tortious interference claim; and (3) there was at least some evidence of causation and of Conex's actual damages. Consequently, remand for a new trial was required. 273 S.W.3d at 447-488.

David Gaultney, J., dissenting, concluded: (1) the evidence was legally and factually sufficient to support the business disparagement claim, and (2) the evidence was legally and factually sufficient to support the \$1.8 million award of contract damages.

*Parties on Appeal:*

*Respondents/Appellants:* Fluor Enterprises, Inc. f/k/a Fluor Daniel, Inc. and Leslie Antalffy

*Petitioner/Appellee:* Conex International Corp.

### **STATEMENT OF JURISDICTION**

The Court has jurisdiction because this case involves legal errors of such importance to the jurisprudence of the state that they require correction by this Court. *See* TEX. GOV'T CODE ANN. § 22.001(a)(6) (Vernon 2004). The Supreme Court also has jurisdiction because the justices of the court of appeals disagreed on a question of law material to the decision. *See* TEX. GOV'T CODE ANN. § 22.001(a)(1) (Vernon 2004).

Fluor's jurisdictional statement impermissibly argues its case, using those pages in derogation of the 50-page-limit rules. *See* TEX. R. APP. P. 53.2, 53.6 ("The petition must state, *without argument*, the basis of the Court's jurisdiction.").

## **RESPONSE TO FLUOR'S ISSUES PRESENTED**

Fluor gives the same argumentative treatment to its issues presented. The good news is that its argumentative statement of issues has been re-worked, shrinking from the eight full pages, with sixteen total issues presented, that found their way into the petition for review. Now there are just seven issues presented, with multiple, rambling sub-parts. Conex responds below, in the argument section, to each issue presented by Fluor.

Amazingly, Fluor never acknowledges that the underlying judgment was reversed, and Fluor's vituperative argument rings hollow in the face of the remand. As of now, this case is going back for another trial. Fluor disparaged Conex and willfully interfered with Conex's contract by falsely maligning Conex's work. In the same fashion, Fluor's interference continues to date with its blackballing of Conex on Fina's \$2.2 billion deep conversion project (DCP), which Fluor is now building. There is nothing in Fluor's issues presented warranting this Court's time or trouble to struggle with a case that is now on remand. However, the Court should review the court of appeals opinion and police the erroneous application of the factual-sufficiency review standards, and it should grant review of Conex's petition.

## RESPONSE TO FLUOR'S STATEMENT OF FACTS

Given Fluor's laundering of the record, it is tempting to regurgitate the standard of review; a visceral response might be understandable. But Fluor already is aware of the standard that applies to re-examining facts, and another lesson in the admonitions of this Court would be useless in convincing Fluor to play by the rules. "[A]ppellate courts must view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). Fluor cannot—or will not—credit evidence contrary to its own story. It is telling that all three appellate justices found credible evidence of contract interference and business disparagement while Fluor sees none. Fluor's tactics in presenting one-sided facts are just like its competitive tactics. Fluor engaged in deceitful and untruthful conduct while it interfered with Conex's contract rights. "Fluor had no privilege to maliciously make false statements disparaging Conex . . . . Fluor crossed a line in maliciously and falsely attributing the need for the extra work to incompetence by Conex." 273 S.W.3d at 449. The fact fight has been waged and it is over.

***Fluor Is Wrong About the Contract.*** Fluor limits the contract to having just two parts: *one*, a cleanout/maintenance piece and a *second* capital component. Actually, the contract's Section 5.0 "Scope of Work" lists no fewer than five parts, referenced in separate addendums: (A) pre-turnaround mechanical work; (B) pre-turnaround electrical and instrumentation work; (C) turnaround mechanical work; (D) turnaround electrical and instrumentation work; and (E) turnaround maintenance work. PX9 at TOT 0208.

Fluor's distinction between capital and other work is not in the contract, except that "[f]or cost reasons only, it is imperative that the contractor separate the "Expense" work from the "Capital" work." PX9 at TOT 0206. Fluor therefore confuses an accounting feature, used so that Fina could take money out of different parts of its budget to pay Conex, with the scope of work required by the contract.

Fluor next mistakes what the contract required for PWHT, supposing it specified protection from "harmful thermal gradients." That term is nowhere found in the contract; all that was required was code compliance. "Repairs to pressure vessels including heat exchanger components shall be in accordance with applicable code and coordinated with Owner's inspection department." PX9 at TOT 0329. An authorized code inspector was called to look at Conex's welding and post-weld heat-treating procedures. He determined they were within all tolerances specified by applicable codes. RR 5:30-31. The Conex PWHT procedures met code requirements and passed Fluor's inspection. RR 12:62; 8:44-45; 20:71. John Carrens of Fina, the project manager, admitted at trial that "[t]here are different methods to stress relieve. It needs to be code compliant." RR 13:35.

The contract—not Fluor's extraneous third-party evidence—specifies the kind of PWHT that would be appropriate under the Conex-Fina turnaround agreement. In its specifications, which became a part of the contract, *see* PX9 at TOT 0542, Conex noted that only welds performed on vessels less than five feet in diameter would be stress-relieved using full circumferential bands. *Id.* at TOT 0537. Otherwise, "[s]tress relieving is based on local heating of attachment welds and/or nozzles to large vessels over [five feet] diameter." *Id.* Conex's proposal for spot stress-relief work is "what they should

have been proposing;” it is the same spot-PWHT procedure “done for half a century, . . . accepted by the code all that time and by the National Board of Pressure Vessel Inspectors.” RR 7:29. Fluor’s Terry Phillips acknowledged:

Q. If after a post weld heat treatment procedure . . . of a heat affected zone caused by a weld, the Big 10 Hardness Test and Brinell Hardness Test shows that the softness of the metal is within code, would you think it more likely or less likely that the residual stresses caused by the weld had been relieved?

A. I would think that more likely they had been relieved.

RR 17:85. These hardness tests showed proper stress relief. RR 20:71; 8:45; 12:62.

Fluor’s insistence on using a *draft* WRC-452, the enormous “racetrack” PWHT design for the tower, and its error-filled PWHT processes were extra-contractual and abnormal. The contract required Conex to provide NBIC (National Board Inspector Code, *see* PX72) forms to show the work was performed adequately. PX9 at TOT 0330. According to NBIC, WRC-452 is not “recognized” as a code section, is not applicable to Conex’s work, and should not govern evaluations of this work. PX72; RR 7:59.

***Payment for “Extra” Work.*** Because Fluor’s cumbersome and expensive PWHT processes were extra-contractual, Conex had a right to be paid more than the agreed-upon price for PWHT work—bid by Conex and accepted by Fina—of only \$63,000. RR 4:94. As the contract recognized, “[c]hanges should be expected during the normal course of construction . . . .” PX9 at TOT 0356. Procedures for handling changes in the contract’s scope of work were specified so that Conex *had to* initiate change requests within 24 hours, and it *had to* keep summaries of its requests. *Id.* at TOT 0356-57; PX17.

Despite Conex's compliance with the contract's procedures for "expected" change orders, Fluor berates Conex for asking to be paid for the extra work that Fina required during the turnaround. Even Fina's representative told his superiors that it was not Conex who abused the extra-work payment process, but Fina who mishandled those field change orders from the very first one. "We have not handled FCO-001 properly. The review/evaluation duration has been entirely too long and still not complete. More concerning to me, the contractor [Conex] was not told the truth, which does make us liars." PX14. Although these events happened before the turnaround "even started," pre-turnaround work was proceeding at a furious pace, and Conex cannot be criticized for asking to be paid when Fina expanded the scope of work.<sup>1</sup>

Fina's Carrens finally admitted "there [were] changes in the 'issued for construction' and the 'issued for bid' drawings." PX62 at 3. He therefore approved a number of change orders and wrote that the contract's base price would be adjusted. *Id.* Fina's paperwork adjusting the contract price flatly contradicts, in writing, Fluor's argument that Conex allegedly invented "multiple change orders" seeking payment for work not covered by the contract. If the work had not been required by the contract, Fina would not have approved payment.

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<sup>1</sup> Fluor derides this process as "an all-out 'Hatfields and McCoys' type feud." Fluor Pet. Br. at 6. However, Conex resolved its dispute with Fina amicably, *see* PX17, 33, and it never would have happened at all without the cunning tactics used by Fluor, which resembled Niccolo Machiavelli's renaissance Italy more than the mountains of West Virginia. Moreover, the Hatfields never hired the McCoys repeatedly, awarding multi-million dollar contracts and writing glowing letters about their excellent work, saying "Your experienced supervision has always given Conex an edge on your competitors . . . . We are looking forward to working with your group in the future." PX4.

***Fluor's Claims About Its Superior PWHT Proven Wrong.*** Again in its brief, as at trial, Fluor makes untrue claims about the superiority of its PWHT processes as opposed to the tried-and-proven Conex methods. First, it invokes the name of Exxon, straining to support WRC-452 through reference to Fluor's expert, who stated that Exxon had used the "principles" contained in WRC-452 for years, even though he did not testify Exxon actually followed WRC-452. Indeed no major oil company, not even Exxon, used WRC-452 before this 2001 turnaround because the paper was then only a draft. No other Conex customers like Motiva (a joint venture between Shell and Aramco), Valero, or Huntsman used WRC-452 in their PWHT procedures. RR 5:124.

Next, Fluor tries to prop up the draft WRC-452 by invoking the name of Joseph McEnerny from Cooperheat, "a world-renowned heat treating company" hired by Conex. Fluor Pet. Br. at 4. Actually, it was someone named Dr. Dong who wrote WRC-452, *see* RR 6:63, and he did not work for Cooperheat. He—Dr. Pingshaw Dong, not McEnerny—faxed the *draft* WRC-452 to Fluor's Terry Phillips. RR 11:3, 58. Moreover, Dr. Dong admitted in his foreword that the draft was written before the code was changed, and he did not account for those changes. RR 6:63. Fluor cannot even get the author right as it holds up WRC-452 as the "recognized document in the industry."

