

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

No. 97-8726

**CHERYL MALOOF JOHANSEN, et al.
Plaintiffs/Appellees/Cross-Appellants**

v.

**COMBUSTION ENGINEERING, INC.
Defendant/Appellant/Cross-Appellee**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA**

BRIEF FOR THE APPELLANT

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**CERTIFICATE OF INTERESTED PARTIES AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1, the following is an alphabetical list of the trial judge, attorneys, persons, firms, partnerships, and corporations with any known interest in the outcome of this appeal:

ABB AB, 50% owner of ABB Asea Brown Boveri, Ltd.

ABB AG, 50% owner of ABB Asea Brown Boveri, Ltd.

ABB Asea Brown Boveri, Ltd., Parent of Asea Brown Boveri, Inc.

Asea Brown Boveri, Inc., Parent of Combustion Engineering, Inc.

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Johansen v. Combustion Engineering, Inc.

No. 97-8726

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No. 97-8726

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STATEMENT REGARDING ORAL ARGUMENT

In *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), the Supreme Court identified three guideposts for lower courts to use in determining whether punitive damages awards are unconstitutionally excessive. To our knowledge, this Court has not yet had the opportunity to apply those guideposts. The present case, which was remanded for further consideration in light of *BMW*, presents the Court with that opportunity. Because the case is, in that sense, one of first impression in this Circuit and because it can fairly be predicted that the district courts within this Circuit will regularly be confronted with the task of reviewing large punitive awards, we submit that oral argument is appropriate and would be beneficial to the Court.

CERTIFICATE OF TYPE SIZE AND STYLE

This Brief is composed in 14 point Times New Roman.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1332. The trial court entered interlocutory judgments on June 16, 1994, which it certified as final pursuant to Fed. R. Civ. P. 54(b). After this Court affirmed the judgments, the U.S. Supreme Court vacated this Court's judgment and remanded for further consideration in light of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). This Court in turn remanded to the district court, which ordered a remittitur of the punitive damages and entered judgments on June 9, 1997 and an amended judgment with respect to one of the plaintiffs on July 8, 1997. Combustion Engineering filed a notice of appeal on July 8, 1997 and an amended notice on August 5, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether punitive damages of more than \$4 million are excessive when the conduct being punished was found to be of low reprehensibility, and the punitive award is 100 times actual damages and more than 400 times the penalty assessed by state environmental regulators for the same conduct.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

This is a nuisance and trespass case brought by owners of property downstream from a former mine site against the owner of the site, Combustion Engineering, Inc. (“CE”). The plaintiffs alleged that acidic water has escaped from the site, damaging streams that run through their properties. The jury awarded the plaintiffs an aggregate of \$47,000 in compensatory damages and \$45 million in punitive damages. The trial court ordered a remittitur of the punitive damages to \$15 million. During the pendency of CE’s appeal from the judgments, CE reached a settlement with three of the plaintiffs, leaving \$43,500 in compensatory damages and \$12 million in punitive damages at issue in the appeal.

After receiving briefs and hearing argument, this Court affirmed the judgments without opinion. CE then filed a petition for a writ of certiorari challenging the punitive damages as unconstitutionally excessive. The Supreme Court granted that petition, vacated this Court’s judgment, and remanded for further consideration in light of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). This Court thereupon

remanded the case to the district court, which concluded that the \$15 million punitive exaction was indeed unconstitutionally excessive and reduced the punitive damages to \$4,350,000, representing 100 times the amount of the compensatory damages awarded to the plaintiffs remaining in the case. CE appealed from the district court's judgment, and plaintiffs then filed a cross-appeal.

B. Statement of the Facts

1. *Mining operations on Graves Mountain.* Graves Mountain is a unique geological formation (R9-205-206; R10-820) located in Lincoln County, Georgia. Beginning in the 1920s, Tiffany's mined the site for rutile, a substance used for polishing diamonds. R9-610-611. At some point thereafter (not specified in the record), Aluminum Silicates, Inc. began mining the site for kyanite, a mineral used to make heat-resistant products. R9-265. Sometime in the mid-1960s, Combustion Chemicals, Inc. was formed to purchase the site and conduct kyanite mining operations. *Id.* Combustion Chemicals was at all times a wholly-owned subsidiary of CE. R9-266.

Combustion Chemicals conducted mining operations until 1984, when it sold the property to Pasco Mining Company. R9-318; R10-936. Pasco operated the mine site until November 1, 1986, at which time the facility and all environmental responsibilities attendant to it reverted to Combustion Chemicals pursuant to the parties' 1984 contract. R9-319; R10-936-937. Combustion Chemicals never resumed mining

operations. R10-937. In 1990, it was merged into CE. R9-266. Because there is no dispute that CE is responsible for Combustion Chemicals' liabilities, we shall hereinafter refer to both entities as CE.

2. *The acidic water problem.* As with many industrial processes, the mining of kyanite has environmental consequences. At the time mining began, Graves Mountain was, in essence, a "big solid rock." R9-177. The kyanite was embedded within the rock. The mine operator would remove, crush, and process the rock in order to extract the kyanite. R9-176, 566. The operator would then deposit the remaining crushed rock, or "tailings," in containment areas, known as "tailings ponds." R9-176, 566-567. One of the minerals remaining in the tailings was pyrite. When rainwater falls on pyrite that has been exposed to oxygen, a chemical reaction takes place that renders the water more acidic. R9-177, 178, 682. Although most of the water on CE's property was collected and treated in a retention pond (R9-306, 370-371, 390, 565-573; R10-988-989), acidic water periodically seeped into streams that originated on CE's property and flowed through properties downstream.

Although the runoff from the mine site affected the quality of streams running through the neighboring properties (*see* R9-429, 431, 441, 446-447, 491-492, 498-499, 507-508, 509-511, 554-555, 581, 607-608, 649-650), the owners of those tracts rarely complained to CE during the close to 20 years that it conducted mining operations there. *See* R9-431-432, 447-448, 462, 472-473, 493-494, 520-521, 563, 607-608, 654.

See also R10-803 (trial court’s observations that “there were very few vocal and aggressive complaints, if any” and that “there does seem, in this evidence, to be a paucity of complaints up until the time that the lawsuits were conceived”). When owners of downstream properties did complain about escaping water, silt build-up or other problems, CE responded decisively to remedy those problems. R9-420, 436, 515-517, 520-521, 573; R10-1024. Indeed, when CE was aware of a problem, it moved to fix it even in the absence of complaints. *See, e.g.*, R9-376, 569-570.

