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

THIRD-STEP BRIEF FOR APPELLANTS/CROSS-APPELLEES

ANDREW L. FREY
LAUREN R. GOLDMAN
MAYER, BROWN, ROWE & MAW LLP
1675 Broadway
New York, New York 10019
(212) 506-2500

EVAN M. TAGER
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3240

Attorneys for Appellants/Cross-Appellees Sunrise Assisted Living, Inc. and Sunrise Assisted Living Management, Inc.

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INTRODUCTION

Due process requires 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 Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 426 (2003). In a thinly disguised effort to distract the Court from that constitutional imperative, and apparently confusing appellate briefing with an occasion for an over-the-top jury argument, CGB ignores most of our arguments and loads up its brief with heated, and largely empty, rhetoric. It accuses Sunrise of harboring "extraordinary malice" (Br. 12), exhibiting "a total disregard for the judicial system that borders on contempt" (*id.*), having "a deeply ingrained corporate culture of dishonesty" (*id.*), "intentionally and systematically trying to crush CGB" (Br. 13), committing "other despicable acts" against it (Br. 28), being a "recalcitrant bully" (Br. 11), and "display[ing] contempt for the judicial process" (Br. 29).

This rhetoric cannot be squared with the record: the conduct at issue here was, at worst, an isolated incident of tortious interference with an at-will relationship, which caused $109,000 in purely economic harm and has no broader societal implications. Under the circumstances, the suggestion that the deterrent objective generally, and the three *BMW* guideposts in particular, support a punitive

award nearly twenty times the compensatory award (or anything close to it) is badly misguided.

Many of CGB's factual assertions concern matters that are self-evidently irrelevant to the sole question now at issue – whether $2 million is unconstitutionally excessive punishment in this case.[1] Most of its bluster is also inaccurate. We will not burden the Court with a point-by-point response to every irrelevant misrepresentation and overstatement in CGB's brief. Instead, we will address only those misstatements that concern the legal issues before this Court.

ARGUMENT

I. EVEN AS REDUCED, THE $2 MILLION PUNITIVE AWARD IS UNCONSTITUTIONALLY EXCESSIVE.

A. Sunrise's Conduct Was Minimally Reprehensible.

CGB offers no response to our showing (Sunrise Br. 21-22) that Sunrise's conduct was barely even tortious: in the absence of the breach of a fiduciary duty to ***RHA*** (which itself was hardly egregious), Sunrise's conduct toward CGB would not even have been actionable, much less the basis for punitive liability. *CGB Occupational Therapy, Inc.* v. *RHA Health Servs., Inc.*, 357 F.3d 375, 388-389 (3d Cir. 2004). Accordingly, notwithstanding CGB's hyperbolic rhetoric, the tortious interference in this case can be regarded as "egregiously improper" only in a land in which "all the children are above average" and all punishable conduct is highly

[1] CGB does not even reach this issue until page 51 of its 73-page brief.

reprehensible. *Cf.* Garrison Keillor, Monologue Excerpt (Mar. 15, 1995).[2] It is only by relying on conduct that is not punishable and distorting the facts relating to the conduct that is punishable that CGB can contend otherwise.

1. The Only Conduct Relevant To The Court's Assessment Of Reprehensibility Is Sunrise's Solicitation Of CGB's Therapists.

This Court made it very clear that CGB may recover punitive damages only for Sunrise's interference with CGB's contractual relationship with the therapists who worked at the Prospect Park facility. 357 F.3d at 390. Without responding to our argument that under *State Farm* the only conduct relevant to gauging reprehensibility is that which gave rise to the compensatory damages (Sunrise Br. 19), CGB repeatedly invokes conduct that had nothing to do with its tortious interference claim. In particular, CGB's assertion that Sunrise "did not simply engage in three isolated incidents of misconduct," but rather "has intentionally and systematically tried to crush CGB for more than seven years" (Br. 13), rests entirely on (i) misrepresentations about the record; (ii) conduct that had nothing to do with Sunrise's recruitment of CGB's therapists; and (iii) conduct that was not, in any event, wrongful.

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[2] Available at http://prairiehome.publicradio.org/features/hodgepodge/chats_1997/100197_children_hearts.shtml.

a. CGB's assertions about Sunrise's litigation conduct are both false and irrelevant.

CGB spends many pages of its brief complaining about various things that Sunrise allegedly has done in this and other litigation. Most of CGB's assertions are entirely without support in the record; in any event, they lend no legitimate support to its claim for punitive damages.

i. CGB repeatedly represents that Sunrise asserted a claim against it in RHA's bankruptcy – conduct that it characterizes as "malicious." Br. 13, 28-29, 56. Sunrise's only involvement in the filing of that claim, however, was as a member of the creditors' committee. And in any event, it was an ordinary preference action filed against a party who had received a payment from the debtor that the committee deemed voidable. There is no evidence – and CGB cites none – for the implausible hypothesis that Sunrise (which was owed a substantial amount by RHA) filed the claim in order to "destroy" CGB. Moreover, Sunrise was never sanctioned for its role in the action; indeed, CGB never even claimed that Sunrise's actions during the bankruptcy proceeding were sanctionable. The bankruptcy claim, therefore, is patently irrelevant.

For similar reasons, Sunrise's tortious interference cannot be treated as being more egregious merely because Sunrise raised a corporate-separation argument in its defense against that claim. Plaintiff's heavy reliance on this point (see, *e.g.*, Br. 3, 4, 13, 28, 34, 35) is misplaced, and serves merely to demonstrate the lengths to

which CGB must go in order to contend that Sunrise's tort was highly reprehensible. Sunrise has a perfectly typical corporate structure and has never been sanctioned either for assuming that structure in the first place or for taking the good-faith litigation position that Sunrise Senior Living Management and Sunrise Senior Living are two distinct entities.

