No. _____

In The
Supreme Court of the United States

FREDRIC N. ESHELMAN,

Petitioner,

v.

PUMA BIOTECHNOLOGY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JEFFREY M. HARRIS
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22201
(703) 243-9423

ELIZABETH M. LOCKE, P.C.
Counsel of Record
JOSEPH R. OLIVERI
CLARE LOCKE LLP
10 Prince Street
Alexandria, VA 22314
(202) 628-7400
libby@clarelocke.com

Counsel for Petitioner

Date: October 18, 2021

QUESTION PRESENTED

Following a five-day trial, a jury found that Puma Biotechnology defamed Dr. Fredric Eshelman by falsely accusing him of committing fraud. The jury awarded Dr. Eshelman $15.85 million in compensatory damages and $6.5 million in punitive damages. Puma appealed, raising classic sufficiency of the evidence arguments, namely, that the question of damages "never should have made it to the jury" because there was no "proof of harm whatsoever." A panel of the Fourth Circuit agreed, holding that "there is no evidence whatsoever of actual harm sufficient to support the damages award." App.15.

Puma's sufficiency of the evidence arguments never should have been considered on appeal in the first place because Puma did not move for judgment as a matter of law in the district court either during trial (under Rule 50(a)) or after the verdict was returned (under Rule 50(b)). The Fourth Circuit's decision flouts this Court's holding in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006), that a defendant's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence." The decision below also conflicts with the decisions of several other circuits holding that *Unitherm* applies with full force to sufficiency of the evidence challenges to damage awards. The question presented is:

Under *Unitherm* and the Federal Rules, can a defendant who did not file a Rule 50 motion for judgment as a matter of law in the district court nonetheless raise a sufficiency of the evidence challenge to damages on appeal?

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Petitioner Dr. Fredric N. Eshelman was the plaintiff in the district court and the appellee/cross-appellant in the Fourth Circuit.

Respondent Puma Biotechnology, Inc. was the defendant in the district court and appellant/cross-appellee in the Fourth Circuit.

Pursuant to Rule 14.1(b)(iii), Petitioner is aware of one "directly related" case in state or federal courts: *Puma Biotechnology, Inc. v. Hedrick Gardner Kincheloe & Garofalo LLP.*, No. 20-CVS-12456 (N.C. Super. Ct. Mecklenburg Cty.) (Puma's legal malpractice lawsuit against its trial counsel, arguing Puma was prejudiced and injured by counsel's failure to file Rule 50 motions).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTRODUCTION

In the decision below, the Fourth Circuit threw out a reasoned jury verdict and a thorough, 44-page district court decision upholding that verdict, based on defaulted arguments that never should have been considered on appeal in the first place. Certiorari is warranted to review the Fourth Circuit's significant misinterpretation of this Court's precedents, resolve a clear and entrenched circuit split, and restore uniformity to this important area of the law.

Following a five-day trial in the U.S. District Court for the Eastern District of North Carolina, a jury unanimously found that Puma Biotechnology defamed Dr. Fredric Eshelman and awarded him $15.85 million in compensatory damages and $6.5 million in punitive damages. The evidence showed that Puma published to a global audience and to industry insiders false and defamatory accusations that Dr. Eshelman was replaced as CEO of the clinical research company he founded after being involved in clinical trial fraud. At no point in the district court proceedings did Puma move for judgment as a matter of law under Rule 50 on the ground that the evidence was insufficient to support an award of damages.

Puma nonetheless appealed to the Fourth Circuit on classic sufficiency of the evidence grounds, arguing that there was no "proof of harm whatsoever" and that Dr. Eshelman "introduced no evidence of actual harm to his reputation or emotional wellbeing." Puma C.A.4 Br. 18, 48-49. Under this Court's clear precedent, an appeal on those grounds should have been a non-starter because a defendant's "failure to comply with [FRCP] 50 forecloses its

challenge to the sufficiency of the evidence" on appeal. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006).

The Fourth Circuit nonetheless held that Puma could maintain its sufficiency of the evidence appeal because it had challenged the damage award as excessive in a motion for a new trial under Rule 59. But that holding is wrong on its own terms and conflicts with the decisions of multiple other circuits. Those other circuit courts have correctly recognized that *Unitherm*'s holding applies with full force in the context of sufficiency of the evidence challenges to damage awards. In direct conflict with the Fourth Circuit's reasoning, other circuit courts have also recognized that, although filing a Rule 59 motion can generally preserve the arguments raised therein for appeal, the "one exception" to that rule involves sufficiency of the evidence challenges, which—under *Unitherm*—must be raised through a Rule 50 motion in the trial court to be preserved for appeal. *Pediatrix Screening, Inc. v. TeleChem Int'l, Inc.*, 602 F.3d 541, 546-47 (3d Cir. 2010).

Certiorari is warranted not only to address this tension among the circuits but also considering the importance of this issue. This Court has repeatedly emphasized the sanctity of the jury's constitutionally protected role as the finder of fact responsible for weighing the evidence and assessing credibility. Simply put, the right to a jury trial is "'so fundamental and sacred to the citizen'" that it must be "'jealously guarded by the courts.'" *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 352 (1979) (citation omitted). Yet the decision below eliminates an important

procedural check on a litigant's ability to take an issue away from the jury by allowing a defaulted sufficiency of the evidence challenge to proceed on appeal notwithstanding a blatant failure to comply with Rule 50 and *Unitherm*.

