

Nos. 03-16882 and 03-16930

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOANNE CEIMO,

Plaintiff-Appellee/Cross Appellant,

v.

**GENERAL AMERICAN LIFE INSURANCE COMPANY,
THE PAUL REVERE LIFE INSURANCE COMPANY, and
PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,**

Defendants-Appellants/Cross-Appellees.

**On Appeal From The United States District Court
For The District Of Arizona, No. CV-00-01386-FJM**

**APPELLANTS' REPLY BRIEF AND
CROSS-APPEAL RESPONSE BRIEF**

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I. THE JURY INSTRUCTIONS EFFECTIVELY DIRECTED A VERDICT FOR CEIMO ON TOTAL DISABILITY NOTWITHSTANDING THE ABSENCE OF EVIDENCE TO SUPPORT THAT VERDICT.

A. The Instructions Improperly Directed A Verdict On Total Disability.

1. Defendants preserved their objections.

Ceimo’s contention that we have not preserved our challenges to the instructions because they are not worded identically to our objections at trial (Resp.52-53¹) is baseless. We argued below that the policy’s definition of “total disability” required the jury to compare Ceimo’s material and substantial pre-disability duties to the ones she was capable of performing post-disability; that Ceimo’s proposed instructions “place[d] an undue emphasis” on the total-disability provision; that those instructions would enable Ceimo “to tell the jury that if you find that she does any invasive procedures, no matter what small percentage of her practice it is, by this instruction you have to find that she’s totally disabled”; and that the instructions therefore amounted to overturning the court’s decision that neither side was entitled to summary judgment on the issue. ER976-79. On appeal, we make the same points, albeit with different words: To say that the instructions “nullified” the partial-disability provision and “effectively directed a verdict” for Ceimo on total disability (Br.22) is simply a stronger way of saying that the instructions would place

¹ “Resp. ___” refers to Ceimo’s brief; “Br. ___” refers to our opening brief.

undue emphasis on the total-disability provision and would effectively overturn the denial of Ceimo's summary-judgment motion. Rule 51 requires that the party state its objections, but does not set in stone the words it uses to do so. *See, e.g., In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989).²

2. Defendants never conceded that the “usual or customary” gloss was proper.

Ceimo's contentions (Resp.54) that defendants “identified” the “usual or customary” standard “as the governing Arizona rule in a pretrial filing” and that General American conceded its applicability in *McFarland v. General American Life Insurance Co.*, 149 F.3d 583 (7th Cir. 1998), are misguided. In the pretrial filing upon which Ceimo relies, defendants argued at length that Ceimo was *not* totally disabled under the policy. CR114. That filing cited an out-of-state case that included a reference to “usual and customary,” but only for the proposition that “courts consistently focus upon the insured's tasks in determining whether he or she meets the definition of total disability.” *Id.* at 2. Defendants did not concede that, under Arizona law, the “usual or customary” language must be read into policies that don't contain it. In any event, the district court did not regard defendants as conceding the

² For the same reason, Ceimo is mistaken in claiming that our expression of “concern” about how she would use the instructions does not qualify as an “object[ion]” (Resp.53 n.5).

point, so neither should this Court. As for *McFarland*, it does not even mention the phrase “usual or customary,” much less indicate that General American conceded its applicability.

3. The instructions, as understood by all involved, misstated the law and improperly directed a verdict for Ceimo.

On the merits, Ceimo asserts that the “usual or customary” instruction merely “clarified what it means to be *unable* to perform *duties*” (Resp.55 (second emphasis added)) and hence did not effectively direct a verdict in her favor. That argument constitutes revisionist history.

During the charge conference, the district court stated that it was disinclined to give Ceimo’s proposed “usual or customary” instruction on the ground that “the usual or customary way doesn’t seem to add much to the policy language.” ER975. Ceimo responded that the instruction in fact meant much more than the trial court believed. According to Ceimo, “[w]hat this [instruction] allows us to say is that if invasive procedures were a material and substantial part of her job, and she’s no longer able to do them, that even if she can do other material and substantial parts of her job, she’s no longer performing her *job* in the usual and customary way, and she’s entitled to [total-disability] benefits.” ER981 (emphasis added). In other words, the instruction meant that Ceimo was totally disabled if she no longer could perform any *one* of her

pre-disability duties and hence no longer could perform her **job** in her “usual or customary” way.³

After hearing claim-handler Judy Renihan’s explanation that, under the policy, Ceimo was totally disabled only if she was unable to perform **all** of her important pre-disability duties (*see* FER96⁴), the court agreed that it “could now foresee with greater clarity the plaintiff’s interest in fleshing out a little bit more the whole notion of usual or customary way” and therefore would give Ceimo’s proposed instruction. SER2:1829. Ceimo proceeded to use the instruction precisely as she said she would, telling the jury that this “most important instruction” “entitled her to [total-disability] benefits” because her inability to provide invasive procedures when needed meant that “[s]he was no longer doing her **job** in the usual or customary way.” ER986-87 (emphasis added).⁵

³ As noted in our opening brief (at 22), Ceimo’s instruction thus eviscerated the distinction between total and partial disability.

⁴ “FER__” refers to our Further Excerpts of Record.

⁵ Because the court understood that by giving the “usual or customary” instruction it was authorizing this argument, Ceimo’s contention that defendants were required to object separately to her closing argument (Resp.56) is misguided. *See, e.g., Gulliford v. Pierce County*, 136 F.3d 1345, 1348 (9th Cir. 1998) (“Where the district court is aware of the party’s concerns with an instruction, and further objection would be unavailing, we will not require a futile formal objection.”) (quotation marks and citations omitted).

Ceimo’s claim that the instruction merely addressed “what it means to be unable to perform duties” is thus specious.⁶

The two Arizona cases upon which Ceimo relies—*Nystrom v. Massachusetts Casualty Insurance Co.*, 713 P.2d 1266 (Ariz. Ct. App. 1986), and *Radkowsky v. Provident Life & Accident Insurance Co.*, 993 P.2d 1074 (Ariz. Ct. App. 1999)—do not support inclusion of the “usual or customary” language in an instruction at all, much less the misuse of it that occurred here.

In *Nystrom*, the Arizona Court of Appeals used the “usual or customary” standard to *limit* the circumstances in which an insured can qualify for benefits. The insured in *Nystrom* had quit his job as sales and marketing manager at Farnan

⁶ Ceimo’s attempt to minimize the impact of this instruction also ignores the synergistic effect of the other contested instruction, which stated that the partial-disability rider does not limit the coverage for total disability. Ceimo insists that the latter instruction was needed to foreclose an argument that the partial-disability rider changed the scope of Ceimo’s total-disability coverage. Resp.57. But, contrary to Ceimo’s characterization, we have always agreed that “total disability” meant the same thing both before and after Ceimo added the partial-disability rider. Our point is that the partial-disability provision nonetheless illuminates the meaning of “total disability” because the scope of total-disability coverage necessarily ends where a disabling condition ceases to be “total” and becomes “partial”—and vice versa. By telling the jury that partial disability does not “limit” total disability while also giving Ceimo’s “usual or customary” instruction, the court conveyed the erroneous impression that Ceimo was totally disabled if she was unable to perform any one of her important pre-disability duties.

Company. The court held that he was entitled to benefits “if he could show that the stress which caused him to resign * * * resulted from the substantial and material part of his duties as an executive sales and marketing manager * * * and not * * * circumstances peculiar to his situation at Farnan.” 713 P.2d at 1271-72. In other words, *Nystrom* would be disabled only if his condition prevented him from working under “the usual or customary” conditions in which sales and marketing managers work. *Nystrom* thus lends no support to the way in which the “usual or customary” language was used here.

Nor does *Radkowsky*. That case involved a physician with a lifelong visual impairment, who “decided that he could not generate sufficient income without working significantly longer hours than other internists to achieve the same financial rewards.” 993 P.2d at 1075. *Radkowsky* argued that he was totally disabled because he could not perform many of the “usual or customary” tasks of an internist. The Court of Appeals deemed this invocation of *Nystrom* “misplaced” because *Radkowsky* was “no more disabled from his practice of internal medicine than he had been.” *Id.* at 1076.

In short, neither *Nystrom*, nor *Radkowsky*, nor any other case of which we are aware, has employed the “usual or customary” language in the way it was used here. And neither *Nystrom* nor *Radkowsky* held that this language should be added to jury

instructions.⁷ In such circumstances, the Arizona courts “discourage[] extracting jury instructions directly from the language of appellate decisions * * * which instructions can be confusing to those not trained in the law.” *Arizona v. Dawley*, 34 P.3d 394, 397 (Ariz. Ct. App. 2001) (quotation marks and citations omitted). The district court’s failure to heed that caution wreaked havoc in this case—licensing Ceimo’s evisceration of the distinction between total and partial disability.

B. Ceimo Was Not Totally Disabled.

Even assuming that Arizona law authorizes courts to incorporate the “usual or customary” gloss in jury instructions defining “total disability,” it does not follow that Ceimo’s inability to perform invasive procedures rendered her totally disabled. Although the Arizona courts have not definitively resolved the issue, the near-universal rule elsewhere—in jurisdictions that employ the “usual or customary” gloss and in those that do not—is that an insured must be unable to perform *all* of her

⁷ For this reason, Ceimo’s reliance on *Hangarter v. Provident Life & Accident Insurance Co.*, 373 F.3d 998 (9th Cir. 2004), gets her nowhere. *See* Resp.54. *Hangarter* was explicitly premised on this Court’s conclusion that “California law requires courts to deviate from the explicit policy definition of ‘total disability’” by giving a “usual or customary” instruction. 373 F.3d at 1006. Moreover, neither *Hangarter* nor the California case upon which it relied—*Erreca v. Western States Life Insurance Co.*, 121 P.2d 689 (Cal. 1942)—suggested that an insured is totally disabled if she cannot perform her *job* (as opposed to all of her important duties) in the usual or customary way. To the contrary, *Erreca* held that “the insured is not totally disabled if he is * * * capable of performing a substantial portion of the work connected with his employment” (*id.* at 695)—precisely the situation here.

important pre-disability duties in order to qualify for total-disability benefits.⁸ There is no reason to suppose that Arizona courts would deviate from this commonsense rule.

Application of this rule here requires entry of JMOL in favor of defendants because it was *undisputed* that Ceimo continued to perform most of her important pre-disability job duties in her usual and customary way: She continued treating many of the same patients, performing most of the same procedures, and running essentially the same practice—except that she would refer patients to another cardiologist for invasive procedures rather than doing those procedures herself. *See* ER214, 216-17, 354, 356, 359. The same was true after she finished her geriatrics fellowship and returned to practicing cardiology. SER2:734-39.

Insofar as Ceimo means to suggest that she was not performing her non-invasive duties in her “usual or customary” way because she was no longer

⁸ Our opening brief cites seven cases reaching that conclusion. Br.23-24. Others include: *Guidry v. Northwestern Mutual Life Insurance Co.*, 88 Fed. Appx. 12, 14 n.3 (5th Cir. 2004); *Bond v. Cerner Corp.*, 309 F.3d 1064, 1067-68 (8th Cir. 2002); *Russell v. Paul Revere Life Insurance Co.*, 288 F.3d 78, 82 (3d Cir. 2002); *Helus v. Equitable Life Assurance Society*, 309 F. Supp. 2d 1170, 1179 (N.D. Cal. 2004); *Conway v. Paul Revere Life Insurance Co.*, 2002 WL 31770489 (W.D.N.C. Dec. 5, 2002), *aff'd*, 70 Fed. Appx. 117 (4th Cir. 2003) (per curiam); and *Falik v. Penn Mutual Life Insurance Co.*, 204 F. Supp. 2d 1155 (E.D. Wis. 2002). The only state of which we are aware that applies a contrary rule is Arkansas. *See Gammill v. Provident Life & Accident Ins. Co.*, 55 S.W.3d 763, 768 (Ark. 2001) (cited at Resp.56).

performing them along with invasive procedures, that argument finds no support in the law. In one recent case, for example, an orthopedic surgeon who could no longer perform surgery argued that “his post-disability *in-office duties* are fundamentally different from those he performed pre-disability because he is no longer performing them ‘as an orthopedic surgeon.’” *Gross v. UnumProvident Corp.*, 319 F. Supp. 2d 1129, 1152-53 (C.D. Cal. 2004) (emphasis added). The court rejected that argument because “[t]he policy focuses on occupational duties, not merely on an occupational title,” and “[t]o credit such an argument would be a back door way of finding Plaintiff to be totally disabled based entirely on a finding that Plaintiff is unable to perform surgery.” *Id.*

Ceimo’s “*cf.*” cites (Resp.56-57) do not hold otherwise. In one, the Second Circuit held that a surgeon was totally disabled, even though he could still work as a general practitioner, because “[s]ince 1941 plaintiff’s practice had been exclusively surgery.” *Dixon v. Pac. Mut. Life Ins. Co.*, 268 F.2d 812, 814 (2d Cir. 1959). The court contrasted that situation with one in which “the doctor practiced both as a physician and surgeon” and “[h]is practice as a physician continued in substantial volume,” thus precluding a finding of total disability. *Id.* at 816 (citation omitted). Here, Ceimo was not “exclusively” engaged in performing invasive procedures; rather, it is undisputed that her practice included many other important duties, which

she “continued [performing] in substantial volume.”