In deciding whether Fluor's abnormal approach to PWHT interfered with Conex's PWHT procedures specified in the contract, the jury heard testimony from perhaps the most qualified pressure-vessel expert in the world, William O'Donnell, Ph.D. He worked for Westinghouse's Bettis Atomic Power Laboratory. RR 6:6. At Westinghouse, O'Donnell designed and tested reactors for U.S. Navy nuclear aircraft carriers and

submarines, alongside Admiral Rickover. RR 6:6-7. Together with a colleague, O'Donnell developed processes for stress-relief on vessels inside nuclear reactors that were adopted and approved by the Nuclear Energy Regulatory Commission. RR 6:9-10. He is the only non-professor to win the Pi Tau Sigma engineering society's Gold Medal Award for contributions to material design and mechanical engineering. RR 6:13. Dr. O'Donnell has "been chairman of the American Society of Mechanical Engineers Technical Code subgroup on fatigue for 30 years [where they] are putting in all kinds of stress limits, fatigue limits, temperature limits, corrosion limits to prevent fatigue of pressure vessels and piping." RR 6:16-17. The University of Texas hired Dr. O'Donnell recently as a consultant on the University's Gen-4 high-temperature hydrogen reactor being built in West Texas, because he has spent a lot of years working in the field of high temperature creep, creep relaxation, creep ratcheting, and creep fatigue. RR6:12. He is eminently qualified to testify about Conex and Fluor's PWHT debate. PX34.

Dr. O'Donnell testified from his experience as ASME subcommittee chair on fatigue strength that Conex followed "code requirements, and that is extremely important. That will keep you out of trouble." RR 6:20. He saw the actual vessels in use at the Port Arthur Refinery, RR 6:27, and reviewed Conex's PWHT procedures as well as the procedures developed from Fluor's advice based on WRC-452. *Id.* Dr. O'Donnell criticized and questioned Fluor's motives because Fluor "was not satisfied with the code post weld heat treating, conventional post weld heat treating, and wanted a lot more exotic stuff done." RR 6:29. He responded to the allegation that the Conex PWHT procedure would cause cracking and could hurt people:

I think that's preposterous, and I don't think that it should even be allowed that he said that . . . . Because when you do a code post weld heat treating, which is what Conex was gonna do, just do it to the code, those residual stresses are essentially gonna go from 44,000 down to about 13,000 where they can't cause any problems. So, for somebody to say that Conex was going to do something that would create a future risk of cracking when they were following the code procedures is not correct; and it's just saying something that's not true.

RR 6:38-39. Despite the engineering certainty that Conex would not cause a risk of cracking, and that such an allegation was untrue, Fluor's emails published exactly that accusation to Conex's customer, Fina. PX37. Fluor's emails compared Conex to "contractors" who "just slap up the high temp bands and call it done without checking it out." PX15. Fluor warned Fina about "the consequences [of] improper PWHT procedures," PX22, without ever telling Fina (1) that Conex's procedures met the code requirements, or (2) that Fluor's statements about Conex's work were unverified, or (3) that Fluor's own PWHT procedures and calculations "were just absurd." RR 6:37.

Fluor next asserts that an "unauthorized" PWHT was performed by Conex on the top nozzle, and its brief bullet-points the supposed chronology to argue that Conex's heat treatment was a surprise to everyone at the refinery when it was "discovered," on October 7, that Conex had done a PWHT on October 3. *See* PX37. The problem with this chronology is that it leaves out important events and facts.<sup>2</sup> For example, Fluor's chronology does not mention that Fina received a proposal about PWHT procedures from Conex and its subcontractor, Ameritek, on September 24, as John Carrens admitted and

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<sup>2</sup> Fluor also leaves out facts when it disparages Conex for filing this case in Judge Sanderson's court by amending a petition in a case arising from work in Mississippi, also involving Fluor. No mention is made, in Fluor's brief, that Fluor's motion in limine, granted by Judge Sanderson, precluded any mention of the 2000 Mississippi project. CR 429-30.

as documents proved. RR 13:31. And the bullet chronology does not include any reference to the hot work permits that would have been issued before the PWHT, as the contract itself required. PX9 at TOT 0388 (a hot work permit “grants written permission to do the work.”). It is simply false for Fluor to suggest, imply, or argue that the PWHT performed on October 3 was a surprise to anyone. The only surprise is that Fluor would *again* make such an argument in its Supreme Court Brief on the Merits after the jury resolved those factual disputes about Fluor’s October 22 email against it. PX37.

Fluor’s metallurgist conceded it was likely that Conex’s PWHT procedure had relieved the residual stresses caused by the weld if “the Big 10 Hardness Test and the Brinell Hardness Test shows that the softness of the metal is within code.” RR 17:85. Fluor’s “lead corporate welding engineer,” Charles Patrick, agreed the hardness tests “tell[] you whether the heat treat has been done right or not.” RR 17:76- 78. The hardness tests all demonstrated good results with proper stress relief. RR 20:71; 8:45; 12:62. The jury was free to consider this evidence as a direct contradiction of Fluor’s argument that the statements in the email were true and made without malice.

Those statements were anything but true. The PWHT that Conex performed on the top nozzle required a hot work permit issued by Fina, followed by Brinell hardness testing. Fluor has to admit the falsity of its statements, as it notes in its brief that “[f]urther testing showed there were no cracks and there was sufficient tensile strength.” Fluor Pet. Br. at 5. Yet Fluor will not be honest enough to admit that its October 22 email falsely accused Conex of incompetence and ruined a 20-plus year relationship that was consistently profitable and beneficial for both Fina and Conex.

*The Impact of Fluor's Conduct.* Fluor is left to downplay the importance of its false statements, because it cannot deny them or prove its statements to be true. Thus, Fluor quotes its metallurgist, Terry Phillips, who testified that he had not really meant anything much in accusing Conex of incompetent work, because his statement did not indicate there was a loss of creep life of "any degree, consequence or significance." The jury was smart enough to know there is nothing inconsequential about allegations of cracked pressure vessels in a refinery. Like the jury, Fina's John Carrens thought the statements were significant events in the Fina-Conex relationship, as he understood Fluor's remarks to mean "there could be a high potential for catastrophic loss if there is a failure due to inadequate repairs." RR 13:8. Moreover, Carrens agreed that words in the emails about failing to check work imply a lack of safety. RR 13:8-9.

Finally, Fluor seeks sympathy because it "was paid [only] \$20,441 for its limited advice," *see* Fluor Pet. Br. at 6. Yet Fluor's involvement was more significant than the money connotes. Fluor insinuated itself between Conex and Fina like an interloper in a marriage, making itself "available for review of the AmeriTek procedure if required." RR 5:34. Fluor controlled the PWHT procedures foisted on Conex. *Id.* at 35. Even if two Fluor employees worked 200 hours on the 2001 turnaround project, its people were involved the whole length of the 22-day turnaround. RR 5:36-37. And the \$20,000 investment of time paid off handsomely in Fluor's being awarded the contract to build the multi-billion dollar DCP for Fina.

## SUMMARY OF THE ARGUMENT

The Beaumont Court of Appeals did not expressly hold “that an intermediate appellate court should automatically remand claims for exemplary damages whenever the appellate court is remanding underlying liability for a new trial.” The court of appeals simply held that when remanding claims for intentional business disparagement, intentional interference with an existing contract, and intentional interference with prospective business relations—all claims requiring proof of scienter or malice—the issue of exemplary damages also should be remanded. The court of appeals’ decision is neither shocking nor erroneous.

Contrary to Fluor’s assertions, the court of appeals did not convert “evidence of alleged mistakes . . . into evidence of malice.” Fluor Pet. Br. at 38-39. No justice on the court of appeals agreed with Fluor’s no-evidence-of-liability arguments, and every justice on the court of appeals found some evidence to support the jury’s liability verdict and the damages caused by tortious interference with the 2001 turnaround. As Conex has set forth in its Petitioner’s brief, there is ample evidence to support the jury’s verdict. Fluor merely recycles its own arguments and facts in response to the jury verdict.

As to Fluor’s complaints about lost profits, there is ample evidence of causation. Not surprisingly, the court of appeals did not hold that this is a case of unproven profits, or that Conex failed in its causation proof. In truth, Conex is entitled to have the entire liability and damages case against Fluor affirmed. Yet, under the Beaumont Court’s opinion, Conex faces a second two-month trial before Judge Sanderson, likely to be followed by another round of appeals and years more of delay. In these uncertain

economic times, an American corporation—and an enviable local success story headquartered in Texas—should not be subjected to a second, lengthy, and expensive trial when the case already has been fully litigated and the record plainly reveals that Fluor disparaged Conex and intentionally interfered with Conex’s existing and prospective contractual relations. Justice Gaultney agreed that Conex proved its disparagement case; the only question left open in his mind and in Fluor’s contorted argument is how much damages that maligning conduct caused. As Conex sat by and watched Fluor win the DCP-construction contract, those damages are increasing daily at the refinery. The courts should provide a meaningful remedy for such unethical, sharp, and unfair competitive practices.

## **ARGUMENT**

### **I. The Court of Appeals Addressed Fluor’s Rendition Arguments.**

The court of appeals understands its obligation to address rendition points, and it addressed Fluor’s rendition points. Because Fluor first challenged the jury’s liability findings regarding business disparagement and tortious interference, the court of appeals first examined the evidence supporting those findings. *See Fluor Enters., Inc. v. Conex Int’l Corp.*, 273 S.W.3d 426, 432-45 (Tex. App.—Beaumont 2008, pet. filed). Ultimately, the court of appeals held that legally but not factually sufficient evidence supported the jury’s findings; thus remand was required. Having determined that remand was required, the court of appeals proceeded to “address the remaining issues only to the extent they would entitle Fluor to the rendition of a take-nothing judgment.” *Id.* at 445.

**A. Fluor’s lost profits arguments were addressed below.**

Contrary to Fluor’s assertions in this Court, the court of appeals expressly addressed Fluor’s lost profits complaints “to the extent those issues present arguments for rendition of a take-nothing judgment, and to that extent [the court] overrule[d] those issues.” *Id.* at 448. The court correctly explained that “[b]ecause we have already determined that a new trial must be had on liability issues, we only consider whether all recovery is barred due to the plaintiff’s failure to establish the fact of lost profits, not the amount.” *Id.* at 447. And the court specifically held that “there is some evidence in the record that Conex has lost profits from Fina projects after the 2001 Turnaround.” *Id.* at 448. The only lost profits issues the court declined to consider were those that could not “result in a rendition for Fluor.” *Id.* at 447 n.3.

