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Court Below: Colorado Court of Appeals,
Case No. 2008CA00134
Opinion by Judge Webb; Judge Richman dissenting in part and concurring in part.

Trial Court: Denver District Court
Case No. 05 CV 6972, Judge Sheila A. Rappaport

Petitioners-Defendants/Third-Party Plaintiffs: Qwest Services Corporation and Qwest Corporation

Respondents-Plaintiffs: Andrew Blood, Carrie Blood

Respondent-Third Party Defendant: Public Service Company of Colorado, d/b/a Xcel Energy

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS-DEFENDANTS/THIRD-PARTY PLAINTIFFS

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses, representing 300,000 direct members and indirectly representing the interests of over 3,000,000 companies as well as state and local chambers and industry organizations throughout the country. 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, including every case in which the United States Supreme Court has addressed such issues during the past 21 years.

The Chamber is especially interested in the second issue presented in this case—namely, whether the $18 million punitive award is unconstitutionally excessive. The Chamber submits this brief because it believes that the court of appeals majority misapplied the principles bearing on the excessiveness issue in a way that, if left uncorrected, threatens to lead to an upward spiral in punitive damages awards.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Although Colorado has done more than most states to ensure that punitive awards do not run wild, neither its 1:1 cap nor the various procedural safeguards it has imposed are always sufficient to ensure against unconstitutional punishments. This case is a perfect illustration. Because the compensatory damages are so enormous, the punitive award falls below the cap. Yet the absolute amount of punitive damages—$18 million—is the highest ever imposed in Colorado in a single-victim negligence case.

To uphold a punitive award of such breathtaking magnitude, there should need to be a compelling reason to conclude that no lower amount would suffice to punish and deter. Here, there is no such compelling reason.

To begin with, the court of appeals majority acknowledged that this case does not involve fraud, malice, or the targeting of the financially vulnerable. To the contrary, Qwest's tort constituted nothing worse than the passive failure to do more to ensure the integrity of utility poles it owned. Until this very case, Qwest's duty to do more—namely, to conduct a periodic pole inspection program—was not clearly established by statute, regulation, or common law. Indeed, given the undisputed fact that Qwest had never experienced an accident of this sort in over 70 years, Qwest had every reason to believe that the alternative it had been

employing—requiring its employees to conduct pre-climb inspections and assuming that other utilities would impose similar precautions—fully satisfied its common-law duty of care. Hence, the need for retribution is minimal, if not non-existent.

So too is the need for deterrence. Indeed, the enormous compensatory award—$21,667,600—by itself far outstrips even the most expansive estimate of the savings to Qwest from not instituting a periodic pole inspection program: $200,000 to $300,000 per year (or a total of between $8.8 million and $13.2 million from the date Qwest entered into the JUC with Xcel to the date of the accident). Any significant amount of punitive damages on top of the enormous compensatory damages thus serves no valid state interest. Accordingly, even though it bears less than a 1:1 ratio to the compensatory damages, the $18 million punitive award is unconstitutionally excessive and should be either vacated in its entirety or reduced to a nominal amount.

ARGUMENT

In reviewing the $18 million punitive award for excessiveness, the court of appeals majority made a fundamental mistake. The court evaluated each of the three excessiveness guideposts identified by the U.S. Supreme Court without ever stopping to consider the point of doing so—namely, to determine whether the

amount of punitive damages awarded is greater than reasonably necessary to accomplish the state's legitimate interests. Had the court understood the ultimate purpose of its inquiry, it could not conceivably have concluded that an $18 million exaction serves any legitimate state interest.

In Part I of this *amicus* brief, we discuss this critical constitutional inquiry at greater length. In Part II, we demonstrate that the punitive award fails this inquiry.

I. A PUNITIVE AWARD IS EXCESSIVE IF IT IS GREATER THAN REASONABLY NECESSARY TO SATISFY THE GOVERNMENTAL INTERESTS IN RETRIBUTION AND DETERRENCE.

