Nos. 06-16285 and 06-16350

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRETT D. LEAVEY,

Plaintiff-Appellant/Cross-Appellee,

v.

UNUM PROVIDENT CORPORATION; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Defendants-Appellees/Cross-Appellants.

On Appeal From The United States District Court
For The District Of Arizona, No. CV-02-02281-PHX-SMM

DEFENDANTS-APPELLEES/CROSS-APPELLANTS' ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Defendant Provident Accident and Life Insurance Company is a subsidiary of defendant UnumProvident Corporation, which is a publicly-held corporation. No other publicly-held corporation owns 10% or more of UnumProvident Corporation's stock.

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JURISDICTIONAL STATEMENT

Defendants adopt the jurisdictional statement in plaintiff/appellant's opening brief and further state that defendants filed a timely notice of cross-appeal on July 21, 2006. This Court has jurisdiction over the cross-appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED

Brett Leavey has an own-occupation disability policy with Provident Life and Accident Insurance Company, a subsidiary of UnumProvident Corporation ("defendants"). In 1998, Leavey filed a claim for total disability from the practice of dentistry based on his drug addiction. Defendants promptly began paying his claim.

Approximately three years after Leavey reported his disability, defendants became concerned that he had abandoned treatments that could have led to his recovery and a possible return to dentistry. After having Leavey examined by independent experts on addiction, defendants sent a letter to Leavey stating that if he complied with the treatment recommendations of the independent experts he should be able to return to work in six months, offering him financial assistance in implementing those recommendations, and advancing the next six-months worth of benefits. The letter said that it was defendants' "goal to offer [Leavey] this opportunity for intense/focused treatment in order to assist in [his] return to work";

it also said that Leavey did "not qualify for continuing Total Disability benefits under the terms of [his] policy." Neither Leavey nor his physicians responded to this letter. Instead, Leavey sued. At the end of the six-month period for which benefits had been advanced, defendants reinstated Leavey's month-by-month benefits because Leavey still had not recovered.

Leavey has received every dollar of benefits he is owed, so there is no breach-of-contract claim in this case. Instead, Leavey argued that the letter that defendants sent three years into his claim amounted to bad faith. Recognizing the weakness of this claim, Leavey focused at trial—as he does in his brief—on a raft of evidence intended to show that defendants are bad companies. This technique was successful; the jury awarded him $809,028 as a lump-sum payment of all future benefits under his policy, $4,000,000 for "mental, physical, and emotional pain and suffering," and $15,000,000 in punitive damages. The trial court ordered a remittitur of the non-economic damages to $1,200,000 and reduced the punitive award to $3,000,000. The court subsequently awarded $755,247.50 in attorneys' fees.

Defendants do not dispute that the evidence construed in the light most favorable to the verdict is sufficient to support the finding of bad faith. The issues presented in the appeal and this cross-appeal are:

1. Whether defendants are entitled to judgment or a new trial on punitive damages because Leavey failed to present clear and convincing evidence that defendants engaged in quasi-criminal conduct with an evil mind.

2. Whether the district court committed reversible error by refusing to instruct the jury that under Arizona law each party to a contract owes a duty of good faith to the other.

3. Whether the $1,200,000 remitted award of non-economic damages remains excessive.

4. Whether the $3,000,000 punitive award is unconstitutionally excessive or, instead, is below the constitutional maximum, as Leavey asserts.

STATEMENT OF FACTS

1. Leavey's Policy

Under Leavey's disability policy, if "due to Injuries or Sickness," he were (i) "not able to perform the substantial and material duties of [his] occupation" and (ii) "receiving care by a Physician which [was] appropriate for the condition causing the disability" (Ex. 4-0010) for at least 60 days, then, starting on the 61st day, he would be entitled to tax-free benefits totaling $3,960 per month (Ex. 4-0010, DER281-82).[1]

[1] "DER__" refers to Defendants' Excerpts of Record.

2. Leavey's Occupation

Following graduation from dental school in 1988, Leavey moved to Arizona and spent a year working as a tennis pro while trying to pass the dental boards. DER243-44. After passing on his third attempt, Leavey began working as a general dentist for an existing practice. But Leavey "'never got [his] heart into the practice of dentistry'" and "satisfaction from his work was minimal." DER82. Leavey changed jobs at least 20 times over the next 9 years. DER244. His pre-tax income ranged around $60,000 (DER245-46), peaking at $92,000 in 1997 but declining thereafter (DER304-05). Because Leavey could not maintain a practice, he consistently had "trouble financially," never saved money, and "felt that everything [he] made in the practice of dentistry had to be spent to keep afloat." DER246-47.

Leavey reports that he became depressed and anxious about his life and occupation in the early 1990s.[2] DER82. In 1995 or 1996, Leavey began abusing Vicodin and other pain killers. DER261-62. This did not improve his mental health: "At one point, he was despondent enough to contemplate suicide by overdose" (DER82), but he never tried to harm himself and "never considered that

[2] Although Leavey has reported some symptoms of clinical anxiety related to his practice, he never sought medical attention for them until after his drug addiction. A reviewing physician concluded that "[i]t is very hard to tease apart [Leavey's] dislike for dentistry from the anxiety that was provoked in him by the practice of dentistry." DER151.

as a way out" (DER4).[3] Leavey's drug abuse continued unnoticed until April 1998, when his employer discovered that he had been ordering Vicodin for personal use, terminated his contract, and reported him to the dental board. DER91-92. Leavey entered into an agreement with the dental board in May 1998, pursuant to which he enrolled in an outpatient addiction-treatment program and entered the dental board's aftercare addiction-monitoring program while continuing to practice at a new job. DER15.

Leavey's financial problems continued: He got into trouble with the IRS, was assessed "substantial penalties," and still was making settlement payments to the IRS in July 2003 (DER250-51); he defaulted on his student loans (DER305); and, in October 1998, he filed for bankruptcy (DER54, 260). Leavey's student-loan default resulted in his exclusion from various insurance networks, which further hampered his ability to develop a successful practice. DER251-60, 305.

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[3] Leavey's opening brief ("LOB") creates the impression that he was at constant risk of suicide. *See* LOB9-10, 14. That is contrary to the evidence. Leavey never was diagnosed as a suicide risk, never made an effort to harm himself, and never even had a plan to harm himself, but simply had thoughts of death, which is a normal aspect of depression. *See* DER325-28, 339-341. The district court recognized that "everyone's comments was [sic] it was thought about, but it really wasn't a true suicidal ideation." DER385. Moreover, contrary to the implication in Leavey's brief (at 9), Leavey's thoughts of death followed his addiction, not the other way around (*see* DER75, 82, 142). The last mention of Leavey's "suicide ideation" was in early 1999, immediately after the dental board suspended his license. *See* DER82.

Following a brief period of sobriety, Leavey relapsed. He developed a habit of obtaining narcotics by intentionally injuring his hand—at first running his hand over with a car tire and "then at different times hurting … it further." DER229, 279-80.

On October 29, 1998, Leavey tested positive for narcotics as part of the dental board's monitoring program. DER8. The dental board's addictionologist, Dr. Sucher, recommended that Leavey enter an inpatient program that was "familiar with treating addicted health care professionals." DER2. He concluded that it was "appropriate that [Leavey] not be practicing dentistry at the present time" and that "once [Leavey] completes treatment, reevaluation is imperative regarding his return to practice and for establishing the basis for his continuing recovery monitoring." *Id*. As a result, the dental board suspended Leavey's license until he completed an inpatient addiction-treatment program and was certified to return to practice by Dr. Sucher. DER7-14, 263-64. Upon his return to dentistry, Leavey would be subject to the dental board's monitoring program and a 5-year probationary period involving various restrictions and safeguards including random testing, regular counseling, and a prohibition on the possession or dispensing of narcotics in his dental practice. DER10-13.

3. Leavey's Claim

Following the dental board's detection of his relapse, Leavey stopped practicing, entered an inpatient program at the Chandler Valley Hope Alcohol and Drug Treatment Center ("Valley Hope"), and filed a claim for total disability based on "chemical dependency (addiction to Vicodin pills)." DER7-8. Defendants sent letters to Leavey's attending physicians requesting information on their diagnoses and treatment plans and offering the assistance of defendants' "rehabilitative and case management professionals" in working through "the incremental steps to return your patient to [his] occupation." *See, e.g.*, DER27. On February 2, 1999, defendants began paying benefits in order to "avoid any hardship" for Leavey, even though they still were investigating his claim. DER49a-49b.

a. Leavey is discharged from Valley Hope

Meanwhile, on December 3, 1998, Leavey was discharged from successful treatment at Valley Hope with "a good prognosis, provided he follow[s] through with aftercare recommendations" including weekly counseling, maintaining a relationship with his sponsor, and following the dental board's aftercare program. DER25-26, 176-78. At this point, Leavey's medical providers included:

- Dr. Pardi, Leavey's sponsor in his addiction-recovery program (DER268);
- Dr. Desch, a psychiatrist from Valley Hope (DER19);
- Dr. Sucher, the dental board's addictionologist;

- Ms. Garrett, a nurse in the dental board aftercare program (DER265-67);
- and Dr. Crow, who Leavey saw for anxiety (DER132).

Dr. Sucher said that he anticipated Leavey's return to dentistry after a "minimum [of] 6 months" (DER38) but Dr. Desch cautioned that it was "too soon to tell" whether Leavey would successfully recover (DER63). Upon his discharge, Leavey was "every bit convinced [that he] would be returning to dentistry." DER263.

Approximately a month later, in January 1999, Leavey reported a "one day relapse" to Dr. Sucher. DER38. The dental board imposed new treatment requirements but "was understanding that relapses happen" and still wanted to "work with [Leavey] to return [him] to the practice of dentistry." DER266-68.

b. Leavey decides to start taking methadone and drops all of his treating physicians

In April 1999, Leavey decided to enroll in a methadone clinic. This was a personal choice that Leavey tried to conceal from his physicians. DER271-73. In fact, when Leavey's methadone use came to light, several of his treating physicians concluded that the methadone clinic was so inappropriate for Leavey that he would have to choose between continued treatment with them in an abstinence-based program and methadone. DER273-76, 133. Leavey chose methadone.

Defendants discovered that Leavey had entered the methadone clinic when they obtained an Independent Medical Examination ("IME") conducted by Dr.

O'Connor for Standard Insurance Company, Leavey's other disability insurer. DER79-89. Dr. O'Connor concluded that Leavey was "not capable of performing as a dentist at this time" (DER84) but noted serious concerns with the adequacy of the care he was receiving (DER84-85) and concluded that "a higher standard of care and aftercare … will be required from here on out if a satisfactory long-term outcome in treatment is to be expected" (DER85). He recommended that Leavey (i) enter a residential care facility for "at least 6 months to establish a regimen of sobriety," (ii) "continue to participate in the aftercare program at [Valley Hope]," (iii) "continue his various therapeutic contacts with [Ms.] Garrett and Dr. Crow[]," and (iv) begin to integrate the efforts of his various physicians. DER85. On December 10, 1999, defendants asked Standard Insurance Company whether Leavey's physicians had responded to Dr. O'Connor's recommendations. DER90. Defendants did not receive a response.

In early 2000, defendants requested updated records from Leavey's physicians. Dr. Pardi reported, in March 2000, that Leavey "has not been seen in our office during the last 4 months" (the period for which records had been requested). DER102-03; *see also* DER268. Dr. Desch told defendants that her "last D[ate] O[f] S[ervice]" for Leavey was almost a year prior. DER101. And Ms. Garrett sent defendants a letter saying: "I regret to inform you that I have not consulted with [Leavey] in the last six months" (the period for which records were

requested). DER104-05. In fact, Leavey had dropped out of the dental board's aftercare monitoring program in May or June 1999 after the board's discovery that he had enrolled himself in the methadone clinic. DER273-74. Leavey ended his relationship with Dr. Crow—the last of the physicians that had been treating him upon his discharge from Valley Hope—in October 2000. DER108, 270.