As a matter of law, neither the bankruptcy preference action nor the corporate-separation argument can support an award of punitive damages. Both *State Farm*'s nexus requirement and the First Amendment preclude using punitive damages to penalize positions taken by a party in litigation. *See State Farm*, 538 U.S. at 422-423 (to be punishable, conduct "must have a nexus to the specific harm suffered by the plaintiff"); *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 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 if the litigant had a "reasonable belief that there [was] a chance that a claim [might] be held valid upon adjudication"). If these litigation positions were frivolous, CGB could have invoked the procedures for obtaining sanctions under Rule 11; it did not do so. But whether reasonable or not, Sunrise's legal position does not increase the reprehensibility of the tortious interference.

ii. Relatedly, the punitive award cannot be justified on the basis of Sunrise's decision to defend itself in this action, even if CGB has had to "endure the anxiety and cost of litigation in two courts for more than seven years just to recover a little bit of money from Sunrise." Br. 49; see also Br. 14, 26-27, 47, 56.[3] For one thing, the very fact that CGB has recovered only "a little bit of money" demonstrates exactly how wrong-headed this argument is. As we discussed in our opening brief (at 27), Sunrise was largely successful in its defense and appeal: it eliminated one of the two claims and reduced the compensatory damages to $109,000 – less than one-tenth of the amount alleged in the complaint. Punitive damages are not intended to compensate a plaintiff for its litigation expenses, whether undertaken in pursuit of a high-value claim or, as here, one that does not justify the cost of pursuing it. *Int'l Elecs. Co.* v. *N.S.T. Metal Prods. Co.*, 88 A.2d 40, 46 (Pa. 1952) (Evidence adduced to support claim for punitive damages "may not include loss of profits or counsel fees as here asserted, for neither properly relates to the punitive purpose of exemplary damages. Evidence thereof as elements for the jury's consideration in awarding such damages is, therefore,

[3] We note that CGB's assertion that "[t]he only reason Sunrise paid [the compensatory damages] just a few weeks before the punitive damages trial was so that it could argue it did not deserve to be punished because CGB had been 'made whole'" (Br. 49) is unaccompanied by any citation to the record. That is unsurprising; nothing in the record supports CGB's characterization of Sunrise's motives for paying the damages award when it did.

inadmissible."); *Day* v. *Woodworth*, 54 U.S. 363, 371 (1851) ("It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel-fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.").

In any case, Sunrise has a constitutional right to defend itself in court. Punishment for a defendant's decision to invoke that basic right is plainly unconstitutional. Cf. *United States* v. *Jackson*, 390 U.S. 570, 583 (1968) (penalizing defendant for invoking right to a jury trial is unconstitutional); *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.") (citations and quotation marks omitted); *United States* v. *Armour & Co*., 402 U.S. 673, 682 (1971) (a defendant's "right to litigate the issues raised" is "a right guaranteed to him by the Due Process Clause").

iii. Finally, CGB attempts to justify the disproportionate punitive award by pointing to Sunrise's alleged "dilatory tactics" and discovery violations in connection with the first trial in this matter. Br. 4-5, 27-28. First of all, CGB's account of these violations is wildly inaccurate. For example, its assertion that

Sunrise failed to produce documentation of its "wealth and corporate structure" at the first trial (Br. 4-5) is pure fabrication. Sunrise offered to produce its Form 10-Qs and 10-Ks, which contained ample information about its financial condition and corporate structure, but plaintiff's counsel decided to obtain the documents from the public record.[4] The district court did not order Sunrise to turn over any additional documents, and Sunrise was not sanctioned for any failure to do so.

CGB also claims that Sunrise "refused to produce its corporate executives for depositions" and that they "did not appear for the first trial, in violation of a court order." Br. 4, 28; see also Br. 29. Not so. Sunrise agreed to produce Marjorie Tomes for deposition, and she was deposed. It objected, on various grounds, to CGB's request to depose Paul Klaasen, Teresa Klaasen, and Tiffany Tomasso, and moved for a protective order. The district court did not rule on that motion until the first day of trial, at which time it issued an order denying the relief Sunrise had requested.

[4] Given that Sunrise is a public company with readily available financial statements, plaintiff's assertion that it lacked evidence of Sunrise's wealth at the time of the first trial (Br. 37) clearly has no basis in reality.

That Order pertained to depositions, not to trial testimony. JA28.[5,6] Nevertheless, Sunrise made Tomasso available to testify at the trial, which had already begun; the Klaasens were out of the country. 6/11/02 Tr. at 207-208 (SA7-8). Plaintiff argued that the district court should either require Sunrise to produce these witnesses for trial or bar its corporate-separation argument and allow CGB to pierce the corporate veil between Sunrise Assisted Living and Sunrise Assisted Living Management. *Id.* at 205-206, 211-212 (SA5-6, SA9-10). The court agreed, and barred the corporate-separation argument. *Id.* at 208 (SA8). Thus, Sunrise was amply sanctioned for any "dilatory" conduct that actually took place; its failure to produce witnesses for trial on short notice certainly cannot support an ***additional*** penalty of punitive damages.

Second, CGB itself describes most of the litigation conduct as mere carelessness: it emphasizes a procedural default that it attributes to the "'professional incompetence' and 'shamelessly negligent' behavior of Knaup and Sunrise's in-house counsel." Br. 27. Carelessness, negligence, and incompetence

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[5] "JA" refers to the Joint Appendix. "SA" refers to the Supplemental Appendix that will be filed with a motion for leave.

[6] Docket Entry No. 98 is captioned "ORDER DENYING [78-1] MOTION FOR PROTECTIVE ORDER WITH RESPECT TO THE NOTICES OF DEPOSITION ISSUED BY PLFF FOR THE APPEARANCE OF PAUL J. KLASSEN, THERESE M. KLASSEN AND TIFFANY TOMASSO. (SIGNED BY JUDGE CLARENCE C. NEWCOMER) 6/11/02 ENTERED AND COPIES GIVEN TO COUNSEL BY CHAMBERS. (gn)." JA28.

do not give rise to punitive liability in Pennsylvania or elsewhere. *Phillips* v. *Cricket Lighters, Swedish Match, S.A.*, 883 A.2d 439, 445 (Pa. 2005) ("a showing of mere negligence, or even gross negligence, will not suffice to establish that punitive damages should be imposed"); *Martin* v. *Johns-Manville Corp.*, 494 A.2d 1088, 1096 (Pa. 1985) ("[T]he imposition of damages to punish a civil defendant is appropriate only when the conduct complained of is especially egregious. Punitive damages may not be awarded for misconduct which constitutes ordinary negligence such as inadvertence, mistake and errors of judgment.").

