UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION	)	MDL No. 2244
	)	Honorable Ed Kinkeade
This Document Relates To:	)	
Andrews v. DePuy Orthopaedics, Inc., et al. No. 3:15-cv-03484-K	)	
Davis v. DePuy Orthopaedics, Inc., et al. No. 3:15-cv-01767-K	)	
Metzler v. DePuy Orthopaedics, Inc., et al. No. 3:12-cv-02066-K	)	
Rodriguez v. DePuy Orthopaedics, Inc., et al. No. 3:13-cv-03938-K	)	
Standerfer v. DePuy Orthopaedics, Inc., et al. No. 3:14-cv-01730-K	)	
Weiser v. DePuy Orthopaedics, Inc., et al. No. 3:13-cv-03631-K	)	

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Following a trial that was rife with inflammatory and inadmissible evidence concerning matters that were wholly irrelevant to the core liability issues in the six plaintiffs' cases, the jury found for each plaintiff and returned an astronomical verdict of $1.04 billion dollars. Both the damages and liability components of this verdict were the product of unfairly prejudicial evidence that should have been excluded from trial under even the most permissive interpretations of the Federal Rules of Evidence. As set forth below, if the Court does not grant defendants' Rule 50(b) motions, it should strike the damages as excessive and order new trials on all issues for several reasons.

First, the Court should grant new trials due to the severe prejudice and confusion that resulted from the consolidation of six disparate product-liability cases. Defendants repeatedly objected prior to trial that burdening the jury with the task of differentiating the individualized and complex issues arising from the claims of six different plaintiffs would result in significant juror confusion and severely prejudice defendants. That is precisely how these cases played out, with the jury applying the same exact figure ($500,000) for each category of compensatory damages for each plaintiff who was implanted with one Pinnacle Ultamet device (as well as for each element of damages for each consortium plaintiff) and another figure ($750,000) for the two plaintiffs who were implanted with two devices. The jury's "fail[ure] to consider each case on its own merits," coupled with the "relatively short deliberation time in comparison with the length of trial and the volumes of evidence presented," demonstrates that "consolidation . . . did not work," and requires new trials. *Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1455-56 (S.D. Ala. 1992).

Second, defendants are also entitled to new trials on all issues because plaintiffs injected an enormous amount of unfairly prejudicial evidence into this trial – all of which should have

been excluded under any fair reading of the Federal Rules of Evidence and which led the jury to decide the case based on emotion and prejudice rather than reason. This evidence included numerous references to unsubstantiated claims that metal-on-metal hips pose a risk of cancer – a risk Mr. Andrews and Ms. Davis told the jury they now fear as a result of having once had metal-on-metal hip implants; repeated references to a highly irrelevant and vulgar email regarding the aSphere head; and incessant references to a deferred prosecution agreement ("DPA") and a related civil settlement payment that had nothing to do with the safety of the Pinnacle Ultamet device – much less the six plaintiffs in these cases. All of these highly improper pieces of evidence were highlighted during plaintiffs' counsel's closing argument, ensuring that they would be fresh in the minds of the jurors when they began deliberating. Because this litany of inadmissible evidence not only prejudiced defendants by generating a billion-dollar damages verdict but also deprived them of a fair trial on the threshold question of liability, defendants are entitled to new trials on all issues.

Third, the compensatory damages verdicts totaling $32,361,648 are undeniably excessive as to each plaintiff because: (1) the individual damages amounts are grossly disproportionate to plaintiffs' claimed injuries; and (2) plaintiffs did not present any evidence supporting certain items of damages. Accordingly, the Court should grant new trials on compensatory damages or reduce the excessive compensatory damages awards.

Fourth, the colossal punitive damages award is also undoubtedly excessive under rudimentary due-process principles. While the Court reduced the punitive damages award from the jury's initial verdict of $1.009 billion to $510,509,667 for the six primary plaintiffs, the reduced amount – which is ***18 times higher*** than the inflated award of compensatory damages – still falls far outside the "single-digit ratio" representing the "outermost limit of the due process

guarantee." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).[1] Indeed, under *State Farm* and its progeny, only a roughly 1:1 ratio between punitive and compensatory damage awards would remotely pass constitutional muster in these cases given the bloated compensatory damages, which themselves are punitive in nature. Accordingly, the Court should, at the very least, reduce the punitive damages award to $28,361,666.17, which would create a constitutionally permissible 1:1 ratio.

ARGUMENT

A court may grant a new trial "based on its appraisal of the fairness of the trial and the reliability of the jury's verdict." *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 612-13 (5th Cir. 1985). Although Rule 59 of the Federal Rules of Civil Procedure does not limit the grounds on which a motion for a new trial may be granted, a new trial is appropriate if the court "finds the verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." *Id.* at 613 (footnotes omitted). "[T]he judge may set aside the verdict even though there is substantial evidence to support it." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2806 (3d ed.).

As detailed below, defendants are entitled to new trials because: (1) the Court's improper consolidation order resulted in juror confusion and prejudice, as illustrated by the identical compensatory damages awards for each of the plaintiffs who were implanted with one Pinnacle Ultamet device and identical awards for the two plaintiffs who were implanted with two such devices; (2) the excessive verdict and findings of liability were the product of highly prejudicial

[1] The defendants' challenge to the punitive damages award is focused on the awards to the six primary plaintiffs. The figures in the punitive damages section of this brief thus refer to the aggregate compensatory and punitive awards to those plaintiffs. Of course, if compensatory damages are reduced as they should be, there would be a corresponding effect on the analysis of the award of punitive damages as well.

evidentiary rulings; and (3) the compensatory damages are excessive. In addition, the exorbitant punitive damages award is plainly unconstitutional, even as reduced by this Court.

I. DEFENDANTS ARE ENTITLED TO NEW TRIALS BECAUSE THEY WERE UNDULY PREJUDICED BY THE IMPROPER CONSOLIDATION OF SIX DISPARATE CASES.

The jury's astronomical $1.04 billion damages verdict – awarded after extremely brief deliberations following a months-long trial and composed of essentially identical compensatory and punitive damages awards to each plaintiff – confirms the extreme prejudice and confusion resulting from the Court's erroneous decision to consolidate these six cases for trial.

Prior to trial, defendants argued that consolidated treatment of the plaintiffs' cases would be grossly unfair and would undermine defendants' due-process rights to a fair trial. (*See* Defs.' Mem. of Law in Supp. of Mot. for Recons. of Consolid. Order at 17-22, Sept. 26, 2016.) Specifically, defendants argued that a consolidated trial would "sacrifice basic fairness" by deluging the jury with a mountain of disparate evidence regarding the plaintiffs' individual causation issues, medical histories, physician decisions and other factors that could not be "compartmental[ized]" from plaintiff to plaintiff. (*Id.* at 18 (quoting *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993), *Minter v. Wells Fargo Bank, N.A.*, No. 07-3442, 2012 WL 1963347, at *1 (D. Md. May 30, 2012)).)

These risks are unavoidable in a complex multi-plaintiff personal injury trial: "despite all the precautionary measures taken by [a] [c]ourt," including instructions and other measures, "the joint trial of . . . a large number of differing cases" will "confuse[] and prejudice[] the jury." *Cain*, 785 F. Supp. at 1455. In such a case, the "jury ma[kes] no effort to follow the court's instructions requiring them to consider all of the evidence and to assess reasonable damages" and instead "simply pick[s] a figure and applie[s] it . . . regardless of the proof." *Alexander v. City of*

Jackson, No. 3:04-cv-614 HTW-LRA, 2008 WL 907658, at *3-4 (S.D. Miss. Mar. 31, 2008) ("This court, on [this] alone, is persuaded that defendants are entitled to a new trial.").

A verdict tainted by the confusion inherent in consolidation is easy to spot. As one court explained in granting a new trial after experimenting with a multi-plaintiff trial, such "confusion and prejudice [were] manifest in the identical damages awarded in the . . . personal injury cases, the relatively short deliberation time as well as in the inflated amounts of many of the damage awards and the lack of evidence supporting some of the damages in several cases." *Cain*, 785 F. Supp. at 1455; *see also Arnold v. E. Air Lines, Inc.*, 712 F.2d 899, 907 (4th Cir. 1983) (ordering new trial where multiple cases were consolidated for trial, resulting in possible "overstate[ment] [of] damages"); *Alexander*, 2008 WL 907658, at *3 (ordering new trial where, among other things, the jury awarded identical amounts for each of four elements of damages). A verdict rendered in these circumstances "amount[s] to the jury throwing up its hands in the face of a torrent of evidence," and is grounds for a new trial. *Malcolm*, 995 F.2d at 352 (reversing and remanding for a new trial where jury "apportioned an equal 9% liability to each defendant" in asbestos case because "there is an unacceptably strong chance that the equal apportionment of liability amounted to the jury throwing up its hands in the face of a torrent of evidence").

Cain is instructive. That case involved ten personal injury and three wrongful death actions arising from the exposure of each plaintiff, or plaintiff's decedent, to asbestos in the workplace. 785 F. Supp. at 1450. In the wake of the jury's plaintiff verdict after a single consolidated trial, the court recognized that "[i]t appears that the jury simply lumped the personal injury plaintiffs into two categories and gave plaintiffs in each category the same amount of compensatory damages no matter what their injuries." *Id.* at 1455. For example, two of the personal injury plaintiffs (who had suffered from cancer and were diagnosed with asbestosis)

both received $100,000 for future medical expenses and $750,000 for pain and suffering. *Id.* The remaining personal injury plaintiffs were each awarded $80,000 for future medical expenses and $500,000 for pain and suffering even though "each presented testimony that they suffered from asbestos-related lung disease of ***varying severity***." *Id.* (emphasis added).

