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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The $69-million punitive damages verdict (remitted to $51 million) against City Finance Company ("City Finance") is the latest in a series of exorbitant verdicts which have undermined public confidence in the fairness of this State's civil jury system. Ostensibly aimed at protecting consumers from unfair business practices, these wildly excessive verdicts are having the unintended effects of depriving consumers of important insurance and other necessary goods and services and unfairly crippling an already anemic Mississippi economy.

Contrary to the unsubstantiated arguments below, credit insurance is a carefully regulated product, which provides important protection for consumers who cannot afford or qualify for traditional insurance or who are under-insured. It is purchased by millions of persons who expressly request the insurance to protect their credit and their families. The excessive and unwarranted punitive damages verdicts, which are increasingly being rendered against insurers and other companies, are driving up the costs of insurance and other necessary goods and services or driving the companies which provide them out of Mississippi all together. This doubly punishes Mississippi residents who are not only deprived of necessary goods and services but also lose thousands of jobs a year.

Recent jury studies demonstrate that excessive and arbitrary punitive damages verdicts occur because juries lack the experience and expertise required to properly calibrate in dollars punishment to wrongdoing. These findings have important implications for judicial review of punitive damages awards in this State. First, it is imperative that courts jealously guard their role as gatekeepers and allow only truly exceptional punitive damages claims to go to the jury. After punitive damages verdicts are rendered, courts must engage in a searching *de novo* review of the verdicts to ensure they are warranted, bear a reasonable relationship to actual damages, and are not otherwise excessive. Careful judicial scrutiny will limit the *in terrorem* power of punitive damages claims, strike the

balance needed to punish and deter wrongful conduct without depriving Mississippi residents of vital jobs and services, and restore public confidence in the fairness of this State's legal system.

ARGUMENT

I. CREDIT INSURANCE IS A HIGHLY REGULATED PRODUCT NEEDED BY MILLIONS OF PERSONS TO PROTECT THEIR CREDIT AND THEIR FAMILIES

A. Credit Insurance Provides Important Benefits to Mississippi Residents Who Do Not Have Access to the Individual Life and Disability Markets

Credit insurance is offered in connection with a loan or other credit transaction and its proceeds are used to repay the debt upon the occurrence of a specified event. Anthony Rollo, *A Primer on Consumer Credit Insurance*, 54 CONSUMER FIN. L. Q. REP. 52 (Spring 2000). For example, "credit life insurance pays the borrower's outstanding obligation to the creditor upon the borrower's death." *Id.* at 53. Credit disability insurance pays the borrower's monthly loan payments to the creditor when the borrower becomes sick or injured in an accident and therefore suffers an interruption of income. *Id.* Thus, credit insurance provides borrowers with relief from their obligations and the "peace of mind" of knowing that a specific debt will be paid off in the event of death, disability, involuntary unemployment, etc. *Id.* at 52 & 56.

Many consumers are uninsured or under-insured, and as many as 25 percent of Americans have no life insurance at all. *Id.* at 56. They do not have access to traditional life or disability insurance because it is too expensive or because they do not qualify for it due to health reasons. *Id.* at 55. Credit life and related policies provide several major advantages to insureds who cannot qualify for or obtain sufficient traditional insurance:

> Credit life insurance is beneficial because it has lower premiums than traditional life insurance, its premiums do not increase with age, and it has limited or no medical criteria for qualification. These benefits are especially advantageous for individuals who cannot meet the medical criteria required to purchase traditional life insurance and for individuals who cannot afford the higher premiums charged for life

> insurance. . . . Credit life insurance provides an economic alternative to life insurance for individuals who need life insurance coverage but cannot obtain traditional life insurance.

JoClaudia Mitchum, *The Death of Credit Life Insurance*, 27 Cumb. L. Rev. 719 (1996-97).

