

IN THE COURT OF APPEALS OF THE STATE OF OREGON

PAUL R. BOCCI, JR., guardian ad litem for) Multnomah County Circuit
PAUL R. BOCCI, III, an incapacitated individual) Court No. A9210-07050

Plaintiff,) CA A86556

v.)

KEY PHARMACEUTICALS, INC., a foreign)
corporation, SCHERING-PLOUGH CORPORATION,)
a foreign corporation, and SCHERING)
CORPORATION, a foreign corporation,)

and)

MILES, INC., an Indiana corporation, MILES, INC.,)
PHARMACEUTICAL DIVISION, an Indiana)
corporation, LEGACY HEALTH SYSTEM, an)
Oregon corporation, LEGACY IMMEDIATE CARE)
CLINIC, FREDERICK D. EDWARDS, M.D., and)
THE EUGENE CLINIC, a partnership,)

Defendants.)

-----)
FREDERICK D. EDWARDS, M.D.,)

Cross-Claim Plaintiff-Respondent,)

v.)

KEY PHARMACEUTICALS, INC., a foreign)
corporation, SCHERING-PLOUGH CORPORATION,)
a foreign corporation, and SCHERING)
CORPORATION, a foreign corporation,)

Cross-Claim Defendants-Appellants.)

BRIEF OF *AMICUS CURIAE*
CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA

On Remand from the Supreme Court of the United States
On Appeal from the Judgment of September 9, 1994;
September 9, 1994; and January 19, 1995 of the Multnomah County
Circuit Court, Honorable William C. Snuffer

Thomas M. Christ, OSB #83406
COSGROVE VERGEER KESTER LLP
805 SW Broadway, 8th Floor
Portland, OR 97205
(503) 323-9000

Robin S. Conrad
National Chamber Litigation Center, Inc.
615 H Street, N.W.
Washington, D.C. 200062
(202) 463-5337

Andrew L. Frey
Even M. Tager
Miriam R. Nemetz
MAYER BROWN ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

[July 2003]

William F. Gary, OSB #77032
James E. Mountain, Jr., OSB #75267
Sharon A. Rudnick, OSB #83083
HARRANG LONG GARY RUDNICK PC
360 East 10th Avenue, Suite 300
Eugene, OR 97401-3248
(541) 485-0220

Daniel M. Holland, OSB #80056
Ronald B. Terzenback, OSB #78093
LOOMIS & HOLLAND
801 East Park Street
Eugene, OR 97401-2980
(541) 344-8333

Dave Frohnmayer, OSB #71001
2315 McMorrان Street
Eugene, OR 97403
(541) 686-0434

Margaret A. Sundberg, WSBA #14550,
Special Admit OSB #05171
Mary H. Spillane, WSBA #11981,
Special Admit OSB #05182
WILLIAMS KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
P.O. Box 21926
Seattle, WA 98111-3926
(206) 628-6600

Attorneys for Cross-Claim Defendants-
Appellants Key Pharmaceuticals, Inc.,
Schering-Plough Corp. and Schering Corp.

Attorneys for Cross-Claim Plaintiff-
Respondent Frederick D. Edwards, M.D.

Hardy Myers, OSB #64077
Attorney General of the State of Oregon
Office of the Solicitor General
400 Justice Bldg., 1162 Court Street, N.E.
Salem, OR 97301-4096
(503) 378-6002

Attorney for Judgment Creditor
State of Oregon

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (“the Chamber”) is the nation’s largest federation of business companies and associations, with underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber’s members are profoundly concerned that the management of punitive damages by the nation’s courts be sound and fair. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S Ct 1513 (2003), the Supreme Court provided significant guidance about how to ensure the constitutionality of punitive damages awards. The construction and application of *State Farm* by the lower courts will greatly affect the future administration of punitive damages in this country. Because this Court may be one of the first to apply the teachings of *State Farm* to a claim that an award of punitive damages is unconstitutionally excessive, the decision in this case is of more than ordinary importance, both in Oregon and in other states. Accordingly, the Chamber has a strong interest in participating as an *amicus* in this case.^{1/}

^{1/} The Chamber has been granted leave to file, and has filed, an *amicus curiae* brief in *Waddill v. Anchor Hocking, Inc.*, 334 Or 260, 47 P3d 486 (2002), cert. granted and judgment vacated, 123 S Ct 1781 (2003), which was also remanded for reconsideration in light of *State Farm*. Because the cases implicate different, albeit to some extent overlapping, aspects of the *State Farm* analysis, this brief does not unduly duplicate the brief filed in *Waddill*.