Needing someone to fill out the attending physician statement for his disability claim, on May 19, 1999, Leavey went to see Dr. Curtin (DER72), who had given him a physical in early 1998 when his addiction first was discovered by the dental board (DER73-74). Nine days later, Dr. Curtin certified to defendants that Leavey was totally disabled by "chemical dep[endency], chronic depression," that Leavey's condition was "stable or somewhat worse," and that Leavey was "unable to practice dentistry or any other type of employment."[4] DER75. This was a departure from Dr. Pardi's prior certification indicating that Leavey was disabled by "chemical dependency," had no changes in his condition, and was "unable to practice dentistry until approved by [the dental] board." DER68.

Dr. Curtin also recommended a new psychiatrist, Dr. Almer, to replace the physicians that Leavey had dropped. DER277. At his first meeting with Dr. Almer, Leavey said that he "is pretty sure that he doesn't want [to] return to

[4] When he later learned that Leavey had been attending the methadone clinic, Dr. Curtin told Leavey that it "wasn't the treatment that he would have recommended." DER235.

dentistry." DER477-78. Although Dr. Almer agreed to treat Leavey while he was taking methadone, he "urged [Leavey] to come up with some sort of timetable for the completion of his detox" from methadone.[5] DER106.

On February 2, 2000, Leavey had told defendants that he was "h[o]peful that within the next four to six months, he [would] be able to project some type of return to dentistry." DER97; *see also* DER100 (a return to dentistry was Leavey's "overall goal"). A year later, however, Leavey had changed course, stating that "it is the hands down opinion from all of his physicians [at that point, Drs. Curtin and Almer] that he will not be returning back to dentistry." DER111.

In April 2001, defendants' internal medical consultant, Dr. Brown, reviewed the medical records for Leavey's claim. DER113-16. He noted that "[t]here have been problems with [Leavey's] treatment" (DER113), including "a general lack of coordination in treatment" (DER114), Leavey's dishonesty with his physicians (DER113-15), and Leavey's involvement with "multiple providers over a relatively short period of time" (DER115). He observed that Leavey "remains on methadone treatment rather than pursuing a treatment plan that would allow a

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[5] Initially, Dr. Almer thought that Leavey had left the methadone clinic (DER133, 141) because Leavey was accepting a regular prescription for ReVia, a non-opiate detoxification drug that is incompatible with methadone but that would have been in compliance with the Valley-Hope and dental-board programs (*see* DER116). It was several months before Dr. Almer discovered that Leavey had never filled the ReVia prescriptions and had surreptitiously remained in the methadone clinic. *Id.*

return to dentistry" as "a matter of personal choice and … without the recommendations of his treating psychiatrists."[6] DER116. Because of his concerns about Leavey's care and the element of choice, Dr. Brown recommended "a thorough and comprehensive independent evaluation" of Leavey. DER113-16; *see also* DER309-13.

Later that month, a multidisciplinary "roundtable" review of Leavey's claim confirmed Dr. Brown's recommendation to "proceed w[ith] the independent assessment." DER117; *see also* DER313-15. Defendants told Leavey that they would be scheduling two IMEs. DER118. Although Leavey initially complained that the IMEs were "excessive" and "not … reasonable" (DER129), he agreed to attend.

c. The IMEs

Dr. Obitz, a psychologist, conducted a two-day evaluation of Leavey on June 18-19, 2001. DER130-38. Leavey told Dr. Obitz that he finally had tapered off of methadone earlier that month, but she noted that "since [Leavey] is not always a reliable informant, it is not clear whether this is the case." DER137. Dr. Obitz

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[6] Dr. Brown testified that, in a quarter century of treating professionals with anxiety and addiction problems (DER307-08), he had seen only one other professional remain on methadone as long as Leavey (two years at the time of Dr. Brown's review), and that this other professional had become a "street addict." DER311-13. The normal course of methadone treatment is three weeks to six months. *Id.*

observed that Leavey "is still highly vulnerable to relapse" because of his failure to participate fully in treatment alternatives, his efforts to deceive his physicians, and the general inadequacy of the care he had been receiving. DER137, 349-51. She also agreed with Dr. O'Connor's recommendation that Leavey should enter a sober living facility and be given a "strong recovery structure, including a sponsor and attendance at 12-step groups." *Id.* Dr. Obitz concluded that Leavey's "anxiety and depression as well as a present risk for relapse" prevented him from practicing dentistry "at th[at] time." DER138.

Dr. Stonnington, a psychiatrist, evaluated Leavey on July 16, 2001. DER139-51. She agreed with Dr. Obitz's concerns about Leavey's current care and recommendations for appropriate treatment (DER150, 362-63, 366-68, 374-79) but had a more skeptical view of Leavey's prospects for recovery given his apparent lack of motivation (DER149-51). Dr. Stonnington concluded that Leavey currently was disabled by a "risk of relapse, which is high, and inability to cope with the anxiety of potentially harming patients in his dental work," which is "something he has never been able to resolve, and he does not appear to be motivated to do so." DER151.

After receiving the IME reports, Dr. Brown indicated that "a number of clarifications are required before I submit my final recommendations." DER153; *see also* DER315a-315e. He sent follow-up letters to Drs. Obitz and Stonnington

asking whether certain treatment protocols could assist Leavey in returning to work and whether anything prevented him from pursuing such treatments. DER154-55.

In response, Dr. Stonnington noted further deficiencies in Leavey's current care, proposed a program of treatments that could lead to recovery, and opined that "the primary issue preventing him from participating in the program … would be his lack of motivation." DER156-57. Dr. Brown then called Drs. Stonnington and Obitz to request further clarification. *See* DER316-06, 356, 368-69. Dr. Stonnington sent another letter providing more details of her diagnoses and treatment recommendations. DER160-61. Dr. Obitz responded by providing specific treatment recommendations and opining that only "personal choice," not "clinical concerns," would "prevent [Leavey] from participating in these treatment recommendations." DER158-59. Neither doctor changed her opinion that Leavey was unlikely to follow through with the recommended treatment plan given his apparent lack of motivation, but both said that Leavey might recover if he chose to do so.[7]

After reviewing the IMEs and follow-up letters, Dr. Brown concluded that Drs. Stonnington and Obitz had provided "a reasonable RTW [return to work] plan" for Leavey—including coordinated, aggressive treatment for both his

[7] Dr. Stonnington did moderate the skepticism of her initial letter after Dr. Brown informed her of the dental board's strong aftercare monitoring program and probationary restrictions. DER370.

anxiety/depression and his addiction—but had "speculate[d] that [Leavey] may not be willing to participate in such a plan because of personal choice issues." DER164-65. Dr. Brown testified that the IME physicians had provided "a reasonable time frame" for treatment and "the best and most effective treatment for abstinence if the person is truly interested in not using narcotics again." DER320-22.

d. Defendants' letter to Leavey

Defendants' recognized that Leavey was currently disabled from dentistry and that he might never be able to return. But the record before them caused serious concerns about the adequacy of the care that Leavey was receiving and suggested that Leavey was making a personal choice to abandon treatment that could have led to his recovery and possible return to dentistry. Therefore, the claim representative handling Leavey's claim, Jennifer Conrad, recommended that defendants pay Leavey six-months of benefits in advance and "provid[e] assistance" with a return-to-work effort by forwarding the IME reports and follow-up letters to Leavey and his physicians and offering to pay for any additional treatment he chose to obtain. DER169. Because defendants would be paying Leavey six-months of benefits in advance (and hoped that he would choose to pursue treatments that could lead to recovery), Conrad also indicated that

defendants should "close [his] claim for benefits," *i.e.*, stop the month-by-month payment of benefits. *Id.*; *see also* DER192, 198-99.

This recommendation was approved by Conrad's supervisor, Jeff Johnson, and defendants then sent a letter to Leavey on December 4, 2001 ("the Letter"). DER166-68. The Letter provided treatment recommendations from Drs. Obitz and Stonnington and told Leavey that "it is our understanding that with appropriate care and compliance with treatment recommendations, you should be able to return to work within 6 months."[8] DER167. The Letter also advanced Leavey six-months of benefits and offered "assistance in the implementation of the aforementioned treatment recommendations by providing payment for additional sessions." *Id.* Defendants told Leavey that "[i]t is our goal to offer you this opportunity for intense/focused treatment in order to assist in your return to work." *Id.*

Unfortunately, the Letter also included the language that Leavey emphasizes in his brief: "We regret to inform you that … you do not qualify for continuing Total Disability benefits." DER166. Throughout this litigation, defendants have acknowledged that the Letter was "poorly worded" and that "the intentions of [defendants'] actions could have been more clearly expressed." DER191; *see also*

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[8] For example, the letter set out defendants' belief that with more effective care Leavey's "anxiety can be managed" and he "would not be so vulnerable to risk of relapse." DER167.

DER203-04, 213-14. Specifically, the claim representatives consistently have testified that the language emphasized by Leavey did ***not*** accurately reflect defendants' intentions in sending the letter.[9] DER203-04.

At the end of the Letter, Defendants asked Leavey to contact them if he "believe[d] that [they] d[id] not have complete information or that [they] ha[d] misunderstood this matter in any way" or if he had "any questions." DER168.

Because defendants "had provided benefits for six months and were unclear if benefits would be payable beyond that point," they had to stop the month-by-month payment of Leavey's claim. DER192; *see also* DER198-99. Therefore, Leavey's claim was closed on defendants' "PACE" claim-payment system. *Id.* When defendants reinstated Leavey's month-by-month benefits at the end of the six-month period, his claim was reopened on the PACE system. DER195-96.

After defendants sent the Letter to Leavey, they wrote to Dr. Curtin, stating that, although Leavey currently was disabled, they believed that his condition required more "aggressive treatment." DER170. Defendants provided Dr. Curtin with "specific treatment recommendations that are explicitly geared toward

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[9] Conrad testified that if she had intended to permanently cut off Leavey's benefits, or "terminate" his claim, she would have (i) issued a longer and more detailed letter, (ii) included language telling Leavey about his right to appeal the decision to defendants' appeal unit, and (iii) personally called Leavey to inform him of the decision. DER211-12. Also, she said that she would not have sent a series of follow-up letters seeking input from Leavey's physicians on a terminated claim (*see infra*). *Id.*

returning [Leavey] to the work force." *Id.* They also asked Dr. Curtin to "provide a written response" to these recommendations. *Id.* Because they did not receive a response from Dr. Curtin, defendants sent a follow-up letter on February 1, 2002, again requesting his reaction to the treatment recommendations from the IME physicians. DER171.

Neither Leavey nor Dr. Curtin ever responded. Instead, Leavey filed this lawsuit in March 2002, before the expiration of the six-month period for which benefits had been advanced and without having once contacted defendants.

In June 2002, as the six-month period came to an end, defendants sent Leavey another letter, noting that "we have been providing monthly disability benefits to you from October 29, 1998 to June 8, 2002" and "are committed to providing ongoing monthly benefits so long as you continue to be eligible … under the terms of your disability policy." DER172-75. Defendants reminded Leavey that they had asked for his and Dr. Curtin's reaction to the IME treatment recommendations but had not heard from them and told Leavey that if he still was disabled they "would resume making monthly payments such that you do not suffer a break in your payments." *Id.* Leavey said that he still was disabled, and defendants have paid his benefits ever since.

SUMMARY OF THE ARGUMENT

This much is undisputed: (i) defendants sent Leavey an unfortunately worded letter in December 2001 and (ii) defendants have paid Leavey every penny he is owed without interruption. Defendants' claim representatives testified that their letter was poorly worded but was intended to provide Leavey with encouragement, assistance, and an opportunity to obtain the type of care that could lead to his recovery (and possible return to dentistry). Leavey, on the other hand, asked the jury to infer that defendants intended to permanently cut off his benefits. Both parties agreed that it would have been bad faith for defendants to permanently cut off Leavey's benefits but would have been perfectly appropriate for them to provide him treatment recommendations and assistance in returning to more effective care for his condition.[10] Thus, Leavey's bad-faith and punitive damages claims turned on the jury's interpretation of the Letter and, more to the point, defendants' intentions in sending the Letter. If Leavey had simply contacted defendants after he received their letter, they would have explained their intentions. Instead, Leavey sued and, with the aid of "bad company" evidence having no nexus to the handling of his claim, turned a poorly worded letter into a multi-million-dollar windfall.

