United States Court of Appeals
for the
Third Circuit

Nos. 05-3409, 05-3586

CGB OCCUPATIONAL THERAPY, INC., d/b/a CGB REHAB, INC.,

Appellee/Cross-Appellant,

– v. –

RHA HEALTH SER INC.; SYMPHONY HEALTH SER; RHA PA NURSING HOMES, d/b/a PROSPECT PARK REHABILITATION CENTER d/b/a PROSPECT PARK NURSING CENTER d/b/a PROSPECT PARK HEALTH AND REHABILITATION RESIDENCE; RHA PENNSYLVANIA NURSING HOMES, INC., d/b/a PEMBROOKE NURSING AND REHABILITATION CENTER d/b/a PEMBROOKE NURSING AND REHABILITATION RESIDENCE f/k/a WEST CHESTER ARMS NURSING AND REHABILITATION CENTER;

SUNRISE ASSISTED LIVING, INC.; SUNRISE ASSISTED LIVING MANAGEMENT, INC.,

Appellants/Cross-Appellees.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPENING BRIEF FOR APPELLANTS/CROSS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, appellants/cross-appellees make the following disclosures:

On May 30, 2003, the appellants/cross-appellees in this case, Sunrise Assisted Living, Inc. and Sunrise Assisted Living Management, Inc., changed their names to Sunrise Senior Living, Inc. and Sunrise Senior Living Management, Inc., respectively.

1) *For non-governmental corporate parties please list all parent corporations.* Sunrise Senior Living, Inc., a public company traded on the New York Stock Exchange, owns 100 percent of the stock of Sunrise Senior Living Management, Inc. Sunrise Senior Living, Inc. has no parent corporations.

2) *For non-governmental corporate parties, please list all publicly held corporations that hold 10% or more of the party's stock.* Sunrise Senior Living, Inc., a public company traded on the New York Stock Exchange, owns 100 percent of the stock of Sunrise Senior Living Management, Inc.

3) *If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.* Not applicable.

4) This is not a bankruptcy appeal

Dated: March 21, 2006

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PRELIMINARY STATEMENT

This is an appeal from a retrial that was limited to the question of liability for and amount of punitive damages. Plaintiff's only claim is that, in the course of a five-minute meeting, defendants tortiously interfered with the relationship between plaintiff and several independent contractors that it employed on an at-will basis. The first jury awarded $109,000 in compensatory damages, an amount that fully compensated the plaintiff for all losses associated with that tortious interference. The second jury, after hearing an enormous amount of irrelevant and inflammatory evidence, awarded ***$30 million*** in punitive damages. The district court reduced the award to $2 million – a sum nearly twenty times the amount of compensatory damages.

Even as reduced, the award is grossly and unconstitutionally excessive. As this Court held when this case was last before it, the defendant's conduct in this case was barely even tortious. It cannot support more than a very small award of punitive damages – and certainly does not justify an amount that the Supreme Court has characterized as "tantamount to a severe criminal penalty." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 585 (1996). The judgment below must be vacated and the punitive award reduced to no more than the amount of compensatory damages.

JURISDICTION

This is an appeal from a final judgment that disposes of all parties' claims. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court had jurisdiction of this diversity action pursuant to 28 U.S.C. § 1332. Defendants' post-trial motion was denied in part and granted in part on July 7, 2004. They filed a timely notice of appeal on July 12, 2005.

ISSUE PRESENTED

Whether a $2 million punitive damages award – which is more than 18 times the $109,000 award of compensatory damages – is unconstitutionally excessive punishment for defendants' tortious interference with plaintiff's at-will relationships with its employees.

RELATED CASES AND PROCEEDINGS

As discussed below (at pages 3-4), this case was before this Court in 2004. The Court's opinion appears at 357 F.3d 375. Additionally, plaintiff has cross-appealed from the judgment below. The cross-appeal is docketed as No. 05-3586.

STATEMENT OF THE CASE

Plaintiff-appellee CGB Occupational Therapy, Inc. ("CGB"), which is owned and operated by Cindy Brillman, provided therapy services to two nursing home facilities in Pennsylvania that were owned by RHA Pennsylvania Nursing Homes ("RHA"). Both facilities were managed by Sunrise Assisted Living

Management, Inc., a subsidiary of Sunrise Assisted Living, Inc.[1] (Both Sunrise entities will be referred to collectively as "Sunrise.") In 1998, RHA terminated CGB's contract.

CGB filed suit in the U.S. District Court for the Eastern District of Pennsylvania against both RHA and Sunrise. CGB alleged that (*inter alia*) Sunrise had tortiously interfered with its contractual relationships with (i) RHA and (ii) several of the therapists at the Prospect Park facility. RHA, which had by then gone bankrupt, settled with CGB prior to trial; the claims against Sunrise went forward. In June 2002, a jury awarded CGB $685,000 in compensatory damages and $1.3 million in punitive damages – a ratio of less than 2:1. $576,000 of the compensatory award was attributed to the claim for tortious interference with the contract between RHA and CGB, and $109,000 was attributed to the claim for tortious interference with the at-will employment relationship between CGB and its therapists. The district court entered judgment on the jury's verdicts, and Sunrise appealed.

This Court reversed the verdict for tortious interference with the contract between CGB and RHA. *CGB Occupational Therapy, Inc.* v. *RHA Health Servs.,*

[1] On May 30, 2003, Sunrise Assisted Living, Inc. and Sunrise Assisted Living Management, Inc. changed their names to Sunrise Senior Living, Inc. and Sunrise Senior Living Management, Inc., respectively, to reflect the increased scope of their operations.

Inc., 357 F.3d 375 (3d Cir. 2004). It held that, as a matter of law, Sunrise could not have tortiously interfered with that contract, because it was acting as RHA's agent, and an agent cannot interfere with a contract between its principal and a third party. *Id.* at 385-88. The Court affirmed the $109,000 compensatory award for tortious interference with the relationship between CGB and its therapists (which Sunrise has paid). Because it was impossible to tell what portion of the $1.3 million punitive award was attributable to the invalid claim, the Court remanded for a new trial limited to the issues of liability for and amount of punitive damages. At the second trial, the jury awarded CGB $30 million in punitive damages.

On January 28, 2005, Sunrise timely moved for a new trial, contending among other things, that the jury's finding of liability for punitive damages was against the weight of the evidence and that the verdict was the product of passion and prejudice. In the alternative, Sunrise asked the court to reduce the award to a constitutionally permissible amount. The district court denied Sunrise's motion for a new trial but reduced the punitive damages from $30 million to $2 million. In the current appeal, Sunrise is challenging that $2 million judgment. The plaintiff has filed a cross-appeal, seeking reinstatement of the verdict or an enhancement of the existing $2 million figure.

STATEMENT OF FACTS

Facts Giving Rise To The Litigation

RHA owned two nursing home facilities in Pennsylvania, one in West Chester (the "Pembrooke" facility) and the other in Prospect Park. During the relevant time period, both facilities were managed by Sunrise. Pursuant to its contracts with RHA, Sunrise was responsible for, *inter alia*, procuring and coordinating the therapy services that were provided to patients at the two facilities. JA320-322.

On January 1, 1995, CGB entered into a contract with RHA to provide physical, occupational, and speech therapy services to the Pembrooke facility. The parties entered into a similar contract with regard to the Prospect Park facility on October 7, 1996. Under those contracts, RHA paid CGB an hourly billable rate for the therapists' services, not a flat monthly fee. JA435-439; JA440-444; JA339. Each agreement also included a "no-raiding" clause, which barred RHA from recruiting CGB's therapists for a twelve-month period after termination of the contract. JA435-439; JA440-444. The therapists were independent contractors who were employed by CGB on an at-will basis.

RHA and Sunrise were very happy with the quality of CGB's therapists, and the contractual relationship proceeded smoothly for several years. During that time, the therapists formed close personal relationships with RHA's patients, many

of whom were elderly and frail. Marjorie Tomes, Sunrise's executive director for the Prospect Park facility, thought that the therapists "did an outstanding job" and were good for the facility. JA336. Michael Gasiewski, the head Prospect Park therapist, confirmed that "a close knit family-type environment existed between the patients and the [CGB] therapists." 1/12/05 Tr. 100.

In 1998, however, changes to the federal Medicare system altered RHA's business dramatically. RHA's CFO, John West, testified that under the old regulations, Medicare had simply reimbursed RHA for its costs. Under the new system, however, the government would "give us a flat rate for a specific type of service and what they deem [an appropriate] level of care at which point, whatever we spent on that level of service was our problem or our benefit. *** Based on our review of the PPS Regulations it appeared there was going to be a tighter payment schedule for overall nursing services including the therapy component." JA340-342; see also JA207-208. RHA believed that CGB's per-hour pricing structure was incompatible with the new regulations. *Ibid*. CGB, however, was unable or unwilling to modify its business practices or rates in light of the new regulations. JA210-211. Accordingly, on June 30, 1998, at RHA's direction Sunrise notified CGB in writing that RHA had decided to terminate the Pembrooke and Prospect Park contracts effective September 30, 1998. JA446. The letter attributed the decision to "changes in the [Medicare reimbursement] system." *Id.*

On July 1, 1998, Sunrise executed an agreement on RHA's behalf with Symphony Health Services, Inc. ("Symphony"), under which Symphony became the new therapy services provider at both the Pembrooke and Prospect Park facilities.

