No. 04-19-00044-CV

IN THE FOURTH COURT OF APPEALS

SAN ANTONIO, TEXAS

TITLE SOURCE, INC.,

Appellant,

v.

HOUSECANARY ANALYTICS, INC. F/K/A
CANARY ANALYTICS, INC.,

Appellee.

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES..... ii

INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

I. The Due Process Clause Requires Exacting Review of the $470.8 Million Punitive Damages Award. 2

II. The $470.8 Million Punitive Damages Award Offends Due Process.....3

A. The reprehensibility factors weigh heavily against the $470.8 million in punitive damages awarded. 4

B. The punitive damages award is disproportionate to the already substantial ($235 million) compensatory award. 8

C. The punitive damages are also grossly disproportionate to comparable civil penalties. 14

PRAYER 16

CERTIFICATE OF SERVICE 17

CERTIFICATE OF COMPLIANCE.....18

INDEX OF AUTHORITIES

Page(s)

Cases

Bach v. First Union Nat'l Bank,
486 F.3d 150 (6th Cir. 2007) 5, 6, 11

Bennett v. Grant,
460 S.W.3d 220 (Tex. App.—Austin 2015)
aff'd in part, rev'd in part, 525 S.W.3d 642, 650 (Tex. 2017).....5

Bennett v. Grant,
525 S.W.3d 642 (Tex. 2017) 3

Bennett v. Reynolds,
315 S.W.3d 867 (Tex. 2010) 7, 8

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996).....2, 4, 8, 9

Boerner v. Brown & Williamson Tobacco Co.,
394 F.3d 594 (8th Cir. 2005) 12

Brand Mktg. Grp. LLC v. Intertek Testing Servs., N.A., Inc.,
801 F.3d 347 (3d Cir. 2015) 12

Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.,
532 U.S. 424 (2001).....8

David v. Caterpillar, Inc.,
185 F. Supp. 2d 918 (C.D. Ill. 2002) 9

Diesel Mech., Inc. v. B.R. Lee Indus., Inc.,
418 F.3d 820 (8th Cir. 2005) 12

Dziadek v. Charter Oak Fire Ins. Co.,
213 F. Supp. 3d 1150 (D.S.D. 2016) 12

Dziadek v. Charter Oak Fire Ins. Co.,
867 F.3d 1003 (8th Cir. 2017) 12

Page(s)

Exxon Shipping Co. v. Baker,
554 U.S. 471 (2008).....9

Flores v. Millennium Interests, Ltd.,
185 S.W.3d 427 (Tex. 2005) 14

Gasperini v. Ctr. for Humanities, Inc.,
518 U.S. 415 (1996).....8

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994).....2

Horizon Health Corp. v. Acadia Healthcare Co.,
520 S.W.3d 848 (Tex. 2017) 2, 3, 4, 5, 6, 7, 8, 14

Jones v. United Parcel Serv., Inc.,
674 F.3d 1187 (10th Cir. 2012) 10

Jurinko v. Med. Protective Co.,
305 F. App'x 13 (3d Cir. 2008) 11

Lompe v. Sunridge Partners, LLC,
818 F.3d 1041 (10th Cir. 2016) 10

Marauder Corp. v. Beall,
No. 05-08-00713-CV, 2009 WL 4199329
(Tex. App.—Dallas Nov. 25, 2009, no pet.) 15

Mercedes-Benz USA, LLC v. Carduco, Inc.,
562 S.W.3d 451 (Tex. App.—Corpus Christi Mar. 31, 2016),
rev'd on other grounds, 583 S.W.3d 553 (Tex. 2019) 7, 11

Morgan v. N.Y. Life Ins. Co.,
559 F.3d 425 (6th Cir. 2009) 5

Owens-Corning Fiberglas Corp. v. Malone,
972 S.W.2d 35 (Tex. 1998).....8, 11

Payne v. Jones,
711 F.3d 85 (2d Cir. 2013) 10

Page(s)

Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.,
345 F.3d 1366 (Fed. Cir. 2003) 13

Saccameno v. U.S. Bank Nat'l Ass'n,
No. 19-1569, 2019 WL 6334280 (7th Cir. Nov. 27, 2019).....10, 11

