

No. 03-12776-JJ

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHNNY C. MCCLAIN, ET AL.

Plaintiffs/Appellees/Cross-Appellants,

v.

METABOLIFE INTERNATIONAL, INC.,

Defendant/Appellant/Cross-Appellee.

**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT**

Appeal from the United States District Court for the Northern District of Alabama
(No. CV-01-AR-1801-S)

Robin S. Conrad
National Chamber Litigation Center
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Evan M. Tager
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3240

Counsel for the Amicus

December 19, 2003

CERTIFICATE OF INTERESTED PARTIES

In addition to the parties identified in the brief of the appellant/cross-appellee, the following is a list of all persons, firms, partnerships or corporations that have an interest in the outcome of this appeal:

Evan M. Tager

Robin S. Conrad

Chamber of Commerce of the United States

National Chamber Litigation Center

Mayer, Brown, Rowe & Maw LLP

Evan M. Tager

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
ISSUE PRESENTED	2
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
A. The District Court Abdicated Its Duty To Render An Independent Determination Of The Degree Of Reprehensibility Of The Conduct	4
B. The District Court Erred In Holding That A 9:1 Ratio Is Per Se Constitutional.	9
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page(s)
* <i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559 (1996)	<i>passim</i>
<i>Bogle v. McClure</i> , 332 F.3d 1347 (11th Cir. 2003), pet. for cert. filed, 72 U.S.L.W. 3310 (U.S. Oct. 23, 2003) (No. 03-623)	1
* <i>Cooper Indus., Inc. v. Leatherman Tool Group, Inc.</i> , 532 U.S. 424 (2001)	3, 6, 8
<i>Davis v. Celotex Corp.</i> , 420 S.E.2d 557 (W. Va. 1992)	17
<i>Diamond Woodworks, Inc. v. Argonaut Ins. Co.</i> , 135 Cal. Rptr. 2d 736 (Cal. Ct. App. 2003)	14
<i>Fischer v. Johns-Manville Corp.</i> , 512 A.2d 466 (N.J. 1986)	17
<i>Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.</i> , 181 F.3d 446 (3d Cir. 1999)	15
<i>Johnson v. Ford Motor Co.</i> , 2003 WL 22794432 (Cal. Ct. App. Nov. 25, 2003)	13
<i>Jones v. Sheahan</i> , 2003 WL 22508171 (N.D. Ill. Nov. 4, 2003)	11, 14
<i>Juzwin v. Amtorg Trading Corp.</i> , 718 F. Supp. 1233 (D.N.J. 1989)	17
<i>Kochan v. Owens-Corning Fiberglas Corp.</i> , 610 N.E.2d 683 (Ill. App. Ct. 1993)	17
<i>Lincoln v. Case</i> , 340 F.3d 283 (5th Cir. 2003)	12
<i>Mathias v. Accor Economy Lodging, Inc.</i> , 347 F.3d 672 (7th Cir. 2003)	11
<i>McClain v. Metabolife Int'l, Inc.</i> , 259 F. Supp. 2d 1225 (N.D. Ala. 2003) .	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page(s)
<i>Memphis Community School Dist. v. Stachura</i> , 477 U.S. 299 (1986)	15
<i>Pacific Mut. Life Ins. Co. v. Haslip</i> , 499 U.S. 1 (1991)	13
<i>Roginsky v. Richardson-Merrell, Inc.</i> , 378 F.2d 832 (2d Cir. 1967)	17
<i>Romo v. Ford Motor Co.</i> , ___ Cal. Rptr. 2d ___, 2003 WL 22784959 (Cal. Ct. App. Nov. 25, 2003)	13
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	15
<i>St. Louis, I.M. & S. Ry. v. Williams</i> , 251 U.S. 63 (1919)	11
* <i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 123 S. Ct. 1513 (2003)	<i>passim</i>
<i>Stevens v. Owens-Corning Fiberglas Corp.</i> , 49 Cal. App. 4th 1645 (1996)	17
<i>Waddill v. Anchor Hocking, Inc.</i> , 78 P.3d 570 (Or. Ct. App. 2003)	12
STATUTES	
Ala. Code § 6-11-20	5