Credit insurance is, therefore, a viable alternative for "lower-income consumers" who "are effectively shut out of the individual life and disability market due to high minimum annual premiums and other requirements," or persons who because of age, medical condition, or other reasons cannot qualify for insurance that is "underwritten" in the "normal sense." Rollo, at 55. Indeed, credit insurance is often "the only type of insurance convenient or available to consumers to protect them from the risk of being unable to pay their debts upon death, disability, [or other casualty] . . . ." *Id.*

Because of the comparative benefits of credit life insurance, credit insurance purchasers believe that it is a good alternative. Thomas A. Durkin, *Consumer and Credit Disclosures: Credit Cards and Credit Insurance* 201, 211 (Federal Reserve Bulletin 2002), http://www.federalreserve.gov/pubs/bulletin/2002/02index.htm. Indeed, a recent study by the Federal Reserve Board found that 90% of all purchasers of installment credit insurance were happy with the product and would buy it again. *Id.* at 211 & 213. The most frequently cited reasons consumers gave for their favorable attitudes were that the credit insurance: protects the purchaser/survivor; is good for individuals with health risks; is a good idea; provides a sense of security; and protects credit ratings. *Id.* at 211-12.

B. The Sale of Credit Insurance is Carefully Regulated Under Federal and State Law

The sale of credit insurance is carefully regulated by federal and state law to ensure that consumers obtain the important benefits provided by the insurance without coercion and with full

disclosure of its costs. For example, the Federal Truth in Lending Act provides that credit insurance premiums for credit life, disability and unemployment must be disclosed as a finance charge unless: "[1] the coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, [2] this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit, and [3] . . . the person to whom the credit is extended [ ] give[s] specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof." 15 U.S.C. § 1605(b).

The Mississippi Credit Life and Disability Act regulates the sale of credit insurance in this State. Miss. Code Ann. §§ 83-53-1, *et. seq.* The Act regulates: the forms of insurance permitted (§ 83-53-5), the amount of insurance allowed (§ 83-53-7), the commencement and term of the credit insurance (§ 83-53-9), the contents of policies and certificates of insurance (§§ 83-53-13 and § 83-53-15), the rates, refunds and remissions (§§ 83-53-17, & 23) the reporting and settlement of claims (§ 83-53-19), the debtor's freedom to choose (§ 83-53-21), and the commissions and other compensation (§§ 83-53-25 & 27). The Mississippi Insurance Commission has comprehensive authority to promulgate rules and regulations (§ 83-53-29), and to issue cease and desist orders and penalties (§ 83-53-31) for violations of these requirements.

There is no allegation in this case that any of these regulations were violated. It is undisputed that all the required forms were filed, that the rates were approved, and that the statutory disclosures were made. Instead, the unsupported claims below were that City Finance sold the plaintiffs a useless, unnecessary product; failed to orally disclose that the insurance was optional; failed to disclose that it tries to make profits; and failed to disclose that credit insurance may not be right for everyone.

C. The Need for Credit Insurance Is Amply Demonstrated by the Fact That Consumers Voluntarily Choose to Purchase Millions in Such Insurance Every Year and Millions in Claims Are Paid

By the end of 1997, more than 46 million Americans were insured by credit life, and more than 154,000 claims, totaling $795,734,000 were paid in that year alone. Consumer Credit Insurance Association, *The 2001 Fact Book of Credit-Related Insurance* at 7-8 (April 2001) ("*2001 Fact Book*"). In 2000, credit insurance paid consumers more than 2.2 billion dollars in benefits. Consumer Credit Insurance Association, News and Views, *Credit Insurance Benefits Totaled Billion in 2000*, (Nov. 19, 2001), at http://www/cciaonline.com/consumers.nsf.News Lookup/20011120 ("News and Views"). In 1999, Mississippi consumers purchased in excess of $50 million in credit life insurance and in excess of $34 million in credit disability insurance, and millions were paid in claims. *2001 Fact Book*, at 12 & 13. Credit insurance provides important benefits for millions of Americans, including many residents of Mississippi.