John West instructed Tomes that she should make the transition to Symphony as smooth as possible for the patients and staff at Prospect Park, but that she should not recruit CGB staff members. JA209. In late July, Tomes learned from the Prospect Park director of nursing, Debbie Melella, that rumors were circulating among the therapists about the termination of CGB's contract, and that those rumors were negatively affecting patient care: as Tomes explained it, the therapists "felt that they were not able to function effectively in caring for our residents because they may not be there tomorrow." JA332; JA338. Tomes was concerned that these rumors would intensify over the following few weeks, because Symphony was preparing to take over therapy services and would soon begin making visits in order to "assess the facility for what equipment they needed to bring in." JA330. Tomes was also worried that the patients would suffer stress and anxiety if they had to adjust to an entirely new set of therapists when Symphony took over. 1/12/05 Tr.101-102.

Tomes testified that, with these concerns in mind, she sought legal and practical advice from Craig Knaup, RHA's in-house counsel and Medicare expert, about exactly what she could tell the therapists. JA332-JA336. Knaup told her

that she could not recruit the therapists, but that she could provide them with certain specific information about the termination of CGB's contract. After speaking to Knaup, Tomes' understanding was

> [t]hat I could inform the therapists that the contract had been canceled and the effective date. I could let them know that if they had an interest to be interviewed by Symphony, that they could sign a piece of paper with their name and phone number. And then, finally, that it was not at all to do with performance. It was absolutely an economic decision.

JA335.

Accordingly, on July 31, 1998, Tomes held a five-minute meeting with several of CGB's therapists. The meeting took place in Tomes' office, which had a glass door. She informed the therapists that CGB's contracts with RHA were being terminated because RHA believed that CGB's pricing structure was incompatible with new Medicare regulations, and that Symphony would be retained as the new therapy service provider both at Prospect Park and at the Pembrooke facility. Tomes then provided the therapists with a "sign-up sheet" on which they could leave their names and contact information if they wished to talk to Symphony. None of the therapists testified that Tomes attempted to persuade anyone to leave CGB. Rather, she simply relayed to them that (i) CGB's contract had been terminated and (ii) employment opportunities might be available with Symphony. See JA457-JA460. Soon after the meeting, one of the therapists

apparently informed Brillman, who called Tomes less than two hours later to complain. JA340-341.

Apart from that five-minute meeting, CGB alleged only two other acts of interference with its at-will relationship with the therapists: (i) Tomes' provision of a conference room at the facility for Symphony to meet with the therapists when Symphony came to inspect the facility prior to the starting date of its contract, and (ii) Tomes' statement to Symphony that one of the therapists, Michael Gasiewski, merited a higher salary than Symphony had offered him. JA47-48.

On June 30, 1998, RHA's in-house counsel Knaup sent a letter to CGB reiterating that RHA had decided to terminate the contracts as a result of the change in the Medicare regulations and that its decision was final. JA481-482. In response to Brillman's complaint that Sunrise had been interfering with her employees, Knaup explained:

> [W]e did no such thing, but merely informed your employees when it was more than apparent that you had not – that your contract was canceled effective September 30, 1998. We did so only because our new provider of services was scheduled to inspect the facility and discuss arrangements with administration and staff of the provision of services scheduled to begin on October 1st, 1998.
>
> We asked you to do so and inform your staff, realizing the new provider's appearance would raise questions in your staff's mind, and wanting only not to disrupt service to the residents. At no time did the facility expect to start

> their own therapy department, nor was any offer of employment ever extended.

Id.[2] According to John West, the word "we" referred to RHA Pennsylvania and Sunrise, which "was acting as our agent." JA403. Nevertheless, throughout August 1998 Brillman sent letters to and left telephone messages for various RHA and Sunrise employees. She complained about Tomes' meeting with the therapists, sought more information about the reasons for termination, and requested its reversal. CGB's counsel, moreover, sent a letter to Tomes stating that her meeting with the therapists appeared to have constituted tortious interference and a breach of the contract between RHA and CGB. JA461-462.

Several of CGB's therapists signed contracts with Symphony during September 1998 but continued working for CGB until the RHA contracts were terminated. Without the RHA contracts, CGB simply did not have work for its therapists. 1/12/05 Tr.104; JA394-395. Although Brillman testified that she would have placed a second mortgage on her home in order to continue paying the therapists, and that she would have provided them with clerical work or manual labor in order to keep them busy, she did not have work for them that would be appropriate for their skill levels. JA174-178. Significantly, the therapists who

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[2] See also JA460 (statement of CGB therapist Robin Ferrara) ("The reason Marjorie [Tomes] gave for meeting us in the first place was so that if/when we saw strange people coming through rehab dep't we knew who they were.").

worked at the Pembrooke facility – who were not "solicited" in any way by Sunrise – also left CGB for other employment. JA175-176.

The Retrial

Sunrise is not seeking a new trial on this appeal because the expense of a third trial is likely to exceed the amount that this Court determines to be the maximum constitutionally permissible punishment. Nevertheless, we briefly discuss a number of evidentiary, instructional, and other errors that took place during the proceedings below, because those errors help explain the jury's decision to return a punitive damages award of $30 million in this case involving a relatively minor tort that caused, at most, $109,000 worth of purely economic harm.

Pursuant to this Court's order, the only tortious conduct properly at issue in the retrial was Sunrise's interference with CGB's contractual relationships with its therapists – specifically, Marjorie Tomes' five-minute meeting with the therapists; her conversation with Symphony regarding Michael Gasiewski's salary; and her decision to allow Symphony to interview therapists at the facility. Notably, however, most of the evidence that CGB put before the jury (over the objections of defense counsel) had nothing to do with that conduct.

First, plaintiff's counsel elicited a great deal of irrelevant and prejudicial testimony about the wealth of Sunrise and its officers – though, notably, not the

less well-compensated Marjorie Tomes, who was the only Sunrise employee accused of soliciting CGB's therapists. Plaintiff's counsel questioned Sunrise's senior officers at length about the exercise of their stock options and about the amount that Sunrise spent for executives' personal use of a corporate jet. JA292-293; JA266-271. Plaintiff's counsel introduced and emphasized Sunrise's corporate financial data – particularly its gross revenues. In his summation, counsel wove all this irrelevant information into a rousing indictment of Sunrise for being a large and successful company:

> When you sit here deliberating for $40 and a sandwich and mileage, they are making $4.1 million [per day]. *** We're talking about big numbers here because we think you have to get up in the stratosphere that [Sunrise officers] fl[y] around in and make [them] understand that this was wrong. You have to show the other corporate executives out there in billion dollar companies that you cannot just squash a little company like an ant and keep right on rolling. You have to send a message that will be heard on Wall Street. *** You have to consider the wealth of the defendants. You also have to consider compensatory damages, but the Judge will tell you that's just one small subset.

JA426-428.

Plaintiff's counsel also repeatedly complained to the jury about how long it had taken CGB to collect the $109,000 in compensatory damages. He blamed Sunrise for that delay, arguing that Sunrise had done something wrong by choosing to defend itself in court. In his opening argument, he told the jury to "look at the

way Sunrise has treated CGB since 1998. 1998. It is here 2005. *** We have fought years of litigation with this company. *** It's not easy to be a party in litigation. It's not cheap." JA44; JA51. Counsel repeated the tactic during summation. "What matters is how much time, how much anxiety, stress, money, it took Cindy Brillman to fight for what was right, to get that little bit of money." JA425.

This emphasis on litigation conduct dovetailed with plaintiff's resurrection of veil-piercing issues that were litigated in the first trial but had no legitimate role in this proceeding. During the trial, plaintiff's counsel elicited extensive testimony about Sunrise's corporate structure and insinuated that the structure had not "compl[ied] with the federal securities laws" (JA234) and had been established in order to "maintain [a] façade," to deceive investors, and to "lie to the public." See, *e.g.*, JA215-252. Sunrise's corporate structure, which is typical of a large corporation and which has never been shown to be wrongful in any way, had ***nothing*** whatsoever to do with the tortious interference claim at issue. Yet plaintiff's counsel relied heavily upon it, contending in his opening argument that "not only did CGB have to pierce the corporate veil and break through that to get to the truth, but anybody else would as well. That is very, very important. When we talk about telling the truth and taking responsibility, keep that in mind." JA52. He closed his summation by asking: "How are they going to be held responsible

for their actions when they are allowed to assert all this and drag a little company like CGB through the muck for two and a half years and have a determination that Sunrise is responsible for [the] actions of Sunrise [Management]? One is just the alter ego of the other. It took two and a half years to prove that." JA429.

Finally, plaintiff's counsel complained bitterly about Sunrise's treatment of CGB in connection with the termination of the contracts – conduct for which this Court specifically held that Sunrise could not be punished. He claimed that Sunrise had acted wrongfully by failing to apprise Cindy Brillman of the true reasons for the termination and by refusing to allow her to cure any problems:

> In considering the conduct of Sunrise relating to that termination, the reason for the determination given to CGB was incorrect. Marjorie Tomes knew it was incorrect and she had known because back in April, Cindy Brillman told her she could comply with Medicare and PPS and in June, immediately after the termination letters were sent out, Cindy Brillman called and said what is this all about? What is this the [sic] basis for the termination? This is not proper cause. *** What was the one thing that Cindy Brillman was never told in June of 1998? *** You think maybe Marjorie Tomes should have told Cindy Brillman she had already signed a contract with Symphony before the termination letter went out?