3. *The reclamation of Graves Mountain.* When Pasco acquired the mine site from CE, it was required to submit to the Environmental Protection Division (“EPD”) of the Georgia Department of Natural Resources a plan for reclaiming the site. That plan, which estimated the cost of reclaiming the site at \$169,200 (*see* Ct. Exh. 1, at 3),¹ was approved by the EPD and was in effect at the time CE reacquired the property from Pasco (R10-940). Upon reacquiring the property, CE dismantled the mining facility pursuant to Pasco’s reclamation plan. R9-358, 375, 383-384; R10-937-938, 940-941, 969. CE then set about determining what other steps needed to be taken in order “to control any type of rainfall that would come on to the mountain.”

¹ Court Exhibit 1 is a composite of several documents. Unfortunately, the pages of this exhibit and several others are not numbered consecutively. Our page cites to all exhibits are derived by counting consecutively from the cover sheet of the exhibit.

R9-384. Accordingly, it “went about studying elevation and topo[graphic] maps to determine the drainage patterns.” *Id.*

CE also entered into discussions with the EPD for purposes of developing an amended reclamation plan “to reflect the conditions that [CE] found when [it] took the property back over.” R10-941. *See also* R9-382. At the same time, the University of Georgia (and others) were actively considering acquiring all or part of the property for scientific purposes. *See* P. Exh. 23, at 2-3. Because of its interest, the University specifically urged the EPD not to require reclamation of various portions of the property. For example, the mineralogy department indicated that it “want[ed] the mine area and the surrounding dump area left unscathed by any reclamation,” while the forestry and agriculture departments were “interested in the settlement pond area as a ‘severely stressed study area.’” *Id.* at 5. Ultimately, the University did not buy the property, and CE then developed and submitted a four-phase plan that went far beyond the plan submitted by Pasco and previously approved by the EPD. Ct. Exh. 1, at 30-42; R9-382-383.

The EPD approved CE’s reclamation plan in December 1988. Ct. Exh. 1, at 43; R9-383; R10-947. In its approval letter, the EPD indicated that it “appreciated [CE’s] prompt submittal of a formulated work schedule and a time frame in which to accomplish Phases I, II, III, and IV.” Ct. Exh. 1, at 43. The approval letter further indicated that the EPD “look[ed] forward to working with [CE] in restoring the Graves

Mountain site to an area that will be of increased value to [CE] and to future generations in Lincoln County.” *Id.*

As the district court found, both in conjunction with its implementation of the four-phase reclamation plan and subsequently, CE has “actively attempted to prevent acidic water from entering the streams emanating from its property.” R8-266-5. Specifically, since reacquiring the property from Pasco, CE has utilized berms, drains, a piping system, and a system of diversion ditches to channel surface water to the retention pond, where it is treated to bring it into compliance with state water quality standards. R9-288-289, 306-308, 331-332, 371, 373, 386-387, 388-389; R10-954-955, 966. The water is then discharged in a controlled fashion into a stream below the pond pursuant to a discharge permit issued by the EPD. R10-954, 966. The permit requires CE to monitor the discharges and to submit monthly reports to the EPD. R9-331, 371. *See also* R9-312.

Notwithstanding CE’s “active[.]” efforts (R8-266-5), acidic water has periodically seeped into the streams emanating from CE’s property. In particular, although the retention pond was engineered to the specifications applicable to facilities in this part of Georgia (R10-955), there were two unusually heavy rain events in 1992 in which substantial amounts of untreated water escaped from the pond. R9-307, 334-335, 337, 339-340; R10-955-956. On both occasions, CE immediately reported the escapes to the EPD (R9-335, 338, 339-340, 341-342; R10-955, 1212-1213; P. Exh. 10) and immediately undertook corrective actions (R9-340-341, 342; R10-955-957, 1213; P.

Exh. 10). The EPD specifically praised CE for its decisive action in response to the first of the two events. Ct. Exh. 1, at 61.

In addition to these one-time events, in late 1990 or 1991 CE discovered that there were small seeps coming from a tailings pond known as West Pond 1 and a second tailings pond, known as the pyrite pond. R9-289-290, 303-305; R10-950-951, 971, 1006, 1206, 1210.² Some time after suit was filed in August 1991, CE also discovered a seep on the north side of the property. R10-964-965, 972, 996-997. That part of the property contains some old tailings ponds that had been fully reclaimed and revegetated years earlier, well before mining ceased. *See* R9-308-309; R10-946, 965, 997-998.³

² The berm beneath West Pond 1 had leaked in 1976. At that time, CE rebuilt the core of the berm. For at least the remaining years during which CE operated the mining facility (1976-1984), the berm did not leak. R9-569-570. After CE began reclaiming West Pond 1 pursuant to the supplemental reclamation plan, it discovered a small hole in the side of the berm. R9-365-366. CE filled in that section of the berm with a backhoe. That corrective action plugged the leak. R9-366. As indicated in text, in late 1990 or 1991, CE discovered that the berm had developed a new leak.

³ At the time CE reacquired possession of the property from Pasco, the CE employee responsible for the reclamation effort walked the perimeter of the property and found no water on the north side. R9-372-373. When CE did discover that water was seeping from the north side of the property, the source was far from obvious. *See* R9-309; R10-

Roughly contemporaneously with the discovery of the seep from the pyrite pond, the EPD issued an administrative complaint against CE alleging that acidic water was escaping from the pyrite pond and that there had been a discharge of acidic water from the retention pond. R10-984-985. The complaint did not allege problems with either West Pond 1 or the north side of the property. CE immediately entered into discussions with the EPD, which ultimately resulted in a consent order dated September 6, 1991. R10-985-986.

Pursuant to the consent order, CE promptly submitted a plan for preventing acidic water from escaping from the property, redesigning the water treatment system and reclaiming the west side of the retention pond. Ct. Exh. 1, at 44-60; R10-951, 986-987. After receiving EPD approval on March 3, 1992 (*see* D. Exh. 55), CE set about implementing the plan. As promised in the plan, CE graded the pyrite pond, covered it with an impermeable high density polyethylene cap, covered that with topsoil, and began revegetation. It also built a limestone retention pond beneath the pyrite pond so as to catch any water that continued to seep from that pond. R9-303,

972. Once CE located the source of the seep, it began to work on plans to remedy the problem by piping the water from the area of the seep to the retention pond. R9-309, 311; R10-1205. As of the time of trial, the plans had been completed, but had not yet been submitted to the EPD for approval. R9-309-311.