Sanchez v. Southampton Civic Club, Inc.,
367 S.W.3d 429 (Tex. App.—Houston [14th Dist.] 2012, no pet.) 15

Snodgrass-King Pediatric Dental Assocs., P.C. v. DentaQuest USA Ins.,
295 F. Supp. 3d 843 (M.D. Tenn. 2018) 12

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003)..... 2, 3, 4, 6, 7, 8, 9, 13, 14

Tony Gullo Motors I, L.P. v. Chapa,
212 S.W.3d 299 (Tex. 2006) 3, 6

Uptegraph v. Sandalwood Civic Club,
312 S.W.3d 918 (Tex. App.—Houston [1st Dist.] 2010, no pet.).....15

In re Xerox Corp.,
555 S.W.3d 518 (Tex. 2018) 14

Statutes

TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 8

TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(a)(1) 14, 15

TEX. FIN. CODE ANN. § 392.403(e) 15

TEX. PROP. CODE ANN. § 5.007(c) 15

TEX. PROP. CODE ANN. § 202.004(c) 15

Rule

TEX. R. APP. P. 11 1

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community—like this one.

In particular, the principles guiding the fair administration of punitive damages awards by juries have significant importance to defendants (which are always U.S. businesses). Although this particular case involves a dispute between two businesses, the outcome of this case on punitive damages will have ramifications for defendants in Texas in cases outside of this commercial context. Because these legal issues are important to the business community, the Chamber regularly files

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[1] In accordance with Texas Rule of Appellate Procedure 11, the Chamber certifies that this brief is filed solely on its behalf, that the fee for preparation of the brief will be paid by the Chamber, and that copies of this brief are being served on all parties to the case.

amicus briefs in significant punitive damages cases pending in state and federal appellate courts, including all the U.S. Supreme Court's cases that have addressed punitive damages over the last three decades.

ARGUMENT

I. The Due Process Clause Requires Exacting Review of the $470.8 Million Punitive Damages Award.

"The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). This prohibition stems from "[e]lementary notions of fairness enshrined in our constitutional jurisprudence," which "dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *see also Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 873 (Tex. 2017) (quoting *Gore*, 517 U.S. at 574).

Indeed, punitive damages "pose an acute danger of arbitrary deprivation of property" because their administration is notoriously imprecise. *Campbell*, 538 U.S. at 417 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). Thus, courts must consider three guideposts to ascertain whether a particular award comports with due process: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the plaintiff's harm and the punitive damages award; and

(3) the difference between the punitive damages award and civil penalties available in comparable cases. *Horizon Health Corp.*, 520 S.W.3d at 873-74 (citing *Campbell*, 538 U.S. at 418).

Whether the punitive damages exceed constitutional bounds presents a question of law reviewed de novo. *Bennett v. Grant*, 525 S.W.3d 642, 650 (Tex. 2017); *see also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 307 (Tex. 2006). "Exacting appellate review ensures that an award of punitive damages is based on an application of law, rather than a decisionmaker's caprice." *Campbell*, 538 U.S. at 418 (internal quotation marks omitted).

II. The $470.8 Million Punitive Damages Award Offends Due Process.

The jury's enormous punitive damages award cannot survive the requisite "[e]xacting" review. *See id.* As noted above, the jury's discretion when choosing the amount of punitive damages poses serious concerns about the arbitrariness of such awards. *See id.* Those concerns are heightened when a plaintiff engages in tactics designed to inflame the jury's passions and feed improper biases against corporate entities. Counsel for Plaintiff did just that, declaring "[t]his isn't about settling disputes between one party and another," exhorting the jury to send a message that "this community ... is where we draw the line on corporate unethical behavior," and pushing the jury to put this case "in the Wall Street Journal." RR.50:71-72.

These inflammatory remarks were an appeal to prejudice against American business. They also asked the jury to punish Title Source arbitrarily for unspecified corporate wrongs against unnamed persons, even though due process does not permit punitive damages to rest on such hypothetical, non-party claims. *See Campbell*, 538 U.S. at 423. Regardless whether these arguments amounted to reversible error, they underscore the need for close scrutiny of the resulting $470.8 million punitive damages award. Under *Campbell*'s three guideposts, this award should be reversed.