Worse still, the decision below eliminated that critical procedural check in the context of a defamation case—an area of law in which courts have already demonstrated an unusual tendency to undermine jury verdicts. *See Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting from denial of certiorari) (lamenting that "because this Court's jurisprudence has been understood to invite appellate courts to engage in the unusual practice of revisiting a jury's factual determinations *de novo*, it appears just 1 of every 3 jury awards now survives appeal"); Elena Kagan, *A Libel Story:* Sullivan *Then and Now (reviewing Anthony Lewis, Make No Law: The* Sullivan *Case and the First Amendment (1991))*, 18 Law & Social Inquiry 197, 205 (1993) (The "obvious dark side" of current defamation jurisprudence is that it "allows grievous reputational injury to occur without monetary compensation or any other effective remedy."); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 875 (2000) (citing empirical studies and concluding that "the practical effect" of the constitutional and common law of defamation has "ma[d]e it almost impossible for any plaintiff to succeed in a defamation action"). Moreover, the Fourth Circuit's decision eliminates those procedural safeguards in an area of law in which "[t]he assessment of damages is particularly within the

province of the jury." *Blumenfeld v. Stuppi*, 921 F.2d 116, 118 (7th Cir. 1990); *Cantu v. Flanigan*, 705 F. Supp. 2d 220, 227 (E.D.N.Y. 2010) ("Jurors are uniquely positioned to assess the evidence presented at trial and assign a monetary value to the plaintiff's non-economic damages"; affirming $150 million non-economic defamation damages award). The petition should be granted.

OPINIONS BELOW

The Fourth Circuit's panel opinion is published at 2 F. 4th 276 and reproduced at App.1-19. The Fourth Circuit's order denying rehearing is reproduced at App.86-87. The district court's order denying Puma's Rule 59 motion is reproduced at App.20-85.

JURISDICTION

The Fourth Circuit issued its judgment on June 23, 2021, and denied rehearing on July 20, 2021. App.86-87. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 50 of the Federal Rules of Civil Procedure is reproduced in the Appendix at App.88-90.

STATEMENT OF THE CASE

A. Puma Defames Dr. Fredric Eshelman to a Global Audience in a Permanently Accessible Investor Presentation.

1. This case arises from Puma's publication of defamatory statements falsely accusing Dr. Eshelman of being replaced as CEO of the clinical research company he founded after being involved in clinical trial fraud. JA634-36, JA659.[1] Specifically, it arises from Puma's permanent publication of a defamatory presentation to a global audience, including shareholders and industry analysts, targeting Dr. Eshelman because he proposed adding independent directors to Puma's board after Puma committed securities fraud. JA757, JA759-60, JA771-73. Puma's retaliatory presentation levied among the most damaging accusations possible against Dr. Eshelman, claiming that a man who dedicated his life to ensuring ethical clinical research in the pharmaceutical industry was, himself, involved in clinical trial fraud. JA759-60, JA771-773, JA1635-36. The accusations are false. Dr. Eshelman and his company, Pharmaceutical Product Development ("PPD"), were the victims of a fraud committed by others—and the FDA recognized that PPD's whistleblowing resulted in the real perpetrator's criminal conviction. JA1309. But Puma intentionally and maliciously twisted the facts to punish

[1] "JA" refers to the Joint Appendix in the Fourth Circuit. "DE" refers to docket entries in the district court.

Dr. Eshelman—a Puma shareholder—for daring to question Puma's mismanagement.

2. Dr. Eshelman, a septuagenarian, has spent more than 40 years in the pharmaceutical industry, developing and commercializing medicines, monitoring clinical drug trials, and investing in new pharmaceuticals. JA753.

Born and raised in rural North Carolina, Dr. Eshelman ultimately obtained his Pharm.D. and began working for leading pharmaceutical companies developing medicines and serving in management. JA1546, JA1728, JA1742. In 1985, Dr. Eshelman founded PPD as a one-person start-up and eventually grew it into a successful contract research organization that runs clinical drug trials. JA753; DE 430 at 39. Dr. Eshelman was PPD's CEO from 1990-2009 and was promoted to Chairman of its board in 2009, a position he held until the company was sold in 2011. JA753. After also serving as the founding Board Chairman of Furiex Pharmaceuticals from 2009 until its 2014 sale, he founded Eshelman Ventures, which invests in nascent healthcare and pharmaceutical companies. JA753, JA1315, JA1728. He has served on the boards of numerous companies, earning a national reputation for "car[ing] more about shareholders getting a good return on their investment than ... about management remaining entrenched and in charge of [a] company." JA806, JA1728.

Dr. Eshelman developed a stellar, wide-ranging reputation, dedicating his life to the industry and quickly becoming known as a man of great integrity and ethics. JA1293-94, JA1297, JA1312-13.

The strength of Dr. Eshelman's reputation paid dividends, enabling him to expand his businesses, including growing PPD from a one-man start-up into a company with over $2 billion in revenue. JA1305; DE 430 at 39. Indeed, Dr. Eshelman earned such an impeccable reputation that Puma itself hired PPD to work on the clinical trial for its flagship drug. JA767. Dr. Eshelman is also a devoted philanthropist, giving over $140 million to charity—including $100 million to UNC's pharmacy school that bears his name. JA206; JA629; DE 430 at 159. By all accounts, before Puma's defamation, Dr. Eshelman's reputation was "extraordinary." App.68.