Credit insurance is becoming increasingly important to consumers who have high levels of debt in these troubled economic times. Consumer spending relative to income has been on an upward trend since the early 1980s, and this increased spending has generally been funded with increased debt. October Economic Trends: *Consumer Indebtedness*, at http://www.clev.frb.org/research/Et96/1096/labmkt2.htm. Non-mortgage consumer debt in the United States rose to $1.5 trillion at the end of 2000, and about 1/7 of this debt ($212 billion) was protected by credit life insurance. News and Views, *supra*. Household debt service payments were more than 14% of disposable income in the first quarter of this year, the highest level in 22 years. *Consumer Credit: Is a crunch coming*? Business Week online, August 2, 2002, at http://www.businessweek.com/bwdaily/dnflash/aug2002/nf2002082_0656.htm. The amount that Americans owe on loans for houses, cars, credit cards and other purchases adds up to nearly 100% of their annual income after

taxes, up from 75% in 1992, after the last recession ended. *Id.* Not surprisingly, delinquencies on non-mortgage consumer debt are steadily increasing, and are already at their highest levels in a decade. *Id.* Credit insurance provides an important safety net for debt-laden consumers and is, therefore, needed now more than ever.

II. EXCESSIVE PUNITIVE DAMAGES VERDICTS ARE DRIVING INSURERS AND OTHER VITAL BUSINESSES OUT OF MISSISSIPPI, DEPRIVING MISSISSIPPI RESIDENTS OF MUCH NEEDED GOODS, SERVICES AND JOBS

A. Mississippi Has Developed a National Reputation as a Mecca for Excessive Punitive Damages Awards

Mississippi courts have become "mecca" for large damage claims. *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 774 (5th Cir. 2001). As Senator Trent Lott recently explained, "[m]y own state of Mississippi has become a mecca for frivolous lawsuits with unlimited damages." Robert Pear, *Mississippi Gaining As Lawsuit Mecca*, N.Y. Times, Aug. 20, 2001, at A14.

Mississippi juries have rendered awards in excess of $1.8 billion since 1995. Jerry Mitchell, *Staggering jury verdicts draw calls for tort reform,* The Clarion-Ledger, October 30, 2001 ("Mitchell"). Until 1995, no verdict in Mississippi exceeded $9 million. *Id.* Since then, there have been at least twenty-one, and at least eight exceeding $100 million each, including:

1. $145 million against the Ford Motor Company (Jimmie E. Gates & Sherri Williams, *Jurors say larger awards were fair,* The Clarion-Ledger, July 2, 2001);
2. $500 million against the Loewen Group (*Id.*);
3. $150 million against the maker of Phen-Phen (*Id.*);
4. $100 million against Johnson & Johnson (Mitchell); and
5. $150 million against the 3M Corporation (*Id.*).

The extortionary pressure of exorbitant jury verdicts has resulted in nearly $1billion in settlements in the last few years. For example, in 1999, two asbestos manufacturers settled claims for $160.6 million. *Mississippians Get Asbestos Settlement,* The Clarion-Ledger, (Jackson, MS) Jan. 25, 2000. American Home Products paid $600 million in settlements in October and December

2000. New York Times Article, at A14. *Mississippi Becomes a Mecca for Tort Suits,* Nat'l L.J., Apr. 30, 2001, at A14. Pending suits threaten industry with billions more in claims. *Id.*

B. Excessive Awards Are Destroying Confidence in the Mississippi Judicial System and Driving Vital Businesses out of Mississippi

A recent survey of 800 corporate counsels ranked Mississippi's liability system the worst in the nation. George F. Will, *Tort Reform Now,* The Washington Post, Sept. 29, 2002 ("Will"); News, U.S. Chamber of Commerce, May 8, 2002, at www/uschamber.com,("News"). Because of the widespread perception that Punitive Ds awards in Mississippi are unfair, the U.S. Chamber of Commerce recently warned its members not to do business in this State. Will; *supra*; News; *supra.* Some seventy-one insurance companies have heeded this warning and discontinued operations. Will, *supra.* Those companies which are not leaving the State are passing the costs of the legal system on to consumers in the form of higher prices. For example, last year the Insurance Commissioner approved a 65% increase in premiums for malpractice insurance sold by the St. Paul Companies. N.Y. Times, Aug. 20, 2001, at A14. Soaring premiums and the threat of punitive damages are in turn causing doctors to flee the State. Will, *supra.*; *Tort Reform Showdown,* The Wall Street Journal Online, Sept. 12, 2002, at http://online.wsj.com/article ("Soaring malpractice premiums have forced 100 doctors to leave this year."). "Most Mississippi cities with populations smaller than 20,000 no longer have obstetricians." Will, *supra.*

