

No. 02-16501

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

Gary Greenberg

Plaintiff-Appellee,

v.

Paul Revere Life Ins. Co. and UNUMProvident Corp.,

Defendants-Appellants,

On Appeal From the United States District Court
for the District of Arizona, No. CV-99-00154-SRB

BRIEF FOR THE APPELLANTS

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RULE 26.1 DISCLOSURE STATEMENT

Defendant-Appellant UNUMProvident Corp. is a publicly held corporation; no other publicly held corporation owns 10% or more of its stock. Defendant-Appellant Paul Revere Life Insurance Co. is a wholly owned subsidiary of Paul Revere Corp., which is an indirect wholly owned subsidiary of UNUMProvident Corp.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1332(a)(1), 1441, and 1446(b). This Court has jurisdiction under 28 U.S.C. § 1291. Amended final judgments were entered on July 16, and November 6, 2002. Notices of appeal were timely filed, pursuant to FRAP 4(a), on July 24, and November 14, 2002.

STATEMENT OF ISSUES

This case arises out of defendants' termination of plaintiff's disability insurance claim after paying him \$317,000 in benefits over the course of more than eight years. Finding that defendants breached the duty of good faith and fair dealing, the jury awarded plaintiff past benefits of \$151,552.42, future benefits (*i.e.*, lump sum compensation in lieu of future, monthly payments upon proof of continuing disability) of \$395,893, and punitive damages of \$2,400,000. The trial court awarded attorneys' fees and costs of \$299,785.17 under Arizona law. The questions presented are:

1. Whether the evidence was insufficient to support the imposition of punitive damages under Arizona's stringent punitive-liability standard.
2. Whether the punitive damages are unconstitutionally excessive.
3. Whether, under Arizona law, a court may award "future benefits" as damages for the bad-faith denial of an insurance claim in the absence of proof that the insurer repudiated the insurance contract.

4. Whether the district court committed reversible error by admitting the testimony of plaintiff's bad-faith expert, and by excluding certain evidence bearing on plaintiff's psychological condition and credibility.

STATEMENT OF THE CASE

Plaintiff Gary Greenberg asserts that Paul Revere Life Insurance Company and its corporate affiliates (collectively, "Paul Revere" or "defendants") denied his claim for disability benefits in bad faith. Greenberg submitted his disability claim in December 1990. Although initial and follow-up investigations raised questions about Greenberg's claim, Paul Revere nonetheless paid him disability benefits for over 8 years. However, after uncovering substantial evidence that Greenberg lied in order to get the policy, consciously fabricated a psychological ailment in order to leave an occupation in which he had overstayed his welcome, deliberately refrained from filing a claim until his policy's "contestability" period expired, and then attempted to sabotage every psychological exam that Paul Revere set up in an effort to determine whether he was in fact disabled – culminating in an independent medical examination ("IME") that concluded that Greenberg was exaggerating his symptoms and was not disabled under the terms of the policy – Paul Revere terminated benefits payments.

Greenberg sued, alleging both breach of contract and breach of the covenant of good faith and fair dealing. After plaintiff dismissed the former claim, a trial

was held on his bad-faith claim. The jury found for plaintiff, and awarded him \$151,552.42 in past benefits, \$395,893 in future benefits, and \$2.4 million in punitive damages.

Defendants filed post-trial motions raising a number of challenges to the jury's verdict, which the district court denied by memorandum order. The court then awarded attorneys' fees and costs of \$299,785.17 under Arizona law.

STATEMENT OF FACTS

Because the gravamen of plaintiff's claim is that Paul Revere investigated his disability claim inappropriately, a detailed history of the handling of that claim is necessary.¹

A. The Early History Of Greenberg's Claim.

Greenberg purchased a disability policy from Paul Revere in November 1988, while working as a stockbroker. *See* ER087. The policy included an "Own Occupation" rider (*see* ER090), which entitled him to receive benefits in the event he were to become "totally disabled" from performing the important duties of his own occupation – being a stockbroker. *See* 11/27 Tr. 34 (ER595).² Like most disability policies, Greenberg's policy provided for a two-year "contestable

¹ Almost all citations to the record are to plaintiff's claim file (ER001-376) or to the trial transcript (ER437-720) which, for clarity, we cite as [date] Tr. [page] (ER[page]).

² This differs from a traditional disability policy, under which a claimant must be unable to perform the duties of *any* occupation. *See* 11/27 Tr. 37 (ER596).

period,” after which Paul Revere could no longer rescind the policy should it learn of inaccuracies in the application for that policy. *See* 11/27 Tr. 59 (ER608); ER109.

Fourteen months after purchasing the policy – and 10 months before the end of the contestability period – Paul Revere received a letter from Greenberg’s attorney asserting total disability and requesting that Paul Revere send claims forms. *See* ER116. As requested, Paul Revere sent the forms, but Greenberg never completed or returned them. Instead, five months later Greenberg informed the company that he was dropping the claim. *See* ER117.

In December 1990 – six weeks after the end of the contestability period – Greenberg filed a claim, asserting that he was totally disabled from working as a stockbroker. He submitted a “Proof of Claim” form (ER118-123) and a three-page letter from his treating psychologist, Dr. Francis Enos (ER124-126), who attested that Greenberg suffered from “Panic Disorder” and “Dysthymic Disorder” – a form of low-grade depression (*see* 11/14 Tr. 8 (ER464)) – which rendered Greenberg unable to function as a stockbroker. *See* ER124; 11/14 Tr. 34 (ER465).

Although his initial form did not disclose the fact, Greenberg shortly thereafter informed Paul Revere that, while he was no longer working as a stockbroker, he *was* working approximately 20-30 hours a week as an insurance salesman. *See* ER127; ER134. Because of the obvious similarities between these two profes-

sions, Paul Revere decided to investigate Greenberg's claim further. *See* ER135. In particular, the claims supervisor suggested, first, that the claim be referred to a field investigator who could meet with Dr. Enos and with Greenberg and obtain various records, and, second, that an IME to confirm Greenberg's diagnosis might be appropriate. *See id.*

Despite not having completed its investigation, and despite still not having received the "Psychiatric Assessment Form" ("PAF") from Dr. Enos that it had requested shortly after receiving the claim, Paul Revere nonetheless commenced making disability payments to Greenberg as soon as he became eligible, in early 1991.³ In the meantime, the claims agent asked Jon Allen, a field agent in Arizona, to investigate, and in particular to look into (a) "differences in jobs and how he is able to be a[n] insurance salesman but not a stockbroker," (b) the possibility of Greenberg's eventual return to being a stockbroker, and (c) the "exact details of disability." *See* ER136.

Allen spent several months investigating Greenberg's claim. He met with Greenberg, obtained past medical, employment, and legal records, and talked to Dr. Enos. Allen's "Field Representative Report" (ER139-142), which he completed in October 1991, raised a number of significant red flags. In particular, Al-

³ Greenberg's policy specifies that benefits are available starting 90 days after a period of disability commenced; *see* PRL002883. His benefits therefore began accruing in March 1991, and his first benefit check was sent in April 1991.

len was “quite concerned in regards to possible prior manifestation concerning this particular claim. There are many things [in Greenberg’s records] in regards to past medical history that we were not aware of at the time this policy was issued.” ER139. He continued: “Obviously in reading through the medical records there is a great deal of history of anxiety, tension, Valium use and other things” (ER142)⁴ – none of which had been disclosed on Greenberg’s application.

Allen raised a number of other issues in addition to prior manifestation. For example, he reported that there were numerous undisclosed incidents on Greenberg’s driving record and that Greenberg had been involved in a number of lawsuits, none of which had been revealed in response to relevant questions on Greenberg’s application. *Id.* Allen also expressed “some concern in regards to income” – that is, whether Greenberg had been making as much money in prior years as he claimed. ER139-140. Finally, Allen expressed concern because “Mr. Greenberg originally filed this claim through his attorney and then did not follow through with it until after the two-year contestable period.” ER142.⁵

⁴ The medical records show a variety of past drug use, legal and illegal. *See, e.g.*, ER137, 084, 085.

⁵ At trial Greenberg acknowledged that numerous aspects of his application for insurance were inaccurate. For example, he had not been “six years in the business” of being a stockbroker (11/16 Tr. 66 (ER562)); he had taken illegal drugs (*id.* at 70-72 (ER563-565)); and he had not answered questions about his history of “nervousness” accurately (*id.* at 78-79 (ER566-567)).

After receiving this report, Paul Revere retrieved copies of the pleadings in the lawsuits that Allen had discovered. Those records showed, among other things, that Greenberg had lied on his application for a job as a stockbroker with Dean Witter – claiming to be a college graduate when in fact he was not – which had led the NASD to bring an action against him that resulted in his license being suspended for 30 days and Dean Witter firing him (ER001-003; 009-058; 11/15 Tr. 79 (ER514)); that Greenberg had also been fired from a job as a stockbroker at Smith Barney, because a client had accused him of unauthorized trades (ER074; 11/16 Tr. 21 (ER525)); and that in the 1980s he had resigned from yet another job as a stockbroker, at Rauscher Pierce, “from stress” (ER073).

Based on a review of Allen’s report and these files, Paul Revere determined that Greenberg’s claim, even if otherwise valid, was almost certainly an undisclosed “pre-manifested” condition. However, because the contestability period had passed, Paul Revere decided that it would be inappropriate to deny his claim on this basis. *See* ER143-144; 11/13 Tr. 188 (ER461).

Paul Revere continued to investigate Greenberg’s new job selling insurance for MetLife – to see how similar it was to his prior job as a stockbroker – but it took many months to obtain any employment information from that company. *See* ER149-150; 151-152; 153; 154. Eventually, Paul Revere learned that, while most of Greenberg’s duties at MetLife involved selling insurance, he also sold securities.

ER150. And when Paul Revere received Greenberg's application to work at MetLife (ER176-177), it learned that he had applied for the job *several months before* he stopped working as a stockbroker and filed his disability claim (*see* ER177; 11/27 Tr. 39 (ER597)). Finally, by comparing Greenberg's MetLife application to other records in its possession, Paul Revere determined that Greenberg had lied on that application, too. Specifically – as he admitted at trial – Greenberg failed to list several jobs he had held; claimed to have resigned from a job from which he was fired; and falsely denied being involved in litigation. *See* 11/16 Tr. 24-59 (ER526-561).