As a matter of common law, it long has been established that a punitive damages award must be set aside if it is greater than necessary to achieve the state's interests. *See, e.g.*, *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (Alabama common law employs standards designed to determine "whether [the] particular [punitive] award is greater than reasonably necessary to punish and deter"); *DeRance, Inc. v. Painewebber Inc.*, 872 F.2d 1312, 1328 (7th Cir. 1989) (under Wisconsin law, "we must reject the amount of a jury's award if it exceeds what was required to serve the objectives of deterrence and punishment") (internal quotation marks omitted); *Aldrich v. Thomson McKinnon Sec., Inc.*, 756 F.2d 243, 249 (2d Cir. 1985) ("[Punitive] damages should not be permitted to go beyond that amount reasonably necessary to secure the purposes of such awards, and thus to

become in part a windfall to the individual litigant."); *Ace Truck & Equip. Rentals, Inc. v. Kahn,* 746 P.2d 132, 136-37 (Nev. 1987) ("If the awarding jury or judge assesses more in punitive damages than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive.").

It is thus hardly surprising that the U.S. Supreme Court has held that the Due Process Clause embraces the same limitation. As the Court put it in its seminal punitive damages decision, "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). In most states, including Colorado (*see Leidholt v. Dist. Court*, 619 P.2d 768, 770 (Colo. 1980)), those interests are limited to retribution and deterrence. If a punitive award is "'grossly excessive' in relation to these interests," it serves no legitimate purpose and accordingly "enter[s] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *BMW*, 517 U.S. at 568.

In *BMW*, the Court identified three guideposts to assist in determining whether the $2 million punitive award at issue was unconstitutionally excessive: (i) the degree of reprehensibility of the defendant's conduct; (ii) the ratio of the punitive damages to the compensatory damages; and (iii) the disparity between the

punitive damages and the legislatively established penalty for comparable conduct. It applied each one in turn, but ultimately returned to the central question, explaining:

> The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less dramatic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question ***whether a lesser deterrent would have adequately protected the interests of Alabama consumers***.

Id. at 584 (emphasis added).

Several years later, the Court again applied the three guideposts in the course of holding that a $145 million punitive award was unconstitutionally excessive. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Again the Court emphasized that the ultimate inquiry was whether the punitive damages exceeded the amount reasonably necessary to punish and deter, stating that "a more modest punishment for [the defendant's] reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further." *Id.* at 419-20.

Although the Court in *State Farm* indicated that, under the circumstances of that case, "a punitive damages award at or near the amount of compensatory damages" might be justified (*id.* at 429), that hardly means that a ratio of 1:1 or

lower will immunize every punitive award from scrutiny, as the court of appeals majority seemed to think.[1] To the contrary, the Court reiterated its oft-stated admonition that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula …." *Id*. at 424 (internal quotation marks and alteration omitted).

The lesson of *BMW* and *State Farm* is that the three guideposts do not exist in a vacuum. Instead, they must be understood by reference to the ultimate purpose of the exercise: to determine whether the punitive award is greater than

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[1] Relatedly, the court of appeals was mistaken in believing that there are no cases reducing punitive awards below the level of compensatory damages. *See, e.g.*, *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 467-70 (3d Cir. 1999) (reducing $50 million punitive award for breach of contract and fraud to $1 million where compensatory damages were approximately $48 million); *Motorola Credit Corp. v. Uzan*, 509 F.3d 74 (2d Cir. 2007) (affirming reduction of punitive damages from $2.1 billion to $1 billion where compensatory damages were $2.1 billion); *Zakre v. Norddeutsche Landesbank Girozentrale*, 541 F. Supp. 2d 555 (S.D.N.Y. 2008) (reducing punitive award from $2.5 million to $600,000 where compensatory damages were roughly $1.5 million); *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 2008 WL 4279812, at *16 (D. Or. Sept. 12, 2008) (reducing punitive damages from $137 million to $15 million where compensatory damages were more than $50 million because, "[a]fter considering the *Gore* guideposts, … even a 1 to 1 ratio between compensatory and punitive damages is too high"); *Watson v. E.S. Sutton, Inc.*, 2005 WL 2170659 (S.D.N.Y. Sept. 6, 2005) (reducing punitive damages from $2.5 million to $717,000 where compensatory damages were approximately $1.5 million); *Geuss v. Pfizer, Inc.,* 971 F. Supp. 164 (E.D. Pa. 1996) (reducing $150,000 punitive award to $17,500 where compensatory damages were $165,000).

