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IN THE SUPREME COURT OF THE STATE OF NEVADA

TEVA PARENTERAL MEDICINES, INC., A DELAWARE CORPORATION, F/K/A SICOR PHARMACEUTICALS, INC.; SICOR, INC.; BAXTER HEALTHCARE CORPORATION, Appellants, vs. HENRY CHANIN AND LORRAINE CHANIN, HUSBAND AND WIFE; GASTROENTEROLOGY CENTER OF NEVADA, LLP; DESERT SHADOW ENDOSCOPY CENTER, LLC, A NEVADA LIMITED LIABILITY COMPANY; RAJAT SOOD, M.D.; BOBBIE GLASS-SERAN, CRNA, Respondents.	No. 57085

APPEAL
from the Eighth Judicial District Court
The Honorable Jessie Walsh, District Judge
District Court Case No. A571172

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS AND REVERSAL

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I. INTERESTS OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses, representing over three million companies as well as state and local chambers and industry organizations all over the country. It is the voice of business, fighting for free enterprise before all branches of government at all levels. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs involving issues of national concern to American business.

Few issues are of more concern to American business than those pertaining to the fair administration of punitive damages. The Chamber regularly files *amicus* briefs in significant punitive damages cases. The Chamber and its members have a substantial interest in the procedures courts employ in punitive damages cases and in the process by which trial and appellate courts evaluate jury awards of punitive damages. The Chamber believes that its familiarity with the law of punitive damages can be of assistance to the Court not just in resolving the issues raised in this appeal, but also in more broadly addressing the requirements imposed by due process to protect defendants from unconstitutionally excessive punitive damages awards like the one at issue here.

II. INTRODUCTION

In a case awarding a *per se* unconstitutional $500 million punitive damages award on $3.25 million in compensatory damages, something must have gone wrong. In this case, both liability for punitive damages and the amount awarded resulted from numerous errors, and the Chamber highlights three particularly egregious ones in this brief. If any one of these errors had not been committed, the defendants likely would not now face a judgment for a *per se* unconstitutional punitive damages award. Because the risk of such arbitrary and crippling awards stands as a potential deterrent for all businesses seeking to locate in or do business in Nevada, the Chamber urges this Court to reverse the judgment below and institute reasonable constraints that will prevent their recurrence.

First, the District Court wrongly excluded all evidence of regulatory compliance by the defendants. Throughout the country, state and federal courts have recognized that

compliance with regulatory standards is at least indicative—if not dispositive—of a defendant's exercise of due care. And under the plaintiff's theory that the defendants engaged in "despicable" conduct in "conscious disregard" of their rights and safety, evidence that the defendants exercised due care and held a reasonable belief that they have fulfilled their obligations respecting drug safety is highly probative of whether they held the deplorable state of mind necessary to warrant punitive damages.

Second, the plaintiffs provided articles discussing 148 other purported cases of Hepatitis C outbreaks at endoscopy clinics, and the District Court admitted them over the defendants' objection. But these reports were irrelevant and inadmissible, and impermissibly infected the punitive award. They did not describe any conduct by the defendants at all, and did not even involve the same factual predicate—the methods of contamination varied among the reports and ***none*** of them involved the alleged method of contamination at issue here.

Third, the District Court allowed a patently unconstitutional punitive damages award to stand. With a compensatory damages award of $3.25 million, the District Court entered judgment for $500 million in punitive damages. The constitutional upper limit for the ratio of punitive damages to compensatory damages is 9:1 in the abstract. And in a case like this that involves a high compensatory damages award and a lack of intentional harm, the maximum allowable ratio is closer to 1:1. Yet the District Court entered a judgment with a punitive damages ratio of over 150:1. There is no possible justification for such a large punitive damages award, and this Court should reverse it.

III. ARGUMENT AND AUTHORITIES

A. The jury should have seen all evidence bearing on the defendants' culpability.

The District Court violated the defendants' fundamental right to a fair trial by excluding all evidence pertaining to the defendants' compliance with government and industry standards even though that evidence bears directly on whether the defendants had

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the culpable state of mind to justify awarding punitive damages. In Nevada, punitive damages may only be awarded if the plaintiff proves "by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice." NRS 42.005. Oppression and fraud were not submitted to the jury, but the District Court found that punitive damages were supported by evidence of implied malice. Order Denying Defendants' Motion to Alter or Amend Judgment in *Chanin v. Teva Perenteral Medicines, Inc.*, No. A571172 (Clark County District Court Sept. 27, 2010) ("Order") at 16. Malice "means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." NRS 42.001. Plaintiffs did not allege that either defendant intended to injure them. Thus, they had to prove by clear and convincing evidence that the defendants engaged in "despicable conduct" in "conscious disregard" of their rights or safety.