**B. Punitive damages rendition points were considered as well.**

Fluor also complains that the court of appeals did not consider its rendition argument on exemplary damages. But Fluor refuses to acknowledge the court of appeals’ liability holdings addressing malice, scienter, intent, and lack of good faith. Before remanding punitive damages, the court of appeals concluded there was legally sufficient evidence that Fluor published false statements of fact about Conex and that Fluor acted with malice: “As to Fluor, there is some evidence in the record from which the jury could find that Fluor disparaged Conex in statements five through eight, and that Fluor acted with malice . . . .” *Fluor v. Conex*, 273 S.W.3d at 440. The court of appeals likewise found legally sufficient evidence that Fluor “committed independently tortious conduct . . . with a conscious desire to prevent the relationship [between Conex and Fina]

from occurring or [knowing] that the interference was certain or substantially certain to occur.” *Id.* at 441. The court of appeals also found legally sufficient evidence of Fluor’s “willful and intentional” interference with the turnaround contract between Conex and Fina, including evidence of Fluor’s “intent . . . to effect a breach of contract” and Fluor’s “knowing” inducement of one of the contracting parties to breach its obligations. *Id.* at 442-43. Finally, the court of appeals rejected Fluor’s assertion that “the evidence conclusively establishes that [Fluor’s] interference was privileged or justified and that they acted because of a good faith belief that they had a legal right to do so.” *Id.* at 444. The court held “there was some evidence in the record from which the jury could reject Fluor’s assertion that it acted in objective good faith.” *Id.* at 445.

So, before remanding punitives, the court of appeals found at least some evidence that: (1) Fluor made false statements of fact and did so with malice; (2) Fluor engaged in unlawful tortious conduct with a conscious desire to prevent Conex from forming a business relationship with Fina or with knowledge that the interference was certain or substantially certain to occur; (3) Fluor committed a willful and intentional act of interference with an intent to effect Fina’s breach of its contract with Conex; and (4) Fluor did not act in objective good faith. Having found evidence of intent, scienter, malice, and an absence of good faith in response to numerous complaints by Fluor, the court of appeals cannot be criticized for remanding the issue of punitive damages for a new trial with all the other issues of intent, scienter, and malice.

**C. Rule 43.3 does not compel a different judgment.**

Fluor asserts that Rule 43.3 required the court of appeals to address Fluor's rendition arguments. The court did so. In any event, what the rule provides is that "the court must render the judgment that the trial court should have rendered, except when: (a) a remand is necessary for further proceedings . . . ." TEX. R. APP. P. 43.3. The court of appeals concluded that "a remand is necessary for further proceedings" so Rule 43.3 imposed no obligation upon the court to "render" judgment. Fluor may disagree with the determination that remand was required, but there is no violation of Rule 43.3 when a remand is ordered. *Cf. Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 652 (Tex. 1988) ("in exercising its jurisdiction over the facts the Court of Civil Appeals may reverse the trial court's judgment and remand the case . . . .").

**D. Rule 44.1 applies to partial remands.**

The court of appeal's decision was within its discretion. "It is unusual for an appellate court to limit the remand of a jury case." 6 MCDONALD & CARLSON, TEXAS CIVIL PRACTICE § 34.4 (2d ed. 1998). The Committee on Trial Practice of the American Bar Association agrees that "[t]he power to grant a partial new trial should exist but . . . should be sparingly exercised . . . and then only where the several issues are clearly and fairly separable." *Id.*, vol. 5 § 28.43 & n. 418. "It is well settled that [the rule on partial remand] does not contemplate the trial of an indivisible cause of action by piecemeal." *Waples-Platter Co. v. Commercial Standard Ins. Co.*, 156 Tex. 234, 237, 294 S.W.2d 375, 377 (1956). When the issue "concerns an appellate court's authority to limit the scope of its remand," the court must recognize that "the Rule . . . does not authorize a

partial reversal and remand unless the issues are severable.” *Otis Elevator Co. v. Bedre*, 776 S.W.2d 152 (Tex. 1989). Even if potentially severable, the issues may be “so intertwined that a severance would be unfair to the parties.” *Woods v. Littleton*, 554 S.W.2d 662, 672 (Tex. 1977). *Cf. Liberty Nat’l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996). Here, no separable issues are presented because the issues address elements of an indivisible cause of action, are significantly intertwined, and cannot be remanded in piecemeal fashion.

Ignoring numerous cases that have directly addressed exemplary damages under Rule 44.1, Fluor argues that a remand of Conex’s entire tortious interference and business disparagement claims need not include exemplary damages. Fluor opened its rehearing argument in the court of appeals with the assertion that “a claim for exemplary damages is ‘an independent ground of recovery.’” *See* Motion at 5. Fluor will not expressly make that argument in this Court, because it has so consistently and thoroughly been rejected. But Fluor’s argument for rendition depends on its false premise that a claim for punitive damages is a severable, independent claim. Otherwise a partial reversal and remand for a new trial is not proper.

This Court rejects Fluor’s analysis. In *Romero v. KPH Consolidated, Inc.*, 166 S.W.3d 212 (Tex. 2005), this Court initially held that Romero failed to prove a credentialing claim that required proof of malice. The Court then considered what to do with Romero’s separate cause of action for negligence. According to the Court, the jury’s erroneous malicious credentialing finding also “tainted” the jury’s “punitive damages findings.” 166 S.W.3d at 230-31. “[F]or that reason alone,” this Court held that

“a new trial *on the entire negligence claim* is required.” *Id.* at 231 (citing Rule 61.2, the supreme court equivalent of Rule 44.1)(emphasis added). The courts of appeals consistently reach the same result under Rule 44.1.<sup>3</sup> Rule 44.1 prohibits a partial remand of liability and punitive damages here.

## **II. There Is at Least Some Evidence of Fluor’s Malice, So Remand of Punitive Damages Is Appropriate.**

Fluor asserts the charge allowed the jury to consider only evidence of Fluor’s specific intent to injure Conex in 2001. Fluor is wrong for many reasons.

### **A. The charge is not as limited as Fluor asserts.**

The jury was not asked whether Fluor had a specific intent to injure Conex in 2001. The jury instead was asked whether “the injury to Conex resulted from a specific intent to cause substantial injury to Conex on the part of Fluor . . . .” CR 512. The question focuses on Conex’s continuing injury. And all that is required is that Conex’s injury, whenever it occurred, resulted from a specific intent to cause substantial injury to

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<sup>3</sup> See *Telecheck Servs., Inc. v. Elkins*, 225 S.W.3d 731, 737 (Tex. App.—Dallas 2007, no pet.) (“[T]he issues of malice and exemplary damages are not separable from the remainder of the case.”); *Williams v. Lifecare Hosp., L.P.*, 207 S.W.3d 828, 834 (Tex. App.—Fort Worth 2006, no pet.) (“[T]he issues of malice and exemplary damages . . . are not ‘separable’ from those of the remainder of the case.”); *Robbins v. Payne*, 55 S.W.3d 740, 747 (Tex. App.—Amarillo 2001, pet. denied) (“there is no independent cause of action for exemplary damages. They are simply an element of damages recoverable under a cause of action.”); *Peshak v. Green*, 13 S.W.3d 421, 428 (Tex. App.—Corpus Christi 2000, no pet.) (“Because we do not believe the issues of malice, which would support a finding of punitive damages, and liability for defamation can be separated without unfairness to the parties, we remand this entire cause for new trial.”); *Polley v. Odom*, 957 S.W.2d 832, 941 (Tex. App.—Waco 1997, judgment vacated) (“Since we have remanded the negligence, we also remand the gross negligence claim. A partial remand is improper unless the issues are severable.”); *Prati v. New Prime, Inc.*, 949 S.W.2d 552, 557 (Tex. App.—Amarillo 1997, pet. denied) (disagreeing that “gross negligence is a separate cause of action from an action for ordinary negligence” and remanding “the cause” for a new trial).

Conex on the part of Fluor, whenever that intent existed. Because Conex was not injured only in 2001, Fluor's intent did not have to exist only in 2001.

**B. Fluor ignores the standard of review and the evidence of malice.**

There is at least some evidence supporting the jury's finding that "the injury to Conex resulted from a specific intent to cause substantial injury to Conex on the part of Fluor" considering acts or omissions committed, "authorized," "ratified" or "approved" by management-level employees. CR 512. By their very nature, ratification and approval *must* occur after the initial bad acts, and the jury charge quite correctly places no limits on when ratification or approval had to occur. CR 512.

Fluor is a direct competitor of Conex, and Fluor even does turnaround work itself. RR 23:14-15; 27:10-11, 24. Fluor's denials of this fact—in the face of overwhelming contrary evidence including Fluor's efforts to negotiate and win the DCP-construction contract, and its efforts to exclude Conex from that process—rightly persuaded the jury that Fluor was lying about its motive and intent. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("[T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principles of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'").

Fluor made malicious defamatory statements about a business competitor in order to acquire an unfair competitive advantage. It could not prove the truth of its accusations. It did not even try. Fluor has no basis for its accusations. Not only had Fluor done

nothing to determine whether Conex had damaged Fina's vessel and caused loss of creep life, Fluor disregarded the test results that it ordinarily utilized, accepted and relied on.

The only explanation Fluor offered for its defamation and interference was that it just made a mistake. But Fluor never told Fina about its mistake. To the contrary, at the time Fluor allegedly discovered its "mistake" in 2006, Fluor took action at the highest levels of the company to make sure that Conex was deleted from Fina's list of approved contractors who could compete for work on the DCP project. When that happened, Fluor did not yet have the contract to construct the DCP. RR 18:25. As the largest, most experienced Fina-approved contractor, Conex stood in the way. RR 18:27, 29; 19:15, 35-37; 20: 21-22, 28-31. That was unacceptable to Fluor's executive director for the DCP project, so he involved Thomas Mohan, Fluor's department manager for the contracts management group, and Phil Hill, "the functional leader of contracts worldwide," and had Conex added to Fluor's warning list, and deleted from the list of approved contractors for Fina. RR 18:30-35, 43-45. Fluor's own corporate procedures required Fluor to give written notice to Conex of the action taken against it and to "specify the requirements that must be met to be removed from the warning or alert list." RR 18:50-51. But Fluor did not give notice to Conex. *Id.*

The court of appeals accepted Fluor's assertion that it could not tell Fina about mistakes that it did not know it had made. But the jury had many reasons to reject Fluor's assertion, and the jury rather the court of appeals is the proper arbiter of the facts. *Benoit v. Wilson*, 150 Tex. 273, 281, 239 S.W.2d 792, 796-97 (1951). "Historically, Texas courts have treated questions of intent in a variety of circumstances as uniquely

within the realm of the fact finder because the determination of an individual's intent in taking a particular action is so dependent on evaluation of witnesses and credibility." *In re Estate of Romancik*, 281 S.W.3d 592, 596 (Tex. App.—El Paso 2008, no pet.); *see also Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986) ("While a party's intent is determined at the time the party made the representation, it may be inferred from the party's subsequent acts after the representation is made."). Intent "invariably must be proven by circumstantial evidence." *Spoljaric*, 708 S.W.2d. at 435. Fluor's explanation that it acted out of an innocent mistake was proven bogus.