The economic cost of industry's reaction to Mississippi's "jackpot" system of justice is devastating to an economy which already ranks 50th among the states in per capita income. *Id.* A recent economic study by the Perryman Group has concluded that:

> **Mississippi has a judicial system that is widely believed to be imbalanced and, in fact, is considered one of the worst in the country.** The unpredictability and risk associated with this situation adds to the cost of living and doing business in Mississippi and reduces the state's competitiveness in attracting business activity.

> The situation has become more severe in recent years, as massive punitive damage awards have accelerated and significant reforms in other states (particularly Alabama) have led to increased tort activity within Mississippi.
>
> **The result of the existing legal framework is an inefficient and ineffective use of the state's scarce economic resources, increased costs on the goods and services purchased by consumers, reduced productivity, and a check to economic development. These losses are also increasing over time, as Mississippi's relative competitive disadvantage is magnified.**

The Perryman Group, *The Potential Impact of Proposed Judicial Reforms on Economic Activity in Mississippi*, at i-ii (February 2002) (emphasis in original). The study found that the total direct losses caused by Mississippi's unfair legal system was $192.7 million in 2001. It costs Mississippi 7,500 jobs a year, and the average family in Mississippi pays an additional $264 for goods and services. News, *supra*. Simply put, the litigation crisis in this State is devastating the very Mississippi residents whom the punitive awards are intended to benefit.

C. Exorbitant Punitive Damages Awards Occur Because Juries Lack the Experience and Expertise Required to Calibrate Punishment to Wrongdoing

Recent jury studies by leading scholars from Harvard, Duke and the University of Chicago demonstrate that punitive damages verdicts tend to be arbitrary and excessive because jurors lack the expertise to properly monetize the amount of punitive damages. *See generally* CASS R. SUNSTEIN, ET AL., PUNITIVE DAMAGES HOW JURIES DECIDE (The University of Chicago Press 2002). This is not surprising since the average juror will participate in only one punitive damages case in his or her lifetime. *Id.* at 6 n. 12. The most important findings of these remarkable studies were the following:

- Although jurors were consistent in determining the reprehensibility of conduct, juror's judgments became erratic and unpredictable when asked to translate their intent to punish into a dollar award.
- Juries award erratic penalties for similar conduct.

- Deliberation increases both the severity and unpredictability of jury awards. When punitive damages were awarded, over 27% of juries awarded as much or more than any juror had awarded pre-deliberation, and 83% of the awards were above the median individual juror's award.

- Jurors are improperly influenced by the amount of punitive damages requested by the plaintiff.

- Juries award local plaintiffs 35% more than out of state plaintiffs.

- On average jurors remember and comprehend only 5% of jury instructions on punitive damages.

- Juries are much more likely than judges to award punitive damages.

- Juries exhibit an overwhelming hindsight bias rendering it difficult for them to judge defendant's pre-accident decisions objectively.

- Jurors award 50% higher punitive damages awards against companies which perform a cost-benefit analysis.

Id. at 22-25, Table 1.1.

III. DILIGENT, MEANINGFUL AND CONSISTENT JUDICIAL REVIEW IS NECESSARY TO END THE LITIGATION CRISIS AND TO RESTORE CONFIDENCE IN THIS STATE'S LEGAL SYSTEM

The devastating impact of punitive damages awards on Mississippi companies and residents, coupled with the knowledge that the large verdicts stem from juries' inability to properly calibrate punishment to wrongdoing, demonstrate the need for searching judicial scrutiny in punitive damages cases. SUNSTEIN, at 249 ("[J]udges should feel free to supervise punitive damages awards with some care, to make sure they are sensible in light of the various goals of the legal system."). Trial and appellate courts must ensure that only truly extreme cases go to the jury, and after a punitive damages award is entered, courts must engage in a searching *de novo* review of the award.