As the court lamented, "[i]t is inconceivable . . . that a properly functioning jury could have awarded the same amount in each case." *Id.* "Further evidence that the jury failed to consider each case on its own merits," the court explained, was "the relatively short deliberation time in comparison with the length of trial and the volumes of evidence presented." *Id.* at 1456. Specifically, after a 15-day trial, the jury only deliberated for approximately six hours, during which the "jury was required to determine liability in each of thirteen cases, compensatory damages as to ten plaintiffs, loss of consortium as to nine plaintiffs, and punitive damages as to each defendant." *Id.* For all of these reasons, "consolidation simply did not work," necessitating a new trial. *Id.*

Similarly, in *Alexander*, four plaintiffs, all firefighters with the City of Jackson, Mississippi, alleged that they were the victims of sexual harassment. 2008 WL 907658, at *1. After a joint trial lasting several weeks, the jury returned a verdict in favor of the plaintiffs, awarding each plaintiff a similar amount of damages. *Id.* at *2. Defendants moved for a new trial on multiple grounds, which the district court granted. "First of all," the court declared, "one does not need a magnifying glass when examining the jury's verdict on damages to see that the jury refused to examine ***each*** category of damages under the credible evidence." *Id.* at *3 (emphasis added). With respect to one of the plaintiffs, the court noted, the jury awarded $28,561.80 each for past physical harm, for future physical harm, for past emotional and mental harm, and for future emotional and mental harm. *Id.* "Down to the exact penny, the jury

provided this same sum for these four different categories." *Id.* "The jury found similarly" for another plaintiff, "settl[ing] on $25,000 as reasonable damages . . . for each of the four categories" of harm. *Id.* at *4. Further, the verdict on damages for the third plaintiff "reflect[ed] more of the same," with the jury awarding that individual $25,084.26 for the four categories of damages. *Id.* And the jury followed the same pattern for the fourth plaintiff, awarding her $30,936.48 "for all four of these categories." *Id.* "Clearly," the court stressed, "the jury made no effort to follow the court's instructions requiring them to consider all of the evidence and to assess reasonable damages as shown by a preponderance of the evidence." *Id.* Instead, the "jury simply picked a figure and applied it to all four categories regardless of the proof." *Id.* "[O]n [this basis] alone," the court was "persuaded that defendants [were] entitled to a new trial." *Id.*

The verdicts in these cases are even more egregious than *Cain* or *Alexander* – indeed, they exhibit the worst qualities of each. As in *Cain*, it "appears that the jury simply lumped the . . . plaintiffs into two categories" – here based on the number of Pinnacle Ultamet devices they received – "and gave plaintiffs in each category the same amount of compensatory damages no matter what their injuries." *Cain*, 785 F. Supp. at 1455. Specifically, the jury used the same exact figure ($500,000) for each category of compensatory damages for each plaintiff who was implanted with one Pinnacle Ultamet device and used another figure ($750,000) for the two plaintiffs who were implanted with two devices. (*See* Court's Charge to the Jury & Jury Verdict ("Verdict") at 76-81, Dec. 1, 2016.) And as in *Alexander*, the jury also awarded each plaintiff the same amount for each of several (here eight) elements of damages.[2]

[2] The jury awarded different amounts for past medical expenses, but these amounts were stipulated by the parties.

"[O]ne does not need a magnifying glass . . . to see that the jury refused to examine each category of damages" or plaintiff separately, despite substantial differences in the relevant facts, *Alexander*, 2008 WL 907658, at *3:

- ***Mr. Andrews***. The jury awarded Mr. Andrews $500,000 for each of the eight categories of harm set forth in the Court's charge to the jury and instructions without any regard to the evidence itself. (*See* Verdict at 76.) For example, while "pain" was the "chief reason" for Mr. Andrews's revision (10/28/16 Trial Tr. 120:23-121:3), his "hip fe[lt] great" and "everything [was] going well" several months after his hip was revised in 2015 (10/31/16 Trial Tr. 156:8-15), rendering the equal amounts of damages for past and future pain utterly illogical. While Mr. Andrews's spouse testified that her husband had some difficulty moving around after the revision surgery (10/31/16 Trial Tr. 215:13-18), there was no evidence of any ***future*** physical impairment. Indeed, as Ms. Andrews testified, she and her husband are able to go out walking together and see their grandchildren play baseball. (*Id.* 222:21-223:7.) Similarly, the jury awarded Mr. Andrews $500,000 for past disfigurement and awarded him the same amount for future disfigurement even though there was no evidence whatsoever of either past or future disfigurement.

- ***Ms. Davis***. The jury similarly awarded Ms. Davis $500,000 for each of the eight categories of harm without any regard to the evidence adduced at trial. (*See* Verdict at 77.) For example, while there is evidence that Ms. Davis suffered pain prior to her revision surgery (11/1/16 Trial Tr. 40:10-41:8), she testified that her current pain level is "[a]bout a 2" (10/31/16 Trial Tr. 265:13-15). In fact, Ms. Davis told the jury that her pain is now ***less*** than it was before she was implanted with the Pinnacle Ultamet hip and her revision surgery. (11/1/16 Trial Tr. 51:25-52:1.) In other words, Ms. Davis herself differentiated between her past and current physical pain. That the jury awarded Ms. Davis the same amount of damages for both categories of harm demonstrates that the jury simply "thr[ew] up its hands in the face of a torrent of evidence." *Malcolm*, 995 F.2d at 352. Further, despite the lack of ***any*** evidence of either past or future physical disfigurement, the jury awarded Ms. Davis $500,000 for past disfigurement and awarded her the same amount for future disfigurement. The jury took a similar approach with regard to the categories of past and future physical impairment. While there was evidence that Ms. Davis could "'only walk about six blocks'" and had other impairments before her revision surgery (10/27/16 Trial Tr. 178:15-22; *see also* 11/1/16 Trial Tr. 11:23-24), plaintiffs failed to come forward with any evidence that Ms. Davis will suffer physical impairment in the future.

- ***Ms. Metzler***. The jury also applied the $500,000 figure "to all [eight] categories" of damages claimed by Ms. Metzler "regardless of the proof." *Alexander*, 2008 WL 907658, at *3-4. (Verdict at 78.) In particular, Ms. Metzler's testimony about her past physical pain and loss of enjoyment of life stands in stark contrast to her testimony on future pain and loss of enjoyment of life. (*Compare* 11/1/16

Trial Tr. 93:1-14 ("And after a while it got so bad it was – the pain increased just about to the same level that it was before I had my original implant. And I started limping again[.]"), *with id.* 98:20-99:3 (Ms. Metzler testifying that she is "doing pretty good" and although she still has "some aches and pains . . . ***that's probably normal for somebody my age***.") (emphasis added).) The jury similarly failed to individually assess Ms. Metzler's damages for past and future physical impairment. Specifically, while Ms. Metzler testified that her husband had to help her up and down the stairs, in the bathroom, and in the shower after her revision (*id.* 97:1-19), she made clear that she can now "walk really well" and has "been able to do the things [she] wanted to do again" "for the most part" (*id.* 98:20-99:3, 112:18-20). Further, just like Ms. Davis, Ms. Metzler did not present any evidence of either past or future physical disfigurement; nonetheless, the jury still proceeded to award Ms. Metzler $500,000 for both categories of damages.

- ***Ms. Rodriguez***. For Ms. Rodriguez, too, the jury "picked a figure" – specifically, $750,000 – and "applied it to all [eight] categories regardless of the proof." *Alexander*, 2008 WL 907658, at *3-4. (Verdict at 79.) For example, the jury awarded Ms. Rodriguez $750,000 for past physical pain and loss of enjoyment of life and the same amount for future physical pain and loss of enjoyment of life even though the evidence shows that she suffered little, if any, pain after being implanted with the Pinnacle Ultamet devices. (10/28/16 Trial Tr. 235:1-236:2 (Dr. Miric testifying that Ms. Rodriguez rated "her current pain at zero out of 10 and satisfaction at 10 out of 10"); *id.* 236:13-20 (Dr. Miric testifying that after doing Ms. Rodriguez's other hip, she recovered from that surgery nicely as well).) While there was evidence that Ms. Rodriguez had "some pain" at a regular follow-up visit before her revision surgery (*id.* 167:23-168:4), Ms. Rodriguez told the jury that she is now doing "pretty good" for the most part – testimony consistent with Dr. Miric's "very optimistic" prognosis for Ms. Rodriguez. (10/31/16 Trial Tr. 18:1-3.) Further, despite there being no evidence of any past or future physical disfigurement, the jury again awarded the same amount of $750,000 for both of these categories of harm. And the jury did exactly the same thing when it came to assessing Ms. Rodriguez's damages for past and future physical impairment and past and future mental suffering and distress.

- ***Ms. Standerfer***. The jury similarly applied the $750,000 figure to all "categories regardless of the proof" for Ms. Standerfer. *Alexander*, 2008 WL 907658, at *3-4. (Verdict at 80.) While Ms. Standerfer testified that she still "ha[s] a lot of pain . . . it's a ***different*** pain" (11/1/16 Trial Tr. 187:9-12 (emphasis added)) – which should preclude an award of ***the same*** damages amount for past and future physical pain and loss of enjoyment of life. Ms. Standerfer's surgeon testified that Ms. Standerfer had some difficulty "standing on her feet all day" at work in the wake of being implanted with the Pinnacle Ultamet devices (*see* 11/2/16 Trial Tr. 159:11-160:19); however, there was no evidence that Ms. Standerfer will be physically impaired ***in the future***. Similarly, the jury awarded Ms. Standerfer $750,000 for past physical disfigurement and the same amount for future physical disfigurement, even though the record contained no evidence to support either category of damages.

