No. 14-8082

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMBER NICOLE LOMPE,
Plaintiff/Appellee,

v.

SUNRIDGE PARTNERS, LLC; AND APARTMENT MANAGEMENT CONSULTANTS, L.L.C,
Defendants/Appellants.

On appeal from the United States District Court for the District of Wyoming,
No. 12 CV 088 J, Hon. Alan B. Johnson

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS/APPELLANTS

Kate Comerford Todd
Warren Postman
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Evan M. Tager
Carl J. Summers
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

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

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

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 every case in which the United States Supreme Court has addressed such issues during the past two decades.

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[1] All parties have consented to the filing of this brief. No party or counsel for a party in the pending appeal authored the proposed *amicus brief* in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of this brief, other than the *amicus curiae*, its members, and its counsel.

INTRODUCTION AND SUMMARY OF ARGUMENT

Applying an exceptionally deferential standard, the district court refused to disturb a pair of punitive awards that are shocking in their total size, the financial devastation they threaten for the two defendants, and their relationship to the already substantial compensatory award. The district court's ruling implicates a number of important issues related to the amount of punitive damages.

First, the hands-off approach employed by the district court in reviewing the amount of punitive damages is diametrically opposed to the exacting review mandated under the Due Process Clause. Relatedly, when assessing the reprehensibility of the defendants' conduct, the district court inappropriately deferred to phantom factual findings that the jurors never made. With respect to the Supreme Court's ratio guidepost, the district court both failed to reduce the compensatory damages to account for the plaintiff's negligence and improperly compared the punitive award imposed against each defendant with the entire compensatory award, badly skewing the ratio calculation. Finally, and regardless, the ratios accepted by the district court are out of line with modern case law, which strongly suggests that the constitutional maximum is 1:1 or lower when, as here, the compensatory award is substantial and the conduct at issue is not especially heinous.

ARGUMENT

I. Under The Due Process Clause, Reviewing Courts Must Take An Active Role In Ensuring That Punitive Damages Are Not Excessive.

The fundamental question underlying constitutional review of punitive awards for excessiveness is "whether [the] particular award is greater than reasonably necessary to punish and deter." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991). When "a more modest punishment for [the defendant's] reprehensible conduct could have satisfied the State's legitimate objectives," then a reviewing court should reduce the award to that amount and "go[] no further." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-20 (2003); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S.559, 568, 584 (1996) ("The sanction imposed … cannot be justified … without considering whether less drastic remedies could be expected to achieve [punishment and deterrence]."); *cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008) (recognizing "the need to protect against the possibility … of [punitive] awards that are unpredictable and unnecessary, either for deterrence or for measured retribution").

To aid courts in determining whether a punitive award exceeds the amount necessary to punish and deter, the Supreme Court has identified three "guideposts": (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 574-75. Although courts reviewing a

punitive award must consider each of these guideposts, the guideposts have no intrinsic constitutional significance. Instead, they are useful because they create a framework that helps courts rationally and consistently answer the relevant constitutional question: Whether the State's legitimate interests in punishment and deterrence can be accomplished by a lower award.

A. The district court erred by taking a deferential, hands-off approach to the question of excessiveness.

Under the Due Process Clause, reviewing courts must take an active role in policing punitive awards for excessiveness. As the Supreme Court has observed, "the level of punitive damages is not really a 'fact' 'tried' by the jury" but instead "is an expression of [the jury's] moral condemnation." *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432, 437 (2001). That is why review of punitive awards using the Supreme Court's guideposts is *de novo* and must be "[e]xacting" to "ensure[] that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *State Farm*, 538 U.S. at 418 (internal quotation marks omitted).

When a criminal defendant has been found guilty beyond a reasonable doubt, following a trial safeguarded by numerous Due Process protections that are not available to a civil defendant, the range of appropriate punishments generally is cabined by statute. In contrast, civil juries tasked with setting punitive damages have "nothing to rely on other than the instincts of the jurors and random, often

inaccurate, bits of information derived from press accounts or word of mouth in the community about how [punitive damages] have been valued in other cases." *Payne v. Jones*, 711 F.3d 85, 93 (2d Cir. 2013). They have "no objective standards to guide them, and understandably outraged by the bad conduct of the defendant, jurors may be impelled to set punitive damages at any amount." *Id*. at 93-94. Thus, studies have shown that "salient numbers, such as a plaintiff's request for a specific dollar amount, have a dramatic impact on [mock] jurors' awards" of punitive damages, whether or not those numbers have a legitimate relationship to the appropriate punishment for the defendant's conduct. Cass R. Sunstein et al., PUNITIVE DAMAGES: HOW JURIES DECIDE 240 (2002). Moreover, jurors may be influenced by extraneous factors such as "[r]egional biases against particular companies." *Payne*, 711 F.3d at 94. It is thus critically important that courts diligently carry out their role under the Due Process Clause to ensure that punitive damages imposed by a civil jury are not greater than "reasonably necessary to punish and deter." *Haslip*, 499 U.S. at 22; *see also Kimble v. Land Concepts, Inc.*, 845 N.W.2d 395, 407 (Wis. 2014) ("[a] punitive damages award is excessive, and therefore violates due process, if it is more than necessary to serve the purposes of punitive damages") (internal quotation marks omitted), *cert. denied*, 135 S. Ct. 359 (2014).