Fluor's defamatory statements were made, authorized, ratified, and approved by management-level employees of Fluor. George Miller is the leader of Fluor's finite element team and the most experienced person Fluor has in that area. RR 16:75. Terry Phillips is Fluor's director of metallurgy and the supervisor of his department. RR 17:84. Les Antalffy was Fluor's project manager on the Fina turnaround. RR 16:54; 23:29. He is a "senior mechanical engineering director" and one of only "three senior fellows within the whole organization of about 35,000 people." RR 23:59-60. Fluor ceded all "final decision making" regarding the Fina project to Antalffy. RR 16:87. Antalffy claimed to have discovered mistakes in 2006, but neither he nor others above him took any action to advise Fina of those mistakes. RR 16:69-79, 83-84; 24:11, 13, 17, 21-22, 31-37, 40-41, 45-47. When Fluor learned of its mistakes, it never mentioned them to Fina, and Fluor's most senior management blackballed Conex. RR 18:27-51.

There was certainly some evidence, more than a scintilla, that Fluor maliciously disparaged and intentionally interfered with Conex's relationship with Fina with a specific intent to injure Conex.

### **III. The Jury's Damage Awards Are Supported By the Evidence.**

#### **A. Conex proved its lost *net* profits.**

Fluor's assertion that Conex failed to calculate "net" profits is flatly wrong. Conex is and always has been a profitable company. RR 20:46-50. That is undisputed. Conex's total revenues exceeded its total expenses *before* Fluor's tortious conduct, and Conex's total revenues exceeded its total expenses even *after* Fluor's tortious conduct. *Id.* Conex's complaint is not that it earned *no* net profits. Conex's complaint is that it earned less in net profits than it would have but for Fluor's wrongful conduct. Thus, Conex's lost-profits analysis had to determine how much *more* profit Conex would have earned. It did so through a number of witnesses, including Fluor's own expert.

Consider the example Conex's attorney discussed with Fluor's expert during trial. *See* RR 29:73-75. First, assume that in a given year Conex has \$60 million in total revenues and \$50 million in total costs. RR 29:73-74. As Fluor's expert agreed, in that situation Conex has a net profit (total revenues minus total expenses) of \$10 million. *Id.* Then "let's assume that Conex is saying, well, but for a certain event, we believe that we should have made \$66 million in revenues." RR 29:74. In that situation, Fluor's expert agreed that it would be necessary to figure out how much the \$50 million in total expenses would increase in order to earn the extra \$6 million in revenues. RR 29:74-75.

Completing the analysis, Fluor's expert agreed that if Conex's expenses went up by \$5 million, then Conex's lost net profits would be \$1 million. *Id.*

Because Conex is already profitable—total revenues exceed total expenses—Conex's lost profits analysis focuses on the increased revenues and expenses. In the hypothetical discussed by Conex's lawyer with the defendants' expert, either of two calculations leads to exactly the same result. To find lost net profits, you can compare actual *total* revenues and expenses to expected *total* revenues and expenses (that is you can compare \$60 million in actual total revenues less total expenses of \$50 million with expected total revenues of \$66 million less total expenses of \$55 million). Comparing *total* revenues and expenses, the lost net profits are \$1 million (\$11 million minus \$10 million). Alternatively, you can get to the identical result by considering only the expected *increased* revenues of \$6 million less the *increased* expenses of \$5 million, which proves the same lost net profits of \$1 million. Because Conex's total revenues exceed its total costs, the two methods will yield the same result.

Fluor asserts that Conex should have subtracted fixed overhead costs from its projected additional revenues, but Fluor's argument would require Conex to double count its fixed overhead expenses. As John Duplissey explained, “[t]he overhead has already been paid” out of existing revenues. RR 20:47-48. Even without the additional Fina work, Conex does “more than enough work already to pay the overhead.” RR 20:50. Conex is “already paying [its] overhead and making profit.” *Id.* All variable and overhead costs are included in Conex's accounting procedures as direct job costs. *Id.*

Fluor's expert agreed that fixed overhead costs should *not* be deducted in calculating Conex's net profits. RR 30:17. Fluor's expert merely contested the variable costs including aviation fuel costs (for what: flying from Beaumont to Port Arthur?), payments to widows of Conex retirees (why would retiree costs increase by job?), and repairs of Conex's building and yard (which already had been made). *See* RR 29:37-39, 86-87; 30:13-14. This was a fact fight the jury was free to resolve in Conex's favor. *See SAS & Assocs., Inc. v. Marketing Servicing, Inc.*, 168 S.W.3d 296, 300 (Tex. App.—Dallas 2006, pet. denied) (defense expert's disagreement with the plaintiff's "accounting treatment" for certain expenditures "did not create an impermissible 'analytical gap' between the data and [the plaintiff's expert's] conclusions;" these "alleged errors" were for cross-examination).

**B. Conex proved its lost profits with reasonable certainty.**

To recover lost profits, "the amount of the loss must be shown by competent evidence with reasonable certainty." *Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994). This case presents the textbook example of recoverable lost profits. "Where the business is shown to have been already established and making a profit at the time when the contract was breached or the tort committed, such pre-existing profit, together with other facts and circumstances, may indicate with reasonable certainty the amount of profits lost." *Texas Instruments*, 877 S.W.2d at 279 (quoting *Southwest Battery Corp. v. Owen*, 131 Tex. 423, 426, 115 S.W.2d 1097, 1098-99 (1938)). More specifically, "[i]t is permissible to show the amount of business done by the plaintiff in a corresponding period of time not too remote, and the business during

the time for which recovery is sought.” *Id.* “Furthermore, in calculating the plaintiff’s loss, it is proper to consider the normal increase in business which might have been expected in the light of past development and existing conditions.” *Id.*

**1. Conex proved its actual historical profits before and after Fluor’s tortious conduct.**

Conex was an established business making a profit when Fluor disparaged Conex and interfered with its contract. RR 19:15, 30. It had been a profitable company for nearly two decades, working profitably for Fina since at least 1988. RR 5:95-97; 19:30. Conex proved its lost profits by “show[ing] the amount of business done by the plaintiff in a corresponding period of time not too remote, and the business during the time for which recovery is sought.” *Texas Instruments*, 877 S.W.2d at 279; *see also Bright v. Addison*, 171 S.W.3d 588, 602-03 (Tex. App.—Dallas 2005, pet. denied).

John Duplissey, Conex’s founder, and Jimmy Duplissey, Conex’s President, produced the company’s business records that detailed Conex’s work at the Fina plant between 1991 and 2001—the decade preceding Fluor’s tortious conduct. *See* RR 5:86-87, 91-92; PX 18, 28; RR 20:10, 12. Every contract was identified, the revenues received on every contract were identified, the total costs associated with every contract were identified, and every corresponding profit margin was identified. *Id.* John Duplissey explained that between 1994 and 2001, Conex’s average annual revenues on Fina work were \$7.5 million, with average annual costs of \$5.85 million, and average annual profits of about \$1.65 million. RR 20:14-15; PX 28. Following Fluor’s disparagement and interference, between 2001 and 2006, Conex’s average annual revenues from Fina

dropped to only \$1.1 million, with annual profits averaging \$300,000. RR 20:16-18. The math was simple. On average, Conex's lost profits on Fina work totaled \$1.35 million per year—without considering inflation or increase in business. RR 20:19-20.

**2. Conex also proved the increased business expected in light of past development and existing conditions.**

In calculating lost profits, it also “is proper to consider the normal increase in business which might have been expected in the light of past development and existing conditions.” *Texas Instruments*, 877 S.W.2d at 279. The plaintiff is under no obligation to prove that the increased business is guaranteed or that the prospective contract “would have certainly been made.” *Richardson-Eagle, Inc. v. William M. Mercer, Inc.*, 213 S.W.3d 469, 475 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). The law requires only reasonable certainty. *Id.*; *Texas Instruments*, 877 S.W.2d at 279-80.

Conex offered legally and factually sufficient evidence to support the jury's award of lost profits for Conex's loss of work on Fina's Deep Conversion Project. First, it is reasonably certain that Fina will continue with the DCP it has already begun at its Port Arthur refinery. Fina has publicly announced its intention to proceed with the DCP. PX 82. Fina's project manager at the Port Arthur refinery, John Carrens, now works “full time” and “exclusively” on the DCP. RR 14:18, 24. In addition to Carrens, there are another 12 high-ranking Fina employees who are working full-time on the DCP in Jefferson County. RR 14:24. Additionally, 100 Fluor employees are working full-time on the DCP. A separate office complex devoted to the DCP has been constructed at the Port Arthur refinery. RR 15:26-27. Key Port Arthur employees have transferred from

their refinery positions to work full-time on the DCP. *See* RR 15:26-29. And they are not going back; their old positions have been filled. *Id.*

It is reasonably certain that TOTAL is going forward with the DCP, and it is also reasonably certain that Conex would have earned profits on DCP work. As discussed, Conex is an extremely well run company with a strong history of profitability in the industry. Conex has worked in every refinery in Jefferson County, and it continues to work in every refinery save one—the Fina refinery. RR 19:35-36. Conex has done more capital work in the Jefferson County area than anyone else. RR 19:37. Just since 1993, Conex and its principals have been involved in the construction of 12 refinery units, “building them from the grassroots up or taking over units that . . . somebody else couldn’t finish.” RR 19:37. Moreover, Conex has experience working on the same type of coker unit project as Fina’s DCP. Conex is working right now on Motiva’s expansion project to add a second coker unit. RR 20:21. Conex’s portion of the Motiva work amount to \$1 billion. RR 11:80, 20:21-22. Conex has 200 people on the job and will grow to approximately 1000 people on the job over the course of four years. RR 20:40.