- ***Mr. Weiser***. "It appears that the jury simply lumped" Mr. Weiser with the other plaintiffs who were implanted with one Pinnacle Ultamet device, awarding him "the same amount of compensatory damages no matter what [his] injuries." *Cain*, 785 F. Supp. at 1455. And once again, the jury simply "applied" the $500,000 figure without "examin[ing] each category of damages under the credible evidence." *Alexander*, 2008 WL 907658, at *3-4. (Verdict at 81.) For example, the evidence at trial showed that Mr. Weiser initially did well after he was implanted with the Pinnacle Ultamet, but that he was in a "great deal" of pain shortly thereafter. (11/7/16 Trial Tr. 13:10-12; *see also id.* 11/1/16 Trial Tr. 202:25-203:4 (Mr. Weiser testifying that the pain got bad after the surgery).) By contrast, Mr. Weiser told the jury that he "feel[s] pretty good these days" and the "revision worked." (11/1/16 Trial Tr. 208:6-7.) While Mr. Weiser testified that he still does not "have all [of his] physical strength back . . . ***it doesn't hurt anymore***. . . . [t]he ***pain went away***." (*Id.* 208:6-9 (emphases added).) The clear juxtaposition of the evidence of past and future physical pain leaves no doubt that the jury "thr[ew] up its hands," *Malcolm*, 995 F.2d at 352, and "applied [the $500,000 figure] to [both] categories [of harm] regardless of the proof," *Alexander*, 2008 WL 907658, at *4. The jury employed a similar approach in awarding Mr. Weiser damages for past and future physical impairment. Indeed, the evidence of the former category of harm showed that Mr. Weiser had little physical impairment after he was implanted with the Pinnacle Ultamet. Although Mr. Weiser had a wobbly gait after being implanted with the device, he "'could walk a mile if he had to'" and used an elliptical machine for forty minutes at a time with no problems. (11/7/16 Trial Tr. 103:12-105:25.) The evidence at trial further established that any past physical impairment was largely remedied by the revision surgery, allowing him to go back to playing golf, hiking, walking and doing chores. (11/1/16 Trial Tr. 209:7-210:6; *see also* 11/7/16 Trial Tr. 119:7-10 (Dr. Huddleston testifying that Mr. Weiser's current walk "appear[s] normal").) Nonetheless, the jury simply applied the $500,000 figure to both past and future physical impairment.

The jury followed the same approach with respect to loss of consortium damages for Ms. Andrews, Mr. Davis, Mr. Metzler and Ms. Weiser, awarding them each $500,000 for past loss of consortium and $500,000 for future loss of consortium irrespective of the evidence adduced at trial. (*See* Verdict at 83.) Once again, these undifferentiated awards were out of step with the individualized facts underlying each consortium plaintiff's case.

For example, although Ms. Andrews testified that her husband's recovery from his revision surgery was "very concerning" for her and suggested that it had some unspecified impact on their marriage (10/31/16 Trial Tr. 216:17-217:2), there was no evidence of any ***future***

loss of consortium damages. Similarly, although Mr. Davis testified that it was "hard" to care for Ms. Davis and his mother-in-law after the revision surgery (*see* 11/1/16 Trial Tr. 68:10-69:4, 69:16-70:2), there was no evidence of any ***future*** loss of consortium damages. To the contrary, Mr. Davis told the jury that he and his wife currently garden, cook and walk together, rendering the award of $500,000 for future loss of consortium unsupported. (*Id.* 72:19-20, 73:20-25.) Similarly, Mr. Davis testified that he took on "[m]ost" of the household chores ***before*** his wife was even implanted with the Pinnacle Ultamet (*id.* 75:13-16), undermining any basis for loss of consortium damages whatsoever. The jury took the same approach with Mr. Metzler, whose only testimony on loss of consortium was that he sometimes had to lift his wife out of bed when she first returned home from her revision surgery. (*Id.* 140:21-141:5.) And finally, while Ms. Weiser testified that she had to help her husband with showering after Mr. Weiser was revised back in 2013 (*id.* 214:10-14), there was no evidence of any ***future*** loss of consortium damages. In sum, as with the primary plaintiffs, the spouses were awarded the same amount of loss of consortium damages "no matter what" the evidence showed. *Cain*, 785 F. Supp. at 1455.

In short, "[i]t is inconceivable . . . that a properly functioning jury could have awarded the same amount in each case," *id.*, and equally unfathomable that a properly functioning jury could have "applied" the $500,000 and $750,000 figures "to all [eight] categories regardless of the proof." *Alexander*, 2008 WL 907658, at *3-4. Instead, "[i]t is evident . . . that . . . the joint trial . . . of differing cases both confused and prejudiced the jury," as manifested "in the identical damages awarded" for each of the two categories of plaintiffs, "as well as in the inflated amounts of many of the damage awards and the lack of evidence supporting some of the damages in several cases." *Cain*, 785 F. Supp. at 1455. "Further evidence that the jury failed to consider each case on its own merits is the relatively short deliberation time in comparison with the length

of trial and the volumes of evidence presented." *Id.* at 1456. After a ***two-month*** trial, the jury deliberated less than one full day, during which it was "required to determine liability in each of [six] cases, compensatory damages as to [six] plaintiffs, loss of consortium as to [four] plaintiffs, and punitive damages as to each defendant." *Id.* For this reason too, it is clear that "consolidation simply did not work in this instance," *id.*, and the Court should grant new trials.

II. NEW TRIALS ARE WARRANTED IN LIGHT OF THE HIGHLY PREJUDICIAL AND INFLAMMATORY EVIDENCE THAT WAS INAPPROPRIATELY PRESENTED TO THE JURY.

The Court should also grant new trials on all issues because the panoply of inflammatory evidence that was paraded before the jury prejudiced defendants, depriving them of a fair trial on the threshold question of liability.

New trials are required on all issues when there is evidence that the entire verdict was infected by passion and prejudice. *See, e.g.*, *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 282-83 (5th Cir. 1975) ("If the verdict is the result of passion or prejudice, or for any other reason it appears that the jury erred or abused its discretion not only on the issue of damages, but also on the issue of liability, the trial court ***must*** unconditionally order a new trial and cannot give the plaintiff the option to accept a lesser amount.") (emphasis added, citation omitted); *see also Williams v. Slade*, 431 F.2d 605, 609 (5th Cir. 1970) ("'[W]here the damages are excessive and the verdict is the product of passion or prejudice a new trial as to all the issues must be ordered.'") (quoting 6A J. Moore, Federal Practice § 59.06, at 3767); 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2815 (3d ed.) (explaining that when passion or prejudice may have affected the decision of the jury on liability as well as damages, "a complete new trial is required").

Even a single evidentiary ruling that has "seriously affected the fairness of the judicial proceeding" and affected "the outcome of [a] trial" can justify a new trial. *Anderson v. Siemens*

Corp., 335 F.3d 466, 473-75 (5th Cir. 2003) (granting new trial where court found clear error in trial court's admission of hearsay evidence that was the "critical lynchpin holding together [plaintiff's] case"). The same is true with respect to multiple erroneous evidentiary rulings, the "cumulative effect of" which has "prejudiced [a party's] ability to have her case fairly considered on its merits." *Nichols v. Am. Nat'l Ins. Co.*, 154 F.3d 875, 889-90 (8th Cir. 1998) ("'[G]iven the way this trial unfolded,' [the] erroneous evidentiary rulings 'so seriously altered its course' that [plaintiff] was denied a fair and impartial presentation of her case, and the error was therefore not harmless.") (citations omitted).

As elaborated in defendants' prior mistrial motions – both of which are expressly incorporated by reference into this memorandum – the trial of these cases was repeatedly and incurably tainted by irrelevant and prejudicial evidence. (*See generally* Defs.' Mem. of Law in Supp. of Mot. for a Mistrial or in the Alternative to Strike the Test. of Dr. Bernard Morrey, ECF No. 241, Nov. 17, 2016; Defs.' Mem. of Law in Supp. of Mot. for a Mistrial Regarding Improper References to Cancer & Other Systemic Injuries ("Cancer Mistrial Mot."), ECF No. 240, Nov. 17, 2016.) Indeed, in contrast to the typical product-liability suit, in which the product at issue and the plaintiff's alleged injury play the leading roles, the spotlight in these cases was stolen by a broad range of irrelevant and prejudicial evidence, including the following:

- Repeated references to cancer and the ongoing risk of metal poisoning: Plaintiffs' counsel repeatedly prejudiced defendants by introducing irrelevant, speculative and highly inflammatory evidence and argument that plaintiffs face a risk of cancer and death as a result of having once had metal-on-metal hip implants. (*See, e.g.*, 10/26/16 Trial Tr. 115:8-11 (plaintiffs asking Dr. Woods whether he had "seen the e-mails that the jury will have seen about ***taking out references to cancer and other things like this so that it doesn't alarm anybody and any doctors***?") (emphasis added); *id.* 163:6-164:6 (summarizing a supposed documented case of metal-on-metal total hip arthroplasty cobalt cardiac toxicity that has led to patient death and comparing the death of the 69-year-old female to the circumstances of Ms. Metzler, telling the jury that Ms. Metzler's chromium and cobalt numbers were "pretty close" to those of the decedent and editorializing

that it's "kind of scary.").) The prejudicial impact of this evidence was compounded by the testimony of plaintiffs Andrews and Davis, who told the jury that they now fear the risk of cancer and other systemic injuries as a result of having once had metal-on-metal hip implants. (*See, e.g.*, 10/31/16 Trial Tr. 162:4-163:14; 11/1/16 Trial Tr. 25:11-18, 27:20-28:5, 67:20-25.) As explained in defendants' mistrial motion, plaintiffs' repeated references to cancer were speculative, utterly irrelevant and highly prejudicial. (Cancer Mistrial Mot. at 8-12.) Plaintiffs' counsel reminded the jurors about this prejudicial evidence during closing statements, accusing defendants of "edit[ing] out the cancer information" from the technical monograph. (11/30/16 Trial Tr. 130:1-2 (emphasizing that Dr. Morrey is "the one who said . . . you worry about the cancer in the future because nobody knows."); *id.* 218:6-9 ("And when the FDA puts on its glasses, it says, wait, wait, wait, you've got to tell these people this stuff could cause cancer, we don't know.").)