A. *The reprehensibility factors weigh heavily against the $470.8 million in punitive damages awarded.*

The first constitutional guidepost examines Title Source's degree of reprehensibility. *See Horizon Health Corp.*, 520 S.W.3d at 873. This is the "most important indicium" for assessing the unreasonableness of the punitive damages awarded. *Id.* at 875 (quoting *Gore*, 517 U.S. at 575). Five factors are relevant: (1) whether the resulting harm was physical or economic; (2) whether the defendant's conduct demonstrated indifference to or reckless disregard of health or safety; (3) whether the target of the conduct had financial vulnerability; (4) whether the conduct involved repeated actions or was instead an isolated incident; and (5) whether the harm resulted from intentional malice, trickery, or deceit, or mere accident. *Id.* (citing *Gore*, 517 U.S. at 576-77).

Tellingly, the Plaintiff concedes that three of the reprehensibility factors weigh against the punitive damages award. *See* Br. of Appellee at 84-85. The

alleged harm was purely economic, which "weighs *against* a finding of reprehensibility, and therefore, in favor of [Title Source]." *Horizon Health Corp.*, 520 S.W.3d at 875. Likewise, the claimed misconduct did not endanger anyone's health or safety, much less evince any indifference to or reckless disregard of such concerns. *See id.* And the Plaintiff neither claims nor shows that Title Source engaged in any repeated misconduct. To the contrary, until this particular case, Title Source had never been sued for misappropriating trade secrets during its twenty-year history of doing business. *See* Br. of Appellant at 59; Br. of Appellee at 85 (not disputing this contention); *see also, e.g.*, *Horizon Health Corp.*, 520 S.W.3d at 875 (lack of recidivism negates the repeated-misconduct reprehensibility factor). All these factors "run counter" to the amount of punitive damages awarded. *See id.*

The Plaintiff touts the financial vulnerability factor, but that factor has no bearing on the punitive damages award. This factor is designed to account for plaintiffs that have limited financial resources. *Compare Bach v. First Union Nat'l Bank*, 486 F.3d 150, 155 (6th Cir. 2007) ("elderly widow" was financially vulnerable), *with Morgan v. N.Y. Life Ins. Co.*, 559 F.3d 425, 441-42 (6th Cir. 2009) (plaintiff who "earned between $500,000 and $1,000,000 yearly" was not financially vulnerable). Texas courts have also construed this factor narrowly, limiting it to plaintiffs in dire financial straits. *Compare Bennett v. Grant*, 460 S.W.3d 220, 249 (Tex. App.—Austin 2015) (plaintiff was financially vulnerable where his salary

"was hovering on the federal poverty line" and defendant's conduct "threatened to financially ruin" him), *aff'd in part, rev'd in part*, 525 S.W.3d 642, 650 (Tex. 2017) (agreeing with this analysis), *with Tony Gullo Motors I, LP v. Chapa*, 212 S.W.3d 299, 308 (Tex. 2006) (plaintiff was not financially vulnerable when the alleged harm "did not threaten financial ruin").

The Plaintiff is no widow or pauper. It does not lack financial resources. There is no dispute that the Plaintiff is funded by sophisticated and wealthy investors, which overshadows whatever financial "quagmire" HouseCanary claims it faced. *Compare* Br. of Appellant at 59, *with* Br. of Appellee at 85. Nor is there any contention that TitleSource's conduct threatened the Plaintiff with "financial ruin." *Tony Gullo Motors I, LP*, 212 S.W.3d at 308. At best, the financial vulnerability factor is neutral, but its inapplicability should weigh further against a finding of reprehensibility. *Cf. Horizon Health Corp.*, 520 S.W.3d at 875.

The Plaintiff's reprehensibility argument thus boils down to a single factor: TitleSource's claimed malice, trickery, or deceit. *See* Br. of Appellee at 59. But even assuming that the evidence supports this factor, "[t]he existence of a single [reprehensibility] factor 'may not be sufficient to sustain a punitive damages award.'" *Tony Gullo Motor I, LP*, 212 S.W.3d at 308 (quoting *Campbell*, 538 U.S. at 419); *see also, e.g.*, *Bach*, 486 F.3d at 154 (satisfaction of "only one of the five reprehensibility factors ... does not support the large punitive damage award in this

case" (internal quotation marks and alteration omitted)). And here it is not. After all, the degree of reprehensibility is critical to the reasonableness of a punitive damages award, and such damages are appropriate only where "the defendant's *culpability*, after having paid compensatory damages, is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence." *Campbell*, 538 U.S. at 419 (emphasis added).