JA421-422.

To compound the problems created by counsel's flagrantly improper argument, the district court refused to give the jury instructions that Sunrise requested, which were drawn directly from *State Farm Mutual Automobile*

Insurance Co. v. *Campbell*, 538 U.S. 408 (2003). Instead, the court simply instructed the jury that in assessing punitive damages, it should consider (i) the "character of the defendant's act"; (ii) the "nature and the extent of the harm to the plaintiff," including "the plaintiff's trouble and expense in seeking to protect its interests in legal proceedings and in this suit"; and (iii) "the wealth of the defendants insofar as it is relevant in fixing an amount that will punish it and others from [sic] like conduct in the future." JA430; see also JA45 ("Should you decide to punish Sunrise, you will also need to think about its wealth."). The court specifically downplayed the importance of the amount of compensatory damages: "So long as it is reasonable, the amount you assess as punitive damages, if any, ***need not bear any relationship*** to the amount of compensatory damages. As I have just said, this is one of the factors that you must consider, should you choose to award punitive damages. Again, there is not some magical multiplier or divider that you should employ." JA430-431; see also JA46 ("[Y]ou must remember that your award of punitive damages, if any, does not need to bear a proportional relationship to the award of compensatory damages.").

After hearing all of this irrelevant, inflammatory evidence and argument, and after being instructed to base its punitive award on Sunrise's financial resources and to discount the importance of the amount of compensatory damages, the jury awarded CGB ***$30 million*** in punitive damages.

SUMMARY OF THE ARGUMENT

The touchstone of the due process analysis is that "the measure of punishment [must be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426. CGB's compensatory damages for its injuries, which were entirely economic, were $109,000. Sunrise's conduct was barely even tortious, and certainly cannot support more than a small amount of punitive damages. The award entered by the district court, however, is nearly 20 times the compensatory damages award. Under *State Farm*, in a case like this one – in which the compensatory damages are substantial and the defendant's conduct was minimally reprehensible – the maximum constitutionally-permissible ratio of punitive to compensatory damages is no more than 1:1.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews the district court's application of the *BMW* guideposts *de novo*. *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001). In so doing, the Court should review the evidence in an evenhanded manner and not take the evidence in the light most favorable to the plaintiff. In *Cooper Industries*, the Court observed that "the level of punitive damages is not really a 'fact' 'tried' by the jury," but instead "is an expression of [the jury's] moral condemnation." 532 U.S. at 432, 437 (internal quotation marks omitted). In the course of holding

that appellate review of a trial court's application of the *BMW* guideposts is *de novo*, the Court indicated that reviewing courts must accept "***specific*** findings of fact" by the jury (*id.* at 439 n.12 (emphasis added)), thereby implying that, in the absence of such findings, reviewing courts must resolve for themselves factual issues bearing on the application of the three guideposts. As the California Supreme Court recently explained, when the jury has made "no *** express finding" on a particular issue bearing on application of 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." *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 (Cal. 2005). Accordingly, "[w]hile [courts must] defer to express jury findings supported by the evidence, in the absence of an express finding on the question [they] must independently decide" whether the fact at issue has been established. *Id.* at 72. There were no such findings in this case.

ARGUMENT

The Supreme Court has characterized a $2 million award as "tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585), which can be warranted only in cases of "egregiously improper conduct" (*id.* at 580). This is not such a case. The conduct at issue here was, at worst, an isolated incident of non-iniquitous tortious interference with an at-will relationship that caused $109,000 in purely economic

harm and that has no broader societal implications. Such conduct simply cannot support a $2 million punitive award.

In *BMW*, the Supreme Court identified three "guideposts" for determining whether a punitive award is unconstitutionally excessive: (i) the degree of reprehensibility of the conduct; (ii) the ratio of punitive to compensatory damages; and (iii) the legislatively established fines for comparable conduct. In *State Farm* the Court refined and amplified the "guidepost" analysis. In this case, application of the guideposts confirms that a $2 million punishment is unconstitutionally excessive and that the maximum permissible punitive award is no more than the amount of the compensatory damages – $109,000.

A. Sunrise's Conduct Barely Registers On The Reprehensibility Scale.

In gauging reprehensibility, it is necessary to limit the focus to the conduct that is legitimately at issue here – Sunrise's interference with CGB's at-will relationship with its therapists. Plaintiff's counsel succeeded in convincing both the jury and the district court to impose punishment based on a host of irrelevant and improper factors: Sunrise's finances; the circumstances surrounding the termination of CGB's contracts with RHA (for which, this Court held, Sunrise is not liable at all, much less subject to punishment); Sunrise's alleged refusal to respond to Cindy Brillman's requests for information after the contracts had been terminated; and the discovery disputes that took place prior to the first trial. Those

matters had nothing to do with the tortious conduct giving rise to punitive liability, and they therefore cannot form the basis for punishment. "The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance." *State Farm*, 538 U.S. at 424. Rather, evidence is pertinent to the "reprehensibility" of the tort only when it bears a specific nexus to the conduct underlying the plaintiff's claim. See *id.* at 422-23 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

The conduct that ***is*** properly at issue here is at most marginally reprehensible, and therefore cannot support a large award of punitive damages. As the Supreme Court has explained, "[t]hat conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award." *BMW*, 517 U.S. at 580; see also *State Farm*, 538 U.S. at 419 ("The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.") (internal quotation marks and alterations omitted). Thus, the reprehensibility inquiry examines how far in ***excess*** of the threshold for punitive damages the defendant's conduct is.

In *State Farm*, the Supreme Court identified five non-exclusive factors that bear on the degree of reprehensibility of a defendant's conduct: whether (i) "the harm caused was physical as opposed to economic"; (ii) "the tortious conduct evinced an indifference to or reckless disregard of the health or safety of others"; (iii) "the target of the conduct had financial vulnerability"; (iv) "the conduct involved repeated action or was an isolated incident"; and (v) "the harm was the result of intentional malice, trickery, or deceit, or mere accident." 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, not a single one of the five reprehensibility factors is present. And there is much mitigating evidence on the other side of the ledger. Under Pennsylvania law, punitive damages are available only for conduct that was "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Martin* v. *Johns-Manville Corp.*, 494 A.2d 1088, 1096 (1985). To the extent that Sunrise's conduct crossed that threshold at all, it surely did so only by the thinnest of margins, and hence falls on the far low end of the reprehensibility spectrum.

1. Sunrise's conduct was barely even tortious.

In the prior appeal in this case, this Court recognized that the facts alleged by CGB were barely sufficient to support a claim that Sunrise had tortiously interfered with the contracts between CGB and its therapists. Interference by a third party (here, Sunrise) in the relationship between an employer and its at-will employees is ordinarily not actionable unless "the purpose of such enticement is to cripple and destroy an integral part of a competitive business organization rather than to obtain the services of particularly gifted or skilled employees" or to have "the employees commit wrongs, such as disclosing their former employer's trade secrets or enticing away his customers." 357 F.3d at 388 (quoting *Albee Homes, Inc.* v. *Caddie Homes, Inc.*, 207 A.2d 768, 771 (Pa. 1965)). CGB proved none of those things. This Court reasoned, however, that the claim could stand because by soliciting CGB's therapists Sunrise breached its fiduciary duty to ***RHA***. 357 F.3d at 388-89. As the Court saw it, because the breach of fiduciary duty to RHA made Sunrise's solicitation of the therapists independently wrongful, it could support tort liability under Section 768 of the Restatement (Second) of Torts.

But the breach of fiduciary duty itself was not egregious; if it had been, surely RHA would have sought redress from Sunrise. And, contrary to the district court's suggestion that Sunrise acted wrongfully by "exhibiting virtually total disregard for the instructions of its principal" (JA12), Sunrise cannot be punished

for that breach in this litigation. See *State Farm*, 538 U.S. at 423 ("[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis"). CGB could not and did not show that Sunrise's conduct toward ***it*** was highly reprehensible.

2. None of the *BMW* factors is present.

None of the BMW reprehensibility factors is present in this case. As the Supreme Court observed in *State Farm*, the "absence of all of them renders any award" – and certainly an award that is nearly 20 times the substantial compensatory damages award – "suspect." *Id.* at 419.

a. *The first two factors are undisputed.*

As the district court recognized, there can be no denying that Sunrise did not inflict physical injury on plaintiff (a corporation). See JA12. There similarly is no basis for finding that the defendant disregarded a risk to health or safety. *Id.* Indeed, the evidence demonstrated that Sunrise acted out of ***concern*** for the health and safety of its patients.

b. *Sunrise did not target CGB at all, much less because it was financially vulnerable.*

The district court's determination that "[p]laintiff here was financially vulnerable" (JA12) is belied by the record: According to plaintiff, CGB was a successful, if small, company. JA142; JA424. And Brillman herself is an

educated and sophisticated businessperson who was represented by competent legal counsel at all relevant times. See JA461-462. CGB clearly was not among "the weakest of the herd – the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit." *State Farm*, 538 U.S. at 433 (Ginsburg, J., dissenting) (internal quotation marks omitted).