By late 1993, Paul Revere finally had obtained the background information it had started trying to compile in 1991. Thereafter, the claims agent referred the claim to Paul Revere's internal team that specializes in psychiatric claims. *See* ER156. The specialist, Kathleen Brennan, questioned whether there was support for an ongoing claim, given that the last "PAF" had been received over two years before.⁶ Brennan thus suggested that the claims agent obtain new PAFs from Dr. Enos (Greenberg's psychologist) and Dr. Posner (Greenberg's psychiatrist, who monitored his medication), and suggested that an IME to confirm disability might be in order (*see id.*) – the same suggestion made by the claims supervisor in 1991

⁶ As claims handler Lucy Baird testified without contradiction, it is fairly infrequent that disability claimants with psychiatric claims are permanently disabled; most eventually return to work. *See* 11/27 Tr. 26 (ER594).

(*see* page 5, *supra*).

B. The 1994 IME.

It took Greenberg's doctors several months to return the requested PAFs (*see* ER157-160; 161-164), both of which described Greenberg's condition as basically unchanged. Paul Revere therefore decided to schedule an IME to confirm Greenberg's diagnosis. As is frequently done with psychiatric IMEs (*see* 11/30 Tr. 19 (ER671)), Paul Revere hired a psychologist to perform psychological testing (*see* ER187), and a psychiatrist to examine the insured thereafter, and to prepare a report based on the testing and interview (*see* ER185).

Greenberg was minimally cooperative. He objected to the first psychologist Paul Revere hired, calling him "unbalanced" based only on a phone call about scheduling the IME. *See* ER178. He threatened to kill himself if Paul Revere found him not to be disabled. *See* ER179. He tried to get Paul Revere to change psychologists a *second* time – after Paul Revere had done so once – claiming that the "mental status" of the second psychologist "[wa]sn't right" (ER183-184). And he rescheduled his examinations repeatedly. *See* ER180-181; 182; 189.

Eventually, however, Greenberg met with Dr. Lorna Cheifetz for psychological testing, and then with Dr. Mariam Cohen for an interview. As Dr. Cheifetz reported (*see* ER190-198), Greenberg's behavior with her was bizarre. He claimed to be two hours late for the appointment, though he was in fact early (ER191); was

distressed to have any contact with her because of the “bad vibe” he had from her (*id.*); and in general was “extremely dramatic, needy, expressed suicidal ideation, and a good deal of anger.” *Id.* On the Rorschach Inkblot Test, Greenberg refused to look at more than two cards, and gave extremely negative responses to those cards – describing one as showing a “man with a dark hood and eyes” or “body parts,” the other as showing “dead animals,” and both as “very evil and ominous.” *Id.* His behavior on the MMPI-II and MCMI2 tests was equally uncooperative. On the MMPI-II he took significantly more time than normally allowed, “and despite [Dr. Cheifetz’s] encouragement for him to not leave any blank, he omitted nineteen answers.” ER192. He also left several items blank on his MCMI2. As Dr. Cheifetz explained, “[a]s a result, [both tests were] of very questionable validity.” She also reported:

Other variables [a]ffecting validity include an extreme over reporting of symptoms. Specifically speaking, the MMPI2 has what is called obvious and subtle items and even when compared to the typical psychiatric population, Mr. Greenberg had very high scores on the obvious items relative to the subtle items of the various pathology indicators ***suggesting a propensity to exaggerate his symptomatology.***

Id. (emphasis added); *see also* ER196 (responses to MCMI2 “suggest[ed] a tendency to over emphasize problems”); ER197 (“What could not be ruled out by the data * * * was the issue of malingering and secondary gain contributing to the patient’s presentation.”).

Based on these tests, Dr. Cheifetz suggested that possible diagnoses included schizophrenia or related personality disorders. *See id.* She repeatedly stressed that “[t]he possibility of malingering could not be completely ruled out due to the fact that all test data showed a propensity to exaggerate the symptomatology,” however, and deferred formal diagnosis to Dr. Cohen. *See id.*

Dr. Cohen thereafter met with Greenberg. Based on that (equally odd) meeting and on Dr. Cheifetz’s report, Dr. Cohen prepared an IME report. *See* ER199-203. Her conclusion was that “[Greenberg’s] behavior in [the] interview was consistent with more than ‘neurotic’ levels of anxiety but approached psychotic proportions. * * * Taking all * * * factors into consideration suggests a possible diagnosis of Schizophrenia, Paranoid Disorder” (ER203) – a similar diagnosis to Dr. Cheifetz’s. Dr. Cohen concluded that, if her observations were accurate, “the treatment [Greenberg was] receiving [was] considerably inadequate” and that “effective psychopharmacological medication and considerable supportive psychotherapy” were called for. *Id.*

When Paul Revere received these reports, a Paul Revere consulting psychologist, Paul Burges, reviewed them. His conclusion was that:

[the] IME finds the [insured] T[otally] D[isabled] but with different diagnostic and treatment recommendation and considerations [than the treating doctors]. At this point I would suggest sending a copy of both reports to the [treating doctors] for comment.

Based on the IME, *T[otal] D[isability] seems substantiated at this time*. However, *if the considerations are followed, we may see improvement*. Happy to review any further clinical information.

ER204 (emphasis added); *see* 11/27 Tr. 152 (ER618); 11/13 Tr. 168-169 (ER459-460). Based on this internal review, Paul Revere continued paying Greenberg's disability claims, and the claims handler forwarded the reports to Drs. Enos and Posner. *See* ER216-217

C. Follow-Up Consideration Of Greenberg's Psychiatric Condition.

Some months later, in May 1995, Paul Revere asked Dr. Enos for an updated PAF "as current certification of [Greenberg's] disability." ER205. The PAF Dr. Enos submitted (ER207-210) was basically identical to earlier PAFs, and reflected no changed diagnosis or treatment as a result of the IME reports. Paul Revere also asked Dr. Posner for updated forms (*see* ER211; 212, 213), which it received in August 1995 (*see* ER214-215). Those forms also showed no change in medication or diagnosis.

Because of the lack of change in diagnosis or treatment by either Dr. Enos or Dr. Posner, in January 1996 the claims agent asked a Paul Revere consulting psychiatrist, Dr. Terry Missel, to review the file. *See* ER218; 11/27 Tr. 44 (ER598). Dr. Missel sent a follow-up letter to Dr. Enos seeking his reactions to the IMEs. *See* ER219-220. In his March 1996 response, Dr. Enos accounted for the difference between his diagnosis and those of Drs. Cheifetz and Cohen by saying simply

that Greenberg “has got to know and trust me. Hence I see him at his optimal level of functioning [sic].” ER225. Dr. Missel also called Dr. Posner. *See* ER218. Dr. Posner “was cooperative and presented a picture of fewer limitations and more activity on the part of” Greenberg than Dr. Enos (ER216), but also did not change his diagnosis or treatment plan.

Dr. Missel’s August 8, 1996, report concluded that the IMEs “provided an inconsistent and inconclusive assessment,” because of Greenberg’s “limited apparent ability or willingness to cooperate” and possible malingering. He stressed the inconsistency between those IMEs – which focused on possible psychosis or thought disorders – and the treating physicians’ continued diagnosis of dysthymia and panic disorder. Dr. Missel therefore recommended that Paul Revere obtain updated clinical reports from Drs. Enos and Posner, consider surveillance to see how much Greenberg was in fact working in insurance sales, and then “[c]onsider[] a repeat IME” because “[t]he prior IME did not appear to accurately reflect insured’s clinical condition.” ER229; *see also* 11/27 Tr. 44 (ER598).

Pursuant to Dr. Missel’s recommendation, between late 1996 and mid-March 1997 Paul Revere repeatedly sought updated clinical records and PAFs from Drs. Enos and Posner. *See* 11/27 Tr. 48-53 (ER599-604); ER231-236. For example, on March 7, 1997, Sandy Fallon, a psychiatric consultant, asked Dr. Enos for an updated PAF for the third or fourth time and suggested to Lucy Baird, the

claims examiner who had been assigned to Greenberg's claim in late 1996, that "at some point soon" she should consider sending Greenberg for another IME. *See* ER237-238. In early April, Fallon received a PAF from Dr. Enos, which continued to diagnose Greenberg as suffering only from dysthymia and panic attacks. *See* ER239-240.

D. Investigation Of The Fraud Accusation Against Greenberg.

On April 7, 1997, Baird received an *unsolicited* phone call from David Goldfarb, who claimed to be an acquaintance of Greenberg's. *See* ER243-245; 11/27 Tr. 54 (ER605). Goldfarb accused Greenberg of outright fraud.⁷ According to Goldfarb, Greenberg had planned to "go on claim for panic attacks" when he initially purchased his policy. Goldfarb stated that Greenberg had explained the contestability period to him and had literally "mark[ed] the days off" on a pocket calendar until his policy's contestability period expired. *See* ER244. Goldfarb further stressed that, before Greenberg first went to see Dr. Enos, he had explained what he planned to say to ensure a diagnosis of panic disorder. Finally, Goldfarb reported that, prior to Greenberg's 1994 IME, Greenberg had studied material provided by one of his treating doctors "in order to appear psychotic" at that IME and had enlisted Goldfarb's son, Michael, to assist him in that preparation. *See* ER245.

⁷ This was not the first time that Paul Revere had received a telephone call questioning Greenberg's eligibility for benefits; it had received an earlier anonymous call on June 18, 1993. *See* ER155.

Although Paul Revere had no specific evidence to corroborate these particular allegations, other assertions made by Goldfarb matched Paul Revere's existing records. For example, Goldfarb reported – accurately (*see* page 7, *supra*) – that Greenberg's brokerage license had been temporarily revoked and that there were pending complaints against him at the time he applied for insurance. *See* ER243.