Here, the district court fundamentally misunderstood its role when reviewing the quasi-criminal punitive awards imposed by the jury. Instead of engaging in an exacting review to determine whether Wyoming's interest in punishment and deterrence could be accomplished by a lesser sanction, the court relied on cases emphasizing the great deference reviewing courts normally give to an award of ***compensatory*** damages. *See* slip op. 24-25. For example, the district court said that a jury's award of damages "is inviolate unless we find it 'so excessive that it shocks the judicial conscience and raises an irresistible inference that passion, prejudice, corruption, or other improper cause invaded the trial.'" App. 310-11 (quoting *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 766 (10th Cir. 2009) (describing standard of review for compensatory damages)). And the court declined to reduce the punitive awards—even while accepting that they are "surprising" and "far greater than that usually seen in this district"—because "the [c]ourt hesitates to interfere with the jury's determination as to punitive damages." App. 313-14.

That reluctant, deferential, and hands-off approach is diametrically opposed to the exacting review required by Supreme Court precedent and demonstrated by recent federal appellate decisions. For example, in *Payne*, an excessive-force case against a police officer, the Second Circuit recently ordered a remittitur of the punitive damages from $300,000 to $100,000. While recognizing that, "there is no

doubt that [the officer's] conduct was reprehensible," the Second Circuit noted that "there were also mitigating factors to be counted in [the officer's] favor in making the degree-of-reprehensibility analysis." 711 F.3d at 101. Accordingly, taking into account both its conclusion that "the degree of reprehensibility was not all that high" (*id*.) and its determination that the $60,000 compensatory award was "substantial" (*id*. at 103), the court held that the conduct "was not so egregious as to justify punitive damages of $300,000" and ordered a remittitur to $100,000 (*id.* at 106).

Here, there can be no question that the punitive awards approved by the district court fail the fundamental test whether a lesser sanction could achieve Wyoming's interest in punishment and deterrence. The conduct being punished here is repairing or replacing furnaces as problems arise—which the evidence showed is the standard industry practice—rather than engaging in preventive maintenance. If this is punishable conduct at all, it is far from the most egregious seen in the judicial system.[2] Yet if allowed to stand the punitive awards in this case

[2] We note that many courts—including this one—and commentators have observed that compliance with industry custom is inconsistent with the state of mind necessary for imposition of punitive damages. *See, e.g., Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir. 1986) (reversing denial of directed verdict on punitive damages where defendants' conduct was consistent with industry practice); *Ford v. GACS, Inc.*, 265 F.3d 670, 678 (8th Cir. 2001) (similar); *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995) (similar); *see generally* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 40-41 (1982) ("Rarely

will wreak financial havoc on the defendants, stripping them of years of profits that have long since been distributed. And, as the district court acknowledged, the sheer size of these awards is far out of line with that of other punitive awards from Wyoming courts. App. 313-14. Nothing close to this draconian result is necessary to accomplish whatever interest Wyoming may have in punishing this conduct and encouraging landlords to adopt preventive maintenance programs going forward.

B. The district court erred by deferring to phantom factual findings that the jury did not make.

The district court stated that "it is not the [c]ourt's province to second-guess the jury's findings" and "[i]t is unquestioned that the jury viewed the defendants' conduct as egregious, warranting a greater award of punitive damages." App. 313-14. But the jury made no such express finding about egregiousness of the defendants' conduct. This kind of deference to "implied" findings confuses the jury's liability determination with its judgment of an appropriate amount of punishment. A liability verdict necessarily constitutes a factual finding that each indispensable element of the cause of action has been established. In contrast, the jury's function in setting the amount of punitive damages does not typically involve determining whether any particular fact has been proven. The jury generally is not instructed that it must find specific facts to impose a particular

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will an entire industry act with flagrant impropriety against the health and safety of the consuming public, and running with the pack in general should shield a manufacturer from later punishment for conforming to the norm.").

amount of punitive damages and rarely is asked to return a special verdict answering specific factual questions that would bear on the degree of reprehensibility of the defendant's conduct or other issues relevant to determining the amount of punitive damages. Rather, the jury essentially is asked to make an impressionistic judgment about the amount of punishment to exact. The resulting verdict is the legal equivalent of an ink blot, subject to any number of possible interpretations. *See, e.g.*, *Cooper Indus.*, 532 U.S. at 432, 437 ("the level of punitive damages is not really a 'fact' 'tried' by the jury" but "is an expression of [the jury's] moral condemnation").