reasonably necessary to punish and deter. As we next discuss, when that ultimate inquiry is kept firmly in mind, the conclusion that the $18 million exaction in this case is unconstitutionally excessive becomes inescapable.

II. THE $18 MILLION PUNITIVE AWARD IN THIS CASE IS GROSSLY EXCESSIVE.

"In the absence of a history of noncompliance with known [legal] requirements," the Supreme Court held in *BMW*, "there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance" with the law. 517 U.S. at 584-85. That principle directly controls this case. In light of the enormous compensatory award and the minimal reprehensibility of Qwest's conduct, there is simply no basis for concluding that a large punitive award, much less the single largest amount ever imposed in a single-victim personal injury case, is necessary to achieve Colorado's interests in retribution and deterrence.

A. The $18 Million Punitive Award Is Far Greater Than Necessary To Serve Any Interest In Retribution That Colorado May Have.

Retribution refers to making the defendant "suffer for his misconduct and accompanying mental state." Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 844 (1989). "In the retributive view, the justification of any punishment is backward-looking and

desert-based rather than forward-looking and consequentialist." Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 780 (1989).

It is a matter of genuine doubt whether retribution is a meaningful concept in the case of incorporeal entities, like Qwest. *See* Lisa Litwiller, *From* Exxon *to* Engle*: The Futility of Assessing Punitive Damages As Against Corporate Entities*, 57 RUTGERS L. REV. 301, 328-30 (2004). But accepting for present purposes that it is, there should be little question that $18 million far exceeds any reasoned measure of retribution.

As the Supreme Court has observed, even $2 million is "tantamount to a severe criminal penalty." *BMW*, 517 U.S. at 585. Accordingly, a punishment of that magnitude—let alone nine times that amount—can be justified on retributive grounds only for "egregiously improper conduct." *Id*. at 580. Yet here, as in *BMW*, "the record contains nothing to suggest that the extraordinary size of the award in this case is explained by the extraordinary wrongfulness of the defendant's behavior … rather than arbitrariness or caprice." *Id.* at 595 (Breyer, J., concurring).

To the contrary, the court of appeals majority acknowledged that Qwest's conduct did not involve fraud, malice, or the targeting of a financially vulnerable

victim. *Blood v. Qwest Servs. Corp.*, 224 P.3d 301, 315 (Colo. App. 2009). It also acknowledged that, in over 70 years, "Blood's accident was the ***first*** of its kind on a Qwest-owned pole." *Id.* at 314-15 (emphasis added). Finally, it acknowledged that "Blood did not present evidence that Qwest had a statutory or regulatory duty to inspect its poles." *Id.* at 314. Because there was no evidence of such a pre-existing duty, it follows that, just as in *BMW*, there was no "history of noncompliance with known statutory requirements" (517 U.S. at 585), much less "evidence that [Qwest] persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions" (*id.* at 579).