- RCH email: Plaintiffs were permitted to present an irrelevant and prejudicial email regarding the aSphere head from Steve Corbett to Paul Berman. In the email, Mr. Corbett states that "'[w]e should definitely shave an rch off these heads and charge more before we understand what drives free metal ions in the bloodstream, wear versus corrosion.'" (10/5/16 Trial Tr. 191:23-192:1.) Plaintiffs' counsel told the jury that "when [Mr. Corbett] talks about shaving an rch off, that is a pejorative vulgarity for basically nothing of any count at all. Without doing the entire abbreviation, it's a red C hair." (*Id.* 192:5-8.) However, as explained in defendants' omnibus motion in limine, none of the plaintiffs – with the exception of plaintiff Davis – was implanted with an aSphere device, rendering aSphere-related evidence utterly irrelevant as to those plaintiffs. (*See* Defs.' Omnibus Mot. *in Limine* at 76-78, Sept. 16, 2016 (citing *Hagen v. Richardson-Merrell, Inc.*, 697 F. Supp. 334, 340 (N.D. Ill. 1988)) (the issue in a product liability suit involving a prescription drug or device is the defendant's "knowledge of any established [risks] associated with [the drug or device] and not its marketing of any other products").) Further, even as to Ms. Davis, plaintiffs did not present any evidence that the aSphere had anything to do with her claimed injuries. And in any event, even if there were some marginal probative value, it was vastly outweighed by the undue prejudice stemming from the vulgar nature of the email under Rule 403. At a minimum, the exhibit should have been redacted to excise the profane term, which was unnecessary for the jury to understand the context of the conversation between the two employees. Plaintiffs' counsel reminded the jury of this profane email during closing statement, which had an unmistakable impact on the jury's verdict. (11/30/16 Trial Tr. 118:10-11 ("You look at those documents, you look at the offensive ones, the RCH email[.]"), 214:14-16 ("I referenced the RCH email[.]").) Indeed, ***the jury specifically asked for – and received – this very exhibit*** during its brief deliberations. (12/1/16 Trial Tr. 4:18-20.)

- References to a deferred prosecution agreement: Plaintiffs also introduced evidence of a DPA between DePuy and the government to resolve government allegations that DePuy inappropriately compensated doctors, even though no

admission of liability was made and no charges were ever pursued (much less proven) in court, in clear violation of Rules 410, 408, 403 and 401 of the Federal Rules of Evidence, among other things. (*See, e.g.*, 10/3/16 Trial Tr. 36:8-9; 10/5/16 Trial Tr. 162:17-19, 166:2-17; 10/11/16 Trial Tr. 178:23-179:4; 11/17/16 Trial Tr. 104:4-9, 104:25-105:3.) In fact, the related civil settlement agreement, in which DePuy agreed to pay $84 million to resolve alleged overpayments by Medicare, specifically stated that "DePuy denies that it engaged in any wrongdoing and specifically denies that any of the payments, services, or remunerations were illegal, improper, or resulted in any false or fraudulent claims." (Settlement Agreement § II.E, https://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/DePuyCivilSettlement.pdf.)

- Despite this clear language, plaintiffs' counsel referred to the payment as a "fine" imposed for the payment of "bribes" to doctors, which the Court apparently permitted based on the erroneous conclusion that it "absolutely is not a civil settlement. It's criminal, period." (10/5/16 Trial Tr. 162:17-19; *see also* 10/3/16 Trial Tr. 36:8-10, 62:23-25.) Plaintiffs' counsel continued to highlight the DPA and the civil settlement payment in his closing statement, telling the jury that "DePuy used outrageous payments and bribes to doctors" and that the Company "paid $84 million for allegedly violating the kickback laws with doctors[.]" (11/30/16 Trial Tr. 114:14-17; *see also id.* 221:1-4 ("They got hit for an 84 million dollar payment. Because the Department of Justice was after them under the anti-kickback laws for kickbacks to doctors, for an illegal scheme to these doctors.").) Indeed, plaintiffs' counsel emphasized the $84 million settlement no fewer than ***five times*** during the closing statement, going so far as to describe "84 million bucks [as] headache money" for DePuy. (*see, e.g.*, *id.* 114:14-21, 132:10-13, 145:8-12.) The impact on the jury was unmistakable: it awarded each plaintiff $84 million in punitive damages against each defendant a day later. After the verdict came back, even plaintiffs' own counsel "credited the win with evidence that showed Johnson & Johnson paid kickbacks to surgeons to promote the device[.]" Amanda Bronstad, *Johnson & Johnson Hit With $1 Billion Verdict in Hip Implant Case*, National Law Journal, Dec. 2, 2016, http://www.americanlawyer.com/id=1202773739047/Johnson--Johnson-Hit-With-1-Billion-Verdict-in-Hip-Implant-Case?slreturn=20170024110625.

All of the improper pieces of evidence and argument chronicled above were reiterated during plaintiffs' counsel's closing statement when it "would have been somewhat fresh in the jurors' minds" and most susceptible to depriving defendants of a fair trial. *Hollybrook Cottonseed Processing, L.L.C. v. Am. Guar. & Liab. Ins. Co.*, 772 F.3d 1031, 1034 (5th Cir. 2014) (affirming district court's order of a new trial where "the improper testimony about the settlement offer came shortly before the case was submitted to the jury, and it therefore would

have been somewhat fresh in the jurors' minds"). And it is clear that this improper evidence and argument had the intended effect on the jury, generating a gargantuan $1.04 billion verdict, that the Court itself recognized had to be reduced because it so far exceeded any reasonable constitutional limit. The size of the verdict highlights the impact of plaintiffs' improper evidence, further demonstrating that defendants were deprived of a fair trial on the threshold question of liability.

For this reason too, the Court should grant defendants new trials on all issues.

III. DEFENDANTS ARE ENTITLED TO NEW DAMAGES TRIALS BECAUSE THE COMPENSATORY DAMAGES ARE EXCESSIVE.

Even if the Court does not grant new trials on all issues, it should at least grant new trials on damages. Defendants are entitled to new trials on compensatory damages for at least two independent reasons: (1) the awards of compensatory damages are grossly excessive; and (2) plaintiffs failed to submit any evidence to sustain the jury's award of several categories of compensatory damages. Moreover, "the general rule [is] that when a new trial is granted on compensatory damages, 'it must at the same time be granted on the issue of punitive damages.'" *Poullard v. Turner*, 298 F.3d 421, 424 (5th Cir. 2002) (citation omitted).

A. Defendants Are Entitled To New Trials Unless Plaintiffs Agree To A Remittitur Of The Compensatory Damages Awards.

A reviewing court must vacate a damages award as excessive as a matter of law where the award "'"clearly exceed[s] th[e] amount that ***any*** reasonable [person] could feel the claimant is entitled to."'" *Osburn v. Anchor Labs., Inc.*, 825 F.2d 908, 918-19 (5th Cir. 1987) (citation omitted); *see also, e.g.*, *Chacon v. Copeland*, 103 F. Supp. 3d 827, 835 (W.D. Tex. 2015) (explaining that compensatory award should be vacated where it "exceeds 'any rational appraisal or estimate of the damages that could be based upon the evidence before the jury'") (citation omitted). If the court deems the damages excessive, it "can either order a new trial on damages

or allow plaintiffs the option of avoiding such a new trial by agreeing to a remittitur of the excessive portion of the award." *Osburn*, 825 F.2d at 919. As to remittitur, the Fifth Circuit "follows the maximum recovery rule, according to which remittitur can reduce a damages award only to 'the maximum amount the jury could properly have awarded.'" *Id.* (citation omitted).

To determine the proper amount for purposes of remittitur, a court should "look at cases in the recent past that have properly applied" the relevant state's damages law to "find the ***greatest*** amount that they have awarded for similar injuries." *Seidman v. Am. Airlines, Inc.*, 923 F.2d 1134, 1141 (5th Cir. 1991) (emphasis added). Here, even a cursory examination of California personal injury cases involving non-fatal injuries demonstrates that the jury's multi-million dollar damages awards are excessive under California law.