INTEREST OF THE AMICUS CURIAE¹

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

Because few issues are of more concern to American business than those pertaining to the fair administration of punitive damages, the Chamber regularly files amicus briefs in significant punitive damages cases, including each of the cases in which the Supreme Court has addressed such issues during the past 15 years. If this Court does not overturn the underlying judgment against Metabolife on the grounds raised in Metabolife’s brief, the present case promises to be among the first federal appellate decisions applying the Supreme Court’s most recent pronouncements on punitive damages in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003).² Moreover, as a result of the reasoning employed by the district

¹ All parties have consented to the filing of this amicus brief.

² Ironically, the first post-*State Farm* decision of any federal court of appeals was *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003), pet. for cert. filed, 72 U.S.L.W. 3310 (U.S. Oct. 23, 2003) (No. 03-623). This Court there upheld a \$13.3 million punitive award on \$3.5 million in emotional distress damages as both “reasonable and proportionate to the amount of harm * * * and to the general damages recovered.” *Id.* at 1362. Because that case was decided without the benefit of either amicus briefs or

court in its excessiveness review, the Court’s decision in this case likely will be of substantial importance to the development of post-*State Farm* punitive damages doctrine. The Chamber believes that its substantial familiarity with the law of punitive damages can be of assistance to the Court in resolving the important issues in this case.

ISSUE PRESENTED

The Chamber will limit itself in this brief to addressing issues pertaining to the constitutionally permissible amount of punitive damages. In so doing, we by no means intend to suggest that the other issues raised by Metabolife are either unimportant or lacking in merit. To the contrary, we agree with Metabolife that errors committed by the trial court necessitate reversal and that this Court should not need to reach the issue of excessiveness of the punitive damages.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Supreme Court has held that, when evaluating a punitive award for excessiveness, reviewing courts should consider three “guideposts”: (i) the degree of reprehensibility of the defendant’s conduct; (ii) the ratio of the punitive damages to the monetary value of the harm or potential harm to the plaintiff resulting from the punishable conduct; and (iii) any variance between the punitive damages and the legislatively established penalty for comparable misconduct. *State Farm*, 123 S. Ct.

decisions of other courts, we submit that the current case is the better vehicle for the development of excessiveness criteria post-*State Farm*.

at 1520; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435, 440, 441-43 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996).

With regard to the second guidepost, the Court admonished that “[o]ur jurisprudence and the principles it has now established demonstrate * * * that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *State Farm*, 123 S.Ct. at 1524. The Court went on to emphasize the “long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages” and indicated that, although such ratios (*i.e.*, 1:1, 2:1, and 3:1, respectively) “are not binding, they are instructive.” *Id.* Indeed, while observing that “ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages,” the Court made clear that “[t]he converse is also true, however. 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.” *Id.* (internal quotation marks and citation omitted).

In applying the excessiveness guideposts, the district court made two critical errors that warrant correction. First, it held that, in gauging the *degree* of reprehensibility of Metabolife’s conduct, it was bound by the jury’s finding that

Metabolife acted recklessly. The Supreme Court has made clear, however, that the mere finding that the defendant's conduct was sufficient to trigger punitive liability is not sufficient to support the imposition of "a substantial punitive damages award." *BMW*, 517 U.S. at 580. More broadly, the *de novo* review that is required as a matter of due process means that courts must make their own determinations of the degree of reprehensibility of the conduct without deferring to assumed factual findings that the jury may not necessarily have made. Second, the court erroneously assumed that, because the Supreme Court had indicated that any ratio in excess of 9:1 is constitutionally suspect, ratios at or below that magnitude are per se constitutional. In fact, it could not be clearer from *State Farm* that when, as here, compensatory damages are substantial, ratios considerably below 9:1 may nonetheless exceed the constitutional maximum. Indeed, as we explain below, because this lawsuit involves a product that allegedly has injured many people other than the plaintiffs, a low ratio — no greater than 1:1 — is necessary to avoid the prospect of an excessive aggregate punishment.