The award of punitive damages in this case thus was not based on any active misconduct at all, but instead on the purely passive failure to do more to prevent accidents of this sort and, specifically, on the "failure to implement a periodic pole inspection program." *Blood*, 224 P.3d at 319. But here, as in *BMW*, "[t]here is no evidence that [Qwest] acted in bad faith" when it relied on other means of ensuring pole safety. 517 U.S. at 579. Indeed, "a corporate executive could reasonably interpret" the absence of an on-point statutory or regulatory duty to adopt a pole inspection program as authorization to rely on alternative approaches. *Id.* at 578. Just as "the omission of a material fact may be less reprehensible than a deliberate false statement," (*id.* at 580), so too a passive failure to implement a pole

inspection program is less reprehensible than affirmative misconduct resulting in injury, "particularly when there is a good-faith basis for believing that no duty … exists" (*id.*).

Accordingly, like *BMW*, "this case exhibits none of the circumstances ordinarily associated with egregiously improper conduct," making even a $2 million punitive exaction unwarranted on retributive grounds. *Id*. at 580.

Contrary to the belief of the court of appeals majority, this conclusion is confirmed by consideration of the third *BMW* guidepost. As the court of appeals acknowledged, "Colorado does not impose civil or criminal penalties for the type of conduct at issue" in this case. *Blood*, 224 P.3d at 318. The fact that the elected officials of this state have not seen fit to criminalize Qwest's conduct ***at all*** is as compelling an indication as there can be that the conduct is not so vile as to warrant an $18 million sanction on retribution grounds. *See, e.g.*, *FDIC v. Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997) (holding that the fact that the conduct is not subject to criminal or civil fines suggests that defendant was not on notice that its conduct could give rise to substantial punitive damages, and reducing $1.2 million punitive award to $264,000); *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 995 (W.D. Wash. 1997) ("the fact that apparently there is no law imposing civil or criminal penalties for comparable conduct strongly suggests that

an enormous punitive damages award is not warranted here"; reducing $750,000 punitive award to $50,000).

B. The $18 Million Punitive Award Is Far Greater Than Necessary To Serve Colorado's Interest In Deterrence.

The punitive award in this case is no more justified on deterrence grounds than it is on retributive ones. Indeed, not a single relevant consideration suggests that any material amount of punitive damages is necessary to accomplish Colorado's interest in deterrence.

1. There is no evidence that Qwest has a history of noncompliance with known statutory requirements.

Punitive damages serve a legitimate deterrent function when the defendant is a recidivist—that is, someone who "has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful." *BMW*, 517 U.S. at 576-77. In such circumstances, "strong medicine" may be warranted "to cure the defendant's disrespect for the law." *Id*. at 577.

But here, there is no basis for concluding that Qwest has ever "disrespect[ed]" the law, much less that "strong medicine" is needed to cure any such disrespect. As we already have discussed, "Blood did not present evidence that Qwest had a statutory or regulatory duty to inspect its poles." *Blood*, 224 P.3d at 314. Given the absence of evidence that any duty existed until it was recognized

as a matter of common law in this very case, Qwest's reliance on pre-climb inspections and its expectation that other users of its poles would take similar precautions does not constitute the kind of disrespect for the law that would justify high punitive damages for purposes of deterrence.[2] As the Supreme Court held in *BMW*, "[i]n the absence of a history of noncompliance with ***known*** statutory requirements, there is no basis for assuming that" a multi-million-dollar punitive award is necessary "to motivate full compliance" with a defendant's common-law duties. 517 U.S. at 584-85 (emphasis added).

To be sure, counsel for Mr. Blood succeeded in putting before the jury the fact that Qwest had not adopted a pole inspection program between the date of the

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[2] The court of appeals majority stated that "Qwest's lack of an inspection program for its 157,000 poles statewide evinced some disregard for the safety of other companies' linemen, as well as of persons on the ground who could be injured by a falling pole." *Blood*, 224 P.3d at 315-16. As the court's use of the modifier "some" reflects, the level of disregard at issue cannot justify a large punishment for purposes of deterrence. After all, "Blood's accident was the first of its kind on a Qwest-owned pole" (*id.*) in over 70 years. And that absence of prior injuries is not mere fortuity. The accident in this case would not have occurred but for a Palsgrafian chain of events. First, all lateral support for the pole was removed. Second, Xcel made the decision to have Mr. Blood climb the pole, rather than ascend in a bucket truck, which was located nearby. Third, Mr. Blood and his supervisors violated Xcel safety rules by not ensuring that the pole was supported before Mr. Blood tried to climb it. There appears to be no evidence that a pole has fallen on its own—threatening injury to "persons on the ground"—in the more than 70 years that Qwest has maintained the poles.