Baird referred Goldfarb's allegations to the "Special Services" – that is, fraud – unit for review. *See* ER246; 11/27 Tr. 57 (ER606). Jim Prouty, who conducted the initial review, concluded that the statute of limitations had probably run on any possible fraud prosecution, but suggested that the claim be further investigated and reported (which Paul Revere was legally obligated to do (*see* 11/27 Tr. 60-61 (ER609-610))). He recommended that an investigator obtain a taped statement from Goldfarb, and that the investigation focus on the "alleged manipulation of the IMEs." ER247.

Jon Allen, the field agent in Arizona, conducted the requisite investigation. He interviewed Goldfarb, arranged for surveillance of Greenberg, reported the allegations to the state, and interviewed Greg Davis, whom Goldfarb had indicated could confirm some of his allegations. *See* ER289-290, 289, 281-286, 264-267; 11/27 Tr. 62-63 (ER611-612). Many of the details of Goldfarb's initial telephone call, and of his 14-page statement to Allen on August 16, 1997 (ER248-263), were consistent with information in the claim file. Among the consistencies were the

following:

- An early sign of Greenberg’s supposed disability was his claim to be experiencing heart palpitations – which Goldfarb knew about and stated were feigned (*see* ER254). *See* 11/27 Tr. 58 (ER607).
- At Greenberg’s 1994 IME he correctly spelled the word ‘world,’ but asserted that he was unable to spell it backwards – which Goldfarb knew about and said was a deliberate attempt to “pull[] the wool over [Dr. Cheifetz’s] eyes” (ER260). *See* 11/27 Tr. 58 (ER607).
- Goldfarb knew about Greenberg’s bizarre responses to the Rorschach tests. *See* page 10, *supra*; ER259; 11/27 Tr. 58 (ER607).
- Goldfarb confirmed Greenberg’s drug history and his lies about it on his insurance application. *See* 11/27 Tr. 58-60 (ER607-609); ER253.
- Goldfarb knew about Greenberg’s falsification of his educational background in connection with his application for a securities license and that there had been several complaints raised against Greenberg for engaging in securities trades without his clients’ permission. *See* 11/27 Tr. 58 (ER607); ER252, 243.
- The timing of Greenberg’s claim for benefits, which corroborated Goldfarb’s allegation (at ER253-254) that Greenberg was waiting out his policy’s contestability period. *See* 11/27 Tr. 59-60 (ER608-609).

Greenberg even admitted to a number of Goldfarb’s specific allegations at trial. Thus, he acknowledged that he had been arrested for hitting his son (11/16 Tr. 14-15 (ER523-524)), that he sometimes had a hard time paying his bills (*id.* at 102 (ER568)), and that he went to Dr. Barnes complaining of chest pains (*id.* at 104-105 (ER570-571)), which Goldfarb alleged were fabricated.⁸

⁸ At trial Michael Goldfarb, David Goldfarb’s son, and Greg Davis, his lawyer, also corroborated certain of Goldfarb’s key allegations – namely, that Greenberg used Goldfarb and his children to “practice” for psychological testing and that Greenberg was manipulating his treating physician. *See* ER289-290; 11/28 Tr. 60-

Baird received Greenberg's claim file back from the fraud investigators in late 1997.⁹ Despite the above consistencies between the claim file and Goldfarb's statements, Prouty's report accompanying the file (ER289-290) indicated that there were serious questions about Goldfarb's credibility. For example, the Arizona Securities Division told Paul Revere that it had an ongoing investigation of Goldfarb for defrauding various investors (including Greenberg). Because of this credibility concern, Prouty stressed that Goldfarb's allegations "should be independently verified by other sources" before Paul Revere relied on them. *See* ER290.¹⁰

E. The 1998 IME.

Because of Prouty's warning, and because even *before* Goldfarb called Paul Revere she had been focused on arranging for a new IME (*see* pages 13-14, *supra*), Baird added a few accumulated PAFs to the file¹¹ and then sent the file to the psy-

68 (ER621-629); 11/27 Tr. 117 (ER617).

⁹ As she explained, while the file was with the fraud unit all she could do was process payments and collect Greenberg's monthly progress statements and occasional PAFs. *See* 11/27 Tr. 64 (ER613).

¹⁰ This worry did not apply to the results of Paul Revere's surveillance of Greenberg, which revealed that, despite his repeated assertion that he was struggling to succeed even as an insurance salesperson, he had been Country Companies' "Agent of the Month" during the period in which he was surveilled. *See* ER270.

¹¹ These included several from a new psychologist, Dr. Moyal, who had taken over for Dr. Enos when Dr. Enos retired. *See* ER288. Those PAFs were basically identical to earlier ones from Dr. Enos; in fact, at trial Dr. Moyal testified that he simply accepted Dr. Enos's diagnosis of Greenberg. *See* 11/15 Tr. 36-38 (ER509-

chiatric review unit. *See* ER291; 11/27 Tr. 75 (ER614). Larry Iannetti, who had replaced Fallon as the psychiatric consultant on the case, reviewed the file and decided to arrange for a new IME to determine whether Greenberg was disabled under the terms of his policy as Dr. Missel and Ms. Fallon had suggested in late 1996 – before anyone at Paul Revere was aware of Goldfarb’s allegations. *See* ER291; 11/30 Tr. 7-8 (ER659-660).

Iannetti testified about the process by which he chose Dr. Steven Pitt to perform the IME: He looked for a board-certified psychiatrist in the Phoenix area with a specialization in forensic psychiatry. A colleague suggested that he use Dr. Pitt and provided Iannetti with a copy of a previous IME report that Dr. Pitt had drafted. Because he found that sample IME report – *in which Dr. Pitt determined that the claimant was disabled* – to be “very thorough, very detailed,” Iannetti selected Dr. Pitt for Greenberg’s IME. 11/30 Tr. 9-10 (ER661-662).

Dr. Pitt agreed to perform the IME, so Iannetti sent him a packet of material from the claim file – including the policy, the claim form, all medical files, the previous IME reports, all PAFs, and all correspondence with Greenberg’s treating doctors – to familiarize Dr. Pitt with Greenberg’s case. *See* 11/30 Tr. 10-13 (ER662-665); ER310-314. In total, Iannetti provided Dr. Pitt with a three- to four-inch-thick stack of documents. *See* 11/30 Tr. 54-55 (ER680-681). Iannetti chose

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not to include Goldfarb's 14-page statement to Dr. Pitt in that initial packet, so as to minimize any possible prejudice or bias before Dr. Pitt's interview. *See* 11/30 Tr. 15-16 (ER667-668).¹² Although Baird's two-page phone log of Goldfarb's initial telephone call was included in the stack of documents (*see* 11/30 Tr. 34-36 (ER677-679)), Iannetti testified without contradiction that the inclusion of this document was inadvertent. *See* 11/30 Tr. 54-55 (ER680-681).

As part of his examination, Dr. Pitt arranged for Greenberg again to be administered an MMPI-II, this time by Dr. David Biegen. As with Dr. Cheifetz's MMPI-II several years before, this test proved basically useless. Dr. Biegen reported to Dr. Pitt that the results lacked any validity:

The client has responded to the MMPI-2 items in an *extremely exaggerated manner*, endorsing a wide variety of rare symptoms and attitudes. These results may stem from a number of factors that include excessive symptom checking, falsely claiming psychological problems, low reading level, a plea for help, or a confused state. *The resulting MMPI-2 clinical profile is not a valid indication of the individual's personality and symptoms.*

ER342 (emphasis added).

¹² Because of the "clinical content" of that statement – its specific references to Greenberg's behavior in the earlier IME – Iannetti felt that it was "critical" that Dr. Pitt see it "at some point in time." *Id.* This aligned with Prouty's belief, when Paul Revere first heard from Goldfarb, that the "alleged manipulation of the IMEs" was of central concern. *See* page 15, *supra*. Thus, in his cover letter, Iannetti asked Dr. Pitt to contact him for additional information after the interview but before Dr. Pitt wrote up his final report. *See* ER294; 11/30 Tr. 16 (ER592).

After Greenberg took the MMPI-II, Dr. Pitt met with him for a 4¼-hour videotaped interview. *See* 12/4 Tr. 49 (ER709). Soon thereafter, Dr. Pitt called Iannetti and “reported that the insured exhibited many inconsistent behaviors during the examination, particularly indicative of malingering.” ER299. Dr. Pitt suggested that further neuropsychological testing might be in order, to see whether this was truly the case. *Id.* At this point, Iannetti explained Goldfarb’s allegations to Dr. Pitt and agreed to fax him the transcript of Goldfarb’s interview (*id.*); Iannetti decided to defer consideration of further testing until Dr. Pitt finalized his report. *Id.*

Dr. Pitt’s *fifty-page* IME report concluded that Greenberg was almost certainly malingering and not totally disabled. *See* ER354-355; 12/4 Tr. 73 (ER712).¹³ Based on some lingering questions raised while drafting that IME report, however, Dr. Pitt again suggested that Paul Revere have Greenberg undergo additional testing. *See* 11/30 Tr. 18-19 (ER670-671); ER300-301. Because this was outside the normal course of an IME, Iannetti deferred to Dr. David McDowell, a Ph.D. psychologist and the clinical director of the psych unit at Paul Revere (*see* 11/30 Tr. 19-20 (ER671-672)), who agreed to authorize neuropsychological

¹³ Dr. Pitt also explained that he was “troubled by the apparent lack of consideration given [by Greenberg’s treating physicians] to the possibility that the claimant may, in fact, be intentionally producing false or grossly exaggerated physical and psychological symptoms for the purpose of secondary gain,” because there had been no significant signs of improvement over eight years. ER352.

testing and accepted Dr. Pitt's recommendation that Dr. Pamela Willson, a leading neuropsychologist, perform those tests. *Id.*; 12/4 Tr. 72 (ER711).