Consistent with these principles, the Texas Supreme Court held that due process required further reducing an already remitted $1.1 million punitive damages award that was premised partly on the defendants' intentional misappropriation of trade secrets, despite acknowledging that the defendants' conduct amounted to malice, trickery, or deceit. *See Horizon Health Corp.*, 520 S.W.3d at 867, 873, 876. The Corpus Christi Court of Appeals similarly held that this same reprehensibility factor, even if satisfied, nonetheless evinced a lack of "particularly egregious" conduct and failed to support a $115 million punitive damages award. *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 562 S.W.3d 451, 494-95 (Tex. App.—Corpus Christi Mar. 31, 2016) (quoting *Bennett*, 315 S.W.3d at 878), *rev'd on other grounds*, 583 S.W.3d 553 (Tex. 2019).

All these authorities confirm that the absence of all but arguably a single reprehensibility factor cannot support the $470.8 million punitive damages award.

B. *The punitive damages award is disproportionate to the already substantial ($235 million) compensatory award.*

The second guidepost for the constitutional check on a punitive damages award requires examining its mathematical ratio with the amount of compensatory damages awarded. *See Horizon Health Corp.*, 520 S.W.3d at 873 (citing *Campbell*, 538 U.S. at 418). As a threshold matter, the fact that the punitive damages comply with the statutory cap in Section 41.008 of the Texas Civil Practice & Remedies Code cannot render it constitutional—presumptively or otherwise—as the Plaintiff claims. *See* Br. of Appellee at 85-86. The Texas Supreme Court correctly observed that "even an award well *below* the statutory ceiling can offend due process." *Bennett v. Reynolds*, 315 S.W.3d 867, 882 (Tex. 2010). Thus, "even if an assessment of punitive damages is not deemed excessive under governing state law, it may violate a party's substantive due process right to protection from 'grossly excessive' punitive damages awards." *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 45 (Tex. 1998) (quoting *Gore*, 517 U.S. at 568).

Notwithstanding a state's ability to "limit[] permissible punitive damages awards," the Due Process Clause "of its own force" forbids states from imposing "grossly excessive" punishments. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433-34 (2001) (internal quotation marks omitted); *see also Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.12 (1996) ("For rights that are state created, state law governs the amount properly awarded as punitive

damages, *subject to an ultimate federal constitutional check for exorbitancy*." (emphasis added)). The application of a statutory cap neither supplants nor dilutes the "[e]xacting appellate review" that due process demands. *See Campbell*, 538 U.S. at 418; *see also, e.g.*, *David v. Caterpillar, Inc.*, 185 F. Supp. 2d 918, 926-27 (C.D. Ill. 2002) (reducing a statutorily capped punitive damages award of $250,000 to $150,000).

Under *Campbell*, "[w]hen compensatory damages are substantial, then a lesser ratio [with punitive damages], perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425; *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514-15 & n.28 (2008) (quoting same language and holding "[i]n this case, then, the constitutional outer limit may well be 1:1"). Conversely, extremely reprehensible conduct can sometimes support higher ratios between punitive and compensatory damages, especially when that conduct "has resulted in only a small amount of economic damages." *Campbell*, 538 U.S. at 425.

These benchmarks, although not a "mathematical formula," *Gore*, 517 U.S. at 582, reflect a sliding-scale approach that depends on two factors: the degree of the defendant's reprehensibility and the amount of compensatory damages that the plaintiff recovered. For the first factor, the maximum allowable ratio rises and falls with the degree of reprehensibility. This means that conduct falling on the lower

end of the reprehensibility scale counsels for a corresponding lower ratio. *See Saccameno v. U.S. Bank Nat'l Ass'n*, No. 19-1569, 2019 WL 6334280, at *10 (7th Cir. Nov. 27, 2019) (explaining that a punitive damages award may be impermissible "even with a low ratio, if the acts are not that reprehensible and the damage is easily or already accounted for"). But as a separate consideration, the maximum permissible ratio must also account for the size of the compensatory damages award. That figure has an *inverse* relationship with the maximum ratio, such that higher compensatory damages awards demand lower ratios with punitive damages. *See, e.g.*, *Payne v. Jones*, 711 F.3d 85, 103 (2d Cir. 2013) (10:1 ratio could be permissible if compensatory damages were $10,000, but 1:1 ratio would be "very high" if compensatory damages were $300,000). "Said another way, given the same conduct, an increased compensatory damages award leads to a decreased permissible ratio, and vice-versa." *Saccameno*, 2019 WL 6334280, at *10.