John Duplissey estimated that the available construction work on the DCP would total only \$425 million and that Conex’s portion of that work would amount to roughly \$260 million over four to five years. RR 20:28. That is only about a fourth of the size of Conex’s work on the Motiva expansion. *See* RR 20:21-22. Conex’s profit on the DCP—over the course of four or five years—would be “somewhere in the neighborhood of \$73 million.” RR 20:29. Conex has the ability, the business model, and the capacity to earn

those profits. RR 20:31. In 2006 alone, Conex did more than half that amount of work, with gross revenues of over \$150 million. RR 19:15.

As to the size of the DCP, the evidence supports the estimate of a total project cost. Motiva's expansion—adding a second coker unit—has a cost well in excess of \$1 billion; Conex's portion of the work alone exceeds \$1 billion. RR 20:38. Fluor's engineers who are involved with designing and engineering the DCP estimated a cost “well in excess of one billion dollars”—approximately \$1.5 billion. RR 23:40; 27:16.

By their nature, lost profits calculations must involve assumptions. Those assumptions are made necessary by the defendants' conduct. Had Fluor *not* excluded Conex from those eligible to obtain DCP work, there would be no need for anyone to estimate the amount of available work, Conex's portion of the work, or Conex's expected profit. There would be no need to calculate lost profits at all. But Fluor wrongfully deprived Conex of its ability to earn profits on the DCP. So Conex relies on the experience of its principals, its own historical records, and the admissions of Fluor's DCP engineers. That is not speculation; it is reasonable certainty.

**C. The testimony of John and Jimmy Duplissey was properly admitted and independently supports the awards.**

John and Jimmy Duplissey, as owners and officers of Conex, were competent to testify, and they provided the jury with substantial evidence of Conex's lost profits. Fluor labels their testimony—describing the historical operations, revenues, and expenses of Conex—“speculative,” and asserts that they did not satisfy the reliability standards for expert testimony. Fluor is wrong on both counts. As discussed above, John and Jimmy

Duplissey testified to the historical client base, business generation, revenues, expenses, and profits of Conex. They did not offer *opinion* testimony concerning these matters, they offered *factual* testimony based on personal knowledge.<sup>4</sup> Moreover, the Duplisseys qualified as experts by their skill and experience. See *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 722 (Tex. 1998) (“there are many instances when the relevance and reliability of an expert witness’s testimony *are* shown by the witness’s skill and experience”). While all expert testimony must meet reliability and relevance standards, “it is equally clear that the considerations listed in *Daubert* and in *Robinson* for assessing the reliability of scientific evidence cannot always be used with other kinds of expert testimony.” *Id.* at 726.

The trial court did not err in concluding that John and Jimmy Duplissey’s testimony was reliable and relevant. John Duplissey went into business for himself and founded Conex in 1984. RR 19:29. Jimmy joined the company in 1985 as an estimator and eventually took over as president in 1992. RR 4:72-74. John described the meticulous and systematic way he developed Conex’s business model, RR 19:55-58, a model that has made Conex a successful, profitable company every year since its inception in 1984. RR 19:29-30. Under the leadership of John and later Jimmy

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<sup>4</sup> “A witness may provide evidence of lost profits by testifying from personal knowledge as to what profits would have been.” *Naegeli Transp. v. Gulf Electroquip, Inc.*, 853 S.W.2d 737, 740 (Tex. App.—Houston [14th Dist.] 1993, writ denied). The Fourteenth Court of Appeals recognized the force of this rule in *Friedman, Clark & Shapiro, Inc. v. Greenberg, Grant & Richards, Inc.*, No. 14-99-01218-CV, 2001 WL 1136169, at \*5 (Tex. App.—Houston [14th Dist.] Sept. 27, 2001, pet. denied). In *Friedman*, the court rejected the appellants’ assertion that one of the owners of GGR was not qualified to testify about GGR’s lost profits “because he [was] not an economist, but, instead, [was] only a high school graduate.” *Id.* The court explained that “[a]s owner of GGR, Glasscock could provide testimony on lost profits because it was from personal knowledge.” *Id.*; see also *Frank B. Hall & Co. v. Beach, Inc.*, 733 S.W.2d 251, 269 (Tex. App.—Corpus Christi 1987, writ ref’d n.r.e.).

Duplissey, Conex has become one of the largest private employers in all of Jefferson County. RR 19:32. Through the course of the 1990s, Conex had annual revenues that averaged between \$50 and 60 million. RR 19:15. In 2005, Conex's total revenues were over \$121 million, and its total revenues for 2006 were \$150 million. RR 19:15; 21:5. Not surprisingly even Fluor's expert told the jury, "you have to understand, Conex is a very well run company. I mean, I can tell by looking at it, it is an extremely well run company." RR 30:71.

Fluor had John Duplissey admit that he is not an accountant, does not have a degree, and is not a CPA. RR 21:7. Nonetheless, while John could not say whether his profitability analysis followed generally-accepted accounting practices, he knew that his analysis followed "what you have to be to be successful . . . . I know what it takes to be successful in business and what you have to do to be a business man in business and make money." RR 21:7. As Fluor's lawyer put it, John based his profit analysis on his "looking back at the company's history and performance . . . ." RR 21:6. That testimony, based on actual, objective facts and figures is competent, reliable and entirely sufficient to support the jury's awards of lost profits. It is well-settled under Texas law that when historical profits are shown, a principal/owner can provide evidence of a company's lost profits.<sup>5</sup> Given Conex's history, the cases support the admissibility, competency, and sufficiency of the lost profits testimony.

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<sup>5</sup> *White v. Sw. Bell Tel. Co.*, 651 S.W.2d 260, 262-63 (Tex. 1983) (owner of flower shop permitted to testify as to the percentage from gross receipts; data was used with the testimony of the plaintiff's CPA to prove past lost profits, based on the shop's 33-year history of profits.); *Pena v. Ludwig*, 766 S.W.2d 298, 302 (Tex. App.—Waco 1989, no writ) (owner of salon allowed to give opinion as to the amount of

**D. The testimony of Dr. Hawkins was properly admitted and supports the jury's damage awards.**

Fluor also asserts that Dr. Hawkins and the Duplisseys incorrectly assumed that Conex was guaranteed a certain level of Fina work. Fluor Pet. Br. at 29-31. They made no such assumption. Dr. Hawkins, as well as John and Jimmy Duplissey, provided the jury with actual historical evidence of “the amount of business done by the plaintiff in a corresponding period of time not too remote, and the business during the time for which recovery is sought.” *Texas Instruments*, 877 S.W.2d at 279. According to Fluor, a decades-long profit history is no evidence of lost profits without a “guarantee” of future work. That is not the law. If Fluor were correct, lost profits could be recovered *only* by an entity with a long-term contract guaranteeing a given profit. There is no such rule. Contrary to Fluor’s assertions, there is no different rule in *Szczepanik v. First Southern Trust Co.*, 883 S.W.2d 648 (Tex. 1994). *See, e.g. Edmunds v. Sanders*, 2 S.W.3d 697, 705-06 (Tex. App.—El Paso 1999, pet. denied) (“to recover lost profits, a party must show *either* a history of profitability *or* the actual existence of future contracts”) (emphasis added).

Fluor’s argument would preclude any recovery for a defendant’s tortious interference with prospective contractual relations, because any testimony supporting lost profits would “assume” the existence of a guaranteed contract. Again, the law is not so nonsensical. “It is not necessary to prove that the contract would have certainly been

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lost profits based upon past profits earned in a comparable period); *VingCard A.S. v. Merrimac Hospitality Sys., Inc.*, 59 S.W.3d 847, 864 (Tex. App.—Fort Worth 2001, pet. denied) (president permitted to testify regarding lost profits for an existing business with a history of profits); *Leavens v. Envtl. Control Sys. Corp.*, No. 01-96-00831-CV, 1998 WL 23096, at \*3 (Tex. App.—Houston [1st Dist.] Jan. 8, 1998, pet. denied) (company president allowed to testify regarding lost profits).

made but for the interference; it must be reasonably probable, considering all of the facts and circumstances attendant to the transaction.” *Hill v. Heritage Res., Inc.*, 964 S.W.2d 89, 109 (Tex. App.—El Paso 1997, pet. denied). *Accord Richardson-Eagle, Inc.*, 213 S.W.3d at 475-76. Moreover, “[i]f the question is whether the plaintiff would have succeeded in attaining a prospective business transaction in the absence of defendant’s interference, the court may, in determining whether the proof meets the requirement of reasonable certainty, give due weight to the fact that the question was ‘made hypothetical by the very wrong’ of the defendant.” RESTATEMENT (SECOND) OF TORTS § 774A, cmt. c (1977). Fluor’s own wrongful conduct cannot defeat Conex’s recovery.

Fluor also makes the implausible assertion that the use of averages makes the lost profits testimony unreliable, *citing Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 254-58 (Tex. 2004). Apparently, Fluor believes that because it is speculative for an expert to opine that a future oil well will match the average historical production of two nearby wells, it is speculative for any expert to opine that the future performance of anything or anyone can be determined by its historical performance. The supreme court did not condemn the use of averages in *Kerr-McGee*, nor did it make a blanket holding that experts cannot rely on historical averages to support opinions regarding future performance. Fluor’s own expert agreed with Dr. Hawkins’ use of averages: “It is the way that we all do it and it is a reliable way and it is an indication.” RR 29:69.