Third, and most fundamentally, litigation conduct – whether negligent, reckless, or even intentional – simply cannot support an award of punitive damages. Under Pennsylvania law, "punitive damages must, by necessity, be related to the injury-producing cause of action." *Kirkbride* v. *Lisbon Contractors, Inc.*, 555 A.2d 800, 802 (Pa. 1989); see also *Reading Radio, Inc.* v. *Fink*, 833 A.2d 199, 214 (Pa. Super. 2003) (requiring "reasonable relationship * * * between the nature of the ***cause of action underlying the compensatory award*** and the decision to grant punitive damages") (internal quotation marks omitted) (emphasis added); *Burke* v. *Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993) ("To award punitive damages, a jury must find that the conduct ***from which the claim arose*** constituted wilful and wanton disregard for the rights or safety of another.") (emphasis in original). Federal principles of due process incorporate the same requirement. See

State Farm, 538 U.S. at 422-423 (Courts may not "award[] punitive damages to punish and deter conduct that [bears] no relation to the [plaintiff's] harm. * * * A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

Accordingly, a number of state and federal courts have vacated punitive damages awards on the ground that the jury was improperly told about the defendant's discovery violations. *FDIC* v. *British-American Corp.*, 755 F. Supp. 1314, 1329 (E.D.N.C. 1991) ("Punitive damages * * * are not intended to redress misconduct occurring during the litigation process. Such misconduct is properly redressed through the Federal Rules of Civil Procedure."); *Ostano Commerzanstalt* v. *Telewide Sys., Inc.*, 794 F.2d 763, 768 (2d Cir. 1986); *Kopczick* v. *Hobart Corp.*, 721 N.E.2d 769, 779 (Ill. Ct. App. 1999); *James* v. *Powell*, 225 N.E.2d 741, 747 (N.Y. 1967); *Citizens & Southern Nat'l Bank* v. *Bougas*, 265 S.E.2d 562, 563 (Ga. 1980); *Gonzales* v. *Surgidev Corp.*, 899 P.2d 594, 597 (N.M. 1995). If this evidence should not be placed before the jury, it clearly cannot factor into the reviewing court's assessment of reprehensibility.[7]

[7] We submit that punishment on this basis is even less appropriate here than in most cases. On CGB's theory, the second jury in this case was permitted to "sanction" Sunrise based upon its litigation conduct in the first trial. But CGB itself asserts that the alleged procedural violations from the first trial were cured prior to the second trial and that those violations had no impact on its ability to prosecute its claim. Br. 6, 11, 37.

b. The termination of CGB's contracts with RHA is irrelevant.

Equally irrelevant are the circumstances under which CGB's contracts with RHA were terminated. CGB describes the termination at great length, insinuating that there was something nefarious about Sunrise's reasons for wanting the contracts to be terminated and complaining about Tomes' refusal to discuss the matter with Brillman. See, *e.g.*, Br. 17-18, 24-25. But this Court's decision in *CGB I* establishes that there is no basis for imposing liability of any kind – compensatory or punitive – on Sunrise for either the termination of CGB's contracts or the refusal to reconsider or discuss that decision. *CGB Occupational Therapy*, 357 F.3d at 387-388.

2. None Of The *BMW* Reprehensibility Factors Is Present In This Case.

CGB asserts that three of the five reprehensibility factors identified in *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996) are present in this case. The evidence simply does not bear out that contention.

a. Financial vulnerability of the victim

CGB claims that Sunrise's conduct was particularly reprehensible because "Sunrise knew CGB is a small company with limited financial resources." Br. 55. CGB does not dispute our argument that the important inquiry for purposes of this factor is whether Sunrise intentionally targeted CGB ***because*** it was financially vulnerable. See Sunrise Br. 23-24. Although CGB asserts that Sunrise "exploited

CGB's financial weakness at every turn," it relies for this assertion only on Sunrise's participation in an adversary proceeding against it during the RHA bankruptcy and an alleged threat that Sunrise would keep CGB tied up in "litigation forever" if CGB did not drop its lawsuit. Br. 55-56. As noted above, the adversary proceeding was a run-of-the-mill preference action that had nothing to do with whether CGB was financially vulnerable. As for the alleged threat, it is based on nothing more than Cindy Brillman's vague testimony: prompted by her lawyer's leading question – "Were you threatened by Sunrise?" – Brillman testified, "Sunrise constantly. Just like David and Goliath. We are going to keep new [sic] litigation forever." JA167. Given that Brillman did not identify a particular person at Sunrise who made any such threat, the circumstances under which it was made, or even its timing, her obviously rehearsed testimony provides no support for CGB's accusation.

b. Repeated misconduct

As we discussed in our opening brief (at 24-27), the tortious interference at issue here was an isolated incident.[8] CGB offers no authority contradicting the

[8] It is not clear what CGB means when it asserts that "Sunrise's recruitment of CGB's therapists * * * lasted for more than one year * * *." Br. 4; see also Br. 25, 58. The record citations that CGB provides (which correspond to the testimony of Marjorie Tomes and that of Michael Gasiewski, one of the therapists) say nothing of the kind. Tomes met with the therapists on July 31, 1998, and the other alleged incidents of tortious interference took place in August 1998. Sunrise Br. 8-9.

many cases we cited for the proposition that this factor is met only when the plaintiff can show "specific instances of similar conduct by the defendant in relation to ***other parties***," not simply the plaintiff itself. *Willow Inn, Inc.* v. *Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 232 (3d Cir. 2005) (emphasis added). It nevertheless doggedly continues to argue that Sunrise engaged in repeated misconduct because it solicited six therapists, each of whom had a contract with CGB. 57-58. But although six therapists may have been solicited, the conduct was essentially a single meeting at which the six happened to be present. The kind of repeated conduct that can give rise to a finding of aggravated reprehensibility entails discrete but ***similar acts aimed at multiple victims***. This reprehensibility factor was present in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460-461 (1993), in which Alliance adduced evidence that TXO had committed similar torts against other property owners. But it was absent in *State*

CGB's contracts with RHA were terminated as of September 30, 1998. At most, then, the tortious interference spanned a few weeks.