ARGUMENT

The Supreme Court's decision in *State Farm* dramatically alters the legal landscape against which punitive damages may be awarded by juries and must be evaluated by reviewing courts. In *State Farm*, the Court expressed "concerns over the imprecise manner in which punitive damages systems are administered." 123 S Ct at 1520. It noted that, unless imposed "wisely and with restraint," punitive damages "have a devastating potential for harm." *Ibid*. Accordingly, the Court emphasized that lower courts *must* subject punitive awards to searching review, through the faithful application of factors designed to ensure proportionality, fairness, and restraint. See *id.* at 1525-1526. ("The principles set forth in *Gore* must be implemented with care, to ensure both reasonableness and proportionality."). After *State Farm*, there should be no doubt that the "rational juror" standard described in *Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 17 P3d 473 (2001), no longer can justify deferential judicial review of punitive awards. Rather, "[e]xacting appellate review" is required to "ensure[] that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" 123 S Ct at 1521-1522 (citation omitted).

Among the most significant principles prescribed by *State Farm* are the following:

The relationship between punitive damages and the harm suffered by the plaintiff. It is here that the vacated decision in this case and many other prior Oregon decisions are most strikingly at odds with the constitutional constraints fleshed out in *State Farm*. Although the *State Farm* Court declined "to impose a bright-line ratio which a punitive damages award cannot exceed" (123 S Ct at 1524), it did make clear beyond serious dispute that the kind of double-digit ratios approved in *Parrott* and this case go well

beyond the constitutional pale. Indeed, it is plain from the decision that, apart from exceptional cases, the maximum allowable ratio would fall in the range of between 1:1 and 4:1. *Ibid.*

Punishment for harms suffered by non-parties. In cases where the plaintiff claims injury arising from an action, policy, or decision that also affected other people, juries have often been invited, as was the *State Farm* jury, to punish the defendant for that entire course of conduct or range of injuries. It is now clear that this is impermissible: “Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis * * *. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.” *Id.* at 1523.

Extraterritorial conduct. In *State Farm*, the Court stated unequivocally that “[a] State cannot punish a defendant for conduct that may have been lawful where it occurred. * * * Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for *unlawful* acts committed outside of the State’s jurisdiction.” *Id.* at 1522 (emphasis added). The award in this case is premised on evidence and arguments that violate this principle (see pp. 11-13, *infra*).

The role of wealth. Having on several prior occasions expressed concern about the potential prejudice inhering in evidence of a corporate defendant’s substantial finances (see, e.g., *BMW of North America, Inc. v. Gore*, 517 US 559, 585 (1996); *Honda Motor Co. v. Oberg*, 512 US 415, 432 (1994)), the Court went farther in *State Farm* to rule explicitly

that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” 123 S Ct at 1525. Rather, “courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” *Id.* at 1524.

In recent years, the *Parrott* decision has provided the template against which punitive damages awards were reviewed in Oregon — and, almost invariably upheld. As the foregoing summary makes clear, *Parrott* is no longer good law in this regard because the crucial underpinnings of its analysis violate the central teachings of *State Farm*. First, the Court in *Parrott* justified a punitive award that was *87 times* the plaintiff’s actual damages based on its “consider[ation of] the potential injury that [the defendant’s] misconduct may have cause to past, present, and future customers.” 331 Or at 563, 17 P3d at 489. As just noted, *State Farm* says just the opposite: “Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims” (123 S Ct at 1523). Second, the Court suggested in *Parrott* that the 87:1 ratio was justified because the defendant’s acts were “particularly egregious.” 33 Or at 563, 17 P3d at 489 (quoting *BMW*, 517 US at 582). Under *State Farm*, however, as we discuss at greater length below, even egregious misconduct ordinarily will not support a ratio greater than 4:1, and double-digit ratios are presumptively unconstitutional unless the actual damages are slight.