It follows that the procedure for reviewing the amount of punitive damages must be substantially different from the procedure courts use when a party challenges the liability determination based on insufficiency of the evidence. 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 in reality are phantom factual determinations. This approach will consistently result in "false positive" determinations of high reprehensibility whenever the jury has returned a large award and thus interferes with meaningful review of awards for excessiveness.

Concern about the misleading effect of improper deference to phantom factual findings is more than hypothetical. In most cases in which punitive damages are sought against a corporation, the plaintiff's counsel argues 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. This case is no exception. Lompe's entire presentation during the punitive damages phase consisted of testimony from an economist who opined about the defendants' finances. *See* App. 1873-1917. And during the punitive phase arguments, Lompe's counsel unabashedly and repeatedly urged the jury to peg its punishment to the defendants' financial status, telling the jury that a lesser award would be insufficient to motivate "wealthy" corporate defendants to change their practices. *See, e.g.*, App. 1869-70, 1945-46.

For this and other reasons, there is no basis for the district court's assumption that, in imposing punitive damages totaling $25.5 million, the jury regarded the defendants' conduct to be especially reprehensible, much less that it found defendants to have acted with the degree of malice that generally would be expected to warrant a punishment of this magnitude. *Cf. Rufo v. Simpson*, 103 Cal. Rptr. 2d 492, 524-25 (Ct. App. 2001) (affirming punitive awards of $25 million for brutal murders of defendant's ex-wife and a bystander). Indeed, empirical research suggests that the verdict was more likely the result of the skewed financial frame

of reference offered by plaintiff's counsel than of a considered finding that the defendants' conduct was exceptionally reprehensible. *See generally* Sunstein, *supra*, at 62 (explaining that empirical research demonstrates that "[t]he dollar amounts that are requested by plaintiffs in their closing arguments to a jury have a dramatic effect on the size of the punitive damages award: the higher the request, the higher the awards").

Each of the Supreme Court's last three punitive damages due process decisions either implicitly or explicitly recognizes the distinction between liability determinations and the impressionistic task of setting an amount of punitive damages, and each therefore undercuts the notion that courts conducting the constitutionally required excessiveness review should defer to "implicit" findings that there is no basis for concluding the jury actually made.

In *BMW*, for example, the plaintiff's theory was that "BMW was palming off damaged, inferior-quality goods as new and undamaged, so that BMW could pocket 10 percent more than the true value of each car." Brief of Respondent at 17, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (No. 94-896), 1995 WL 330613. Had the Supreme Court believed itself obliged to apply a sufficiency-of-the-evidence standard, it surely would have accepted this inference as being one that the jury reasonably could have reached. Instead, after reviewing the record for itself, the Court concluded that the case implicated "none of the aggravating factors

associated with particularly reprehensible conduct" and expressly found that "[t]here is no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers." *BMW*, 517 U.S. at 576, 579. 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 interests 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.").

In *Cooper Industries,* the Supreme Court observed that "the level of punitive damages is not really a 'fact' 'tried' by the jury," but instead "is an expression of [the jury's] moral condemnation." 532 U.S. at432, 437 (internal quotation marks

omitted). Accordingly, review for excessiveness is *de novo* unless the jury has made "*specific* findings of fact." *Id.* at 439 n.12 (emphasis added). Indeed, exercising that *de novo* review, the Court expressly rejected the plaintiff's assertion that, for purposes of the second guidepost, the potential harm was $3 million. *Id.* at 441-42.

Then, in *State Farm*, after reiterating the importance of "[e]xacting appellate review" (538 U.S. at 418), the Court made clear from its own actions that this critical constitutional requirement cannot be satisfied by application of the extremely deferential sufficiency-of-the-evidence standard. Thus, although one of the dissenting Justices applied such a standard, arguing that "[e]vidence the jury could credit demonstrated that the PP & R program regularly and adversely affected Utah residents" (*id.* at 432 (Ginsburg, J., dissenting)), the six-Justice majority gave no deference to findings that the jury did not necessarily make, instead concluding from its own review of the record that there was "scant evidence of repeated misconduct of the sort that injured [the plaintiffs]" (*id.* at 423).

The upshot is that where, as here, the jury has not been asked to respond to special interrogatories bearing on the degree of reprehensibility of the defendant's conduct and other considerations relevant to setting the amount of punitive damages, reviewing courts may not simply assume that every relevant fact was

resolved against the defendant and indulge every inference urged by the plaintiff. Instead, a reviewing court must independently resolve the disputed factual issues bearing on the amount of punitive damages before applying the three *BMW* guideposts. As the Supreme Court of California has noted, while "findings of historical fact made in the trial court are still entitled to the ordinary measure of appellate deference," reviewing courts may not "presume[e] simply from the size of the punitive damages award" that the jury made any particular finding of fact, because "to infer [such a finding] from the size of the award would be inconsistent with *de novo* review, for the award's size would thereby indirectly justify itself." *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 (Cal. 2005); *see also, e.g.*, *Aken v. Plains Elec. Generation & Transmission Co-op*, 49 P.3d 662, 668 (N.M. 2002).