By definition, "[t]he defendant's state of mind represents a key element in determining whether a defendant acted with . . . actual malice." *Malcolm v. Evenflo Co.*, 217 P.3d 514, 530 (Mont. 2009). And "[e]vidence of [a defendant's] good faith effort to comply with all government regulations . . . 'would be evidence of conduct inconsistent with the mental state requisite for punitive damages.'" *Id.* at 531 (citation omitted). For that reason, the Supreme Court of Montana reversed a punitive damages award when the trial court excluded evidence of compliance with government safety standards. *Id.* at 532. The court recognized that the defendant "may have been able to persuade the jury that its compliance with [a government safety standard] showed that it had not evinced 'deliberate indifference' to the welfare of" the customers. *Id.* The court ruled that the jury would also have been free to decide "that evidence of [the defendant's] misconduct demonstrated 'deliberate indifference'" regardless of compliance, "but the District court 'should not have preempted that debate by disabling [the defendant] from explaining itself.'" *Id.* (citation omitted).

The Montana Supreme Court is not alone in this understanding. Rather, its holding that compliance with government safety standards is admissible to disprove punitive

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damages liability is consistent with the generally accepted principle that "a defendant's compliance with governmental regulations [is] evidence of due care." Richard C. Ausness, et al., *Providing a Safe Harbor for Those Who Play by the Rules: The Case for a Strong Regulatory Compliance Defense*, 2008 Utah L. Rev. 115, 115-16 (2008) (noting that most courts consider compliance with governmental regulations as evidence of the defendant's use of due care while the remaining courts have found it dispositive). In Nevada, one exercises due care when his conduct "'conform[s] to the legal standard of reasonable conduct in light of the apparent risk.'" *Sims v. Gen. Tele. & Elec.*, 107 Nev. 516, 522 (1991) (citation omitted), *overruled on other grounds by Tucker v. Action Equp. And Scaffold Co.*, 113 Nev. 1349, 1356 n.4 (1997). Thus, evidence of exercising due care necessarily rebuts an argument that the defendant acted in conscious disregard of others' safety. Restatement (Second) of Torts, §908 cmt. b. (1965) (the degree of culpability required for imposition of punitive damages is greater than it is for "ordinary negligence"). And such evidence must therefore be admissible to rebut a punitive damages request like the one at issue here. 22 Am. Jur. 2d §725 (2003) (to determine punitive damages liability, "evidence of any fact which legitimately tends to show the motive and intent of the defendant in doing the act complained of is admissible").

As this Court has noted, courts around the country have recognized that evidence of compliance with government regulations and industry standards has least some probative value on punitive damages liability.[1] Indeed, the national debate on the role of regulatory compliance is not on whether it is admissible, but rather whether it precludes imposing punitive damages, creates a presumption against imposing them, or is simply

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[1] *See Wyeth v. Rowatt*, 126 Nev. Adv. Op. No. 44 at *29-30 (Nov. 24, 2010) (citing cases). *See also Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) (punitive damages unavailable as a matter of law in part because "[c]ompliance with industry standard and custom serves to negate conscious disregard"); *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1981) ("compliance with regulatory standards may be admissible on the issue of care but does not require a jury to find a defendant's conduct reasonable").

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probative and admissible evidence. Ausness, 2008 Utah L. Rev. at 155 ("a number of states have concluded that compliance with government safety standards . . . will preclude liability for punitive damages, at least in some cases"). There are strong arguments in favor of regulatory compliance being an absolute defense against punitive damages. *Id.* at 155-57. But this Court recently determined that compliance with regulatory standards does not bar such liability. *Wyeth*, 244 P.3d 765, 777-78, 126 Nev. Adv. Op. No. 44, at *32. Notably, however, the Court did not go so far as to suggest that evidence of compliance is irrelevant and inadmissible. *Id.* Nor did it address whether there is a presumption against liability for punitive damages when a defendant complies with government regulatory standards. Indeed, echoing the Supreme Court of Montana's reasoning in *Malcolm*, the Court in *Wyeth* stated that "a ***jury*** could reasonably determine" the question of malice based on the language of the defendants' warnings and its actions. *Id.* (emphasis added).