315; R10-951-952, 974; Ct. Exh. 1, at 57. Finally, it installed a water diversion system, comprised of diversion ditches, checkdams, and detention ponds (R10-975; Ct. Exh. 1, at 46-56) and made improvements to the original retention pond in order to better control the discharges from that pond (R9-333-334; Ct. Exh. 1, at 57). In addition, although West Pond 1 was not the subject of any administrative charges and was not covered by the consent order, CE made several efforts to seal the berm at that pond so as to stop the seep. R10-1006, 1210.

The work on the pyrite pond slowed the seep considerably but did not stop it entirely. R10-952, 1005, 1209-1210, 1215. The efforts to stop the seep from West Pond 1 also were not entirely successful. R10-1210, 1215-1216. *See also* R9-305-306. Accordingly, CE developed a plan to install a piping system that would take the water from both the pyrite pond and West Pond 1 to the retention pond. R9-313; R10-952-953, 1210. That plan was submitted to the EPD in November 1992 and was approved in April 1993. R10-953; Ct. Exh. 1, at 72. Work began a week later and was in progress at the time of trial, with a scheduled completion date of July 1993. R10-953, 1205-1206. While work on the piping system was ongoing, CE also performed alterations to remove the standing water from the pyrite pond. R10-1005-1006. In short, as the district court found, “[a]t all times, Combustion cooperated with the Environmental Protection Division to deal with recurrent problems of acidic water discharge or seepage.” R8-266-6.

From the time it began dismantling the mining plant through June 1991, CE spent approximately \$700,000 in reclaiming the property. R9-389; R10-949-950. Between that time and April 1993, CE spent an additional \$633,000 on measures for preventing the escape of acidic water. R10-964. In addition, other measures were either in progress at the time of trial or were planned to commence after trial. *See* R9-309-311; R10-956-960, 1205-1206. The cost of the measures that were underway brought CE's total expenditures for reclamation of the site to approximately \$1.6 million as of the time of trial (R10-1205) — *i.e.*, nearly ten times the amount estimated in the Pasco plan that was approved by the EPD and inherited by CE..

4. *Prior proceedings.* The plaintiffs in this case were 23 individuals who owned a total of 16 tracts downstream from the CE property. R8-266-1. Very few of these individuals live on their property. *See* R9-399-400, 425-426, 497, 575, 641-643. Some do not use their property at all (R9-324, 328, 330), and several others have been to their property (or the streams on it) only rarely if at all over the past several years (R9-328, 422, 460-461, 463-464, 466). The plaintiffs who use their property do so for raising cattle (*see* R9-400, 432, 497, 551, 595, 643), storing junked cars (R9-433), hunting (R9-440, 483, 582-583), timbering (R9-445, 453, 461-462, 464-465, 470, 472, 488, 551, 576, 592, 595, 601-602, 615-616, 643), and growing hay (R9-489-490, 504, 584-585, 643).

From November 1986 (the time CE retook possession of the site) through August 1991, not a single one of the 23 plaintiffs felt sufficiently aggrieved about the escape of acidic water from the site to complain to CE. *See* R9-424, 431-432, 447-448, 462, 472-473, 493-494, 520-521, 563, 607-608, 654; R10-964, 989. *See also* R10-803. Nonetheless, several of them filed suit against CE in August 1991, alleging nuisance and trespass. Several others filed a similar suit in May 1992. After the two suits were consolidated, the remaining plaintiffs were added by motion.

The case was tried to a jury in a two-phase trial in which issues relating to punitive damages were decided separately from liability for the underlying torts and compensatory damages. Because Georgia has a four-year statute of limitations for trespass and nuisance, the parties were in agreement, and the jury was instructed, that the relevant time frame for damages purposes was the four-year period prior to the commencement of the plaintiffs' suits. R9-17, 55, 211, 325; R10-1166-1167, 1171-1172, 1173, 1179.

At trial the plaintiffs did not claim that the condition of the streams caused any personal injury, risk to human health, diminution in property value, damage to crops or animals, or other economic loss. *See* R9-329-330, 411-412, 428, 434-435, 443-445, 453, 461-462, 468, 471-472, 481, 488-490, 503-504, 553-554, 582-585, 594-596, 602, 608-609, 647, 652; R10-769. The only harms alleged by the plaintiffs were that the streams looked and smelled bad, that the streams no longer contained fish, and that

cows would not drink from the streams. *See* R9-403-404, 428-429, 435, 441, 452, 467, 478-480, 499, 501-502, 552, 554, 577, 644, 648-649. Significantly, the plaintiffs generally acknowledged that these harms were the result of the mining operations that had ceased in 1986, not the reclamation activities during the four-year statute-of-limitations period preceding the initiation of their lawsuits. R9-413-414, 429, 431, 441, 446-447, 491-492, 498-499, 507-508, 509-511, 554-555, 581, 607-608, 650. Indeed, several testified that conditions had improved since mining ceased. R9-435, 485-486, 504-505, 522-523, 562-563, 652. *See also* R10-1021-1022 (testimony of non-plaintiff neighbor). And, in fact, the documentary evidence reflected that the pH of the water on most of the plaintiffs' properties was well within state water quality standards. *See* P. Exh. 9, at 10, 25, 37, 42, 45; P. Exh. 12, at 3 (stations L-10 and L-11); P. Exh. 13, at 4 (samples 5 and 7); D. Exh. 45 (stations SW11, SW17, SW4, SW6, SW5, SW7, SW12, SW10, SW8, SW15, SW14).

In the first phase of the trial, the jury returned a total of 13 verdicts for compensatory damages in favor of the various plaintiffs in the combined amount of \$47,000. The 13 verdicts ranged from \$1,000 to \$10,000. The jury also awarded the plaintiffs litigation costs in the amount of \$227,000.

In the second phase of the trial, the plaintiffs put on evidence (over CE's objection) that CE's parent paid \$1.6 billion to purchase the stock of CE. R10-1198-1199. They also introduced (again over CE's objection) CE's balance sheet and

income statement for the years 1991 and 1992. R10-1200-1201. In addition, plaintiffs' expert testified that CE could have prevented the escape of acidic water from its property by expending an additional \$6 million. R10-1216-1217.