Here, for example, when reviewing the size of the punitive award, there is no warrant to assume that the jury believed that the defendants engaged in any of the post-accident "cover up" alleged by plaintiffs' counsel. Rather, like the U.S. Supreme Court in *BMW, Cooper Industries*, and *State Farm* (and the Supreme Court of California in *Simon*) this Court should independently review the record for purposes of resolving any disputed issues of fact that bear on the degree of reprehensibility of the defendants' conduct and any other considerations that are pertinent to the excessiveness inquiry. After making the necessary factual

determinations, the three guideposts should be applied to those facts *de novo*. In this way, the Court can provide the lower courts of this Circuit with needed guidance about the proper application of the *BMW/Cooper Industries/State Farm* framework.

II. The District Court Committed At Least Two Errors In Calculating The Punitive/Compensatory Ratio.

A. The district court erroneously failed to deduct from the compensatory damages the amount attributable to plaintiff's negligence.

When calculating the ratio of punitive to compensatory damages, the district court used the entire amount of compensatory damages found by the jury—$3,000,000—(App. 288, 312) even though the jury assigned plaintiff 10% of the fault for her own injuries (*id.* at 287-88). As other courts have held when confronting this issue, "a ratio based on the full compensatory award would improperly punish [defendants] for conduct the jury determined to be the fault of the plaintiff." *Clark v. Chrysler Corp.*, 436 F.3d 594, 606 n.16 (6th Cir. 2006); *see also, e.g.*, *Goddard v. Farmers Ins. Co.*, 179 P.3d 645, 666 (Or. 2008) (en banc). Accordingly, the proper amount of compensatory damages for purposes of the ratio guidepost here is $2,700,000.

B. The district court erred in comparing each punitive award to the full amount of compensatory damages.

The district court committed an even more consequential error by comparing the punitive damages against ***each*** defendant to the total amount of compensatory

damages apportioned between the plaintiff and ***both*** defendants. As the Eighth Circuit has explained in rejecting this very methodology, however, to compare each defendant's punitive damages to the total amount of compensatory damages "assumes an impossibility … because it posits that each defendant will ultimately pay the full compensatory damages award." *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000); *see also, e.g., Alla v. Verkay*, 979 F. Supp. 2d 349, 374 (E.D.N.Y. 2013) (following *Grabinski*). Instead, the appropriate methodology in a case involving punitive awards against unrelated defendants is to first apportion the compensatory damages between the defendants pursuant to the jury's assessment of relative fault and then apply the Supreme Court's guideposts separately for each defendant. Here, for example, Sunridge was found to be 25% at fault and the ratio for the punitive award against Sunridge would thus be 4:1 ($3,000,000 to $750,000), while the ratio for AMC would be 11.5:1 ($22,500,000 to $1,950,000).[3] This procedure is necessary to preserve the rationale of the ratio

[3] Although the question is not presented here, when a jury returns separate punitive awards against multiple members of the same corporate family, the best practice is to compare the total amount of punitive damages to the total amount of compensatory damages, since whatever punitive damages are left standing after review will ultimately be paid by the corporate parent. *See, e.g., Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co.*, 2009 WL 361267, at *9-10 (D. Utah Feb. 11, 2009) (in case in which punitive damages were imposed separately against three members of same corporate family, court calculated ratio by comparing the aggregate amount of punitive damages to the compensatory award for which all the defendants were held jointly and severally liable), *aff'd in part, vacated in part, rev'd in part*, 408 F. App'x 162 (10th Cir. 2011); *Advocat, Inc. v. Sauer*, 111

guidepost—establishing a stable and predictable relationship between the punitive award and the harm caused by the defendant.

III. The Ratio Of Compensatory To Punitive Damages Should Not Exceed 1:1 When, As Here, The Compensatory Damages Are Substantial.

In *State Farm*, the Supreme Court "addressed [the ratio] guidepost with markedly greater emphasis and more constraining language" than it had in previous cases, "tighten[ing] the noose" that it previously had thrown around the problem of excessive punitive awards. *Simon*, 113 P.3d at 76. Specifically, *State Farm* reiterated the Supreme Court's prior statement that a punitive award of four times compensatory damages is generally "close to the line of constitutional impropriety" and indicated that, though "not binding," the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to 3:1) is "instructive." 538 U.S. at 425. More to the point here, *State Farm* also "emphasizes and supplements" *BMW* "by holding that '[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Bains LLC v. ARCO Prods. Co.*, 405 F.3d 764, 776 (9th Cir. 2005) (quoting *State Farm*, 538 U.S. at 425).