In *Bigler-Engler v. Breg, Inc.*, for instance, the plaintiff sued the manufacturer of a medical device that she used for rehabilitation after undergoing knee surgery. No. D063556, 2017 WL 65411, at *1 (Cal. Ct. App. Jan. 6, 2017). The device caused the plaintiff substantial pain – to the point where she felt like her knee "'was going to explode.'" *Id.* at *2. Use of the device also produced a "large black area of dead tissue covering much of the upper half of her knee," which forced the plaintiff to undergo ten procedures to cure, each of which was "very painful." *Id.* at *4. Even then, the plaintiff was left with a large scar on her knee, which she attempted to remedy by undergoing two scar-reduction surgeries, after each of which she was forced to immobilize her knee for six weeks. *Id.* At the time of trial, she still had a significant scar on her knee, the area surrounding the scar was "hypersensitive and painful to the touch," and the plaintiff felt "numbness and a deep itching sensation that she could not scratch." *Id.* at *5. Not only that, but the plaintiff was hindered in her recreational pursuits; she had weakness and pain while kneeling, could not continue to ride horses competitively, had difficulty dancing, and

experienced problems riding a bike while with her leashed dog. *Id.* The jury awarded the plaintiff a little over $5.1 million in noneconomic compensatory damages. *Id.* at *1.

The Court of Appeal reversed, concluding that the compensatory award was excessive. *Id.* at *18. It first acknowledged that the plaintiff had "suffered a serious injury" characterized by "persistent" and "substantial" pain, "extremely painful" follow-up surgeries, a "disfiguring" scar, and "highly compromised" daily activities. *Id.* at *21. Nevertheless, the court found that an award of $1.3 million for noneconomic damages represented the "maximum amount supported by the current record." *Id.* at *18, *23. In support, the court cited cases in which the plaintiffs suffered "horrific injuries" yet received damages lower than those awarded by the jury to the plaintiff. *Id.* at *22. The court also highlighted the "influence[] [of] improper factors" on the jury's damages award, including reference to extraneous evidence and "episodes of overheated, emotional rhetoric." *Id.*

Similarly, in *Collins v. Union Pacific Railroad Co.*, the plaintiff was injured when a block fell from a crane onto his head. 207 Cal. App. 4th 867, 872 (2012). The plaintiff suffered a fractured jaw, "extensive facial laceration," cerebral bleeding, "multiple fractures of the face near the nose with mouth displacement," swelling in the sinuses and base of the skull, a punctured lung, and soft tissue throat swelling that required a tracheostomy. *Id.* at 873-74. He also was forced to undergo a series of surgeries to rebuild his jaw (with bone grafts taken from his hip) and suffered from cognitive deficits after the accident. *Id.* at 874. In the four months after the accident, the plaintiff "was in pain and confused, and questioned his ability to plan or make decisions as he could not track exactly what was going on when he gave directions." *Id.* The jury found the operator of the crane negligent at trial and awarded the plaintiff over $3.9 million in damages, $3.5 million of which included damages for past and future pain and

suffering. *Id.* at 874-75. The trial court ordered remittitur to less than $2.6 million in damages, and the appellate court affirmed. *Id.* at 882-84. While the appellate court noted the severity of the plaintiff's injuries, it nevertheless held that "the award of noneconomic damages was excessive." *Id.* at 884; *cf. also, e.g.*, *Ford v. Polaris Indus., Inc.*, 139 Cal. App. 4th 755, 758, 765 (2006) (award of $3.65 million in damages to plaintiff, including $3.2 million in noneconomic damages, where plaintiff suffered catastrophic injuries when she fell off of a defective jet ski and came in contact with a "high-pressure stream of water that tore apart her internal organs" and, as a result of her injuries, no longer could engage in recreational activities, lacked control over her bowels, and suffered from numbness in her lower right torso and leg).

The decisions in *Bigler-Engler* and *Collins* are consistent with the practice of courts within the Fifth Circuit, which have repeatedly scrutinized multi-million-dollar compensatory awards. *See, e.g.*, *Lebron v. United States*, 279 F.3d 321, 324, 328 (5th Cir. 2002) (reducing total noneconomic damages award from $9 million to $1.25 million in case involving "severe, permanent brain damage" caused by the negligent delivery of a baby); *Osburn*, 825 F.2d at 920 (reducing noneconomic damages award from $2 million to $1.5 million where product caused plaintiff to contract leukemia at the age of 42 and there was "no doubt that [plaintiff] has suffered and will continue to suffer until his death significant . . . mental anguish as a result of the knowledge that his illness is terminal" and would "undoubtedly suffer pain as the disease progresses"); *Sosa v. M/V Lago Izabal*, 736 F.2d 1028, 1035 (5th Cir. 1984) (holding that $10 million noneconomic damages award was excessive for seaman who was burned on more than 80 percent of his body and suggesting that $1 million "approaches the maximum amount"); *Barnett v. Merck & Co.*, 523 F. Supp. 2d 471, 475 & n.5 (E.D. La. 2007) (ordering new trial unless plaintiff, who suffered heart attack from use of a pharmaceutical drug, agreed to a

remittitur of, *inter alia*, $600,000 in compensatory damages because no reasonable jury could have found that plaintiff's losses totaled $50 million where he "returned to certain of his beloved recreations").

The jury's noneconomic damages awards here – ranging from $4 million to $6 million – substantially outstrip those deemed appropriate in *Bigler-Engler* and *Collins*. Moreover, plaintiffs' injuries are no more dire than those experienced by the plaintiff in *Bigler-Engler*, whose knee felt like it was "'going to explode,'" and who had limitations in her daily activities; underwent nine "very painful" surgeries; and suffered from a disfiguring scar, hypersensitivity in the knee, numbness, and a "deep itching sensation," 2017 WL 65411, at *2-5; and less serious than those of the plaintiff in *Collins*, who suffered "severe" injuries to his head and neck and suffered from cognitive impairment, 207 Cal. App. 4th at 882-84. The claimed injuries are also substantially less severe than those of the plaintiff in *Ford*, whose internal organs were "tor[n] apart," and who lost control over her bowels, 139 Cal. App. 4th at 765, but received an award of only $3.65 million. As previously discussed in connection with defendant's consolidation arguments, the injuries sustained by plaintiffs in these cases were primarily past physical pain, past physical impairment, past mental suffering and past loss of consortium.

Because the bloated compensatory damages awards """clearly exceed[ed] th[e] amount that ***any*** reasonable [person] could feel the claimant[s] [are] entitled to,""" *Osburn*, 825 F.2d at 918-19 (citations omitted), the Court should grant new trials on damages unless plaintiffs accept a reasonable remittitur of the compensatory portion of the verdict.

B. <u>There Is No Evidence To Support The Awards Of Several Categories Of Compensatory Damages.</u>

The Court should also set aside the specific compensatory damage awards because plaintiffs presented no evidence at trial to sustain many of the elements of damages, and the

identical nature of the many elements of damages indicates that the jury simply assigned a massive award to each plaintiff and then formulaically worked backward to fill in the special verdict form.

A plaintiff, of course, must support each element of damages with sufficient evidence, and "[d]amages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery." *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 530-31 (1996) (citation omitted) (noting that "[a] plaintiff seeking to recover for a future loss must show with reasonable certainty that the loss actually would have accrued"). Here, however, plaintiffs submitted ***no evidence*** to support a number of the jury's damages awards, even though they insisted that the Court include those categories in the verdict form:

- Past disfigurement: Plaintiffs presented no evidence to support recovery by any of the plaintiffs for past disfigurement. Although Mr. Andrews suggested that his revision surgery left him with a scar (10/31/16 Trial Tr. 100:2-4), the surgeon simply "re-incised" Mr. Andrews's "'previous surgical incision'" to perform the procedure. (10/28/16 Trial Tr. 57:1-9.) In other words, the scar complained of by Mr. Andrews was the result of the initial surgery, ***not*** the revision surgery. No other plaintiff presented any evidence of disfigurement.

- Past mental suffering, inconvenience, grief, anxiety, humiliation, and/or emotional distress: Plaintiffs presented no evidence to support recovery by Ms. Rodriguez for past emotional distress.

- Future disfigurement: There was no evidence to support recovery by any of the plaintiffs for future disfigurement, either through medical records or testimony or through the testimony of the plaintiffs or their spouses.

- Future mental suffering, inconvenience, grief, anxiety, humiliation, and/or emotional distress: Plaintiffs presented no evidence to support recovery by Ms. Rodriguez, Ms. Standerfer, and Mr. Weiser for future mental suffering.

- Future physical impairment: Plaintiffs presented no evidence to support recovery of a substantial award by Ms. Davis, Ms. Metzler, Ms. Rodriguez, Ms. Standerfer, and Mr. Weiser for future physical impairment. To the contrary, the little evidence presented on this score establishes that these plaintiffs will not be physically impaired (or only minimally impaired) in the future. (*See, e.g.*, 11/1/16 Trial Tr. 97:20-99:3, 112:18-20 (Ms. Metzler testifying that she can now "walk really well" and has "been able to do the things [she] wanted to do again" "for the most part").)

- Future physical pain and loss of enjoyment of life: Plaintiffs presented no evidence to support recovery by Mr. Weiser for future physical pain. Indeed, the evidence again is to the contrary. (*See* 11/1/16 Trial Tr. 208:6-9 (testifying that while Mr. Weiser still does "not have all [of his] physical strength back . . . it doesn't hurt anymore . . . [t]he pain ***went away***") (emphasis added).)

- Future loss of consortium: Plaintiffs presented no evidence of future loss of consortium damages for Ms. Andrews, Mr. Metzler and Ms. Weiser. And the little evidence that plaintiffs did present on this topic shows that Mr. Davis will not suffer any loss of consortium in the future. (*See* 11/1/16 Trial Tr. 72:19-20, 73:20-25 (testifying that he and his wife currently garden, cook and walk together).)