accident and the date of the trial. But that hardly distinguishes this case from *BMW*. There, the company did not begin to disclose that it had performed refinishing on certain vehicles it had sold as "new" until after it had suffered adverse verdicts in two cases (the one before the Court and a prior one in which only compensatory damages had been awarded). *Id.* at 566. The Supreme Court nonetheless was adamant that BMW could not be treated as a recidivist because the duty to disclose had not been clearly established until that very case. *Id*. at 579.

Indeed, it would be unconstitutional to base a defendant's punishment on the fact that it did not immediately adopt new policies after the first accident of its kind in 70 years and instead elected to litigate whether it owed a duty to an employee of another company. "[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (internal quotation marks omitted). That constitutional guarantee is meaningless if a defendant can be punished for breaching a common-law duty in the very case in which the duty is first announced. Recognizing that, several state supreme courts have expressly declined to allow punitive damages ***at all*** in the first case in which a duty is recognized. *See, e.g.*, *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 360 (Ill. 1978); *Murphy v. City of Topeka-Shawnee County Dept. of Labor*

Servs., 630 P.2d 186, 193 (Kan. App. Div. 1981); *Hansen v. Harrah's*, 675 P.2d 394, 397 (Nev. 1984); *Nees v. Hocks*, 536 P.2d 512, 516-17 (Or. 1975); *see also Silberg v. California Life Ins. Co.*, 521 P.2d 1103, 1110 (Cal. 1974). It follows that a defendant's decision not to adopt new policies until after the existence of a duty to do so has been definitively established cannot be the basis for holding that a large punitive award is necessary in order to deter future intransigence.

2. The enormous compensatory damages already fully satisfy Colorado's interest in deterrence.

It is a matter of common sense that, from the defendant's perspective, any obligation to pay money—whether nominally labeled as punitive or compensatory—is going to have a deterrent effect. A large compensatory damages award, and particularly one as large as the award in this case, will have a significant deterrent effect completely independent of any punitive damages award. *See, e.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("Deterrence . . . operates through the mechanism of damages that are compensatory."); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); *Lane v. Hughes Aircraft Co.*, 993 P.2d 388, 400 (Cal. 2000) (Brown, J., concurring) ("[L]arge compensatory damage awards not based on a defendant's illgotten gains have a

strong deterrent and punitive effect in themselves. The magnitude of such awards should be considered in deciding whether and to what extent punitive damages should be imposed."); *see also* 1 DAN B. DOBBS, LAW OF REMEDIES § 3.1, at 282 (2d ed. 1993) ("Even if the defendant is not subject to punitive damages, an ordinary 'compensatory damages' judgment can provide an appropriate incentive to meet the appropriate standard of behavior."); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931) ("[I]f the 'compensatory' damages are large, the defendant is severely admonished without the addition of any punitive damages.").

Accordingly, as a general matter, the greater the amount of compensatory damages, the lower the amount of punitive damages that will be necessary to satisfy the State's interest in deterrence. Indeed, in many cases, the compensatory damages may be high enough by themselves to obviate the need for any non-nominal amount of punitive damages. As the Supreme Court has thus explained, "punitive damages should only be awarded if the defendant's culpability, ***after having paid compensatory damages***, is so reprehensible as to warrant the impositions of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419 (emphasis added).