3. Puma is a publicly traded, for-profit biopharmaceutical corporation founded by Alan Auerbach. Auerbach previously founded Cougar Biotechnology, Inc. and grew and sold it for $1 billion. JA110-11. Demonstrating the value of reputation in the industry, Auerbach marshaled his then-stellar reputation to command sky-high compensation as Puma's President, CEO, and Board Chairman, JA1351-65, and from 2010-2018 alone received compensation valued at over $125 million, JA752.

Puma's single product was the cancer drug neratinib. JA752. In July 2014, Auerbach publicly claimed—while withholding supposedly corroborating data—that neratinib's disease-free survival rates were "in line" with an already-FDA-approved cancer drug. JA754. Puma's stock price immediately quadrupled, making Auerbach an "[o]vernight [b]illionaire," and Dr. Eshelman invested nearly $9 million in Puma. *Id.* Shortly after, Puma's claims were revealed to be false, and Puma's stock price

plummeted. JA754-55; JA1602. Auerbach's false statements resulted in a federal securities fraud verdict that Puma has estimated will result in up to $51.4 million liability.[2]

4. Troubled by Puma's mismanagement, Dr. Eshelman sent Puma a "books and records" request. JA757. Puma denied his request, and Auerbach reacted by telling his lawyers to "[t]ell [Eshelman] to go [f***] himself" and threatening to murder Dr. Eshelman with a tire-iron. JA608, JA1378. Increasingly concerned, Dr. Eshelman filed a Preliminary Consent Statement with the SEC, proposing that Puma's shareholders elect four independent directors to Puma's five-person board. JA757. Auerbach responded by vowing revenge and threatening that he was "going to F [Eshelman] up." JA757, JA796. Two days before drafting Puma's defamatory Investor Presentation, Auerbach reiterated, to industry analysts, that "Im [*sic*] just getting warmed up. I'm gonna f*** this Eshelman guy up. Bad." JA1690.

Auerbach made good on his threat. In December 2015, Puma mailed a "Consent Revocation Statement" to its shareholders across the country and around the globe, urging them to reject Dr. Eshelman's proposal and directing them, via weblink/URL in an "IMPORTANT NOTICE," to

---

[2] *See Hsu v. Puma Biotechnology, Inc.*, No. 8:15-cv-865 (C.D. Cal.); Puma Biotechnology, Inc., Quarterly Report (Form 10-Q) at 42 (Aug. 5, 2021) https://www.sec.gov/ix?doc=/Archives/edgar/data/1401667/000156459021041634/pbyi-10q_20210630.htm.

Puma's website where Puma published its defamatory Presentation. JA151. Puma's defamatory Presentation falsely accused Dr. Eshelman of being replaced as CEO of PPD after being involved in clinical trial fraud. JA759-60, JA771-773, JA1635-34. But, in reality, PPD had been the victim of fraud, which it discovered and blew the whistle on during a trial of another company's drug. JA764-65, JA783-85, JA790, JA1309.

Puma published its defamatory Presentation to the largest possible audience. JA799-800. Puma published its Presentation in multiple places on its website where it was viewed repeatedly, including by people at institutional investors, banks, and brokerage firms, and was viewed hundreds of times by people around the world, from the United States to Germany to China to Japan and many places in between. JA771-72; PX-255. Puma also filed the Presentation with the SEC, and it is thus permanently accessible on the SEC's website—it cannot be removed or deleted. JA771. And Puma sent the Presentation directly to industry insiders, including at Vanguard Investments, JA772, and the Bank of America analysts to whom Auerbach promised he would "f*** up this Eshelman guy," with the added note that Dr. Eshelman "was involved in a clinical trial fraud.... Now you know why he [w]as fired as CEO of PPD." JA1404, JA1690, JA1696.

B. Proceedings Before the District Court.

1. In February 2016, Dr. Eshelman sued Puma for defamation. JA40-93. Puma unsuccessfully moved to dismiss, DE 20, filed counterclaims—which

the court dismissed—and took an interlocutory appeal to the Fourth Circuit—which that court summarily dismissed. JA323-32; JA381-82; JA398-99; JA401-13. Following discovery, the parties cross-moved for summary judgment. The district court denied Puma's motion and granted Dr. Eshelman's motion in part, holding that Puma's statements were libelous *per se* and "of and concerning" Dr. Eshelman. JA600-26. The case proceeded to trial on the questions of falsity, actual malice, and damages.

2. The parties stipulated to a lengthy recitation of the facts about the events leading to Puma's publication of the false and defamatory Presentation. At trial, in addition to those stipulated facts, jurors heard "overwhelming" and "compelling" evidence of every factor that jurors must consider when determining presumed damages under North Carolina law. App.72-74; DE 386 at 21-22 (jury instructions). Examples are many:

- "The evidence showed that Eshleman built an extraordinary reputation over a 40-year period," JA1546, as a "leader in the [pharmaceutical] industry," JA1297, and that "[t]o be accused of fraud" went "to the heart of [his] career." JA1314.

- In the world in which Dr. Eshelman does business, having a "reputation as a person of integrity" is "everything." JA1304.

- Dr. Eshelman had uniquely monetized his reputation. JA1297, JA1305, JA1728-29.

- Notwithstanding his plans to retire, Dr. Eshelman, despite being a septuagenarian, "ha[s]n't retired" and instead "work[s] ... harder than [he] did before" to "demonstrate to people ... [Puma's defamation is] not true." JA1314-15.

- Puma's defamation caused Dr. Eshelman "stress," "anxiety," and "anguish," including because it affected him and "[his] family, in terms of a good name." JA1315.