ARGUMENT

A. The District Court Abdicated Its Duty To Render An Independent Determination Of The Degree Of Reprehensibility Of The Conduct.

The district court made a critical misstep at the very outset of its analysis. Though acknowledging the significance of the reprehensibility guidepost, the court

went on to observe that the jury had found, “**by clear and convincing evidence**, that the manufacturer acted with a deliberate and reckless disregard for the rights and safety of the consumer. Either this jury finding by a higher burden of proof that Metabolife was guilty of gross wantonness constituted a finding of reprehensibility that binds the court, or the issue of wantonness should never have been submitted to the jury.” 259 F. Supp. 2d at 1231 (emphasis in original). This substitution of the jury’s finding of punitive liability for the court’s duty to independently gauge the *degree* of reprehensibility of the conduct is squarely foreclosed by Supreme Court precedent.

In *BMW*, an Alabama jury found that the defendant committed fraud and also found, by clear and convincing evidence, the prerequisite for imposition of punitive damages — that the fraud was ““gross, oppressive or malicious.”” *BMW*, 517 U.S. at 565 (quoting Ala. Code § 6-11-20)). Notwithstanding that jury finding, the Court independently evaluated the degree of reprehensibility of the defendant’s conduct, concluding that “none of the aggravating factors associated with particularly reprehensible conduct [was] present.” *Id.* at 576. The Court emphasized that the jury’s finding of the conduct necessary for punitive liability was entirely irrelevant to the excessiveness analysis, stating:

We accept, of course, the jury’s finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. * * * That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest

award of exemplary damages[, however,] does not establish the high degree of culpability that warrants a substantial punitive damages award.

Id. at 579-80. *See also id.* at 585 (“[W]e of course accept the Alabama courts’ view that the state interest in protecting its citizens from deceptive trade practices justifies a sanction in addition to the recovery of compensatory damages. We cannot, however, accept the conclusion of the Alabama Supreme Court that BMW’s conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty.”).

After *BMW*, the Supreme Court made it even clearer that the determination of the degree of reprehensibility of the conduct must be made by reviewing courts without deference to a jury finding that the standard for punitive liability had been satisfied. In *Cooper Industries*, the Court squarely held that appellate courts must review trial courts’ application of the excessiveness guideposts *de novo*. And in the course of so holding, the Court indicated that reviewing courts must accept “*specific* findings of fact” by the jury (532 U.S. at 439 n.12 (emphasis added)), thereby strongly implying that they need not and should not equate the threshold finding necessary for the imposition of punitive liability with a binding finding that the aggravating factors characteristic of highly reprehensible conduct are present.

This distinction makes sense because neither a jury’s finding of punitive liability nor the amount of punitive damages it elects to impose supplies any indication of its

assessment of the *degree* of reprehensibility of the defendant's conduct. That is because the jury's function in setting the amount of punitive damages does not typically involve determining whether any particular fact has been proven. Once the punishment-setting stage is reached, the jury generally is not instructed that it must find particular facts and rarely is asked to return a special verdict answering specific factual questions bearing on the degree of reprehensibility of the defendant's conduct. Instead, juries typically are told little more than that they have discretion in setting the amount of punitive damages and that the purposes of punitive damages are to deter and punish.³ In short, the jury essentially is asked to make an impressionistic judgment about the amount of punishment to exact.