Even if the district court had been correct that CGB was financially vulnerable, that circumstance would not tip this factor in plaintiff's favor. The important inquiry for purposes of this factor is whether Sunrise intentionally targeted CGB ***because*** it was financially vulnerable. See *BMW*, 517 U.S. at 576 ("infliction of economic injury, especially when *** the ***target*** is financially vulnerable, can warrant a substantial penalty") (emphasis added). Unlike in other cases in which this factor has been invoked as a justification for a substantial punitive award, there is no evidence that Sunrise was ***motivated*** by CGB's lack of resources. *Cf. Kemp* v. *American Tel. & Tel. Co.*, 393 F.3d 1354, 1363 (11th Cir. 2004) ("We think the trial court was also justified in finding that AT&T ***intended to target*** financially vulnerable individuals given the jury's finding of fraud. AT&T's efforts to misleadingly represent gambling debts, which were illegal under Georgia law, as legitimate charges for long distance calls could be deemed by a jury to be designed to exploit customers who were unsophisticated and

economically vulnerable.") (emphasis added); *Neibel* v. *Trans World Assurance Co.*, 108 F.3d 1123, 1126 (9th Cir. 1997) (finding scheme to prey on "Joe Lunch Buckets" sufficiently reprehensible to justify a $500,000 punitive award); *Life Ins. Co. of Ga.* v. *Johnson*, 701 So. 2d 524, 526-29 (Ala. 1997) (reducing what originally was a $15 million punishment to $3 million where defendant engaged in a pattern of selling worthless Medicare supplement policies to "elderly, uneducated, single black women").

c. *Sunrise's tort was an isolated incident.*

CGB presented no evidence of "repeated misconduct of the sort that injured [the plaintiff]." *State Farm*, 538 U.S. at 423. Nor could it. This was an isolated incident of tortious interference, which did not even extend to the other RHA facility that Sunrise was operating; there is not a shred of evidence that Sunrise has engaged in such conduct at any other time.

The district court asserted that Sunrise was a recidivist because it allegedly "refused to be held responsible for its actions, ignoring and rebuffing Plaintiff and presenting countless obstacles to rapid resolution of Plaintiff's claims." JA9; see also JA7 ("There was also testimony on Defendant's treatment of Plaintiff throughout the course of their relationship – and this testimony certainly was not favorable to Defendant."); JA12 ("the evidence tells a tale of repeated stalling and dishonesty, starting from the initial interference with Plaintiff's relationships with

her therapists and extending to the eve of the first trial"). That analysis, however, misperceives what the *BMW* Court meant by "repeated misconduct." As this Court recently explained, "[t]he 'repeated conduct' cited in [*BMW*] involved not merely a pattern of contemptible conduct within one extended transaction (*i.e.*, the sale of one automobile to Dr. Gore), but rather specific instances of similar conduct by the defendant in relation to ***other parties***." *Willow Inn, Inc.* v. *Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 232 (3d Cir. 2004) (emphasis added); see also *Bach* v. *First Union Nat'l Bank*, 2005 WL 2009272, at *9 (6th Cir. Aug. 22, 2005) ("It appears that the Supreme Court has interpreted this factor to require that the similar reprehensible conduct be committed against various different parties rather than repeated reprehensible acts within the single transaction with the plaintiff."); *Park* v. *Mobil Oil Guam, Inc.*, 2004 WL 2595897, at *12-*16 (Guam Nov. 16, 2004) ("T]he Supreme Court cases refer to the frequency of *past* similar conduct of the defendant in question, similar to a repeat offender status in a criminal case."); *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005) (repeated-misconduct factor was not present because, even though "the evidence showed deceptive conduct *** spanning many weeks," the tortious act was based on "a single false promise [with] no evidence [that the defendant] had acted similarly toward other potential buyers").

This case does not even involve the pattern of stonewalling that the *Willow Inn* Court viewed as "relevant, but with less force." See 399 F.3d at 231. *Willow Inn* was a bad-faith insurance coverage action. The defendant insurer owed the plaintiff policyholder a fiduciary duty, and its refusal to respond to repeated demands for reimbursement constituted a breach of the insurance contract, a violation of Pennsylvania's bad faith insurance statute, and a tort. *Id.* at 233. By contrast, there is nothing in the least bit wrongful about Sunrise's refusal to respond to inquiries from CGB, a business with which it was engaged in an arm's-length relationship. Sunrise owed no duty to CGB, and certainly had no obligation to discuss matters as to which CGB had already explicitly threatened litigation. See JA461-462 (August 3, 1998 letter from CGB's counsel to Tomes, suggesting that the dispute would "go into litigation as, for example, a suit against you personally and Sunrise, your employer, for tortious interference with contract"). Thus, to the extent that the district court was referring to Sunrise's alleged refusal to return Brillman's calls, its reliance on that conduct as a basis for punishment was misplaced. Even if that refusal was impolite, it was not legally wrongful.

Nor can Sunrise be punished for refusing to settle this case, as the district court implied (and as plaintiff's counsel improperly argued to the jury). A party's decision to defend itself in court cannot be characterized as "stonewalling," and cannot form the basis for punishment. *Cf. United States* v. *Jackson*, 390 U.S. 570,

583 (1968) (holding that it is unconstitutional to enhance punishment based on the defendant's invocation of the right to trial by jury). Enhancing punishment because the defendant invoked its due process right to defend itself is particularly unjust when, as here, the defendant ultimately ***prevails*** as to the major part of the plaintiff's claim. Sunrise was largely successful in its defense and appeal, knocking out one of two claims and reducing the compensatory damages to $109,000 – less than one-tenth of the amount alleged in the complaint. It was CGB's dogged insistence on pursuing a disproportionate punitive award in a retrial that has accounted for the remaining delay.

d. *There was no evidence of intentional malice, trickery, or deceit.*

There was no evidence that Sunrise's actions in dealing with CGB or its therapists were characterized by "intentional malice, trickery, or deceit." *State Farm*, 538 U.S. at 419. CGB's theory as to motive involved no allegation of malice; its theory was that "Sunrise had a financial incentive to keep those therapists on." JA423. According to CGB, Tomes believed that the CGB therapists were so talented that their continued employment was crucial to the financial health of the facility that she managed. JA49-50. Tomes, by contrast, testified that she was motivated by concern for RHA's patients: she wanted to ensure continuity of care by the therapists on whom they had come to rely. See,

e.g., JA323; JA324. But whether her motive was financial or altruistic, it is undisputed Tomes did ***not*** act out of ill will toward CGB.

Nor did CGB present any evidence that Sunrise engaged in intentional trickery or deceit. Marjorie Tomes met with the therapists openly, as a group, in a room with a glass door. There is no allegation that she attempted to mislead them in any way. To the contrary, Tomes told the therapists only what, after speaking with RHA's counsel, she believed she was permitted to tell them. She stuck to her script – a fact that is confirmed by the essentially identical recitations from all of the therapists as to what transpired at the five-minute meeting. See JA457-460. Nor was there any effort to conceal the meeting after the fact. RHA's Knaup specifically told Brillman that Sunrise had "informed your employees, when it was more than apparent that you had not, that your contract was cancelled effective September 30, 1998." JA481-482.

It is unclear what the district court meant when it made a passing reference to "repeated stalling and dishonesty." See JA12. As noted, punitive damages cannot be imposed for Sunrise's refusal to discuss the termination of the contract with Brillman in the summer and fall of 1998. To the extent that the court was referring to the discovery disputes that took place prior to "the eve of the first trial" (*id.*), its reliance is likewise misplaced, for at least two reasons. First, even if those disputes somehow prejudiced plaintiff in connection with the first trial, they

certainly had no bearing on the retrial; by the time the case was remanded, all discovery issues had long been sorted out. Second, and more importantly, both *State Farm*'s nexus requirement and the First Amendment preclude the use of punitive damages to punish litigation conduct. See *State Farm*, 538 U.S. at 422-23; *Professional Real Estate Investors, Inc.* v. *Columbia Pictures*, 508 U.S. 49, 62-63 (1993) (holding that antitrust liability cannot be based upon a reasonable litigation position, regardless of the litigant's subjective beliefs or motives, and observing that a common-law claim for wrongful civil proceedings is barred by litigant's "reasonable belief that there [was] a chance that a claim [might] be held valid upon adjudication").

3. The record contains substantial mitigating evidence.

Sunrise presented a great deal of mitigating evidence – all of which the district court ignored.

a. *The tortious conduct took place in the context of a socially valuable task.*

Sunrise is a model corporate citizen that takes indisputably excellent care of the elderly patients who are entrusted to it. While we accept for purposes of this appeal that Sunrise's employee Marjorie Tomes committed a tortious interference when she facilitated contact between Symphony and the therapists, there is no suggestion that she did so in order to hurt CGB. Tomes testified that she was trying to protect RHA's patients. JA323; JA324. Even if, as CGB claims, her

concern for continuity of therapy services arose instead from a desire to maintain the financial health of a facility responsible for the care of elderly and ill residents, that objective itself is one that militates against the imposition of a large punitive award. The Ninth Circuit has recognized that tortious conduct that takes place in the context of a "socially valuable task" is inherently less reprehensible than conduct that serves no defensible purpose at all, such as "intentional, repeated ethnic harassment." *Bains LLC* v. *ARCO Prods. Co.*, 405 F.3d 764, 775 (9th Cir. 2005). That sensible observation fits this case like a glove.

b. *Sunrise had a good-faith belief that its conduct was permissible.*

As discussed above (at pages 7-9), the evidence at trial showed that Tomes specifically tried to ***avoid*** violating CGB's contractual rights. Tomes was aware of the no-raiding clause in the contract between CGB and RHA; accordingly, she sought the advice of RHA's lawyer prior to speaking with the therapists. When she met with them, she stayed on message and told them only what she had been advised was permissible; accordingly, she did not believe that she had done anything wrong. JA340; JA349. Nor did Tomes believe that she was doing anything wrong by allowing Symphony to use a Prospect Park conference room for interviews, or by telling Symphony that, in her view, one of the CGB therapists was "well worth" his high salary. JA345-347; JA350-351. Tomes believed that there was a specific line that she had to walk in order to smooth the transition from

CGB to Symphony and simultaneously comply with the contract between CGB and RHA, and she walked it. Plaintiff offered no evidence to rebut Tomes' testimony about her contemporaneous understanding of what she could do to achieve continuity of care ***without*** interfering with CGB's rights. Nor did it adduce any evidence to suggest that she might have deliberately disregarded the instructions that she had received from RHA's lawyer.