In making this assertion, CGB may be referring to the testimony of Jennifer Butler, who was not even a therapist; she was a CGB rehabilitation aide who was not covered by the no-raiding clause (SA2-3) and, more fundamentally, was never recruited by Sunrise. Butler briefly went to work for Symphony after it took over at Prospect Park. She then returned to CGB for a few months. Because CGB had inadequate work for her (see page 26, *infra*), Butler ***again*** returned to Prospect Park the following spring, by which time Symphony had been replaced by another provider of therapy services. When asked whether Sunrise had recruited her to return to RHA, Butler testified that it had not and that, in fact, she had simply "answered an ad in the newspaper." JA396. Accordingly, Butler's testimony provides no basis for CGB's claim that the recruitment lasted for more than a year.

Farm, in which the Supreme Court concluded that, "because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct which harmed them is the only conduct relevant to the reprehensibility analysis * * *." 538 U.S. at 424. Here, as in *State Farm*, the conduct involved a single course of conduct affecting a single victim. Accordingly, the "repeated misconduct" factor is equally absent here.[9]

c. Intentional malice, trickery and deceit

CGB's contention that Sunrise engaged in "intentional malice, trickery and deceit" is predicated principally on its claim that Sunrise "knowingly and recklessly disseminated false information about CGB to its employees – telling them their employer was losing business because it was unable to fulfill the fundamental requirements of its profession, thereby causing CGB's employees to believe their livelihoods were in jeopardy and their employer was intentionally concealing important information from them." Br. 58. CGB grossly misstates the evidence. It was undisputed at trial that RHA's CFO, John West, and its legal counsel, Craig Knaup, believed that under the new Medicare regulations RHA would receive less money per patient and needed to reduce the overall costs of all

[9] In support of its argument that this factor is satisfied, CGB also points once again to Sunrise's decision to defend itself in this litigation. Br. 57. As discussed above (at pages 6-7), that decision is irrelevant and cannot support an award of punitive damages.

patient services, including therapists. JA207-208. It is also undisputed that RHA believed CGB to be unable or unwilling to modify its billing practices in light of the new regulations. JA210-211. Indeed, the termination letters specifically stated that "there are sweeping changes taking place in the long-term care industry, with the advent of Medicare PPS to take place July 1, and the introduction of the MDS 2.0. * * * Unfortunately, after evaluation of the delivery and cost of our PT/OT/ST services, we find it necessary to give you notice on the above referenced contracts." JA445-446. Thus, there was nothing false about Tomes's statement that RHA had terminated CGB's contracts because CGB was unable or unwilling to comply with the new regulations – and she had no reason to believe otherwise.

Moreover, the assertions that CGB attributes to Tomes were in fact accurate. The evidence presented at trial demonstrates that the jobs of CGB's employees ***were*** in jeopardy, because after RHA terminated CGB's contract Brillman had inadequate work for the therapists. Sunrise Br. 10; pages 26-27, *infra*. The evidence also demonstrated that Brillman ***was*** keeping important information from the therapists. See JA481-482 (letter from Knaup to CGB: "We * * * merely informed your employees ***when it was more than apparent that you had not*** – that your contract was canceled effective September 30, 1998.") (emphasis added); JA91-92 (CGB therapist Mike Gasiewski's testimony that Brillman "kept * * * to

herself" the fact that CGB had lost the contracts with RHA, and that her failure to disclose that development "bothered me a lot").[10] Accordingly, to the extent that Tomes indicated as much to the therapists, she was not being deceitful.[11]

CGB contends that Sunrise "also used deception to circumvent the letter and the spirit of the agreements CGB had with RHA. * * * Sunrise did not tell Symphony about the contractual prohibitions against hiring CGB's therapists." Br. 58-59. First of all, in the very testimony that CGB cites, Tomes stated that she "believe[d] [Symphony was] indeed aware [of those contractual provisions], and that's why they wanted to negotiate a buyout." JA382. Moreover, Sunrise had no contractual or other obligation to inform Symphony about CGB's contractual

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[10] This letter, in which RHA's Knaup described to CGB exactly what Tomes had done, likewise refutes CGB's citation-free assertion that "Sunrise lied to both RHA and CGB, denying that it was engaged in any recruitment of CGB's staff." Br. 59. Clearly, Tomes had told Knaup about the meeting, and he passed his knowledge along to CGB. The contention is also in tension with CGB's repeated claim that no one at Sunrise would return Cindy Brillman's calls; if Sunrise refused to talk to CGB, how can it have "den[ied] that it was engaged in any recruitment of CGB's staff"?

[11] The record simply does not support CGB's assertion that "Tomes admitted she knew the statements she made to CGB's staff about their employer were not true." Br. 21. At the cited pages of the record, Tomes testified that she knew that ***Brillman*** "didn't feel we had just cause to terminate the contract" (JA379) – not that she herself believed RHA lacked such cause. She also testified that she "believe[d] personally" that CGB could "provide Medicare" (JA387); that belief was inconsistent with neither (i) RHA's opinion that CGB could not comply with the Medicare regulations ***in a cost-effective way*** nor (ii) Tomes' statement to the therapists that RHA had terminated CGB on the basis of that opinion. See Sunrise Br. 8-9.

relationship with RHA, and Symphony had no contractual or other obligation to refrain from hiring CGB's therapists.

The balance of CGB's argument that Sunrise was engaged in "deceit" is, in addition to being baseless, predicated solely on positions taken during litigation, which, as we have already explained, is irrelevant to whether the tort itself involved deceit.[12]

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[12] Remarkably, CGB asserts (Br. 57) that "Sunrise has even lied to this Court in this appeal (by claiming that it was not seeking a new trial because of [sic] the cost was not justified when, in fact, Sunrise has waived its right to seek a new trial.)" Sunrise did ***not*** waive its right to seek a new trial on either of the grounds that we asserted in the post-trial motion – grounds that are preserved for this Court's review but that we have nevertheless elected not to raise on appeal.

First of all, Sunrise's failure to move for JMOL at the close of all the evidence did not waive the argument that the jury's finding of punitive liability was against the weight of the evidence and that a new trial was therefore required. This Court has expressly held that, because the contention that the verdict is against the weight of the evidence "is not a position that can be taken in support of a Rule 50 motion for judgment as a matter of law," it is not waived by the failure to make such a motion at the close of the evidence. *Greenleaf* v. *Garlock, Inc.*, 174 F.3d 352, 365 (3d Cir. 1999).