Another of Ceimo’s cases, *Rahman v. Paul Revere Life Insurance Co.*, 684 F. Supp. 192 (N.D. Ill. 1988), involved an emergency-room cardiologist who became unable to run to patients suffering “emergency cardiac arrests.” The court granted him summary judgment on total disability because his “statement that an *essential* aspect of his pre-injury emergency cardiology practice was to run to his patients [was] *uncontroverted*.” *Id.* at 197 (emphasis added). In other words, the court found that the insurer had failed to adduce evidence that Rahman had any pre-disability tasks for which running was not essential. *Id.* Here, by contrast, it was uncontroverted that Ceimo’s loss of arm strength and fine motor skills in two fingers had no effect on her ability to perform the non-invasive duties that she was able to perform pre-disability.⁹

In sum, no reasonable jury could have found that Ceimo was unable to perform all of her important pre-disability duties—“the usual or customary way” or otherwise. Accordingly, defendants are entitled to JMOL on total disability.

II. THE ERRONEOUS EVIDENTIARY RULINGS ENTITLE DEFENDANTS TO A NEW TRIAL.

A. Prater’s Testimony Was Improper.

A disturbing new trend among litigants is to proffer “expert” witnesses who

⁹ As noted above (at n.8), Ceimo’s third case—*Gammill*—rests on Arkansas’s idiosyncratic interpretation of the term “total disability.”

function “more to argue the client’s cause from the witness stand than to bring to the fact-finder specialized knowledge or expertise.” *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 538 (S.D.N.Y. 2004). Prater epitomizes this trend, and Ceimo’s efforts to justify his testimony fail to come to grips with this aspect of it.

1. Defendants preserved their objections to Prater’s testimony.

Ceimo argues that defendants waived some of their examples of improper expert testimony by failing to object to *each* one at trial. Resp.60-61. When a trial court has overruled an objection to the admission of expert testimony, however, “there is no requirement that a party engage in a futile and formalistic ritual” of renewing its objections every time the objectionable testimony is elicited. *United States v. Varela-Rivera*, 279 F.3d 1174, 1177-78 (3d Cir. 2002). Recognizing that “constant objections * * * could antagonize the jury,” this Court has emphasized that such repetition is “certainly not required.” *Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1286 (9th Cir. 1984).

Defendants argued in their motion *in limine* that, for many reasons, Prater’s proffered testimony—including his plan to offer a narrative account of defendants’ allegedly unlawful conduct—was improper and inadmissible. *See* ER628 (arguing that Prater “has taken on the role of the finder-of-fact * * * in the guise of expert opinion”). The court initially ruled that Prater could testify “only as to the general

practices of the insurance trade to help the jury understand what insurance companies do and how they operate,” and invited objections to questions that crossed the line. ER699-700. During trial, defendants did just that, reiterating their concern that Prater would improperly supply Ceimo’s version of the facts in the guise of expertise. *See* ER713 (“What he clearly intends to do * * * is exactly what we laid out in the motion in limine, which is to go through all these documents and tell the jury what the company was doing and what his opinion is on that.”). Ceimo admitted that Prater would “tell the story” by “explain[ing] the relationship between the institutional documents and the claim handling that ultimately occurred.” ER715. The trial court flatly ruled that “he can do that,” effectively foreclosing further objections. ER717.

Given the court’s unequivocal ruling, defendants sensibly confined their further objections to other problems with Prater’s testimony. First, they objected (unsuccessfully) when Prater made key factual assertions that were not linked to specific documents or testimony. *See, e.g.*, ER753, 747, 752-54. Second, they objected (unsuccessfully) to questions calling for Prater to offer legal conclusions regarding the meaning of Ceimo’s insurance policy. *See, e.g.*, ER800, 801-02. That was sufficient to preserve the points we have raised on appeal.

2. Prater should not have been permitted to act as biased narrator.

Responding to our argument that Prater's slanted rendition of the facts was improper, Ceimo contends that he appropriately supplied "factual inferences" relevant to her claim. Resp.61. Because Ceimo cannot demonstrate that Prater's fact-spinning was helpful to the jury, however, her rejoinder misses the point. *See Mukhtar v. California State Univ.*, 299 F.3d 1053, 1063 n.7 (9th Cir. 2002) (whether expert testimony is "helpful to the jury" is the "central concern" of Rule 702), *modified*, 319 F.3d 1073 (2003).

Contrary to Ceimo's suggestion (Resp.59), Prater's expertise in insurance-industry practices and standards did not make this line of testimony "helpful." Lacking any firsthand knowledge of the pertinent events, Prater had no special insight into *what happened* within the defendant companies generally or in Ceimo's case in particular. The jurors were equally capable of reviewing the documentary evidence and the testimony of percipient witnesses and determining the facts. *See Rezulin*, 309 F. Supp. 2d at 550 (excluding expert's inferences from documentary evidence because "plaintiffs' counsel may present [the documents] directly to the fact-finder while arguing his or her view of [its] significance"); *Taylor v. Evans*, 1997 WL 154010, at *2 (S.D.N.Y. Apr. 1, 1997) (excluding expert testimony "presenting a narrative of the

case which the jury is equally capable of constructing”).

Ceimo contends (Resp.61) that Prater’s fact-spinning was authorized by Federal Rule of Evidence 704, which provides that “testimony in the form of an opinion or inference *otherwise admissible* is not objectionable because it embraces an ultimate issue to be decided by the trier of fact” (emphasis added). As the emphasized phrase makes clear, however, eliminating the prohibition on “ultimate issue” testimony did not make *all* factual inferences fair game. *See* Rule 704, Advisory Committee Notes (“[t]he abolition of the ultimate issue rule does not lower the bar as to admit all opinions”). Rule 704’s drafters emphasized that *all* expert testimony must be “helpful to the trier of fact,” lest the expert “merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day.” *Id.*¹⁰

The factual inferences that Prater drew here—for example, that medical and claims personnel were “in cahoots” (ER753), that the defendants pressured claims personnel to terminate claims regardless of their merits (ER765-66, 779), and that they purposely selected biased doctors to perform IMEs (ER752-754)—did not involve the

¹⁰ For similar reasons, Ceimo is mistaken in contending (Resp.64) that *Hangarter* authorizes Prater’s result-oriented testimony. In *Hangarter*, the Court approved expert testimony “that Defendants deviated from industry standards,” but was careful to note that the expert “never testified that he had reached a legal conclusion that Defendants actually acted in bad faith.” 373 F.3d at 1016. Prater’s testimony that defendants’ actions were “improper” (ER752) and “absolutely inappropriate” (ER765) crossed the line that this Court carefully drew in *Hangarter*.

application of Prater’s alleged expertise regarding industry standards and practices. Instead, his factual assertions were advocacy masquerading as expert opinion. The admission of expert testimony (like Prater’s) that serves only to “bolster” the client’s case is an abuse of discretion. *Unites States v. Gibbs*, 190 F.3d 188, 212-13 (3d Cir. 1999) (lower court abused discretion in admitting expert testimony regarding meaning of statements that were within the ken of lay jurors).

Ceimo contends that it is proper for an expert to “undermin[e] a party’s innocent, self-serving interpretation of evidence.” Resp.62. But that is so only when the expert conveys specialized knowledge that is helpful to the jury. Because Prater did not do that, his testimony was inadmissible for this or any other purpose.¹¹

Ceimo next argues that Prater’s description of defendants’ conduct had “ample foundation.” Resp.62. That argument is circular, relying entirely on the nefarious

¹¹ Ceimo cites cases upholding the admission of the testimony of (1) a percipient witness who opined, based on his personal observations and his expertise regarding narcotics trafficking, that the defendant was acting as a lookout (*United States v. Fleishman*, 684 F.2d 1329, 1335-36 (9th Cir. 1982)); and (2) a police captain who explained that, in drug transactions, “one person typically sells the drugs while the other person serves as a surveillance monitor” (*United States v. Molina*, 172 F.3d 1048, 1056 (8th Cir. 1999)). Neither case justifies allowing an “expert” who lacks any personal knowledge of events to deliver a plaintiff-slanted construction of the paper record.

spin Prater placed on routine corporate documents,¹² his deliberate blurring of material temporal distinctions,¹³ and his invention of facts suiting his premise that defendants

¹² For example, none of the documents that Ceimo cites supports Prater's conclusion "that Defendants' agents knew their conduct was improper." Resp.63. ER186 urges that discussions regarding changes in structure and compensation following the integration of Provident and Paul Revere be kept confidential until finalized. *See* FER41-42. ER35 simply states—quite reasonably—that involving attorneys in "potentially questionable" claims "will add to the quality of decisions, promote uniformity, and help prevent unwarranted litigation." As for ER247, the suggestion that invoking attorney-client privilege reflects a guilty mind is precisely the kind of result-oriented spin that has become Prater's specialty; moreover, although the document recommends destruction of "file review sheets," it also states that "the actions recommended at the meeting, if approved, [will] be transcribed to the Action Plan Log." *Id.* Finally, the statement that the quarterly scrub is "unwise from a potential litigation standpoint" accompanies a law firm's recommendation to "eliminate the scrub process" (ER35) which Provident did (*see* n.13, *infra*). It hardly supports Prater's theory that the defendants set about to institute *more* aggressive claim-handling practices while trying to hide their tracks.

¹³ Ceimo contends, for example, that there is "overwhelming support in Defendants' documents" for Prater's testimony that defendants improperly undertook to "scrub the files and try to get the reserves down." Resp.62. Although Prater opined that the "quarterly scrub" was symptomatic of an improper attitude toward claims that affected Ceimo (ER754), this practice was *eliminated* before Provident Companies merged with Paul Revere's parent and long before Paul Revere denied Ceimo's claim. After Ralph Mohny took over Provident's claim department, the quarterly scrub was replaced with more effective daily claim-handling processes involving more training, better organization, and lighter case loads. ER74-75, 130. This example well illustrates the larger issue in this case: For how long are plaintiffs going to be allowed to tar these defendants with long-since-superseded documents and stale testimony of former employees on the theory that the practices allegedly embodied in the documents and employees' memories were carried over to the merged company in 1997?

improperly set out to deny claims.¹⁴ The important point, however, is that it was *the jury*'s responsibility to decide what the evidence disclosed about defendants' conduct. The factfinding process should not have been tainted by "expert" testimony that was nothing more than an adversarial presentation of the evidence.

Prater's testimony was especially harmful because the jury never saw most of the evidence on which he ostensibly relied. Ceimo admitted that she would introduce only "a fraction" of the documents upon which Prater would base his testimony. ER714. Indeed, Prater claimed that he formed his views about defendants over the course of "four or five years," based on his review of documents *in other cases*. ER720. Ceimo's strategy of using Prater to summarize and characterize evidence that she did not directly adduce left the jury with no way to assess the accuracy of Prater's testimony, rendering it not only unhelpful but also highly prejudicial.

Responding to our argument that Prater improperly vouched for the testimony of former-Provident-employee William Feist—whose deposition was Prater's sole basis for opining that roundtables were used to "try and figure out ways to deny or close claims or terminate claims" (ER772)—Ceimo contends that Prater instead

¹⁴ Ceimo contends that there was substantial documentary support for Prater's testimony that defendants "aggressively pursued claim-closing goals and pressured their claim examiners to meet those goals." Resp.63. As shown in Section IV.A, *infra*, there was no evidence at all of such "pressure."

“corroborat[ed]” Feist’s testimony. Resp.64. But an expert witness with no firsthand knowledge of the facts cannot “corroborate” the evidence on which he relies. Ceimo asserts that Prater relied on “document review” as well as Feist’s testimony for his information about roundtables (*id.*), but the few documents relating to roundtables that Prater discussed did no more than describe who attended such meetings. *See* ER772-73. Furthermore, other witnesses who testified about how roundtables were conducted at Paul Revere (the company that handled Ceimo’s claim) contradicted Feist’s account. FER42-43, 45-46, 64-68, 77-83, 87-95. Prater evidently saw no need to consider their testimony when drawing his conclusions about roundtables.

Facts such as these are “properly presented through percipient witnesses and documentary evidence” (*Rezulin*, 309 F. Supp. 2d at 551), not expert testimony. Prater had nothing to offer but his “personal belief as to the weight of the evidence.” *Bouchard v. Am. Home Prods. Corp.*, 213 F. Supp. 2d 802, 809 (N.D. Ohio 2002). Accordingly, his testimony “invade[d] the province of the jury” (*id.*) and should have been excluded. *See Primavera Familiestifung v. Askin*, 130 F. Supp. 2d 450, 529 (S.D.N.Y. 2001) (excluding expert’s testimony construing deposition testimony because it “seeks to supplant the role of counsel in making argument at trial, and the role of the jury interpreting the evidence”).

3. Prater should not have been permitted to testify about the legal meaning of Ceimo's policy.

As even the cases that Ceimo cites make clear, experts may not testify as to the “legal effect” of contracts. *Energy Oils, Inc. v. Mont. Power Co.*, 626 F.2d 731 (9th Cir. 1980). To escape this rule, Ceimo asserts that Prater merely described the “custom and usage” of contractual terms “that routinely appear in contracts” within his area of expertise. Resp.65.

The record refutes Ceimo's argument. Prater did not limit himself to addressing obscure terms of art found within the contract, but instead interpreted Ceimo's policy from beginning to end and told the jury what rights it gave her. SER2:298-301. For example, Prater described the “own-occupation rider” as follows:

When you buy the own occupation rider, it promises to pay you that \$12,000 a month if you're unable to perform the material and substantial duties of your own unique occupation, your own specialty, if you will: If you're a surgeon, your ability to do surgery; *invasive cardiologist, your ability to do invasive cardiology*; trial lawyer, your ability to be a trial lawyer.