As this dearth of supporting evidence makes clear, the awards of $500,000 or $750,000 for some of these elements are entirely unsustainable. Indeed, as discussed above in connection with the consolidation issue, it is apparent that the jury simply decided on a fixed amount to award each plaintiff, either in total or on a per-element basis, and then proceeded to fill in the blanks on the verdict form without regard to what the evidence actually showed as to each element. The law forbids this approach. While juries are "given a measure of discretion in finding damages, that discretion is limited," and a jury may not "simply pick a number and put it in the blank." *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996); *see also Lane v. Martinez*, 494 S.W.3d 339, 345-51 (Tex. App. 2015) (reversing damages award where the jury "picked a number at random and just filled in the blanks" to achieve a lump sum of $1 million). And because this forbidden approach was plainly the basis on which ***all*** elements of damages were calculated by the jury, ***none*** of them can be upheld, regardless what the evidence shows.

Accordingly, the compensatory awards lack evidentiary support or, at a minimum, far exceed the minimal evidence offered by plaintiffs, and the identical nature of the awards for the separate elements of damages indicates that the jury did not make calculations based on the evidence. The Court should vacate each of these awards of compensatory damages, which total $16,000,000, and order new trials on damages. *See Westside*, 42 Cal. App. 4th at 530-31.

IV. THE PUNITIVE DAMAGES AWARD IS EXCESSIVE AND MUST BE REDUCED.

The Court should reduce the jury's award of punitive damages – which (even after a sua sponte reduction in the award by this Court) totals a staggering $510,509,667.06 and is 18 times higher than the already bloated award of compensatory damages – because the award is unconstitutionally excessive.[3]

"Punitive damages pose an acute danger of arbitrary deprivation of property," and so "[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 421, 432 (1994). The Supreme Court has identified three "guideposts" that a reviewing court should consider when evaluating whether an award of punitive damages is excessive in violation of due process: (1) "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award"; (2) "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases"; and (3) "the degree of reprehensibility of the defendant's misconduct." *State Farm*, 538 U.S. at 418; *see also, e.g.*, *Lincoln v. Case*, 340 F.3d 283, 292 (5th Cir. 2003) (restating three-part test). These guideposts support reduction of the award here.

A. The Ratio Between Punitive And Compensatory Damages Should Not Exceed 1:1.

First, the initial guidepost – the ratio between the punitive damages award and the "actual harm inflicted on the plaintiff," which is "perhaps [the] most commonly cited indicium of

[3] Defendants' challenge to the punitive damages award is focused on the awards to the six primary plaintiffs. The figures in this section thus refer to the aggregate compensatory and punitive awards to those plaintiffs. Of course, if the consortium awards are reduced as they should be in some of these cases, the resulting disparity between the punitive awards to those plaintiffs and the underlying compensatory awards (if any remain) might also become unconstitutionally excessive, and must therefore be examined applying the same principles and reduced accordingly. Defendants reserve the right to brief these issues further should a remittitur be granted on the consortium awards.

an unreasonable or excessive punitive damages award," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996) – is dispositive. When analyzing the ratio guidepost, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426. "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425; *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514-15 (2008) ("In *State Farm*, we said that a single-digit maximum is appropriate in all but the most exceptional of cases.").

Furthermore, where, as here, "compensatory damages are substantial, then a lesser ratio, perhaps ***only equal to compensatory damages***, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425 (emphasis added). A lower ratio also is required when compensatory damages "likely were based on a component which was duplicated in the punitive award," including elements captured by noneconomic damages. *See id.* at 426. Notably, if an award fails to withstand scrutiny under the ratio guidepost, it cannot be sustained merely because the defendant is a wealthy corporation. *See id.* at 427.

Applying this guidepost, courts have vacated punitive damages awards and concluded that a roughly 1:1 ratio between punitive and compensatory damage awards is the constitutional limit when the compensatory damage award is substantial. In *State Farm*, for instance, the jury awarded the plaintiffs $2.6 million in compensatory damages and $145 million in punitive damages. *Id.* at 415. The Supreme Court struck down the punitive award as an "irrational and arbitrary deprivation of the property of the defendant." *Id.* at 429. In so doing, it stressed that the compensatory damages were "substantial" and noted that they also included a "punitive

element." *Id.* The Court determined that a "punitive damages award at or near the amount of compensatory damages" "likely" represented the constitutional limit. *Id.*

Similarly, the jury in *Lompe v. Sunridge Partners, LLC* awarded the plaintiff $1.95 million in compensatory damages and $22.5 million in punitive damages for her claims against one of the defendants arising out of her exposure to carbon monoxide from a malfunctioning furnace in her apartment. 818 F.3d 1041, 1068-69 (10th Cir. 2016). Despite evidence that the defendant caused the plaintiff physical harm in the form of "injuries consistent with [carbon monoxide] poisoning" and that the plaintiff might have "lingering physical injuries for many years, possibly the rest of her life," the Tenth Circuit deemed the $2.7 million compensatory award "substantial" and found the 11.5:1 ratio between the punitive and compensatory awards "constitutionally suspect." *Id.* at 1065, 1070. The court reduced the award to a 1:1 ratio in light of, among other factors, the substantiality of the compensatory award and the fact that it included a $1 million award for emotional distress, which might have incorporated an element duplicated in the punitive award. *Id.* at 1075.

Other courts have similarly found that the Constitution requires reduction of punitive damages to create a low single-digit ratio with substantial compensatory awards. *See, e.g.*, *S. Union Co. v. Irvin*, 563 F.3d 788, 792 (9th Cir. 2008) (finding 10:1 ratio excessive and reducing punitive award to create 3:1 ratio); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (finding roughly 4:1 ratio excessive and reducing punitive award to create a ratio of "approximately 1:1" even where conduct was "highly reprehensible"); *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 366-67 (6th Cir. 2005) (concluding that 6.6:1 ratio was "alarming, especially considering the fact that much of the [$2.6 million] compensatory damage award must be attributable to [plaintiff's] pain and suffering" and ordering a new trial on

punitive damages or remittitur); *Conseco Fin. Serv. Corp. v. N. Am. Mortg. Co.*, 381 F.3d 811, 825 (8th Cir. 2004) (reducing punitive damages award from $18 million to $7 million and noting that the $3.5 million compensatory award was "large"); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 488-90 (6th Cir. 2007) (concluding that a "ratio of closer to 1:1 or 2:1 is all that due process can tolerate in this case" where, among other things, the compensatory award of $366,939 was "very large" and "included a punitive element").

The same conclusion follows here. Notably, the Court has already recognized the excessiveness of the awards, reducing them sua sponte in final judgments as to the six primary plaintiffs: Mr. Andrews – $37,064,922.66 against each defendant; Ms. Davis – $36,724,713.93 against each defendant; Ms. Metzler – $36,225,410.67 against each defendant; Ms. Rodriguez – $54,552,739.05 against each defendant; Ms. Standerfer – $54,409,233.87 against each defendant; and Mr. Weiser – $36,277,813.35 against each defendant. (*See, e.g.*, *Andrews* Final J., ECF No. 294; *Davis* Final J., ECF No. 289; *Metzler* Final J., ECF No. 285; *Rodriguez* Final J., ECF No. 284; *Standerfer* Final J., ECF No. 281; *Weiser* Final J., ECF No. 283.)

But these reductions did not go far enough. Although the Court apparently intended to impose a 9:1 ratio of punitive damages to compensatory damages (*see, e.g.*, *Andrews* Final J. at 2 (acknowledging that "'[f]ew awards exceeding a single-digit ratio . . . to a significant degree, will satisfy due process'") (quoting *State Farm*, 538 U.S. at 425)), defendants respectfully submit that it erred in two respects.

As a threshold matter, the resulting ratio was 18:1, not 9:1, because each punitive award was entered twice – once against J&J, and once against DePuy – even though there is only one underlying compensatory award, to be divided between the defendants. Under the Court's approach, it appears that the ratio was derived using the full compensatory award as the

denominator for each defendant, but only half of the total punitive award for that plaintiff (i.e., the portion attributable to each defendant) as the numerator. As other courts have noted, this methodology is flawed because it "assumes an impossibility" – "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) (emphases added). Instead, the Court should have "divide[d] the individual punitive damages awards by the individual *pro rata* shares of the actual damages." *Id.* Under the Court's approach, even the reduced punitive award is ***eighteen times*** larger than the compensatory award and thus well in excess of the outermost limits of due process as defined in the portion of *State Farm* on which this Court relied in entering final judgments.

In any event, and more fundamentally, even an appropriately calculated 9:1 ratio would be well beyond what due process permits in these cases, which involve substantial compensatory damages awards that clearly include an overwhelming punitive element. For starters, the jury's award of compensatory damages – whether viewed in the aggregate or broken down per primary plaintiff – manifestly ***is*** substantial. In *State Farm*, for example, the Supreme Court concluded that a $2.6 million compensatory award was substantial. 538 U.S. at 429. And as the Tenth Circuit recently stated more generally, "compensatory damages have often been considered 'substantial' when they are over $1,000,000." *Lompe*, 818 F.3d at 1069. Here, the compensatory awards – which range from $4 million to more than $6 million – are almost double the award deemed substantial in *State Farm* and far greater than the $1 million threshold for substantiality identified in *Lompe*.

Furthermore, almost the entirety of the compensatory awards in these cases includes a punitive element likely duplicated in the grossly excessive punitive awards. Indeed, $28,000,000

out of the $28,361,666.17 aggregate compensatory award – a whopping 98.7 percent – compensated plaintiffs for noneconomic injuries. This type of allocation also weighs heavily in favor of a substantial reduction of the punitive award. *See, e.g.*, *State Farm*, 538 U.S. at 429; *Lompe*, 818 F.3d at 1075.