Plaintiff is equally mistaken in suggesting (Br. 33) that Sunrise waived the contention that the verdict was the product of passion and prejudice by failing to object to inflammatory rhetoric during closing arguments. When we made the passion-and-prejudice argument in the district court, we explained that the tenor of the closing argument confirmed that the jury was animated by passion and prejudice; we did not claim that the court's failure to restrain plaintiff's counsel was an independent source of reversible error. Accordingly, no objection was required.

For the same reason, plaintiff misses the point in defending the district court's rulings admitting evidence about stock options, corporate jets, and net worth. Br. 34-35. We described these aspects of the proceedings below in our

B. CGB Seeks To Render The Ratio Guidepost Meaningless.

Evidently aware that the 18:1 ratio of punitive to compensatory damages demonstrates the gross excessiveness of the jury's award, CGB attempts to diminish its importance by emphasizing the Supreme Court's comment in *State Farm* that "there are no rigid benchmarks that a punitive damages award may not surpass." Br. 61 (quoting *State Farm*, 538 U.S. at 425). That bromide, however, was not meant to eradicate all of the other guidance on ratios provided by the Supreme Court in its opinion, including the Court's repeated statement that the punitive damages must be proportionate to the harm to the plaintiff (538 U.S. at 426, 427, 428). Indeed, when explaining why a pre-*State Farm* ruling upholding a 28:1 ratio no longer is good law, the Ninth Circuit recently opined that "*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 LLC* v. *ARCO Prods. Co.*, 405 F.3d 764, 776 (9th Cir. 2005) (internal quotation marks and alterations omitted); accord *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005) ("*State Farm* addressed this guidepost with markedly greater emphasis and more constraining language. If, in *BMW*, the high court threw a lasso around the problem of what it had previously identified as

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opening brief in order to give the Court a sense of why the jury returned a $30 million punitive award.

'punitive damages awards run wild,' in *State Farm* it tightened the noose considerably.") (some internal quotation marks and alterations omitted).

Especially after this Court's express recognition in *Willow Inn*, 399 F.3d at 230, 235, that a 1:1 ratio will often mark the constitutional limit, CGB's arguments here are self-evidently untenable. As we argued in our opening brief (at 34-47) with the support of dozens of cases – virtually none of which CGB bothers to address – the maximum ratio in this case is 1:1, and certainly no more than 4:1.

1. The Ratio Of More Than 18:1 Demonstrates That The Punitive Award Is Excessive.

CGB offers almost no response to our reasonable relationship argument. It ignores our discussion of the ratio framework set forth in *State Farm*, and it offers no analysis, or even mention, of the many post-*State Farm* decisions demonstrating the excessiveness of an 18:1 ratio in this case. See Sunrise Br. 34-48.[13] Instead,

[13] Indeed, in the few months since we filed our opening brief, several additional decisions that support our position have been reported. See, *e.g.*, *Clark* v. *Chrysler Corp*., 436 F.3d 594, 607 (6th Cir. 2006) (plurality op.) (holding that a 2:1 ratio was constitutional maximum in wrongful death case where compensatory award was $235,629 after reduction for decedent's comparative fault); *id*. at 613-614 (Kennedy, J., concurring) (expressing the view that proper denominator was $471,258.26 and that this amount was substantial enough to warrant a 1:1 cutoff); *Casumpang* v. *Int'l Longshore & Warehouse Union Local 142*, 411 F. Supp. 2d 1201 (D. Haw. 2005) (reducing ratio to 1:1 in case involving retaliatory against employee for publicly criticizing employer where compensatory damages were $240,000); *Gober* v. *Ralph's Grocery Co.*, 2006 WL 475558, at *13 (Cal. Ct. App. Mar. 1, 2006) (reducing $24 million aggregate punitive award in sexual harassment case to $1.5 million because "a 6 to 1 ratio of punitive to compensatory damages is

CGB offers up a handful of cases in which the post-review ratio was greater than 9:1. None of these cases, however, provides a fair parallel to this one.

For example, CGB cites four cases in which the compensatory damages were $10,000 or less.[14] See Br. 61-62. Notably, in *Mathias*, on which CGB places particularly heavy emphasis, the compensatory damages were only $5,000 to each of two plaintiffs; the court held that a ratio of 37 to 1 was permissible 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 * * *." *Id.* at 677. *Mathias* and the other three cases in this category are irrelevant because the *State Farm* Court specifically stated that its single-digit limitation on ratio was inapplicable in cases in which a "particularly egregious act has resulted in only a small amount of economic damages." 538 U.S. at 425.[15] Clearly, the $109,000 compensatory award in this case, which represented full compensation for CGB's

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sufficient to punish [the defendant] and deter it and others from similar conduct in the future").

[14] *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003); *Craig* v. *Holsey*, 590 S.E.2d 742 (Ga. 2003); *Reatta Resources, Inc.* v. *Kraft*, 2004 Tex. App. LEXIS 2193 (5th Dist. Mar. 9, 2004); and *Jones* v. *Rent-A-Center, Inc.*, 281 F. Supp. 2d 1277 (D. Kan. 2003).

[15] The Court identified only two other exceptions to that rule: (i) cases in which "the injury is hard to detect" and (ii) cases in which "the monetary value of noneconomic harm might have been difficult to determine." *Id*. Those exceptions are equally inapplicable here.

redressable injury, cannot be described as "small."[16] Moreover, under no stretch of the imagination can the conduct here be analogized to the egregious misconduct involved in *Mathias*.