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[10] **Leavey:** DER250; *see also* DER179, 181-82, 186.
Defendants: DER188, 202, 218-20.

Defendants accept that, taken in the light most favorable to the verdict, the statement in the Letter that Leavey no longer qualified for total disability benefits is sufficient to support the jury's finding of bad faith. But that is as far as the evidence will take Leavey. No other evidence supports his theory that defendants were engaged in a malicious scheme to cheat him out of his benefits. By contrast, much evidence supports defendants' position that they never intended to permanently cut off his benefits if he did not recover, including: (i) the balance of the Letter which expressed defendants' belief that with more effective care Leavey's "anxiety can be managed" so that he "would not be so vulnerable to risk of relapse" and stated that it was defendants' "goal to offer [Leavey] this opportunity for intense/focused treatment in order to assist in [his] return to work"; (ii) Conrad's testimony that, if defendants had intended to permanently deny Leavey's claim, they would have written a much more detailed letter of explanation, would have called to inform him, and would not have made repeated attempts to follow-up with his treating physicians; (iii) the testimony of defendants' claim-representatives that they intended to continue paying the claim if Leavey had not recovered within six months as they had expected; and (iv) the fact that defendants never actually did cut off Leavey's benefits. Under Arizona's exacting requirement that Leavey adduce ***clear and convincing*** evidence that

defendants engaged in quasi-criminal conduct with an evil mind, the punitive verdict must be reversed.

Moreover, although the evidence may have been sufficient to support the finding of bad faith, defendants are entitled to a new trial because the district court erroneously refused to instruct the jury that the duty of good faith runs in both directions. This undisputed rule of Arizona law had obvious applicability. Contrary to the district court's conclusion, it was not enough to let defendants state the rule during closing argument.

If the Court does not order a new trial, the non-economic damages must be reduced. The remitted non-economic damages of $1,200,000 remain grossly excessive as compensation for someone who worried about his finances for six months but never actually went a day without his disability benefits. The other injuries identified by the district court—a broken hand and a drug relapse—were not caused by defendants and thus the component of the award that constitutes compensation for those harms must be eliminated.

And if the Court does not grant either judgment or a new trial on punitive damages, the punitive award remains unconstitutionally excessive and must be further reduced. If defendants' conduct crossed the line of reprehensibility required for punitive damages, it did so only barely. Moreover, Leavey's compensatory damages, even if further reduced, will remain substantial and will

continue to impart substantial deterrence and punishment in their own right, especially when added to the large award of attorneys' fees. Under these circumstances, the highest constitutionally permissible punitive award is the amount Leavey received for economic damages—approximately $800,000.

Finally, Leavey's attempt to reinstate the original punitive award must be rejected. He has misinterpreted the applicable legal standards, misstated the facts of the case, and mischaracterized the district court's actions in reducing an obviously unconstitutional award.

STANDARDS OF REVIEW

The Court reviews the denial of a Rule 50(b) motion *de novo*, taking the evidence in the light most favorable to the non-moving party. *White v. Ford Motor Co.*, 312 F.3d 998, 1010 (9th Cir. 2002), *amended by* 335 F.3d 833 (9th Cir. 2003). "[T]his court reviews the denial of a new trial motion for abuse of discretion." *Wharf v. Burlington N. R.R. Co.*, 60 F.3d 631, 637 (9th Cir. 1995). It also reviews a district court's refusal to give a jury instruction for abuse of discretion. *White*, 312 F.3d at 1012. The district]court's calculation of a remittitur is reviewed for an abuse of discretion. *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 778 (9th Cir. 1990). And the district court's resolution of defendants' excessiveness challenge to the punitive award is reviewed *de novo*. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

ARGUMENT

I. Defendants Are Entitled To Judgment Or A New Trial On Punitive Damages.

In his opening brief, Leavey portrays defendants' conduct as highly aggravated and outrageous. But he fails to mention that the district court very nearly didn't allow the issue of punitive damages to go to the jury at all. *See* DER384-93. At the end of Leavey's case, Judge McNamee (who is bald) remarked that the evidence Leavey had proffered to support punitive damages was "probably even thinner than my hairline." DER306. And, at the close of defendants' case, he observed:

> [Y]ou have a lot of evidence that goes back and forth about what they intended to do, what they didn't intend to do. [Leavey] was reinstated. He hasn't suffered any additional harm to this point. He has no, really, lost income damage. … [T]here was a lot of conflicting evidence that there wasn't appropriate care being given. And even [Leavey's] own expert says they have the right to make those inquiries. Whether they did it in good faith [is] a question of fact for the jury. But I don't know how you make that quantum leap into punitive damages on the facts of this case.

DER387-88. Despite this skepticism, the district court took defendants' Rule 50 motion "under advisement" in the interest of judicial economy so that there would be a jury verdict on the issue. DER392-93.

On defendants' post-trial motions, the district court decided to allow the punitive verdict to stand for three reasons:

1. "Reasonable jurors could infer from the testimony and evidence that Dr. Brown misrepresented [Leavey's] medical treatment in his contact with independent medical examiners (i.e., focusing only on the negative aspects of [Leavey's] treatment and omitting the positive aspects)."

2. "[A] reasonable juror could conclude that Ms. Conrad and Mr. Johnson's testimony about whether or not they entirely closed the claim, together with the unambiguous language in the December 2001 letter and the PACE screens which show the claim was indeed closed, demonstrated that Defendants intentionally closed the claim and disregarded the risk that [Leavey's] rights would be injured."

3. "[A] reasonable juror could conclude that Defendants targeted [Leavey's] claim for closure in their own self-interest of profitability" because Leavey "proffered documentary evidence of Defendants' goals for terminating claims and their claim-closing strategies, as well as evidence that at least one of those strategies (the roundtable review) was used in [Leavey's] case."

CR274:11-12. Contrary to the district court's conclusion, none of these contentions can support the finding of punitive liability.

A. Arizona allows the "extraordinary civil remedy of punitive damages" only when there is clear and convincing evidence of "the most egregious of wrongs."

The Arizona Supreme Court has made clear that "the extraordinary civil remedy of punitive damages" should be "restricted to only the most egregious of wrongs." *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 680 (Ariz. 1986). To obtain punitive damages in Arizona, a plaintiff must prove "something more than the conduct required to establish the [underlying] tort." *Id.* at 681. Thus, in a case alleging bad faith, the plaintiff must prove not only that the defendant knowingly acted in an unreasonable manner, but also that its conduct was

"aggravated and outrageous" and motivated by an "evil mind" (*id.* at 680-81)—a mental state that "involves some element of outrage similar to that usually found in crime" (*Gurule v. Illinois Mut. Life & Cas. Co.*, 734 P.2d 85, 86 (Ariz. 1987) (internal quotation marks omitted)).

"It is only when the wrongdoer should be consciously aware of the evil of his actions, of the spitefulness of his motives or that his conduct is so outrageous, oppressive or intolerable in that it creates a substantial risk of tremendous harm to others that the evil mind required for the imposition of punitive damages may be found." *Linthicum*, 723 P.2d at 679. And, of course, the defendant's "evil mind" and the element of "outrage similar to that usually found in crime" must be proved by "clear and convincing evidence." *Id.* at 681.

Some jurisdictions might pay only lip service to strict standards for punitive damages such as these—but not Arizona. On the contrary, Arizona courts often have reversed punitive awards against insurers, even while affirming on bad faith. In *Linthicum*, for example, the defendant health insurer had denied coverage for Mr. Linthicum's cancer, asserting that it was a pre-existing condition even though it had not previously been diagnosed. The Arizona Supreme Court recited a litany of the insurer's misdeeds and concluded that the insurer was aware of "the harm a denial would cause"—Mr. Linthicum's permanent paralysis. *Id.* at 681-82. Nevertheless, the court held that the insurer's "tough claims policy" did not meet

Arizona's strict standards for imposing the "extraordinary civil remedy" of punitive damages. *Id.* at 680.

Similarly, the Arizona Supreme Court reversed an award of punitive damages in *Gurule,* despite affirming bad-faith liability, because the insurer "did not ignore 'overwhelming' medical evidence when it denied Gurule's claim." 734 P.2d at 92. And in *Filasky v. Preferred Risk Mutual Insurance Co.*, 734 P.2d 76 (Aziz. 1987), the Arizona Supreme Court concluded that bad-faith delays in the settlement of claims did not warrant the imposition of punitive damages even though the delays "resulted from [the insurer] taking a groundless position." *Id.* at 82-84; *see also Tritschler v. Allstate Ins. Co.*, 144 P.3d 519, 531-32 (Ariz. Ct. App. 2006) (affirming summary judgment on punitive damages, while reversing summary judgment on bad-faith claim).

If punitive damages were inappropriate in *Linthicum*, *Gurule*, and *Filasky*, they are all the more so here. Defendants concede that the Letter they sent to Leavey was poorly worded and (under the preponderance of the evidence standard) can be interpreted in a way that supports the finding of bad faith. But nothing in this case approaches clear and convincing evidence that defendants acted with an "evil mind" and with an "element of outrage similar to that usually found in crime."

B. The IMEs were not carried out with an "evil mind."

In his initial IME referrals to Drs. Obitz and Stonnington (DER120-28), Dr. Brown provided the following background:

> Brett Leavey is a 40-year-old dentist who presented a claim for disability on October 30, 1998, due to depression and chemical dependency. In a November 29, 1999 review, the medical records indicated that the chemical dependency diagnosis was in early remission. A June 2, 2000, review indicated that our insured was in need of a sustained methadone free period in order to return to work. As of April 2000, methadone had been reduced to 25 mg. per week; a March 22, 2001 field visit reported current usage of 9 mg. per day. During the field visit, Dr. Leavey indicated that he has not complied with the board's monitoring program and that he will not be returning to dentistry. He is actively involved in a graduate program and various other physical activities, and it appears that our insured will graduate with an MBA [in] approximately June 2001. Available records indicate that our insured's last relapse was May 1999.
>
> In order to clarify the extent of our insured's impairment and how it prevents him from returning to his own occupation, we believe a comprehensive evaluation is necessary. We are interested in your opinion regarding diagnosis, treatment options, and restrictions and limitations. Medical records are enclosed to assist you with your evaluation.

DER121. Leavey never has disputed that all of the statements in Dr. Brown's background were accurate, and defendants forwarded to the IME physicians all relevant medical records (DER347, 361-62).

The district court opined that the jurors could "infer" that "Dr. Brown misrepresented [Leavey's] medical treatment" by "focusing only on the negative

aspects of [Leavey's] treatment and omitting the positive aspects." CR274:11-12. That "inference" cannot support the finding of punitive liability for two reasons.

First, because all of Dr. Brown's statements were true, his focus on the aspects of Leavey's medical history that gave rise to defendants' concerns could "misrepresent" the facts only if he purported to be providing a complete summary of Leavey's claim. But his referral letter was neither intended nor read in that way.

As Dr. Stonnington testified, the referral was "supposed to alert [me to defendants'] concerns," but defendants "gave me a huge amount of other information that had a lot more facts [i]n it than that, and I understood that my job was to find out as much as [possible, which is] the reason, of course, that I talked to Dr. Almer and talked to other people that may be able to provide other points of view. So that I could have a very balanced view. And that's my goal is to have as balanced a view of [Leavey] as possible." DER380; *see also* DER381 ("I don't think it's unusual to get [an insurer's] opinions or concerns. I mean, that's—how else are they going to create—create a question to ask, you know, for an independent medical evaluation?"); DER323-24 (Dr. Brown's testimony that it is "entirely appropriate" and "customary" for him to tell the IME physicians "that these are the problems that I see. These are the facts as I understand them.").