Given the extremely large compensatory award, which consists almost entirely of noneconomic damages, the Court should reduce the total punitive award to create a 1:1 ratio as compared to the compensatory awards.[4] Such a ruling would be consistent with the Supreme Court's admonition that a punitive award roughly equal to the compensatory award "'reach[es] the outermost limit of the due process guarantee'" when the compensatory award is "'substantial.'" *Exxon*, 554 U.S. at 515 (citation omitted); *see also, e.g.*, *Lompe*, 818 F.3d at 1075.

B. There Are No Legislative Penalties That Support Any Award Of Punitive Damages.

Second, there are no comparable civil penalties because there are no readily identifiable California statutes that provide for monetary penalties for conduct similar to that found by the jury in these cases. Thus, this factor does not affect the analysis. *See, e.g.*, *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 189 (3d Cir. 2007) (reducing punitive award based on the reprehensibility and ratio guideposts but declining to consider the civil-penalties guidepost because it was "not instructive here").

Plaintiffs might attempt to argue that the settlement payment made in connection with the DPA – which never should have been admitted at trial – supports the punitive award as a

[4] For the reasons set forth above, the compensatory award should itself be significantly reduced, and then the punitive award should be reduced to an amount that does not exceed the reduced compensatory award. At a minimum, even if the Court does not reduce the compensatory award, it should reduce the total punitive award against all defendants to $28,361,666.17.

comparable civil "penalty." But this argument fails for multiple reasons. As a threshold matter, the payment reflected a civil settlement without admission of any of the alleged facts, meaning that it is not a "penalty" in the relevant sense and thus has no bearing here. Moreover, the civil settlement did not address alleged design defects or injuries to patients but instead concerned alleged overpayments by Medicare for products it purchased from DePuy as a result of allegedly improper payments to surgeons. And it was not even limited to hip replacement products, let alone the Pinnacle Ultamet specifically, but instead encompassed all hip and knee replacement products. Thus, the amount of the payment has no pertinence to these cases for punitive damages purposes (and would be significantly overinclusive even if it could somehow be construed to cover some of the same conduct at issue in these cases). *See, e.g.*, *Anderson v. Boeing Co.*, No. 02-CV-196-CVE-FHM, 2005 WL 6011245, at *2-3 (N.D. Okla. Aug. 2, 2005) (concluding that evidence of other fines imposed on the defendant or other companies in other matters was not relevant to punitive damages under controlling due-process principles and excluding the evidence). Finally, the DPA is not a proper reference because the settlement amount is not a ***legislative*** penalty. Supreme Court precedent is predicated on the notion that a court should "accord 'substantial deference' to ***legislative*** judgments concerning appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583 (emphasis added, citation omitted). The reference to ***legislative*** guideposts – which are fixed and discernible ex ante, unlike negotiated civil settlements with a U.S. Attorney – is critical because the issue at the heart of the Supreme Court's due-process cases is that defendants be provided with "fair notice" to a defendant that its conduct might make it "subject . . . to a multimillion dollar penalty." *Id.* at 584. Here, the $84 million settlement payment says nothing about the California Legislature's view of the proper penalty in cases like these. Rather, it represents, at most, a fact-specific

resolution of distinct allegations concerning the amount allegedly overpaid by Medicare based on the number of joint replacement products purchased and the price of those products (not costs or harm attributable to allegedly defective medical devices). It thus was incapable of providing the requisite "fair notice" to defendants that they were placing themselves at risk of a $500-plus million penalty through the conduct implicated in these cases.

Moreover, even if consideration of the DPA and related civil settlement payment were relevant to this issue – which defendants vigorously dispute – it would weigh ***against*** an award of punitive damages in these cases. Because defendants have already satisfied any payment obligations with respect to the allegedly improper payments, using the settlement payment to ratchet upward the punitive damages award in these cases would raise the specter of impermissibly imposing "multiple punitive damages awards for the same conduct." *See State Farm*, 538 U.S. at 423; *see also Gore*, 517 U.S. at 593 (Breyer, J., concurring) (noting the risk of punitive awards that "double count" and the corresponding problem of over-deterrence).

C. The Reprehensibility Guidepost Further Supports A Substantial Reduction In Punitive Damages.

Third, the reprehensibility guidepost also supports reduction. As a threshold matter, even a finding of extreme reprehensibility could not possibly support anything remotely close to even the reduced $500 million punitive award in these cases. In *Boerner*, for instance, the jury awarded the plaintiff $4.025 million in compensatory damages and $15 million in punitive damages for claims against a tobacco manufacturer. 394 F.3d at 598. On appeal, the Eighth Circuit ordered reduction of the punitive award to $5 million. *Id.* at 603. Even though the court concluded that the defendant's conduct was "highly reprehensible" and involved a "callous disregard for the adverse health consequences of smoking," the court found that a ratio of roughly 1:1 reached the constitutional limit, in light of the "substantial compensatory damages

award." *Id.* at 602-03. Likewise, the Tenth Circuit in *Lompe* confronted similar allegations of misconduct that resulted in physical harm to the plaintiff and the potential for "lingering physical injuries for many years, possibly the rest of her life." 818 F.3d at 1065. Despite the apparent high degree of reprehensibility of the defendant's conduct in that case, the Tenth Circuit still reduced the punitive award to create a 1:1 ratio with the $2.7 million compensatory award. *Id.* at 1075. As a result, there is no finding with respect to reprehensibility that could possibly justify the award in these cases. Indeed, even a finding of high reprehensibility could not justify a ratio of higher than 1:1 in light of the substantial compensatory award.[5]

The punitive award – even as reduced by the Court – is all the more excessive in light of the reality that this is not a case involving a high degree of reprehensibility. Under *State Farm*, courts should determine the reprehensibility of a defendant's conduct by considering whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to – or reckless disregard for – the health or safety of others; (3) the target of the conduct was financially vulnerable; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. 538 U.S. at 419. As set forth more fully below, the totality of these factors weighs against a finding that defendants' conduct evinced the requisite reprehensibility to support the Court's reduced punitive damages awards.

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[5] The district court's decision in *In re Actos (Pioglitazone) Products Liability Litigation*, No. 6:11-md-2299, 2014 WL 5461859 (W.D. La. Oct. 27, 2014), does not compel a different conclusion. There, the court reduced a punitive award totaling $9 billion (representing a 5424:1 ratio for one defendant and an 8136:1 ratio for another defendant) to a total of just under $37 million (representing a 25:1 ratio for each defendant). *Id.* at *33, *55. But the *Actos* court erred to the extent it failed to faithfully apply Supreme Court precedent stating that a ratio approaching 1:1 represents the outer bounds of due process when a compensatory award is substantial, which the approximately $1.4 million compensatory award in that case clearly was. And even ignoring that error, *Actos* is inapposite because the compensatory award here is even more substantial – $4 million to $6 million per plaintiff, as compared to the approximately $1.4 million in *Actos*.

Attention to the health and safety of others. This is not a case involving indifference to the health or safety of others. To the contrary, it is a case about a company that designed a device with the intent of helping doctors and patients in the midst of a broader search within the orthopedic community for a new type of hip implant that would avoid the risks of osteolysis and dislocation posed by existing implants. Although plaintiffs' presentation emphasized the risks of metal-on-metal implants, the record shows that the medical community debated the existence and severity of those risks and that DePuy tested for and warned about the risks of metal debris specifically.

Evidence that the virtues of metal-on-metal designs were debated by orthopedic experts (or that DePuy chose to innovate before those debates were definitively resolved) does not support a finding of reprehensibility. Rather, as courts have recognized, evidence of "a good-faith dispute" about product safety and compliance with industry standards weighs against reprehensibility under the *State Farm* rubric. *Clark v. Chrysler Corp.*, 436 F.3d 594, 603 (6th Cir. 2006) (although Chrysler had failed to conduct a specific test on one of the truck's components, "the record show[ed] that there was a good-faith dispute over whether such testing was necessary"); *see also Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (concluding that case was not "an 'extreme case' meriting punitive damages" where, among other things, there was a genuine dispute in the scientific community about the product's dangers and utility).

For example, in *Clark*, the plaintiff sued Chrysler for negligence after her husband was involved in an automobile accident in which he was "ejected from his vehicle and died a short time later." 436 F.3d at 596. The plaintiff alleged that the truck's "B-pillar" was defectively designed, causing it to deform upon impact and force open the door's latch during the accident.

Id. at 603. Much of the plaintiff's evidentiary presentation consisted of Chrysler's failure to conduct certain testing with regard to the B-pillar. However, "the record show[ed] that there was a good-faith dispute over whether such testing was necessary." *Id.* Thus, "although it [was] possible that [the] test[ing] may have alerted Chrysler to the deficiencies of its B-pillar design and prevented Mr. Clark's accident," the Sixth Circuit reasoned that "Chrysler's failure to adopt the test [at issue] [did not] indicate[] a level of indifference to or reckless disregard for the safety of others sufficient to weigh in favor of reprehensibility." *Id.*

These cases are no different. As elaborated in defendants' renewed motion for judgment as a matter of law on plaintiffs' claims for punitive damages, plaintiffs' evidence at best demonstrates that there was a good-faith scientific dispute over the risks and benefits of metal-on-metal implants in general and the Pinnacle Ultamet hip implant in particular. (*See* Defs.' Renewed Mot. for J. as a Matter of Law on Pls.' Claims for Punitive Damages at 12, filed separately.) Indeed, plaintiffs conceded that the risk of harm from ions and debris was recognized when DePuy first sold the Pinnacle Ultamet in 2001 (10/11/16 Trial Tr. 78:2-5), and was extensively debated in the scientific and medical community ***before and after*** the Pinnacle Ultamet was cleared by the FDA (11/9/16 Trial Tr. 98:3-99:21). Thus, "because there [was] a good-faith dispute over [the metal-ion risk underlying plaintiffs' cases], . . . [defendants'] conduct d[id] not evince a level of indifference to or reckless disregard for the safety of others to permit" a $500 million punitive damages award. *Clark*, 436 F.3d at 603-04. And notably, although plaintiffs pressed the idea at trial that DePuy should have engaged in clinical testing prior to the sale of the Pinnacle Ultamet, *Clark* underscores that an alleged failure to conduct additional testing does not weigh in favor of a reprehensibility finding in this context, where the science surrounding the need for such testing is a matter of good-faith debate.