S.W.3d 346, 360-62 (Ark. 2003) (dividing aggregate punitive awards against three related companies by total compensatory award to calculate ratio).

Although it is not a due-process case, *Exxon Shipping* reiterates *State Farm*'s statement that "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." 554 U.S. at 501 (internal quotation marks and alterations omitted); *see also id.* at 514 & n.28 (quoting the same language and stating that "[i]n this case, then, the constitutional outer limit may well be 1:1").[4]

To be sure, these principles do not establish a rigid mathematical formula for calculating punitive damages, but instead create a rough framework under which the maximum permissible ratio depends principally on two variables: the degree of reprehensibility of the conduct and the magnitude of the harm caused by the conduct (here, as in most cases, the amount of the compensatory damages). The maximum permissible ratio is directly related to the degree of reprehensibility and inversely related to the harm caused. In other words, for any particular degree of reprehensibility, as the compensatory damages increase, the maximum permissible ratio decreases. And for any particular amount of compensatory damages, the lower on the reprehensibility spectrum the conduct falls, the lower the constitutionally permissible ratio. In *Payne*, for example, the Second Circuit indicated that a 10:1 ratio might be permissible had the conduct before it caused

[4] The Supreme Court's concern in *Exxon Shipping*—that the current punitive damages system is not producing "consistent results in cases with similar facts" (554 U.S. at 500)—applies with even greater force in the context of due process.

only $10,000 in compensable harm, while a 1:1 ratio would be "very high" if the compensatory damages had been $300,000. 711 F.3d at 103. The court concluded that, "given the substantial amount of the compensatory award"—$60,000—a 5:1 ratio "appears high" (*id.*); ultimately, it ordered a remittitur to $100,000, representing a ratio of 1.67:1 (*id.* at 106).

Thus, when *State Farm* and *Exxon Shipping* stated that a ratio of 1:1 may be the constitutional limit when compensatory damages are substantial, they were describing an outer bound for ***all*** such punitive awards. It follows that when compensatory damages are substantial and reprehensibility is ***not*** high, an even lower ratio may be required. That is the only way to maintain proportionality between reprehensibility and ratio—ensuring that more egregious conduct is punished more severely. Here, for example, where the compensatory damages are very substantial but the conduct is far from the high end of the spectrum of reprehensible conduct, a ratio below 1:1 likely is required.

Since *State Farm*, many courts—including this one—have found that, when compensatory damages are in the hundreds of thousands or millions of dollars, a ratio of 1:1 or lower marks the outer limit of due process.[5] We have surveyed all

[5] Illustrative decisions of the federal courts of appeals include *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1206-08 (10th Cir. 2012) (reducing $2,000,000 punitive award to amount equal to the $630,307 compensatory award); *Morgan v. New York Life Ins. Co.*, 559 F.3d 425, 441-43 (6th Cir. 2009) (vacating $10,000,000 punitive award that was 1.67 times the compensatory award and

appellate decisions from the past decade involving punitive damages in which the final compensatory award was $2.7 million or greater. In ***none*** of those cases has a double-digit ratio of punitive to compensatory damages survived review. *See* Exhibit 1.[6] Among the 46 cases—many of which involve significantly more

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remanding with instructions to enter remittitur in an amount not more than compensatory damages); *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 56 (1st Cir. 2009) (reducing $350,000 punitive award to $35,000, which equaled the compensatory damages); *Zakre v. Norddeutsche Landesbank Girozentrale*, 344 F. App'x 628, 631 (2d Cir. 2009) (affirming reduction of punitive award from $2.5 million to $600,000 where compensatory damages were approximately $1.5 million); *Jurinko v. Medical Protective Co.*, 305 F. App'x 13, 27-32 (3d Cir. 2008) (reducing 3.13:1 ratio to 1:1 where compensatory damages and attorneys' fees totaled approximately $2 million); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 487 (6th Cir. 2007) (reversing punitive award that was 9.5 times the compensatory damages and holding that "[i]n this case where only one of the reprehensibility factors is present, a ratio in the range of 1:1 to 2:1 is all that due process will allow"); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 152-53, 157 (6th Cir. 2007) (ordering remittitur of $2,628,600 punitive award to no more than $400,000, where compensatory damages were $400,000); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (reducing ratio from 3.7:1 to 1.2:1 where compensatory damages were about $4,000,000); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 798-99 (8th Cir. 2004) (reducing $6,063,750 punitive award for harassment to $600,000, an amount equal to the compensatory damages); *DiSorbo v. Hoy*, 343 F.3d 172, 176-77, 189 (2d Cir. 2003) (ordering remittitur of compensatory award to $250,000 and remittitur of punitive damages from $1,275,000 to $75,000). There are many additional decisions of federal district courts and state appellate courts reducing punitive awards to the amount of the compensatory damages or below.