Neither the \$1,000,000 punitive award upheld in *Parrott*, and even more so the massive \$22.5 million punishment previously sustained but since vacated in this case, withstand the analysis required by *State Farm*. Dr. Edwards was awarded \$500,000 in

compensatory damages; his punitive award was thus *45 times* the already generous compensatory award. The principles announced in *State Farm* lead inexorably to the conclusion that the award to Dr. Edwards is grossly excessive.^{2/} Furthermore, the jury fixed the amount of the punitive award to Dr. Edwards with an eye toward Key's marketing activities nationwide – thus running afoul of *State Farm's* holding that States ordinarily may not punish defendants for their extraterritorial conduct. Accordingly, this Court should grant a new trial on punitive damages or drastically remit the punitive award.

A. *State Farm* Demonstrates That The Ratio Of Punitive To Compensatory Damages In This Case Is Excessive

State Farm teaches that, in cases in which the compensatory damages are substantial, a ratio of punitive to compensatory damages that exceeds single digits cannot stand, regardless of the reprehensibility of the misconduct at issue. Ordinarily, where compensatory damages are substantial, punitive damages should not exceed the compensatory damages; in cases of highly reprehensible conduct, the permissible ratio may reach as high as 4:1; and ratios in excess of 9:1 are presumptively unconstitutional absent extraordinary circumstances, and then only if the compensatory damages are low.

^{2/} The Court previously has ruled that Key did not preserve an objection to the ratio between the punitive and compensatory awards to Edwards, but “argued only that the *total* award to Bocci and Edwards was excessive.” *Bocci v. Key Pharms., Inc.*, 178 Or App 42, 51, 35 P3d 1106, 1111 (Ct App 2001), cert. granted and judgment vacated, 123 S Ct 1781 (2003) (emphasis added). As discussed above, *State Farm* unequivocally requires that the award of punitive damages to each plaintiff be compared with the award of compensatory damages to that plaintiff. Even if a waiver somehow could alter the application of this constitutional standard and require a comparison between the total punitive damages and the total compensatory damages awarded in the case, *State Farm's* teachings make it clear that the resulting 10½:1 ratio is itself grossly excessive, and that Key accordingly would still be entitled to a significant reduction of the punitive damages.

The *State Farm* Court emphasized the “long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages” and indicated that, although such ratios (*i.e.*, 1:1, 2:1, and 3:1, respectively) “are not binding, they are instructive.” *State Farm*, 123 S. Ct. at 1524. Indeed, while observing that “ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages,” the Court made clear that “[t]he converse is also true * * *. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Ibid.*

The Court also referred to its previous statement that ratios as high as 4:1 would be “close to the line of constitutional impropriety.” See *ibid.* The Court’s discussion indicates that ratios above that level would ordinarily be reserved for cases coupling relatively low compensatory damages with especially egregious misconduct. Finally, the Court was emphatic that ratios greater than 9:1 are presumptively unconstitutional (“in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process”), though they may be countenanced in the very limited category of cases “where a particularly egregious act has resulted in only a small amount of economic damage.” *Ibid.* (internal quotation marks and citation omitted).^{3/} This assuredly is not such a case.

^{3/} As is clear from the treatment of emotional distress damages elsewhere in the opinion (see p. 11, *infra*), the Court’s reference to “economic damage” does not mean that higher ratios are allowable simply because a substantial award of compensatory damages is comprised principally of non-economic damages.

Moreover, enhanced punishment is not justified simply because the defendant's conduct may be labeled as willful or wanton and hence "reprehensible," for without the presence of such factors *no* punishment would be warranted. As the Supreme Court indicated in *BMW*, the fact that the defendant's conduct "is sufficiently reprehensible to give rise to tort liability" and may even support "a modest award of exemplary damages" (517 US at 580) "does not establish the high degree of culpability that warrants a substantial punitive damages award" (*ibid.*). While the *State Farm* Court identified certain aggravating factors that would support a finding of enhanced reprehensibility, it cautioned that "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." 123 S Ct at 1521.