Nor were defendants required to include a complete summary of the evidence in their IME referral. There is no statutory or common-law requirement

that an insurer include a description covering all aspects of a claim in an IME referral. On the contrary, it is common practice—and perfectly legitimate—for an IME referral to identify the factors that gave rise to the insurer's decision to order an IME so that the IME physician can address those concerns. *See* DER323-24 (Dr. Brown), DER381 (Dr. Stonnington). It is the IME physician's review of the records and examination of the insured that provides the full picture of the claim—and there is no dispute that, in this case, Drs. Obitz and Stonnington conducted their own complete and independent evaluation of the evidence (as defendants asked them to do). *See* DER130-51, 347-48, 362.

Second, regardless of the applicable legal standard, there is no way to discern clear and convincing evidence of an evil mind in defendants' handling of the IMEs. All things considered, Dr. Brown's IME referral letter was remarkably conservative in its substance and tone. For example, it did not emphasize Leavey's history of personal dissatisfaction with dentistry; it omitted the fact that Leavey's after-tax income was almost the same on disability as it had been while he was practicing; and it did not tell the IME physicians that Leavey had dumped every doctor or treatment program that told him to stop taking methadone.

Moreover, even if Dr. Brown's referral letter was inappropriately "slanted" toward those aspects of Leavey's claim that gave rise to defendants' concerns, that is not enough to support punitive liability, which requires evidence that is

"inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing." *Hamed v. Gen. Accident Ins. Co. of Am.*, 842 F.2d 170, 172 (7th Cir. 1988). Because the referral letter did not contain false information, and defendants did not conceal relevant medical information from the IME physicians, there is no such evidence.

Leavey also implies that there was something nefarious about Dr. Brown's requests for clarifications and additional details from the IME physicians. *See* LOB13-14. Notably, the district court did not identify that as a factor supporting punitive damages. And, again, there is nothing unusual or inappropriate about the conduct that Leavey attacks. *See* DER187-88 (Johnson), DER202a (Conrad); DER354-55 (Dr. Obitz); DER363-64 (Dr. Stonnington). Indeed, it can be bad faith for an insurer to act ***without*** asking follow-up questions if the IME report is ambiguous, vague, or incomplete. *See, e.g.*, *Kadabra-Lord v. State Farm Mut. Auto. Ins. Co.*, 2001 WL 882147, at *1 (Wash. Ct. App. Aug. 6, 2001). Leavey also has failed to identify a coherent theory of how Dr. Brown's follow-up requests were inappropriate or made in bad faith (let alone with an evil mind), but simply assumes that any follow-up must be nefarious.

As to whether Dr. Brown's specific requests were appropriate, Dr. Obitz said that she "didn't even think about" there being something improper with the

follow-up letter because she "didn't really go into details in [her] first report." DER354-55. And she said that the follow-up phone call involved "fair inquir[ies]" regarding "clarifications and specifics" for her treatment recommendations. DER356. Dr. Stonnington also said that the letter was not "inappropriate or unprofessional" and that Dr. Brown simply "wanted me to be more detailed in some of my answers and clarify some of the points" that "I really kind of glossed over … fairly briefly in my initial evaluation." DER363-64. She saw the follow-up phone call as an attempt to "get more specifics," "clarify some of the points that I had made," and get "an estimated timeline of what [the recommended] therapy would require." DER368-69; *see also* DER382-83. Both physicians testified that they never felt any pressure to conform or change their opinions (DER355-56, 368) and, in fact, had not changed their initial opinions, but only provided clarifications and further details (DER360, 382-83).[11]

[11] Leavey contends that "Dr. Brown's pressure on the [IME] physician[s] not only expressly *disregarded* the serious risk of relapse about which he had been warned, but gave no consideration to whether this intensive treatment was in [Leavey's] best medical interest." LOB13-14. But he does not, and cannot, suggest that the treatments recommended by Drs. Obitz and Stonnington (and Dr. O'Connor) could have caused a relapse or injured him. On the contrary, these were aggressive but standard treatments for anyone seeking to recover from addiction and lead a drug-free life. Leavey does not explain how efforts to obtain effective treatment recommendations can "disregard" his health or his recurrent relapses but, again, simply hopes to create the appearance of impropriety with inflammatory language.

In sum, defendants' handling of the IMEs was completely appropriate. And even if the jury could "infer" otherwise, there certainly was not clear and convincing evidence that defendants conducted the IMEs with an "evil mind" (*Linthicum*, 723 P.2d at 679) and an element of "outrage similar to that usually found in crime" (*Gurule*, 734 P.2d at 86).

C. The closure of Leavey's claim on the PACE system is irrelevant.

The district court cited the closure of Leavey's claim on the PACE system as the second of three possible bases for punitive damages. DERCR274:11-12. But as Conrad and Johnson testified, because defendants intended to provide Leavey a six-month advance, they had to stop the payment of monthly benefits. DER192, 198-99. They did that by closing the claim on the PACE claim-payment system. *Id.* That clerical action has no relevance to the issues in this case.[12] Specifically, it does ***not*** tend to show that defendants intended to permanently cut off Leavey's benefits regardless of whether he recovered during the six-month advance period.

Years later, when defendants' claim representatives were deposed in this case, they understandably did not remember the details of this particular claim.

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[12] Leavey misleadingly describes this clerical action as the "detailed process of closing [his] claim and releasing the reserve." *See* LOB17-19. Far from a "detailed process," the only steps required of the claim representative were (1) obtaining approval from his or her superior (*see* DER169) and (2) entering a code in the PACE system. *See* DER196-97, 201. Claim representatives don't have "anything to do with setting reserves on a claim," which takes place completely behind the scenes from their point-of-view. DER337-383.

See, e.g., DER335-36. To refresh their recollection, they reviewed the PACE system. *See, e.g.*, *id.* But the PACE system provides only a snapshot of the current status of a claim, closed or open, and does not automatically record whether a claim was closed or reopened in the past. DER329-30; *see generally* DER222-26. The PACE system does have a field for a "reopen" date, but that field is populated only if there has been an actual break in the payment of benefits. DER331-32, 336-37. Because Leavey's claim had been closed and then reopened without a break in benefits, the "reopen" field was blank on the PACE system. *Id.* The claim representatives saw that the "field in the payment system … for a reopen date … was blank" and naturally concluded "that the claim had never been closed in the payment system" as it apparently had never been reopened.[13] DER193; *see also* DER198-99, 206-10, 329-30.

Following the claim representatives' initial depositions, Leavey discovered a monthly print-out from another of defendants' computer systems—which was not accessible to claim representatives (*see* DER333-34)—indicating that Leavey's claim had been closed on the PACE system (Ex. 373-0002). Although the claim representatives still did not recall closing and reopening Leavey's claim, they agreed that they must have done so. DER189-91, 206-08. But the particular

[13] The claim representatives did not learn that the reopen date would populate only upon an actual break in benefits until they spoke with the system administrators following the confusion discussed below. DER331-32, 336-37.

technique that they used to stop Leavey's month-by-month benefit payments during the six-month advance period was irrelevant to their consistent testimony that they intended to resume his payments if he did not recover at the end of six months. *Id.* Indeed, the only relevance of the status of a claim on the PACE system—from either a claim representative's or an insured's perspective—is that it controls whether a benefit check is issued each month. *See* DER329-30. Therefore, it was perfectly appropriate from a claim-handling point-of-view to have closed Leavey's claim in the PACE system as a way of stopping month-by-month benefits while intending to reopen the claim on the system, thus "restarting" his monthly benefits, if Leavey did not recover during the six-month period (which they did). *See* DER192, 198-99.

Because the closure of Leavey's claim on the PACE system is not "inconsistent with the hypothesis" that defendants were acting in good faith or, at worst, were guilty of some "noniniquitous human failing" (*Hamed*, 842 F.2d at 172), it cannot support punitive damages.

In sum, the ***only*** evidence suggesting that defendants intended to terminate Leavey's claim is the language in the Letter that defendants consistently have acknowledged was a mistake and that is contradicted by other aspects of the Letter, the claim-representatives' testimony regarding their intent, and defendants' prompt resumption of monthly benefits before Leavey missed even a single payment (*see*

pages 16-18 & n.9 *supra*)). The unfortunate language in the Letter may be enough to support a finding of bad faith (on a preponderance-of-the-evidence standard), but it is insufficient to support a finding of punitive liability under Arizona's strict standards for that "extraordinary civil remedy."

D. Leavey's "bad company" evidence does not establish that defendants acted with an "evil mind" in this case.

Leavey centered his claim for punitive damages around what has become a standardized package of documents and testimony intended to show that members of the UnumProvident family of insurers always act in bad faith.[14] Leavey opens his brief with that "bad company" account—in a section that could have been copied from any number of briefs filed in this and other courts over the last several years. But "evidence in support of [an] institutional bad faith claim is irrelevant unless plaintiff establishes a nexus between that evidence and the handling of [his] individual claim." *Montoya Lopez*, 282 F. Supp. 2d at 1104 n.65 (citing *Knoell*, 163 F. Supp. 2d at 1078); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409-10 (2003) (evidence regarding a defendant's practices is "probative" of "the deliberateness and culpability of the defendant's action" only when it has "a nexus to the specific harm suffered by the plaintiff"). Here, Leavey's pre-

[14] This is a common practice in many insurance-bad-faith cases, regardless of the defendant. *See, e.g.*, *Montoya Lopez v. Allstate Ins. Co.*, 282 F. Supp. 2d 1095, 1104 (D. Ariz. 2003); *Knoell v. Metro. Life Ins. Co.*, 163 F. Supp. 2d 1072, 1078 (D. Ariz. 2001).

packaged "bad company" evidence, whatever its accuracy, does not prove that defendants acted with an evil mind in their handling of ***his*** claim.

Recognizing that there must be a nexus between the "bad company" evidence and Leavey's individual claim, the district court identified a single connection: the fact that there was a roundtable review of Leavey's claim (a practice that Leavey's "bad company" account had impugned). CR274:14-15.

But in Arizona, "having a round table discussion where more than one person evaluates the status of a claim is not a company acting in bad faith" (*Knoell*, 163 F. Supp. 2d at 1078), let alone with the "evil mind" required for punitive damages. The relevant question, then, is whether there is clear and convincing evidence that the roundtable on Leavey's claim in particular was conducted with an "evil mind." There is not.

The roundtable review of Leavey's claim simply confirmed Dr. Brown's recommendation that Leavey undergo an IME.[15] *See* DER117. Not only did defendants have a contractual right to request an IME (*see* Ex. 4-0020), an IME was particularly appropriate in this case because Leavey had chosen to drop a number of his own physicians and treatments. Even Leavey's expert conceded that defendants had a right to investigate whether Leavey was getting appropriate care.

[15] Inexplicably, Leavey asserts that defendants "destroyed (or failed to create)" a record of what happened at the roundtable (LOB12) even while referencing the very document that memorialized the outcome of the roundtable (DER117).

See DER180-83. Because the roundtable of Leavey's claim reached a manifestly reasonable result, it cannot constitute clear and convincing evidence that defendants were acting with an evil mind.

Although Leavey's "bad company" case describes various other practices (*e.g.*, "top ten lists"), there is no evidence that any of them were used in Leavey's claim. Therefore, those practices lack the required "nexus" to Leavey's claim.

E. Leavey's other allegations do not support the imposition of punitive damages.

Leavey makes several other allegations in the course of his brief, none of which was adopted by the district court, and none of which can support an award of punitive damages.

First, Leavey falsely claims that defendants conveyed to his physicians that they had to return him to dentistry "regardless of whether that was medically appropriate" and that his policy "did not cover the risk of relapse" (LOB10-11). A cursory review of defendants' letters to the physicians (DER27-37) reveals that both contentions are false.

The letters, sent at the outset of Leavey's claim, asked Leavey's physicians about their treatment plans and offered to help with returning Leavey to his occupation because most people—including, at this point, Leavey—want to return to work. DER27. The letters did not say that the physicians' treatments ***had to***

return Leavey to dentistry, let alone that they had to do so "regardless" of the risk to Leavey.