[6] We have excluded from this survey six cases brought against the Islamic Republic of Iran for sponsoring acts of terrorism that resulted in the violent deaths of and devastating injuries to hundreds of innocent victims. Those cases are so unique as to be useless for determining an appropriate ratio of punitive to compensatory damages in a case in which the defendant undeniably had no intention of causing injury.

reprehensible conduct than is present here—the median ratio is 0.95:1 and the mean ratio is 1.33:1. The highest ratio is 9:1 (on compensatory damages of $5.5 million) in a case alleging that a tobacco company systematically deceived millions of smokers—including youths at whom the representations were targeted—about the health effects of smoking, resulting in the plaintiff's development of lung cancer that required "extremely painful surgery to remove the upper part of a lung" and ultimately spread to his brain and lymph nodes. *Boeken v. Philip Morris Inc.*, 26 Cal. Rptr. 3d 638, 657-58, 687 (Ct. App. 2005) (reducing $3 billion punitive award to $50 million). This survey of cases confirms that the district court's deferential ruling, which allowed a ratio of 9:1 to stand (using the aggregate punitive damages), is out of line with modern decisions applying the Supreme Court's due process guideposts. This is one of those cases in which the compensatory damages are substantial, the conduct is not exceptionally egregious, and the outside limit for the ratio accordingly should be 1:1 or lower.

Moreover, a downward adjustment of the ratio is warranted in cases, like this one, in which a significant portion of the compensatory award is for non-economic damages such as emotional distress, which already have a punitive aspect. As a general matter, the Supreme Court repeatedly has recognized that compensatory damages have a deterrent effect in their own right, and, accordingly, has emphasized that "punitive damages should only be awarded if the defendant's

culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419; *see also Memphis Cmty. Sch. Dist. v. Stachura* 477 U.S. 299, 307 (1986) ("[d]eterrence … operates through the mechanism of damages that are compensatory"). The punitive aspect of compensatory damages is most pronounced for non-economic damages. With such damages, "'there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.'" *State Farm*, 538 U.S. at 426 (quoting Restatement (Second) of Torts § 908, cmt. c (1979)); *see also, e.g.*, *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 165-66 (2d Cir. 2014) (Ratio of 4:1 "serves neither predictability nor proportionality … particularly … where the underlying compensation is, as it is in this case, for intangible—and therefore immeasurable—emotional damages. Imposing extensive punitive damages on top of such an award stacks one attempt to monetize highly offensive behavior, which effort is necessarily to some extent visceral, upon another.").

Accordingly, courts have held that "when the compensatory damages are substantial ***or already contain a punitive element***, lesser ratios 'can reach the outermost limit of the due process guarantee.'" *Simon*, 113 P.3d at 77 (emphasis added); *see also, e.g.*, *Walker v. Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507, 513 (Ct. App. 2007) (affirming reduction of punitive damages to 1:1 ratio because award of

emotional distress damages added "a punitive element to respondents' recovery of compensatory damages").

In sum, in this case, where the conduct barely crosses the line that allows the imposition of punitive liability (if it does cross that line) and the plaintiff already has received a very sizeable compensatory award that undoubtedly contains a significant punitive element in the form of emotional-distress damages, a ratio of 1:1 should be considered the outer limit and the live question should be whether an even lower ratio is called for.

CONCLUSION

Assuming that the Court does not reverse on one of the grounds raised by the defendants, the punitive damages should be reduced to, at most, $2,700,000 and allocated between the two defendants in proportion to the punitive damage awards originally imposed by the jury.

Dated: April 16, 2015

Respectfully submitted.

Of Counsel:

Kate Comerford Todd
Warren Postman
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

s/Evan M. Tager

Evan M. Tager
Carl J. Summers
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

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

Exhibit 1

Punitive Damages Judgments 2004–2014 In Which Final Compensatory Damages Were $2,700,000 Or Higher