Dr. Willson tested Greenberg and submitted a 10-page report, which concluded that there was "a high likelihood of malingered or factitious presentation on the cognitive tests that were administered." ER367.¹⁴ Based on that additional testing and his own earlier observations, Dr. Pitt issued his final report. His conclusion was unequivocal: "*It is * * * my opinion, to a reasonable degree of medical certainty, that Gary L. Greenberg is not totally disabled because of injury or sickness that prevents him from being able to perform the important duties of his occupation.*" ER370-371 (emphasis added).¹⁵

F. Paul Revere's Decision To Terminate Greenberg's Benefits.

Based on Dr. Pitt's IME, Iannetti (ER372) and Dr. McDowell (ER371) each concluded that Greenberg was not totally disabled under the terms of his policy. Baird, the claims agent who retained principal decisionmaking authority over

¹⁴ Dr. Willson also concluded that Greenberg's performance "indicate[ed] the likelihood that he was not responding in an honest and accurate manner, but was rather deliberately biasing his responses" (ER365), called his performance on other exams "questionable" (*id.*), and noted that on the MMPI-II "he [made] a great many unusual responses, which typically reflect a degree of overstatement or exaggeration, but may also reflect genuine disturbance." ER366.

¹⁵ Both Dr. Pitt and Dr. Willson stood by their reports at trial; neither denied that Greenberg suffered from some level of mental illness – nor had they done so in their reports – but both believed him to be exaggerating its extent and not to be disabled. *See* 11/30 Tr. 81-83, 89-91 ((ER685-686, 692-694); 12/4 Tr. 79 (ER713).

Greenberg's claim, concurred, and informed Greenberg of this conclusion by letter dated September 29, 1998. *See* ER374-376. However, Paul Revere provided Greenberg's then-treating physician, Dr. Moyal, with a copy of the IME reports as a courtesy (*see* 11/30 Tr. 24 (ER676)) and offered both Dr. Moyal and Greenberg an opportunity to provide further information to support the reinstatement of benefits. Neither did so. *See* 11/27 Tr. 91 (ER615); 11/15 Tr. 41-42 (ER512-513). In fact, Dr. Moyal was specifically instructed by Greenberg's lawyer not to respond. *See Id.* Instead, Greenberg sued.

SUMMARY OF ARGUMENT

Notwithstanding the undeniable fact that plaintiff's claim file was chock full of red flags and the conclusions of multiple independent medical examiners that Greenberg, at a minimum, was exaggerating his symptoms in an effort to deceive defendants, the jury awarded him not just his past disability benefits, but also almost \$400,000 in future benefits and \$2.4 million in punitive damages. This alarming outcome is unsustainable for several reasons.

1. To begin with, the finding of liability for punitive damages is unsupported as a matter of law. Under Arizona law, punitive damages are awardable only upon proof by clear and convincing evidence that the defendant acted with an "evil mind." The evidence in this case falls far short of clearing that high hurdle. The district court's conclusion otherwise is based solely on its belief that the jury rea-

sonably could have inferred that defendants sought to bias Dr. Pitt's IME by informing him about Goldfarb's allegations. Not only is that kind of attenuated inference insufficient to satisfy the clear-and-convincing standard, but, even if the inference is accepted uncritically, it still does not rise to the level of outrageousness required under Arizona case law.

2. Even if the finding of punitive liability were sustainable, the \$2.4 million award is unconstitutionally excessive under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Each of *BMW's* three "guideposts" mandates this conclusion: defendants' conduct barely registers on the "reprehensibility" scale; the ratio of punitive damages to compensatory damages – 16:1 if this Court strikes the award of future benefits, 4.4:1 if not – is inappropriate in a case of such low reprehensibility; and the punitive award is **480 times** the only penalty that the state would even plausibly consider imposing for "comparable misconduct" – \$5,000.

3. As with the finding of punitive liability, the award of future benefits is unsustainable as a matter of law. Although the Arizona Supreme Court has not addressed the question, there is no reason to presume that it would deviate from basic principles of tort law by authorizing the award of damages that are unlikely ever to occur and that, in any event, would be the result of a future delict, not the one for which the defendant has been held liable.

4. Finally, the district court's erroneous evidentiary rulings – specifically,

its admission of the unreliable *ipse dixit* of plaintiff's bad-faith expert; its refusal to allow Dr. Pitt to testify about his observations of plaintiff when plaintiff personally deposed him; and its refusal to permit defendants to introduce scurrilous and fraudulent web postings by plaintiff to impeach his credibility – presented the jury with a substantially skewed picture of reality, necessitating a new trial on all issues.

ARGUMENT

I. PAUL REVERE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PUNITIVE LIABILITY.

The standard for finding liability for punitive damages in Arizona is extraordinarily stringent – requiring proof by clear and convincing evidence that the defendant acted with an “evil mind” (*Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 679 (Ariz. 1986)), a state of mind that “involves some element of outrage similar to that usually found in crime” (*Gurule v. Illinois Mut. Life & Cas. Co.*, 734 P.2d 85, 86 (Ariz. 1987) (internal quotation marks omitted)). Given the amazing number of red flags in plaintiff's claim file, the trial court's conclusion that the evidence sufficed to support the imposition of punitive damages is impossible to square with this strict standard.¹⁶

¹⁶ This Court reviews the denial of a Rule 50(b) motion *de novo*, taking the evidence in the light most favorable to the non-moving party. See *White v. Ford Motor Co.*, 312 F.3d 998, 1010 (9th Cir. 2002).

A. Under Arizona Law, Only “Extraordinary” Cases Of Bad Faith Warrant Punitive Damages.

The Arizona Supreme Court has made clear that “the *extraordinary* civil remedy of punitive damages” should be “restricted to only the *most egregious* of wrongs.” *Linthicum*, 723 P.2d at 680 (emphasis added). Thus, in the context of bad faith claims, to be entitled to an award of punitive damages the plaintiff must demonstrate “*something more* than the conduct required to establish the tort”¹⁷: He must show *by clear and convincing evidence* that the defendant had an “*evil mind*” and engaged in “aggravated and outrageous conduct.” *Id.* at 680-681 (emphasis added). “It is only when the wrongdoer should be consciously aware of the evil of his actions, of the spitefulness of his motives or that his conduct is so outrageous, oppressive or intolerable in that it creates a substantial risk of tremendous harm to others that the evil mind required for the imposition of punitive damages

¹⁷ A plaintiff must show two things to establish a breach of the duty of good faith and fair dealing: that the insurance company engaged in objectively unreasonable behavior *and* that “the insurer *knew* that its conduct was unreasonable or acted with such reckless disregard that such knowledge could be imputed to it. ‘Mere negligence or inadvertence is not sufficient – the insurer must intend the act or omission and must form that intent without reasonable or fairly debatable grounds.’” *Deese v. State Farm Mut. Auto. Ins. Co.*, 838 P.2d 1265, 1267-1268 (Ariz. 1992) (emphasis in original) (quoting *Rawlings v. Apodaca*, 726 P.2d 565, 576 (Ariz. 1986)).

Defendants firmly believe that the evidence at trial was insufficient to support the jury’s finding of bad faith. Because they failed to move for judgment as a matter of law on that issue at the close of all the evidence, however, they do not seek JMOL on bad faith now .

may be found.” *Id.* at 679. Accordingly, punitive damages cannot be imposed in a case of “gross negligence” or even “reckless disregard of the circumstances,” but must be limited to cases involving “conscious action of a reprehensible character.” *Id.* at 680.

Under this stringent standard, courts applying Arizona law often have thrown out punitive awards imposed against insurance companies – even while affirming bad faith liability – finding evidence of the necessary “evil mind” to have been lacking. For example, in *Linthicum* the defendant health insurer had refused to cover the plaintiff’s cancer, asserting that it was a pre-existing condition even though plaintiff’s doctors had never previously diagnosed it. Though finding sufficient evidence that the defendant was aware of “the harm a denial would cause the Linthicums” (paralysis of Mr. Linthicum), the Arizona Supreme Court held that the defendant’s “tough claims policy” was not so outrageous as to warrant punitive damages. The court also found the following additional facts insufficient to support an award of punitive damages: sending a denial letter only to the care provider, not to the insured; not disclosing the medical basis for denial; investigating all dependent claims filed in the first year of coverage for potential denial; not directly asking any of the insured’s doctors whether they had treated him during the 90-day exclusionary period before issuing the denial; strictly construing the policy against the insured; conducting only fake reviews of the claim denial after media

inquiries; and refusing to provide the insured with a copy of the policy. 723 P.2d at 681-682.

Similarly, the Arizona Supreme Court reversed the award of punitive damages in *Gurule*, a disability case – despite affirming bad-faith liability – because the defendant “did not ignore ‘*overwhelming*’ medical evidence when it denied Gurule’s claim.” 734 P.2d at 92 (emphasis added). The fact that the defendant’s “decisions to terminate benefits were based on apparently reputable medical evidence that arguably supported its position” (*id.*), though insufficient to preclude a claim of bad faith, was enough to foreclose punitive damages.

And in *Filasky v. Preferred Risk Mutual Insurance Co.*, 734 P.2d 76 (Ariz. 1987), the Arizona Supreme Court concluded that bad-faith delays in the settlement of claims did not warrant the imposition of punitive damages even though the delays “resulted from [the defendant] taking a groundless position.” 734 P.2d at 82-84. As the court thus clarified, something more than indifference to facts and failure to investigate a claim in a timely manner must exist before punitive damages may be awarded. *Id.* at 84.¹⁸

In sum, as this Court has explained, punitive damages “are recoverable in bad faith tort actions when, *and only when*, the facts establish that defendant’s

¹⁸ See also *Walter v. Simmons*, 818 P.2d 214, 225 (Ariz. Ct. App. 1991); *Farr v. Transamerica Occidental Life Ins. Co.*, 699 P.2d 376, 385 (Ariz. Ct. App. 1984); *Lange v. Penn Mut. Life Ins. Co.*, 843 F.2d 1175, 1183-1184 (9th Cir. 1988).

conduct was aggravated, outrageous, malicious or fraudulent.” *Lange*, 843 F.2d at 1183 (emphasis in original). As we next discuss, defendants’ handling of plaintiff’s claim does not evidence the kind of “outrageous” mental state necessary to allow the imposition of punitive damages under these cases.

B. Paul Revere’s Conduct In This Case Does Not Even *Approach* The Level Necessary To Warrant Punitive Damages Under Arizona’s Stringent Standard.