Numerous courts have held that good-faith reliance on the advice of counsel is a complete defense to, or at least a mitigating factor in the assessment of, punitive damages.[3] Even though Knaup was not Sunrise's lawyer at the time, it is clear that Tomes' reliance on his advice, and her undisputed belief that her conduct was permissible, are factors that militate strongly against a finding of high reprehensibility.

***

By any measure, if Sunrise's conduct crossed the threshold of reprehensibility necessary for the imposition of punitive damages, it did so only by

[3] *See, e.g.*, *Pierce* v. *Penman*, 515 A.2d 948, 955 (Pa. Super. 1986); *In re Heghmann*, 316 B.R. 395, 406 (B.A.P. 1st Cir. 2004); *Henderson* v. *U. S. Fid. & Guar. Co*., 695 F.2d 109, 113 (5th Cir. 1983); *Fox* v. *Aced*, 317 P.2d 608, 610–611 (Cal. 1957); *Lopez* v. *Three Rivers Elec. Co–op., Inc*., 26 S.W.3d 151, 160 (Mo. 2000); *Kuznik* v. *Bees Ferry Assocs*., 538 S.E.2d 15, 32 (S.C. Ct. App. 2000); *cf. Sheetz, Inc*. v. *Bowles Rice McDavid Graff & Love*, PLLC, 547 S.E.2d 256 (W. Va. 2001); *Kluczyk* v. *Tropicana Prods., Inc*., 847 A.2d 23, 32 (N.J. Super. Ct. App. Div. 2004).

a whisker. There is therefore no doubt that the conduct does not warrant the imposition of $2 million in punitive damages – the very amount the Supreme Court analogized to a "severe criminal penalty" in *BMW*.

B. The Ratio Guidepost Confirms The Gross Excessiveness Of A $2 Million Punishment.

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 stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"; reiterated its prior statement that a punitive award of four times compensatory damages was likely to "be close to the line of constitutional impropriety"; indicated that, though "not binding," the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to 3:1) is "instructive"; and, most importantly for present purposes, explained that, although a higher ratio may be permissible when "a particularly egregious act has resulted in only a small amount of economic damages," "[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." 538 U.S. at 425. Applying these guidelines to the facts of the case before it, the Court observed that, even though State Farm's conduct was "reprehensible" and "merit[ed] no praise"

(*id*. at 419-20), "a punitive damages award at or near the amount of compensatory damages" – *i.e.*, a 1:1 ratio – was likely the constitutional maximum. *Id*. at 429.

To be sure, *State Farm* did not impose a simple mathematical formula for the imposition of punitive damages. But the fact that there is no one-size-fits-all ratio does not mean that the Supreme Court intended the second *BMW* guidepost to be effectively a nullity. To the contrary, the *State Farm* opinion and the dozens of lower court decisions applying it clearly demonstrate that the maximum permissible ratio will vary from case to case based 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).[4] The maximum permissible ratio is directly related to the former and inversely related to the latter. In other words, for any particular degree of reprehensibility, as the compensatory damages increase, the maximum permissible ratio decreases. And for any particular amount of compensatory damages, the lower on the reprehensibility spectrum the conduct falls, the lower the constitutionally permissible ratio.

[4] In some cases, a third variable – the likelihood of avoiding detection – may also be relevant. *See State Farm*, 538 U.S. at 425. Here, Sunrise's conduct was open and obvious; accordingly, that variable cannot justify any enhancement of punishment.

Application of these commonsense principles compels the conclusion not only that the 18:1 ratio of punitive to compensatory damages allowed by the district court is indicative of an unconstitutional punishment, but also that a 1:1 ratio, or certainly no more than a 4:1 ratio, is the constitutional maximum under the specific circumstances of this case.

1. The ratio of more than 18:1 is a clear indicator of excessiveness.

To begin with, as indicated above, the *State Farm* Court expressly stated that "few awards" exceeding a single-digit ratio will satisfy due process. 538 U.S. at 425. Such ratios generally will be permissible only if the defendant's conduct is "particularly egregious" ***and*** the compensatory damages are "small."[5] *Id*.

[5] Although the precise meaning of "small" is an open question, there can be little doubt that $109,000 is not "small." It is most likely that by "small" the Court meant awards below $10,000. *See BMW*, 517 U.S. at 582-83 (discussing exception for cases in which "a particularly egregious act has resulted in only a small amount of economic damages," while giving no indication that $4,000 compensatory award in case before it qualified for that exception); *Bains*, 405 F.3d at 776 ("[t]his is not a 'small amount' case because the economic damages were substantial – $50,000"); *Roth* v. *Farner-Bocken Co.*, 667 N.W.2d 651, 669-70 (S.D. 2003) ($25,000 award was not "small"), *Jones* v. *Sheahan*, 2003 WL 22508171, at *16 (N.D. Ill. Nov. 4, 2003) (same); *cf. Mathias* v. *Accor Economy Lodging, Inc.* 347 F.3d 672, 677 (7th Cir. 2003) (upholding 37:1 ratio in case in which two plaintiffs received $5,000 awards because the conduct "was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional"); *Simon*, 113 P.3d at 75-78 (invoking *State Farm* exception where compensatory award was $5,000).

The courts – including this Court – have with few exceptions adhered to the single-digit limit, particularly in cases involving compensatory awards in the range at issue here. See, *e.g.*, *Willow Inn*, 399 F.3d at 233-34 (observing that *State Farm* generally sets single-digit limit on ratio of punitive to compensatory damages). The Ninth Circuit has patrolled this limit in a trilogy of recent decisions.

In *Planned Parenthood of the Columbia/Willamette Inc.* v. *American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005), for example, a jury found that anti-abortion activists had made "true threats of violence" against abortion providers with the intent to intimidate them, and awarded $526,336 in compensatory damages and $108,500,000 in punitive damages. After reviewing *BMW*, *State Farm*, and the Ninth Circuit's post-*State Farm* cases, the court explained:

> In cases where there are significant economic damages and punitive damages are warranted but behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of constitutionality. In cases with significant economic damages and more egregious behavior, a single-digit ratio greater than 4 to 1 might be constitutional. And in cases where there are insignificant economic damages but the behavior was particularly egregious, the single-digit ratio may not be a good proxy for constitutionality.

Id. at 962 (citations omitted). Agreeing with the district court that the defendants' conduct was "particularly reprehensible," but observing that "[m]ost of the

compensatory awards are substantial," the court limited each punitive award to a 9:1 ratio to the corresponding compensatory damages. *Id*. at 963.

In *Southern Union Co.* v. *Southwest Gas Corp.*, 415 F.3d 1001, 1010 (9th Cir. 2005), a case involving a public official's flagrant abuse of his office, the district court upheld a punitive damages award of $60 million, which represented a ratio of 153:1 to the compensatory damages award of $390,072. That decision was reversed by the Ninth Circuit, which agreed that the defendant's conduct was highly reprehensible but held that "the ratio [of punitive to] actual damages is too high" and remanded for further consideration of a more appropriate ratio. 415 F.3d at 1011. In so holding, the court stated:

> [W]e have been reminded that, under established principles, few awards exceeding a single digit ratio to a significant degree will satisfy due process. Even an award more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. History points to double, triple, or quadruple punitives; these ratios are instructive."

Id. (citations and quotation marks omitted).[6]

Finally, in *Bains*, the defendant had engaged in racial discrimination and harassment that the court characterized as highly reprehensible: "the conduct was not an isolated incident but repeated, the target was highly vulnerable financially,

[6] In its brief opposing Sunrise's post-trial motions, CGB relied heavily on the district court's opinion in *Southern Union*. The reversal of that decision renders the district court's opinion in this case even more of an outlier.

and the harm resulted from intentional malicious conduct." 405 F.3d at 775. Nonetheless, the court held that a ratio of between 6:1 and 9:1 was the constitutional maximum. *Id.* at 777. In explaining why a pre-*State Farm* case upholding a 28:1 ratio was no longer good law, the court stated: "*State Farm* emphasizes and supplements the *BMW* limitation by holding that when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Bains*, 405 F.3d at 776 (citations and internal quotation marks omitted).