It follows from this that the standard for reviewing the amount of punitive damages should be substantially different from the standard that applies to sufficiency challenges to liability determinations. Because it is not possible to tell what facts (if any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may have been found, application of a sufficiency-of-the-evidence standard (as the district court did here) would result in deference being given to what are in reality phantom factual determinations. This concern is not merely

³ For example, the jury in this case was instructed only that "there is no measure except what it takes in the totality of circumstances to accomplish the purpose of punishment and deterrence." Tr. 1553. (All references to "Tr. ____" are to the transcript of the trial, which is contained in Document No. 208.)

hypothetical. In most cases in which a large punitive award is imposed against a wealthy company, the plaintiff's counsel argues both that the conduct was egregious and that the punitive damages must be significant in relation to the defendant's net worth (or some similar measure of wealth) in order to accomplish the deterrent function.⁴ It is impossible to tell from the mere fact that the jury returned a multi-million dollar punitive verdict whether the jury actually accepted any of the inferences urged on it by the plaintiff's counsel or instead believed that, in view of the vastness of the defendant's financial resources, a multimillion dollar award constituted modest punishment for conduct of modest reprehensibility.

In sum, under both *BMW* and *Cooper Industries*, it could not be clearer that reviewing courts have an obligation to independently gauge the degree of reprehensibility of the defendant's conduct. Because the district court abdicated that responsibility here, reversal is required so that it can perform that function in the first instance.

⁴ This case is no exception. Plaintiffs' counsel asserted during closing argument that Metabolife's revenues exceeded \$500 million per year and that a punishment in the range of one to ten percent of that was necessary "to get the attention [of] the powers that be in San Diego, California." Tr. 1485, 1527. In view of that exhortation, there is no basis for assuming that, in choosing to impose an aggregate punishment of \$3.1 million (a figure below the bottom of the range suggested by plaintiffs' counsel), the jury regarded Metabolife's conduct to be especially reprehensible.

B. The District Court Erred In Holding That A 9:1 Ratio Is Per Se Constitutional.

As previously noted, in applying the second *BMW* guidepost the Supreme Court has deemed “instructive” the double (1:1), treble (2:1), and quadruple (3:1) damages remedies that have been a hallmark of Anglo-American jurisprudence for over 700 years, reiterated that a ratio of 4:1 may be “close to the line of constitutional impropriety,” and admonished that, when compensatory damages are substantial, a punitive award that is no greater than the plaintiff’s actual damages may be the maximum constitutionally permissible. *State Farm*, 123 S. Ct. at 1524.

The court below ignored all of this, instead focusing exclusively on the Supreme Court’s statements that ““few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process”” and that ““[s]ingle-digit multipliers are more likely to comport with due process”” than the 500:1 and 145:1 ratios involved in *BMW* and *State Farm*. 259 F. Supp. 2d at 1230-31 (emphasis omitted) (quoting *State Farm*, 123 S. Ct. at 1524). The district court drew from these statements the proposition that “a multiplier of 9 or less means that the punitive damages presumptively passes [sic] muster under the Due Process Clause” (*id.* at 1231) and therefore upheld without further scrutiny the three punitive awards in this case that were less than ten times the corresponding compensatory awards, while

reducing a fourth punitive award to exactly nine times compensatory damages (*id.* at 1231, 1235).⁵ This approach is fundamentally inconsistent with *State Farm*.

Although the Supreme Court properly declined in *State Farm* “to impose a bright-line ratio which a punitive damages award cannot exceed” (123 S. Ct. at 1524), its discussion of the second guidepost nonetheless suggests a framework that appellate courts profitably can use in providing further guidance to trial courts. Under this framework, the permissible range of ratios generally is a function of two variables — the degree of reprehensibility of the conduct and the economic value of the injury (*i.e.*, compensatory damages) or potential injury to the plaintiff (in cases of thwarted intentional torts). The permissible range of ratios is directly related to the former and inversely related to the latter. In other words, for any particular degree of reprehensibility, as the compensatory award (or potential harm) increases, the permissible range of ratios decreases. And for any particular amount of compensatory damages, the lower on the reprehensibility spectrum the conduct falls, the lower the constitutionally permissible ratio.

⁵ The court indicated that a fifth punitive award that was 25 times the associated \$1,000 compensatory award was “automatically suspect” under the 9:1 rule (259 F. Supp. 2d at 1231), but wound up entering judgment on that award without explanation.