Taking the evidence in the light most favorable to plaintiff, this is still a case in which defendants had an *extraordinary* number of reasons to question plaintiff’s claim – and most of those reasons were plaintiff’s own fault. Perhaps a jury reasonably could find that defendants handled plaintiff’s claim in a less-than perfect manner; perhaps defendants should have followed up on more issues, interviewed more people, further investigated Goldfarb’s credibility, run yet more tests, or suspended disbelief even longer. But the proposition that defendants’ investigation of plaintiff’s claim evidenced the kind of “evil mind” (*Linthicum*, 723 P.2d at 681) necessary for punitive liability is simply untenable.¹⁹

¹⁹ Even plaintiff’s so-called bad-faith expert, Donald Kelley, acknowledged that almost all aspects of defendants’ investigation of plaintiff’s claim were “proper.” 11/14 Tr. 122 (ER506). Kelley explained that “[t]he way [defendants] went about gathering documents was correct.” He testified that the various IMEs defendants required plaintiff to undergo were appropriate. The surveillance of plaintiff was appropriate. In fact, Kelley’s only “concern [wa]s what [defendants] did with the information after they got it” – in particular his belief “that [defendants] withheld very significant portions of the information they developed from

The district court denied defendants' post-verdict motion for judgment as a matter of law on the limited grounds that "[t]he jury may have concluded that * * * the Goldfarb statement [was sent] to [Dr. Pitt] * * * to prejudice [his] opinion and to create a basis upon which a diagnosis of malingering would be made" and that "[t]he evidence showed that not all of the information [defendants] had about Goldfarb was communicated to [Dr. Pitt,] which the jury may have found was done with the intent to cause Plaintiff injury." ER730 (June 26 Order).

Given the heightened burden of proof, these rationales are far too flimsy a foundation upon which to base a finding of punitive liability. Although the Arizona Supreme Court has indicated that the necessary "evil mind" may be "inferred from defendant's expressions, conduct, or objectives" (*Gurule*, 734 P.2d at 87), in this case the inferences are unsupported by the testimony of *any* of the numerous individuals involved in the handling of the claim or the existence of a *single* smoking-gun document suggesting that defendants harbored the intent to bias Dr. Pitt.

Mr. Greenberg and from his treating physician after they obtained it." *Id.*

Plaintiff, too, testified that most of defendants' conduct towards him was reasonable. In particular, he acknowledged that, during the first several years he was on disability, defendants treated him appropriately (11/15 Tr. 106 (ER515)) and that he was treated "fine" by Drs. Cheifetz, Cohen, and Willson (*id.* at 108-109, 117 (ER517-518, 519)). The record reflects that defendants went out of their way to be helpful to plaintiff by, for example, repeatedly sending checks to him by overnight mail. *See* ER296, 145, 148; *see also, e.g., id.* at 128. Defendants also agreed in 1994 to send plaintiff to a different IME doctor than they had originally chosen. *See id.* at 178.

To the contrary, Iannetti expressly denied it. *See* 11/30 Tr. 58 (ER683). The Arizona Supreme Court’s decision to adopt the clear-and-convincing standard would be rendered meaningless if the kind of vague inferences indulged by the district court are sufficient to uphold a finding of punitive liability in these circumstances. Indeed, the district court’s hands-off approach to the finding of punitive liability threatens to “lead[] to misapplication of the extraordinary civil remedy of punitive damages which should be appropriately restricted to only the most egregious of wrongs” (*Linthicum*, 723 P.2d at 680) and to “overdeter[]” insurance companies, by inducing them to “pay legitimately questionable claims to avoid the risk of a punitive damages award” (*Gurule*, 734 P.2d at 86-87).

Beyond that, neither of the district court’s two justifications for punitive liability has any support in the record. First, the uncontroverted testimony was that Iannetti told Dr. Pitt of Goldfarb’s accusations *because they bore directly on the integrity of the IME process*: Goldfarb had accused plaintiff of manipulating past IMEs (see pages 14-15, *supra*), making it entirely appropriate to alert the examining doctor to the possibility of manipulation. Notwithstanding plaintiff’s ability to retain a bad-faith expert to offer a post-hoc opinion that this constituted an improper effort to bias the IME, there was no regulation or published standard at the time (or since, for that matter) that would have given Iannetti reason to believe that

it was improper to inform Dr. Pitt of Goldfarb's allegations.²⁰

The district court's second rationale for upholding the finding of punitive liability – that defendants failed to share all their information on Goldfarb with Dr. Pitt – is even less defensible. The undisputed evidence was that defendants *had* warned Dr. Pitt to question Goldfarb's credibility. Dr. Pitt's IME report itself demonstrates this; in it he explained that he was "somewhat loathe [sic] to put the weight of [his] opinion into Mr. Goldfarb's assertions, *especially when [he] understand[s] Mr. Goldfarb and Mr. Greenberg are involved in litigation.*" ER354 (emphasis added). As that report specifically clarified, Dr. Pitt concluded that "[i]ndependent of Mr. Goldfarb's report, the claimant's presentation is suspect and most likely malingered." *Id.*; see also 12/4 Tr. 65 (ER710). Thus, at trial Dr.

²⁰ The only evidence even *arguably* supporting the district court's inference that Iannetti sent the Goldfarb statement to Dr. Pitt so as to bias his opinion was Dr. Pitt's testimony that, though Iannetti never overtly attempted to bias the IME (12/4 Tr. 22 (ER704)), he thought that Iannetti might have been "covertly trying to influence [his] decision" (*id.* at 81-82 (ER715-716)). However, Dr. Pitt could recall no specific actions that led to that belief. Rather, it was simply his view of the *general attitude* of *all* insurance company employees. *See id.* Thus, if anything, this testimony undermines the allegation that plaintiff's claim was handled in bad faith; defendants hired an IME doctor who harbored a general skepticism about insurers and hence was in no way willing to be manipulated. *Id.* at 47 (ER708). Furthermore, Dr. Pitt specifically explained that he would "want" and expect to be provided with information such as Goldfarb's allegations if hired to perform an IME. *See id.* at 37 (ER705). Thus, Iannetti's decision to share these allegations with Dr. Pitt could not have been the basis for Dr. Pitt's perceived "covert[]" bias.

Pitt testified that he “wouldn’t call” the Goldfarb information “significant” to his conclusions. 12/4 Tr. 39 (ER707).

Even if the district court’s inferences are accepted uncritically, the court erred by considering them in isolation, rather than in the broader context of the handling (and payment) of plaintiff’s claim over a period of more than eight years. That is the teaching of *Linthicum*, *Gurule*, *Filasky*, and *Lange*. In each of those cases, there was evidence that, if considered in isolation, could have given rise to an inference of bad-faith claim handling. But in each case, when the court considered the evidence in the context of the overall handling of the claim, it concluded that the defendant did not have the “evil mind” necessary to support a finding of punitive liability. In *Filasky*, for example, the Arizona Supreme Court held that, although “[a]ll of the evidence clearly suggest[ed] that reasons given by [the insurer] for delaying settlement of Filasky’s three claims were groundless or inadequately investigated,” the evidence that the defendant “was guided by an evil mind” was “slight and inconclusive,” thus precluding punitive damages *even under the preponderance standard*. 734 P.2d at 82, 84. *A fortiori*, no punitive damages are permissible in this case in which defendants paid plaintiff’s claim for more than eight years notwithstanding the enormous number of red flags in the claim file, and denied it only after numerous different independent medical examiners concluded that the plaintiff was likely malingering.

II. THE PUNITIVE DAMAGES ARE UNCONSTITUTIONALLY EXCESSIVE.

Although in a world of nine-digit lottery prizes and seven-digit executive salaries, a \$2.4 million punitive award might not cause gasps, it is important to remember that punitive damages are punishment. Recognizing that, the Supreme Court has observed that a \$2 million punitive award is “tantamount to a *severe* criminal penalty” (*BMW*, 517 U.S. at 585 (emphasis added)), and therefore can be warranted only in cases of “egregiously improper conduct” (*id.* at 580). Both the Supreme Court and this Court repeatedly have made clear that the Constitution requires searching appellate review of the amount of punitive damages so as to ensure that defendants “are not subjected to punitive damages of arbitrary amounts” and “to stabilize the law by assuring the uniform treatment of similarly situated persons.” *In re Exxon Valdez*, 270 F.3d 1215, 1238-1241 (9th Cir. 2001) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 429 (1994)).

The Supreme Court has identified three “guideposts” for determining whether a punitive award is unconstitutionally excessive – (1) the degree of reprehensibility of the defendant’s conduct; (2) the ratio of punitive to compensatory damages; and (3) the civil penalties applicable to comparable conduct (*BMW*, 517 U.S. at 575-576) – and has further clarified that appellate courts must review lower courts’ application of these guideposts *de novo* (*Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)). In other words, “a hands-off

appellate deference to juries, typical of other cases and issues, is unconstitutional for punitive damages awards.” *Exxon*, 270 F.3d at 1239. As we now explain, the district court made a number of errors of law in applying the *BMW* guideposts. The required *de novo* application of the *BMW* guideposts demonstrates that the \$2.4 million punitive award is unconstitutionally excessive.

1. *Reprehensibility*. The degree of reprehensibility of a defendant’s conduct is “[p]erhaps the most important indicium of the reasonableness of a punitive damages award.” *BMW*, 517 U.S. at 575. The importance of this factor reflects the principle that “punitive damages may not be grossly out of proportion to the severity of the offense.” *Id.* at 576 (internal quotation marks omitted). As this Court has observed, the Supreme Court has outlined a “hierarchy of reprehensibility, with acts and threats of violence at the top, followed by acts taken in reckless disregard for others’ health and safety, affirmative acts of trickery and deceit, and finally, acts of omission and mere negligence.” *Swinton v. Potomac Corp.*, 270 F.3d 794, 818 (9th Cir. 2001) (internal quotation marks and citations omitted), *cert. denied*, 535 U.S. 1018 (2002).

None of the aggravating factors identified by the Supreme Court in *BMW* is present here. To begin with, defendants’ conduct clearly involved no physical harm or threat of physical harm and “evinced no indifference to or reckless disregard for the health and safety of others.” *BMW*, 517 U.S. at 576. Like the injury at

issue in *BMW*, the injury sustained by plaintiff was “purely economic in nature,” indicating the low level of reprehensibility of defendants’ conduct. *Id.*; *Exxon*, 270 F.3d at 1241-42; *Swinton*, 270 F.3d at 818. The district court’s contrary conclusion (ER728-736 (June 26 Order)) is inexplicable in light of the jury’s refusal to award a single penny in non-economic damages (*see* ER728) and hence cannot survive the required *de novo* review.