- Puma's defamation hurt Dr. Eshelman's ability to pursue his businesses and charitable ventures because people "[a]re not going to do [business] with a fraudster." *Id.*

- Puma's Presentation was "very compelling," JA1718, and a sophisticated investor testified that he "would 'absolutely not' support" in "business someone who had been involved in fraud." JA772, JA1294.

- Puma directed shareholders to its defamatory statements, emailed them to investment professionals, and published them to global audiences in multiple locations, including a permanent, online, government-sanctioned forum—the SEC database—that is regularly consulted and relied upon by businesspeople doing diligence, that "can easily be reviewed, re-published, and called up in electronic searches," and that will continue to damage

Dr. Eshelman into the future. JA771-72, JA800-01, JA1404, JA1690-95.

- Puma's CEO—the author of the defamatory statements—refused to retract the defamation and expressed zero remorse for his actions, testifying that "[w]e have nothing to be sorry for." JA1462-63.

3. At no point during the trial did Puma move for judgment as a matter of law under Rule 50(a)—a motion that would have allowed it to challenge the sufficiency of the evidence on damages.

The case was submitted to the jury, which, after deliberating for over eleven hours, unanimously found that Puma defamed Dr. Eshelman and awarded him $15.85 million in compensatory damages and $6.5 million in punitive damages. Once again, Puma did not move for judgment as a matter of law under Rule 50(b) on the ground that the evidence was insufficient to support the damages awards. Instead, Puma moved only under Rule 59 for remittitur, or, in the alternative, a new trial.

4. The district court (Dever, J.) denied Puma's Rule 59 motion in a 44-page opinion. With regard to Puma's challenge to the size of the damages awards, the court explained that "the very unique facts of this case, including the 146 stipulations and the extensive trial record" were more than sufficient to sustain the jury's damages awards. App.68. The district court "recite[d] the 146 stipulated facts" that the jury received because they "provide necessary background information and help to explain the jury's verdict" and

discussed in detail the evidence in the trial record. App.32-64.

Among other things, the court explained based on its first-hand observations that "Eshelman presented compelling evidence of the reprehensibility of Puma's motives and conduct, the likelihood of serious harm to Eshelman, Puma's awareness of the probable consequence of its actions, [and] the duration of Puma's conduct," in addition to the "overwhelming evidence that Puma's statements were false" and "compelling evidence that Puma acted with actual malice." App.72-74. Emphasizing the importance of evaluating the evidence as it was presented in the courtroom, the district court specifically cited Puma's CEO's "disastrous" testimony and admonished that "[y]ou needed to see it to understand it completely." App.72-73.

The district court, after setting forth the types of evidence that juries may consider under North Carolina law when determining damages, explained that Puma failed to "cit[e] any persuasive factor to support its argument" against the jury's damages awards. App.67. Ultimately, the district court concluded:

> The jury deliberated for over eleven hours before determining liability and the amount of Eshelman's [] damages, and Puma does not raise a persuasive argument to set aside the jury's verdict. In fact, this court could not locate a single case applying North Carolina law in which a trial court remitted a jury's award of presumed damages or a North

> Carolina appellate court reduced such an award. Accordingly, in light of the stipulations, the evidence produced at trial, the credibility of the witnesses, and North Carolina law, the court declines to set aside the jury's [] damages award[s].

App.69.

C. Puma Sues Its Trial Counsel for Malpractice.

At the same time Puma pursued an appeal to the Fourth Circuit (*see infra*), Puma sued its trial counsel for legal malpractice. Specifically, the day after briefing closed in its appeal, Puma sued its trial counsel, alleging that counsel were negligent for failing to "make a motion for judgment as a matter of law under [FRCP 50]." Eshelman Notice of Suppl. Auth. [C.A.4 Dkt. 46] (Complaint ¶¶ 29, 43(e), *Puma Biotechnology, Inc. v. Hedrick Gardner Kincheloe & Garofalo LLP*, No. 20-CVS-12456 (N.C. Super. Ct. Mecklenburg Cty. Sept. 17, 2020)). Puma alleged that its trial counsel's actions in failing to make a Rule 50 motion were highly prejudicial because they "caused Puma to lose the Eshelman defamation case and caused the entry of a Judgment for excessive damages against Puma." *Id.* ¶ 45. Puma itself thus recognized that counsel's decision not to file a Rule 50 motion resulted in significant adverse consequences for its defense.

D. Proceedings on Appeal.

1. Because the evidence of Puma's misconduct was so extensive, Puma's appeal, remarkably, did not

challenge the sufficiency of the evidence supporting Puma's "actual malice"—the heightened standard of fault that "has evolved from a high bar to recovery into an effective immunity from liability" for defamation-defendants. *Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting from denial of certiorari).

Instead, Puma's appeal launched a broadside attack on the jury's considered verdict and the district court's thorough opinion refusing to set it aside. Although Puma did not file a Rule 50 motion before the district court (either during trial or post-verdict), Puma nonetheless attempted to challenge the sufficiency of the evidence of damages on appeal, arguing that the case "never should have made it to the jury" because there was no "proof of harm whatsoever." Puma C.A.4 Br. 4, 18. According to Puma, "Eshelman presented no evidence at trial of any harm, and the evidence affirmatively rebutted the notion that he suffered any." *Id.* at 20.