Case Name	Original Ratio	Final Compensatory Damages	Final Punitive Damages	Final Ratio	Type of Case
Ondrisek v. Hoffman , 698 F.3d 1020 (8th Cir. 2012)	10: 1	$3,000,000.00	$12,000,000.00	4	Battery
Madison v. Williamson , 241 S.W.3d 145 (Tx. Ct. App. 2007)*	0.58 : 1	$3,000,000.00	$1,750,000.00	0.58	Battery
Meisel v. Grunberg , 521 F. App'x 3 (2d Cir. 2013)	0.33 : 1	$3,000,000.00	$1,000,000.00	0.33	Breach of Fiduciary Duty
Computerized Store Sys., Inc. v. Compaq Computer Corp. , 124 F. App'x 521 (9th Cir. 2005)	0.62 : 1	$3,245,000.00	$2,000,000.00	0.62	Fraud
Robertson v. Cartinhour , 475 F. App'x 767 (D.C. Cir. 2012)	1: 1	$3,500,000.00	$3,500,000.00	1	Breach of Fiduciary Duty
CNH Am., LLC v. Ligon Capital LLC , --- So. 3d ----, 2013 WL 5966782 (Ala. 2013)	2 : 1	$3,800,000.00	$7,600,000.00	2	Breach of Contract/Fraudulent Misrepresentation/Fraudulent Suppression
Eshaghian v. Ghodsi , 2006 1727910 (Cal. Ct. App. 2006)*	0.95 : 1	$4,225,000.00	$4,000,000.00	0.95	Assault/Battery/Intentional Infliction of Emotional Distress
Steele v. Evenflo Co. , 178 S.W.3d 715 (Mo. Ct. App. 2005)	0.89 : 1	$4,500,000.00	$4,000,000.00	0.89	Products Liability
Gottlieb v. Fahs , 2012 WL 5310004 (Cal. Ct. App. 2012)*	0.12 : 1	$5,000,000.00	$5,000,000.00	1	Defamation/Intentional Infliction of Emotional Distress
Prince George's Cnty. Md. v. Longtin , 19 A.3d 859 (Md. 2011)	0.20 : 1	$5,025,000.00	$1,000,000.00	0.2	Wrongful Arrest
Union Pac. R.R. Co. v. Barber , 149 S.W.3d 325 (Ark. 2004)	4.9 : 1	$5,100,000.00	$25,000,000.00	4.9	Personal Injury
Wright v. Suzuki Motor Corp. , 2005 WL 1594850 (Ohio Ct. App. 2005)*	0.19 : 1	$5,278,703.00	$1,000,000.00	0.19	Personal Injury
Ceimo v. Gen. Am. Life Ins. Co. , 137 F. App'x 968 (9th Cir. 2005)	1.28 : 1	$5,470,000.00	$7,000,000.00	1.28	Insurance Bad Faith
Boeken v. Phillip Morris, Inc. , 127 Cal. App. 4th 1640 (2005)	541.6 : 1	$5,539,127.00	$50,000,000.00	9	Tobacco
Izell v. Union Carbide Corp. , 231 Cal. App. 4th 962 (2014)	0.6 : 1	$6,000,000.00	$18,000,000.00	3	Personal Injury -- asbestos
Morgan v. N.Y. Life Ins. Co. , 559 F.3d 425 (6th Cir. 2009)	1.67 : 1	$6,000,000.00	$6,000,000.00	1	Employment Discrimination
Allstate Ins. Co. v. Dodson , 376 S.W.3d 414 (Ark. 2011)	1 : 1	$6,000,000.00	$6,000,000.00	1	Defamation/Tortious Interference of Contractual Relationship
Meron Tech. Distrib. Corp. v. Discreet Indus. Corp. , 189 F. App'x 3 (2d Cir. 2005)	0.57 : 1	$6,300,000.00	$3,600,000.00	0.57	Trade Secrets
Sec. Title Agency, Inc. v. Pope , 200 P.3d 977 (Ariz. Ct. App. 2008)*	5.59 : 1	$6,300,000.00	$6,100,290.00	0.97	Breach of Fiduciary Duty
Kendall v. Wyeth, Inc. , 2012 WL 112609 (Pa. Super. Ct. 2012)*	4.44 : 1	$6,300,000.00	$28,000,000.00	4.44	Failure to Warn
Magnolia N. Prop. Owners' Assoc. v. Heritage Cmtys. Inc. , 725 S.E.2d 112 (S.C. 2012)	0.31 : 1	$6,500,000.00	$2,000,000.00	0.31	Breach of Warranty
Burns v. Prudential Secs., Inc. , 857 N.E.2d 621 (Ohio Ct. App. 2006)*	15.63 : 1	$6,800,000.00	$6,800,000.00	1	Breach of Contract/Breach of Fiduciary Duty
Quad/Graphics, Inc. v. One2One Commc'ns, LLC , 529 F. App'x 784 (7th Cir. 2013)	0.75 : 1	$8,000,000.00	$6,000,000.00	0.75	Breach of Contract
Pfeifer v. John Crane, Inc. , 220 Cal. App. 4th 1270 (2013)*	1.76 : 1	$8,253,580.47	$14,500,000.00	1.76	Products Liability
FAF Enters. LLC v. Trident LLC , 2005 WL 348955 (Cal. Ct. App. 2005)*	0.005 : 1	$9,500,000.00	$45,000.00	0.005	Tortious Interference of Contract
Lorillard Tobacco Co. v. Alexander , 123 So.3d 67 (Fla. Dist. Ct. App. 2013)	2.5 : 1	$10,000,000.00	$25,000,000.00	2.5	Tobacco