CGB misunderstands this Court's decision in *Willow Inn*. The Court did not, as CGB asserts, treat the compensatory damages as a "red herring" (Br. 63) in reviewing the $150,000 punitive exaction in that case. To the contrary, as we discussed in our opening brief (at 49-50), the Court was very focused on the dollar amount that the defendant was statutorily obligated to pay to the plaintiff as a result of its tortious conduct. Specifically, the court explained: "[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

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[16] See *BMW*, 517 U.S. at 582-583 (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); *Jones* v. *Sheahan*, 2003 WL 22508171, at *16 (N.D. Ill. Nov. 4, 2003) (stating in civil rights case in which injured prisoner was awarded $25,000 in compensatory damages that "this case does not strike us as one where compensatory damages are so low that a double-digit multiplier of punitive damages might be permissible"); *Waits* v. *City of Chicago*, 2003 WL 21310277, at *6 (N.D. Ill. June 6, 2003) ($15,000 compensatory award is "substantial"); *Blust* v. *Lamar Adver. Co.*, 813 N.E.2d 902, 913-914 (Ohio Ct. App. 2004) ($32,000 compensatory award is "substantial"); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003) ($25,000 compensatory award is "substantial"); *Jackson* v. *Byrd*, 2004 WL 3249693, at *3 (D.C. Super. Ct. June 30, 2004) ($148,175 compensatory award is "substantial").

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 (emphasis added). Thus, contrary to CGB's assertion (Br. 61), the relevant ratio in *Willow Inn* was not 75:1. Nor does the decision even remotely suggest that it would be erroneous to focus "on the dollar value of the compensatory damages awarded to CGB" in calculating the ratio in this case.

CGB cites only a few other cases in which the compensatory damages were more substantial, and none of those decisions supports affirmance of the 18:1 ratio here. *Phelps* v. *Louisville Water Co*., 103 S.W. 3d 46 (Ky. 2003), was a wrongful death case, and the court found that the compensatory award of approximately $175,000 substantially undercompensated the plaintiffs for the "catastrophic" harm that they suffered as a result of the loss of their children. *Id.* at 54. In any case, the ratio was 11:1 – much lower than the 18:1 ratio at issue in this case, which involves far less serious misconduct. In *Hollock* v. *Erie Insurance Exchange*, 842 A.2d 409 (Pa. Super. 2004), the post-review ratio was 10:1, and the case is currently being reviewed by the Pennsylvania Supreme Court and therefore cannot at this time be said to represent an accurate reflection of Pennsylvania law.

Continental Trend Resources, Inc. v. *OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996), cited at Br. 63, was decided well before *State Farm*. Yet the court recognized that "in economic injury cases if the damages are significant and the

injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio." *Id.* at 639. Plaintiff is simply wrong in asserting that the Tenth Circuit upheld a ratio of 22.3:1. *Continental Trend* involved a tortious scheme that was – unlike the tort at issue here – largely unsuccessful; the court found that "the potential damages to these plaintiffs had OXY's course of action succeeded was substantially more" than the $269,000 compensatory award *Id.* at 640. After reviewing in great detail the expert testimony presented by the plaintiffs, the court concluded that the actual and potential harm associated with the defendant's conduct amounted to $1 million. It remitted the $30 million jury award to $6 million – yielding a ratio of 6:1. *Id.* ("This amount is approximately six times the actual and potential damages plaintiffs suffered according to our best estimate of their proof.").

And in *Inter Medical Supplies, Ltd.* v. *EBI Medical Systems, Inc.*, 181 F.3d 446, 467 (3d Cir. 1999), the tortious interference decision that CGB says "cited [*Continental Trend*] with approval" (Br. 63), this Court ***overturned*** a $50 million punitive damages award on the ground that it was excessive. Even though the compensatory award was $48 million and the ratio therefore was about 1:1, the Court reduced the punitive award to $1 million. *Id.* at 470.

Surprisingly, CGB also relies on *Planned Parenthood* v. *American Coalition of Life Activists*, 300 F. Supp. 2d 1055 (D. Or. 2004), in which the defendants

violated federal law by making death threats against abortion providers. The district court upheld compensatory awards totaling $526,336 and punitive awards totaling $108.5 million – producing an aggregate ratio of 206:1. As we discussed in detail in our opening brief (at 35-36), however, that decision was ***reversed*** by the Ninth Circuit. In discussing the framework established in *State Farm*, the court observed that "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." 422 F.3d 949, 962 (9th Cir. 2005). Because the conduct at issue was exceptionally reprehensible, however, the court concluded that a multiple of nine times the compensatory damages was the constitutional maximum. *Id.* at 963. The conduct here, of course, is on the far opposite end of the spectrum from the conduct in *Planned Parenthood*, dictating the conclusion that even a 4:1 ratio would be grossly excessive.

2. The Denominator Of The Ratio Is $109,000.

In order to inflate the denominator of the ratio, and thus justify a larger punitive award, CGB invokes a number of injuries for which, it claims, it has not been compensated. All of these attempts to establish a serious injury are beside the point because the jury in the first trial valued the sole injury for which punitive damages can be awarded in this case – the loss of the six therapists – at exactly

$109,000. Just as Sunrise cannot relitigate the question whether it committed a tortious interference, CGB cannot relitigate the extent of the injury arising from that interference. Among the unproven and legally irrelevant losses invoked by CGB are the following:

- ***Lost revenue arising from CGB's inability to assign its therapists to other facilities after September 30, 1998.*** Br. 25, 46, 64, 66-67. In the first trial, CGB did not ask (much less receive) compensation for such lost revenues. That is hardly surprising: Brillman admitted that CGB had no work for the therapists after it lost the RHA contracts (JA174-178; Sunrise Br. 10-11), so it could not have earned revenue by reassigning them. Mike Gasiewski testified that Brillman "said that she would provide me with work but not as an occupational therapist." JA 89. Jennifer Butler, a CGB rehabilitation aide, testified to the same effect. JA394-396.[17] CGB repeatedly asserts that it could not "obtain

[17] None of the other therapists testified at trial. Plaintiff claims that Lisa Fagan, CGB's operations manager, testified that "CGB could have put its therapists to work at other facilities after the loss of the RHA contracts," but that assertion is unsupported by CGB's record citations. In fact, at the cited pages Fagan testified that the therapists were "independent contractors. I did not promise work. As there was work available, yes." JA202. She admitted that CGB did not have adequate full-time work that was appropriate to the therapists' skills:

> Q: Did you have the ability to keep them at that point in time?
>
> A: We had sufficient work within the company.
>
> Q: Was that work relating to messengers and copy work or was it therapy work that you had sufficient work for the therapists?
>
> A: There was a mix of both available. There is always a need for therapists to fill in and do vacation and relief work and coverage and new contracts that were potentially coming together * * * . * * * I did not tell them that there were permanent positions at that time but that we would very much work with them and try to keep them as best they could.

new contracts" (Br. 24) because it lost the therapists, but that account turns the record on its head, as the experience of the Pembrooke therapists establishes. It is undisputed that they were ***not*** solicited by Sunrise. They nonetheless left CGB's employ because Brillman had no work to give them. JA175-177. Accordingly, the record refutes CGB's contention that it was Sunrise's tortious interference, rather than market forces, that prevented CGB from employing the Prospect therapists on new contracts.