Under the guise of an appeal of the denial of its Rule 59 motion, Puma pressed classic sufficiency of the evidence arguments to the Fourth Circuit throughout its briefing, repeatedly arguing that "Eshelman presented *no evidence* of harm at trial, and any presumption of harm was firmly rebutted by evidence that he continued to enjoy a favorable reputation and a host of business opportunities even after the allegedly defamatory statements were made." Puma C.A.4 Reply Br. 36 (emphasis added).[3]

---

[3] *See also, e.g.*, Puma C.A.4 Br. 18 (arguing that there was no "proof of harm whatsoever"); *id.* at 48-49 ("[Eshelman]

In so doing, Puma focused on its contention that there was no evidence that Dr. Eshelman suffered *pecuniary* harm—even though no such proof is required for presumed damages under North Carolina law and this Court's precedent.[4] Puma ignored all other cognizable evidence and defamation damages it had agreed that the court and jury must consider, DE 436 at 5-6 (Puma Mem. in Supp. of Rule 59 Mot. (citing Restatement (First) of Torts § 621 cmts. b-c (2018)))—and invited the Fourth Circuit to do the same.

---

introduced *no evidence* of actual harm to his reputation or emotional wellbeing"; "[i]ndeed, the evidence showed the exact opposite—that Eshelman's reputation remained fully intact." (emphasis added)).

[4] *E.g.*, *Flake v. Greensboro News Co.*, 195 S.E. 55, 59 (N.C. 1938) ("The law presumes that general damages actually, proximately, and necessarily result from an unauthorized publication which is libelous *per se* and they are not required to be proved by evidence since they arise by inference of law, and are allowed whenever the immediate tendency of the publication is to impair plaintiff's reputation, although no actual pecuniary loss has in fact resulted."); *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405, 408 (N.C. 1984) ("[N]o proof is required as to any resulting injury"'; damages are "'not required to be proved by evidence.'" (quoting *Flake*, 195 S.E. at 59)); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred."); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) ("[P]roof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted[.]" (citation omitted)).

2. The Fourth Circuit fully affirmed the jury's finding that Puma had defamed Dr. Eshelman but vacated the jury's damages awards without even offering Dr. Eshelman a remittitur. App.11-19.

The court began by rejecting, in a footnote, Dr. Eshelman's argument that, under *Unitherm*, Puma waived its sufficiency of the evidence challenge to the jury's damages awards by failing to move for judgment as a matter of law under Rule 50. App.11 n.2. In so doing, the court disregarded this Court's holding in *Unitherm* that a party's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence," 546 U.S. at 404, and the holdings of no fewer than eight other federal circuits that have applied *Unitherm*'s holding to foreclose sufficiency-of-the-evidence challenges to damages awards when a party fails to file a Rule 50 motion before the district court.

The Fourth Circuit then accepted Puma's argument on the merits, echoing the sufficiency of the evidence arguments in Puma's briefing. According to the court, Dr. Eshelman "provide[d] *no support*" for his claimed damages and "there is *no evidence* justifying" the damages award, including "*no evidence whatsoever* of actual harm." App.12, 15 (emphasis added). By contrast, according to the court, "Puma presented evidence that ... Eshelman's reputation remained both commendable and intact after the [defamatory] publication." App.13.

Notwithstanding the abuse-of-discretion standard of review mandated by the Seventh

Amendment,[5] the Fourth Circuit, in "find[ing] no evidence to support" the jury's damages awards, App.17, did not discuss or even cite the district court's 44-page opinion denying Puma's motion for remittitur or, in the alternative, a new trial and upholding the jury's damages awards. The Fourth Circuit did not acknowledge, much less discuss, the district court's admonition about "the very unique facts of this case," including Puma's CEO's testimony that was so "disastrous" that "[y]ou needed to see it to understand it completely." App.68, 72. And the Fourth Circuit entirely ignored the fact that "[t]rial judges have the 'unique opportunity to consider the evidence in the living courtroom context,' while appellate judges see only the 'cold paper record.'" *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996) (citation omitted).

Moreover, although the court paid lip service to North Carolina law that "'presumes that general damages actually, proximately, and necessarily result' from defamation *per se*," App.13 (quoting *Flake v. Greensboro News*, 195 S.E. 55, 59 (N.C. 1938)), it repeatedly cited its (incorrect) belief that Dr. Eshelman presented "no evidence whatsoever of actual harm" in vacating the jury's damages awards. *E.g.*, App.12-15. And although North Carolina law provides that "the size of the award, standing alone"

---

[5] *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279-80 & nn.25-26 (1989).

is not evidence that a damages award is improper,[6] the court "start[ed] with the observation that the jury's [damages] award ... is exceptionally large," and made that observation outcome-determinative. App.12.

3. After the Fourth Circuit denied Dr. Eshelman's petition for rehearing and motion to stay the mandate pending decision on this then-forthcoming petition for certiorari, Dr. Eshelman made an Emergency Application to Chief Justice Roberts, as Circuit Justice, to stay the Fourth Circuit's mandate. *See Eshelman v. Puma Biotechnology, Inc.*, No. 21A14. On August 4, 2021, Chief Justice Roberts entered an order granting a stay of the Fourth Circuit's mandate and calling for a response from Puma. Ultimately, the Chief Justice vacated that order and denied Dr. Eshelman's Application.

[6] *Finch v. Covil Corp.*, 972 F.3d 507, 516 (4th Cir. 2020) (citing North Carolina caselaw).

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari to Address Whether a Party Waives a Sufficiency of the Evidence Challenge to a Damages Award if It Fails to Raise that Issue in a Rule 50 Motion at Trial.