Other federal and state appellate courts have recognized the same limiting principles. See, *e.g.*, *Bach*, 2005 WL 2009272, at *10 (noting that Supreme Court "has stated that awards exceeding a single-digit ratio will rarely be upheld against a constitutional challenge" and that a 1:1 ratio may be the limit when "the amount of compensatory damages is high," and concluding that 6.6:1 ratio was "alarming" where compensatory damages were $400,000); *Munro* v. *Golden Rule Ins. Co.*, 393 F.3d 720, 721-22 (7th Cir. 2004) (*State Farm* "set constitutional limits on the punitive damages multiplier in simple economic-loss cases" and created a "presumption against punitive damages that are a double-digit multiple of the compensatory injury"); *Simon*, 113 P.3d at 77 (reading *State Farm* as having established a "presumption [that] ratios *** significantly greater than nine or 10 to

one are suspect and, absent special justification *** cannot survive appellate scrutiny").[7]

Nothing about this case that warrants deviating from the overwhelming consensus that ratios in excess of single digits are reserved for truly exceptional cases in which the conduct is highly reprehensible and the compensatory damages are small. Accordingly, at a minimum, the conclusion is inescapable that the existing 18:1 ratio is indicative of a grossly excessive punishment.

2. The maximum permissible ratio in this case is 1:1.

What, then, is the constitutional maximum in this case? We submit that the answer to that question again is supplied by *State Farm*. The Court there indicated

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[7] In an appendix to our post-trial brief in the district court, we showed that of the ***37*** decisions handed down between April 2003 (when *State Farm* was decided) and February 2005 (when we filed the brief) in which the actual or potential harm was between $100,000 and $300,000, only ***three*** cases upheld a ratio that exceeded single digits. In all of the other 34 cases, the award (after judicial review) was less than ten times the compensatory damages – in most cases far less. *See* Appendix A. And even the three outlier cases had post-review ratios of 10:1, 10:1 and 11:1, respectively. *See Hollock* v. *Erie Ins. Exch.*, 842 A.2d 409 (Pa. Super. 2004); *Collins Entm't Corp.* v. *Coats & Coats Rental Amusement*, 584 S.E.2d 120 (S.C. Ct. App. 2003); *Phelps* v. *Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003). The Pennsylvania Supreme Court granted review in *Hollock* (878 A.2d 864 (Pa. June 28, 2005)); the case was argued in December 2005.

As of today, there have been ***43*** such decisions (excluding this case). And there has been only one additional case (for a total of ***four***) upholding a ratio of greater than single digits. *See Superior Fed. Bank* v. *Jones & Mackey Constr.Co.*, 2005 WL 3307074 (Ark. Ct. App. Dec. 7, 2005) (upholding ratio of 18:1 in case involving compensatory damages of $175,000).

that punitive damages should not be awarded ***at all*** unless "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), that "[t]he existence of any one of [the reprehensibility] factors *** may not be sufficient to sustain a punitive damages award" (*id*.), that "the absence of all of them renders ***any*** award suspect" (*id*. (emphasis added)), and that, even in cases of reprehensible misconduct (like *State Farm* itself), "[w]hen compensatory damages are substantial," a 1:1 ratio "can reach the outermost limit of the due process guarantee" (*id*. at 425).

Here, none of the reprehensibility factors was present (see Point A.2, *supra*), making "any [punitive] award suspect." Moreover, the $109,000 compensatory award was "substantial" and constituted ***more*** than "complete compensation" for the injury arising from Sunrise's tort. *State Farm*, 538 U.S. at 425, 426. Brillman herself admitted that she valued the loss of the six therapists in question at $109,000: one week before the therapists went to work for Symphony, she offered to waive her contractual rights to their services in exchange for a lump sum "buyout" of 25 percent of their salaries – or $109,000. See JA449-451.

Indeed, most of that $109,000 loss was caused not by Sunrise's tort, but rather by the termination of CGB's contracts with RHA – a harm for which Sunrise cannot legitimately be punished. See *CGB Occupational Therapy*, 357 F.3d at 390

("Sunrise could not have interfered with the contracts between CGB and RHA/Pennsylvania."). Both of the CGB therapists who testified at trial stated that, once CGB lost the RHA contracts at Prospect and Pembrooke, their departure was a foregone conclusion. Gasiewski, the head therapist, explained:

> Q: After you found out that she had lost the contract, you went to Miss Brillman and you asked her whether she had work for you as an occupational therapist, didn't you?
>
> A: Yes.
>
> Q: She told you she didn't, right?
>
> A: Right.
>
> ***
>
> Q: So in your view, sir, you had a choice of either going to work for Symphony or, if you wanted to work as an [occupational therapist], working for someone other than CGB, isn't that a fact?
>
> A: Yes.
>
> Q: Either way, no matter what happened, you were going to have to leave CGB once they lost that therapy provider contract, isn't that true?
>
> A: I felt I was forced to leave CGB.
>
> Q: Because of the loss of the contract?
>
> A: Yes.

1/12/05 Tr. 105; JA89-90. Because the therapists would have left CGB even in the absence of Tomes' actions, the $109,000 compensatory award far ***exceeds*** any

minimal losses that CGB may have suffered as a result of Sunrise's solicitation of the therapists, as distinguished from losses relating to termination of the contracts.[8]

In view of the ample size of the compensatory award, and the absence of any indicia of reprehensibility, a punitive award equal to the compensatory damages is the constitutional maximum – if indeed anything other than a nominal award is permissible. In *Roth* v. *Farner-Bocken Co.*, 667 N.W.2d 651 (S.D. 2003), an employment case in which the defendant was found to have invaded the plaintiff's privacy, the jury awarded $25,000 in compensatory damages and $500,000 in punitive damages – a ratio of 20:1. The Supreme Court of South Dakota determined that only one of the *BMW* factors was present and that the compensatory award fully redressed the harm. Accordingly, it held that the 20:1 ratio was indicative of a grossly excessive award, explaining:

> [T]he harm caused to Roth was economic as opposed to physical. Farner put no one's health or safety at risk and the evidence indicates Farner's conduct was limited to two isolated incidents. Although Farner's fraudulent concealment indicates it engaged in conduct of trickery and deceit, Roth was fully compensated for the damages he suffered ***. *** [W]e find that in this case, the combination of the "shocking disparity" between compensatory and punitive damages awarded, combined with the lack of potential and actual harm and the low

[8] Although Brillman testified at trial that CGB's true damages far exceeded the $109,000 award, every element of additional harm that she identified was either abandoned by her counsel during closing argument at the first trial or found to be non-compensable by this Court. See pages 47-48 *infra*.

> degree of reprehensibility of the defendant's conduct, counsel against a substantial punitive award.

Id. at 667-69 (citations and internal quotation marks omitted). The court concluded that "'a punitive damages award at or near the amount of compensatory damages' is justified" and remanded for a new trial on punitive damages. *Id.* at 671 (quoting *State Farm*, 538 U.S. at 429).

The Eighth Circuit reached a similar conclusion in a case involving conduct materially more egregious than that at issue here – racial harassment in the workplace. See *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004). It held that a $6,063,750 punitive award that was just over ten times the plaintiff's $600,000 compensatory award was unconstitutionally excessive and ordered a remittitur to the amount of compensatory damages, explaining:

> Mr. Williams'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." Mr. Williams 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 Mr. Williams's harassment claim be remitted to $600,000.

Id. at 799 (citation omitted); see also *Boerner* v. *Brown & Williamson Tobacco Co.***,** 394 F.3d 594, 602-603 (8th Cir. 2005) (holding that "a ratio of approximately 1:1 would comport with the requirements of due process" in case in which

compensatory damages were "substantial" and conduct was deemed to be "highly reprehensible"); *Ceimo* v. *General Am. Life Ins. Co.*, 2005 WL 1523445 (9th Cir. June 29, 2005) (unpublished) (affirming district court's remittitur of punitive award to a 1:1 ratio); *Watson* v. *E.S. Sutton, Inc.*, 2005 WL 2170659, at *19 (S.D.N.Y. Sept. 6, 2005) (reducing punitive damages from $2.5 million to $717,000 in employment discrimination case where compensatory damages were $1.5 million because "the Court does not believe this is a case with the most culpable conduct possible"); *Czarnik* v. *Illumina, Inc.*, 2004 WL 2757571, at *11 (Cal. Ct. App. Dec. 3, 2004) (unpublished) (reducing $5 million punitive award to $2.2 million and explaining that "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 *** we conclude that a 1:1 ratio of punitive to compensatory damages is the maximum award that is sustainable against a due process challenge").

Here, as in *Williams*, the compensatory award "is a lot of money." That is especially so because the $109,000 in compensatory damages that Sunrise had to pay did not represent the return of ill-gotten gain, but instead, from Sunrise's standpoint, was entirely an out-of-pocket loss. In *State Farm*, the Supreme Court recognized that compensatory damages have a deterrent effect in their own right, 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 (emphasis added).[9] We respectfully submit that this case does not fall in the category thus described, making even a 1:1 ratio constitutionally questionable.[10]

Even for cases of higher reprehensibility, both the Supreme Court and most lower courts have regarded a 4:1 ratio as marking "the line of constitutional impropriety" (*State Farm*, 538 U.S. at 425) when the compensatory damages have exceeded $100,000. For example, one court reduced a punitive award of $2

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[9] Prior and subsequent cases have made the same point. *See, e.g.*, *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence *** operates through the mechanism of damages that are *compensatory*") (emphasis in original); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); *United States* v. *Bailey*, 288 F. Supp. 2d 1261, 1281 (M.D. Fla. 2003) (setting aside $3,000,000 punitive award "in its entirety" because, among other things, the compensatory damages exceeded the gain to the defendant, making "the imposition of further sanctions to achieve punishment or deterrence" unnecessary), *aff'd*, 419 F.3d 1208 (11th Cir. 2005). Because the award of compensatory damages already has rendered Sunrise's tortious interference with CGB's relationship with its at-will employees completely unprofitable, those damages are themselves fully sufficient to deter any repetition of that conduct, making it unnecessary to allow a punitive/compensatory ratio in excess of 1:1.