Indeed, although the Supreme Court characterized the conduct in *State Farm* itself as "reprehensible" and as "merit[ing] no praise" (*ibid.*), and the conduct involved at least two aggravating factors – intentional deceit and a financially vulnerable victim – (see *id.* at 1518), the Court nevertheless strongly suggested that the presence of these aggravating factors was insufficient to move the appropriate relationship of punitive to compensatory damages in that case beyond a ratio of 1:1. See *id.* at 1526 ("application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages"). The ratio previously approved in this case is impossible to square with that conclusion or with the other indicators in the *State Farm* opinion that only modest ratios will be tolerated.

The California Court of Appeal recently ruled, in one of the first appellate cases to consider the import of *State Farm*, that “*Campbell, Gore, and Haslip* all suggest that in the usual case, *i.e.*, a case in which the compensatory damages are neither exceptionally high nor low, and in which the defendant’s conduct is neither exceptionally extreme nor trivial,^{4/} the outer constitutional limit on the amount of punitive damages is approximately four times the amount of compensatory damages.” *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal Rptr 2d 736, 762 (Ct App 2003). See also *Waits v. Chicago*, 2003 WL 21310277, at *6 (ND Ill June 6, 2003) (ordering punitive awards of \$500,000 and \$1.5 million remitted to \$20,000 and \$25,000 where compensatory damages were \$15,000, and noting Supreme Court’s statement in *State Farm* that “when compensatory damages are substantial * * * , then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limits of the due process guarantee”).

In evaluating the degree of reprehensibility of the defendant’s conduct, moreover, *State Farm* makes clear that the punishment must be “both reasonable and proportionate to the amount of harm *to the plaintiff* and to the general damages recovered.” 123 S Ct at 1524 (emphasis added). See also, *e.g., id.* at 1523 (“A defendant should be punished for the conduct that harmed the plaintiff * * * .”). Evidence that the defendant’s conduct may have harmed (or threatened to harm) someone else cannot be used to justify a punitive award that is excessive in relation to the conduct toward, and the harm suffered by, the

^{4/} Because there can be no punitive liability whatever in the absence of wanton or malicious misconduct, the word “trivial” in this context must mean conduct egregious enough to support the imposition of punitive damages, but still relatively low on the spectrum of punishable misconduct.

person receiving the award. This means that, in a case involving punitive awards to more than one party, each plaintiff's award must be examined individually to ensure that it satisfies the *BMW/State Farm* proportionality analysis.

In this respect, *State Farm* fundamentally changes the way that Oregon courts must approach excessiveness review. Under *Parrott*, Oregon courts have approved very high ratios of punitive to compensatory damages in order to punish the defendant for *all* of the harm caused to *everyone* by the defendants' misconduct. In *Williams v. Philip Morris, Inc.*, 182 Or App 44, 48 P3d 824 (Ct App 2002), petition for cert. filed, No. 02-1553 (April 23, 2003), this Court stated that the excessive multiple punishment potentially inhering in that approach can be mitigated by limiting *future* punitive awards. See *id.* at 71, 48 P3d at 841 ("future juries and courts [may] take previous awards into account when they set or evaluate punitive damage awards in future cases. The alternative to that approach is to limit punitive damages * * * to an amount that may be inadequate, based on speculation of what might happen in some future unknown case."). *State Farm* squarely rejects this approach to punitive damages review. See 123 S Ct at 1523.

A faithful application of the principles announced in *State Farm* precludes approval of the award in this case. First, "the federal excessiveness inquiry * * * begins with an identification of the state interests that a punitive award is designed to serve." *BMW*, 517 US at 568. Even accepting the jury's finding that Dr. Edwards was not negligent, the unusual nature of his claim – that he was lulled by the defendant's overzealous promotion of its drug into abandoning the physician's customary obligation to "sift through the relevant literature" to learn the risks associated with a particular drug (*Oksenholt v. Lederle*

Laboratories, 656 P2d 293, 297, 294 Or 213, 297-298 (Or 1982)) – suggests caution in conferring a substantial windfall on him in the form of punitive damages, which may tend to encourage similar unfortunate departures from normal medical practice.