A. Rule 50 is unquestionably available when a party argues that the evidence is insufficient to support a damages award.

Rule 50 provides that "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may … resolve the issue against the party" and grant that party judgment as a matter of law. Fed. R. Civ. P. 50(a). A party may move for judgment as a matter of law at any time before the case is submitted to the jury, *id.*, and may then renew its motion after a verdict is returned, Fed. R. Civ. P. 50(b).

In considering whether to grant a Rule 50 motion, a court must "review all of the evidence in the record, drawing all reasonable inferences in favor of the non-moving party," and "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000) (citation omitted). Critically, the court may not "make credibility determinations or weigh the evidence," as these are "'jury functions, not those of a judge.'" *Id.* at 150 (citation omitted); *see also Flowers v. S. Reg'l*

Physician Servs., Inc., 247 F.3d 229, 235 (5th Cir. 2001) ("[J]udgment as a matter of law should not be granted unless the facts and inferences point 'so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion.'").

A Rule 50 motion is unquestionably available when a defendant believes that the plaintiff has failed to offer sufficient evidence that it is entitled to damages or is entitled only to nominal damages. For example, in *Akouri v. State of Florida Department of Transportation*, 408 F.3d 1338 (11th Cir. 2005), the jury found that the defendant discriminated against the plaintiff in a promotion decision and awarded $700,000 in compensatory damages. The defendant moved for judgment as a matter of law on damages under Rule 50 both at the close of evidence and after the verdict was returned, arguing that the plaintiff "failed to adduce any evidence to support the jury's damages award." *Id.* at 1342. The district court agreed and "reduced [the plaintiff's] award to $1.00 in nominal damages on the basis that [plaintiff] failed to prove any actual damages—either monetary or non-monetary." *Id.* The Eleventh Circuit affirmed, explaining that "[a] review of the record reveals that [plaintiff] made no attempt to describe any kind of harm, mental, emotional, or otherwise, arising from the discrimination." *Id.* at 1345.

Similar cases abound in which a defendant moves for judgment as a matter of law under Rule 50 on the ground that the evidence is insufficient to support any damages (or only nominal damages). *See, e.g.*, *Neb. Plastics v. Holland Colors Americas, Inc.*,

408 F.3d 410, 417 (8th Cir. 2005) (defendant moved for JMOL on damages under Rule 50 and district court granted motion, holding that "there was not sufficient evidence from which the jury could have calculated [plaintiff's] future damages with reasonable certainty"); *Tercero v. Tex. Southmost Coll. Dist.*, 989 F.3d 291, 296 (5th Cir. 2021) (district court granted Rule 50(b) motion and held that plaintiff was entitled to only $1 of nominal damages because "there was an absence of sufficient evidence showing that [plaintiff's] injuries were caused by the due-process violation"; Fifth Circuit affirmed); *Alston v. King*, 231 F.3d 383, 385-86 (7th Cir. 2000) (defendant moved for judgment as a matter of law on the ground that the evidence was insufficient to support more than nominal damages). There is accordingly no question that a defendant who believes the evidence is insufficient to support a damages award may raise that issue both during trial under Rule 50(a) and after a verdict is returned under Rule 50(b).

B. Challenges to the sufficiency of the evidence are waived on appeal if not raised in a properly filed Rule 50 motion.

Although a party need not file any motions for judgment as a matter of law under Rule 50, it *must* do so if it intends to later appeal the judgment based on insufficiency of the evidence grounds. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006). In *Unitherm*, the defendant failed to make a post-trial motion for judgment as a matter of law under Rule 50(b) but the Federal Circuit nonetheless allowed the defendant to litigate a sufficiency-of-the-

evidence challenge on appeal. *See Unitherm*, 546 U.S. at 398-99.

This Court reversed, holding in no uncertain terms that a party's "failure to comply with [FRCP] 50 *forecloses its challenge to the sufficiency of the evidence*." *Id.* at 404 (emphasis added). That holding was grounded in the text of Rule 50, which "sets forth the procedural requirements for challenging the sufficiency of the evidence in a civil jury trial" and requires any such challenge to be raised at "two stages … prior to submission of the case to the jury, and after the verdict and entry of judgment." *Id.* at 399. The Court also explained that the "'requirement of a timely application for judgment after verdict is not an idle motion'" because "'principles of fairness'" dictate that the trial judge who saw the evidence first-hand should be given an opportunity to determine the sufficiency of the evidence in the first instance. *Id.* at 401 (citation omitted).

The Court further emphasized that its holding in *Unitherm* applies "with equal force whether a party is seeking judgment as a matter of law or simply a new trial." *Id.* at 402; *see also id.* (holding it "immaterial" whether party is seeking new trial or judgment as a matter of law based on insufficiency of the evidence); *id.* at 404 (Court's holding applies when a party "seeks a *new trial* based on the legal insufficiency of the evidence" but did not file proper motions under Rule 50). In short, "since [defendant] failed to renew its pre-verdict motion as specified in Rule 50(b), there was no basis for review of [defendant's] sufficiency of

the evidence challenge in the Court of Appeals." *Id.* at 407.[7]

C. The decision below conflicts with the decisions of multiple other circuits that properly apply *Unitherm* to sufficiency of the evidence challenges to damages awards.

This Court's intervention is warranted because the Fourth Circuit's decision conflicts with the decisions of multiple other circuits that have found sufficiency of the evidence challenges to damage awards foreclosed by *Unitherm* where the party failed to file proper motions under Rule 50 at trial. *See* S. Ct. R. 10(a) (certiorari warranted if a court of appeals "has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter").