The letters also did not state that Leavey's policy excludes coverage for the risk of relapse. Instead, the letters said that there must be a "mental/nervous disability" and not just "the possibility of a recurrent … disabling condition." DER27. Defendants never have disputed that a sufficiently significant risk of relapse is relevant to whether the insured has a "mental/nervous disability," as is evident in their consistent payment of Leavey's benefits (*see also* DER324a). The point of the standardized language in the letter is that if an insured's ***current*** condition is not disabling, he is not rendered disabled simply by the possibility that his condition could worsen in the future.

Second, in an effort to create the impression that defendants were "targeting" Leavey's claim during the two years that they were paying it, Leavey identifies a medical review of his claim for "S/D [skill deficits] AND SEVERITY" which concluded that Leavey's current skill deficits—his inability to practice without a license—amounted to a "'severe' situation." *See* DER56-57. Leavey tries to characterize this as "flagg[ing]" his claim because of defendants' potentially "severe" financial exposure. LOB11. But the review analyzed Leavey's occupational limitations and, appropriately, concluded that they were severe; it had nothing to do with defendants' financial interests. As with all of

these contentions, there is nothing to support Leavey's interpretation but his counsel's imagination.

Third, Leavey asserts (LOB11) that, early in his claim, someone in defendants' settlement unit—who had no control over Leavey's claim—observed that "[i]f [Leavey's] license is reinstated [and] he does not [return to work], [defendants] could take the position that he is making a choice to change occ[upations] that is not related to disability" (DER69). As an initial matter, it is undisputed that defendants never took that position, so the relevance of this observation is tangential at best. But more important, the observation was not inappropriate. The dental board would reinstate Leavey's license only if he safely could return to the practice of dentistry (as many dentists with addiction problems do). If Leavey safely could return to the practice of dentistry but did not, then he ***would*** be making a personal choice to change occupations. That was not a remote hypothetical either, given Leavey's well-documented dislike of dentistry. *See* pages 4-5, 12-15, *supra*. This isolated comment in the claim file is thus utterly insufficient to support the finding of punitive liability.

In sum, the evidence does not clearly and convincingly prove that defendants were acting with the type of "evil mind" required to impose punitive damages under Arizona law. Defendants did send Leavey a poorly worded letter, but have

paid him every penny that he was owed without interruption. For their mishandling of the Letter, defendants accept the jury's finding of bad faith: As they have said from the beginning, the Letter unquestionably should have been worded differently. Anything beyond a finding of bad faith, however, is not grounded in the type of "clear and convincing" evidence of intentionally outrageous conduct and an "evil mind" that Arizona demands before imposing "the extraordinary civil remedy of punitive damages." The Court accordingly should reverse the award of punitive damages. At the very least, defendants are entitled to a new trial on the issue of punitive damages. *See, e.g.*, *Wharf*, 60 F.3d at 637.

II. Defendants Are Entitled To A New Trial Because The District Court Refused To Instruct The Jury On The Reciprocal Duty Of Good Faith.

Because Leavey has never missed a day of benefits payments, his effort to use this case to become an instant millionaire turned on one (and only one) hotly contested factual issue: whether defendants intended to permanently terminate his claim when they sent him the Letter. Central to this dispute was defendants' resumption of month-by-month benefit payments at the end of the six-month period. That fact obviously supports the claim representatives' testimony that they intended to resume paying Leavey's monthly benefits if he did not recover. But Leavey argued that the jury should interpret the resumption of his monthly benefits as a change of heart, motivated by this lawsuit. DER221, 394-95. Of course, the fact that Leavey chose to file a lawsuit before the end of the six-month period

without first confirming defendants' intentions makes it impossible to affirmatively refute his *post hoc* characterization of those intentions.

For this, and other reasons, defendants asked the district court to instruct the jury that "the duty of good faith and fair dealing is something that the parties owe to each other." DER342. There is no question that this is an accurate statement of the law. In Arizona, "firmly established law indicates that the insurance contract between [the insured] and [the insurer] include[s] a covenant of good faith and fair dealing, implied in law, whereby ***each of the parties*** was bound to refrain from any action which would impair the benefits which the other had the right to expect from the contract or the contractual relationship." *Rawlings v. Apodaca*, 726 P.2d 565, 570 (Ariz. 1986) (emphasis added); *see also id.* at 569 ("[t]he essence of that duty is that ***neither party*** will act to impair the right of the other") (emphasis added).

Leavey objected to defendants' instruction because defendants had not pled his failure to act in good faith as an affirmative defense. DER342-45. Defendants responded that this is not "a true affirmative defense that ever needed to be pled," but simply "a correct statement of the law" that was relevant to the jury's decision-making process. DER345. The district court agreed that this was an accurate statement of law and recognized that it was relevant on the facts of the case (DER343-44), but nevertheless refused to instruct the jury on it, concluding that

defendants were "entitled to argue that [there is a reciprocal duty of good faith], but I don't think it's the subject of a separate jury instruction" (DER346).

It is not enough, however, to leave relevant points of law to the parties' arguments. Instead, the court itself must properly instruct the jury on all relevant legal principles because "[i]nstructions have a different effect upon the jury than closing arguments." *DeMontiney v. Desert Manor Convalescent Ctr., Inc.*, 695 P.2d 255, 260 (Ariz. 1985) (rejecting contention that refusal to properly instruct the jury was harmless because party stated the relevant legal principle in its closing argument). As the Arizona Supreme Court noted in *DeMontiney*, "[h]aving just been warned that they need not accept the parties' closing arguments as fact, the members of the jury would not be likely to embrace and apply [the party's] argument as fully as if it had come from 'on high.'" *Id.* (internal quotation marks and citation omitted). Here too, the court was obliged to instruct the jury on the relevant law. Its abdication of that responsibility to the parties was error.

If the jury had been appropriately instructed, it very well could have concluded that Leavey had a good-faith obligation to contact defendants before rushing to the courthouse. That might have led the jury to give defendants the benefit of the doubt when resolving the hotly contested issue of defendants' intentions in sending the Letter. Moreover, even if the jury might still have concluded that the Letter amounted to bad faith, it could well have concluded that

punitive damages were unwarranted (again, giving defendants the benefit of the doubt in light of Leavey's breach).

Furthermore, regardless of its effect on liability, the instruction might have affected the damages awarded by the jury. The jury might have concluded that it was Leavey's decision to sue defendants without having contacted them, rather than defendants' conduct, that caused most of his emotional distress. And, because setting the size of punitive damages necessarily is a highly subjective process, any perceived breach of a good-faith obligation on Leavey's part might have resulted in a more modest punitive award. *Cf. Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 467 (3d Cir. 1999) (plaintiff's breach of contract and tortious activities justified a reduction in the punitive award); *Ezzone v. Riccardi*, 525 N.W.2d 388, 399 (Iowa 1994) (reducing punitive award because defendants' conduct was provoked by the plaintiffs).

Finally, the instruction might have impacted the jury's deliberations in less direct ways. For example, it might have led the jury to take a more skeptical view of Leavey's testimony in light of his various false statements to defendants (*see, e.g.*, DER271-72, 278-79) or to more closely scrutinize Leavey's decision to abandon recovery-oriented treatments (and doctors) in favor of methadone.

In sum, defendants requested an instruction on an undisputed legal principle with obvious relevance to the case that could have affected the verdict in any

number of ways. The district court's refusal to instruct the jury on this point of law requires reversal.

III. The Award Of Non-Economic Damages Is Unsustainable.

The jury awarded Leavey $4,000,000 as compensation for "mental, physical, [and] emotional pain and suffering." DER396. Leavey had sought compensation for his financially-related emotional distress and a relapse he experienced in February 2002 when he intentionally broke his hand to obtain drugs. In ruling on defendants' post-trial motions, the district court concluded that the jury's award "shocks the conscience" as compensation for a "'slight' physical injury, relapse, and [the] mental and emotional distress caused by worrying about … financial security."[16] CR274:16. The district court accordingly ordered a new trial unless Leavey agreed to a remittitur to $1,200,000.

That was a step in the right direction, but it did not go far enough for two reasons. First, the emotional distress component of the remitted award remains excessive. Second, the district court allowed compensation for a hand injury and relapse that defendants did not cause.

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[16] In Arizona, a compensatory award must be reduced if it "'shocks the conscience' of the court" or is "the result of passion or prejudice." *Sheppard v. Crow-Barker Paul No. 1 Ltd. P'ship*, 968 P.2d 612, 622 (Ariz. Ct. App. 1998) (citation omitted). A verdict is the product of passion and prejudice if it is not "within the range of credible evidence." *See Flieger v. Reeb*, 583 P.2d 1351, 1353 (Ariz. Ct. App. 1978).

A. The award for Leavey's emotional distress is excessive.

The district court awarded Leavey $1,000,000 for his financially-related emotional distress because, the court concluded, *State Farm* teaches that "$1 million [is] a 'substantial' compensatory award for emotional distress alone" and Leavey "suffered primarily emotional distress and only a 'slight' physical injury and a relapse."[17] CR274:17. But there are substantial differences between *State Farm* and this case. Most obvious, the award in *State Farm* was compensation for the emotional distress of two people. Moreover, in *State Farm* the plaintiffs' financially-related distress lasted 18 months, whereas Leavey got the "good news" that his month-by-month benefits would resume "without any strings attached" after only six months of financial uncertainty. DER293-94, 300-01. It is arbitrary and irrational to place the same value on Leavey's emotional distress as on that of two people who each suffered three times as long.

In fact, the district court's $1,000,000 award implies that Leavey's distress was five times more "intense" or "severe" than Mr. Campbell's (whose award was remitted from $1,400,000 to $600,000 for distress that lasted three times as long as Leavey's). Yet the emotional distress experienced by Leavey was substantially less intense than that experienced by the Campbells who "lived for nearly eighteen

[17] In *State Farm*, the jury awarded the insured $1,400,000 and his wife $1,200,000. The trial court ordered a remittitur of the awards to $600,000 and $400,000 respectively. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1143 nn.4-5 (Utah 2001).

months under constant threat of losing everything they had worked for their whole lives." *Campbell*, 65 P.3d at 1149. Leavey experienced only concern that he would lose a stream of future income. Unlike the Campbells, Leavey never feared for the loss of his life savings or other assets. And while State Farm affirmatively told the Campbells to "put [a] for sale sign[]" on their family home (*id.* at 1142), Leavey simply decided on his own to move into a more affordable apartment (DER239a).[18]

Furthermore, in *State Farm* the insurer was fully aware of the distress it was causing its insureds and, indeed, was dismissive when they said that they feared financial ruin. 65 P.3d at 1142. Here, to the contrary, Leavey ignored defendants' request that he contact them after receiving the Letter (DER298-99), and the next contact he had with defendants was the letter in which they resumed his monthly benefits without missing a payment. Leavey's alleged emotional distress arose entirely from his interpretation of a single letter (and his decision not to contact defendants).

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[18] Leavey emphasizes the difficulty he had obtaining work and states that "his doctors believed he was neither emotionally or [sic] physically ready" to work. LOB17. But Leavey already was trying to return to work before he received defendants' letter, having recently received an MBA and sent out over a hundred resumes. DER236, 238-39. Defendants' letter did not cause Leavey to re-enter the job market, and defendants cannot be blamed for the fact that Leavey's job search went poorly.

In sum, far from providing a basis for the district court's exorbitant $1,000,000 award, *State Farm* demonstrates that any emotional-distress award over $200,000 (one third of Mr. Campbell's award) would be outside "the range of credible evidence" (*Flieger*, 583 P.2d at 1353).

Other cases confirm that conclusion. As far as we are aware, the highest emotional-distress award ever permitted in a reported Arizona bad-faith case was $100,000. *Filasky*, 734 P.2d at 82-83. The largest emotional-distress award ever upheld by this Court in a reported bad-faith case was $200,000. *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895 (9th Cir. 2000). And the largest such award ever approved by any appellate court in a reported decision is the $600,000 award to Mr. Campbell in *State Farm*. 65 P.3d at 1166. Leavey—who has received every penny he is owed without interruption—is far from an appropriate candidate for resetting the benchmark for all future cases.