A. The Trial Court Must Determine, and the Appellate Court Must Carefully Review, Whether Punitive Damages Claims Should be Submitted to the Jury

This Court has explained that, "the trial court is the gatekeeper for the issue of whether

punitive damages, in cases involving both intentional and non-intentional torts, should be submitted and considered by a jury." *Alpha Gulf Coast, Inc. v. Jackson,* 801 So.2d 709, 733-34 (Miss. 2001); Miss. Code. Ann. § 11-1-65 (1)(d) ("[t]he court shall determine whether the issue of punitive damages may be submitted to the trier of fact . . ."). "The trial judge is required to review all the evidence presented and determine whether the facts of the case and the conduct of the defendant justifies a jury consideration of punitive damages." *Tillman v. Singletary,* No. 1999-CA-00686-COA, 2001 WL 268246, at *3 (Miss. Ct. App. March 20, 2001).

Punitive damages should only be awarded in extreme cases. *See Aqua-Culture Technologies, Ltd. v. Holly,* 677 So.2d 171, 184 (Miss. 1996). Accordingly, stringent requirements must be met before punitive damages claims may be submitted to the jury:

> In order for punitive damages to be awarded, the plaintiff must demonstrate a willful or malicious wrong or the gross, reckless disregard for the rights of others. Punitive damages are only appropriate in the most egregious cases so as to discourage similar conduct and should only be awarded in cases where the actions are extreme. The jury should be allowed to consider the issue of punitive damages if the trial judge determined under the totality of the circumstances and in light of defendant's aggregate conduct, that a reasonable, hypothetical juror could have identified either malice or gross disregard to the rights of others.

Paracelsus Health Care Corp. v. Willard, 754 So.2d 437, 442 (Miss. 2000) (internal citations omitted); *see also Alpha,* 801 So.2d at 733. The punitive damages issue should be submitted to the jury only if there is "clear and convincing" evidence of malice or gross disregard for the rights of others. *Id.* at 734.

As this case vividly demonstrates, strict adherence to, and careful appellate review of, the trial court's gatekeeper function is necessary to mitigate the unreasonable threat of excessive punitive damages verdicts. The plaintiffs here each sought $3 million in punitive damages for City Finance's alleged failure to orally disclose that credit insurance was optional - an allegation that was

contradicted by City Finance employees and rendered irrelevant by the express disclosure in the loan documents themselves - and that it earned profits from the sale of insurance. As City Finance's brief cogently demonstrates, these alleged omissions are not even actionable, and they certainly do not constitute malice or gross disregard for the rights of others. *See Dixie Ins. Co. v. Mooneyhan*, 684 So.2d 574, 583 (Miss. 1996) (collecting cases) (where defendant's conduct is arguably justified "the jury should not be permitted to decide the issue of punitive damages"). Mississippi's legal system is widely perceived as unfair, and companies are choosing not to do business in this State, precisely because Mississippi juries are allowed to entertain punitive damages claims, "limited only by the ability of lawyers to string zeros together in drafting a complaint,"[1] for routine business practices that are neither unlawful nor immoral nor harmful. This Court must make clear to the lower tribunals that marginal claims for punitive damages should not be submitted to the jury.

B. Where Punitive Damages Are Awarded, Due Process Requires a Searching *De Novo* Judicial Review in Order to Ensure Punishment Is Reasonably Related to the Reprehensibility of the Conduct

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the United States Supreme Court squarely held that the constitutionality of punitive damages awards must be reviewed *de novo*. *Id.* at 436. In *MIC Life Ins. Co. v. Hicks*, 825 So.2d 616 (Miss. 2002), this Court concurred: "We review *de novo* a challenge to the constitutionality of the size of a punitive damages award." *Id.* at 622. A searching *de novo* review of the constitutionality of punitive damages awards is necessary to correct and eliminate the growing number of erroneous punitive damages verdicts and is essential to restoring the rationality of Mississippi's civil jury system. As the *Cooper* Court explained:

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[1] *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 62 (1991) (O'Connor J., dissenting) (citation omitted).