For example, in *Gleason v. Norwest Mortgage, Inc.*, 253 F. App'x 198, 202 (3d Cir. 2007), the defendant argued that "the evidence presented at trial was insufficient as a matter of law for the jury to find that Norwest suffered any loss because the supposedly lost value to Gleason was based on lost profits that were not reasonably certain to materialize." That is *virtually identical* to what Puma

[7] The 7-2 majority in *Unitherm* also expressly rejected the dissent's suggestion that "courts of appeals [may] consider the sufficiency of the evidence underlying a civil jury verdict notwithstanding a party's failure to comply with Rule 50" as "foreclosed by authority of this Court." *Unitherm*, 546 U.S. at 402 n.4.

argued on appeal here—namely, that Dr. Eshelman "presented no evidence at trial of any harm, and the evidence affirmatively rebutted the notion that he suffered any." *E.g.*, Puma C.A.4 Opening Br. 20.

While the Fourth Circuit allowed Puma's waived arguments to be considered on the merits, the Third Circuit correctly found similar arguments to be barred by *Unitherm*. "For a party to challenge on appeal the sufficiency of the evidence to support a jury's finding, that party must have first made an appropriate post-verdict motion under [Rule] 50(b)." *Gleason*, 253 F. App'x at 202. A court "will not consider [the defendant's] challenge to the sufficiency of the evidence" on appeal where that party "filed no such post-verdict motion" under Rule 50(b). *Id.* Under that reasoning, Puma's sufficiency of the evidence appeal would have been a non-starter if this case had arisen in the Third Circuit.

Similarly, in *RFF Family Partnership, LP v. Ross*, 814 F.3d 520, 536-37 (1st Cir. 2016), the plaintiff argued on appeal that it was entitled to at least a certain level of damages as a matter of law because "there was no evidence before the jury that would allow the jury to return a verdict of less than $866,000 in damages." But the plaintiff had failed to advance any similar argument in the Rule 50 motions it filed at trial, and the court accordingly held that "[t]his argument has not been adequately preserved for appeal." *Id.* at 536.

The Eleventh Circuit's decision in *Rosenberg v. DVI Receivables XIV, LLC*, 818 F.3d 1283 (11th Cir. 2016), also underscores that a party may not evade the requirements of Rule 50 and *Unitherm* by

recharacterizing a defaulted sufficiency of the evidence challenge as another type of argument. After failing to renew its challenge to emotional distress damages through a post-trial Rule 50(b) motion, the defendant in *Rosenberg* attempted to re-cast its argument as an assertion that the damage award violated Eleventh Circuit precedent. But the court rejected that maneuver, explaining that "*[r]egardless of how the defendants attempt to characterize their claim*, we think it is clear that they seek to challenge the sufficiency of the evidence at trial." *Id.* at 1292 (emphasis added); *see also Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 804 (7th Cir. 2016) (holding that "[t]o the extent" the party "framed" its arguments on appeal "as a challenge to the sufficiency of the evidence," that argument was "waived" because "the City failed to make a proper motion under [Rule 50]"). These cases are clear that the court must focus on substance over form in determining whether a defendant is impermissibly seeking to appeal on sufficiency of the evidence grounds that were not properly raised below through a Rule 50 motion.

Here, too, it was crystal clear that Puma's appeal fundamentally sought to challenge the sufficiency of the evidence in support of *any* damage award. *See supra* 14-16; *infra* 28-29. Puma's failure to properly raise that issue through a Rule 50 motion would have thus been "fatal to the defendants' argument on appeal" if they had sought to appeal on those grounds in the Eleventh Circuit, *Rosenberg*, 818 F.3d at 1292, or the other circuits that correctly interpret and apply *Unitherm*.

Several other circuits have likewise held that a defendant cannot argue on appeal that the plaintiff "did not offer sufficient evidence of damages" where that defendant "did not [make] its sufficiency of the evidence claim in a Rule 50 [] motion." *Crew Tile Distrib., Inc. v. Porcelanosa L.A., Inc.*, 763 F. App'x 787, 800 (10th Cir. 2019); *see also Noyes v. Kelly Servs., Inc.*, 349 F. App'x 185, 188 (9th Cir. 2009) (party that did not file a Rule 50 motion cannot "challenge[] the sufficiency of the evidence to support the amount of compensatory damages"); *OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*, 841 F.3d 669, 680 (5th Cir. 2016) (party cannot dispute sufficiency of the evidence in support of lost profits award on appeal where not "properly raised in a Rule 50(b) motion"); *Bennett v. Nucor Corp.*, 656 F.3d 802, 813 (8th Cir. 2011) (defendant cannot argue on appeal that "there was insufficient evidence to support the jury's award of punitive damages" where it did not raise that argument below through Rule 50 motion).

By contrast, the Sixth Circuit and Federal Circuit have agreed with the Fourth Circuit that a party may raise a sufficiency of the evidence argument through some alternative means (such as a motion for a new trial) even if it failed to file a Rule 50 motion. The Sixth Circuit has held that "[a] court may grant a new trial if the jury's verdict could not 'reasonably ... have been reached' based on the evidence presented at trial—*even if the moving party never asked for judgment as a matter of law*." *Peterson v. W. TN Expediting, Inc.*, 856 F. App'x 31, 33 n.1 (6th Cir. 2021) (emphasis added). And the Federal Circuit has likewise held (applying Second Circuit law) that a

court may "order a new trial" even if "no motion for JMOL was made under Rule 50(a)." *Medisim Ltd. v. BestMed, LLC*, 758 F.3d 1352, 1359 (Fed. Cir. 2014).