Beyond this general framework, the following more specific guidance fairly can be discerned from the Court’s discussion of the ratio guidepost and other pre- and post-*State Farm* case law.

First, as the district court correctly recognized, ratios in excess of 9:1 are presumptively unconstitutional. *State Farm*, 123 S. Ct. at 1524. Such ratios generally will be permissible only if the compensatory damages are “small” and the degree of reprehensibility of the conduct is “particularly egregious.” *Id.*⁶ Although there may be room for debate as to the meaning of “small,” it surely is the case that, once compensatory damages reach five figures, ratios of double digits (or higher) become highly suspect. *See Jones v. Sheahan*, 2003 WL 22508171, at *16 (N.D. Ill. Nov. 4,

⁶ A recent example is *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), in which the Seventh Circuit upheld two \$186,000 punitive awards that were 37 times the \$5,000 compensatory awards. The court did so because the defendant’s conduct — knowingly allowing a bedbug infestation in a hotel “to reach farcical proportions”; renting rooms that, as a result of the infestation, had been placed on “[d]o not rent” status; failing to warn customers; and instructing desk clerks to call the bedbugs “ticks” (on the misguided theory that the customers would be less alarmed) — “was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional.” *Id.* at 675, 677.

Of course, when the compensatory damages are nominal or *de minimis*, higher ratios may be permissible even in the absence of high reprehensibility because of the likelihood that the wrongdoer would expect to escape liability altogether in such circumstances. *See, e.g., St. Louis, I.M. & S. Ry. v. Williams*, 251 U.S. 63 (1919) (upholding statutory penalty of \$75 in case in which plaintiff’s actual damages were 66¢).

2003) (stating in civil rights case in which injured prisoner was awarded \$25,000 in compensatory damages that “this case does not strike us as one where compensatory damages are so low that a double-digit multiplier of punitive damages might be permissible”).

Importantly, the fact that a higher ratio is permissible when compensatory damages are small does not mean that the sky is the limit. Courts remain obliged to “ensure that *the measure of punishment*” — *i.e.*, the absolute amount of punitive damages — is “reasonable” in terms of both the degree of reprehensibility of the conduct and the extent of the harm to the plaintiff. *State Farm*, 123 S. Ct. at 1524 (emphasis added). *See, e.g., Lincoln v. Case*, 340 F.3d 283 (5th Cir. 2003) (reducing \$100,000 punitive award to \$55,000 where compensatory damages were \$500).

Second, when the conduct is highly reprehensible and the compensatory damages are relatively modest (but not “small”) — say, perhaps, in a range of \$10,000 to \$200,000 — a ratio between 4:1 and 9:1 may be constitutionally permissible. Again, where the constitutional maximum falls will vary with the degree of reprehensibility of the conduct and the amount of compensatory damages. For example, a 9:1 ratio might be permissible for reprehensible conduct causing \$50,000 of damages, but might be excessive for similar conduct causing \$200,000 in damages.

See, e.g., *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570 (Or. Ct. App. 2003) (reducing ratio from 10:1 to 4:1 where compensatory damages were approximately \$100,000).

Third, ratios of 2:1 to 4:1 generally will be the outside limit when either (i) the compensatory damages are relatively modest and the conduct is no more egregious than the conduct involved in *State Farm* or (ii) the compensatory damages are “substantial” and the conduct is determined to be materially more reprehensible than the conduct involved in *State Farm*. See *State Farm*, 123 S. Ct. at 1524 (noting that “long legislative history” of double, treble, and quadruple damages was “instructive” and referencing its conclusion in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), that the 4:1 ratio in that case “might be close to the line of constitutional impropriety”).⁷

A recent example of the first kind of case that would permit a ratio in the range of 2:1 to 4:1 is *Johnson v. Ford Motor Co.*, 2003 WL 22794432, at *7 (Cal. Ct. App. Nov. 25, 2003). *Johnson* involved an alleged intentional violation of the state lemon