> [I]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles. . . . [T]hey will acquire more meaningful content through case-by-case application at the appellate level. [*D*]*e novo* review tends to unify precedent and stabilize the law.
>
> . . .
>
> Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself.

Cooper, 532 U.S. at 436 (internal quotations and citations omitted).

1. Under *BMW*, Due Process Permits Only Low Ratios of Punitive to Actual Damages for Business Torts Involving Economic Harm

"[E]xemplary damage must bear a 'reasonable relationship' to compensatory damages." *BMW of N. Am. v. Gore*, 517 U.S. 559, 580 (1996). Supreme Court precedents imply that due process tolerates at most single digit multiples even for the most egregious conduct. Indeed, in *Haslip*, 499 U.S. at 23-24, the Supreme Court stated that a punitive damages award of four times the amount of compensation damages was "close to the line." In *BMW*, the Court held that conduct which causes only economic harm is less deserving of punishment than conduct causing physical injury or death, and that the "omission of a material fact may be less reprehensible than a deliberate false statement." *BMW*, 517 U.S. at 576, 580; *see also Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 638 (10th Cir. 1997) ("torts causing only economic injury [are] less worthy of large punitive damages awards than torts inflicting injuries to health or safety").

Following *BMW*, appellate courts have generally sustained punitive damages multiples of only five to ten times compensatory damages in cases involving non-negligible economic losses, particularly where review is *de novo*. *See, e.g., Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 285 F.3d 1146, 1150-51 (9th Cir. 2002) (applying *de novo* review standard and reducing ratio

from 90:1 to 10:1); *Continental Trend*, 101 F.3d 634 (reducing ratio from 30:1 to 6:1); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 468-69 (3d Cir. 1999) (reducing $100 million punitive award to $1 million when compensatory award was $48 million).

Prior to *Cooper* and *MIC Life*, this Court upheld larger punitive damages ratios. However, these cases involved small compensatory damage awards, and the punitive damages awards therefore ranged from a mere $100,000 to a maximum of $1.5 million.[2] This Court has never upheld a large multiple yielding anything close to a $51 million dollar punitive damages award. Moreover, when these cases were decided, this Court gave "great deference" to punitive damages awards, and would reverse them only when they constituted an abuse of discretion. *See American Income Life Ins. Co.*, 2001 WL 695516, at *9. *Cooper Industries* and *MIC Life* have overruled this discretionary standard in favor of *de novo* review. *See MIC Life*, 825 So. 2d at 623 (concluding that 1567:1 ratio "absolutely boggles the mind").

In this case, the jury awarded punitive damages which ranged from 1,143 to 33,523 times the amount of actual economic loss suffered by the plaintiffs.[3] These awards are clearly excessive and arbitrary. They are wholly out of proportion to the gravity of the misconduct, are inconsistent with

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[2]*See American Income Life Ins. Co. v. Hollins*, No. 1999-CA-00528-SCT, 2001 WL 695516, at *9-10 (Miss. June 21, 2001) (upholding $100,000 punitive damages award which was 250 times the $400 compensatory award); *Paracelsus*, 754 So. 2d at 445 (Miss. 1999) (upholding $1.5 million punitive damages award which was 150 times the $10,000 compensatory award); *Independent Life & Acc. Ins. Co. v. Peavy*, 528 So. 2d 1112 (Miss. 1988) (affirming $250,000 punitive damages award which was 606 times the $412.20 compensatory award); *National Life & Acc. Ins. Co. v. Miller*, 484 So. 2d 329, 338 (Miss. 1985) (affirming $350,000 punitive damages award which was 140 times $2,500 compensatory award).