The district court was equally mistaken in basing its finding of high reprehensibility on its belief that “deceit ***could have been found by the jury*** based on the information selectively disclosed to and withheld from Dr. Pitt” (ER735 (June 26 Order)(emphasis added)). Under *Cooper*, reviewing courts are not supposed to take all facts in the light most favorable to the verdict and to credit the plaintiff with every inference that conceivably could be drawn from the evidence.²¹ Instead, they are supposed to make an independent judgment as to whether the conduct was attended by such factors as “trickery,” deferring only to “specific findings of fact” made by the jury. *Cooper*, 532 U.S. at 439 n.12. *See also Exxon*, 270 F.3d at 1239 (“[r]eview limited to a ‘no substantial evidence’ test” is inadequate).

²¹ It is clear that the district court did just that. In discussing the *BMW* guideposts, it stated: “As detailed previously, Defendants’ conduct was reprehensible.” *Id.* That earlier discussion took place in the context of its rejection of defendants’ state-law excessiveness argument, in which it stated: “Defendants’ conduct ***when viewed in a light most favorable to upholding the award*** was reprehensible.” *Id.* at 7 (emphasis added).

Here, the required independent review of the record does not justify the conclusion that defendants were engaged in “trickery.” As noted above, plaintiff was unable to elicit an admission from any of the many employees involved in the handling of the claim that the manner in which the Goldfarb allegations were presented to Dr. Pitt was the result of a deliberate plan to trick or deceive. Nor was plaintiff able to produce a turncoat witness or a smoking gun document to support that inference. The only even tangential evidence on this point was that the two-page phone memo summarizing Goldfarb’s allegations was *inadvertently* included in the original package of materials sent to Dr. Pitt and that Iannetti sent Goldfarb’s statement to Dr. Pitt only after Dr. Pitt himself raised the possibility that plaintiff was malingering (*see* page 20, *supra*). Moreover, Dr. Pitt testified in no uncertain terms that his judgment was not affected by his exposure to Goldfarb’s allegations. *See* 12/4 Tr. 38-39 (ER706-707).

Finally, plaintiff’s *own* misconduct mitigates the reprehensibility of defendants’ conduct. As demonstrated above (at pages 6-21), defendants’ skepticism about, and ultimate denial of, plaintiff’s claim was the direct result of his own efforts to deceive the company and its independent medical examiners. Indeed, had he been honest with the company, it is very possible that the medical examiners would have confirmed his diagnosis and the claims personnel would have concluded that he was in fact disabled. In similar circumstances, courts have held that

the plaintiff's wrongful conduct either warranted a substantial remittitur of punitive damages or precluded them entirely. *See, e.g., Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 467 (3d Cir. 1999) (reducing \$50 million punitive award to \$1 million in part because plaintiff's own breach of contract and other tortious acts "tend[ed] to mitigate the need for a high punitive damages award"); *Ezzone v. Riccardi*, 525 N.W.2d 388, 399 (Iowa 1994) (concluding that defendants' conduct was the result of provocation by plaintiffs, including affirmative misrepresentations, and reducing \$1,260,572 in total punitive awards to \$118,500); *Day v. Hill*, 1993 WL 186646, at *2 (Ohio Ct. App. June 3, 1993) (affirming decision denying punitive damages because of plaintiff's unclean hands); *Hoxsey v. Beird*, 287 F. Supp. 416, 419-420 (W.D. Okla. 1968) (declining to award punitive damages in bench trial because of plaintiff's unclean hands); *see also Garrett v. Olsen*, 691 P.2d 123, 125 (Or. Ct. App. 1984) (reversing award of punitive damages because instructions failed to state that plaintiff's conduct could be considered as a mitigating factor in determining amount of punitive damages).

In sum, "this case exhibits none of the circumstances ordinarily associated with egregiously improper conduct" (*BMW*, 517 U.S. at 580). Accordingly, the reprehensibility guidepost weighs heavily against a \$2.4 million punishment.

2. *Ratio*. The ratio of punitive to compensatory damages in this case is approximately 4.4:1, but, contrary to the district court's assumption (ER728-736

(June 26 Order)), that does not mean that it is “clearly within the constitutional range.” In the first place, as explained below, the district court erred as a matter of law in allowing the jury to award future benefits that have not accrued and may never accrue. If those damages are excised, the ratio increases to close to 16:1. The Supreme Court has equated the “reasonable relationship” requirement with the double (1:1), treble (2:1), and quadruple (3:1) damages remedies that prevailed under early English law. *See BMW*, 517 U.S. at 581 & n.33. It follows that, in the absence of a strong justification (and none exists here), a ratio of 16:1 is indicative of excessiveness.

Even if the Court treats the ratio as being 4.4:1, however, that does not warrant a conclusion that the punitive award is constitutionally permissible. The Supreme Court’s pronouncement that there is no “simple mathematical formula” for determining whether a particular ratio is indicative of excessiveness (*BMW*, 517 U.S. at 582) does not cut in only one direction. Just as there are cases in which a high ratio may be permissible (*id.*), so too are there cases in which even a seemingly modest ratio of less than 5:1 may nonetheless be suggestive of an excessive punishment. *See, e.g., Inter Med.*, 181 F.3d at 467-470 (\$50 million award that bore 1:1 relationship to compensatory damages held to be unconstitutionally excessive and reduced to \$1 million). This is one of them. Not only is the degree of reprehensibility in this case quite low and plaintiff’s hands quite unclean, but the

punitive damages are not the only deterrent with which defendants are confronted. The district court also awarded approximately \$300,000 in attorneys' fees and costs under Arizona law. It is common sense that such awards have a strong deterrent effect in their own right, making a substantial punitive award unnecessary. *See, e.g., Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"); *Exxon*, 270 F.3d at 1244 (explaining that "[r]atio analysis as required by *BMW* helps avoid overdeterrence" and indicating that various costs incurred by defendant as a result of its conduct militate in favor of reduced ratio); *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) (factors in deciding whether to award attorneys' fees include "considerations of compensation and deterrence").

3. *Penalties for Comparable Misconduct.* The third *BMW* guidepost requires a comparison between "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. Here, the \$2.4 million punitive award is **480** times the \$5,000 maximum fine for an individual violation of Arizona's proscription against unfair claims settlement practices. *See* Ariz. Rev. Stat. § 20-456(B).

The district court sloughed off this disparity, reasoning that "suspension or revocation[] of an insurer's license is a possible penalty for improper claims han-

dling.” ER735 (June 26 Order). That analysis – which would render the third guidepost a nullity in every bad-faith case – is erroneous as a matter of law. The Supreme Court has cautioned against relying on “unrealistic” assumptions in applying the *BMW* guideposts. *See Cooper*, 532 U.S. at 442. Rather, the focus must be on the kind of civil penalties to which the *specific* conduct “*likely*” would be subject. *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1148 (9th Cir. 2002) (emphasis added). Accordingly, in applying the third guidepost in the *Cooper* remand, this Court refused to endorse the plaintiff’s suggestion that high penalties were hypothetically available, explaining that, “even assuming that as a general matter ‘severe’ awards might be appropriate in some cases, Leatherman has not shown that the award here was comparable to the amount that might have been recovered in civil penalties in a *comparable* case.” *Id.* at 1149 (emphasis added). The Eleventh Circuit has made precisely the same point. *See Johansen v. Combustion Eng’g, Inc.*, 170 F.3d 1320, 1337 (11th Cir. 1999) (“If a statute provides for a range of penalties depending on the severity of the violation * * * it cannot be presumed that the defendant had notice that the state’s interest in the *specific* conduct at issue in the case is represented by the maximum fine provided by the statute.”) (emphasis in original). Here, there is no possibility that defendants would lose their license for denying the claim of a single policyholder, especially one who had set out on a long-term course of attempting to deceive it. Ac-

ordingly, the appropriate comparison is with the \$5,000 fine for an individual instance of improper claims handling. As with the \$2,000 DTPA fine involved in *BMW*, the comparison compels the conclusion that the punitive award is unconstitutionally excessive.

III. THE AWARD OF FUTURE BENEFITS IS UNSUSTAINABLE.

The district court held that future benefits – lump sum compensation in lieu of future, periodic benefit payments – are an element of damages in first-party bad faith cases under Arizona law.²² Thus, defendants are required to pay plaintiff the present value of all future benefits that he might possibly receive under his policy through its termination in 2014 – notwithstanding the possibility that new treatments or medication might rid him of his disability or that he might die before the end-date of his policy. *See* 11/27 Tr. 12-16 (ER588-592); 12/5 Tr. 28 (ER720).

There is a split in the states over whether future benefits may be awarded as damages for bad faith. *Compare Doe v. Provident Life & Accident Ins. Co.*, 936 F. Supp. 302, 308 (E.D. Pa. 1996) (future benefits are not awardable unless the insurer has completely repudiated its obligations under the policy) *and Dyer v. General Am. Life Ins. Co.*, 541 S.W.2d 702, 706 (Mo. Ct. App. 1976) (“Missouri law

²² Defendants raised this argument in a motion *in limine* (*see* 10/29 Tr. 21-30 (ER438-447); 11/27 Tr. 3-4 (ER586-587)), in arguments over jury instructions (11/30 Tr. 198-202 (ER695-699)), and again in their post-trial motion. Because this is a question of law, this Court’s review is *de novo*. *See, e.g., Cacique, Inc. v. Robert Reiser & Co.*, 169 F.3d 619, 622 (9th Cir. 1999).

precludes the recovery of future, periodic disability benefit payments”) *with DeChant v. Monarch Life Ins. Co.*, 554 N.W.2d 225, 229 (Wis. Ct. App. 1996) (future benefits are awardable upon a finding of bad faith because “an insurer’s bad faith breach of a policy constitutes its repudiation of the policy as a matter of law”) *and Egan v. Mut. of Omaha Ins. Co.*, 620 P.2d 141, 149 n.7 (Cal. 1979) (future benefits may be awardable upon finding of bad faith). The Arizona Supreme Court has yet to address the question. However, at least one other judge of the United States District Court for the District of Arizona has disagreed with the district court in this case, and has held that, under Arizona law, such benefits are not recoverable merely upon a finding of bad faith. *See McKendry v. General Am. Life Ins. Co.*, No. CIV 96-0754 PHX PGR (oral ruling of Rosenblatt, J.) (attached as Appendix A).