As in *Wyeth*, the jury was, at a minimum, entitled to consider the issue in this case. But the jury did not have the opportunity to reach an informed conclusion because the District Court improperly "preempted that debate" by excluding relevant evidence regarding the defendants' culpability. *Malcolm*, 217 P.3d at 352. The defendants manufactured and supplied a generic FDA-approved drug with FDA-mandated warning labels that were used by the drug's inventor and every other company manufacturing a generic version of that drug. Appellants' Br. 37, 40. The jury could have found that the defendants showed no "conscious disregard" for the safety of Propofol users because the defendants adopted federally-mandated warnings and relied on the basic training of any doctor regarding the dangers of cross-contamination from re-using medical supplies on different patients. But the District Court usurped the role of the jury, which was given no opportunity to weigh that evidence against the plaintiffs' case. *Cf. Grosjean v. Imperial Palace*, 212 P.3d 1068, 1080 (Nev. 2009) (it is the jury's role to evaluate the evidence).

Moreover, and in addition to being erroneous under Nevada law, the District Court's ruling violates the defendants' constitutional due process rights. "[P]unitive

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damages are imposed for purposes of retribution and deterrence. They have been described as quasi-criminal." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (citation omitted). Thus, "[d]espite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion." *Cooper Indus. v. Leatherman Toll Group*, 532 U.S. 424, 433 (2001).

One such limit is that a state cannot exclude relevant evidence regarding a criminal defendant's mental state if that evidence does not violate some "well-established rule[] of evidence." *Clark v. Arizona*, 548 U.S. 735, 770 (2006). Defendants have a right "as a matter of simple due process to present evidence favorable to [themselves] on an element that must be proven to convict." *Id.* at 769 (recognizing defendant's right to present evidence that he suffers from mental disease to rebut evidence that he had the required mens rea at the time of the crime).

In light of the quasi-criminal nature of punitive damages and general common law guidelines for fundamental fairness, that standard should apply to punitive damages proceedings as well. The Due Process clause mandates "what procedures are necessary to ensure that punitive damages are not imposed in an arbitrary manner." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994). And in punitive damages cases, it "prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'"[2] *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (citation omitted). *See also Germanio v. Goodyear Tire & Rubber Co.*, 732 F. Supp. 1297, 1304 (D.N.J. 1990) ("the requirements of due process in civil cases include[e] the right to present mitigating evidence on . . . punitive damages"). Moreover, *any* departure from normal common law procedures "raises a presumption" that the court's departure violates the Due Process Clause. *Honda*, 512 U.S. at 430.

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[2] Indeed, this Court has held that, "at a minimum," even "a quasi-judicial proceeding must afford each party . . . the ability to present and object to evidence." *Stockmeier v. State Dep't of Corrections*, 122 Nev. 385, 391, 135 P.3d 220, 224 (2006).

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As discussed above, the general consensus among the states is that compliance with regulatory standards is admissible to disprove the required mental state for imposition of punitive damages. *Supra* at 3-4. Accordingly, by depriving defendants of the ability to present this accepted defense in response to the plaintiffs' effort to impose quasi-criminal liability, the District Court contravened not only Nevada law but due process as well. Compliance with regulatory standards goes to the heart of the central issue undergirding any imposition of punitive damages—the defendants' state of mind. The District Court therefore violated both Nevada law and the Due Process Clause of the federal Constitution by excluding this evidence and preventing defendants from effectively defending themselves.

B. <u>The district court erroneously admitted evidence of conduct related to non-parties.</u>

The District Court further erred by admitting evidence regarding non-parties and allowing the jury to impute the conduct to the defendants. The first guidepost for assessing whether a punitive damages award is constitutionally appropriate is "'the degree of reprehensibility ***of the defendant's conduct.***'" *Bongiovi v. Sullivan*, 138 P.3d 433, 452, 122 Nev. 556, 583 (2006) (quoting *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)) (emphasis added). Evidence of ***the defendant's*** similar bad acts toward other parties is thus admissible to prove reprehensibility so long as the court makes it clear to the jury that the evidence is only to be used to determine reprehensibility and not to further punish the defendant based on other bad acts. *Philip Morris*, 549 U.S. at 357. But here, the District Court went well beyond that narrow exception to allow otherwise inadmissible evidence. It allowed the plaintiffs to present articles regarding 148 other purported cases of Hepatitis C outbreaks at endoscopy clinics even though those other purported cases (1) were not attributable to any defendant and (2) were not substantially similar to the defendants' conduct here.