Fluor also criticizes Dr. Hawkins because he did not “independently verify” the business records Conex produced demonstrating its revenues, costs, and profit margins. This criticism too is merely a matter for cross-examination. *See Cruz v. Paso Del Norte*

*Health Found.*, 44 S.W.3d 622, 647 (Tex. App.—El Paso 2001, pet. denied) (“The jury decides which expert witness to credit.”). *Accord SAS & Assocs., Inc. v. Marketing Servicing, Inc.*, 168 S.W.3d 296, 300 (Tex. App.—Dallas 2005, pet. denied) (jury was “free to accept or reject either expert’s judgments and inferences”). Dr. Hawkins had access to all of Conex’s books and records and all its facts and figures. RR 22:10-12. So too did Fluor’s expert. RR 29:40; 31:4. No one pointed out any errors in the data maintained and offered by Conex. RR 22:12. Fluor’s expert criticized Dr. Hawkins for not including certain expenses in his analysis, *see e.g.*, RR 29:76, but Fluor’s expert was unable to defend his opinions in front of the jury, *see, e.g.*, RR 29:86-89; 30:13-14, and Jimmy Duplissey explained, item by item, why the expenses identified by Fluor’s expert should not be included in determining lost profits. RR 31:55-69.

**E. There is sufficient evidence that Fluor’s tortious interference and business disparagement caused Conex’s damages.**

The jury was charged with the task of determining whether Fluor’s conduct was the proximate cause of Conex’s damages. CR 506-507. The question of causation is a fact question for the jury. *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 756 (Tex. 1975). “The test is not what the wrongdoer believed would occur; it is whether he ought reasonably to have foreseen that the event in question, or some similar event, would occur.” *Clark v. Waggoner*, 452 S.W.2d 437, 440 (Tex. 1970). As the jury was instructed, causation may be established by direct evidence or circumstantial evidence or both. CR 498. *See also City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 69 (Tex. 2000). “Lay testimony is adequate to prove causation in those cases in which general experience

and common sense will enable a layman to determine, with reasonable probability, the causal relationship between the event and the condition.” *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733 (Tex. 1984). Direct evidence from a contractual counterparty is not required to show third-party interference. *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 82-83 (Tex. 2000).

When Fluor injected itself into a longstanding relationship and tainted Conex’s reputation for safety and efficiency, the Conex-Fina relationship, both existing and future, was destroyed. The immediate effect was that Fina breached the 2001 turnaround contract with Conex and refused to pay for PWHT “extras.” The longer-term effect was that Conex was cut out of work at the Fina refinery.

**1. The Duplisseys’ testimony is evidence that Fluor caused Conex to lose its Fina work.**

Before Fluor came along, Conex was a principal contractor for Fina. As Conex’s Jimmy Duplissey explained, “[w]e used to get an average of 65, 75 percent of their work.” RR 5:95. But that is no longer true. Following the 2001 turnaround and Fluor’s efforts to discredit Conex, “[n]ow I think we’re getting around 9 percent.” *Id.* This small amount of work comes from Fina’s maintenance department, not the engineering department. Fina’s engineering department works with Fluor, and Conex has not been awarded any jobs by Fina’s engineering department since 2001. RR 5:107-8. Conex has been able to obtain small repair projects from Fina’s maintenance department since 2001. *Id.* Fina no longer invites Conex to bid on as much work. RR 11:85. And the amount of work that Fina has awarded Conex has “been down . . . by a lot.” *Id.* This testimony “is

some evidence . . . that Conex has lost profits from Atofina projects after the 2001 Turnaround.” *Fluor Enters.*, 273 S.W.3d at 448.

Despite Fluor’s protests to the contrary, *see* Fluor’s Pet. Br. at 32-33, this Court’s opinion in *Haynes and Boone v. Bouldin, Ltd.*, 896 S.W.2d 179 (Tex. 1995), says nothing whatsoever that would limit a plaintiff from offering proof of causation. *Haynes and Boone* involved a law firm’s alleged malpractice in losing a lawsuit against Blockbuster. The plaintiff, Bouldin, could not prove that Haynes and Boones’ alleged professional neglect was a cause of Blockbuster’s lease termination. However, in this case, it is undisputed that Fina did *not* intend to quit working with Conex before Fluor came along. Indeed, before Fluor came along, Fina had only recently reaffirmed its relationship with Conex by hiring Conex on the multi-million dollar 2001 turn-around project.

Fluor also asserts Conex’s post-2001 bids were somehow not “competitive,” and this explained the drop-off in Conex’s work for Fina. Fluor Pet. Br. at 32. But this is simply false; Fluor’s quoted witness argued that, because Conex has continued to make bids since 2001 but had not received work, this must be a “reflection” of Conex’s competitiveness. That might make some logical sense if something had changed in Conex’s bidding or work from the pre-2001 time frame (with 65 to 75 percent of Fina’s work) to the post 2001 time frame (with 9 percent of Fina’s work). But no such change has taken place. Conex has used the same estimators to prepare bids since the late 1980s. RR 5:99; 11:84-85. Conex uses the same estimating procedures. RR 11:84; 20:17. And Conex uses the same price structure. RR 11:84. Conex continues to bid on every job that Fina sends, but has been unable to reestablish its relationship. RR 19:105-106. So

something other than Conex's competitive pricing has caused Conex to lose its Fina work. That something was Fluor.

**2. Conex did not need an expert to show that Fluor's actions caused Conex's damages.**

Fluor notes that Conex's expert offered no testimony on causation. Fluor Pet. Br. at 32. But what Fluor does not say—and cannot say—is that Conex needed any such expert testimony to support causation. Expert testimony is only necessary “when the causal link is beyond the jury’s common understanding . . . .” *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 119-20 (Tex. 2004). A lay person is particularly well suited to determine causation in this case. “Lay testimony is adequate to prove causation in those cases in which general experience and common sense will enable a layman to determine, with reasonable probability, the causal relationship between the event and the condition.” *Morgan*, 675 S.W.2d at 733; *Guevara v. Ferrer*, 247 S.W.3d 662, 668 (Tex. 2007) (“Undoubtedly, the causal connection between some events and conditions of a basic nature . . . are within a layperson’s general experience and common sense.”). Lay testimony that can provide a “strong, logically traceable connection between the event and the condition is sufficient proof of causation.” *Id.*; see also *Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875, 884-86 (5th Cir. 2004). The jury was fully competent to determine the issue of causation without an “expert.”

**3. John Carrens' testimony helps Conex's causation claim.**

Fluor's final causation argument is that Conex cannot rely on testimony from Fina's project manager, John Carrens. Fluor Pet. Br. at 33. This argument should be summarily rejected because Carrens' denials do not conclusively disprove causation.

**a. Testimony from the contractual counter-party is not required to prove tortious interference.**

John Carrens was not an unbiased third-party. Carrens is currently working with Fluor on the DCP project. RR 13:5; 14:18. "Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony. They may choose to believe one witness and disbelieve another. Reviewing courts cannot impose their own opinions to the contrary." *City of Keller*, 168 S.W.3d at 819. "Courts reviewing all the evidence in a light favorable to the verdict thus assume that jurors credited testimony favorable to the verdict and disbelieved testimony contrary to it." *Id.*

Carrens' testimony is rendered inconclusive by *Prudential Insurance Co. v. Financial Review Services, Inc.*, 29 S.W.3d 74 (Tex. 2000). The Court determined in *Prudential* that false allegations made to customers caused injury to the plaintiff's contractual relations. *Id.* at 83. On appeal, Prudential cited the testimony of a third-party's executive officer, who testified "she terminated the contracts with FRS because of public relations problems caused by the late billing and her disagreement with FRS business practices, not because of anything that Prudential said or did." *Id.* Despite this direct testimony, there is evidence the third-party terminated FRS's contract. This was "some evidence that Prudential's alleged disparagement caused injury to FRS's

contractual relations.” *Id.* Similarly, Fluor accused Conex of improper PWHT technique in its discussions with Fina, and thereafter Fina stopped working with Conex.<sup>6</sup>

**b. Carrens’ testimony supports causation.**

Because Fluor foisted an improper PWHT procedure on Conex, based upon WRC-452 and the incorrect FEA analysis, Conex was forced to perform significant “extras.” Conex submitted field change orders to Fina for additional payment. PX 17. According to John Carrens, “[i]t was the treatment of asking for extras for this post-weld heat treating and the manner that was put on me to try and force me to sign extras . . .” that caused him to reject Conex on future work. RR 14:84-85. In other words, but for Fluor’s misrepresentations concerning PWHT, Conex never would have been in the position of asking for those change orders. *See Prudential Ins.*, 29 S.W.3d at 83; *Johnson v. Baylor Univ.*, 188 S.W.3d 296 (Tex. App.—Waco 2006, pet. denied). Moreover, while he refused to admit that Fluor’s misrepresentations caused him *not* to hire Conex, Carrens did admit to the damage that Fluor’s disparagement caused. RR 13:6-7; 13:73-74; 14:4; 14:96. Fina does not “want to hire contractors that are not able to do the work;” RR 14:4-5, or “who create problems by not doing things right;” *Id.*, or who damage Fina’s equipment by using improper procedures; or who walk away from a job “thinking it was done successfully when it actually was not.” *Id.* Fina does not “want to hire contractors who use procedures which create very high residual stresses in highly concentrated configurations;” or contractors who use procedures which will likely lead to loss of creep

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<sup>6</sup> Fluor quibbles with the logic embraced by *Prudential*, calling it a “before/after” approach to proving lost profits. Nowhere in its brief does Fluor mention the testimony of its own damages expert who agreed that a before-and-after approach “can be a reliable methodology.” RR 29:70.

life.” *Id.* RR 14:4-5. Put another way, each of the disparaging statements made by Fluor about Conex directly undermined Conex’s relationship with Fina. *See Bradley v. Rogers*, 879 S.W.2d 947, 957 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (When they match the facts and law, hypothetical questions can be persuasive.).

**F. The lost profits are recoverable as special damages.**

Conex is entitled to recover lost profits under the tortious interference claim. CR 507. Even if disparagement were the only independent tort that supports tortious interference with prospective business relations, (and it is not) Conex proved \$1.8 million in unpaid extras that even Fluor concedes are special damages. Further, Conex sufficiently pleaded fraud as an underlying tort, especially given the absence of any special exceptions by Fluor. *See* CR 225, 230; *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001) (plaintiff need only prove “that the defendant’s conduct would be actionable under a recognized tort”); *Cnty. Initiatives, Inc. v. Chase Bank*, 153 S.W.3d 270, 283-84 (Tex. App.—El Paso 2004, no pet.) (plaintiff may recover from defendant who makes fraudulent statements about the plaintiff to a third party even without proving the third party was actually defrauded); *Prudential Ins. Co. of Am. v. Fin. Rev. Sers., Inc.*, 29 S.W.3d 74, 81 (Tex. 2000) (plaintiff need only plead and prove method of interference that was tortious in itself such as misrepresentation, and court construes pleading liberally in favor of the pleader). Finally, the lost profits proven by Conex are special damages. Conex proved “damages resulting from loss of business expected from [a] particular customer or prospective customer to whom disparaging statements were made by defendants.” *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d

762, 767 (Tex. 1987) ; *see also* RESTATEMENT (SECOND) OF TORTS §§ 575, 633 (1977) (explaining special harm and pecuniary loss).