Even though you can do all the other things, if you can't do that important, key ingredient of your profession, you're entitled to collect, even though you're making more money, * * * *even though you can work as a doctor or a cardiologist, * * * if you can't do your specialty, your credentialed specialty * * *, you get to collect.*

SER2:301 (emphasis added).

Here, Prater “was not testifying about a technical term that needed explaining”

(*TCP Indus. Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 549-50 (6th Cir. 1981)), but instead was attempting “to direct the jury’s understanding of the legal standards upon which their verdict must be based” (*Specht v. Jensen*, 853 F.2d 805, 810 (10th Cir. 1988)). Because expert testimony on the legal rules that guide the jury’s decision “cannot be allowed” (*id.*), the admission of Prater’s testimony was reversible error.

4. The court did not adequately assess reliability.

Implicitly conceding that the district court did not separately assess the *reliability* of Prater’s testimony, Ceimo contends that “the non-scientific testimony of an insurance industry expert in an insurance bad faith case satisfies the governing reliability standard as long as the expert’s relevant ‘knowledge and experience’ are established.” Resp.66. As the Eleventh Circuit recently held, however, the suggestion that “the reliability prong [is], for all practical purposes, subsumed by the qualification prong” is simply wrong. *United States v. Frazier*, 387 F.3d 1244, 2004 WL 2320339, at *12 (11th Cir. 2004).

Contrary to Ceimo’s assertion (Resp.66), *Hangarter* does not hold otherwise. The *Hangarter* Court expressly ruled that a district court *must* undertake “some kind of reliability determination to fulfill its gatekeeping function” in an insurance-bad-faith case. 373 F.3d at 1018. The Court was satisfied that the trial court had performed its gatekeeping function by probing the expert’s knowledge and experience

and concluding that they “provided a sufficient foundation of reliability for his testimony.” *Id.*

The same cannot be said here. Although Ceimo contends that Prater’s knowledge and experience were “thoroughly described in Plaintiff’s brief opposing Defendant’s motion in limine” (Resp.66), she does not show that the court explored whether those qualifications gave Prater “a sufficient foundation of reliability” (*Hangarter*, 373 F.3d at 1018) for the opinions he intended to offer. *See Mukhtar*, 299 F.3d at 1066 (lower court’s admission of expert testimony over party’s reliability objections did not demonstrate that it made a reliability determination). Had the court undertaken this mandatory examination, it might have realized that Prater’s testimony would be based on adversarial *ipse dixit*, not expertise.

It is “vital” that judges not be “deceived by the assertions of experts who offer credentials rather than analysis.” *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997). Because the trial court failed to heed that caution, the admission of Prater’s unsupported—and hence unreliable—testimony was erroneous.

B. Evidence Regarding The Claims Practices Of General American And Provident Should Have Been Excluded.

1. The General American and Provident documents were irrelevant and prejudicial.

Prater's tale of overly-aggressive claim-handling was based on a small collection of documents produced by the three defendants. As we explained in our opening brief (at 48-55), because Ceimo did not establish a "nexus between that evidence and the handling of [her] individual claim," the documents from General American and Provident, neither of which handled her claim, were "irrelevant." *Montoya Lopez v. Allstate Ins. Co.*, 282 F. Supp. 2d 1095, 1104 n.65 (D. Ariz. 2003).

Struggling to demonstrate the required nexus, Ceimo asserts that the handling of her claim "powerfully demonstrated" how the policies reflected in the institutional documents "affected an individual claim and an individual claimant." Resp.67. Yet Ceimo admits that the practices discussed in the most inflammatory documents—General American's so-called "hit list" and "buyout schemes"—"were not reflected in [her] file." Resp.68. Her contention that those documents were nonetheless probative of General American's "desperation" (*id.*) is frivolous. Ceimo neither disputes that Paul Revere, not General American, handled her claim nor contends that Paul Revere adopted any of General American's practices. Accordingly, documents purporting to reflect General American's attitude had no probative value

to weigh against their enormous prejudicial impact.

Ceimo's rationale for admission of the Provident documents is a single reference to—"roundtable"—in her claim file. Especially given the absence of evidence that Ceimo's claim actually was affected by a roundtable, that cryptic reference did not justify injecting into the case plaintiff's entire package of institutional documents, most of which concerned practices that undisputedly did not affect Ceimo.

Although Ceimo notes that, in *Hangarter*, this Court found many of the Provident documents to be relevant and admissible (Resp.67 (citing 373 F.3d at 1020)), the holding that certain Provident documents were relevant to another plaintiff's claim is not binding here. Indeed, because Hangarter was referred for an IME and her claim clearly was discussed at a roundtable (373 F.3d at 1011-12), she had a stronger argument than Ceimo that the Provident documents touching on those subjects were pertinent to her case. Furthermore, Hangarter did not introduce or advert to the General American documents, which were the most inflammatory documents involved in this case.

In sum, the allegedly "extensive connections" (Resp.68) between the General American and Provident documents and Ceimo's case do not exist. This Court should finally impose limits on the recycling of the plaintiff bar's tired "bad-faith" evidence

by ruling that the General American and Provident documents are inadmissible here.

2. Feist's testimony should have been excluded.

Ceimo contends that Feist's testimony was admissible because Paul Revere began conducting roundtables after it merged with Provident. Resp.68-69. That Paul Revere introduced roundtables after Feist's departure from Provident is not enough to make his idiosyncratic "impression" (ER846) of those earlier meetings pertinent here. And it certainly does not justify the admission of his testimony on other subjects, such as his inflammatory contention that Provident wrongfully fired its older workers. ER839.

Contrary to Ceimo's assertions (Resp.69-70), moreover, it would be sheer speculation to conclude that her claim was affected by a roundtable. The undisputed evidence was that the reference to "roundtable" in Ceimo's file was a mere suggestion that was not followed. ER936-38. Although Ceimo asserts that the absence of evidence that a roundtable occurred is explained by defendants' "policy of destroying 'round table' documents" (Resp.69-70), it was undisputed that defendants recorded the recommendations made at roundtables in the claim files. ER247, 934-35, 948, 953-54; FER73-74, 80-82. Even indulging Ceimo's speculation that her claim was discussed at a roundtable, moreover, there is no evidence that it was adversely affected by that meeting.

Finally, Ceimo points out (Resp.69) that this Court approved the admission of Feist's testimony in *Hangarter*. See 337 F.3d at 1019. That ruling, which involved a plaintiff whose claim undeniably was sent to a roundtable, presents no bar to holding on the very different facts of this case that Feist's testimony had no valid role to play here.

C. The District Court Erroneously Allowed Ceimo To Assert That Paul Revere Caused One Of Her Patients To Suffer A Heart Attack.

Ceimo attacks a straw man in contending that the trial court properly admitted her letter to Paul Revere supporting Waldron's claim for benefits and her testimony that the letter was in her own claim file. Resp.70-71. Our point is that it was a highly prejudicial abuse of discretion for the court to allow Ceimo to testify that Paul Revere subjected Waldron to "a very hostile and aggressive" IME during which he developed "chest pain" (ER885) and her counsel to later advert (counterfactually) to Waldron as the insured who "had been sent to an IME and had a heart attack as a result of the IME" (ER940).¹⁵

Ceimo makes no effort to defend the relevance of these statements. Moreover, her arguments as to why they don't run afoul of the hearsay rule are flatly wrong. First, her assertion that her testimony was not admitted for the truth of the matter

¹⁵ Ceimo's letter says that Waldron "did not sustain any further myocardial damage" as a result of the IME. SER1:68.

asserted (Resp.71 n.18) is belied by the use to which her counsel put it. Second, the hearsay exception for statements made for purposes of obtaining medical treatment is inapplicable because it does not extend to “[s]tatements as to fault” (Fed. R. Evid. 803, Advisory Committee Notes), which is precisely what Ceimo’s testimony entailed.

III. PROVIDENT LIFE WAS NOT A PROPER DEFENDANT.

A. Provident Life Had No Direct Involvement In Ceimo’s Claim.

Ceimo’s contention that Provident Life was directly involved in the handling of her claim is specious. Specifically, contrary to Ceimo’s assertion that “Provident [Life] * * * denied the claim itself in 1999” (Resp.72), the 1999 letter (which affirmed the conclusions in Paul Revere’s original denial letter from March 1998) was signed “The Provident Companies, Inc.” SER1:209-10. The other documents upon which Ceimo relies (Resp.72) either pertain to Provident Companies (SER1:208, 337)¹⁶ or pre-date Provident Companies’ acquisition of Paul Revere by years (SER1:56, 58-

¹⁶ SER1:337 is a letter from William Kasalko of General American to Timothy Arnold discussing procedures relating to buyouts and settlements of claims made under General American policies. Although addressed to Arnold as Assistant Vice President of “Provident Life and Accident,” the letter itself refers only to “Provident,” which makes sense because, contrary to Kasalko’s misaddressed letter, Arnold was the Provident *Companies* executive in charge of the new unified claim operation. See, e.g., FER15 (letter from a Provident Companies Director referring to “Tim Arnold, Vice President”); ER473 (Provident Companies memo discussing Arnold’s transfer to Worcester to oversee transition to unified claim operation). Moreover, Kasalko’s letter is not only wrongly addressed as a matter of fact, but is hearsay when, as here, cited for the truth of Arnold’s company affiliation.

59)¹⁷ and thus, obviously, cannot show that Provident Life was involved in Ceimo's claim.

B. Paul Revere Was Not An Alter Ego Of Provident Life.

In support of her contention that Paul Revere was the alter ego of Provident Life, Ceimo says that "Paul Revere and Provident Life employees * * * worked together handling the same block of claims, and applied a unified set of claim-handling policies." Resp.74. Ceimo is engaged in temporal legerdemain: Provident Life and Paul Revere employees never worked together and never employed a unified set of policies; it was only after these individuals became employees of the new unified claim operation under the auspices of Provident *Companies* (and hence were no longer employees of Paul Revere and Provident Life) that they ever worked together. ER867-68. And it was the new claim organization under Provident Companies that "didn't differentiate between the two companies" (Resp.74 (quoting ER868)) when handling claims (*see, e.g.*, ER473, 867), because it was "appl[ying] a unified set of claim-handling policies" (Resp.74). Finally, the fact that Provident *Companies* owned both Paul Revere and Provident Life and appointed the same members to both of their boards, which then hired some of the same people as officers

¹⁷ SER1:56 is an inquiry by Paul Revere about whether Ceimo had coverage with Provident Life. SER1:58-59 is Provident Life's response in the negative.

(Resp.74), is obviously not evidence that one of the *subsidiaries* was dominating the other or that the two had a “unity of interests and ownership” (Resp.73) exceeding that of any other pair of corporate affiliates.

Moreover, because there is no evidence that Provident Life played any role in *her* claim (*see* ER867-68; SER1:209-10), Ceimo cannot show that preserving the separate corporate identities “would work an injustice” to her by “permitting [Provident Life] to evade responsibility for a portion of the conduct in which it joined, and for which it should be fully liable” (Resp.75).

The cases that Ceimo cites affirmatively undercut her alter-ego argument. In *Gatecliff*, the court found that there was a question of fact regarding alter-ego liability because one defendant “exercised substantially total control over the management and activities of [the other].” *Gatecliff v. Great Republic Life Ins. Co.*, 821 P.2d 725, 728 (Ariz. 1991) (quotation marks omitted). Here, there is no evidence that Provident Life had any—let alone “substantially total”—control over Paul Revere; and only one of *Gatecliff*’s seven “factors” is present: “common officers or directors.” *See id.* The other cases that Ceimo cites are textbook examples of undercapitalized shell corporations set up to shield their owners from liability. *See Cammon Consultants Corp. v. Day*, 889 P.2d 24, 26 (Ariz. Ct. App. 1994); *Employer’s Liab. Assurance Corp. v. Lunt*, 313 P.2d 393, 396 (Ariz. 1957). That is obviously not the situation

here. Similarly, the cases that Ceimo cites finding sister corporations to be alter egos involve one entity that completely dominated the other and essentially operated it as a shell. *See Nichols v. Pabtex, Inc.*, 151 F. Supp. 2d 772, 782-84 (E.D. Tex. 2001); *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1249-52 (1991). There is no comparable dominance of Paul Revere by Provident Life here.

C. Provident Life And Paul Revere Were Not In A Joint Venture With Respect To The General American Policies.

Ceimo claims that Provident Life and Paul Revere were engaged in a joint venture, but there is no evidence that Provident Life had a financial interest in any of Paul Revere's operations, let alone the General American policies in particular.¹⁸ Indeed, Ceimo's own financial expert acknowledged that there is no evidence of any profit-sharing between Provident Life and Paul Revere. SER2:995-96, 998, 1010-18; FER47-63.

Ceimo's cases again highlight the inadequacy of her argument. In *Forest*, **both** Provident Life and Paul Revere "entered into [contractual] agreements to provide claims administration services" and "entered into coinsurance agreements" for the policies in question. *Forest v. Equitable Life Assurance Soc'y*, 2001 WL 1338809, at *1 (N.D. Cal. June 12, 2001). Here, Provident Life had no relationship, contractual

¹⁸ The memo that Ceimo cites (Resp.77-78) shows only that Provident **Companies** had a general interest in its subsidiaries' financial performance (ER521).

or otherwise, with General American. And the two Arizona cases that Ceimo cites involved joint venturers who collected premiums, handled claims, and had a financial interest in the block of policies. *Farr v. Transamerica Occidental Life Ins. Co.*, 699 P.2d 376, 386 (Ariz. Ct. App. 1984); *Sparks v. Republic Nat'l Life Ins. Co.*, 647 P.2d 1127, 1138 (Ariz. 1982); *see also id.* (dismissing third defendant because it did not “exercis[e] any control or tak[e] part in any concerted action toward the plaintiffs”). None of those elements is present here.