Evidence is only relevant to the first guidepost if it establishes that it is "more or less probable" that the defendant's conduct was reprehensible. *See* NRS 48.015 (defining

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relevance). Therefore, there must be some nexus with the ***defendant's*** conduct. Otherwise, the evidence is inadmissible. NRS 48.025(2) ("Evidence which is not relevant is not admissible."). Limiting the reprehensibility determination to conduct by the defendant is consistent with the purposes of punitive damages. Punitive damages are levied "for the sake of example and by way of punishing the defendant." NRS 42.005(1). They "serve the same purposes as criminal penalties" and "'pose an acute danger of arbitrary deprivation of property.'" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (citation omitted). For that reason, the ability to impose punitive damages on a defendant is strictly limited to conduct in which it played an active role. *See, e.g.*, NRS 42.007(1) (limiting vicarious liability for punitive damages).

Here, the plaintiffs did not establish ***any*** nexus between the 148 purported cases and the defendants' conduct. There was no evidence that any of those cases involved Propofol manufactured or distributed by the defendants. Appellants' Br. 64; *see also* Pl. Ex. 93, 94, 95, 97, 98, 106, 108, 109; *see also* 4/19/2010 Tr. at 87-93. For that reason alone, the articles were inadmissible. Indeed, there is no connection at all between the cases and the defendants' conduct that could make it more probable that the defendants' conduct was reprehensible. Yet, without citing any authority allowing evidence of non-parties' conduct to be presented as evidence of reprehensibility of the defendants' conduct, the District Court admitted the plaintiffs' articles.

In any event, the lack of similarity between the conduct described in the articles and the conduct alleged in this case also rendered the articles inadmissible. The admissibility of evidence of acts that have harmed people other than the plaintiff in a case has been limited to evidence of conduct that is similar to the acts that injured the plaintiff. *State Farm*, 538 U.S. at 424 ("because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis"). And none of the cases described in the articles involved the same warnings or the same contamination method as the one at issue

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here.[3] Appellants' Br. 56; *see also* Pl. Ex. 93, 94, 95, 97, 98, 106, 108, 109; *see also* 4/19/2010 Tr. at 87-93. Indeed, some of the articles the plaintiffs produced did not refer to Propofol at all. *See, e.g.*, Pl. Ex. 97.

In light of the fundamental differences between the 148 cases described in the plaintiffs articles and this case, and the fact that none of those cases involved the defendants, the District Court erred by admitting the articles into evidence at all—whether to establish reprehensibility or for any other purpose. In *State Farm*, the Supreme Court was concerned that the case "was used as a platform to expose, and punish the perceived deficiencies of State Farm's operations throughout the country." *State Farm*, 538 U.S. at 420. Far beyond that, the punitive damages award here requires the defendants to pay for the perceived deficiencies of various ***other*** drug manufacturers and distributors around the world for an array of dissimilar conduct. That is not allowable under Nevada law or the United States Constitution.

C. The $500 million punitive damages award is unconstitutional.

The 150:1 ratio of punitive damages to compensatory damages here is *per se* unconstitutional. To evaluate a punitive damage award's propriety under the U.S. Constitution, a court must consider "the degree of reprehensibility of the defendant's conduct," the award's ratio to the "actual harm inflicted," and how the award compares to other civil or criminal penalties imposed for similar conduct. *BMW,* 517 U.S. at 575. This Court has recently adopted the *BMW* test for excessive punitive damages as the State's standard as well. *Bongiovi*, 138 P.3d at 583; 122 Nev. at 583. There is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Pacific Mut.*, 499 U.S. at 18. But as a general limit, "few awards exceeding a single-digit ratio between punitive and compensatory

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[3] This case purportedly involved doctors and nurses (1) using a needle and syringe in a patient with Hepatitis C, (2) using the dirty device to draw Propofol from a vial—thereby contaminating the vial's contents, and (3) later drawing Propofol from that vial for use on another patient. *See* 4/19/2009 Tr. at 84:16-85:13.