⁷ There is, of course, no clear demarcation between “modest” and “substantial” compensatory damages, but a good benchmark may be \$200,000. That was the amount of compensatory damages in *Haslip*. See 499 U.S. at 7 n.2. The conduct at issue in *Haslip* was highly reprehensible — an insurance agent’s pattern of criminal fraud perpetrated against vulnerable health insurance policyholders. *Id.* at 13-14. The Court nonetheless deemed the 4:1 ratio in that case to be “close to the line.” *Id.* at 23. *Haslip* thus comfortably fits within the framework discussed in text: it is a case in which the compensatory damages were “substantial” and the conduct was materially more reprehensible than the conduct in *State Farm*, thus warranting a ratio of up to 4:1.

law — conduct that fairly can be said to be less egregious than the conduct in *State Farm*. The California Court of Appeal held that the constitutional maximum punishment in *Johnson* was three times the \$17,811.60 compensatory award. *See also Jones*, 2003 WL 22508171, at *21 (reducing ratios from 10:1 and 20:1 to 2:1 and 4:1 where compensatory damages were \$25,000 and conduct involved deliberate indifference, but not intentional malice).

A recent example of the second kind of case in which a ratio in the range of 2:1 to 4:1 might be permissible is *Romo v. Ford Motor Co.*, ___ Cal. Rptr. 2d ___, 2003 WL 22784959, at *14 (Cal. Ct. App. Nov. 25, 2003), in which the same court that decided *Johnson* held a punishment of three times the \$4,574,429 in compensatory damages to be “constitutionally reasonable” for what it considered to be extremely reprehensible conduct that resulted in the deaths of the plaintiffs’ parents and brother). *See also Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736 (Cal. Ct. App. 2003) (reducing ratio from 33:1 to 3.9:1 where compensatory damages were \$258,570 and four of the five hallmarks of reprehensibility identified in *State Farm* were present).

Taken together, these four recent cases well illustrate the circumstances in which a ratio of 2:1 to 4:1 may be constitutionally permissible.

Fourth, when compensatory damages are substantial and the conduct is comparable to or less egregious than the “reprehensible” conduct involved in *State Farm*, lower ratios — 1:1 or lower — will be the most that is constitutionally permissible. *See State Farm*, 123 S. Ct. at 1526, 1521 (strongly suggesting that “a punitive damages award at or near the amount of compensatory damages” was the most that constitutionally could be permitted for intentionally deceitful conduct that it freely acknowledged was “reprehensible”).⁸

Finally, one additional refinement is necessary for cases like this one in which a single course of conduct is alleged to have caused injury to multiple victims. In such circumstances, there is a grave risk of excessive aggregate punishment unless the ratio of punitive to compensatory damages in each individual case is sharply controlled. For example, in this case plaintiffs introduced evidence of some 13,000 “adverse event reports” and harped on that figure during closing arguments (Tr. 1520). Assuming for

⁸ Indeed, when compensatory damages reach into the multiple millions of dollars, a ratio of far less than 1:1 may be the constitutional maximum. *See, e.g., Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446 (3d Cir. 1999) (reducing ratio of slightly greater than 1:1 to 1:48 where compensatory damages were \$48 million). This recognizes the principle reiterated in *State Farm* that large compensatory damages have a substantial deterrent effect in their own right. *State Farm*, 123 S. Ct. at 1524-25; *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (“deterrence * * * operates through the mechanism of damages that are *compensatory*”) (emphasis in original); *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”).

the sake of illustration that each of the subjects of an adverse event report were to bring his or her own suit and recover \$100,000 in compensatory damages (a conservative assumption in light of the \$500,000 award to Mrs. McClain and the \$200,000 award to Mrs. Franks), the total compensatory damages would reach \$1.3 billion. Hence, a ratio as low as 1:1 would have the effect of producing an aggregate punitive award in excess of \$1 billion.