* * * * *

In short, there is no evidence that Provident Life had anything to do with Ceimo’s claim, that Paul Revere was its alter ego, or that the two companies were engaged in a joint venture. Accordingly, the Court should dismiss all claims against Provident Life. Furthermore, because Ceimo does not deny that Provident Life’s presence diverted the proper focus of the trial, affected the evidence that was admitted, and caused significant prejudice to the other defendants (Resp.75-81), Paul Revere and General American are entitled to a new trial.

IV. DEFENDANTS ARE ENTITLED TO JMOL ON THE BAD-FAITH CLAIM.

Ceimo cites this Court’s recent decision in *Hangarter* as if it establishes that defendants denied her claim in bad faith. Resp.78. But each case must be decided on

the evidence actually presented (*see, e.g., Milhone v. Allstate Ins. Co.*, 289 F. Supp. 2d 1089, 1100-02 (D. Ariz. 2003)) and the evidence here—both of defendants’ practices and, more importantly, of Ceimo’s claim—was different than in *Hangarter*. When Ceimo turns to the actual evidence in this case, her argument finds no traction. Specifically, she suggests four reasons that the bad-faith verdict should be sustained (Resp.78-79) and her “Statement of the Facts” implies another (Resp.12-13, 15-21). But none is supported by the evidence.¹⁹

A. Defendants Did Not Set Arbitrary Goals For Denying Claims.

Ceimo says that defendants targeted her claim as part of a “scheme designed to eliminate expensive own-occupation claims like hers.” Resp.78. But the only evidence of such a scheme that she mentions as support for the bad-faith verdict is Provident’s implementation of “specific arbitrary and ambitious claim-closing goals

¹⁹ Ceimo’s allegation that two of our arguments “were not properly raised below” (Resp.78 n.20) is misguided. First, in our post-trial JMOL motion we expressly argued that “undisputed facts preclude a finding that Paul Revere’s treatment of Ceimo’s claim as one for partial instead of total disability was objectively unreasonable.” CR199, at 6-7. Second, our argument that Ceimo’s evidence of “institutional practices” cannot support a finding of bad faith is fully embraced within our general argument that “[a]s a matter of law * * * there was no bad faith” (*id.*). A defendant contending that the evidence is insufficient to support a cause of action need not address in its post-trial motions each piece of evidence in order to be able to explain later why that evidence is insufficient. *See Simkins v. Nevadacare, Inc.*, 229 F.3d 729, 736 (9th Cir. 2000) (a “*general issue* is properly before [the Court] on appeal” as long as it was raised below) (emphasis added).

called ‘net termination ratios’—*i.e.*, ratios reflecting terminated claims minus reopened claims, divided by new claims.”²⁰ Resp.15. This argument distorts the evidence.

First, “net termination ratios” have very little to do with accepting or denying claims because “terminations” include claims that close for any reason—and the undisputed evidence showed that the vast majority of claims terminate because the benefit period expires or the insured returns to work, recovers from an illness, or dies. *See, e.g.*, FER43-44, 71-72, 75-76, 84-85. In other words, only a small percentage of terminations involve the denial of a claim. Thus, if an insurer wants to increase the net-termination ratio, it focuses on “getting people back to work,” “apply[ing] additional resource[s] in looking at claims” in order to “find some that were being paid that should not be paid” because the benefit period has expired or the person has returned to work or died, and handling claims accurately and efficiently. FER86. Indeed, the documents that Ceimo cites (Resp.15, 64n.16) *nowhere* mention denying claims as a method of affecting the net-termination ratio.²¹ Instead, they focus on legitimate business initiatives such as adequate staffing and decreased case-loads for

²⁰ We address Ceimo’s broader unsupported allegations about a “scheme” to deny claims in Section VI.B, *infra*.

²¹ Thus, Ceimo’s assertion that these documents “recount[] the company’s quarterly success in cutting benefits to disabled claimants” (Resp.17) is baseless.

claim handlers (ER196-205, 417, 454), specialization of claims staff (ER253, 460, 512), general efficiency (ER396, 423, 438), facilitating returns-to-work (ER396, 429, 443, 460), efficient use of investigative resources (ER257-58, 396, 429, 443, 460, 512-13), and avoiding reopened claims by making accurate and thorough claim determinations the first time (ER257-58, 392-93, 422, 438). There is nothing improper about pursuing such initiatives or employing a metric such as the net-termination ratio to measure their effectiveness.

Second, all of the documents that Ceimo cites (Resp.15) are high-level financial and strategic-planning memoranda between executives with fiduciary responsibilities to Provident and its shareholders. Even Prater, Ceimo's expert/advocate, admitted that there is nothing wrong with an insurer considering how various claim-department policies affect profitability so long as the insurer does not "try[] to save payment dollars *that are owed*."²² SER2:188 (emphasis added). And despite Ceimo's accusations, not a single claim handler said that he or she ever felt pressure to deny claims for financial reasons and not a single member of management said that he or she exerted such pressure. Moreover, the uncontradicted testimony showed that

²² Ceimo implies that Prater opined that the claim department can *never* consider profitability. Resp.10. Even if that was what Prater meant, it is plainly wrong: Initiatives such as those described above are both aimed at profitability and fully consistent with paying all legitimate claims.

defendants' claim handlers did not even know about these financial analyses. FER37-40, 69-72, 85-86. Indeed, the Paul Revere employees who handled Ceimo's claim did not even know what "net-termination ratio" meant.²³ FER97-98. In other words, there is no evidence that defendants denied a claim for financial reasons on any occasion, much less this one.

B. Paul Revere Did Not Delay Paying Ceimo's Claim For Three Years.

Ceimo's allegation that Paul Revere "sought to delay and deny [her] claim for three years" (Resp.78) finds no support in the record. Ceimo filed a preliminary notice of her claim on April 4, 1995 (ER220). For the next year, by her own admission (ER881, 905-09), she failed to produce any of the documents that were required to process her claim. Meanwhile, Ceimo sold her practice in February 1996 (Tr.808) and stopped working entirely on May 6 (ER409). Only then did Ceimo begin gathering the information that Paul Revere had requested. *See, e.g.*, ER408, 415. But as of August 1996, Paul Revere still had not received either the information that it had been requesting for over a year or the new records covering the intervening time

²³ Ceimo's observation that financial information was shared with "all [Provident] employee[s]" on one occasion (Resp.63-64) is true but irrelevant. The information had nothing to do with net-termination ratios or financial goals (let alone financial goals for terminating claims). *See* ER287-88 (summary of "Claim Improvement Initiatives" including financial information on effective use of field investigators and the number of claims reviewed through the roundtable process).

period. ER478, ER480. Furthermore, the fact that Ceimo had sold her practice, left for a fellowship program, was considering returning to cardiology practice after the program, and was now claiming total disability (*see, e.g.*, ER411-12), necessitated a new round of information gathering (*see, e.g.*, ER411-12, 484-85).

Paul Revere's letters over the next year show that it continued having difficulty obtaining relevant records from Ceimo and that, even as late as April 1997, it had not received "all the information necessary to properly evaluate [Ceimo's] claim." ER526. It was not until June 23, 1997, that Ceimo provided the last of the information that Paul Revere had been requesting for over two years.²⁴ FER13. Meanwhile, in April 1997, Ceimo left her geriatrics fellowship at Duke and entered one in Arizona. SER2:734. Paul Revere did not receive information about Ceimo's duties in this new program until July 28, 1997. FER19.

Only then, over two years after Ceimo's initial notice, did Paul Revere finally have the information necessary to evaluate her claim. And a file review on August 8, 1997, concluded that its investigation was on track and that "with some additional

²⁴ Although Ceimo complains about Paul Revere's repeated requests for information (Resp.20-21), which she summarily asserts was "unnecessary" (Resp.22), she fails to either identify a single piece of information that was unnecessary or acknowledge the role that her failure to produce information played in causing these repeated requests.

reviews we should wrap up [Ceimo's] claim.”²⁵ ER590-91.

At that point, Paul Revere made an error in analyzing the evidence of Ceimo's procedures and income in 1996. But Ceimo's insinuation that there was something nefarious about this mistake (Resp.20-21) is baseless. In fact, the mistake was caused by unexplained and undetected changes in the format of information Ceimo had provided. *See* FER32-35. Paul Revere immediately identified the existence of a problem (SER1:135), discussed it with Ceimo (SER1:139), sent her the analysis for review (FER24-31), continued trying to resolve the problem (SER1:142-43), and accepted Ceimo's explanation of the discrepancy (SER1:145, FER32-35). It made a final determination on Ceimo's claim 1½ months after resolving this issue. *See* ER610-13 (letter of March 11, 1998).

Paul Revere (like Ceimo) may not have been perfectly efficient at all times during this process, and (like Ceimo) may have made mistakes, but there is no evidence that it intentionally delayed resolving her claim.

²⁵ Ceimo cites this memo as evidence that Paul Revere had already decided to deny her claim in August 1997. Resp.21-22, 33. But the memo in fact expresses no opinion about the merits of Ceimo's claim. She also cites SER1:305 as evidence that “[d]efendants had internally decided to close [her] claim as early as June 1996” (Resp.21-22)—but that document relates to her separate *business-expense* policy, which *was* “paid to 6-1-96” and then closed because Ceimo had sold her business. *See* ER494-95.

C. Paul Revere Did Not Fabricate A Basis For Denying Ceimo’s Claim.

Ceimo contends that Paul Revere denied her total-disability claim on the pretense that she “was not a ‘real’ cardiologist.” Resp.78-79. That is false: Paul Revere determined that Ceimo did not qualify for total-disability benefits because she “was working in her own occupation * * * doing three out of the four categories of things that she had listed” as important job duties on her claim form. FER106; *see also* ER610; SER1:47, 51-52. Under the terms of Ceimo’s policy, it is *irrelevant* whether Ceimo is “really” an invasive cardiologist or a cardiologist-who-does-invasive-procedures (FER99-106): The policy focuses on the extent to which Ceimo’s disability prevented her from performing her important pre-disability duties (*see* pages 7-10, *supra*). Paul Revere determined that Ceimo was still able to do the majority of her pre-disability job duties and concluded that she therefore did not qualify for total-disability benefits. Even if the Court determines that this conclusion was incorrect, there is no basis for calling it a “fabricat[ion]” (Resp.78).

D. Paul Revere Did Not Use An Additional-Cost Rider To Reduce Ceimo’s Overall Coverage.

Ceimo also claims that Paul Revere acted in bad faith by “attempt[ing] to use a rider designed to provide *additional* protection to *reduce* her coverage.” Resp.79. As discussed above (at n.6), Ceimo misrepresents our position, which is simply that

the existence of partial-disability coverage illuminates why an insured must be unable to perform all of her important pre-disability duties in order to be totally disabled. In any event, as we point out in our opening brief (at 23-24) and Ceimo ignores, the fact that numerous judges around the country agree with us on this point compels the conclusion that it was not bad faith for Paul Revere to employ this interpretation when handling Ceimo's claim.

E. Paul Revere's Investigation Of Ceimo's Claim Was Reasonable.

Finally, although Ceimo does not mention Paul Revere's investigation as a reason to uphold the finding of bad faith (Resp.78-79), her "Statement of the Facts" takes issue with several aspects of that investigation. Her criticisms, however, are based on distortions of the evidence and the unwarranted assumption that, whenever an insurer questions or investigates a claim, it must be "trying to deny" that claim.

The initial management referral. Ceimo's misrepresentations begin with the initial referral of her claim to a manager at Paul Revere. She describes this referral as evidence that Paul Revere set out to deny her claim for financial reasons, quoting the document as saying "Reason for referral: DI \$12,000/mo life w/resid." Resp.12. In fact, there is a box drawn around the description of Ceimo's policies, including the financial terms—although the photocopy in the record is faint—and the "Reason for referral:" begins below that box, with the phrase "Rod, [Insured] is a 46 Y[ear] O[ld]"

Board Certified Invasive Cardiologist * * *.” ER310. Indeed, the manager’s response—that Ceimo appeared to be “limited in her ability to perform invasive procedures and *her policy covers her for that*” (ER310 (emphasis added)—affirmatively undermines Ceimo’s allegation that Paul Revere “began looking for ways to avoid paying the claim” (Resp.12).

Medical referrals. Ceimo’s pejorative characterization of Paul Revere’s internal medical referrals (*see, e.g.,* Resp.13, 18-19, 33) is based on distortions of the actual referrals and responses. For example, Ceimo cites SER1:63 as evidence that “company doctors also obligingly produced the anti-insured opinions for which the adjusters pressed.” Resp.13. But that document’s conclusions that Ceimo was “limited to part[ial] duties” and that her condition might stabilize or improve (SER1:63) were supported by her treating physician’s notes (*see, e.g.,* FER3d; SER1:60) and were consistent with *payment* of partial-disability benefits. The medical consultant’s subsequent observations that “not all cardiologists do invasive procedures, some just do office visits & treat patients” and that, according to the information in her file, Ceimo “can do her occ[upation,] just not catheterizations” (SER1:63) similarly comport with both Ceimo’s (ER214, 216-17, 220) and Steier’s (SER1:60) description of Ceimo’s condition and then-current occupational duties.