Thus, many courts have concluded that due process forbids more than a 1:1 ratio between punitive and compensatory damages when the amount of compensatory relief is already substantial—and at thresholds comprising a tiny fraction of the $235.4 million compensatory award here. *See, e.g.*, *Saccameno*, 2019 WL 6334280, at *11 ($582,000 compensatory damages); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1069, 1073, 1075 (10th Cir. 2016) ($1.95 million); *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1207-08 (10th Cir. 2012)

($630,000); *Bach*, 486 F.3d at 156 ($400,000). This is doubly true when the defendant's conduct was not reprehensible. *See, e.g.*, *Mercedes-Benz USA, LLC*, 562 S.W.3d at 493, 495 (reducing $115 million punitive damages award to $600,000—a .0392:1 ratio with "very substantial compensatory damages award of $15.3 million" for fraud that satisfied single reprehensibility factor); *see also, e.g.*, *Saccameno*, 2019 WL 6334280, at *10-11 (several reprehensibility factors were met; nonetheless reducing punitive damages to a 1:1 ratio with "substantial" $582,000 compensatory award); *Jurinko v. Med. Protective Co.*, 305 F. App'x 13, 15, 27, 30 (3d Cir. 2008) (two reprehensibility factors were met; nonetheless reducing punitive damages from 3.13:1 to 1:1 ratio with $1.6 million compensatory award); *Bach*, 486 F.3d at 153, 155-56 (single reprehensibility factor could not justify an already-reduced $2.4 million punitive damages award; directing remittitur to same figure as "substantial" compensatory award of $400,000).

Even the Plaintiff's authorities that endorsed higher ratios largely fit this framework. Br. of Appellee at 86-87. Nearly every decision involved conduct that satisfied multiple (or all) the reprehensibility factors, and many of those decisions did *not* result in multi-million dollar compensatory damages. *See Owens-Corning Fiberglas Corp*, 972 S.W.2d at 46-47 (affirming 2:1 ratio where defendants' conduct reprehensibly caused physical harm, displayed "indifference to or reckless disregard for the health and safety of others," and had "consciously engaged in a pattern and

practice" of failing to warn of known dangers (internal quotation marks omitted)); *see also Brand Mktg. Grp. LLC v. Intertek Testing Servs., N.A., Inc.*, 801 F.3d 347, 363, 366 (3d Cir. 2015) (majority of reprehensibility factors met; affirming 4.8:1 ratio with $1,045,000 compensatory award); *Diesel Mech., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 826, 839 (8th Cir. 2005) (two factors, upholding 4:1 ratio to $665,000 compensatory award); *Dziadek v. Charter Oak Fire Ins. Co.*, 867 F.3d 1003, 1012-13 (8th Cir. 2017) (adopting district court's findings in *Dziadek v. Charter Oak Fire Ins. Co.*, 213 F. Supp. 3d 1150, 1171-73 (D.S.D. 2016), that all five reprehensibility factors were met, several strongly so; affirming punitive damages award with 4.3:1 ratio to $637,511.70 compensatory award).

In fact, courts routinely impose lower ratios when the plaintiff has received millions of dollars in compensatory damages, even where the defendant's conduct was egregious. *See, e.g.*, *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (defendant's "highly reprehensible" conduct nonetheless required reducing punitive damages to 1:1 ratio to "substantial compensatory damages award" of $4,025,000); *Snodgrass-King Pediatric Dental Assocs., P.C. v. DentaQuest USA Ins. Co.*, 295 F. Supp. 3d 843, 872-73 (M.D. Tenn. 2018) ("egregious" violations of constitutional rights were insufficient to support 2:1 ratio with $7.4 million compensatory award; remitting to 1:1 ratio).