We submit that the courts that have held future benefits not to be available have the better of this argument. It is a fundamental principle of tort law that the plaintiff may recover damages only for injuries arising out of the tort. *See, e.g., Valley Nat’l Bank v. Brown*, 517 P.2d 1256, 1260 (Ariz. 1974) (“Recovery in a tort action is limited to those damages which are the direct and proximate consequence of the defendant’s wrongful acts.”); *Larsen v. Decker*, 995 P.2d 281, 287 (Ariz. Ct. App. 2000) (same).

Under this fundamental principle, if the damages sought by the plaintiff arise

from and are proximately caused by the tortious conduct, the plaintiff may recover their present value. *See, e.g., Continental Life & Accident Co. v. Songer*, 603 P.2d 921, 931 (Ariz. Ct. App. 1979) (“a plaintiff in a tort action is entitled to recover such sums as will reasonably compensate him for all damages sustained by him as the direct, natural and proximate result of such negligence, provided they are established with reasonable certainty”). The paradigmatic example is a personal injury case. *See* DAN B. DOBBS, *THE LAW OF TORTS* § 377, at 1047 (2000). It is more than reasonably certain that a person who has been rendered quadriplegic by a defective product will incur damages for the rest of his or her life as a result of the defendant’s tort. Because those future damages arise out of the tort, the plaintiff is entitled to recover their present value. Indeed, because our legal system does not permit injured persons to file successive lawsuits to recover damages for the same delict, the only opportunity a personal-injury plaintiff has to recover her future damages is at the time she seeks her past damages.

An insurance bad faith case is nothing like the personal injury paradigm. When an insurer denies a claim in bad faith, the injuries that arise out of that denial and hence are compensable may include the unpaid past benefits, any consequential damages proximately caused by the unavailability of the benefits, and any emotional distress suffered by the plaintiff. But the delict of terminating the claim in bad faith *in the past* cannot be said to be the cause of any *future* failure to pay

benefits. Rather, because a verdict of bad faith constitutes a judicial determination that the insured is entitled to benefits, the failure to pay benefits in the face of such a verdict (or the termination of benefits after a period of paying them *without evidence of a change in the claimant's condition*), would constitute a new delict that could form the basis for a new lawsuit – one that would cause most plaintiffs' lawyers to salivate.

In this regard, insurance bad faith is comparable to trespass. When a person drives across a neighbor's farm to save the time it would take to drive around it, the owner of the land is entitled to recover the full amount of the resulting damage to his crops. But the law does not afford the landowner a right to presume that the defendant will continue trespassing (even if the defendant had been doing so for years) and therefore to recover the present value of future damage to next year's crops. Instead, because future crop damage would not arise out of the prior trespass but instead would be the result of entirely new delicts, the law protects the landowner by affording him the right to bring new lawsuits in the future (and to seek punitive damages for the obstinate refusal to recognize the plaintiff's property rights). DAN B. DOBBS, *supra* § 57, at 116 ("If the invasion is temporary or continuing, it is treated as if it were renewed daily, with a new trespass or nuisance each day. The plaintiff may sue for all harms that have occurred to the time of suit or trial, but may not sue for future harms that would be incurred only if the trespass

continues * * *. This measure of damages contemplates the possibility of successive suits.”). See, e.g., *Rebel v. Big Tarkio Drainage Dist. of Holt City*, 602 S.W.2d 787, 793 (Mo. Ct. App. 1980) (“The law assumes that a temporary nuisance will abate – if not by voluntary act of the tort-feasor then by judicial agency – and so confines recovery to injury already accrued.”), *disapproved on other grounds*, *Frank v. Environmental Sanitation Mgmt., Inc.*, 687 S.W.2d 876, 876-877 (Mo. 1985).²³

In sum, the law draws a distinction between situations in which there is a single delict that has future consequences (the personal injury paradigm) and those in which any future injuries would be the result of new delicts (the trespass paradigm). In the former situation, future damages are recoverable; in the latter, they

²³ The case law from other jurisdictions equating bad faith with a repudiation of the contract is simply wrong. As the *Doe* court explained, allegations that may be sufficient to support a finding that the defendant denied a claim in bad faith “do not show that once a judgment has been entered against it [the] defendant will continue to improperly deny the benefits owed to [the] plaintiff, especially in the face of possible punitive damages.” 936 F. Supp. at 308. Such a conclusion would be possible only if there were evidence that “with regard to other insureds defendant has engaged in the kind of repetitive denials and litigation which plaintiff argues could happen here” or that the plaintiff himself “personally has had to bring * * * previous suits to enforce his rights under the specific insurance policies at issue here.” *Id.*; see also, e.g., *Scherer v. Equitable Life Assurance Soc’y*, 190 F. Supp. 2d 629 (S.D.N.Y. 2002) (“Complete repudiation occurs not when the insurer ‘contest[s] the right to payments if it believes the disability does not exist’ but when ‘it calls off the whole arrangement, cancels the policy and refuses future premiums.’”) (quoting *Bell v. Mut. Ben. Health & Accident Ass’n of Omaha*, 192 N.Y.S.2d 854, 856 (N.Y. Sup. Ct. 1959)) (alteration in original).

are not. Because insurance bad faith fits squarely within the latter model, a mere finding of bad faith is insufficient to authorize an award of future benefits. Instead, such benefits should be available only if there is evidence that a defendant has “complete[ly] repudiat[ed]” its obligations under the policy (*Doe*, 936 F. Supp. at 308). Because it is undisputed that the policy was in full force at the time of trial (see 10/29 Tr. 24 (ER441); 11/16 Tr. 203-204 (ER572-573)), the only valid basis for awarding future benefits in a bad faith case is absent here. Accordingly, the Court should excise the award of future benefits from the judgment.²⁴

In addition, because the jury undoubtedly considered the amount of compensatory damages in setting its punitive award, this Court should reduce the punitive award proportionately (to \$664,405.61) in order to reflect the reduction in the compensatory damages. See, e.g., *Shamis v. Ambassador Factors Corp.*, 2000 WL 1368049, at *22 (S.D.N.Y. Sept. 21, 2000) (reducing punitive award by 73% after setting aside claim that accounted for 73% of the compensatory damages); *Lee v. Heights Bank*, 446 N.E.2d 248, 256 (Ill. App. Ct. 1983) (affirming trial court’s reduction of punitive damages by same proportion as reduction of compensatory damages (44%)); *Delahanty v. First Pa. Bank, N.A.*, 464 A.2d 1243, 1266 (Pa. Su-

²⁴ Alternatively, this Court should certify the question to the Arizona Supreme Court under Ariz. Rev. Stat. § 12-1861 and Ariz. Sup. Ct. R. 27. The issue “raises an important question of state law” (*Binford v. Rhode*, 116 F.3d 396, 397 (9th Cir. 1997)) about which the law differs from state to state. See, e.g., *Torres v. Good-year Tire & Rubber Co.*, 867 F.2d 1234, 1237-1239 (9th Cir. 1989).

per. 1983) (reducing punitive award so that it remained in roughly the same proportion to the reduced compensatory award as the original punitive award bore to the original compensatory award).

IV. THE DISTRICT COURT'S ERRONEOUS EVIDENTIARY RULINGS NECESSITATE A NEW TRIAL.

Although courts have broad discretion in admitting evidence, a new trial is necessary when a court makes an erroneous evidentiary ruling that substantially prejudiced the losing party. *Ruvalcaba v. City of L.A.*, 64 F.3d 1323, 1328 (9th Cir. 1995); *United States v. 99.66 Acres of Land*, 970 F.2d 651, 658 (9th Cir. 1992). Through a series of evidentiary rulings, the district court inappropriately tilted the evidence presented at trial. Specifically, a new trial is warranted because the district court erred by (1) permitting plaintiff's bad-faith expert to provide unreliable opinion testimony, and (2) preventing defendants from presenting certain evidence that plaintiff was malingering and exaggerating his symptoms.

A. The District Court Committed Reversible Error In Allowing Donald Kelley To Testify.

At trial, plaintiff relied heavily on the testimony of an expert, Donald Kelley, to establish defendants' bad faith. But Kelley's testimony was nothing more than unreliable *ipse dixit*. As that testimony was practically the only support for the jury's finding of bad faith, the district court's erroneous ruling substantially preju-

diced Paul Revere and therefore necessitates a new trial.²⁵

1. As the Supreme Court has twice made clear, Federal Rule of Evidence 702 imposes an obligation upon courts to ensure that all expert testimony “is not only relevant, but reliable.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999). This role requires courts to undertake a two-part analysis when determining whether expert testimony is admissible. First, the court must determine the validity of the reasoning and methodology underlying the expert’s proposed testimony by considering such factors as (i) whether the expert’s technique or theory is objectively testable; (ii) whether it has been subject to peer review or publication; (iii) its known or potential error rate; and (iv) whether it is subject to controls or other standards. *Daubert*, 509 U.S. at 592-594. Second, the court must determine whether the expert’s reasoning and methodology can be properly applied to the facts in issue – *i.e.*, whether the testimony is relevant. *Id.* at 592. Importantly, the party relying on an expert bears the burden of establishing that the expert’s proposed testimony satisfies the requirements of Rule 702. *See id.* at 589 n.7; *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

In evaluating reliability, courts are entitled to consider the experience of the

²⁵ Defendants objected to the admission of Kelley’s testimony both through a motion *in limine* (see 10/29 Tr. 32-33 (ER448-449)) and again in their post-trial motion.

expert. *See Kumho*, 526 U.S. at 156. However, if the witness is relying solely or primarily on experience, he or she must explain what that experience has been, how that experience leads to the conclusion reached, and how the experience is reliably related to the facts at issue. Thus, as the Advisory Committee recently noted, “[t]he trial court’s gatekeeping function requires more than simply ‘taking the expert’s word for it.’” *See* Advisory Committee Notes to the 2000 Amendments to Fed. R. Evid. 702 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995)).²⁶ The more subjective the expert’s inquiry, the more likely the testimony should be excluded as unreliable. *See O’Connor v. Commonwealth Edison Co.*, 13 F.3d 1090, 1091 (7th Cir. 1994) (affirming exclusion of expert testimony based on a completely subjective methodology).