Ceimo also claims that a response to a referral two months later was biased

because the doctor “speculated” that her condition was “minimal to moderate.” Resp.18-19. But she fails to note that the doctor prefaced his comments by saying “we need additional records concerning this client” (SER1:69) and that, upon receiving those new records, the medical consultant concluded that they “support [Ceimo’s] inability to perform cardiac catheterizations” (SER1:71). Ceimo dubs this favorable recommendation “grudging[.]” and asserts that, by proposing that Paul Revere review her medical records again in four months, the doctor “suggested further delay.” Resp.19. The court will search the document in vain, however, for any hint that the doctor’s recommendation was “grudging[.]” *See* SER1:71. Moreover, his proposal to review the records again in four months because “improvement with her condition [was] possible” (*id.*) was completely reasonable given that none of *Ceimo’s* doctors had determined that her condition was permanently disabling (*see, e.g.,* ER477, FER4-5, 755). And although Paul Revere did not make partial-disability payments to Ceimo during those four months, that was because Ceimo failed to provide the necessary financial information, not because the doctor (after supporting her claim of disability) recommended that her records be reviewed again at a later date.

Finally, Ceimo complains that the doctor “suggested an argument to use in denying the claim” by observing that “the functional requirements of *non-invasive*

cardiology practice seem little different than those of a *geriatric* practice.” Resp.18-19 (quoting SER1:70). But this observation was responsive to the question put to him: “Do you believe she is totally disabled from her occ[upation], partially disabled, or not disabled at all?” SER1:69. The doctor believed that if Ceimo was able to carry out the duties of a geriatrician—as she was doing—then she also was able to carry out the non-invasive duties of a cardiologist. Ceimo’s subsequent “dispute” with the doctor’s statement (*see* Resp.19 (citing SER1:77-79)) was based on a misunderstanding: The point was not whether “[g]eriatrics is nothing more than noninvasive cardiology” (SER1:77-79), but whether, as the doctor responded, “the client *can* do [non-invasive cardiology] if she *chooses* to perform [geriatrics]” (SER1:85).

Financial referrals. Ceimo’s attacks on Paul Revere’s financial referrals and responses (Resp.20-21) are equally baseless. For example, she says that Paul Revere “directed [its] financial consultant to find a basis for arguing that the drop [in her income] was not connected to her disability.” Resp.20-21 (citing SER1:142). But because Ceimo’s partial-disability provision pays benefits only when she has suffered a loss of income “solely as a result of” her disability (ER147), it was perfectly appropriate to ask whether there is “any way to determine if [Ceimo’s] loss [of income in 1996] is from impairment or simply from change in activities/duties” (SER1:142).

That neutrally-worded question is a far cry from “direct[ing]” the financial consultant to fabricate a basis for denying Ceimo’s claim.

Ceimo adopts the same strategy in string-citing some of the medical, financial, and management referrals and concluding, without explanation, that they were intended to “solicit ammunition to help [defendants] deny Ceimo’s claim.” Resp.33. A review of those referrals reveals that the questions posed were appropriate and neutral, and that the responses were reasonable and based on the available evidence (*see* ER248, 308, 481-82, 614, 617; SER1:71, 84-85 (all medical referrals); SER1:142-143, 154; FER6-11, 15-18, 20-23, 34-36 (all financial referrals); ER310-11, 590-91; SER1:147; FER12 (all management referrals)). Ceimo’s pejorative characterizations cannot compensate for her failure to identify a single instance of actual bias in the language or content of the referrals and responses.

The investigations. Ceimo characterizes Paul Revere’s use of investigators as a “broad-ranging effort[] to dig up ‘dirt’ on [her].” Resp.19-20; *see also* Resp.13, 33. But each of the investigations that Paul Revere conducted (or considered conducting) was justified and carried out appropriately. For example, in April 1996—after Ceimo had essentially abandoned her claim for over a year—Paul Revere discovered that she had already sold her practice and was leaving within two weeks to begin a fellowship at Duke, was claiming total disability as a result of that decision, and was considering

returning to cardiology practice after her fellowship. *See* page 34, *supra*. In light of this unexpected and somewhat suspicious development, Paul Revere was warranted in “check[ing] into the details” of the sale of her practice, “conduct[ing] ‘covert surveillance’ of Ceimo” at her new employment at Duke, and ensuring that she was not simply relocating her cardiology practice to a different state. *See* Resp.19-20. These were reasonable steps to protect against the possibility of fraud.

Ceimo also criticizes the fact that a claim handler considered using investigators to obtain records about Ceimo’s pre-disability invasive procedures. Resp.13. But Paul Revere was entitled to seek documentation supporting Ceimo’s characterization of her pre-disability duties, and it eventually obtained this documentation from Ceimo without the assistance of investigators. *See* ER352, 421, 479.

The legal referral. Finally, Ceimo implies that Paul Revere committed bad faith by sending her file to the legal department before denying her claim. Resp.21-22. The request to send the file to the legal department was made on March 11, 1998 (SER1:147), the *same day* that Ceimo’s claim was denied (ER610). Given Ceimo’s explicit threat of a lawsuit (SER1:133-34), obtaining legal advice was completely reasonable.

V. THE AWARD OF BAD-FAITH DAMAGES IS UNSUSTAINABLE.

A. The Award Of Bad-Faith Damages Is Unsustainable As Compensation For Past And Future Policy Benefits.

Ceimo concedes both that the jury was not entitled to award her past and future policy benefits as damages for bad faith and that the \$5,470,000 award “approximates” the value of those benefits. Resp.80-81. But, she argues, this correlation does not prove causation because she asked the jury to give her that exact amount as compensation for her emotional distress. *Id.* That is a no-win argument for Ceimo: Either the award is for policy benefits and must be vacated in its entirety, or it is for emotional distress measured by policy benefits, in which case it must be drastically reduced to conform with the actual, minimal, evidence of emotional harm.²⁶

B. Ceimo’s *Post Hoc* Effort To Justify The Award As Damages For Physical Injury Is Invalid.

Implicitly conceding that the \$5,470,000 bad-faith verdict cannot be justified as damages for the emotional harm to which she testified at trial, Ceimo attempts to recast it as compensation for harm to “Ceimo’s *physical* well being,” as well as for her

²⁶ Ceimo’s suggestion that defendants are barred from challenging the amount of the bad-faith award because they did not object when she suggested that the jury use the amount of unpaid policy benefits as a “yardstick” (Resp.80-81, 82) is meritless. A party does not need to object to statements made during closing argument in order to challenge an award as excessive. *See, e.g., Smith v. Kmart Corp.*, 177 F.3d 19, 25, 32-33 (1st Cir. 1999).

emotional distress. Resp.82 (emphasis in original). This revisionist argument is squarely precluded by the jury instructions, which allowed compensation for “[e]motional distress, humiliation, inconvenience, and anxiety,” *not* physical injuries or pain and suffering. ER1004. Indeed, Ceimo did not ask for an instruction that allowed her to recover for physical injury (ER966) and never mentioned physical injury when addressing bad-faith damages during closing arguments (Tr.1862-63).²⁷

In short, Ceimo’s assertion that defendants caused her to suffer physical injuries is a *post hoc* attempt to justify an obviously excessive award. But the instructions are clear: The bad-faith damages must be measured against the evidence of Ceimo’s *emotional* distress alone, not her alleged “physical deterioration, chronic pain, and sleep deprivation” (Resp.23-24).²⁸

C. The Evidence Does Not Support The Jury’s Record-Shattering Award.

The \$5,470,000 emotional-distress award is by far the highest such award in any reported bad-faith case anywhere in the country (Br.68-69)—a fact that Ceimo does not dispute (Resp.81-84). Ceimo’s effort to salvage that record-shattering award

²⁷ Even if Ceimo had been permitted to recover for physical injury, there is no evidence that defendants’ conduct caused any such injury. *See* pages 49-55, *infra*.

²⁸ Ceimo said that her sleep deprivation was the result of “arm/neck/shoulder discomfort”—*not* emotional trauma. SER1:78.

falls far short for two independent reasons. First, there is no evidence that she suffered significant emotional distress—certainly nothing severe enough to warrant an award that is more than 50 times the highest emotional-distress award ever sustained in an Arizona bad-faith case. *See* Br.68. Second, much of the modest emotional distress to which Ceimo points in her brief was not caused by defendants’ conduct, but rather was the result of her medical condition.

1. Ceimo’s alleged emotional injuries do not support the award.

Ceimo identifies the following emotional harms: “worry,” one instance of “shame,” “bouts of self-doubt and self-reproach,” a sense of loss regarding her cardiology practice, and “increasingly-intense feelings of frustration and helplessness.” Resp.22-24, 80-83. Without denigrating the unpleasantness of these emotions, the fact is that Ceimo offers no evidence that they were sufficiently severe to warrant a substantial award of damages. Specifically, there was no evidence that Ceimo ever sought counseling, let alone psychiatric treatment or medication, for these emotional harms. There was no evidence that she suffered from depression, terror, high levels of anxiety, or any other nervous condition. There was no evidence that she experienced eating or sleep disorders, migraine headaches, nausea, indigestion, uncontrolled weeping, or any other physical manifestation of her emotional state. And there was no evidence that Ceimo’s “frustration,” “worry,” and “self-doubt” affected

her family life or her ability to carry out day-to-day activities. In sum, even after scouring the record for every scrap of “emotional reaction” described at trial, Ceimo has failed to identify any evidence of the kind of significant emotional suffering needed to support a substantial award.

The cases that Ceimo cites prove this point. For example, the only Arizona case that Ceimo cites involved an award of \$1,500,000 for a plaintiff who was subjected to a medically unnecessary radiation treatment that increased his risk of leukemia from one out of 16,000 to one out of 33. That experience resulted in a permanent post-traumatic stress disorder that manifested itself in “long-term * * * mental disturbance,” including fear of death, nightmares, cold sweats, sleeplessness, and impatience with his children and grandchildren, and required him to seek psychological counseling for anger and anxiety. *Monaco v. Healthpartners of S. Ariz.*, 995 P.2d 735, 739 (Ariz. Ct. App. 2000).

In another of Ceimo’s cases, a doctor and his wife each were awarded \$1,120,000 (*i.e.*, about one-fifth of Ceimo’s award) for harassment by abortion protestors that “turned their lives into a hellish, torturous experience,” caused them to “liv[e] in genuine fear for their lives for an extended period of time,” and “permanently affected their life-style, their professional lives, their enjoyment of life, their personalities, their economic well-being, and their general emotional well-

being.” *Tompkins v. Cyr*, 202 F.3d 770, 783 (5th Cir. 2000); *see also S.W. Bell Tel. Co. v. Wilson*, 768 S.W.2d 755, 759-60, 763 (Tex. Ct. App. 1989) (\$1,500,000 for plaintiff who testified to extensive mental anguish caused by a bill-collector’s harassment, including fear of death while being threatened with a gun).²⁹

The stunning difference between the genuine emotional devastation apparent in these cases (corroborated by the testimony of family members and medical professionals) and Ceimo’s self-described worry, shame, self-doubt, frustration, helplessness, and sense of loss confirms that the award here is inordinately excessive.

2. Most of the emotional harm that Ceimo identifies was not caused by the handling of her claim.

Ceimo attributes a range of unpleasant emotional consequences to Paul Revere’s supposed “insist[ence] that [she] work full time as a non-invasive cardiologist, rather than paying her benefits” (Resp.22), the unavailability of which, she avers, caused her “to sell [her] practice to save her health” (Resp.23).

²⁹ The other cases that Ceimo cites are inapplicable because they involve compensation for *physical* pain and suffering—contrary to Ceimo’s description of them as “pure *emotional* distress awards” (Resp.83). *See Prozeralik v. Capital Cities Communications, Inc.*, 635 N.Y.S.2d 913, 915 (N.Y. App. Div. 1995) (damages for unspecified “emotional *and physical* injury”) (emphasis added); *Donahoo v. Turner Constr. Co.*, 833 F.Supp. 621, 623 (E.D. Mich. 1993) (damages for unspecified pain and suffering caused by automobile accident); *Weathers v. Am. Family Mut. Ins. Co.*, 793 F. Supp. 1002, 1012, 1014 (D. Kan. 1992) (damages for “extreme emotional distress and resulting bodily harm”).

Specifically, she asserts that she was caused to “worry about the damage that her limitations were inflicting on her professional reputation,” “endure the shame of giving a faulty prescription while under the influence of pain medication,” “suffer the dissolution of her relationships with patients with whom she had strong personal and professional bonds,” and “endure bouts of self-doubt and self-reproach.” Resp.22. But defendants cannot be held responsible for these emotional reactions for three reasons.

a. *Paul Revere did not require Ceimo to work full time.*

The two documents that Ceimo cites to support her contention that Paul Revere required her to work full time, SER1:61 and SER1:72-73, merely describe Paul Revere’s understanding of the scope of Ceimo’s disability; they do not “insist” that she do anything.³⁰ More importantly, neither document could have influenced Ceimo’s decision to continue working full time because Ceimo was unaware of them until well after she had sold her practice and stopped working altogether: The first document (SER1:61) is an internal memorandum that Ceimo did not see until this litigation, and the second (SER1:72-73) is a letter that Paul Revere sent her on

³⁰ These documents explain Paul Revere’s belief that, during the time Ceimo was working, she was capable of “perform[ing] clinical cardiology on a full-time basis” (SER1:61, 73)—a belief that is supported by the medical evidence and the undisputed fact that Ceimo *had* performed clinical cardiology on a full-time basis throughout that period (ER354).