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damages to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425.

Moreover, the permissible ratio may well be lower than single digits where, as here, the compensatory award is itself significant. While a one-to-one ratio is a general "outermost limit" when compensatory awards are substantial, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008); *State Farm*, 538 U.S. at 425, the limit for any particular award may well be lower, in light of the magnitude of the award, the degree of reprehensibility, the actual harm to the plaintiff, and comparative penalties, *see* Appellants' Br. 77-79. A very large punitive award on top of a very large compensatory award, even where the ratio is single-digit, will raise more serious due process concerns than a small punitive award on top of a small compensatory award where the ratio is high. A $90 punitive award on top of a $10 compensatory award is hardly momentous even though the ratio is nine-to-one. But the award in this case—$500,000,000 as compared to harm of $3,250,000 is *per se* unconstitutional. And even a reduction to 9:1—$29.25 million—would raise extremely serious concerns. As the Supreme Court has held, even a $2 million dollar punitive award—a tiny fraction of the awards in the present cases—is "tantamount to a severe criminal penalty." *BMW*, 517 U.S. at 585.

Although the District Court purported to evaluate the *BMW* factors in its order resolving defendants' post-trial motion, its selection of a 150:1 ratio of compensatory to punitive damages as the appropriate amount proves it failed to apply those factors in a meaningful way. Order at 6. The court relied on the United States Court of Appeals for the Seventh Circuit's decision in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), to claim that any ratio under 37:1 (which it perceived as the true ratio here) is permissible. Order at 16-17. But *Mathias* does not support that conclusion. *Mathias* involved compensatory damages of only $5,000 and punitive damages of $186,000. 347 F.3d at 674. The Seventh Circuit noted that the compensatory damages award was relatively low, and expressly stated that the low compensatory award distinguished that case from *State Farm*, in which $1 million in compensatory damages were awarded. *Id.* at 677. The court further justified the large ratio by noting that "the

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plaintiffs might well have had difficulty financing [the] lawsuit" without such significant damages being possible. That is, of course, not an issue in a case like this one that results in a $3.25 million compensatory damages award.[4] Finally, as the Seventh Circuit observed in a later case, the court ruled that the award was appropriate based on the harm inflicted upon others. *Munro v. Golden Rule Ins. Co.*, 393 F.3d 720, 722 (7th Cir. 2004) ("*Mathias* holds that punitive damages may be a large multiple of any one victim's loss when a defendant's acts inflict small losses on hundreds of people."). The Supreme Court has since ruled that justification unconstitutional. *Philip Morris*, 549 U.S. at 353.

In any event, the award here far exceeds even the 37:1 ratio the District Court deemed acceptable. Applying the method used by this Court in *Wyeth*, the ratio here is over 150:1. *Wyeth*, 244 P.3d at 780, 126 Nev. Adv. Op. No. 44, at *42 (holding that punitive damages of "less than three times the compensatory awards" were not excessive when compensatory damages awarded by the jury were $23 million and punitive damages awarded were $58 million). The mathematical calculation for arriving at a 150:1 ratio is simple. The compensatory damages awarded were $3.25 million, which were assessed jointly and severally. The total punitive damages awarded were $500 million, yielding a ratio of 153.85:1. That dwarfs the generally accepted highest allowable ratio—9:1—even before recognizing that the highest allowable ratio for this case must be closer to 1:1 in light of (1) the size of the compensatory award, (2) the lack of intentional harm, and (3) the multiple pending claims. *See* Appellants' Br. 77-78.

The District Court found that the award reached an 18:1 "blended" ratio by engaging in mathematical contortion without citing any authority to support its formula. Order at 6. To reach that figure, the court first erroneously inflated the compensatory damages amount by including attorney's fees and interest to reach a total of $13.5 million.

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[4] Mrs. Chanin's loss of consortium award cannot be added to the $3.25 million compensatory award for Mr. Chanin because punitive damages are not available on loss of consortium claims. Appellants' Br. 74 n.37; *see also Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1337 (8th Cir. 1985) (collecting cases).