[10] The same result is required as a matter of Pennsylvania law, which holds that the "size of a punitive damages award must be reasonably related to the State's interest in punishing and deterring the particular behavior of the defendant and not the product of arbitrariness or unfettered discretion." *Shiner* v. *Moriarty*, 706 A.2d 1228, 1241 (Pa. Super. 1998).

million to $717,610, in a case in which the plaintiff had received $179,402 in compensatory damages and medical expenses incurred as a result of an assault committed by the defendant's employees. *Fresh* v. *Entertainment U.S.A. of Tennessee, Inc.*, 340 F. Supp. 2d 851 (W.D. Tenn. 2003). Heeding *State Farm*'s discussion of the ratio guidepost, the court found "[t]he award in this case [to be] excessive when viewed as either a deterrent or punitive measure" (*id.*) at 860) and concluded that, given "the substantial amount of compensatory damages and medical expenses awarded in this case, a single-digit multiplier of four (4) appropriately complies with the constitutional limitations most recently set forth in *Campbell* ***." *Id.* In a case involving discrimination against a disabled worker, another court reduced a punitive award of $4.5 million to $300,000. *Young* v. *DaimlerChrysler Corp.*, 2004 WL 2538639, at *4 (S.D. Ind. Oct. 19, 2004). The compensatory damages were $100,000, and the court concluded that, despite the relatively high reprehensibility of the defendant's conduct, a 3:1 ratio was the constitutional maximum.[11]

Most notably, the Eighth Circuit held that a 4:1 ratio was the "due process maximum" in a wrongful death case against the operators of a nursing home whose employees "failed to treat [the decedent's] lengthy constipation and ignored their

[11] As a result of a $300,000 statutory cap on total damages, the plaintiff in *Young* ultimately received only $200,000 in punitive damages.

duty to contact her treating physician despite numerous requests that they do so" and who were engaged in "a practice of careless and at times fraudulent charting of residents' condition[s]." *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 832 (8th Cir. 2004) (ordering remittitur of $5 million punitive award to $2 million). Needless to say, if a 4:1 ratio (and $2 million punishment) is the limit in a case in which a nursing home's conduct caused the death of a patient, nothing close to that is warranted when a similar business's conduct injured another company, but affirmatively benefited the patients.[12]

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[12] Many state courts have likewise viewed 4:1 as the maximum permissible ratio when the compensatory damages are in the six-figure range, even where the reprehensibility of the defendant's conduct is greater than it is in this case. *See, e.g.*, *Cass* v. *Stephens*, 156 S.W.3d 38, 77 (Tex. Ct. App. 2004) (holding, in fraud and malicious conversion case involving $200,082 in compensatory damages, that "because there were sizable economic damages" and discovery sanctions against the defendant, "the circumstances and context of this case do not merit a ratio that exceeds four to one"); *Diamond Woodworks, Inc.* v. *Argonaut Insurance Co.* 135 Cal. Rptr. 2d 736 (Ct. App. 2003) (reducing a punitive award that was 33 times the $258,570 in compensatory damages to slightly less than four times those damages even while determining that the defendant's conduct exhibited four of the five indicia of reprehensibility identified in *State Farm*); *Textron Fin. Corp.* v. *National Union Fire Ins. Co.*, 13 Cal. Rptr. 3d 586 (Ct. App. 2004) (ratio of 4:1 was constitutional maximum in case involving compensatory award of $90,000); *Taylor Woodrow Homes, Inc.* v. *Acceptance Ins. Cos.*, 2003 WL 21224088, at *4 (Cal. Ct. App. May 28, 2003) (unpublished) (reducing $5 million punitive award to $1 million, where compensatory damages were $293,000); *Waddill* v. *Anchor Hocking, Inc.*, 78 P.3d 570, 576 (Or. Ct. App. 2003) (holding in product liability action that, because "there is no evidence that [the defendant] acted with intentional malice or engage[d] in trickery or deceit[,] *** the maximum constitutionally permissible [punitive] award in this case is four times the [$100,854 in] compensatory damages for which defendant is responsible"); *Park*, 2004 WL 2595897, at *12-*16 (upholding reduction of 56:1 ratio to 3:1 where

In sum, if, contrary to our arguments above, the Court concludes that the reprehensibility of Sunrise's tort ***significantly*** exceeds the threshold between punishable and merely tortious conduct, a ratio of 4:1 would mark the outer limit of permissible punishment. If, on the other hand, the Court agrees with us that few if any of the reprehensibility factors are present here, a 1:1 ratio would "reach the outermost limit of the due process guarantee" (*State Farm*, 538 U.S. at 425).

3. The denominator of the ratio is $109,000

In attempting to justify setting the punitive damages at more than 18 times the compensatory damages, the district court asserted, with no concrete reference to the record, that "the $109,000 was not the only conduct that both Juries were allowed to punish. *** [G]iven the hardships Defendant imposed on Plaintiff in its treatment of Plaintiff after the interference took place, and given defendant's antics leading up to the first trial, the true ratio, could the harm by Defendant be expressed as a simple dollar value, would be closer to three to one." JA13-14. That conclusion finds no support in the record or in the law; it is contradicted both by the history of this case and by Circuit precedent.

The procedural history of this case compels the conclusion that $109,000 is the only appropriate denominator for the punitive/compensatory ratio. The jury in

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compensatory damages were $50,000 and defendant's "conduct was not 'a particularly egregious act'") (quoting *State Farm*, 538 U.S. at 425).

the first trial found that the loss of the six therapists harmed CGB by exactly $109,000, and this Court held that that injury was the ***only*** claim for which CGB can recover punitive damages. *CGB*, 357 F.3d at 387-88. All of the other economic losses that CGB asserted in its briefs below were either rejected by the jury at the first trial or attributable to the claim on which Sunrise prevailed. For example, CGB claimed that it lost revenue arising from its inability to assign its therapists to other facilities after the RHA contracts were terminated – but in the first trial it did not request compensation for such lost revenues (which is unsurprising because it had no work for the therapists after it lost RHA's business (see JA174-178)). Similarly, CGB argued that the $109,000 did not compensate it for the costs associated with training new therapists. The first jury, however, was authorized to award damages for all such losses that CGB proved; if it did not include costs associated with training replacements, it was because CGB did not prove any such losses. JA433-434. CGB further claimed that it had not been compensated for losses arising from Sunrise's alleged use of its proprietary treatment techniques, but this Court specifically held that there was no evidence to support such a claim. *CGB*, 357 F.3d at 388-90. In sum, none of these unproven losses can be included in the denominator of the ratio. See, *e.g.*, *Simon*, 113 P.3d at 74 (rejecting plaintiff's attempt to inflate the denominator by "characteriz[ing]

damages he might have obtained on another cause of action, one on which he did not prevail, as potential damages for the cause of action on which he did prevail").

Willow Inn, which the district court cited but apparently misread, in no way stands for the proposition that district courts are free to tinker with the denominator of the ratio. To the contrary, this Court focused almost ***entirely*** on the dollar amount that, pursuant to the Pennsylvania bad-faith statute, the defendant was required to pay to the plaintiff as a result of its tortious conduct. As the Court explained it:

> [B]ecause the $2,000 award on the contract claim was only incidental to the bad faith thrust of this litigation, we conclude that the attorney fees and costs awarded as part of the § 8371 claim is the proper term to compare to the punitive damages award for ratio purposes. These awards totaled $135,000, resulting in approximately a 1:1 ratio, which is indicative of constitutionality under *Gore* and *Campbell*.

399 F.3d at 235. By any measure, the defendant in *Willow Inn* behaved far more reprehensibly than Sunrise: it intentionally took advantage of a vulnerable policyholder to whom it owed a heightened duty of care. And the harm to Willow Inn, as measured by the applicable Pennsylvania statute, was comparable to that at issue here – $137,000 in *Willow Inn*, as compared with $109,000 in this case. Under those circumstances, this Court ***twice*** stated that a 1:1 ratio approached the limit of constitutionality. See *id*. at 230 ("[W]e consider the $150,000 punitive damages to approach but not cross the constitutional line."); *id.* at 235 ("[W]e

believe the $150,000 punitive damages award approaches the constitutional limit given the reprehensibility of PSM's conduct."). If a 1:1 ratio was the constitutional limit in *Willow Inn*, it perforce ***exceeds*** the constitutional limit in this case, in which the defendant's conduct implicated ***none*** of the five *BMW* reprehensibility factors.