September 26, 1996, nearly a year after she had decided to sell her practice, over seven months after she had sold it, and over four months after she had stopped working and left for a fellowship at Duke. Indeed, it is undisputed that Ceimo sold her practice on February 9, 1996 without any warning to defendants (Tr.808, 813-14) and that all of Paul Revere’s communications with Ceimo *prior* to that time were simply requests for information (*see* ER233-36, 309, 332, 352-54, 390-91, 406, 409-10) that Ceimo conceded was necessary for the processing of her claim (ER352, 905-09). In short, Ceimo’s assertion that Paul Revere required her to work full time, or in any way influenced her decision to do so, is false.³¹

- b. *Any emotional distress that arose out of events that occurred between the filing of Ceimo’s claim and the sale of her practice cannot be attributed to tortious conduct on the part of defendants.***

The emotional reactions described by Ceimo—except for her frustration—were either (i) experienced during the nine months that she continued working full time after filing her claim or (ii) resulted from her decision to sell her practice in October 1995. *See, e.g.*, SER1:77-79 (Ceimo’s description of these events). It was during the nine months that she continued working full time (April 1995 to January 1996) that

³¹ In fact, Ceimo told defendants that she continued working full time because she “denied her problems for a long time” (SER1:67), had “hopes of regaining [her] ability to cath” (SER1:77), and wanted to maintain her practice in the meantime (SER1:78).

Ceimo experienced “bouts of self-doubt,” “worry about the damage that her limitations were inflicting on her professional reputation,” and “the shame of giving a faulty prescription while under the influence of pain medication.” Resp.22. And it was Ceimo’s decision to sell her practice in October 1995, and the actual sale in February 1996, that caused her to lament “the dissolution of her relationships” with her patients. Resp.22-23.

But defendants can be required to compensate Ceimo for these emotional reactions only if it was bad faith to fail to pay her benefits *during that period*. The jury never found that it was, and the record would not support such a finding. Even assuming that Paul Revere *later* committed bad faith by not paying benefits, during the ten-month period from the filing of Ceimo’s claim to the sale of her practice, Paul Revere had no reason to suppose that Ceimo was entitled to total-disability benefits; and, because of delays on Ceimo’s part, Paul Revere during that time lacked the financial information necessary to consider her claim for partial-disability benefits.³²

Total Disability. Ceimo’s initial claim form reported that she had “returned to work in a limited capacity” (ER214), specified that she was still performing the vast

³² Indeed, Ceimo herself believed that the date on which she formally applied for benefits was October 23, 1995 (*see* ER329), by which time she had already decided to sell her practice (*see* SER2:715-16). That belief belies her *post hoc* assertion that defendants bear responsibility for her decisions about how hard to work and whether and when to sell her practice.

majority of her pre-disability job duties (ER216-17), and, consistent with these facts, claimed only partial-disability benefits (ER220). Ceimo's second claim form, completed in October 1995, reaffirmed that she was only partially disabled. ER329-31. And in December 1995, Ceimo told Paul Revere's field representative that she "continues to work[,] * * * does hospital rounds, also has rounds at nursing homes, has patients in her office, but any invasive procedures are referred out" (ER354; *see also* ER356, 359 (Ceimo's description of her pre- and post-disability occupational duties))—a description consistent with partial, but not total, disability.

Ceimo's doctors confirmed that she was only partially disabled. Although Dr. Steier checked both partial and total disability on Ceimo's initial claim form (ER218), he subsequently clarified that Ceimo was disabled only from performing invasive procedures and that "her ability to return to work *full time* is guarded at best" (ER283 (emphasis added)). Consistent with this clarification, he checked partial but *not* total disability on Ceimo's second claim form in October 1995 (ER331). Meanwhile, Paul Revere's internal medical consultant came to the same conclusion. ER248, 308. Moreover, none of the medical information that Paul Revere obtained during the relevant time period (*see, e.g.*, FER2-3d) gave it any reason to question the consensus opinion of Ceimo, her doctor, and its internal consultant that Ceimo was partially, but

not totally, disabled.³³

Partial Disability. It is undisputed that Ceimo failed to produce the financial documentation needed to determine whether she was entitled to partial-disability benefits until *after* she had sold her practice and left for Duke. ER881, 905-09 (Ceimo’s testimony that she did not produce any records during this time because she “had a great deal of ambivalence about [her claim]”); *see also* ER409-10, 415 (letter of May 16, 1996, three months after sale of practice, from Ceimo to her doctor saying that she is “going through with [her claim] this time”). Thus, Paul Revere could not have paid Ceimo partial-disability benefits until well after she had sold her practice.

In sum, the record does not support Ceimo’s assumption that Paul Revere was engaged in bad faith during the ten-month period between the filing of her claim and the sale of her practice. Defendants therefore cannot be liable for any emotional distress she experienced as a result of events that occurred during that time.

³³ All of the documents that Ceimo cites as evidence that she “could not * * * balance her own physical therapy and the effects of her pain with [her] full-time practice” (Resp.23) are dated *after* she sold her practice and began her fellowship at Duke. Those documents accordingly cannot support Ceimo’s claim that Paul Revere committed bad faith by failing to pay her benefits before she sold her practice.

- c. ***Even if it was bad faith not to have paid benefits before the sale of Ceimo’s practice, the connection between those benefits and the emotional reactions to which she testified is too attenuated to support an award of damages.***

Even if there were a basis in the record for concluding that it was bad faith not to pay Ceimo benefits during the relevant time-frame, it is pure speculation to conclude that payment of benefits would have prevented the emotional reactions that she recites. For example, there is no evidence that Ceimo would have eschewed the pain medication that resulted in the “shame of giving a faulty prescription” or that being paid benefits would have assuaged her “worry about the damage that her limitations were inflicting on her professional reputation” or prevented her “bouts of self-doubt.” Resp.22. And there is no evidence supporting Ceimo’s *ipse dixit* that, had Paul Revere paid her benefits during the relevant time frame, she could have retained another cardiologist to perform invasive procedures, thus allowing her to work part-time, attend therapy, and save her practice.³⁴ Resp.23. On the contrary, it

³⁴ Ceimo’s argument is similar to a claim for interference with a prospective business opportunity: She says that, but for defendants’ failure to pay benefits, she would have been able to retain an invasive cardiologist and that this would have prevented all of the emotional harms that she describes. But Ceimo has not shown that there is a “reasonable assurance that the contract or relationship would have been entered into but for the [failure to pay benefits],” let alone that such a relationship would have prevented her from experiencing the emotional consequences she catalogues. *S. Union Co. v. S.W. Gas Corp.*, 180 F. Supp. 2d 1021, 1048 (D. Ariz. 2002) (quotation marks omitted).

is undisputed that Ceimo (i) failed to provide any of the information that could have led to partial-disability benefits until *after* she sold her practice (ER881, 905-09); (ii) believed that she had not formally applied for benefits as of the time she decided to sell her practice in October 1995 (ER329); and (iii) finally decided to “go through” with her claim in May of 1996, three months *after* she sold her practice (ER415). This undisputed evidence belies Ceimo’s suggestion that she was desperately waiting for benefits that would have allowed her to save her practice.

In short, the causal chain is simply too speculative and attenuated to justify compensatory damages for the emotions Ceimo describes. *See, e.g., Barrett v. Harris*, 86 P.3d 954, 958-59 (Ariz. Ct. App. 2004) (plaintiff must prove that defendants’ conduct was the proximate cause of her injury); *Hammond v. Northland Counseling Ctr., Inc.*, 218 F.3d 886, 893 n.8 (8th Cir. 2000) (plaintiff’s emotional reactions were “too attenuated and removed from [the tort] to warrant an award of emotional distress damages”); *Jorgensen v. Mass. Port Auth.*, 905 F.2d 515, 527 (1st Cir. 1990) (“the jury could do no more than speculate as to the connection between the accident * * * and [plaintiff’s] emotional distress” where only evidence of a connection was plaintiff’s say-so).

* * * * *

For all of these reasons, the only emotional reaction that validly may be

attributed to bad-faith claim handling was Ceimo's frustration. ER881, 890-91, 893, 925. But frustration—even if “increasingly-intense” (Resp.24)—cannot support a six-figure award, let alone the \$5,470,000 award here. *See* Br.69-70; Chamber of Commerce Amicus Br.14-18.

VI. DEFENDANTS ARE ENTITLED TO JMOL ON PUNITIVE LIABILITY.

Evidently unconcerned with Arizona's restrictive standard for punitive liability (*see* Br.70-73), Ceimo offers only two substantive sentences explaining why she believes that she has met that standard.

First, Ceimo asserts that there was sufficient evidence for the jury to conclude that “Defendants acted to serve their own interests, having reason to know and consciously disregarding a substantial risk that their conduct might significantly injure Ceimo.” Resp.85 (quotation marks and alterations omitted). We already have refuted Ceimo's allegation that defendants knew that Paul Revere's handling of her claim entailed a risk of physical harm to her. *See* pages 50-53, *supra*. If she instead means that defendants “knew and consciously disregarded” the fact that denying Ceimo benefits would cause her *financial* harm, that is no basis for punitive damages (or else every wrongful denial of benefits would automatically qualify). *Cf. Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 682 (Ariz. 1986) (wrongful denial of benefits did not warrant punitive damages).

Ceimo also argues that the denial of her claim was part of a scheme “to eliminate Ceimo-type claims, regardless of merit, as part of a conscious course of conduct, firmly grounded in established company policy.” Resp.85 (quotation marks omitted). But this argument fails too because there is no actual evidence of such a scheme—only Prater’s unfounded, result-oriented speculation.³⁵

Prater’s story is that defendants oversold own-occupation disability policies and then “resorted to implementing a variety of bad-faith practices designed to deny claims like Ceimo’s regardless of merit” in an effort “to correct their own financial mistakes.” Resp.5; *see also* Resp.9-11. Like all good fiction, this story begins with a grain of truth. Defendants did discover that professionals who purchased own-occupation policies were filing more claims than expected (*see* ER129), and this discovery did prompt them to make adjustments (though their responses were different and occurred at different times). But Ceimo omits a critical fact: Not only were defendants receiving more legitimate claims (requiring more benefit payments), but more generally they found themselves unprepared to handle the volume of claims—both valid and invalid. They did not have enough claim handlers; their claim

³⁵ Even if the Court does not hold that it was reversible error to admit Prater’s disguised advocacy, the “clear and convincing” standard requires it to determine whether the inferences that Prater drew have a sufficient foundation and are sufficiently powerful to support punitive damages under Arizona law.

handlers were inadequately trained; their claim departments were inefficiently structured; they lacked the resources necessary to detect fraud; and they were unprepared to follow up on claims to ensure that payments terminated when they should. *See, e.g.*, SER1:277-84; ER1-135. In short, the companies found themselves with overworked, undertrained personnel who responded to the unexpected increase in claims by taking a pay-everything approach. Defendants' internal reforms were aimed at correcting this second effect of the unexpected volume of claims: There is not a shred of evidence, let alone clear and convincing proof, that defendants set about to avoid paying the increased volume of legitimate claims.

Paul Revere. Ceimo cites Paul Revere's audit of General American's claim department as evidence that "Paul Revere [was] a company skilled at applying" "'aggressive' profit-driven claims-closing strategies." Resp.11 (citing SER1:273-77, 84). But that audit demonstrates that General American was simply no longer able to manage incoming claims: It was using "minimal * * * to non-existent" referrals; "the records [were] often simply not requested * * * not ever"; claims were "paid without any investigation"; and "claim payment [was] often continued without an attempt to do routine follow-up work." SER1:281. Paul Revere believed that it could "effect *normal* patterns of closes" by deploying "more manpower resources and horsepower

resources (*i.e.* experience and assertiveness).”³⁶ SER1:280-81 (emphasis added). None of that indicates that Paul Revere intended to deny legitimate claims. On the contrary, these documents show that Paul Revere’s focus was on distinguishing between legitimate and illegitimate claims and ensuring that benefits were not being paid when they were no longer due—*i.e.*, correcting the trend toward *over*payment of claims.

Provident Life. Provident Life went through a change similar to that of Paul Revere. Because the company turned away from the pay-everything atmosphere that had prevailed there, it is not surprising that some former employees believed that Provident Life “transform[ed] itself from a company that gave appropriate weight to the claimant’s needs to one that treated claimants as business investments to be dealt with in whatever way maximized profits.” Resp.15 (citing ER840); *see also* Resp.18. Importantly, however, no witness could identify a single instance in which Provident Life denied a legitimate claim—let alone a pattern or practice of denying legitimate claims. ER850, 864-65e.³⁷

³⁶ Ceimo’s assertion that Paul Revere’s auditor, Rod Boggs, said that General American’s contract language “put the insurer ‘in a corner’” (Resp.11) is false. Boggs posed that as one question to investigate in his plan for the audit (SER1:273-76); but his final report said nothing about the contract language (SER1:277-84, 299-301).