#### **IV. Fluor’s Conduct Cannot Be Written Off As “Mere Negligence.”**

Fluor pretends the court of appeals converted evidence of “alleged mistakes” into evidence of malice. Although this argument is a convenient straw-man, it is nonetheless a creature of Fluor’s imagination. Fluor’s conduct meets all the elements required under the jury charge to prove disparagement and tortious interference.

##### **A. Fluor made the statements with malice, as defined by the charge, and based on this Court’s precedent.**

Fluor’s statements were made with malice, as defined in the jury charge. CR 500 (element b). In a business disparagement case, a defendant is liable “if he [knew] of the falsity or acted with reckless disregard concerning it, or if he acted with ill will or intended to interfere in the economic interest of the plaintiff in an unprivileged fashion.” *Forbes, Inc.v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003) ; *Hurlbut*, 749 S.W.2d at 766; RESTATEMENT (SECOND) OF TORTS § 623A, cmt. g (1977). Proof of “actual malice” requires nothing more than proof that a defendant made a statement “with knowledge that it was false or with reckless disregard of whether it was true or not.” *Forbes*, 124 S.W.3d at 171; *Huckabee v. Time Warner Entertainment Co., L.P.*, 19 S.W.3d 413 ,420 (Tex. 2000) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

The case law recognizes several methods of proof. For example, reckless disregard means that a defendant “in fact entertained serious doubts as to the truth of” his

statements. *Knox v. Taylor*, 992 S.W.2d 40, 55 (Tex. App.—Houston [14th Dist.] 1999, no pet.) ; *see also Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989) . “Whether the defendant had serious doubts regarding the truth of the defamatory statement may be proved by circumstantial evidence.” *Bentley v. Bunton*, 94 S.W.3d 561, 596 (Tex. 2002); *Knox*, 992 S.W.2d at 55. Among the factors to consider are the “care and motive” of the person making the statement. *Id.* In evaluating the evidence, “inherently improbable assertions and statements made on information that is obviously dubious may show actual malice.” *Id. Accord Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 82-83 (Tex. 2000) (making a “baseless” accusation constitutes disparagement). No plaintiff is required to “secure an admission from the defendant that he published the statement knowing of its falsity or with serious doubt as to its truth.” *Knox*, 992 S.W.2d at 55. A defendant’s own testimony about the “reasons for his actions” is not conclusive because “the evidence must be viewed in its entirety.” *Bentley*, 94 S.W.3d at 596.

Fluor’s disparaging statement that “Fluor metallurgist (Terry Phillips) . . . reviewed the issue and advised that the residual stresses would likely lead to loss of creep life” was made without any investigation, basis, or confirmation. Fluor’s metallurgist was held out as the expert source for that accusation. PX37. But at trial, Phillips conceded that neither he nor anyone else at Fluor had done anything to calculate, investigate, or confirm Fluor’s disparaging statement that the “residual stresses” “created” by Conex’s PWHT “would likely lead to loss of creep life.” *See* RR 17:83-87. Fluor did no calculations at all and nothing to “confirm that there was a loss.” *Id.*

At trial Fluor's metallurgist conceded it was likely that Conex's PWHT procedure had relieved the residual stresses caused by the weld if "the Big 10 Hardness Test and the Brinell Hardness Test shows that the softness of the metal is within code." RR 17:85. Fluor's "lead corporate welding engineer," Charles Patrick, likewise agreed that these hardness tests "tell[] you whether the heat treat has been done right or not." RR 17: 76, 78. Patrick also testified that when Fluor was in Conex's role, performing PWHT through a subcontractor, the documents Fluor retained to prove the propriety and correctness of its work were "a copy of the procedure from the subcontractor and the hardness reports." RR 17:78. Despite its knowledge of the validity of hardness tests, Fluor deliberately ignored the results of the hardness tests performed following Conex's PWHT procedures. Contrary to Fluor's unfounded accusations, those tests demonstrated good results with proper stress relief. RR 20:71.

Fluor also "deliberately ignored" the results of its own FEA. When Fluor tried to perform an FEA of the head-to-shell weld, the result was that Fluor's own PWHT methodology appeared to cause excessive heat stresses. Fluor had established a maximum stress threshold of 38,000 psi. RR 9:35-36. When Fluor graphed the PWHT work, it showed a maximum stress of 55,000 psi. RR 9:37-38. But then Fluor lied:

So, selectively, they said, "Well, let's go get another plot that is less than a 38,000; and it's called equivalent stress." But when I reviewed it, I picked on it that it's misrepresentation. In the text of the report they call it stress intensity; but when they put it up there and compare it, they call it equivalent stress. *That's misrepresentation. It's not an error. It's not a mistake.*

RR 9:36-37 (emphasis added). *See also* RR 9:38-39. "When you represent the stress result and you don't represent the highest distress in your report, that is not an error. It's

purposely done.” RR 10:9. “I see errors. And I see misrepresentation, which really they are not errors, they’re just put there to make things acceptable and look good. And that is wrong.” RR 9:45. There is no excuse for Fluor’s deliberate and reckless failures to verify information before it cast its fiery aspersions in a refinery setting.

Fluor’s work was not *just* mistaken; it was reckless. A finite element analysis requires careful effort and substantial time. RR 6:47. George Miller’s hurried FEA reflected a complete lack of care in which he used both the wrong conductivity values and the wrong heat transfer coefficients. RR 8:87, 8:93. The result was not simply incorrect: “I would say the errors were profound . . . so far wrong. We’re not talking about errors of 10, 15, 20 percent. You know, we’re talking about huge errors. The thing is off by over a hundred percent.” RR 6:77. Fluor also accused Conex of creating serious problems at the plant, alleging that Conex had caused “loss of creep life.” PX37.

Fluor did not verify the information in its finite element analysis. As Conex’s finite element analysis expert put it: “I have seen lots of analyses done and I have found mistakes . . . in fact, maybe one mistake, sometimes two, but not so many errors and mistakes it looks like—like nobody paid attention, it was just dump it in and get it out.” RR 8:95. Lack of time is not a reasonable engineering excuse. “If there is not enough time, they shouldn’t do it.” RR 9:7. “No engineer should put product like that out without being checked, verified.” *Id.*

In short, Fluor and its engineers and metallurgists made serious accusations about Conex’s work, yet it backed up none of those assertions. Fluor made misrepresentations without support, and it purposefully avoided the truth. *See Harte-Hanks Commc’n Inc. v.*

*Connaughton*, 491 U.S. 657, 692 (1989). A defendant who “deliberately ignore[s]” those “who could have shown [him] that his charges were wrong” commits actual malice. *Bentley*, 94 S.W.3d at 601. As Dr. O’Donnell testified, “Atofina was being misled and scared unnecessarily by Fluor.” RR 7:32.

**B. Likewise, the liability findings for interference with prospective business relations are supported by the record.**

The elements of a tortious interference claim are (1) an existing contract subject to interference; (2) an act of interference that is willful and intentional; (3) that proximately caused the plaintiff’s injury; and (4) actual damages or loss. *Prudential Ins. Co.*, 29 S.W.3d at 81; *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997). The tort of interference with contract embraces all intentional invasions of contractual relations, including any act interfering with the performance of a contract, regardless of whether breach of contract is induced. *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 446 (Tex. App.—Tyler 2001, pet. granted, judgm’t vacated w.r.m.); *Tippett v. Hart*, 497 S.W.2d 606, 611 (Tex. Civ. App.—Amarillo 1973, writ ref’d n.r.e.). When intentional acts serve to frustrate the purpose of another’s contract with a third party, thereby causing damage, such acts constitute the requisite interference. *Samedan Oil Corp.*, 78 S.W.3d at 447; *Hughes v. Houston Nw. Med. Ctr., Inc.*, 680 S.W.2d 838, 842 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.). Interference includes any act which retards, makes more difficult, or prevents performance. *Seelbach v. Clubb*, 7 S.W.3d 749, 757 (Tex. App.—Texarkana 1999, pet. denied). Interference can include conduct that makes performance of the contract more burdensome or more difficult, or of

less value to the one entitled to performance. *See UAW Local 119 v. Johnson Controls, Inc.*, 813 S.W.2d 558, 568 (Tex. App.—Dallas 1991, writ denied). Plaintiffs must prove the conduct would be actionable as an independent tort, but need not prove all the tort’s elements. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001).

The record supports the jury’s finding of intentional interference. CR 502-04. The jury refused to find that the interference was in good faith, by answering Question 5 “No.” CR 505. Fluor was and still is a competitor of Conex, and it was hired to “construct” the DCP instead of Conex. RR 17:77; 23:14-15; 27:9-11; CR 245-46. And, the evidence shows that Fluor bad-mouthed Conex and misrepresented its procedures and work to Fina, Conex’s oldest customer. PX37.

Moreover, there is historical evidence of many contracts. *See* pp. 23 - 26 above. And historical information proves the likelihood of future work. Fluor’s conduct in placing Conex on its watch list, and inducing Final to delete Conex from a list of approved contractors, compounds the damage. Conex was not invited to informational sessions and the luncheon about the DCP. PX42. Fluor’s conduct in disparaging Conex and blackballing Conex on the watch list is having the desired restrictive effect on Conex’s prospects for more business with Fina.