- ***The cost of hiring and training new therapists.*** Br. 46, 64. The first jury was authorized to compensate CGB for all losses that it had proved. JA433-434. If that jury did not include in its damages award the costs associated with training their replacements, that is because CGB did not prove that it incurred any such costs. Indeed, CGB requested – and received – exactly $109,000 in damages for the loss of its therapists. It requested – and received (and then saw overturned) – an additional $576,000 for lost profits on the RHA contracts. Thus, the additional damages that CGB is now asserting were neither proven nor even requested at the first trial.

- ***Losses arising from Sunrise's alleged use of "CGB's proprietary treatment techniques and patient positioning programs."*** Br. 15, 46-48. CGB's insinuation that Sunrise took advantage of its proprietary techniques is belied by its decision not to bring a claim for misappropriation of trade secrets. Indeed, this Court specifically held that CGB could not recover damages for any use of those proprietary programs by Sunrise because there was no evidence to support such a claim. *CGB Occupational Therapy*, 357 F.3d at 388-390.

- ***Harm to CGB's reputation.*** Br. 21, 47, 64. CGB did not bring a defamation claim (nor could it have), and should not be permitted to inflate the value of its injury by reference to an unproven post-hoc claim for reputational injury.

- ***Any effort or fees expended by CGB in connection with RHA's bankruptcy proceedings, or in connection with Sunrise's decision to defend itself in this action.*** Br. 47, 64. See pages 7-11, *supra*.

JA202-203.

- ***The fees that Sunrise earned from managing RHA's facilities.*** Br. 64. CGB errs in relying upon these fees as proof of the harm caused by Sunrise's allegedly tortious conduct. The amount of harm that CGB incurred as a result of the loss of its six therapists is patently unrelated to Sunrise's management fees. And this alleged injury, like the others described above, is wholly unproven: CGB did not bring, because it could not have proven, a claim for unjust enrichment.

CGB's repeated characterization of the claims submitted by Sunrise in the bankruptcy court as "judicial admissions of the value of the actual harm its conduct caused CGB" (Br. 48, 55, 67-68) is misguided. Sunrise's claim was for "indemnity and contribution in connection with the CGB Litigation." JA663. As CGB itself recognizes, the proofs of claim (which were filed in July 2001 and February 2002, well before the case went to trial in June 2002, see JA673) reflected the amount of compensatory damages for which CGB was ***suing*** Sunrise. JA658-660; Br. 48 (proofs of claim estimated the amount for which Sunrise would be liable "***if*** CGB succeeded in proving its claims") (emphasis added). CGB is now characterizing the sum that it claimed – ***but did not recover*** – as "undisputed evidence" of its actual harm. Br. 68. The only figure that matters is the $109,000 awarded by the jury for the interference with the therapists' contracts – not the amount originally demanded by CGB on both claims or even the lower amount awarded by the jury for both claims.[18]

[18] In the district court, CGB attributed the differential between the amount of harm it claims to have sustained and the $109,000 verdict to events at the first trial over which it claimed to have had no control. In particular, it argued that, because

C. Post-Conduct Punitive Awards Do Not Provide Fair Notice.

CGB admits that "there are no comparable civil sanctions available under Pennsylvania law to punish Sunrise's tortious conduct." Br. 70. That is, of course, dispositive of the question whether the third *BMW* guidepost somehow supports a larger punitive award than is otherwise warranted: it does not. Moreover, CGB simply ignores the cases squarely holding that the absence of a legislatively established penalty is indicative that a large punitive award is unconstitutional. Instead, it claims that a handful of judicial decisions upholding high ratios put Sunrise on notice that it could be subject to an enormous punitive sanction for engaging in a relatively minor tortious interference. For example, CGB invokes *Continental Trend*, which it characterizes as upholding a 22.3:1 ratio. Br. 71. As discussed above, however, that pre-*State Farm* decision in fact deemed the pertinent ratio to be 6:1. CGB makes the same error in characterizing the ratio in *Willow Inn*: as this Court explained, the ratio there was approximately 1:1. See pages 22-23, *supra*. Clearly, neither decision put Sunrise on notice that it could be held liable for a penalty nearly 20 times the amount of harm suffered.

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some of Sunrise's witnesses did not appear at trial, it was severely hampered in its ability to prove its case. But it was CGB's witnesses, not Sunrise executives, who would have knowledge bearing on the nature and extent of CGB's damages.

In addition, CGB's reliance on *Mathias* (and *Willow Inn*) suffers from a temporal problem.[19] CGB's assertion notwithstanding, neither was decided before 1998, when Sunrise engaged in the tortious interference at issue here. The purpose of the third guidepost is to determine whether the defendant had notice of the prospective penalty ***at the time when it engaged in the conduct***, not at the time of the lawsuit. *In re New Orleans Train Car Leakage Fire Litig*., 795 So.2d 364, 387-88 (La. Ct. App. 2001) ("The third *BMW* guidepost, comparison to civil and criminal penalties for comparable misconduct, is addressed more narrowly to the question of 'prior notice' of large financial consequences to particular misconduct."); *State* v. *Exxon Corp*., 2001 WL 1116835, at *12 (Ala. Cir. Ct. 2001) ("This third *BMW* 'guidepost' suggests that the defendant must have notice of the punishment that can be meted out for misconduct such as the defendant is contemplating or engaging in."), *rev'd on other grounds sub nom*. *Exxon Corp*. v. *Dep't of Conservation & Nat. Res*., 859 So. 2d 1096 (Ala. 2002). Accordingly, cases decided after the tort has been completed are irrelevant to the third guidepost.