Moreover, this case is governed by the principle laid down in *State Farm* that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limits of the due process guarantee.” *Ibid.*^{5/} This is because compensatory damages, in addition to serving to compensate the plaintiff, also act in the same way as punitive damages by attaching monetary liability to the defendant’s conduct. Where that liability is substantial, the defendant and others will have incentives to act in the future in a manner that avoids liability, thus wholly or at least partially satisfying the state’s deterrence objective. Because punitive liability should be no greater than necessary to achieve the state goals of punishment and deterrence (see *State Farm*, 123 S Ct at 1521; *BMW*, 517 US at 584; *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F3d 634, 641 (10th Cir. 1996)), substantial compensatory damages will often reduce or eliminate the need for substantial punitive damages.

^{5/} In *State Farm*, the Supreme Court found the compensatory award of \$1 million to be substantial, even though the plaintiffs – whose suit was based on State Farm’s refusal to settle a claim against them for their policy limits, which exposed them to an “excess judgment” that put their home at risk – suffered “a year and a half of emotional distress” before finally obtaining a non-execution agreement from the judgment holder. 123 S Ct at 1524. Here, Dr. Edwards settled with his patient before litigation was instituted, and he was awarded \$500,000 in damages principally for the angst he claims to have suffered when (as contemplated by the settlement to which he agreed), he was named as a defendant in this case. That generous award – like the \$1 million award in *State Farm* – is, by any definition, “substantial.”

In addition, as in *State Farm*, “[t]he compensatory damages for the injury suffered here * * * likely were based on a component which was duplicated in the punitive award.” 123 S Ct at 1525. Dr. Edwards contended that his damages included worry caused by a malpractice suit, concern over his professional reputation, and doubts about his ability to practice medicine. “In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant’s act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.” *Ibid.* (quoting RESTATEMENT (SECOND) OF TORTS § 208, cmt. c (1977)).

There is nothing in the facts of this case sufficient to offset the foregoing considerations. No award of punitive damages that exceeds the already generous compensatory damages can be sustained as consistent with Key’s due process rights.

B. The Punitive Award To Dr. Edwards Cannot Be Justified By Key’s Nationwide Revenues Or Profits

State Farm confirms that the punitive award is infirm for an additional reason beyond its absolute amount. Dr. Edwards supported his claim for punitive damages by pointing to Key’s *nationwide* sales and profits attributable to Theo-Dur, arguing that the punitive damages should take into account the \$35 million in added nationwide revenues that Key supposedly achieved by marketing its drug aggressively to avoid generic substitution. Tr.

2162, 2164, 2169, 3885-3888. Such a rationale for a large award plainly runs afoul of *State Farm*.^{6/}

The U.S. Supreme Court made it clear in *State Farm* not only that “[a] State *cannot* punish a defendant for conduct that may have been *lawful* where it occurred,” but also that, as a “general rule,” a State has no “legitimate concern in imposing punitive damages to punish a defendant [even] for *unlawful* acts committed outside the State’s jurisdiction.” 123 S Ct at 1522 (emphases added). See also *Ace v. Aetna Life Ins. Co.*, 40 F Supp 2d 1125, 1133 (D Alaska 1999) (“the effect of awarding punitive damages based on wealth generated from Aetna’s operations outside Alaska raises serious questions regarding the legitimate extent of Alaska’s interest in punishing Aetna”). Dr. Edwards’ evidence and argument plainly sought – with evident success, given that the jury’s award to co-plaintiff Bocci precisely matched the number put forward by the plaintiffs as added national sales – to convince the jury to set the amount of punitive damages on the basis of Key’s nationwide marketing activities. Yet Oregon would have no legitimate interest in regulating the company’s activities outside the state even if they were unlawful everywhere; here, moreover, it is not even clear that the activities would in fact be considered unlawful by courts and juries in other states, or, even if deemed tortious, that they would support *punitive* liability elsewhere.

^{6/} It was independent error to rely on revenue figures rather than anticipated profits, as it is only the latter that would motivate the company to act. Profits are, necessarily, only some fraction of revenues.

Indeed, only a handful of states have even recognized a cause of action for a physician who claims that he or she mistreated a patient because of a misrepresentation by the drug manufacturer. See, e.g., *Phelps v. Sherwood Medical Indus.*, 836 F2d 296, 302 n.5 (7th Cir 1987); *Vitolo v. Dow Corning Corp.*, 634 NYS2d 362, 365 (NY Sup Ct 1995). To the extent that the punitive award to Dr. Edwards takes into account Key's nationwide conduct, therefore, the award suffers from the same infirmity that doomed the punitive award in *BMW*: it "infring[es] on the policy choices of other States" (517 US at 572) by imposing Oregon's policies on them. As *BMW* makes clear (and *State Farm* forcefully reaffirms), "a State may not impose economic sanctions on the violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW*, 517 US at 572.