This is precisely the kind of case to which the Supreme Court's admonition applies. The compensatory damages are, by any measure, enormous. They include a whopping $9,917,600 for lost wages and past and future medical expenses; $1,000,000 for pain and suffering; an additional $10,000,000 to compensate Mr. Blood for his physical impairment and disfigurement; and $750,000 for his wife's loss of consortium. Totaling close to $22 million, these compensatory awards impart every bit as much deterrence as if the jury had awarded $4 million in compensatory damages and the same $18 million in punitive damages.

Moreover, unlike in some cases, the compensatory damages undeniably exceed any conceivable measure of "ill-gotten gain." The court of appeals acknowledged that there was "no direct evidence … that Qwest's lack of a periodic pole inspection program was financially motivated" (*Blood*, 224 P.3d at 316), so this probably should not be treated as a case of ill-gotten gain at all. But accepting for purposes of argument that Qwest saved between $200,000 and $300,000 per year by not implementing a pole inspection program, as the court of appeals posited (*id.*), the total savings over the 44-year period between the time Qwest entered into the JUC with Xcel and the date of the accident would have been, at most, $8.8 million to $13.2 million.

Indeed, the $8.8 million to $13.2 million range may well overstate the actual savings because, for much of the pertinent time period, labor and equipment costs were much lower than they are today, even on an inflation-adjusted basis, and inspections likely could have been less frequent during the earlier part of this period when poles were newer. Either way, though, the nearly $22 million in compensatory damages far outstrip the savings over 44 years of operations, making punitive damages wholly unnecessary for deterrence purposes.[3] *See, e.g.*, *United States v. Bailey*, 288 F. Supp. 2d 1261, 1281 (M.D. Fla. 2003) (setting aside $3 million punitive award "in its entirety" because, among other things, the compensatory damages exceeded the gain to the defendant, making "the imposition of further sanctions to achieve punishment or deterrence" unnecessary), *aff'd*, 419 F.3d 1208 (11th Cir. 2005).

In short, the compensatory damages by themselves create a more than adequate incentive for the company executives overseeing utility pole maintenance to prevent similar accidents from occurring in the future. Compounding the

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[3] In making this point, we do not mean to suggest that it would be constitutional to permit a single plaintiff to divest a defendant of the entirety of its gain over a 44-year period. To the contrary, such an approach would present an unacceptable risk of multiple punishment "for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *State Farm*, 538 U.S. at 423.

substantial compensatory damages with a massive punitive exaction serves only to cause ***over***deterrence—a danger that should not be taken lightly. As the U.S. Court of Appeals for the Seventh Circuit has pointed out, "[e]xcessive [punitive] awards tend to discourage participation in the underlying economic activity, for some level of error by employees is a risk of doing business." *Perez v. Z Frank Oldsmobile, Inc.,* 223 F.3d 617, 622 (7th Cir. 2000); *see also Loitz v. Remington Arms Co.,* 563 N.E.2d 397, 403 (Ill. 1990) ("Threatened with liability for large punitive awards, product manufacturers may curtail their research and development of new and beneficial products."); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 (Tex. 1994) ("The reason the law of torts recognizes compensation, rather than punishment, as its paramount objective is that civil punishment can result in overdeterrence and overcompensation. Every tort involves conduct that the law considers wrong, but punitive damages are proper only in the most exceptional cases."); Litwiller, *supra*, at 344 (when large "punitive awards are assessed against corporate entities … the consequences are borne by the shareholders, the consumers, and ultimately, the economy itself"); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis,* 111 HARV. L. REV. 869, 882-83 & n.29, 907 (1998) (citing examples and authorities); Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law),* 107

YALE L.J. 2071, 2077 & nn.22-23 (1998) (observing that "a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies" and citing examples of the chilling effects of large punitive damages awards).

CONCLUSION

For the forgoing reasons, the Court should either vacate the punitive award in its entirety or reduce it to a nominal amount.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 26th day of April, 2010, a true and accurate copy of the foregoing *Amicus* Brief in Support of Petitioners-Defendants/Third-Party Plaintiffs was filed with the Clerk of the Court and was served by overnight delivery on:

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