Having succeeded in putting into the record evidence of CE's wealth, out-of-state location, and foreign ownership (*see* R9-264-265; R10-1198-1199), plaintiffs' counsel proceeded to use that evidence to urge a large punitive exaction. Thus, during his punitive damages summation, he unabashedly appealed to the jury's bias against out-of-state companies, stating: "There is only one way to balance the scales, and that is to send them a message. Send them the message that *here in Georgia* we respect a person's rights and their property * * *." R10-1226 (emphasis added). In his rebuttal, plaintiffs' counsel emphasized CE's foreign ownership and urged the jury to punish CE on the basis of the wealth of its parent company or alternatively on the basis of CE's daily revenues:

You have heard the testimony about what *this European company* paid for this company in 1991, about two years ago. They paid one billion 600 thousand dollars. One percent of that is 16 million dollars.

* * * 16 million dollars in punitive damages to this company would be like a \$50 fine to most folks.

* * * [T]hey show total sales of two billion two hundred thousand dollars a year. In one day they have total sales of around 6 million dollars. While we sat here in this courtroom their sales at that rate would have been about 54 million dollars.

R10-1238-1239 (emphasis added). The jury responded to this appeal to bias against wealthy international corporations, imposing punitive damages in the astonishing amount of \$45 million.

The trial court denied CE's motion for judgment as a matter of law and rejected CE's contention that a new trial was warranted because the verdict was the product of passion and prejudice. However, the court did find that the \$45 million punitive award was "shock[ing]" and that, if sustained in full, it would "give[] the system a black eye." R12-108-109. The court subsequently entered an order granting a new trial unless the plaintiffs accepted a remittitur to \$15 million. The plaintiffs accepted the remittitur, and the court proceeded to enter 13 separate judgments for the various individual plaintiffs and groups of plaintiffs.

CE then appealed to this Court. During the pendency of the appeal, CE settled with three plaintiffs, leaving 10 judgments for an aggregate of \$43,500 in compensatory damages and \$12 million in punitive damages. This Court affirmed those judgments without opinion, whereupon CE petitioned for certiorari, contending, *inter alia*, that the punitive damages were unconstitutionally excessive. The Supreme Court held CE's petition during the pendency of *BMW*. After deciding *BMW*, the Court granted CE's petition, vacated this Court's judgment, and remanded the case to this Court for further consideration in light of *BMW*. This Court in turn remanded the case to the trial court.

After briefing and argument, the trial court issued an order concluding that the punitive damages remained unconstitutionally excessive. The court held that “it is absolutely clear * * * that the degree of reprehensibility in this case is not very severe” (R8-266-10), that “the aggregate ratio of 320:1 bears no reasonable relationship to the amount of harm or even potential harm suffered by Plaintiffs” (*id.* at 9), and that the aggregate punishment “is grossly disproportionate to the [administrative] penalties that Combustion has suffered or has come to expect” (*id.* at 11). Nonetheless, rather than either granting a new trial or cutting the punitive damages to a modest multiple of compensatory damages, the court inexplicably held that “a multiplier of 100 to each Plaintiff’s compensatory award is an appropriate assessment of the punitive damages award.” *Id.* The court accordingly entered judgments resulting in an astonishing aggregate punishment of \$4,350,000.

C. Standard of Review

As a general proposition, orders of a district court granting or denying remittiturs are reviewed for abuse of discretion. *Gasperini v. Center for Humanities*, 116 S. Ct. 2211, 2223-2224 (1996). However, to the best of our knowledge, neither this Circuit nor any other federal court of appeals has articulated the standard for reviewing a punitive award under *BMW*. Although we do not believe that the standard of review will affect the outcome of this case, we submit that the trial court’s greater familiarity with the evidence and proceedings below warrants reviewing its determination that the degree of reprehensibility of CE’s conduct was “not very severe” under

the deferential abuse-of-discretion standard. On the other hand, its bald conclusion that a punishment of 100 times the compensatory damages is not excessive implicates both the legal question whether a ratio that high is ever permissible where actual damages are more than nominal, which should be reviewed de novo, and the mixed fact-law question whether, if such a large ratio is ever proper, anything in the particular circumstances of this case can justify it here. In applying *BMW*, courts of appeals have considered even the latter question de novo, at least with respect to determining the outer boundary of permissible punishment. *See, e.g., EEOC v. HBE Corp.*, 1998 WL 25413, at *10-*11 (8th Cir. Jan. 27, 1998); *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 642-643 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1846 (1997).

SUMMARY OF THE ARGUMENT

1. The trial court was correct in concluding that the \$15 million remitted punishment was unconstitutionally excessive, but it was quite wrong in believing that a \$4.35 million aggregate punishment, amounting to 100 times the total compensatory damages, is permissible. To the contrary, the trial court's own application of the *BMW* guideposts demonstrates overwhelmingly that no punishment anywhere near \$4.35 million is appropriate or permissible in this case.

First, the trial court affirmatively found that the conduct in this case, like the conduct in *BMW*, is low on the reprehensibility scale. In particular, the court found that CE “did not act with intentional malice or cause physical injury”; that there is no

evidence that, during the relevant time period, CE “affirmatively engaged in prohibited conduct of any kind”; that CE “did not commit illegal acts, knowing or suspecting that the acts were illegal”; that CE “responded to any criticisms or penalties levied against it by the Environmental Protection Division in a positive, more aggressive manner”; and that “there is no evidence that Combustion is a recidivist that continually repeats certain misconduct.” R8-266-6-7. Instead, the court found, the punishable conduct was nothing more than CE’s “failure to do its absolute best to confront the problems on Graves Mountain.” *Id.* at 7. Assuming that the passive failure to do one’s “absolute best” warrants punishment at all, it surely is not the kind of egregious misconduct for which a penalty of \$4.35 million — or anywhere near that amount — is warranted.

Second, here, as in *BMW*, the aggregate punitive award set by the trial court bears no reasonable relationship to the compensatory damages. Although the Supreme Court indicated in *BMW* that ratios of up to 10:1 may be permissible when the conduct is especially egregious, when, as here, “it is absolutely clear” that the degree of reprehensibility of the conduct “is not very severe,” a ratio of even 4:1 would generally be viewed as excessive. Manifestly, the 100:1 ratio adopted by the trial court is unsustainable under *BMW*.