The only other decision the Plaintiff cites is *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed. Cir. 2003), which upheld punitive damages that exceeded three times the $15 million compensatory award. The court's analysis, however, was incomplete; it failed to acknowledge or address *Campbell*'s caution that a 1:1 ratio between punitive and compensatory damages can be the "outermost limit of the due process guarantee" when the compensatory damages are substantial. *Compare Campbell*, 538 U.S. at 425, *with Rhone-Poulenc Agro, S.A.*, 345 F.3d at 1371-72.

If anything, *Rhone-Poulenc* reinforces why a 2:1 ratio between punitive and compensatory damages here exceeds constitutional bounds. While the $15 million compensatory award in *Rhone-Polenc* was certainly substantial, it pales in comparison to the $235.4 million compensatory recovery here. Moreover, that recovery far exceeded the $5 million-per-year value of the underlying contract that gave rise to the claims here. The magnitude of the compensatory award makes even a 1:1 ratio with punitive damages constitutionally suspect. At the very least, the enormity of the compensatory award cannot support greater than an equal amount of punitive damages.

C. *The punitive damages are also grossly disproportionate to comparable civil penalties.*

The last guidepost requires comparing the punitive damages award with civil penalties for similar alleged theft. *See Horizon Health Corp.*, 520 S.W.3d at 873-74 (citing *Campbell*, 538 U.S. at 418). The disparity between those amounts is startling.

The Texas Theft Liability Act provides that "a person who has sustained damages resulting from theft may recover ... the amount of actual damages found by the trier of act and, in addition to actual damages, damages awarded by the trier of fact in a sum *not to exceed $1,000 ....*" *See* TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(a)(1) (emphasis added). Yet the punitive damages award in this case is *470,800 times greater* than the maximum allowable statutory award for the exact same conduct.

The Plaintiff argues around this guidepost by characterizing the $1,000 figure as statutory damages, rather than a civil penalty subject to imposition by the government. Br. of Appellee at 87-88. But the definition of civil penalties is not as narrow as the Plaintiff claims.

The Plaintiff's own case law recognizes that "[a] remedy unrelated to actual loss is a penalty." *In re Xerox Corp.*, 555 S.W.3d 518, 533 (Tex. 2018). Applying that test, Texas courts have concluded a number of statutory damages provisions are punitive in nature because they bear no relation to a plaintiff's actual harm. *See Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 429, 433-34 (Tex. 2005)

("liquidated damages provision" for failure to timely provide accounting statement under TEX. PROP. CODE ANN. § 5.007(c) "is, in fact, punitive rather than compensatory"); *Sanchez v. Southampton Civic Club, Inc.*, 367 S.W.3d 429, 436 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("civil damages" prescribed for violations of restrictive covenants, TEX. PROP. CODE ANN. § 202.004(c), "are punitive" because they are "unrelated to the type or extent of injury or harm" (internal quotation marks omitted)); *Uptegraph v. Sandalwood Civic Club*, 312 S.W.3d 918, 937 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (same conclusion); *see also, e.g.*, *Marauder Corp. v. Beall*, No. 05-08-00713-CV, 2009 WL 4199329, at *4 (Tex. App.—Dallas Nov. 25, 2009, no pet.) (statutory damages of $100 for each violation of the Texas Debt Collection Act, TEX. FIN. CODE ANN. § 392.403(e), were not compensatory).

Here, the Texas Theft Liability Act makes clear that the statutory damages are punitive. Because the $1,000 minimum award is separate from and "*in addition to* actual damages," TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(a)(1) (emphasis added), that award "is not related to the showing of any type of injury or harm or the extent of such injury or harm," *see Uptegraph*, 312 S.W.3d at 937 (same observation about TEX. PROP. CODE ANN. § 202.004(c)). The minimal size of that penalty further underscores the excessiveness of the $470.8 million punitive damages award in this case.

PRAYER

For these reasons, this Court should reverse the $470.8 million punitive damages award as unconstitutionally excessive.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Brief of *Amicus Cu*riae was served on the following counsel via EFile on the 20th day of December 2019.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations of TEX. R. APP. P. 9.4(i) because this brief consists of 3,460 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

/s/ *Warren W. Harris*
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