In fact, this case involves less severe harm than *Filasky*, in which the Arizona Supreme Court upheld an award of $100,000 to an insured who was unable to make house payments and suffered "frustration, inconvenience, and humiliation" because of the defendant's bad-faith denial of benefits. 734 P.2d at 83. Leavey never experienced the actual hardship and humiliation of missing a payment on a family home; he simply worried about his future income.

Leavey's emotional distress also was materially less severe than that suffered by the plaintiffs in *Pershing Park*, who actually went bankrupt due to the defendant's bad-faith conduct and suffered "[a] variety of emotional symptoms, including major depression." 219 F.3d at 904. Again, Leavey never experienced real financial hardship, only concern about the future.

To be sure, there are cases upholding higher emotional-distress awards than this one. But those cases involve different torts, more severe emotional distress, or a court that has allowed emotional-distress damages as a way of punishing the defendant. Under analogous cases, such as those cited above, Leavey's modest emotional-distress simply cannot justify any award over $200,000.

B. Defendants did not cause Leavey's hand injury or relapse.

Defendants obviously can be required to compensate Leavey only for harms that they caused; they are not automatically responsible for every misfortune that befell Leavey after December 2001. And the burden is on Leavey to prove causation. *See Barrett v. Harris*, 86 P.3d 954, 958-59 (Ariz. Ct. App. 2004). Leavey failed to carry that burden with respect to his self-inflicted hand injury and relapse.

To begin with, Leavey never said that he broke his hand because of defendants' letter. In fact, the sum total of the evidence on this point is:

> Q. Okay. While you were packing to move in January of 2002, did you have a slight injury to yourself?

A. I had a slight injury to my left hand, but it was certainly nothing that would require treatment in any way.
Q. Did this lead to the relapse that you were questioned about in your deposition?
A. It led to an idea and opportunity, and that very much led to relapse.
Q. All right. Again, you purposely injured yourself badly.
A. I put my hand in an exercise—piece of exercise equipment and I dropped 45 pounds on my left hand.
Q. You broke your hand, didn't you?
A. Yeah.
Q. You got more narcotic prescription.
A. I did.

DER240. Leavey's counsel turned that testimony into the following argument for causation: Defendants caused Leavey to break his hand because (1) they sent the Letter in December 2001, which (2) made Leavey worry about his future finances, which (3) resulted in his decision to move into a new apartment, during which (4) he accidentally injured his hand, which (5) gave him the idea to further injure his hand to obtain drugs, which (6) he did the next month of his own free will. The law requires more than this convoluted chain of events before one party is forced to pay for another's injury. *See, e.g.*, *Hammond v. Northland Counseling Ctr., Inc.*, 218 F.3d 886, 893 n.8 (8th Cir. 2000) (plaintiff's emotional reactions were "too attenuated and removed from [the tort] to warrant an award of emotional distress damages"); *Jorgensen v. Mass. Port Auth.*, 905 F.2d 515, 527 (1st Cir. 1990) ("the jury could do no more than speculate as to the connection between the

accident … and [plaintiff's] emotional distress" where the only evidence of a connection was plaintiff's say-so).

In any event, the central link in counsel's convoluted causal "chain" is missing. The injury Leavey suffered while moving was ***not*** where he got the idea that he could obtain drugs by injuring his hand. In fact, as Leavey admitted at trial, that had been his modus operandi for obtaining drugs for years. *See* DER229, 279-80.

For the same reasons, defendants cannot be required to compensate Leavey for the relapse he intentionally suffered when he deliberately injured his hand. Again, Leavey never testified that defendants' letter caused him to relapse, and his counsel offered only the same speculative causal connection as they did for Leavey's hand injury. If the plaintiff's say-so is not enough to support causation (*see Jorgensen*, 905 F.2d at 527), his counsel's certainly is not.

Moreover, Leavey's physician, Dr. Curtin, testified that "[r]elapse is … part of … the disease of addiction" (DER184) and admitted that Leavey had a number of relapses both before he received defendants' letter and after he began receiving monthly benefits again in June 2002 (DER185). Indeed, Leavey has a consistent record over the years of frequent recoveries and relapses. *See*, *e.g.*, DER227-28 (Leavey stopped and then relapsed "quite a bit" in the years before his addiction was discovered); DER229 (relapse in October 1998); DER230 (January 1999);

DER233 (spring 1999); DER279 (February 2002); DER280 (March 2003); DER280 (July 2003); DER241-42 (late 2003); DER281 (January 2004).

For both Leavey's hand injury and relapse, the supposed causal connection between defendants' letter and Leavey's injuries is simply too speculative and attenuated to justify an award of damages. Therefore, Leavey's total award of non-economic damages should be no more than $200,000, the very most that can be permitted for his emotional distress.

IV. The Punitive Award Is Grossly Excessive.

The district court correctly held that the jury's $15,000,000 punitive award was unconstitutionally excessive. But its reduction of the award to $3,000,000 was inadequate for two reasons. First, under the circumstances of this case, even a 1:1 ratio of punitive to compensatory damages would be unconstitutionally excessive. Second, because the award of non-economic damages must be reduced (*see* Part III, *supra*), the punitive award must be reduced accordingly, even if this Court upholds the district court's 1.5:1 ratio.

A. Constitutional review is de novo and exacting.

The Supreme Court has instructed lower courts to consider three "guideposts" when determining whether a punitive award is unconstitutionally excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive to compensatory damages; and (3) the civil penalties applicable to

comparable conduct (*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-76 (1996)). The Court has indicated that "[e]xacting" judicial review employing these guideposts is necessary 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).

Leavey contends that, when reviewing the punitive award for excessiveness, the Court must place a heavy thumb on the scale by "view[ing] the evidence in the light most favorable" to him. LOB23-24 (emphasis omitted). On the contrary, the Supreme Court has indicated that appellate courts should defer only to a jury's "specific findings of fact."[19] *Cooper Indus.*, 532 U.S. at 439 n.12; *see also In re Exxon Valdez*, 270 F.3d 1215, 1239 (9th Cir. 2001) ("a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive damages awards"); *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 70, 72 (Cal. 2005) (when the jury has made "no … express finding" on an issue bearing on the *BMW* guideposts, "to infer one from the size of the award would be inconsistent with de novo review, for the award's size would thereby indirectly justify itself"). Here, the jury made no specific findings beyond the basic liability verdict, and thus there are no "specific findings of fact" to which the Court can

[19] In addition, both sides are bound by findings of the district court that are not "clearly erroneous." *Cooper Indus.*, 532 U.S. at 440 n.14.

defer.[20]

B. Defendants' Conduct Was Not Sufficiently Egregious To Warrant A $3,000,000 Punitive Award.

"The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (internal quotation marks and alterations omitted). Put succinctly, "punitive damages may not be grossly out of proportion to the severity of the offense." *BMW*, 517 U.S. at 576 (internal quotation marks omitted).

This core constitutional requirement entails placing the particular conduct before the reviewing court on a spectrum of reprehensibility. As a general matter, malicious acts of violence are on the high end of that spectrum (*e.g., Hilao v. Estate of Marcos*, 103 F.3d 767, 781 (9th Cir. 1996)); death threats and similar acts of physical intimidation are near that high end (*e.g., Planned Parenthood Inc. v.*

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[20] Contrary to Leavey's implication (LOB23-24), in *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1043 n.14 (9th Cir. 2003), this Court deferred to an ***explicit*** jury finding. And in *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 285 F.3d 1146, 1151 (9th Cir. 2002), this Court concluded "[a]fter independent review" that the defendant's "conduct was more foolish than reprehensible," thus undermining the alleged factual basis for the jury's award. Finally, although a panel of this Court appears to have deferred to phantom factual findings in *Hangarter v. Provident Life & Accident Insurance Co.*, 373 F.3d 998, 1014 (9th Cir. 2004), it did so without considering either *Cooper Industries*' limitation of deference to "specific findings of fact" or the renewed call for "exacting" review in *State Farm*. The Court's references to taking the evidence in the light most favorable to Hangarter thus do not constitute a binding holding; nor could they, because any such holding would contradict that of a prior panel of the Court. *See Exxon Valdez*, 270 F.3d at 1238-39.

American Coalition of Life Activists, 422 F.3d 949, 963-64 (9th Cir. 2005)); acts of racial, ethnic, or religious discrimination and/or harassment are on the moderately high end of the spectrum (*e.g.*, *Zhang*, *supra* and *Bains LLC v. ARCO Prods. Co.*, 405 F.3d 764 (9th Cir. 2005)); placing a known alcoholic in charge of a supertanker falls in the middle of the spectrum (*see In re Exxon Valdez*, 472 F.3d 600, 618 (9th Cir. 2006)); and insurance bad faith and other economic torts generally are separated from these other kinds of torts by a "substantial" "gulf" (*Zhang*, 339 F.3d at 1043).

To assist courts in placing particular conduct on the reprehensibility spectrum, the Supreme Court has identified five non-exclusive factors: (i) whether "the harm caused was physical as opposed to economic"; (ii) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (iii) whether "the target of the conduct had financial vulnerability"; (iv) whether "the conduct involved repeated actions or was an isolated incident"; and (v) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm*, 538 U.S. at 419. Importantly, the Court added, "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.*

Here, none of the five reprehensibility factors is present, confirming that this case barely registers on the reprehensibility spectrum (if it registers at all).[21] The district court found that this case involves three of the factors (CR274:20-23, CR277:2-5), but it relied on the wrong legal standard in finding two of them and made a clear factual error in finding the third.

Physical injury. The district court recognized that this factor "does not weigh in favor of reprehensibility" because Leavey's "injuries were, for the most part, due to emotional distress or economically related." CR274:20 *see also* CR277:2-3. Although Leavey accuses the district court of failing to recognize that "'harm' falls on a continuum," he proceeds to treat this factor as if it were a binary switch that the district court should have flipped to the on position because insurance bad faith can affect a policyholder's "emotional *and physical health*" as well as cause economic harm. LOB35 (emphasis in original). He ignores that the plaintiffs in *State Farm* suffered significant emotional distress, yet the Supreme Court nonetheless expressly held that "[t]he harm arose from a transaction in the

[21] Invoking *Hangarter*, *supra*, Leavey claims that all five factors are present. LOB38. As the district court explained when rejecting this same argument, however, "[t]he facts of each bad faith case are unique, and the facts of this case are materially different from the facts of *Hangarter*." CR277:4; *see also* CR277:5 ("the facts of *Hangarter* appear to be more egregious than th[ose] of this case, thus presumably warranting a different ratio [*i.e.*, lower than 2.6:1]").

economic realm, not from some physical assault or trauma; there were no physical injuries." 538 U.S. at 426.

To be sure, Leavey claims that the Letter ultimately caused him to injure his hand in order to obtain drugs. We already have explained (at 48-51) why the injury to his hand cannot be attributed to defendants' conduct. But even overlooking the absence of a causal connection, in denying Leavey's motion for reconsideration, the district court "consider[ed] [Leavey's] broken hand and relapse in its analysis of this factor" and stated that its "conclusion that [Leavey's] injuries were due, for the most part, to emotional distress or were economically related has not changed."[22] CR277:2-3. Leavey has given this Court no reason to overturn, as "clearly erroneous," the district court's finding that the evidence does not support this reprehensibility factor.