³⁷ Ceimo discerns evidence of a guilty mind in Provident’s internal memoranda urging caution in word choice and document distribution. Resp.15. But the trial of

General American. General American followed a different path: Its goal was, essentially, to get out of the disability-insurance business. *See, e.g.,* SER1:284. Its strategy had three parts: (i) trying to buy out all of its insureds who were currently on claim (ER165); (ii) cutting costs and reinsuring its risk on the remaining policies (SER1:284); and (iii) hiring Paul Revere to handle future claims on those policies (SER1:277, 280-81, 299-301).³⁸ Although Ceimo suggests that General American’s buyout plan was improper (Resp.10-11), she can cite no case holding that it is bad faith (let alone “outrageous” or “evil”) for an insurer to offer claimants the *choice* between a lump-sum payment and monthly benefits. And Ceimo’s implication that the buyout plan saved “literally millions of dollars” (Resp.11) is misleading: The document she cites refers to the actions of a particular employee, not the buyout scheme (*see* ER179), and Paul Revere’s audit of General American’s practices

this case—and Prater’s testimony in particular—shows the extent to which a skilled advocate can manipulate innocuous language to make it appear sinister, thus proving the reasonableness—and prescience—of Provident’s admonitions.

³⁸ The fact that a General American executive cautioned against the litigation risks of distributing sensitive documents and “recognized that many employees would be ‘shocked by our action’” (Resp.10-11 (citing ER167)) is not evidence of bad faith, let alone outrageous or evil conduct. Given that General American was essentially getting out of this line of business, it is understandable that employees would be “shocked” and, as already noted, Prater’s inventive misinterpretations in this case prove that, if anything, defendants should have been more careful in their distribution of sensitive (and easily misinterpreted) documents.

concluded that “[r]esults of the surge of ‘buy out offers’ can be labeled as not successful” (SER1:280-81). There is no question that General American, like the other defendants, went through difficult times. But Ceimo produced no evidence that it reacted by denying legitimate claims.

In sum, there is no dispute that defendants shifted their institutional practices toward more active investigation and documentation of claims, efficient and businesslike claim-handling, and greater scrutiny of new claims. But in the absence of evidence of an intention to deny *legitimate* claims—and there was no such evidence here—that is not bad faith, let alone “evil” or “outrageous” conduct. *See, e.g., Linthicum*, 723 P.2d at 679-82.

VII. THE PUNITIVE AWARD REMAINS UNCONSTITUTIONALLY EXCESSIVE.

Ceimo distorts both the facts and the law in urging the Court not just to uphold the \$7,000,000 reduced punitive award, but to reinstate the original \$79,000,000 award. Application of the *correct* legal principles to the *actual* facts compels the conclusion that any punitive award in excess of the \$1,222,610.60 compensatory award for past benefits is unconstitutionally excessive.

A. All Three *BMW* Guideposts Dictate That The \$7,000,000 Punitive Award Remains Unconstitutionally Excessive.

Before we address Ceimo’s arguments about the three *BMW* guideposts, it bears reiterating that, in *BMW* itself, the Supreme Court observed that a punitive award of \$2,000,000 is “tantamount to a severe criminal penalty” (517 U.S. at 585) and explained that a punishment of such magnitude is warranted only for “egregiously improper conduct” (*id.* at 580). The Court has similarly characterized a \$4,500,000 punitive award as “large” and “a multimillion dollar fine.” *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441, 443 (2001). And in striking down the \$145,000,000 punitive award in *State Farm*, the Court held that “a more modest punishment for [the defendant’s] reprehensible conduct could have satisfied [Utah’s] legitimate objectives, and the Utah courts should have gone no further.” 538 U.S. at 419-20. The Court proceeded to suggest that “[a]n application of the [*BMW*] 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”—*i.e.*, \$1,000,000. *Id.* at 429.³⁹

³⁹ On remand, the Utah Supreme Court concluded that *State Farm*’s conduct was materially more reprehensible than the U.S. Supreme Court believed it to be and therefore held that a punishment of nine times the compensatory damages was constitutionally permissible. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d

The message to be derived from *BMW*, *Cooper Industries*, and *State Farm* is that punitive damages are not to be distributed like Monopoly money. Rather, “multimillion dollar fines” that are “tantamount to a severe criminal penalty” should be reserved for “egregiously improper conduct” and even then should not exceed the amount reasonably necessary to achieve the state’s interests in punishment and deterrence. Indeed, because “defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding” (*State Farm*, 538 U.S. at 417), “[g]reat care must be taken to avoid use of the civil process” to impose monetary penalties that are equivalent to or exceed the ones that are otherwise available “only after the heightened protections of a criminal trial have been observed” (*id.* at 428).

Here, whatever the Court may conclude about the propriety of Paul Revere’s handling of Ceimo’s claim, nothing close to criminal conduct occurred. In such circumstances, due process does not countenance a \$7,000,000 punitive award that is “tantamount to a severe criminal penalty” (*BMW*, 517 U.S. at 585), much less the \$79,000,000 jury award that Ceimo exhorts the Court to reinstate. Application of the

409, 420 (Utah), *cert. denied*, 125 S. Ct. 114 (2004). Although the Supreme Court declined to review that decision, its reasons for doing so cannot be inferred from the denial order, which lacks any precedential force. *United States v. Carver*, 260 U.S. 482, 490 (1923).

three *BMW* guideposts confirms that conclusion.

1. Defendants' conduct was not highly reprehensible.

The Supreme Court admonished in *BMW* that the fact “[t]hat conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award.” 517 U.S. at 580. That “high degree of culpability” is lacking here. Ceimo’s effort to demonstrate otherwise—by arguing that defendants’ conduct embraced all five aggravating factors identified in *State Farm*—is transparently strained.

Physical injury. First, as discussed above (at 49-55), Ceimo’s assertion that Paul Revere forced her to keep working and thereby caused her physical harm is specious: The claim file does not reflect it, no expert testimony or other medical evidence supports it, and Ceimo neither testified to it nor argued it to the jury.

Reckless disregard for health. Similarly, as noted above, each of the documents Ceimo cites as evidence that Paul Revere “*knew*” “that its demand that she continue working full time would—and did—cause her physical condition to deteriorate” (Resp.31 & n.3 (citing SER1:61, 65, 72-73, 77-79, 106-07, 119-20, 186, 207)) is dated *after* the time that Ceimo stopped working. Accordingly, there is no evidence that defendants recklessly disregarded her health.

Financial vulnerability. The suggestion that Ceimo was “financially vulnerable” is equally fallacious. Unlike the Campbells, whom State Farm knew with certainty were retired and would need to sell their house in the event of a verdict that exceeded their policy limits, Ceimo cannot plausibly claim to be among “the weakest of the herd—the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit.” 538 U.S. at 433 (Ginsburg, J., dissenting) (quotation marks omitted). Instead, Ceimo is a highly educated physician and sophisticated businessperson who ran a lucrative cardiology practice—a business that requires dealing with insurance companies on a daily basis. And the evidence showed that Ceimo was receiving support from her husband (ER354) and \$4,000 per month in disability benefits from another insurer (SER1:123).⁴⁰

Repeated misconduct. Ceimo’s assertion that defendants are guilty of repeated misconduct cannot be squared with *State Farm*. This reprehensibility factor requires “evidence of repeated misconduct of the sort that injured [the plaintiff].” *State Farm*,

⁴⁰ Ceimo’s assertion that “she had to struggle fiercely to make ends meet, while she bounced from job to job” (Resp.32), bears no resemblance to her actual testimony, which was that she worked with a friend in a “sheltered workshop” where she was treated as a “princess” and initially made \$10,000 per month (Tr.734-35, 737), then, essentially, returned to her original practice after expiration of the two-year non-compete clause she signed when she sold her practice (ER887-88).

538 U.S. at 423. Here, as in *State Farm*, there was no such evidence. Though Prater regaled the jury with the same kind of “bad-company” testimony that he employed in *State Farm*, and Feist leveled some additional generalized accusations, Prater offered no testimony about the handling of any claim other than Ceimo’s, while Feist admitted that he did not have first-hand knowledge of a single instance in which a claim was wrongly denied. ER850, 864-65e. Thus, just as in *State Farm*, there was no evidence of conduct “similar to that which harmed [Ceimo]” (538 U.S. at 424). Accordingly, the “repeated misconduct” factor is no more present here than in *State Farm*.

Intentional malice, trickery, or deceit. We already have refuted the various components of Ceimo’s assertion that defendants’ conduct involved “intentional malice, trickery, or deceit.” See Parts IV and VI, *supra*. But even accepting *arguendo* that defendants “deceived” Ceimo, *BMW* teaches that not all deceptions should be treated as highly reprehensible. See 517 U.S. at 579-80 (distinguishing suppression of material fact from “deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive”). For example, whatever “deceit” could be deemed to have occurred here pales in comparison to the outright fraud found in *State Farm*. According to the Supreme Court, the defendant there deliberately altered documents to make it appear that the insured had minimal risk of being found liable in the underlying lawsuit, and falsely assured him that his assets would be safe in the

event of an adverse verdict. 538 U.S. at 413, 419. Similarly, any “deceit” here is in a different universe from that in *Eden Electric, Ltd. v. Amana Co.*, 370 F.3d 824 (8th Cir. 2004) (cited at Resp.37-39). In *Eden*, the defendant’s senior management engaged in a “scheme to defraud” a small business into purchasing outmoded inventory by falsely promising the prospect of becoming an exclusive distributor, while planning all along to award the distributorship to someone else. *Id.* at 828. The conduct led the district court to remark that it “can hardly think of a more reprehensible case of business fraud.” *Id.* (quotation marks and citation omitted). Accordingly, merely labeling defendants’ conduct as “deceit” does not “establish the high degree of culpability that warrants a substantial punitive damages award” (*BMW*, 517 U.S. at 580).

In sum, Ceimo’s assertion that all five aggravating factors are present here is preposterous. If accepted, it would render those factors useless as a means of distinguishing truly reprehensible conduct from conduct that barely crosses the threshold for punitive liability.

2. Ceimo distorts the ratio inquiry beyond recognition.

The district court concluded that the denominator of the punitive/compensatory ratio in this case is the sum of the past benefits and bad-faith damages and that, under *State Farm*, “an amount [of punitive damages] roughly equal to the compensatory

damages” is the constitutional maximum. ER1028. Disagreeing with the district court, Ceimo asserts both that the denominator of the ratio should include the full value of her policy—in addition to the past benefits and bad-faith damages (which she elsewhere contends were measured by the full value of the policy)—and that the constitutionally permissible ratio is well over 1:1. Resp.35-39, 48-51. Each of these efforts to evade the impact of *State Farm* is misguided.

a. Potential harm

To begin with, Ceimo ignores the Supreme Court’s repeated caveat that potential harm may be added to the denominator of the punitive/compensatory ratio only if it is *likely* to occur. *See, e.g., BMW*, 517 U.S. at 581 (“the proper inquiry is “whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant’s conduct as well as the harm that has actually occurred””) (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (plurality op.), quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991)); *see also Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 (8th Cir. 1995) (retired Justice Byron White, sitting by designation) (“the touchstone is the potential harm that would have *likely* resulted from the dangerousness inherent in defendant’s actual conduct”) (emphasis added).

There are three reasons why the present value of Ceimo’s unaccrued future

disability benefits should not be included in the ratio analysis under this standard.⁴¹

First, the fact that an insurer has denied a claim does not preclude the insured from receiving benefits in the future based on the same condition (should it worsen) or a different one. The present case proves the point: Although Paul Revere denied Ceimo's claim for total-disability benefits arising out of her neurological condition in 1998, it subsequently concluded that a different condition entitled her to total-disability benefits as of April 2000. ER851-62.

Second, insureds' conditions often improve, enabling them to resume performing their important pre-disability job duties. Unless there is a finding that an insured's condition is permanently disabling, there is no reason to assume that her condition will forever preclude her from performing her pre-disability duties, and thus no reason to treat the full value of unaccrued future benefits as *likely* potential harm. Ceimo neither requested nor received such a finding here.

Third, the loss of a future income stream can be considered to be "likely" only if the income stream is too trivial in amount to result in litigation. When the amount at stake is substantial, by contrast, it is "likely" that a lawsuit will be brought. In that

⁴¹ If, contrary to our arguments in Part V, the Court upholds the \$5,470,000 bad-faith award, then treating the full value of the policy as "potential harm" also would constitute double counting. Ceimo cites no case that allows the same non-compensable economic loss both to be used as the measure of non-economic damages and to be added to those damages as potential harm.

lawsuit, the plaintiff will either prevail, in which case she will not have lost the income stream, or the defendant will prevail, which amounts to a determination that the plaintiff is not entitled to the income stream. Either way, at the time of the conduct, it cannot be said that the plaintiff was “likely” to suffer the loss of an income stream to which she would otherwise be entitled. Again, the present case proves the point. At the time that Paul Revere denied her claim, Ceimo already had indicated that she was considering hiring counsel. *See* SER1:133-34. Hence, it was affirmatively unlikely that Ceimo would be deprived of her benefits if, indeed, she truly were entitled to them.

b. *The constitutionally permissible ratio*

Whatever the denominator, Ceimo is simply wrong in suggesting that any ratio within the “single-digit range” is “presumptively valid” (Resp.37) under the circumstances of this case. On the contrary, even a 1:1 ratio would be unconstitutionally excessive if the Court upholds any significant amount of bad-faith damages.

Although the Supreme Court declined in *State Farm* “to impose a bright-line ratio which a punitive damages award cannot exceed” (538 U.S. at 425), the decision nonetheless suggests that the permissible range of ratios generally is a function of two variables: the degree of reprehensibility of the conduct and the amount of the

compensatory damages. The permissible range of ratios is directly related to the former and inversely related to the latter. Beyond that general framework, *State Farm* provides the following more specific guidance.