Third, the punishment chosen by the trial court is **435** times the amount of the fine set by the EPD for the precise conduct at issue in this case and **29** times the

largest fine *ever* imposed by that agency for any conduct. These comparisons confirm the excessiveness of the \$4.35 million exaction selected by the district court.

2. Because the \$4.35 million aggregate punishment is grossly excessive, the Court must determine an appropriate remedy. We submit that when the amounts paid by CE in settlement with the other plaintiffs are considered, it becomes obvious that CE already has been punished enough and that no additional punishment is needed. Accordingly, the Court should vacate the punitive damages in their entirety.

ARGUMENT

I. THE PUNITIVE DAMAGES ARE IMPERMISSIBLY EXCESSIVE

A. Application Of The Three *BMW* Guideposts Demonstrates That The \$4.35 Million Punishment Is Grossly Excessive.

BMW involved BMW of North America's policy of selling vehicles as new without disclosure of pre-sale damage if its cost of repairing that damage did not exceed 3% of the vehicle's suggested retail price. An Alabama doctor who had purchased a car that had been refinished by BMW, but at a cost less than the 3% threshold, sued BMW alleging fraud. The jury awarded \$4,000 in compensatory damages and imposed \$4 million in punitive damages. The Alabama Supreme Court cut the punishment in half, but the U.S. Supreme Court held that even the \$2 million remitted award was unconstitutionally excessive.

The Court began by noting that a punitive damages award violates the requirements of due process if it is excessive in relation to the governmental interests in retribution and deterrence that justify the imposition of punishment. 116 S. Ct. at 1595. In addition, it explained, “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the severity of the penalty that a State may impose.” *Id.* at 1598.

The Court then identified three “guideposts” for assessing whether a punishment is excessive. The first and “[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” *Id.* at 1599. “The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.” *Id.* at 1601. And the third factor identified by the Court is the size of civil and criminal penalties applicable to the same or comparable misconduct. *Id.* at 1603.

Applying these factors, the Court concluded that the \$2 million punitive award was grossly excessive and remanded the case to the Alabama Supreme Court to determine a remedy. The Alabama Supreme Court in turn ordered the punitive damages reduced to \$50,000. *BMW of North America, Inc. v. Gore*, 701 So. 2d 507 (1997).

A similar result is required here. Although the district court properly examined each of the three *BMW* guideposts in this case, it inexplicably imposed a punishment

that cannot be squared with its own analysis. Neither case law nor common sense justifies a 100:1 ratio of punitive to compensatory damages when, as here, the trial court has expressly concluded that “it is absolutely clear * * * that the degree of reprehensibility [of the defendant’s conduct] is not very severe” (R8-266-10).

1. *The degree of reprehensibility of the conduct.* One of the most significant aspects of the *BMW* decision is the Supreme Court’s explicit reminder that not every punishable act is “sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.” 116 S. Ct. at 1599. Rather, there is a spectrum of misconduct, and deeply entrenched concepts of fairness dictate that “punitive damages may not be grossly out of proportion to the severity of the offense.” *Id.* (internal quotation marks and citation omitted). That principle has especial force here.

As the district court correctly concluded, under Georgia law (and the law of the case) CE could be punished only for conduct occurring in the four years that preceded the filing of plaintiffs’ complaint. R8-266-5. That entire period was after mining operations ceased and after the damage to the streams took place. *See* R9-413-414, 429, 431, 441, 446-447, 491-492, 498-499, 507-508, 509-511, 554-555, 581, 607-608, 650. As the trial court found, during the relevant time period CE’s tort was purely passive — failure to act more quickly and aggressively to prevent acidic water from escaping into the streams that eventually flowed through the plaintiffs’ properties.

That tort is one of the least reprehensible for which punitive damages can be imposed (assuming for present purposes that they could properly be imposed at all for that tort); it comes nowhere near justifying even the \$2 million punishment that the Supreme Court regarded as “tantamount to a severe criminal penalty” in *BMW* (116 S. Ct. at 1604), let alone a sanction over more than twice that amount.

Here, as in *BMW*, “none of the aggravating factors associated with particularly reprehensible conduct is present.” *Id.* at 1599. To begin with, as the district court noted, there was no actual or threatened physical injury. R8-266-6-7. Indeed, this case (unlike *BMW*) does not involve even economic loss. The plaintiffs made no claim of diminution in property value and conceded that the escape of acidic water from CE’s property caused no damage to crops or livestock. The only harm caused by CE’s tort was the plaintiffs’ diminished enjoyment of their properties, which the jury valued at \$47,000 (or, in the case of the non-settling plaintiffs, \$43,500). Although we do not mean to denigrate the plaintiffs’ right to enjoy their properties, the jury’s low valuation of their actual harm reflects that, among environmental torts, this was not an egregious one.

What is more, like *BMW* and unlike the petitioner in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), CE did not act with “intentional malice.” R8-266-6-7. There is not one stitch of evidence in this record that CE made a deliberate decision to allow acidic water to escape into the streams that flow through

the plaintiffs' properties. Indeed, the district court specifically observed that "[t]he evidence does not suggest that Combustion affirmatively engaged in prohibited conduct of *any kind* after it reacquired the property." *Id.* at 7 (emphasis added). Even plaintiffs' highly partisan expert conceded that CE "might just have a careless disregard" and specified that he "wasn't implying intent here." R10-750.

The district court found that "there is no direct evidence of specific intent to cause harm in the record of this case" and that the jury must have inferred intent from a finding of deliberate indifference. R8-266-6. Yet, as the court also suggested, such an inference is not reasonable. Far from being deliberately indifferent, CE "had actively attempted to prevent acidic water from entering the streams emanating from its property," although its efforts "were not entirely successful." *Id.* at 5-6. The court specifically found that reclamation "is a process of trial and error in which Combustion has been *actively* involved." *Id.* at 7 (emphasis added).