Reckless disregard of health or safety. The district court concluded that this factor was established because defendants knew "that if [Leavey] returned to dentistry, there was a very good chance he would relapse into drug addiction, and possibly sink further into depression," yet Dr. Brown "recommended to Conrad that [Leavey] could return to work following six months of aggressive treatment." CR274:21 (quoting CR139:26). That finding was clearly erroneous. Dr. Brown's

[22] The district court specifically noted that Leavey's counsel was exaggerating the seriousness of Leavey's hand injury. CR277:2-3.

recommendation was based on his belief that six months of aggressive treatment could ***alleviate*** Leavey's current risk of relapse and depression. Far from disregarding the risks that Leavey faced from a return to dentistry, defendants' actions were intended to encourage Leavey to get treatment that could mitigate or cure the medical conditions that created those risks so that he could safely return to work.[23]

Financial vulnerability. The district court concluded that this factor was established because, "contrary to Defendants' argument, [Leavey] is not required to demonstrate that he was targeted by Defendants due to his financial vulnerability," but only that he happened to be "financially vulnerable when [the] conduct occurred." CR274:21-22. As this Court subsequently held, however, "there must be some kind of intentional aiming or targeting of the vulnerable" to satisfy this factor. *In re Exxon Valdez*, 472 F.3d at 616-17 (citing *BMW*, 517 U.S. at 575). Here, there is no evidence that defendants targeted Leavey because of his financial condition. Accordingly, this factor is not satisfied.

Repeat misconduct. The district court concluded that this factor weighs in favor of reprehensibility because "Defendants' actions in this case represent one

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[23] Leavey also implies that defendants ignored the risk that he "could suffer adverse health consequences from returning to work [*i.e.*, not just dentistry] before medically ready to do so" (LOB31), but—as noted above (at page 46 n.18)—Leavey already was trying to get work when defendants sent the Letter.

instance in a company-wide, nationwide practice of claims handling." CR274:22; *see also* CR277:3-4. But generalized evidence about corporate practices is insufficient to demonstrate repeat misconduct unless it involves conduct "similar to that which harmed [the plaintiff]." *State Farm*, 538 U.S. at 424. Leavey did not identify even one prior claim that had been handled in the same allegedly improper manner as his. As noted, the district court identified only a single nexus between this case and the "bad company" evidence: the roundtable of Leavey's claim. But because the roundtable was entirely reasonable in this case (*see* pages 36-37, *supra*), there is no "nexus" at all. Therefore, just as in *State Farm*, Leavey's "bad company" evidence is inadequate to satisfy the repeat misconduct factor.

Intentional malice, trickery, or deceit. The district court recognized that defendants did not "maliciously set out to harm [Leavey]" (CR274:23) and that Leavey's harm was not the result of "intentional malice, trickery, or deceit" (CR277:4).

Leavey claims that five statements in the district court's opinion are inconsistent with its holding that this reprehensibility factor was not established. LOB37. But whether or not those statements describe conduct that qualifies as "malice, trickery, or deceit"—a doubtful proposition—all but one were made in the parts of the opinion addressing defendants' motion for judgment as a matter of law and a new trial. Those statements, interpreting the evidence in the light most

favorable to Leavey, are irrelevant in the context of a *de novo* review for excessiveness.[24] Notably, when the district court conducted that *de novo* review, it expressly found that defendants' conduct did ***not*** demonstrate malice, trickery, or deceit. CR274:23. It confirmed that finding after Leavey raised this same argument in his motion for reconsideration. CR277:4.

The one statement cited by Leavey that was part of the court's excessiveness analysis was that defendants sent the Letter and closed Leavey's claim "intentionally" (CR274:23)—*i.e.*, they did not "accidentally send [the Letter] to Dr. Leavey instead of another insured" (DER194). But as the district court recognized, that does not mean that defendants sent the Letter with malice or with an intent to trick or deceive Leavey. CR274:23.

Other factors. On the other side of the ledger, there is much evidence that mitigates any finding of reprehensibility. To begin with, regardless of Leavey's second-guessing of defendants' motives, the fact remains that defendants have paid him every penny that he is owed without interruption. Defendants also repeatedly have offered to help Leavey plan and obtain treatment that could help him lead a

[24] The district court emphasized that it was upholding the punitive verdict even though "the jury's verdict may not have been the same as what the Court would have concluded" (CR274:14) and "the evidence was far from overwhelming" (CR274:12) (internal quotation marks omitted). *See also* CR274:19 (Judge McNamee's statement that he "may not have reached the same conclusion as the jury").

drug-free life and overcome his anxieties—goals he never has been able to achieve with his self-selected treatments.[25]

In sum, if defendants' conduct crossed the threshold of reprehensibility necessary for the imposition of punitive damages, it did so by only the slimmest of margins. Indeed, even if the district court were right that three of *State Farm*'s reprehensibility factors are implicated here, that does not make defendants' conduct especially reprehensible and certainly cannot justify a punitive exaction that is ***2½ times*** the punishment that this Court allowed for death threats, the destruction of careers and relationships, and protracted intentional psychological torture in *Planned Parenthood*.

C. The 1.5:1 Ratio Of Punitive To Compensatory Damages Is Indicative Of Excessiveness On The Facts Of This Case.

In *State Farm*, the Supreme Court undertook to provide lower courts with more detailed guidance regarding the ratio guidepost than it had supplied in previous cases. Specifically, the Court reiterated its 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-

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[25] Indeed, even today—over eight years after he began treatment for his addiction—Leavey still has not recovered sufficiently to hold down a paying job. *See* DER286-87.

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 important for present purposes, however, as this Court has recognized, *State Farm* "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*, 405 F.3d at 776 (quoting *State Farm*, 538 U.S. at 425); *see also Planned Parenthood*, 422 F.3d at 962.

To be sure, these principles do not establish a rigid mathematical formula for calculating punitive damages, but instead create a "rough framework" (*Planned Parenthood*, 422 F.3d at 962), 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 former and inversely related to the latter. In other words, for any particular amount of compensatory damages, the lower on the reprehensibility spectrum the conduct falls, the lower the constitutionally permissible ratio. And for any particular degree of reprehensibility, as the compensatory damages increase, the maximum permissible ratio decreases.

1. The largest permissible ratio in this case is less than 1:1.

There can be no question that, if punishable at all, defendants' conduct was on the lowest end of the reprehensibility spectrum. Indeed, defendants' conduct plainly is far less egregious than the conduct in *State Farm* itself, in which the defendant was found to have deliberately deceived vulnerable senior citizens—altering their claim file to convince them that there was no risk of liability and then insisting that they pay the ensuing excess judgment even if that meant selling their home. 538 U.S. at 413, 419.

Moreover, as in *State Farm*, Leavey's compensatory award—even if further reduced by this Court—"was substantial," constitutes "complete compensation" for his alleged harm, and almost certainly contains "a component which was duplicated in the punitive award." *Id.* at 426. Accordingly, if defendants' conduct were ***as reprehensible as*** the conduct in *State Farm*, a 1:1 ratio would be the constitutional maximum. *See id.* at 429 (in view of "the substantial compensatory damages," State Farm's conduct "likely would justify a punitive damages award at or near the amount of compensatory damages"). Indeed, given the size of the compensatory award here, a 1:1 ratio would be the constitutional maximum even for conduct more egregious than the conduct in *State Farm*.

The Eighth Circuit reached that result in a case in which the plaintiff, a victim of the defendant's racial harassment, was awarded $600,000 in

compensatory damages and over $6,000,000 in punitive damages. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004). The defendants' conduct in *Williams* was despicable: The plaintiff's supervisor "regularly swore at him and berated him in front of other employees" and "treated [the plaintiff] and other black employees with special scorn"; the supervisor and other employees "regularly used racially demeaning language around [the plaintiff]"; "there was a pervasive practice of using a double standard for evaluating and disciplining white and black employees"; "white managers were extended privileges, like travel at company expense, unavailable to black employees"; and "black employees were given shorter breaks than white employees." *Id*. at 795, 798. Nevertheless, the Eighth Circuit held that a 1:1 ratio was the most that was permitted under *State Farm*, explaining:

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

Id. at 799 (citation omitted).

Williams is no aberration. The Eighth Circuit again drew the line at 1:1 in *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005), even while concluding that the defendant's conduct "was highly reprehensible":

> [T]he sale of this defective product occurred repeatedly over the course of many years despite [the defendant's] knowledge that the product was dangerous to the user's health; and [the defendant] actively misled consumers about the health risks associated with smoking. Moreover, the reprehensible conduct was shown to relate directly to the harm suffered by [the plaintiff]: a most painful, lingering death following extensive surgery.

Id. at 602-03. Despite that severe assessment of the defendant's conduct, the court held that "a ratio of approximately 1:1 would comport with the requirements of due process" because of the substantial compensatory award and because "[f]actors that justify a higher ratio, such as the presence of an 'injury that is hard to detect' or a 'particularly egregious act [that] has resulted in only a small amount of economic damages,' are absent here." *Id*. at 603 (quoting *BMW*, 517 U.S. at 582) (second alteration in original).

Other cases drawing the line at 1:1 or lower include *Kent v. United of Omaha Life Ins. Co.*, 430 F. Supp. 2d 946, 957-60 (D.S.D. 2006) (reducing 3:1 ratio to 1:1 in insurance bad-faith case in which compensatory damages were $2,400,000); *Casumpang v. Int'l Longshore & Warehouse Union*, 411 F. Supp. 2d 1201, 1219-21 (D. Haw. 2005) (reducing ratio from 4.2:1 to 1:1 where compensatory damages were $240,000 and conduct entailed "a moderate degree of

reprehensibility"); *Watson v. E.S. Sutton, Inc.*, 2005 WL 2170659, at *19 (S.D.N.Y. Sept. 6, 2005) (suggesting that 1:1 was the constitutional maximum in employment discrimination case where compensatory damages were $1,554,000, but ordering a remittitur to less than half of the compensatory damages under Rule 59); *Czarnik v. Illumina, Inc.*, 2004 WL 2757571, at *11 (Cal. Ct. App. Dec. 3, 2004) (reducing $5,000,000 punitive award to $2,200,000 because "the $2.2 million compensatory damage award was without question 'substantial' and, in light of the fact that [the defendant's] conduct was not highly reprehensible … a 1:1 ratio of punitive to compensatory damages is the maximum award that is sustainable against a due process challenge").

The decisions in these cases are compelling here. To paraphrase the Eighth Circuit, $2,009,028 "is a lot of money" (*Williams*, 378 F.3d at 799), especially for someone who never went a day without his benefits. And with respect to reprehensibility, defendants' Letter to Leavey was not in the same league as racially harassing a subordinate or fraudulently concealing the health risks of a potentially deadly product. Accordingly, if 1:1 is the highest constitutionally permissible ratio for the conduct in *Williams* and *Boerner*, then 1:1 ***exceeds*** the highest constitutionally permissible ratio here.[26]

[26] The cases that Leavey cites (LOB39-42) do not support a contrary conclusion. In *Eden Electric, Ltd. v. Amana Co.*, 370 F.3d 824 (8th Cir. 2004), the court upheld a 4.5:1 ratio (reduced by the district court from 8.5:1) only because it

That is all the more so because Leavey's compensatory award contains a significant amount for emotional distress. In *State Farm*, the Supreme Court recognized that compensatory damages have a deterrent effect in their own right,

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agreed with the district court that "the court can hardly think of a more reprehensible case of business fraud"; the defendant's "actions were purposefully designed to maliciously victimize another corporation"; and the defendant's "agents expressed the desire to 'f … ' and 'kill' [the plaintiff] after taking its $2.4 million." *Id*. at 829. *Zhang*, in which this Court approved a 7:1 ratio, involved compensatory damages of only $360,000 and conduct—racial and ethnic discrimination—that this Court deemed to be significantly more reprehensible than the bad-faith conduct in *State Farm*. 339 F.3d at 1043. *See S. Union Co. v. Sw. Gas Corp.*, 415 F.3d 1001, 1011 (9th Cir. 2005) ("civil rights case ratios," such as in *Zhang*, do not apply to "a private tort action"). In *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003), the court concluded that the defendant's fraudulent conduct was "egregious" and then, after a perfunctory analysis, upheld a 3.33:1 ratio based on the since-discredited conclusion that any ratio below 4:1 is presumptively constitutional. *Id*. at 1372.