There is likewise proof of fraud. A plaintiff may recover from a defendant who makes fraudulent statements about the plaintiff to a third party, even without proving that the third party was actually defrauded. *Cnty. Initiatives, Inc. v. Chase Bank*, 153 S.W.3d 270, 283-84 (Tex. App.—El Paso 2004, no pet.). “By independently tortious we do not mean that the plaintiff must be able to prove an independent tort. Rather, we mean that the plaintiff must prove that the defendant’s conduct would be actionable under a

recognized tort.” *Sturges*, 52 S.W.3d at 726. Fluor never filed a special exception to Conex’s live trial pleading which alleged fraud as an independent tort, forming one of the elements of Conex’s tortious interference claim with prospective business relations. In the absence of special exceptions, a court construes a pleading broadly in favor of the pleader. *Prudential Ins. Co.*, 29 S.W.3d at 81; *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982). The Fifth Amended Petition stated “Defendants made . . . false representations with the express purpose of disparaging Conex and interfering with its contractual relations, *both existing and prospective*, with Fina.” CR 2:225 at ¶ 42. After incorporating this paragraph by reference, Conex sued for interference “with its existing and prospective contractual relations with Fina.” CR 2:230. Conex pleaded reliance as well. *Id.* ¶ 56. “Given a liberal construction, [Conex’s] pleadings allege that [Fluor] interfered by conduct constituting [fraud], a means which is tortious in itself.” *Prudential Ins. Co.*, 29 S.W.3d at 81; *Allied Capital Corp. v. Cravens*, 67 S.W.3d 486, 492 (Tex. App.—Corpus Christi 2002, no pet.).

**C. Fluor’s conduct, and its statements, cannot be excused as “mere mistakes” or faulty “opinions.”**

“Whether a statement is an actionable statement of ‘fact’ or merely one of ‘opinion’ often depends on the circumstances in which a statement is made.” *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex.1995). Relevant circumstances include “the statement’s specificity, the speaker’s knowledge, the comparative levels of the speaker’s and the hearer’s knowledge, and whether the statement relates to the present or the future.” *Id.* Under Texas law, opinions are not insulated from liability, and they may be actionable when: (1) “intertwined” with “direct representations of present facts;” (2)

“the speaker has knowledge of its falsity;” (3) “based on past or present facts;” or (4) the speaker has “special knowledge of facts that will occur or exist in the future.” *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930-31 (Tex.1983). “When a speaker purports to have special knowledge of the facts, or does have superior knowledge of the facts—for example, when the facts underlying the opinion are not equally available to both parties—a party may maintain a fraud action.” *Paul v. Capital Res. Mgmt., Inc.*, 987 S.W.2d 214, 219 (Tex. App.—Austin 1999, pet. denied); *accord Matis v. Golden*, 228 S.W.3d 301, 307 (Tex. App.—Waco 2007, no pet.).

Fluor’s comments to Fina about Conex are more than benign opinions; they were calculated to make Fina trust Fluor—and not Conex—to “get this done right.” PX25. The transgression is not that Fluor competed with Conex, but that its tactics went too far, leading Fluor to build up its client’s trust by falsely disparaging Conex in the eyes of its longstanding customer. Fluor’s competitive strategy was a dishonest and malicious one. It demeaned Conex by reporting as engineering “fact” things that were untrue. No doubt the strategy worked, not only on the 2001 turnaround, but by winning Fluor future construction work. This future work includes the \$1.5 billion Deep Conversion Project. In addition, Fluor eliminated its only viable local competition in construction work. “Exactly correct” is not an opinion. PX 26. Fluor’s “scientific” FEA is not presented as opinion, but fact. PX 37. And Fluor’s George Miller reported about “the science in PWHT” rather than an opinion. PX 25. Whether comments and accusations are statements of fact or expressions of opinion depends “on their verifiability and the context in which they were made.” *Bentley*, 94 S.W.3d at 583.

When a defendant takes a consistent position at trial that the statements are true and factual, that “is a compelling indication” he considered the statements true, and not mere opinion. *Id.* By disparaging Conex and committing fraud as well, Fluor went far beyond making an innocent mistake. It is guilty of more than mere negligence by omission. Fluor made statements that were defamatory, that it knew to be false, and which it made with malice. Fluor’s statements to Fina were “unverified,” “fabricated . . . product[s] of [its] imagination.” *See Bentley*, 94 S.W.3d at 596 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)). Fluor should not be heard to complain that it was just giving advice or simply doing its job. Such recklessness, even by an engineering firm, is actionable.

**V. Conex’s Contract Damages of \$1.8 Million Should Have Been Sustained Under This Record.**

**A. Fluor intentionally interfered with the turnaround contract.**

Question No. 1 asked whether Fluor had damaged Conex by making performance of the 2001 turnaround contract “impossible, more burdensome, or more difficult or of less or no value to the one entitled to performance.” CR 499. Put another way, if Fluor made performance more difficult, then Fluor is liable for interference with that contract.

The contract specified the PWHT. “Stress relieving is based on local heating of attachment welds and/or nozzles to large vessels over 5’-0” in diameter.” PX 9 at TOT 0537. This was routine work that Conex and Fina had done on numerous occasions. RR 5:34. The “heat bands” would be only 6 to 8 inches wide. RR 12:45-46. *See also* RR 6:56-57. But Fluor then injected itself into the PWHT process, disparaged Conex’s work,

and induced Fina to use a different, more difficult, and more expensive process based on inapplicable, non-code-based standards like WRC-452. *See* pp. 2-9, 38-44, above.

In the words of Fluor, this unprecedented PWHT was so immense it was explained to Fina as “world scale.” PX 24. It became the largest PWHT job in the history of the Fina refinery. RR 4:112. It has never been duplicated before or since. RR 4:90-92, 112.

“The difference between what [Fluor] made them do and what [Conex] would have done, left to their own devices, was total nonsense.” RR 7:80. But, unfortunately, Fluor succeeded in convincing Fina that Conex was incompetent: “They have Fina convinced that Conex was gonna do something bad and that thank God they came along and saved it. That’s absolutely wrong. That’s absolutely not true.” RR 7:82.

Fina refused to pay Conex for the PWHT work. As a result of its finite element analysis and its insistence on the applicability of WRC-452, Fluor “absolutely” made Conex do unnecessary work. RR 7:80. As a result, Conex was forced to spend more than \$2 million on the PWHT. *Id.*; RR 9:8-9. Those procedures were based on finite element analyses that were not necessary. *Id.* “You can’t get the right answer from the wrong analysis.” RR 7:80; 9:8-9.

**B. Fluor lost the jury verdict on its justification defense.**

The defendant has the burden of proof on a justification defense. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996). For prospective business relations, “[j]ustification and privilege are defenses . . . only to the extent that they are defenses to the independent tortiousness of the defendants’ conduct. Otherwise, the plaintiff need not prove that the defendant’s conduct was not justified or privileged, nor

can a defendant assert such defenses.” *Sturges*, 52 S.W.3d at 727. The record does not support any “right” to commit fraud or to disparage Conex. Because Conex proved “methods of interference that are tortious in themselves, the issue of privilege or justification never arises.” *Prudential Ins. Co.*, 29 S.W.3d at 81.

Indeed, in answering Question 4 “no,” and thus failing to find that Fluor had “an objectively well-grounded and justifiable belief in the right to engage in the conduct that constitutes interference,” CR 505, the jury foreclosed Fluor’s argument that its conduct was based upon proper motives or was justified as a mere opinion. The record supports the findings that Fluor’s conduct was motivated not by good faith, but by an intention to get work that Conex had done historically as Fina’s preferred contractor and to start the fight over \$2 million-plus in “extras” to poison the relationship Conex had with Fina.

**C. Conex’s settlement with Fina did not release or discharge Conex’s claim against Fluor.**

Fluor also claims to benefit from Conex’s settlement with Fina. But the settlement document specifies that it is only “in full and complete settlement of the disputes between Conex, Inc. and ATOFINA.” PX 33. Because Fluor is not named or specifically identified in the release, Fluor is not released by this settlement: “The rule is a simple one. Unless a party is named in a release, he is not released . . . . We hold that a release of a party or parties named or otherwise specifically identified fully releases only the parties so named or identified, but no others.” *McMillen v. Klingensmith*, 467 S.W.2d 193, 196 (Tex. 1971). This Court recognizes that “[a] nonsettling torfeasor should not fortuitously escape compensating his Texas victim simply because of settlement

arrangements that did not encompass him or his conduct and to which he contributed nothing,” *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 422 (Tex. 1984). Furthermore, the Restatement of Torts explains: “The fact that the plaintiff may have a cause of action against the person who has broken his contract does not prevent recovery against the defendant who has induced or otherwise caused the breach or reduce the damages recoverable from him.” RESTATEMENT (SECOND) OF TORTS § 774 A, cmt. e (1977). Conex did not release or discharge its independent claims against Fluor.

Moreover, this Court has expressly rejected the argument that acceptance of a sum “in complete and final satisfaction of any and all claims for damages” precludes any further claim against an unreleased tortfeasor. *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 807 (Tex. 1980). Only when the releasing party actually has received “full and complete recompense” for all of its damages is further action barred. *Id.* Here, the record proves the money Conex received from Fina was not “such a full satisfaction.” *Id.* Not even Fluor argues that the award of \$1.8 million is supported by no evidence, because it cannot. *See* RR 4:94, 156-57; 5:63-67, 120; 32: 25; PX 11, 17, 20.

Fluor cites *Prairie Producing Co. v. Angelina Hardwood Lumber Co.*, 882 S.W.2d 640 (Tex. App.—Beaumont 1994, pet. denied). That case involved multiple lawsuits between three parties in various Louisiana and Texas courts. Reasoning that a “Texas jury cannot . . . award damages based upon its own determination of title to foreign realty,” the court held that Angelina could not go behind its Louisiana settlement regarding ownership of Louisiana property shared with another third-party. Fluor tries to extend *Prairie* well beyond any recognizable meaning. This case does not ownership of

foreign real property. This case is controlled by *Klingensmith, Duncan, and Knutson*.

Conex preserved its claim against Fluor for the unpaid extras.

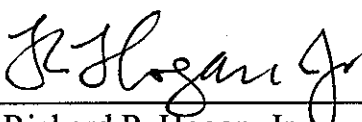
**PRAYER**

The court of appeals' judgment should be reversed and the jury's verdict and the trial court's judgment should be affirmed. Alternatively, the case should be remanded to the court of appeals. Conex International Corporation prays for any other relief to which it may be entitled.

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**CERTIFICATE OF SERVICE**

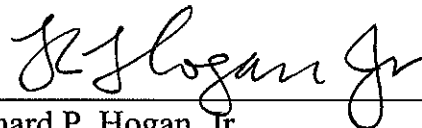
I certify that a true and correct copy of the foregoing instrument was served in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure.

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