2. Kelley’s testimony utterly failed to satisfy the foregoing criteria, and therefore was inadmissible under Rule 702. Although Kelley repeatedly opined at trial that defendants did not meet industry standards with respect to the handling of plaintiff’s claim (*see* 11/14 Tr. 63-97 (ER468-501)), he failed to provide **any** citation to the industry standards allegedly supporting his opinion. *See* 11/14 Tr. 98-101 (ER502-505). To the contrary, despite requests to provide authority support-

²⁶ In *Daubert*, this Court observed that it was “not enough” to present “only the experts’ qualifications, their conclusions and their assurances of reliability.” 43 F.3d at 1319. *See also Mukhtar v. Cal. State Univ. Hayward*, 299 F.3d 1053, 1064 (9th Cir. 2002), *as modified on denial of reh’g*, 319 F.3d 1073 (9th Cir. 2003).

ing or detailing these “industry standards,” Kelley testified that these “standards” are not written in any book, but are instead simply his understanding based on his experience in the insurance industry. *See id.* But there exist countless publications and manuals about the heavily regulated insurance industry. Kelley could have pointed to any number of sources – for example, state insurance commission reports, insurance treatises, claims manuals, journal articles, or conference materials – to justify his view. Had he done so, his opinion might have been admissible under Rule 702. Instead, Kelley cited nothing more than his own unverifiable experience to support his views. But it is inherently impossible to determine the reliability of completely subjective opinions of this sort. And unlike situations in which a party can *at least* point to previous writings *of the expert*, Kelley has not even published his understanding of industry custom in a fashion that defendants (or another expert) could review and, if appropriate, challenge.

The only support for the “validity” of Kelley’s opinions comes from Kelley himself. However, subjective claims by experts that their method is accurate are insufficient. *See Kumho*, 526 U.S. at 157 (“nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert”); *Daubert*, 43 F.3d at 1319 (internal quotation marks omitted). Moreover, prior expert testimony is not tantamount to peer review or general acceptance by the scientific community.

See Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 297 (8th Cir. 1996). There has been no “acceptance” of Kelley’s opinions, which he did not base on any accepted and verifiable standard. As such, Kelley’s testimony was unreliable, cannot be substantiated and should have been excluded. The failure to exclude that critical testimony, which was “cloaked in authority and addressed the central element of [the] case” (*Mukhtar*, 299 F.3d at 1067), warrants a new trial.

3. Furthermore, a new trial is warranted under this Court’s decision in *Mukhtar*, because the district court never directly found Kelley’s testimony to be reliable. The court held that plaintiff could use Kelley’s testimony to prove the appropriate “handling” of disability claims, but its only justification for admitting the testimony was that “[it didn’t] think the jury knows anything about how disability claims are handled, should be handled, have been handled, should not be handled, and the plaintiff’s got the burden of proof and they need to have somebody explain this to the jury.” 10/29 Tr. 32 (ER448). In other words, just as in *Mukhtar*, the district court “said nothing about the *reliability* of [Kelley’s] testimony.” 299 F.3d at 1065 (emphasis in original). In *Mukhtar*, the district court focused only on whether the expert could testify as to the “ultimate issue” at trial (*see id.*); similarly, here the court focused only on whether Kelley could give a “legal opinion” (10/29 Tr. 32 (ER448)). In *Mukhtar*, the expert “drew the inference of discrimination for the jury in a case otherwise based entirely on less-than-convincing circum-

stantial evidence” (*see* 299 F.3d at 1068); here, Kelley “drew the inference” of bad faith for the jury in a case where otherwise such inference had no basis. Thus, as in *Mukhtar*, defendants are entitled to a new trial.

B. The District Court Committed Reversible Error In Limiting Dr. Pitt’s Testimony And Excluding Greenberg’s Internet Postings.

A central issue in this case was whether defendants had reason to question plaintiff’s claim, which depended on, among other things, whether they had reason to question plaintiff’s veracity. The district court’s evidentiary rulings allowed the jury to be presented an inappropriately skewed view of the evidence on this subject. In particular, the court refused to allow Dr. Pitt to testify about his direct observations of plaintiff’s psychological condition while being deposed by plaintiff himself, and refused to allow defendants to introduce postings plaintiff made on a Yahoo® message board that were scurrilous and contained demonstrable lies.²⁷

1. Plaintiff conducted the deposition of Dr. Pitt himself. Dr. Pitt’s professional view was that, at the time of that deposition, plaintiff did not seem to be suffering from mental disability. Given plaintiff’s assertion that his condition had not changed from the time he submitted his claim through the date of trial, this evidence would have been directly relevant to the question whether plaintiff was malingering. The district court’s ruling that Dr. Pitt’s testimony was inadmissible

²⁷ Defendants opposed plaintiff’s motions *in limine* on these issues. *See* 11/7 Tr. 11-13, 19-20 (ER451-453, 455-456).

(11/7 Tr. 19-20 (ER455-456); *see also* ER728-736 (June 26 Order)) was based upon the incorrect assumption that Dr. Pitt’s opinions had to be disclosed in an expert report. However, Dr. Pitt was **not** an expert hired for trial; rather, he was a doctor who had been hired more than three years earlier to perform an IME, who also observed plaintiff on one other occasion – at his deposition.

Under the Federal Rules of Civil Procedure, parties must “disclose to other parties the **identity** of **any** person who may be used at trial to present evidence under Rule[] 702” (Fed. R. Civ. P. 26(a)(2)(A) (emphasis added)). The Rules **further** require that, for an expert witness “**who is retained or specially employed to provide expert testimony in the case,**” the disclosure must also include a written report by the witness (Fed. R. Civ. P. 26(a)(2)(B) (emphasis added)). As the 1993 Advisory Committee Notes to Federal Rule of Civil Procedure 26 explain:

The requirement of a written report in paragraph (2)(B),
* * * **applies only to those experts who are retained or
specially employed to provide such testimony in the case**
* * *. A treating physician, for example, can be deposed
or called to testify at trial without any requirement for a
written report.

Thus, as one court has explained, “it is only when [a] treating physician gives opinions beyond the scope of his own observation and treatment that he is considered a ‘retained’ expert for purposes of Rule 26(a)(2).” *Zurba v. United States*, 202 F.R.D. 590, 592 (N.D. Ill. 2001). Although Dr. Pitt was not a “treating physician,” that is only an **example** of the types of witnesses who need not file an

expert report. Dr. Pitt was not “retained or specially employed” for trial purposes, and he was not attempting to give “opinions beyond the scope of his own observation.” *Cf. Cicero v. Paul Revere Life Ins. Co.*, 2000 WL 656666, at *2 (N.D. Ill. Mar. 23, 2000) (accountant need not prepare expert report “to testify regarding knowledge acquired as Cicero’s personal accountant relating to business costs incurred as a result of Cicero’s disability”); *Piper v. Harnischfeger Corp.*, 170 F.R.D. 173, 175 (D. Nev. 1997) (treating physicians need not file expert reports where “[t]heir testimony is based upon their personal knowledge and the treatment of the patient and not information acquired from outside sources”).

It is undisputed that defendants timely disclosed that Dr. Pitt would testify. Because he was not “retained or specially employed to provide expert testimony in the case,” Dr. Pitt had no obligation to prepare a written report about his observations of the plaintiff. Therefore, Dr. Pitt should have been allowed to testify about plaintiff’s condition. The district court’s failure to allow defendants to present this testimony on a central issue entitles defendants to a new trial.

2. Plaintiff admitted before trial that he was an active participant in a Yahoo® message board devoted to defendants’ stock. *See* ER377-379. He further admitted to authoring a number of defamatory and false postings. Specifically, plaintiff outright lied in several postings, representing himself to be an independent medical examiner employed by defendants. *See* ER396. In misrepresenting that

he was a company-hired IME doctor, plaintiff further asserted that “prior to [defendants] hiring me to do an IME on a claimant” the company “provided me with inaccurate information and incomplete medical files. * * * If I had the whole file, [t]he truth about the inaccurate information[,] [i]t may have changed my disability det[er]mination.” *Id.* Other postings contained defamatory statements about Iannetti and defendants’ chairman.²⁸

The district court refused to admit these postings (*see* 11/7 Tr. 11-13 (ER451-453)), even though they go to plaintiff’s truthfulness and credibility.²⁹ Given the centrality of that issue to the case, the district court clearly abused its discretion in refusing to allow defendants to use the postings to hoist plaintiff on his own petard. Defendants were plainly prejudiced by the skewed view of the case the jury received because of these erroneous evidentiary rulings; had this evidence been admitted it is quite likely that the result would have been different. Thus, the error is not harmless, and a new trial is required. *Cf. Mukhtar*, 299 F.3d at 1066-1067.

²⁸ These included, for example, assertions that Iannetti is a pedophile. *See* ER397-398. As a result of these postings, Iannetti sued plaintiff and received a stipulated judgment against him.

²⁹ The district court further erred by refusing to allow defendants to introduce these postings in response to plaintiff’s rebuttal testimony (12/4 Tr. 134-138 (ER716a-717)), in which he claimed to have “very poor writing skills” (*id.* at 136 (ER716c)).

CONCLUSION

The Court should reverse the awards of punitive damages and future benefits and order entry of judgment in favor of defendants. It also should order a new trial on the bad faith claim as a result of the trial court's evidentiary errors. At minimum, the Court should find the award of punitive damages to be constitutionally excessive and reduce it to a nominal sum.

Respectfully Submitted.

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STATEMENT OF RELATED CASES

Defendants-Appellants are not aware of any cases in this Court that are related within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(B)

I hereby certify that – according to the word-count facility in Microsoft Word – this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 13,951 words and thus complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

David M. Gossett

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2003, I served two copies of the foregoing Brief for the Appellants by overnight delivery on Appellees herein, at the following address:

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