Leavey's other cases involve both smaller compensatory awards and greater reprehensibility than this case. *See Casillas-Díaz v. Palau*, 463 F.3d 77, 82, 86 (1st Cir. 2006) (upholding 10:1 ratio for plaintiff who sustained $50,000 in compensatory damages and 2:1 ratio for plaintiff who sustained $250,000 in compensatory damages where plaintiffs were "brutally assaulted and beaten into unconsciousness, without legitimate reason or provocation" by four policemen); *Haberman v. Hartford Ins. Group*, 443 F.3d 1257, 1263, 1271-72 (10th Cir. 2006) (upholding 20:1 ratio in case in which court limited denominator to $5,000 emotional-distress award, excluding $548,000 contract damages); *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1232, 1237 (N.D. Ala. 2003) ($50,000 compensatory damages and conduct that "deliberately … subject[ed] the consuming public to the risk of suffering a stroke"), *rev'd on other grounds*, 401 F.3d 1233 (11th Cir. 2005); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 661 N.W.2d 789, 802 (Wis. 2003) ($500,000 actual and potential harm; conduct was "continuing, egregious, and flagrant"); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669, 675 (Or. Ct. App. 2003) ($500,000 compensatory damages and "deceitful conduct involving the promotion of a prescription drug as 'safe' when it was not, which resulted in … severe physical injury").

admonishing that "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." 538 U.S. at 419; *see also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence … operates through the mechanism of damages that are *compensatory*"). And when those compensatory damages include a large amount for non-economic harms, "'there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.'" *Id.* at 426 (quoting Restatement (Second) of Torts § 908, cmt. c (1977)).

Here, defendants had no "gain" from the alleged misconduct because they never missed a monthly payment to Leavey. Accordingly, the emotional distress award and, very possibly (if Leavey ever recovers), some portion of the future-benefits award is entirely punitive in nature.

2. The Court should use one ratio.

Leavey's attempt to circumvent *State Farm* and *BMW* by "[a]pportioning the punitive award between the two Defendants" but assigning the entire compensatory award to each (LOB41) or, what is the same thing, dividing the ratio in two (LOB26) is misguided. When this Court calculated the maximum permissible punitive award in *Planned Parenthood*, it multiplied the total joint-

and-several compensatory award by the highest permissible ratio and then "allocate[d] that amount of punitive damages among defendants in the same proportion as the jury did in its verdicts" (thus preserving the jury's assessments of varying reprehensibility). 422 F.3d at 963. By contrast, Leavey's preferred method would have resulted in plaintiff Crist receiving a total punitive award of $4,996,656—$39,656 x 9 (the ratio) x 14 (the number of defendants)—rather than $356,904 (*id*. at 964).

Contrary to Leavey's description (LOB41), in *Casillas-Díaz* the First Circuit divided the undifferentiated punitive award equally between the two plaintiffs ($500,000 each) but did ***not*** divide the ratio by the number of defendants or calculate separate ratios for each of the defendants. 463 F.3d at 86. Indeed, even if there were some precedent for dividing the ratio by the number of defendants, it would be particularly inappropriate here because one defendant is simply a wholly-owned subsidiary of the other.

Leavey's suggestion that the Court add in the "potential harm to Dr. Leavey" and the "potential harm to others" (LOB26) is equally misguided. He made the same argument below (DER399)—to no avail (CR274:26-27). That is because his suggested "potential harms" are nothing more than pure speculation. *Cf. Cooper Indus.*, 532 U.S. at 442 ("unrealistic" estimates of potential harm should not be considered). And, to the extent that he is suggesting that the punitive award should

be increased to punish defendants for harm to others, that is flatly prohibited. *See* pages 57-58, *supra*.

Finally, the generous $755,247.50 award of attorneys' fees provides further reason to conclude that a punitive award equal to the amount of the compensatory damages is unnecessary to punish and deter. Leavey suggests that his attorneys' fees should be added into the denominator. LOB26, 41. On the contrary, because attorneys' fees "include[] a certain punitive element" (*Parrish v. Sollecito*, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003)), a plaintiff who receives a substantial award of attorneys' fees should receive "a lesser rather than greater award of punitive damages" (*Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003)). *See also Pichler v. UNITE*, 457 F. Supp. 2d 524, 532 (E.D. Pa. 2006) (denying request for punitive damages because defendant "will be amply punished" by large compensatory award and attorneys' fees).

D. The Punitive Damages Are Grossly Disproportionate To The Legislatively Established Penalty For Comparable Conduct.

The third *BMW* guidepost requires a comparison between "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583. In this case, the Arizona legislature has fixed the maximum civil penalty for bad-faith claim handling at $5,000.00. Ariz. Rev. Stat. § 20-456(B).

The district court appropriately rejected Leavey's argument that the relevant penalty was the revocation of defendants' licenses. CR274:24-25 (citing *State Farm*, 538 U.S. at 428). Leavey now argues that the possible loss of license should be considered because there is a "nexus between the misconduct that would warrant loss of license and what happened to [him]." LOB28. But he has not identified a single instance in which Arizona has revoked an insurer's license, let alone for claim-handling conduct similar to that involved here. *See* LOB44-45. As in *State Farm*, Leavey's loss-of-license argument is pure speculation and was appropriately rejected by the district court.

Leavey gets no further in contending that *Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073 (Ariz. 1987), gave defendants notice that Arizona could require disgorgement of their profits from an entire course of conduct. LOB45. *Hawkins* pre-dated *State Farm*, which held in no uncertain terms that it is improper to use an individual case to punish a defendant for injuries to non-parties. *See* 538 U.S. at 423 ("[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct").[27]

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[27] Moreover, *Hawkins* involved a uniform $35 deduction from every claim payment made to thousands of Arizona insureds. Here, there is no evidence of such a mechanical practice from which a disgorgement could be calculated.

In sum, the Court should reduce the punitive damages to less than the compensatory damages. We submit that a punitive award equal to the amount of economic damages (approximately $800,000) is the maximum that is constitutionally permissible. And even if the Court upholds the 1.5:1 ratio, it should reduce the punitive award to reflect any reduction in the compensatory damages.

V. Leavey's Arguments For Reinstating The Original Punitive Award Have No Merit.

For the reasons presented above, the constitutional excessiveness analysis requires ***further*** reduction of the punitive award, not reinstatement of an award that was "excessive," "disproportionate to the wrong committed," and "far [in excess of] the constitutional parameters suggested by the Supreme Court" (CR274:26-27). Leavey's arguments to the contrary are misguided.

A. The "other considerations" identified by Leavey do not support reinstatement of the $15,000,000 verdict.

Leavey contends that defendants should be more severely punished because they are recidivists who have "reaped tremendous profits from their wrongful scheme" and have "significant wealth" so that "anything less than the full jury award amounts to a mere 'bad-faith tax' that Defendants have demonstrated they are willing to pay to continue their profitable bad faith practices." LOB45-47.

On the contrary, it is public knowledge, of which Leavey's counsel is aware and this Court can take judicial notice, that in 2005, after a thorough 50-state review of their practices, defendants entered into comprehensive settlement agreements with almost every state's insurance regulator, pursuant to which defendants have revised various claim-handling practices and agreed to heightened oversight by state regulators.[28] Thus, Leavey's suggestion that a high punitive award is necessary to deter ongoing practices by a recalcitrant company is simply wrong.

B. The district court appropriately reduced the punitive award.

Desperately scrambling for some basis to reinstate an excessive punitive award, Leavey accuses the district court of trying to overrule *BMW* and *State Farm*. LOB48-55. Leavey contends that the district court confused "the principle that the Constitution does not impose a generally applicable bright line" ratio of compensatory to punitive damages with "the principle that in any given case the reviewing court must determine" the highest permissible ratio. LOB51. But Leavey is the one who is confused.

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[28] *See* Multistate Exam Settlement Agreements, *available at* http://www.unumprovident.com/settlementagreement; California Settlement Agreement, *available at* http://www.insurance.ca.gov/0400-news/0100-press-releases/0080-2005/upload/CSA.pdf; *see also* UnumProvident Response to California Settlement Agreement, http://www.insurance.ca.gov/0400 news/0100-press-releases/0080-2005/upload/response.pdf.

In his briefing on the post-trial motions, Leavey argued, as he does on appeal, that this Court's decision in *Planned Parenthood* created categories of punitive damages cases with bright-line "constitutional maximum" ratios of punitive to compensatory damages below which the punitive award for such cases cannot be reduced. *See, e.g.*, LOB55 ("in cases involving egregious conduct, the Due Process Clause does not entitle a defendant to have the jury's punitive award reduced if it is between a 4:1 and a 9:1 ratio"); LOB24-25; CR275:10 (the district court would have to "disregard the Ninth Circuit's post-*Campbell* framework" in order to "reduce the award to a ratio closer to 1:1").

As the district court observed, however, *Planned Parenthood* held that "a ratio of ***up to*** 4-to-1 serves as a good proxy for the limits of constitutionality" in cases like this one and that "acts of bad faith and fraud," like the conduct alleged in this case, might warrant "something closer to a 1 to 1 ratio." CR277:6 (emphasis in original). Moreover, the district court noted that the Supreme Court repeatedly has rejected rigid categories such as those proposed by Leavey in favor of a case-by-case analysis in which ratios "'are not binding[;] they are instructive.'" CR277:7 (citing *State Farm*, 538 U.S. at 425). Thus, the district court appropriately "disagree[d] with [Leavey's] contention that a bright-line 'constitutional maximum' must be awarded by this Court." CR277:8. Instead, the

district court conducted the case-specific analysis required by *State Farm*. CR277:8.

Indeed, the district court originally had given Leavey the opportunity to choose between a new trial and a remittitur of the punitive damages. CR274:43-44. The district court subsequently ordered an outright reduction, however, based on Leavey's argument that the court's action did not implicate his Seventh Amendment rights (CR278). But "[t]he court may enter judgment [rather than a remittitur] only if it reduces the jury's verdict to the maximum permitted by the Constitution in that particular case, as any smaller amount would invade the province of the jury." *Johanson v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1331 n.16 (11th Cir. 1999); *see also id.* at 1332 n.19 (a new trial "would be of no value" because any higher punitive award after a new trial would be reduced as a matter of law). The district court's change from a remittitur to a reduction—at Leavey's request—demonstrates that it believed that a 1.5:1 ratio represents the highest permissible award in this case.[29]

Leavey also contends that the district court erred because, contrary to the district court's belief, "the pertinent inquiry is not whether a lesser amount [of

[29] The district court could have ordered a remittitur to an amount below the constitutional maximum under Rule 59 so long as it gave Leavey the opportunity to choose a new trial rather than the remittitur. If that was its intention, then the switch from a remittitur to a reduction—and Leavey's loss of the opportunity to have a new trial—was invited error.

punitive damages] would achieve the 'State's legitimate interests in punishment and deterrence.'" LOB53 (quoting CR274:24). Leavey's criticism is flat wrong. "The *BMW* Court also places in the constitutional calculus the question of the minimum level of penalty necessary to achieve the state's goal of deterrence." *Continental Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 641 (10th Cir. 1996); *see BMW*, 517 U.S. at 584 ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.").

Leavey's distortions of the district court's decision—much like his attempt to spin defendants' words—should be rejected. And if this Court has any doubts about the district court's intentions, the appropriate remedy would be to remand for clarification.

CONCLUSION

The Court should grant defendants judgment on punitive damages. The Court also should grant defendants a new trial on all remaining issues. Failing that, the Court should reduce the non-economic damages to no more than $200,000 and reduce the punitive damages to no more than the amount of economic damages. The Court should decline to reinstate the original punitive award.

Respectfully submitted.

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STATEMENT OF RELATED CASES

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

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

Case Nos. 05-16380 and 05-17059

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Carl J. Summers

CERTIFICATE OF SERVICE

I hereby certify that on this __ day of March, 2007, I served a total of six copies of the foregoing Defendants-Appellees/Cross-Appellants' Answering Brief and Cross-Appeal Opening Brief by overnight delivery on Appellant/Cross-Appellee herein, two to each of the following addresses:

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