The EPD has monitored the reclamation of the mine site continuously since CE took over the property from Pasco. *See* R9-382-383; R10-941; P. Exh. 9, 23, 39; D. Exh. 55; Ct. Exh. 1. During that time, the EPD has seen fit to charge permit violations on only a single occasion; on several other occasions, it took the initiative to praise CE for its cooperation and responsiveness. *See* Ct. Exh. 1, at 43, 61, 70. There is no evidence that CE ever attempted to mislead the EPD or deliberately violated either the

conditions of its discharge permit or any affirmative mandate by the EPD. On the one occasion when CE was cited for a violation of its permit, it did the responsible thing and immediately entered into a consent order with the EPD pursuant to which it undertook a host of corrective measures. The record reflects that CE kept its obligations under the consent order (*see* pages 8-9, *supra*), and there is no evidence that the EPD has been dissatisfied with CE's performance under the order, let alone reached the conclusion that CE has acted in bad faith. To the contrary, the district court expressly found that CE "responded to any criticisms or penalties levied against it by the [EPD] in a positive, more aggressive manner." R8-266-7.

Finally, as in *BMW*, "the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive * * *." 116 S. Ct. at 1601. *See* R8-266-7. Nor, unlike in *TXO*, is there evidence here that CE's failure to prevent the escape of acidic water on Graves Mountain was part of a larger pattern of inattention to environmental concerns.

At the end of the day, *the very worst* that can be said of CE's conduct is that it involved "the failure *to do more*" to prevent *any possible harm* to the plaintiffs' property. R8-266-6 (emphasis added). That is hardly conduct worthy of a \$4.35 million punishment. To the contrary, the Eighth Circuit, in an opinion by retired Justice Byron White, has expressed the view that punitive damages are not constitutionally permissible *at all* where the defendant's tort was "the 'merely objectionable' act of

‘undertak[ing] a less costly alternative to remedy a perceived problem before moving to a more expensive [solution].’” *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 660 n.19 (1995) (quoting *Burke v. Deere & Co.*, 6 F.3d 497, 512 (8th Cir. 1993)).

In sum, what the Supreme Court said in *BMW* applies equally here: “That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award.” 116 S. Ct. at 1601. Because not a single indicium of reprehensibility articulated in *BMW* or *TXO* is present here — and indeed the trial court has expressly concluded that it is “absolutely clear” that the degree of reprehensibility “is not very severe” (R8-266-10) — it is manifest that CE’s conduct does not involve “the high degree of culpability that warrants a substantial punitive damages award.”

2. ***The ratio of punitive to actual damages.*** In *BMW*, the Supreme Court endorsed the principle that punitive damages must bear a “reasonable relationship” to compensatory damages (116 S. Ct. at 1601) and specifically equated that requirement with the double, treble and quadruple damages remedies that prevailed under early English law and that remain a hallmark of federal remedial statutes (*id.* at 1601 & n.33). It reiterated that, in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) — a case of intentional fraud — it had found a ratio of slightly more than 4:1 to be “close to the line.” 116 S. Ct. at 1602. And it clarified that in *TXO* — a case involving “intentional

malice” (*id.* at 1599) — the comparison was between punitive damages and potential harm and that the relevant ratio therefore was “not more than 10 to 1” (*id.* at 1602).

Although eschewing the notion that there is a “simple mathematical formula” for determining whether a punitive award is unconstitutionally excessive (*id.*), the *BMW* Court concluded that, whether viewed as 500 times the plaintiff’s compensatory damages or 35 times the total damages of all 14 Alabama consumers who purchased refinished BMWs, the \$2 million punitive award failed the ratio test. *Id.* at 1602-1603 & n.35; *id.* at 1606 (Breyer, J., concurring) (“[t]o find a ‘reasonable relationship’ between purely economic harm totaling \$56,000, without significant evidence of future repetition, and a punitive award of \$2 million is to empty the ‘reasonable relationship’ test of meaningful content”); *id.* at 1608 (“[a] punitive damages award of \$2 million for intentional misrepresentation causing \$56,000 of harm is extraordinary by historical standards, and, as far as I am aware, finds no analogue until relatively recent times”).

Here, the district court held that “[c]ertainly * * * the aggregate ratio of 320:1 bears no reasonable relationship to the amount of harm or even potential harm suffered by Plaintiffs” and specifically observed that there was no significant amount of potential harm because “Combustion has made and continues to make reasonable efforts to minimize acidic water pollution with some success.” R8-266-9. The court noted that, even in *TXO*, which “involved conduct amounting to intentional fraud, the

relevant ratio was not more than 10:1,” and observed that here, in contrast to *TXO*, “it is absolutely clear * * * that the degree of reprehensibility * * * is not very severe.” *Id.* at 9-10. It concluded that CE’s conduct “does not support a punitive award that is 320 times more than the compensatory damages.” *Id.* at 10.

Nevertheless, the district court did *not* choose the 10:1 ratio from *TXO* that it seemed to think was an appropriate benchmark (for conduct that was unquestionably more reprehensible than CE’s passive failure to prevent the escape of acidic water from its property). Instead, without a word of explanation, it held that a multiplier of 100 would constitute appropriate punishment. *Id.* at 11.

The choice of a 100:1 ratio cannot be squared with *BMW*, which, after all, found a ratio of 35:1 to be a strong indication of excessiveness. Nor can it be squared with the numerous cases decided after *BMW* that have refused to allow ratios of that magnitude (or anywhere near it) to stand.

For example, based on its reading of *BMW*, the Tenth Circuit has expressly concluded that “in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio.” *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 639 (10th Cir. 1996) (reducing punitive award that was 15-30 times the potential and actual harm to an amount that was 3-6 times that aggregate harm), *cert. denied*,

117 S. Ct. 1846 (1997). Moreover, that court has noted, “even a 10:1 ratio will be unconstitutionally excessive in a broad range of cases” in which, as here, the degree of reprehensibility is low. *F.D.I.C. v. Hamilton*, 122 F.3d 854, 861 (10th Cir. 1997) (reducing 27:1 ratio to 6:1). *See also Groom v. Safeway, Inc.*, 973 F. Supp. 987, 995 (W.D. Wash. 1997) (noting that “[t]he Supreme Court has suggested that a ratio of 10-to-1 might be close to the limit” and ordering a 150:1 ratio reduced to 10:1). The Fifth Circuit has gone even further, striking down a punitive award that was 6½ times the compensatory damages and emphasizing the Supreme Court’s statement that a ratio of 4:1 is “close to the line.” *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 767 (1997).