[3]As cogently explained in City Finance's Brief, the plaintiffs failed to establish entitlement to emotional distress damages, and therefore these damages should not be considered in determining the reasonableness of the punitive damages award. Even if they were considered, the punitive damages would clearly be excessive.

punitive damages precedents, and are the reason companies feel they can no longer afford to do business in Mississippi. The award must be reduced to a low single digit multiple of the actual economic loss, if this Court finds punitive damages are warranted at all.

2. Net Worth is not a Valid Consideration Under the Constitutional Analysis Set Forth in *BMW*

In *BMW,* the Supreme Court reaffirmed the long standing "principle that punitive damages may not be 'grossly out of proportion to the severity of the offense.'" *BMW*, 517 U.S. at 576. (citation omitted). The *BMW* guideposts for determining whether a punitive damages award is unconstitutionally excessive are: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive to actual damages; and (3) the civil and criminal penalties for comparable misconduct. *BMW,* 517 U.S. at 575. None of these factors permit a consideration of wealth, and they would be undermined if wealth were used to increase punishments. It is, no doubt, for this reason that the Supreme Court has never sanctioned the use of wealth to increase punitive damages.

Increasing punishment based on wealth is also inconsistent with both of the primary justifications for punitive damages: retribution and deterrence. Retribution rests on the principle of proportional punishment. Peter Diamond, *Integrating Punishment and Efficiency Concerns in Punitive Damages for Reckless Disregard of Risks to Others*, 18 J. L. Econ. & Org. 117, 122 (April 2002). Increasing punitive damages beyond that amount which is properly proportioned to the harm caused, simply because a defendant is wealthy, violates this principle.

Deterrence theory teaches that, if companies are made to internalize the harms they cause, they will take the proper amount of precautions against causing such harm. *See* Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 912 (1998). If punitive damages are increased beyond the optimal amount based on a defendant's wealth:

> [T]hose corporations will be led to take excessive precautions, will undesirably curtail their activities, and will set prices above the proper level, chilling consumption of their products. In an extreme case, such corporations might even withdraw their products from the marketplace despite the value of the products to society.

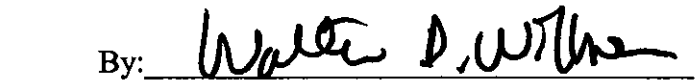
Id. at 911. Furthermore, "imposing punitive damages on the basis of corporate wealth, effectively imposes a tax on corporate size and success, thereby discouraging growth and development." *Id.*

This case amply demonstrates the dangers of permitting juries to increase punitive damages based on a company's wealth. Plaintiffs' counsel asked for $69 million in punitive damages because this purportedly constituted "a year's worth of profit. That's 15% of their net worth. . ." 24: R.T. 1809:5-6. Plaintiffs' counsel argued "the only way you can punish a big corporation, now, you can call it names, you can howl at the moon, but they're going to keep doing what their doing. You've got to take money out of their pockets." 24: R.T. 1813:15-19. The jury awarded precisely $69 million in punitive damages, or at least 12.4% of City Finance's net worth, even though this exorbitant amount is completely out of proportion to the gravity of misconduct, the amount of actual damages, and civil and criminal penalties for comparable misconduct. This award reflects a central finding of the recent jury studies; namely, juries are improperly influenced by the amount of punitive damages requested by the plaintiff's lawyer because they lack any experiential "anchor" for determining the proper amount. Faced with the very real prospect of annihilating punishment, simply because they are wealthy, it is no wonder businesses are leaving this State in droves. *See BMW of N. America, Inc. v. Gore*, 701 So. 2d 514 (Ala. 1997). ("a punitive damages award that exceeds 10% of the defendant's net worth crosses the line from punishment to destruction."). This Court should instruct lower courts that wealth cannot be used to increase punitive damages beyond that amount which is fairly proportioned to the gravity of the misconduct.

CONCLUSION

For the foregoing reasons, the judgment below must be reversed.

Respectfully submitted,

By: 

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