Launders v. Steinberg , 876 N.E.2d 901 (N.Y. 2007)	0.50 : 1	$10,000,000.00	$5,000,000.00	0.5	Wrongful Death
Phillip Morris USA Inc. v. Cohen , 102 So.3d 11 (Fla. Dist. Ct. App. 2012)	1 : 1	$10,000,000.00	$10,000,000.00	1	Tobacco
Holiday Inn Franchising, Inc. v. Hotel Assoc., Inc. , 382 S.W.3d 6 (Ark. Ct. App. 2011)*	0.92 : 1	$10,056,000.00	$12,000,000.00	1.19	Breach of Contract/Fraud
Zakrocki v. Ford Motor Co. , 2009 WL 2243986 (N.J. Super. Ct. App. Div. 2009)*	0.004 : 1	$10,626,479.89	$42,050.00	0.00	Products Liability
Martin v. Survivair Respirators, Inc. , 298 S.W.3d 23 (Mo. Ct. App. 2009)*	1.25 : 1	$12,000,000.00	$15,000,000.00	1.25	Products Liability/Wrongful Death
White v. McKinley , 605 F.3d 525 (8th Cir. 2010)	0.14 : 1	$14,000,000.00	$2,000,000.00	0.14	Section 1983
Brunskill Assoc. v. Rapid Payroll, Inc. , 2010 WL 779688 (Cal. Ct. App. 2010)*	0.73 : 1	$15,000,000.00	$11,000,000.00	0.73	Tortious Interference of Contract
MCC Mgm't of Naples, Inc. v. Int'l Bancshares Corp. , 468 F. App'x 816 (10th Cir. 2012)	0.09 : 1	$15,793,920.00	$1,429,392.00	0.09	Breach of Contract/Fraud
Ammondson v. Nw. Corp. , 220 P.3d 1 (Mont. 2009)	0.23 : 1	$17,500,000.00	$4,000,000.00	0.23	Breach of Contract/Bad Faith/Tortious Interference of Contract/Abuse of Process/Malicious Prosecution
Skinner v. Trident Med. Ctr., LLC , 2004 WL 6334912 (S.C. Ct. App. 2004)*	0.49 : 1	$20,250,000.00	$10,000,000.00	0.49	Negligent Supervision/Defamation
Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC , --- F.3d ----, 2014 WL 3408853 (8th Cir.	0.47 : 1	$21,300,000.00	$10,000,000.00	0.47	Misappropriation of Trade Secrets
Qwest Servs. Corp. v. Blood, 252 P.3d 1071 (Colo. 2011) (en banc)	0.83 : 1	$21,667,600.00	$18,000,000.00	0.83	Personal Injury
Wyeth v. Rowatt , 244 P.3d 765 (Nev. 2010)	2.82 : 1	$23,000,000.00	$57,778,909.00	2.51	Products Liability
Wellogix, Inc. v. Accenture, LLP , 716 F.3d 867 (5th Cir. 2013)	0.69 : 1	$26,200,000.00	$18,200,000.00	0.69	Misappropriation of Trade Secrets
Buell-Wilson v. Ford Motor Co. , 160 Cal. App. 4th 1107 (2008)	2 : 1	$27,606,004.00	$55,000,000.00	2	Products Liability
Estate of Moreland v. Dieter , 395 F.3d 747 (7th Cir. 2005)	0.95 : 1	$29,000,000.00	$27,500,000.00	0.95	Section 1983
Coquina Investments v. TD Bank, N.A. , --- F.3d ----, 2014 WL 3720301 (11th Cir. 2014)	1.09 : 1	$32,000,000.00	$35,000,000.00	1.09	Investment Fraud
Doepker v. Willo Sec. Co. , 2008 WL 1850970 (Ohio Ct. App. 2008)*	0.53 : 1	$34,000,000.00	$18,000,000.00	0.53	Personal Injury
Grefer v. Alpha Technical , 965 So.2d 511 (La. Ct. App. 2007)*	17.81 : 1	$56,145,000.00	$112,290,000.00	2	Environmental
Motorola Credit Corp. v. Uzan , 509 F.3d 74 (2d Cir. 2007)	1 : 1	$2,132,896,905.66	$1,000,000,000.00	0.47	Fraud
			Mean Ratio:	1.334978	
			Median Ratio:	0.950000	

* No subsequent history available; case might have settled.
** Notice of appeal filed; case dismissed on appeal after satisfaction of judgment.
*** Notice of appeal filed; case subsequently dismissed pursuant to stipulation. Probable settlement reducing amount of damages paid by defendant.

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I hereby certify that the attached brief is proportionally spaced, has a typeface of 14 points, and contains 6,729 words, including those in the table attached as Exhibit 1.

s/Carl J. Summers
Carl J. Summers

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

s/Carl J. Summers
Carl J. Summers

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s/Carl J. Summers
Carl J. Summers