First, “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *Id.* Such ratios “may comport with due process” only if the compensatory damages are “small” and the conduct is “particularly egregious.” *Id.* Given the Supreme Court’s characterization of the \$1,000,000 compensatory award in *State Farm* as “substantial” (*id.* at 426), it goes without saying that the compensatory damages here (which exceed that amount even if the Court excises the bad-faith damages entirely) are not “small.” Moreover, notwithstanding Ceimo’s rhetoric to the contrary, the conduct here can be treated as “particularly egregious” only in a land in which “all the children are above average” and all punishable conduct is *highly* reprehensible. *Cf.* Garrison Keillor, Monologue Excerpt (Feb. 15, 2003) *available at* <http://prairiehome.publicradio.org/programs/20030215/forward>. Accordingly, no matter what the denominator, a ratio in excess of single digits is clearly unconstitutional.

Second, while the *State Farm* Court appeared to view 4:1 as an outside limit for most cases of high reprehensibility, its discussion may allow room for a ratio between 4:1 and 9:1 when the conduct is highly reprehensible and the compensatory damages,

though not “small,” are also not “substantial.” *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1602 (2004), in which this Court approved a 7:1 ratio is a good example: The compensatory damages there were \$360,000, and the conduct—racial and ethnic discrimination—was deemed by the Court to be separated from the conduct in *State Farm* by a “substantial” “gulf.” *Id.* at 1043. Here, of course, the compensatory damages are much higher (even if the bad-faith damages are eliminated) and the conduct far less egregious, factors that should rule out consideration of a ratio in excess of 4:1 no matter the size of the compensatory damages left standing after this appeal.

Third, when, as here, the compensatory damages are “substantial,” ratios of 2:1 to 4:1 may be permissible if the conduct is determined to be highly reprehensible. *See State Farm*, 538 U.S. at 425 (noting that the “long legislative history” of double, treble, and quadruple damages was “instructive” and observing that in prior cases it had declared that a 4:1 ratio “might be close to the line of constitutional impropriety”). *Hangarter*, in which this Court upheld a 2.6:1 ratio, is illustrative. The compensatory damages there were \$1,920,849 and the conduct, according to the panel, implicated four of the five aggravating factors identified in *State Farm* (a characterization with which we obviously disagree, but that we accept for present purposes). *See* 373 F.3d at 1014; *see also Eden*, 370 F.3d at 829 (upholding reduction of 8.5:1 ratio to 4.8:1

where compensatory damages were \$2,100,000 notwithstanding court's conclusion that "this was an extraordinarily reprehensible scheme to defraud").

Fourth, when compensatory damages are "substantial" and the conduct is not at the high end of the reprehensibility spectrum, lower ratios—1:1 or lower—mark the outer limits of constitutionally permissible punishment. *See State Farm*, 538 U.S. at 425 ("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."). A recent example is *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004). In *Williams*, a case involving racial harassment in the workplace, the Eighth Circuit reduced a \$6,063,750 punitive award to \$600,000, the amount of compensatory damages, explaining:

Mr. Williams's large compensatory award * * * militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Mr. Williams received \$600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, * * * due process requires that the punitive damages award * * * be remitted to \$600,000.

Id. at 799 (citation omitted).

Under *State Farm*, a 1:1 ratio is the constitutional maximum here too. To begin with, no matter how the Court resolves our argument about the bad-faith damages,

Ceimo’s compensatory damages will remain over \$1,200,000 (unless, of course, the Court agrees with us on a threshold issue)—a “substantial” amount in any sense of the word. Moreover, as discussed above, defendants’ conduct cannot be placed at the higher end of the reprehensibility spectrum unless all punishable torts are to be treated as highly reprehensible—in disregard of the Supreme Court’s admonition that not all punishable conduct entails “the high degree of culpability that warrants a substantial punitive damages award” (*BMW*, 517 U.S. at 580).

Indeed, in the event this Court allows a significant portion of the bad-faith damages to stand, even a 1:1 ratio would exceed the amount necessary to punish and deter, and hence would be unconstitutional. In *State Farm*, the Supreme Court recognized that compensatory damages have a deterrent effect in their own right, admonishing that “punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” 538 U.S. at 419; *see also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (“[d]eterrence * * * operates through the mechanism of damages that are *compensatory*”); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (“The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”); *United States v. Bailey*, 288

F. Supp. 2d 1261, 1281 (M.D. Fla. 2003) (setting aside \$3,000,000 punitive award “in its entirety” because, among other things, the compensatory damages exceeded the gain to the defendant, making “the imposition of further sanctions to achieve punishment or deterrence” unnecessary).

Here, because the award of past benefits erases any past gain to defendants and because defendants have been paying Ceimo her full benefits since 2003, any amount of bad-faith damages left standing after this appeal necessarily will exceed the gain and have a deterrent effect. So too will the \$600,000 award of attorneys’ fees. *See* Br.74-75; *see also Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495, 1505 (9th Cir. 1995) (denying punitive damages because “attorney’s fees adequately serve[] to deter recalcitrance”); *Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003).⁴² Accordingly, in the event that the Court allows a significant amount of bad-faith damages to stand, even a 1:1 ratio will be excessive. In such circumstances, we submit that a punishment in the amount of the past benefits would be the constitutional maximum.

⁴² Ceimo’s halfhearted suggestion that the attorneys’ fees should be included in the denominator of the punitive/compensatory ratio (Resp.36-37) is misguided. They were not awarded by the jury as compensatory damages, but instead were tacked on by the court after the verdict. Because they undeniably have a punitive and deterrent effect, they should, if anything, be included in the *numerator*.

3. The third guidepost compels the conclusion that the \$7,000,000 reduced award remains unconstitutionally excessive.

Ceimo again is compelled to stretch the law beyond recognition in contending that the third *BMW* guidepost supports the jury's award (and, *a fortiori*, the reduced amount). Ignoring the district court's conclusion that the third *BMW* guidepost "obviously suggests [that] the punitive damages award has constitutional problems" because "the maximum [civil] penalty is apparently \$5,000.00" (ER1027 (citing Ariz. Rev. Stat. § 20-456(B))), Ceimo asserts that Arizona's Director of Insurance could have revoked defendants' licenses, which "would have cost these Defendants hundreds of millions of dollars" (Resp.40). She makes this assertion without citing a single instance in which the Director has revoked a license over the handling of a claim. And she also overlooks the fact that this *precise* argument was made and rejected in *State Farm*. See 538 U.S. at 428 (holding that relevant comparison was with \$10,000 fine for violation of Utah's Unfair Claims Practices Act and that Utah Supreme Court's "speculat[ion] about the loss of State Farm's business license" "was insufficient to justify the award").

Ceimo gets no further in contending that *Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073 (Ariz. 1987), gave defendants fair notice that "their ill-gotten gains may be disgorged for bad faith conduct" (Resp.40). For one thing, *Hawkins* pre-dated *State*

Farm, which held in no uncertain terms that it is improper to use an individual case to punish a defendant for injuries to non-parties. *See* 538 U.S. at 423 (“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.”). Beyond that, *Hawkins* involved a uniform \$35 deduction from claim payments made to thousands of Arizona insureds. Here, there is no evidence that defendants improperly handled the claim of any insured other than Ceimo, much less evidence of the kind of uniform practice involved in *Hawkins*.

B. Ceimo’s Additional Arguments In Support Of A High Punitive Award Are Unpersuasive.

The unsustainability of the punitive award—even as reduced by the district court—is perhaps best laid bare by the four “other considerations” (Resp.40) Ceimo invokes in support of it. One of those “considerations” requires her to range beyond the record and all four were expressly rejected in *State Farm*.

1. Ceimo’s reliance on the trial-court judgment in another case against General American is improper.

Ceimo argues that the jury’s verdict in this case is reasonable in light of the fact that one of the defendants—General American—suffered a \$58,000,000 punitive award in Arizona state court in 1999 that was reduced by the trial court to \$18,000,000. According to Ceimo, the \$18,000,000 judgment in that case “is

comparable to the \$26 million per Defendant” imposed by the jury here. Resp.41 (citing *Diamond v. Gen. Am. Life Ins. Co.*). This argument is bogus for multiple reasons.

First, as appellate counsel for Ceimo should know (because their firm served as appellate counsel in *Diamond*), *Diamond* settled during the appeal for an amount that the parties agreed would be confidential. It is misleading to cite the trial-court judgment without disclosing that the case settled. And because the settlement is confidential, it is of no help to this Court to know only the outcome of the post-verdict motions.

Second, although Ceimo claims that the conduct in *Diamond* was “similar” to the conduct involved here, she does not and cannot cite anything to confirm that assertion—for the simple reason that the facts of *Diamond* are not in the record of *this* case. Ceimo’s unsupported, self-serving say-so cannot cure the absence of evidence of similarity.

Third, although Ceimo repeatedly characterizes the jury’s unitary \$79,000,000 punitive award as three separate awards of \$26,000,000, that is an outright invention. The verdict form did not separate the three defendants or require the jury to measure their culpability separately. Quite the contrary, it was Ceimo’s strategy to portray all three defendants as a monolithic entity, tarring each with evidence relevant only to

one of the others. It thus is far too late for her to characterize the verdict as three separate \$26,000,000 awards.

Fourth, *State Farm* counsels strongly against relying on the judgment in *Diamond* as a basis for upholding the jury’s punitive award (or even the district court’s reduced award) in this case. In *State Farm*, unlike here, the plaintiffs actually introduced evidence of a prior verdict against the defendant. Nevertheless, the Supreme Court held that the verdict “should have been accorded little or no weight” because “[t]he award was rendered in a first-party [as opposed to a third-party] lawsuit; no judgment was entered in the case; and it was later settled for a fraction of the verdict.” 538 U.S. at 427. Here, there is no way to know whether the conduct in *Diamond* was similar or dissimilar; the case never resulted in a published opinion; and it settled for an undisclosed amount. Hence, under *State Farm* it is not a valid basis for upholding a large punishment.

2. Defendants’ wealth is not a valid basis for upholding a large punitive award.

In *State Farm*, the Utah Supreme Court “sought to justify the massive [punitive] award” in part “by pointing to * * * State Farm’s enormous wealth.” 538 U.S. at 426. The Supreme Court rejected this rationale, explaining that it bore “no relation to the award’s reasonableness or proportionality to the harm” and constituted “a departure

from well-established constraints on punitive damages.” *Id.* at 427. Observing that State Farm’s “assets (which, of course, are what other insured parties * * * must rely upon for payment of claims) had little to do with the actual harm suffered by the Campbells,” the Court held that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” *Id.*

Notwithstanding this clear rejection of the use of corporate financial condition to justify a high punitive award, Ceimo contends that the jury’s verdict (and, *a fortiori*, the reduced award) should be upheld because it constitutes “less than one-third of one percent of Defendants’ wealth” (Resp.44 (emphasis deleted)). Her rationale is that, properly construed, *State Farm* means that “wealth may be considered * * * within the limits of due process.” Resp.43. That argument is circular. Our point is that application of the three *BMW* guideposts compels the conclusion that the reduced award (and, *a fortiori*, the original verdict) falls outside the limits of due process. Under *State Farm*, defendants’ wealth cannot be used to stretch those limits, which is precisely what Ceimo seeks to do.

3. Ceimo’s disgorgement rationale conflicts with *State Farm*.

Asserting that “Defendants reaped well over a billion dollars from their bad faith conduct in just a few years,” Ceimo argues that the jury’s verdict should be sustained in its entirety because “disgorging ill-gotten gains provides an important

deterrent effect.” Resp.45. Under *State Farm*, however, the only gains that permissibly may be disgorged are those resulting from the conduct directed at the plaintiff. There, the Utah Supreme Court sought to justify the punishment on the ground that “[t]he harm is minor to the individual but massive in the aggregate.” 538 U.S. at 423 (quotation marks and citation omitted). The Supreme Court rejected that rationale, explaining:

Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant[.] * * * 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. Here too, this is not a class action, and the suggestion that defendants have reaped “well over a billion dollars” in ill-gotten gains is not only preposterous on its face, but also entails “adjudicat[ing] the merits of other parties’ hypothetical claims.” Accordingly, this argument is frivolous.

4. Whether or not the district court provided adequate procedural safeguards is irrelevant.

Ceimo’s final argument is that the punitive award is entitled to a “strong presumption of validity” because “fair procedures were followed.” Resp.46, 47 (quoting *TXO*, 509 U.S. at 457 (plurality op.)). Putting aside the question whether it was fair to tar each defendant with the same brush, or to admit evidence of corporate

financial condition, “creat[ing] the potential that juries will use their verdicts to express biases against big businesses”(State Farm, 538 U.S. at 417 (quotation marks omitted)), or to allow a putative expert witness to cloak advocacy in the garb of expertise, the Supreme Court’s recent decisions make clear that “[e]xacting appellate review” is required in all punitive damages cases, not just ones in which the procedures have been deemed to be inadequate. *Id.* at 416-18. Indeed, if the procedures were inadequate, there would never be a need to analyze the amount of punitive damages, because a new trial would be required.

CONCLUSION

The Court should grant JMOL to Provident Life on all issues and to the other defendants on total disability, bad faith, and punitive liability; or grant all defendants a new trial on all issues; or reduce the punitive damages to \$1,222,610.60.

Respectfully submitted.

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December 1, 2004

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Case Nos. 03-16882 and 03-16930

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Carl J. Summers

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December 2004, I served a total of six copies of the foregoing Appellants' Reply Brief and Cross-Appeal Response Brief by first-class mail, postage prepaid, on Appellee/Cross-Appellant herein, two copies to each of the following addresses:

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