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Id. at 16. The court offered no basis for concluding that it could skew that side of the equation, and there is no logical reason for doing so. Punitive damages are intended to punish and deter particular conduct "for the sake of example and by way of punishing the defendant." NRS 42.005. The jury in this case determined that the extent of damage attributable to defendants' punishable conduct in this case was $3.25 million. Attorney's fees and interest did not result from punishable conduct and were not awarded by the jury. *See* Appellants' Br. 74 n.37. Rather, they resulted from the defendants' exercise of their right to raise a legitimate defense, which occurs in every case. Therefore, the District Court should have set the applicable compensatory damages awarded at $3.25 million in the same way this Court did in *Wyeth*.

In addition, the trial court's use of the total compensatory damages against each of the three defendants when calculating the applicable punitive damages ratio for each defendant violated due process by double-counting the compensatory damages. The trial court started with its faulty total compensatory award of $13.5 million. Order at 6. It then divided that number into each of the two punitive damages awards against the defendants individually. *Id.* As a result, it reached ratios of 26:1 for Teva and 10.5:1 for Baxter. Finally, it took the arithmetic mean and rounded down. *Id.* The trial court's method was wrong. It "assumes an impossibility . . . because it posits that each defendant will ultimately pay the full compensatory damages award." *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000).

When liability is joint and several, the maximum total punitive damages should be determined by multiplying the total compensatory award by the appropriate punitive damages ratio. *Id.* Then, the total maximum punitive damages should be apportioned among the defendants according to each defendant's individual culpability as found by the jury. When the jury has not apportioned compensatory damages among the defendants, the apportionment of punitive damages by the jury serves as a suitable proxy. *See, e.g.*, *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949, 963-64 (9th Cir. 2005) (apportioning reduced punitive damages award based on

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jury's apportionment of total punitive damages). This method prevents trial courts from double counting. And it properly ensures that the total punitive award will be in line with the total harm done to the plaintiff.

In recent years, the Ninth Circuit has consistently adhered to this method. *See Leavey v. Unum Provident Corp.*, 2008 U.S. App. LEXIS 21144, at *7 (9th Cir. Oct. 6, 2008) (calculating punitive damages ratio based on comparing total compensatory damages with total punitive damages); *Southern Union Co. v. Irvin*, 563 F.3d 788, 792 (9th Cir. 2009) (same); *Planned Parenthood*, 422 F.3d at 963-64 (same). For example, in *Southern Union*, 563 F.3d at 791-92, the court twice calculated the punitive damages ratio based on the portion of the compensatory award allocable to the defendant that appealed rather than calculating the ratio using the entire compensatory damages award. Using that ratio, the court reversed an unconstitutional punitive damages award, and then reversed the trial court yet again when the punitive damages award still came out too high after remand. *Id.* Similarly, in *Planned Parenthood*, 422 F.3d at 963-64, where there were multiple plaintiffs and multiple defendants, the court issued a remittitur that first calculated the total available punitive damages to each plaintiff by multiplying the maximum constitutionally allowable ratio by that plaintiff's compensatory award and then dividing the resulting amount proportionately among the defendants based on each defendant's proportional share of the unconstitutional punitive damages originally awarded to that plaintiff by the jury.

Here, the maximum ratio should be 1:1 in light of the very high compensatory damages of $3.25 million. Therefore, if punitive damages are awarded, they should total $3.25 million at most and be apportioned between Teva and Baxter based on the 356:144 ratio of punitive damages awarded by the jury. And even if the court adopts the Supreme Court's outer limit for a $1 million compensatory award of 4:1, *State Farm*, 398 U.S. at 425, the total punitive damages should not exceed $13 million. The District Court's $500 million punitive damages award—about 38 times that—is *per se* unconstitutional.

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IV. CONCLUSION

For the foregoing reasons, amicus curiae respectfully request that this Court reverse the judgment below and remand for a new trial on punitive damages liability, or in the alternative, reduce the punitive damages award to a constitutionally allowable figure.

Dated: March 9, 2011.

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IV. CONCLUSION

For the foregoing reasons, amicus curiae respectfully request that this Court reverse the judgment below and remand for a new trial on punitive damages liability, or in the alternative, reduce the punitive damages award to a constitutionally allowable figure.

Dated: March ___, 2011.

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CERTIFICATE OF COMPLIANCE

We, the undersigned Amicus's counsel, hereby certify that we have read the foregoing Brief, and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record. We understand we may be subject to sanctions in the event this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure as required by NRS 223B.133.

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