In *State Farm*, the Supreme Court made clear that plaintiffs in individual cases may not seek to enhance their punitive awards by reliance on evidence of harm to nonparties because “[p]unishment 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.” 123 S. Ct. at 1523. That same concern about excessive multiple punishment compels the conclusion that, when there is a serious prospect of successive punishments, each individual punishment be set at a materially lower multiple of compensatory damages than if the conduct at issue injured only one or a small number of victims.

It is no answer to say that the prospect of excessive aggregate punishment can be dealt with by reducing or eliminating future punitive awards. In the first place, as Judge Friendly recognized years ago, it is unrealistic to expect a court in some other jurisdiction to reduce or vacate the punitive award won by a local plaintiff on the

ground that some plaintiff in another state already has “stripped th[e] cupboard bare.” *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967). *See also* *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1235-36 (D.N.J. 1989); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 478 (N.J. 1986).

Moreover, many jurisdictions do not allow courts reviewing awards for excessiveness to consider evidence that was not introduced at trial. *See, e.g.,* *Stevens v. Owens-Corning Fiberglas Corp.*, 49 Cal. App. 4th 1645, 1661-62 (1996); *Kochan v. Owens-Corning Fiberglas Corp.*, 610 N.E.2d 683, 697 (Ill. App. Ct. 1993); *Davis v. Celotex Corp.*, 420 S.E.2d 557, 564-66 (W. Va. 1992). At the same time, most courts treat requests for bifurcation as being within the virtually unfettered discretion of the trial court. When a trial court denies bifurcation, the defendant that wishes to get “credit” for prior punitive judgments is placed in the untenable position of having to inform the jury about those judgments before it even has been found liable. And even if bifurcation is granted, it is wholly unpredictable what use juries might make of such evidence; they could, for example, use it as a benchmark for their own award — or, worse, a justification for imposing a still higher one.

The only fair solution, therefore, is to require that *each* punitive award be a sufficiently modest percentage of compensatory damages so that, if it were replicated in every case, the resultant aggregate award would not be excessive. In the context of

this case, we submit, that means that the punitive awards surely should not exceed the amount of compensatory damages and very likely should be considerably lower.

CONCLUSION

Assuming that the Court does not reverse the judgment on other grounds, it should (i) hold that, under the circumstances of this case, the punitive awards cannot exceed the amount of the corresponding compensatory awards and (ii) remand to the district court to render an independent factual determination as to the degree of reprehensibility of Metabolife's conduct and, on the basis of that determination, to decide the constitutional maximum amount of punitive damages between \$0 and the amount of the compensatory awards.

Respectfully submitted,

Robin S. Conrad
National Chamber Litigation Center
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Evan M. Tager
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3240

December 19, 2003

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that – according to the word-count facility of WordPerfect 9.0, the program used to draft this brief – the foregoing brief contains 4443 words (excluding those portions excluded under Rule 32(a)(7)(B)(iii)), and therefore complies with the type-volume limitation contained in Rule 29(d).

Evan M. Tager

CERTIFICATE OF SERVICE

I certify that, on December 19, 2003, I served one copy of the foregoing Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Appellant by overnight courier on each of the following:

Robert B. Roden
Shelby, Roden & Cartee
29565 Rhodes Circle
Birmingham, AL 35205

A. David Fawal
Law Offices of Archie Lamb
2017 Second Ave., North #200
Birmingham, AL 35203

David E. Oglesby
Bouloukos & Oglesby
2017 Second Ave., North
Birmingham, AL 35203

Edward G. Bowron
John P. Kavanagh, Jr.
Bowron, Latta & Wasden, P.C.
Colonial Bank Center, Suite 400
41 West I-65 Service Road, North
Mobile, AL 36608

Cavender C. Kimble
Balch & Bingham, L.L.P.
1710 Sixth Avenue North
Birmingham, AL 35201

I further certify that, on December 19, 2003, I directed that the original and six copies of the foregoing Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Appellant be sent by overnight courier for filing to the Clerk of this Court and that a copy was filed electronically by Internet upload on December 19, 2003.

Evan M. Tager