Finally, and most fundamentally, the existence of a few cases upholding high ratios would not satisfy this guidepost, under which the Court is to compare the punitive award to the applicable ***legislative*** and ***administrative*** penalties, not

[19] Because *Mathias* involved low compensatory damages (see page 21, *supra*), it wouldn't constitute meaningful notice even if it had been decided before Sunrise committed its tort.

jury awards that have been upheld by courts, especially ones from outside Pennsylvania. *BMW*, 517 U.S. at 583.

D. Sunrise's Financial Condition Has No Bearing On The Question Of Excessiveness.

Just as it did at trial, CGB places enormous emphasis on Sunrise's finances. It spends fully ten pages of its brief rehashing the evidence of Sunrise's financial condition that was presented at trial. See Br. 36-43, 49-51. It then argues that the $2 million award "is a parking ticket to Sunrise. * * * To have any hope of punishing Sunrise, the punitive damages award must be much, much higher, and CGB believes the original $30 million award is constitutionally appropriate." Br. 69; see also Br. 50.

But *State Farm* forecloses CGB's argument that an award representing "two percent of Sunrise's annual revenue and three percent of its net worth" is "within the range of net worth deemed acceptable as a measure of punitive damages." Br. 50.[20] In *State Farm*, the Supreme Court explained that, because the defendant's

[20] In any event, CGB mischaracterizes this Court's discussion of wealth in *Dunn* v. *HOVIC*, 1 F.3d 1371 (3d Cir. 1993) (en banc). The Court there observed that many punitive awards are in the range of 1% of net worth in the context of rejecting the argument that the $25 million punitive award at issue (which was just over 1% of the defendant's net worth) was the product of passion and prejudice. *Id*. at 1383. The Court never held that a punitive award can be immunized from an excessiveness challenge on the ground that it is only a small percentage of net worth. To the contrary, the Court determined that the punitive award before it, (which already had been reduced by the district court to $2 million), remained unconstitutionally excessive and then reduced it to $1 million. *Id*. at 1391. As for

wealth "bear[s] no relationship to the [punitive] award's reasonableness or proportionality to the harm," "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at 427.[21] It is both misguided and unconstitutional to impose a larger punishment than is otherwise appropriate merely because the defendant is wealthy. See Sunrise Br. 52-57. CGB offers no response to that argument or to the authorities we cited.

CGB's reliance on the Court of Common Pleas' decision in *Reilly* v. *Ernst & Young LLP*, 66 Pa. D. & C. 4th 252 (2003), that decision is currently on appeal and surely is not the most persuasive post-*State Farm* treatment of the subject.

[21] We note that in *Continental Trend Resources*, a pre-*State Farm* case on which CGB relies, the Tenth Circuit rejected precisely the argument made by CGB here, explaining:

> ***From the Court's statements [in BMW] we conclude that a large punitive award against a large corporate defendant may not be upheld on the basis that it is only one percent of its net worth or a week's corporate profits.*** Yet wealth must remain relevant, because $50,000 may be awesome punishment for an impecunious individual defendant but wholly insufficient to influence the behavior of a prosperous corporation. The Supreme Court's opinion seems to ask for the least punishment that will change future behavior; but that is difficult to apply as a constitutional principle. Still, ***in commercial litigation like that before us the actual and potential damages are likely to be substantial, and thus punitive damages awarded on even a modest multiplier generally will be enough to gain the defendant's attention and alter its future behavior.***

101 F.3d at 641-642 (emphasis added).

II. CGB'S CROSS-APPEAL IS MERITLESS.

CGB's cross-appeal rests almost entirely on its argument that the proofs of claim filed by Sunrise in RHA's bankruptcy action constitute a "judicial admission" that Sunrise caused CGB harm amounting to $1,266,833. CGB argues that the district court "erred by overlooking [this] undisputed evidence of the harm Sunrise caused" (Br. 70)[22] and that the denominator of the ratio should be calculated by adding the amount of the proofs of claim to a "fair estimate of the costs and fees CGB has incurred to enforce its rights for nearly eight years." Br. 69-70. On the basis of these assertions, CGB asserts that the "true" ratio of the $30 million jury award to the harm in this case is 20:1, and that such a ratio comports with due process. *Id.* Of course, the proofs of claim are irrelevant (see page 28, *supra*), as are CGB's litigation costs (see pages 6-7, *supra*). Moreover, a punitive award that is 20 times a $1.5 million injury would be grossly excessive in any event. See pages 19-25, *supra*.

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[22] We note that, while CGB offers no response to our argument that reviewing courts may not defer to phantom factual findings that the jury did not make (see Sunrise Br. 17), it claims that the trial court erred by "pa[ying] no deference to the jury's acceptance of this undisputed evidence." Br. 68. There is absolutely no reason to believe that the first jury viewed the proofs of claim as an admission that CGB's claim was worth $1.27 million. Indeed, its award of $109,000 for the tortious interference at issue here is conclusive proof to the contrary. And, of course, the question of the amount of harm caused by Sunrise's conduct was not properly before the second jury. Hence, attributing to ***either*** jury a finding that the proofs of claim represented some kind of "admission" on Sunrise's part would have been reversible error.

CONCLUSION

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.

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

Andrew L. Frey
Lauren R. Goldman
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Richard G. Mann, Jr.
C. William Groscup
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
8405 Greensboro Dr., Suite 100
McLean, VA
(703) 749-1000

Counsel to Sunrise Senior Living, Inc. and
Sunrise Senior Living Management, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this Third Step brief was produced in Times New Roman (a proportionally-spaced typeface), 14-point type and contains 8,975 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.

/s/ Lauren R. Goldman
Lauren R. Goldman
Mayer, Brown, Rowe & Maw LLP
Counsel to Sunrise Senior Living, Inc. and Sunrise Senior Living Management, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th 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:

David G. Concannon

Law Offices of David G. Concannon, LLC

Strafford Building One, Suite 112

150 Strafford Avenue

Wayne, Pennsylvania 19087

/s/ Lauren R. Goldman
Lauren R. Goldman
Mayer, Brown, Rowe & Maw LLP
Counsel to Sunrise Senior Living, Inc. and Sunrise Senior Living Management, Inc.

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 20, 2006

/s/ Lauren R. Goldman
Mayer, Brown, Rowe & Maw LLP
Counsel to Sunrise Senior Living, Inc. and Sunrise Senior Living Management, Inc.