Numerous other courts have similarly refused to countenance punitive awards that were more than a modest multiple of the actual and/or potential injury. *See, e.g., EEOC v. HBE Corp.*, 1998 WL 25413 (8th Cir. Jan. 27, 1998) (43:1 ratio reduced to just over 4:1); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1067-1068 (8th Cir. 1997) (70:1 ratio reduced to 3:1); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 576-578 (8th Cir. 1997) (140:1 ratio reduced to 10:1); *Lawyer v. 84 Lumber Co.*, 1997 WL 827395 (N.D. Ill. Nov. 25, 1997) (5:1 ratio reduced to 3:1); *Kim v. Dial Serv. Int’l*, 1997 WL 458783, at *15, *16 (S.D.N.Y. Aug. 11, 1997) (30:1 ratio reduced to 1:1); *Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403, 415 (S.D.N.Y. 1996) (10:1 ratio reduced to 2:1); *Florez v. Delbovo*, 939 F. Supp. 1341, 1348, 1349 (N.D. Ill. 1996) (15:1 ratio reduced to 5:1); *Utah Foam Prods. Co. v. Upjohn Co.*, 930 F.

Supp. 513, 527, 532 (D. Utah 1996) (18:1 ratio reduced to 2:1); *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194, 201-202 (E.D. Pa. 1996) (10:1 ratio reduced to 1:1), *rev'd on other grounds*, 113 F.3d 476 (3d Cir. 1997); *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760, 785-786, 787 (N.D. Ind. 1996) (13:1 ratio reduced to 3:1); *Talent Tree Personnel Servs. v. Fleenor*, 1997 WL 566228 (Ala. Sept. 13, 1997) (10:1 ratio reduced to 5:1); *American Pioneer Life Ins. Co. v. Williamson*, 1997 WL 545880, at *7, *8 (Ala. Sept. 5, 1997) (8:1 ratio reduced to 3:1); *Life Ins. Co. of Georgia v. Johnson*, 701 So. 2d 524 (Ala. 1997) (60:1 ratio reduced to 12:1 where conduct was highly reprehensible); *Grynberg v. Citation Oil & Gas Corp.*, 1997 WL 678172, at *9, *11 (S.D. Oct. 22, 1997) (13:1 ratio reduced to 3:1); *Apache Corp. v. Moore*, 1997 WL 428875, at *3, *4 (Tex. Ct. App. July 31, 1997) (185:1 and 92:1 ratios reduced to 4:1); *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67 (Wis. 1996) (27:1 ratio reduced to 10:1). *See also In re Taylor*, 1997 Bankr. LEXIS 1322, at *8 (Bankr. E.D. Cal. June 25, 1997) (emphasizing “the backdrop of a legal tradition that routinely authorizes treble damage awards” and choosing a punitive award of four times compensatory damages); *In re Arnold*, 206 B.R. 560, 569 (Bankr. N.D. Ala. 1997) (observing that outer limits of either 4:1 or 10:1 may be appropriate depending on the circumstances, but imposing punitive award that was between two and three times the compensatory damages).

This tidal wave of precedent confirms that the 100:1 ratio selected by the trial court is unsustainably high, particularly given the court’s conclusion that “it is absolutely clear” that the degree of reprehensibility of CE’s conduct “is not very severe.” R8-266-10.

3. *Fines for comparable misconduct.* The final guidepost identified by the Supreme Court is the civil and criminal penalties applicable to comparable misconduct. 116 S. Ct. at 1603. This factor is significant because of the expertise and perspective that legislatures and administrative agencies have in setting punishments. *Id.* It is significant as well because the civil and criminal penalties for comparable misconduct shed light on whether the defendant had fair notice that it could be subject to a penalty in the amount of the punitive judgment. *Id.*

The district court specifically rejected plaintiffs’ contention that the appropriate comparison for purposes of this guidepost is with the theoretical maximum punishment that could have been imposed upon CE had it been engaged in the most egregious violation of Georgia’s environmental statute every day for the four-year damages period — \$146 million. Instead, the court held, “[i]t is more reasonable to assess the actual conduct of the defendant that is subject to punishment” and to give deference to the administrative agency empowered to actually impose the applicable fines. R8-266-10-11.

Here, the EPD imposed a \$10,000 fine for the very conduct at issue. Moreover, the largest fine it has ever imposed for any violation of Georgia’s environmental laws

has been \$150,000. *Id.* at 11 & n.8. As the district court correctly recognized, the \$15 million punitive judgment before the court was “grossly disproportionate to the penalties that Combustion has suffered or has come to expect” and accordingly “would not comport with the fair notice requirements of the Constitution.” *Id.* at 11. But the reduced amount ordered by the court is only minimally less disproportionate. It is a whopping **435** times the fine imposed by the EPD against CE and **29** times the highest fine ever imposed by that agency.

The conclusion is thus inescapable that, given the fines actually imposed by the EPD, CE lacked fair notice that its failure to prevent the escape of small quantities of acidic water in the years after mining operations had ceased could result in anywhere near a \$4.35 million exaction. Accordingly, this *BMW* factor, like the reprehensibility and ratio factors, demonstrates the gross excessiveness of the punitive judgment in this case.

B. CE’s Alleged “Gain” Cannot Justify The Disproportionate Exaction In This Case.

In the district court (and in this Court in earlier proceedings), plaintiffs argued that the \$15 million judgment under review was not disproportionate to the amount of money — \$6 million according to their expert (*see* R10-1216-1218) — that CE allegedly saved by failing to undertake the additional steps needed to ensure that no

acidic water would ever escape its property.⁴ The district court, which was well aware of the difficulty of entirely stopping the flow of acidic water, implicitly rejected that argument.⁵ It was correct in doing so.

To begin with, in *BMW* the Supreme Court did not identify avoided costs as a relevant factor. Accordingly, this Court should be especially cautious about invoking that concept to override the three factors explicitly set forth in *BMW*.

Second, using avoided costs as the yardstick for measuring the proper size of a punitive award is illogical. The primary purpose of punitive damages is deterrence, *i.e.*, to cause the defendant and others similarly situated to act in ways that are socially acceptable or beneficial. But the degree of wrongfulness of a defendant's conduct is not greater when it requires \$6 million to avoid a harm rather than \$6,000. To the contrary, the greater the additional expense required, the more wasteful and undesirable it is to coerce companies to undertake it unless substantial benefits would be produced. Thus, in this case, it is manifestly inappropriate to punish CE in any sub-

⁴ Significantly, before suit was filed no one — not the EPD, any of the plaintiffs, or anyone else — ever suggested to CE that such steps were necessary or appropriate.