Thus, in addition to reversing the award on the ground that the ratio is excessive, this Court also should make clear that, in light of *State Farm*, trial courts may not allow plaintiffs to present nationwide financial data or otherwise to argue that the punitive award should punish defendants for their conduct in other states. This will go far toward ensuring that punitive damages in this State are "implemented with care" (123 S Ct at 1526), as *State Farm* requires.

Finally, a word about remedy. When a punitive verdict is as far off the constitutional mark as this one was, and infected by erroneous evidence to boot, a remittitur is truly an inadequate remedy, as it still subjects the defendant to the largest constitutionally permissible award when a jury that was operating within reasonable boundaries might have imposed a far lesser exaction. The only fair remedy is a new trial on punitive damages.

CONCLUSION

The award of punitive damages in favor of Dr. Edwards is unconstitutional under *State Farm*, and accordingly should be set aside in favor of a new trial or a drastic remittitur.

Respectfully submitted.

Thomas M. Christ, OSB #83406
COSGROVE VERGEER KESTER LLP
805 SW Broadway, 8th Floor
Portland, OR 97205
(503) 323-9000

Andrew L. Frey
Even M. Tager
Miriam R. Nemetz
MAYER BROWN ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Robin S. Conrad
National Chamber Litigation Center, Inc.
615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

July 2003

CERTIFICATE OF FILING AND MAILING

I hereby certify that I filed the foregoing **BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA** with the State Court Administrator at:

State Court Administrator
Records Section
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

by: _____ United States Postal Service, ordinary first class mail
_____ United States Postal Service, certified or registered mail, return receipt requested
_____ Hand delivery
_____ Other [specify]

COSGROVE VERGEER KESTER LLP

Thomas M. Christ, OSB #83406
805 SW Broadway, 8th Floor
Portland, OR 97205
(503) 323-9000
Attorney for *Amicus Curiae* Chamber of Commerce
of the United States of America

I further certify that on July 11, 2003, I served true and complete copies of this **BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA** on:

William F. Gary, OSB #77032
James E. Mountain, Jr., OSB #75267
Sharon A. Rudnick, OSB #83083
HARRANG LONG GARY RUDNICK PC
360 East 10th Avenue, Suite 300
Eugene, OR 97401-3248
(541) 485-0220

Dave Frohnmayer, OSB #71001
2315 McMorrان Street
Eugene, OR 97403
(541) 686-0434

Attorneys for Cross-Claim Defendants-Appellants Key Pharmaceuticals, Inc.,
Schering-Plough Corp. and Schering Corp.

Hardy Myers, OSB #64077
Attorney General of the State of Oregon
Office of the Solicitor General
400 Justice Bldg., 1162 Court Street, N.E.
Salem, OR 97301-4096
(503) 378-6002

Attorney for Judgment Creditor
State of Oregon

Daniel M. Holland, OSB #80056
Ronald B. Terzenback, OSB #78093
LOOMIS & HOLLAND
801 East Park Street
Eugene, OR 97401-2980
(541) 344-8333

Margaret A. Sundberg, WSBA #14550, Special Admit OSB #05171
Mary H. Spillane, WSBA #11981, Special Admit OSB #05182
WILLIAMS KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
P.O. Box 21926
Seattle, WA 98111-3926
(206) 628-6600

Attorneys for Cross-Claim Plaintiff-Respondent Frederick D. Edwards, M.D.

by: _____ United States Postal Service, ordinary first class mail
_____ United States Postal Service, certified or registered mail, return receipt requested
_____ Hand delivery
_____ Other [specify]

DATED: July 11, 2003

COSGROVE VERGEER KESTER LLP

Thomas M. Christ, OSB #83406
805 SW Broadway, 8th Floor
Portland, OR 97205
(503) 323-9000
Attorney for *Amicus Curiae* Chamber of Commerce
of the United States of America