Lack of repeated actions. Courts have also made clear that the "repeated actions" factor is not satisfied where, as here, there is no evidence to support the conclusion that the defendants engaged in the alleged misconduct repeatedly "while knowing or suspecting that it was unlawful." *Clark*, 436 F.3d at 604. Notably, mere knowledge that other designs were available or that the chosen design had known weaknesses does not, by itself, establish the requisite knowledge of unlawful conduct. *See id.* at 601, 604 & n.13 (explaining that, although Chrysler was accused of using sheet-metal B-pillars that "had been removed from the modern state of the art . . . for over 40 years" because they were weaker than other kinds of B-pillars, and "Chrysler knew that its B-pillar was weak," the factor did not favor reprehensibility because there was no evidence that "Chrysler knew that such a weakness could cause the harm suffered by Mr. Clark"). Rather, as long as the defendant "could reasonably interpret the" applicable law to permit the conduct in question, there is no basis for a finding of reprehensibility on this factor. *Gore*, 517 U.S. at 578.

Here, defendants had every reason to believe that their conduct with respect to the use of a metal-on-metal design and disclosure of the risks inherent in such a design was legally permissible. As to the use of metal-on-metal designs generally, it is clear that defendants could reasonably believe such conduct to be lawful in light of the fact that the FDA expressly provides for such devices, as set forth in detail in defendants' motion for judgment notwithstanding the verdict on preemption grounds. (*See* Renewed Mot. For J. As A Matter Of Law On Pls.' Design Defect Claims On The Ground That They Are Preempted (filed separately).) And DePuy consistently warned of the risks of metal ions and debris throughout the time the Pinnacle Ultamet was sold, as discussed in greater detail in defendants' motion for judgment notwithstanding the verdict on plaintiffs' claims sounding in failure to warn or fraud. (*See*

Renewed Mot. For J. As A Matter Of Law On Pls.' Claims Sounding In Failure To Warn And Fraud (filed separately).) Under these circumstances, the "repeated" conduct factor could not have been satisfied.

Lack of intentional malice. This factor focuses on whether the misconduct at issue was "the result of intentional malice, trickery, or deceit" – i.e., an "intent to injure through affirmative conduct." *Lompe*, 818 F.3d at 1067 (citation omitted). In the context of a medical-device case, this factor "must be evaluated in view of the unique circumstances and context surrounding the then-existing . . . device industry and development of the device at issue." *In re Wright Med. Tech. Inc.*, 178 F. Supp. 3d 1321, 1365 (N.D. Ga. 2016). For example, in *In re Wright*, another case involving an allegedly defective metal-on-metal hip device, the court recognized that "one of the driving motivations for the hip replacement device design was to ***improve*** the quality of life for active patients." *Id.* at 1365-66 (emphasis added). "This laudable objective and motivation," the court explained, was "a significant factor in evaluating the degree of punitive damages awarded in th[e] case and undercut[] [p]laintiff's argument that [d]efendant's only motive in advocating for and marketing the device was to increase profits." *Id.* at 1366. Thus, even though the record in that case "support[ed] – ***albeit barely*** – that [p]laintiff's harm was caused by more than a mere accident," the court reduced the jury's $10,000,000 punitive damages award to $1,100,000 (resulting in a ratio of 1.1:1 with compensatory damages). *Id.* at 1365-66 (emphasis added).

The same is true here. The record established that in developing and marketing metal-on-metal hip implants, defendants were attempting in good faith to introduce a useful product that would enable younger and more active patients to receive long-lasting hip implants. (*See, e.g.*, 11/3/16 Trial Tr. 48:22-49:5, 49:21-50:25 (Leanne Turner observing that the "'[Metasul]

articulation appear[ed] to be particularly indicated for more active patients'" and acknowledging that "clinical experience with [Metasul] gave [DePuy] confidence" that metal-on-metal was an "appropriate design solution" to pursue as a low-wear alternative to polyethylene).) In particular, DePuy undertook substantial research and development with regard to metal-on-metal devices before and after the Pinnacle Ultamet was introduced to the market. (*See, e.g.*, *id.* 60:14-21 (Leanne Turner testifying about "R&D research, simulator testing, [and] clinical information from the Ultima").) Moreover, as Dr. Morrey acknowledged, DePuy was not the only manufacturer that made metal-on-metal hip implants available to orthopedic surgeons, many of whom were in favor of their use. (*See* 11/9/16 Trial Tr. 87:8-23.) Dr. Morrey further agreed with the statement that there "were a lot of really well-informed highly esteemed surgeons in the orthopedic community in the period of the late 1990s to the early 2000s who thought that the introduction of metal-on-metal devices in hip arthroplasty as a viable alternative was a good idea." (*Id.* 87:10-18.) Thus, while plaintiffs repeatedly argued that DePuy's "only motive in advocating for and marketing the device was to increase profits . . . [t]hat myopic litigation theme ignores the evidence presented at trial that [DePuy's] goal of offering a better device, with more dependable functionality and durability, was a substantial motivation to bring the device to market." *In re Wright*, 178 F. Supp. 3d at 1366.

Nor do plaintiffs' extensive critiques of defendants' marketing conduct, studies, and compensation of surgeons establish the requisite intentional malice to support a finding of reprehensibility. As set forth at length in defendants' motions for judgment notwithstanding the verdict on plaintiffs' claims sounding in failure to warn and fraud and for punitive damages, plaintiffs failed to prove that any of these matters affected their implanting surgeons' decisions to use the Pinnacle Ultamet. (*See* Renewed Mot. For J. As A Matter Of Law On Pls.' Claims

Sounding In Failure To Warn And Fraud (filed separately); Renewed Mot. For J. As A Matter Of Law On Pls.' Claims For Punitive Dmgs. (filed separately).) As the U.S. Supreme Court has made clear, alleged misconduct must have some nexus to a plaintiff's claims to support a finding of reprehensibility in connection with punitive damages; "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." *State Farm*, 538 U.S. at 423.

Lack of financial vulnerability. This factor has no application since none of the plaintiffs presented any evidence that they were financially vulnerable. *See id.* at 1365 ("Plaintiff did not present any evidence that she – the target of the conduct – had financial vulnerability, and this factor appears neutral."). In any event, "the financial vulnerability factor does not have particular relevance in this case, where the harm [plaintiffs] suffered was physical[.]" *Lompe*, 818 F.3d at 1066; *see also Clark*, 436 F.3d at 604 (finding that financial-vulnerability factor was irrelevant "[b]ecause Chrysler's wealth has no connection to the actual harm sustained by Mr. Clark").

Physical harm. There is no question that the injuries allegedly sustained by plaintiffs are "physical" harm, which generally weighs more in favor of reprehensibility than economic injury. But these plaintiffs were already injured by virtue of their failing natural hips, and it is understood at the outset of any hip implant surgery that hip implants may fail even if not defective. Moreover, the plaintiffs all had successful revisions in which only the head and liner were replaced, leaving the stems and cups in place, which made for relatively short and uncomplicated revision procedures. The ability to pursue lower impact revision surgeries was a direct result of DePuy's decision to design a modular system that allows surgeons to easily

change out the head and liner should a different bearing option prove superior. (*E.g.*, 10/26/16 Trial Tr. 49:8-19; 10/28/16 Trial Tr. 93:7-23, 234:4-17.) As such, this is not a case in which a new injury was inflicted or in which complications of an existing injury were unforeseeable. Rather, it is a case in which the defendant took affirmative steps to mitigate the extent of physical harm that might result in the event revision surgery was required. For these reasons, the physical-harm factor should not carry the same weight as it might in other cases. Moreover, and in any event, the claimed injuries did not result in death, which is the type of severe injury that has "weigh[ed] strongly in favor of finding [a defendant's] conduct reprehensible." *Clark*, 436 F.3d at 601. And even in *Clark*, the appellate court found the jury's award too high despite the fact that the accident at issue resulted in death. *Id.* It follows perforce that the less severe injuries at issue in these cases cannot support a finding of reprehensibility.

* * * *

For all these reasons, the punitive award in these cases should not exceed a 1:1 ratio with the underlying compensatory awards, and the Court should therefore further reduce the punitive damages award to $28,361,666.17 or less.[6]

CONCLUSION

For the foregoing reasons, the Court should grant defendants' motion for new trials on all issues or, in the alternative, further reduce the punitive damages verdicts.

Dated: January 31, 2017 Respectfully submitted,

s/ Steven W. Quattlebaum s/ Michael V. Powell

[6] Separately, the punitive damages award violates California law and must be set aside because it was the "result of passion or prejudice." *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1257 (1991); *see also id.* at 1258 (noting that reviewing courts "must scrutinize punitive damage verdicts because they 'constitute a windfall, create the anomaly of excessive compensation, and are therefore not favored in the law'") (citation omitted); *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 752 (1980) (vacating $10 million punitive award because it was $9.85 million more and 63 times greater than the $158,000 compensatory award).

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CERTIFICATE OF SERVICE

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s/ Stephen J. Harburg

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