⁵ See R8-266-7 (“No one can predict with great certainty what scientific processes will eliminate or even alleviate the very real environmental problems confronting us. It is a process of trial and error in which Combustion has been actively involved.”).

stantial amount — let alone in the millions of dollars — for failing to spend \$6 million to prevent an aggregate harm of \$47,000, particularly given that not one of the plaintiffs complained to CE at any time during the reclamation process.

Under plaintiffs' theory, the more *reasonable* the defendant's conduct (*i.e.*, the larger the cost of the precaution in relation to its benefit), the more *severe* the punishment should be. Thus, if the cost of preventing the escape of acidic water were \$100 million, plaintiffs presumably would contend that a punishment in the order of \$100 million would have been necessary and appropriate to prevent their \$47,000 harm. The use of punitive damages to force the kind of economically inefficient expenditure demanded by the plaintiffs is the very definition of socially harmful *overdeterrence*.⁶

⁶ Under Learned Hand's classic formulation, CE's failure to pay \$6 million to prevent a loss of \$47,000 would not even be negligence. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (the failure to take a precaution is negligent only if the cost of the precaution is less than the expected loss if the precaution is foregone). The plaintiffs have argued in earlier briefs that the Hand formulation does not apply to theft and similar premeditated conversions. Be that as it may, CE was held liable for nuisance and trespass, not a conversion. Significantly, Georgia cases appear to bar punitive damages for a nuisance or trespass caused by a lawful regulated activity such as mining or mine reclamation, limiting neighboring landowners to compensatory damages for any harm suffered. *E.g., Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga.

Third, even if it were appropriate to consider avoided costs, plaintiffs' estimate of the cost of entirely preventing the escape of acidic water is not the relevant measure. If any figure is relevant, it would be the market value of a drainage easement. That is the amount that CE "retained" by "assum[ing] unilaterally a power of private eminent domain." Plaintiffs' Brief on Remand at 21, 23, *Combustion Eng'g, Inc. v. Johansen*, No. 94-8774 (11th Cir. filed July 17, 1996) (emphasis omitted). The record is silent on the value of such an easement. Plaintiffs have thus failed to satisfy their burden of establishing CE's true "gain." Nor may it be assumed that the value of an easement would be anywhere near \$6 million or even one-tenth of that amount. A pre-trial ruling in this case reflects that the market value of the *entire* 1,260 acres of land owned by the plaintiffs — most of which is far from the streams at issue and unaffected by the quality of the water in those streams — was only \$1.347 million. R3-63-3. Needless to say, the value of an easement would fall far short of the total value of the properties.

In short, there is no basis in either the record or common sense for plaintiffs' contention that CE's "gain" justifies a multi-million dollar punitive award.

1993); *General Refractories Co. v. Rogers*, 239 S.E.2d 795, 799-800 (Ga. 1977).

II. IN DETERMINING HOW MUCH (IF ANY) FURTHER PUNISHMENT IS PERMISSIBLE, THE COURT SHOULD TAKE INTO ACCOUNT THE AMOUNTS PAID BY CE IN SETTLEMENT

If this Court agrees that the \$4.35 million penalty set by the trial court remains excessive, it must then determine an appropriate remedy. As discussed above, there is substantial agreement in the courts that, when compensatory damages are significant (as they are here), a ratio of 4:1 generally represents the outer limit, although ratios of as much as 10:1 may be sustainable if the compensatory damages are very small and/or the conduct was highly reprehensible. Neither justification is applicable here. Accordingly, even before taking account of the exceptionally low reprehensibility of CE's conduct, the maximum punishment here should be below \$200,000 (and certainly no higher than \$470,000 — *i.e.*, ten times the jury's initial \$47,000 compensatory award).

That being so, *no* part of the \$4.35 million aggregate punitive judgment is necessary or appropriate here because CE already has paid far more than \$470,000 to settle the claims of three of the plaintiffs — Raymond Jones, William Jones, and Martha Jones Long.⁷ Specifically, CE has paid each of them a total of \$436,666.67, receiving in exchange title to a portion of their land and a release from the judgments

⁷ In addition, as of the trial CE had spent approximately \$1.6 million in reclaiming the mine site and attempting to prevent the escape of acidic water. *See* page 10, *supra*.

entered in favor of those plaintiffs. R7-256-App. 3-5 (For the Court's convenience, copies of the settlement agreements are attached to this brief as Appendices A-C.) The settlement agreements provide that \$36,000 of the \$436,666.67 constitutes payment for the land. The remaining \$400,666.67 per plaintiff is designated as compensation for the loss of the use and enjoyment of their land, even though the jury awarded each of them either \$1,000 or \$1,500 for that loss and even though each plaintiff was relinquishing a punitive judgment of \$1 million. The settlement agreements reflect that tax considerations governed the decision to treat none of the damages as punitive.

Nonetheless, from CE's perspective the \$1.2 million that is not attributable to acquisition of the property serves the purposes of punitive damages. That sum, which is over 25 times the aggregate compensatory damages found by the jury, would probably be excessive in its own right.⁸ Certainly, no additional punitive damages are either necessary or permissible. *Cf. Maiorino v. Schering-Plough Corp.*, 695 A.2d 353, 370 (N.J. Super. Ct. App. Div. 1997) (finding \$8 million punitive award excessive and ordering new trial in part because "the large compensatory award to [plaintiff] of \$435,000 by itself provided significant deterrence"). Accordingly, this Court should

⁸ The settlement was entered into prior to the Supreme Court's decision in *BMW*.

vacate the entirety of plaintiffs' \$4.35 million aggregate punitive judgment.⁹ At a minimum, the Court should give heavy consideration to the amounts already paid in determining an appropriate reduction of the \$4.35 million judgment.

CONCLUSION

The punitive damages should be set aside in their entirety. At a minimum, the Court should reduce the punitive damages to no more than four times the compensatory damages.

⁹ It may seem inequitable that three plaintiffs should receive a windfall of \$1.2 million while the remaining plaintiffs get nothing. However, in Georgia as elsewhere, plaintiffs have no right to punitive damages; they are simply a mechanism through which the State accomplishes its interests in retribution and deterrence. *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 638-639 (Ga. 1993). Accordingly, any inequity among plaintiffs is irrelevant to the question of the proper remedy in this case.

Respectfully submitted.

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February 13, 1998