The district court's reliance on *Sheedy* v. *City of Philadelphia*, 2005 WL 375657 (E.D. Pa. Feb. 15, 2005), is similarly misplaced. First, the compensatory damages in *Sheedy* were $3,075. Cases involving small compensatory awards are simply not relevant for purposes of ratio analysis in this case, in which the compensatory award was orders of magnitude greater. The *State Farm* Court specifically noted that its single-digit-ratio presumption is inapplicable when "a particularly egregious act has resulted in only a small amount of economic damages." 538 U.S. 408 at 425. Intentionally and maliciously causing one's former spouse to be arrested and thrown into jail for a crime that she did not commit is, of course, "particularly egregious" misconduct, and $3,075 is a "small amount of economic damages." Second, in reviewing the award in *Sheedy*, Judge Fullam plainly erred in assuming that "the jury's $500,000 punitive award actually included a substantial amount of compensatory damages," an amount that he estimated to be $100,000. 2005 WL 375657, at *5. Courts have no power to speculate in this way. See *Chuy* v. *Philadelphia Eagles Football Club*, 431 F.

Supp. 254, 270 n.27 (E.D. Pa. 1977) (courts should not engage in "speculation on [the jury's] method of computing punitive damages"), *aff'd*, 595 F.2d 1265 (3d Cir. 1979). Even accepting that it was appropriate for Judge Fullam to assume that the jury smuggled compensatory damages into its punitive award, however, a similar approach is impermissible in ***this*** case. It is clear from the record that the jury awarded the highest amount of compensatory damages that CGB possibly could have suffered from the tortious interference with its relationship with the therapists. See pages 48-49, *supra*. And third, after estimating the true compensatory award to be $100,000, Judge Fullam reduced the punitive award to $200,000. Ultimately, then, *Sheedy* stands for the proposition that, when the defendant's conduct is highly reprehensible and the compensatory damages are $100,000, the appropriate ratio of punitive damages to compensable harm is 2:1. The conduct of the defendant in *Sheedy* was, of course, substantially more reprehensible than the tortious interference attributed to Sunrise in this case. Accordingly, *Sheedy* strongly supports our argument that, if any award of punitive damages is appropriate here, the maximum permissible ratio of punitive to compensatory damages is 1:1.

C. The Third *BMW* Guidepost Confirms The Excessiveness Of The Award.

The third *BMW* guidepost requires a comparison between "the punitive damages award and the civil or criminal penalties that could be imposed for

comparable misconduct." *BMW*, 517 U.S. at 583. There is no legislatively established penalty for the conduct at issue here – *i.e.*, a third party's decision to inject itself into the relationship between an employer and its at-will employees. The absence of any penal provisions covering the conduct is itself a clear indication that a punitive award "tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 575) is excessive. See, *e.g.*, *FDIC* v. *Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997) (holding that the fact that the conduct is not subject to criminal or civil fines suggests that defendant was not on notice that its conduct could give rise to substantial punitive damages, and reducing $1.2 million punitive award to $264,000 – six times the $44,000 compensatory award); *Groom* v. *Safeway, Inc.*, 973 F. Supp. 987, 995 (W.D. Wash. 1997) ("the fact that apparently there is no law imposing civil or criminal penalties for comparable conduct strongly suggests that an enormous punitive damages award is not warranted here"; reducing $750,000 punitive award to $50,000 – 10 times the $5,000 compensatory award).

D. The Punishment Cannot Be Sustained On The Basis Of Sunrise's Finances.

A defendant's wealth "bear[s] no relationship to the [punitive] award's reasonableness or proportionality to the harm," and for that reason "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at 427. Indeed, reliance on corporate financial condition to uphold a high punitive award constitutes "a departure from well-established

constraints on punitive damages." *Id.;* see also *Bains*, 405 F.3d at 777 ("A punitive damages award is supposed to sting so as to deter a defendant's reprehensible conduct ***. But there are limits," and evidence of wealth cannot "cannot make up for the failure of other factors, such as reprehensibility, to constrain significantly an award that purports to punish a defendant's conduct.") (citations and internal quotation marks omitted); *Roth*, 667 N.W.2d at 670 (where "the reprehensibility and harm guideposts counsel in favor of a lower punitive damages award," court "need not address the wrongdoer's financial condition and the effect of the punitive damages award on" the defendant). Thus, the district court clearly erred in suggesting repeatedly that "the tremendous wealth of Defendant" supports a larger award in this case. JA9; see also JA10.

That is because, contrary to the district court's belief, corporate financial condition sheds no light on either of the legitimate purposes of punitive damages: retribution and deterrence. As to the former, "the core of the Aristotelian notion of corrective justice, and more broadly of the principle of the rule of law, is that sanctions should be based on the wrong done rather than the status of the defendant; a person is punished for what he does, not who he is, even if the who is a huge corporation." *Mathias*, 347 F.3d at 676 (7th Cir. 2003). Put another way, retributive principles are not advanced by punishing Wal-Mart more heavily than

Target for the same conduct merely because Wal-Mart has greater financial resources.

Wealth is equally irrelevant to Pennsylvania's interest in deterrence. True, the wealth of an ***individual*** charged with committing a ***non-economically-motivated*** tort – *e.g.*, assault, defamation, or vandalism – is relevant to the amount of punishment necessary to impart deterrence. See *Kemezy* v. *Peters*, 79 F.3d 33, 35 (7th Cir. 1996) ("To a very rich person, the pain of having to pay a heavy award of damages may be a mere pinprick and so not deter him (or people like him) from continuing to engage in the same type of wrongdoing."); Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. LEGAL STUD. 415, 418 (1989) (wealth of individual may be relevant to setting punitive damages sufficient to "sting" individuals "who cause harm out of spite or malice").

But "[t]his point *** does not apply to institutions as distinct from natural persons." *Kemezy*, 79 F.3d at 35. The reason is that "[a] potentially liable [organizational] defendant will compare the benefits it will derive from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs. Whether a[n organizational] defendant is wealthy or poor, this cost-benefit calculation is the same." Abraham & Jeffries, *supra*, at 417.

In sum, because Sunrise's financial resources bear no relationship to Pennsylvania's interest in punishment or deterrence, this Court should not consider that evidence in determining the maximum constitutionally-permissible award of punitive damages.

E. The Fact That The Jury Returned A Large Award Has No Bearing On The Excessiveness Analysis.

The district court's determination that a "very substantial punitive award" (JA9-10) is appropriate here was based in part on the size of the jury's verdict. "Both juries decided that Plaintiff's evidence called for a substantial award, and this Court will not blindly discard both Juries' conclusions." *Id.* That analysis was wrong in several respects.

First of all, the first jury awarded $1.3 million in punitive damages for ***both*** torts, and the ratio of punitive to compensatory damages was approximately 2:1. Moreover, the compensatory damages attributable to the valid cause of action – $109,000 – were only 16 percent of the first jury's total compensatory award. Accordingly, it is plain that, by imposing a $2 million award for that single cause of action, the district court ***did*** "blindly discard" the first jury's conclusion.[13]

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[13] Moreover, even putting aside *State Farm*'s limitations on ratios in excess of single digits, to allow a punishment of more than the $1.3 million awarded by the first jury as punishment for ***both*** torts found by it effectively punishes Sunrise for successfully appealing, in violation of its due process rights. *See Landsberg* v. *Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193, 1199 (9th Cir. 1986) (finding that trial court, on remand, "imposed a chilling impediment to the right to

Moreover, the second jury's award does not – despite its enormous size – provide a basis to infer that the jury made a factual finding of high reprehensibility. As discussed above (at pages 11-15), plaintiff's counsel engaged in a systematic effort to inflame the jury and distract it from its narrow task of setting punishment for the limited tort of interfering with CGB's relationships with its staff. He particularly focused on Sunrise's substantial financial resources, telling the jury that it would take a very large number to get Sunrise's attention. The jury was then instructed by the court that it ***must*** consider Sunrise's wealth in setting punishment, and that it should not feel constrained by the size of the compensatory award – exactly the reverse of the teaching of *State Farm*. The fact that it returned a $30 million verdict demonstrates only that plaintiff's counsel succeeded in influencing the jury with his inflammatory tactics and his emphasis on wealth. It indicates absolutely nothing about the jury's views regarding the reprehensibility of Marjorie Tomes' five-minute meeting with CGB's therapists. As the California Supreme Court recently explained, when the jury has made "no *** express finding" on a particular issue bearing on application of the *BMW* guideposts, "to infer one from the size of the award would be inconsistent with de novo review, for

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appeal by increasing its initial punitive damage award merely because defendants successfully appealed" one of two claims against them).

the award's size would thereby indirectly justify itself." *Simon*, 113 P.3d at 70. The district court's contrary assumption was profoundly misguided.

CONCLUSION

For all of the foregoing reasons, the $2 million punitive award entered by the district court is grossly and unconstitutionally excessive. This Court should reduce the award to an amount no greater than the compensatory damages – $109,000.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief was produced in Times New Roman (a proportionally-spaced typeface), 14-point type and contains 13,844 words (based on the Microsoft Word word processing system word count function).

I further certify that the electronic copy of this brief filed with the Court is identical in all respects except the signature to the hard copy filed with the Court, and that a virus check was performed on the electronic version using the Norton Anti-Virus software program.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2006, I served the foregoing document by causing a true and correct copy thereof to be delivered via electronic and U.S. mail to the following:

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify pursuant to LAR 46.1 that I was admitted to the Bar of the United States Court of Appeals for the Third Circuit on January 14, 2005 and remain a member in good standing of the Bar of this Court.

Dated: March 21, 2006

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