D. Puma's filing of a Rule 59 motion does not excuse its failure to file a Rule 50 motion because it challenges the sufficiency of the evidence on damages.

The Fourth Circuit brushed this entire issue aside in a footnote, asserting that *Unitherm*'s waiver rule "applies to challenges to the sufficiency of the evidence, not to Rule 59 motions alleging an excessive damages verdict." App.11 n.10. Puma, too, has argued that its failure to file a Rule 50 motion was harmless or irrelevant because it separately moved for a new trial under Rule 59. *See* Puma C.A.4 Response/Reply Br. 30 ("Puma clearly challenged the damages awards as excessive under Rule 59(e), not Rule 50, in the district court."). But that reasoning is flawed on several levels, and there is zero authority for the proposition that filing a Rule 59 motion can salvage a waived sufficiency of the evidence challenge.

At the outset, the Fourth Circuit's reasoning misconstrues the arguments that Puma raised both on appeal and in its Rule 59 motion below. Although styled as an appeal from the denial of a motion for a new trial, there is no question that Puma was raising classic sufficiency of the evidence arguments on appeal. Puma's core argument was that the damage award was "unsupported by *any evidence* of actual real-life harm to Eshelman or his reputation." Puma C.A.4 Br. 45 (emphasis added); *see also id.* at 47 (arguing there was "(non-existent) evidence of

damages presented at trial"); *id.* at 48 (Eshelman purportedly "introduced no evidence of actual harm to his reputation or emotional wellbeing"); *id.* ("[Eshelman] could not point to a single damaged business relationship or lost opportunity as a result of the publication of the presentation."); *id.* ("Other than his friend Kenneth Lee, Eshelman was unaware of anyone in the business community or elsewhere who had actually read the presentation."); *id.* at 49 ("Eshelman's reputation remained fully intact.").

Those arguments did not in any way turn on the *specific* damages award returned by the jury; they instead asserted that Eshelman should be entitled to *nothing* other than nominal damages, full stop. These are precisely the types of arguments that could—and should—have been raised via a Rule 50(a) motion during trial and renewed under Rule 50(b) after the verdict was returned. *See supra* Section I.A (collecting cases). There is no doubt that Puma could have made these motions—because these are the same arguments Puma made (unsuccessfully) to the jury in its closing arguments, urging the jury to reject any damages award, or, at most, award nominal damages. DE 431 (Mar. 13, 2019 Trial Tr. 244-46). Since Puma failed to raise its sufficiency of the evidence arguments "as specified in Rule 50(b), there was no basis for review of [Puma's] sufficiency of the evidence challenge in the Court of Appeals." *Unitherm*, 546 U.S. at 407.

In all events, the text of Rule 50 itself contemplates that parties may file *both* a Rule 50 motion and a Rule 59 motion. Rule 50(b) specifically provides that a party may move for judgment as a

matter of law "and may include an alternative or joint request for a new trial under Rule 59." Fed. R. Civ. P. 50(b). In such circumstances, Rule 50(c) directs the court to first rule on the motion under Rule 50 but also to issue a conditional ruling on the Rule 59 motion to ensure those issues are preserved and properly presented for appellate review.

It should hardly come as a surprise, then, that a party may need to file motions under *both* Rule 50 *and* Rule 59 depending on the types of arguments it is raising. As one observer has explained, Rule 50 motions raising sufficiency of the evidence and Rule 59 motions requesting a new trial based on excessiveness or the weight of the evidence "are often raised together and ideally should be." Steven Alan Childress, *Revolving Trapdoors: Preserving Sufficiency Review of the Civil Jury After* Unitherm, 26 Rev. Litig. 239, 244 (2007); *see also Crew Tile Distrib.*, 763 F. App'x at 800 n.6 (noting that party can combine Rule 50 and Rule 59 motion to preserve issues for appeal). Indeed, in both *Gleason* and *OneBeacon*, the defendants *did* file Rule 59 motions in the trial court but that did not prevent the waiver of their sufficiency of the evidence challenges to the damage awards because they had failed to make the proper motions below under Rule 50. *See Gleason*, 253 F. App'x at 202-03 (defendant allowed to appeal from denial of Rule 59 motion but not from waived sufficiency of the evidence claim); *OneBeacon*, 841 F.3d at 675, 680 (challenge to lost profits damage award barred for lack of Rule 50 motion notwithstanding party's separate Rule 59 motion).

The Third Circuit, moreover, has expressly held that—under *Unitherm*—a party *must* file a Rule 50 motion to preserve its sufficiency of the evidence challenge even if it files a separate Rule 59 motion. *See Pediatrix Screening, Inc. v. TeleChem Int'l, Inc.*, 602 F.3d 541, 545-47 (3d Cir. 2010). The court explained that, as a general matter, issues preserved in a Rule 59 motion may be pursued on appeal regardless of whether the party filed a Rule 50 motion. But the court emphasized that the "one exception" to that rule is when a party seeks to appeal based on "insufficiency of the evidence." *Id.* at 547 & n.10; *see also Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 397 n.2 (6th Cir. 2008) (explaining that *Unitherm* requires Rule 50 motions to be properly filed to preserve "question[s] going to the sufficiency of the evidence"); *Crowley v. Epicept Corp.*, 883 F.3d 739, 751 (9th Cir. 2018) (holding that, under *Unitherm*, "a post-verdict motion under Rule 50(b) is an *absolute prerequisite* to any appeal based on insufficiency of the evidence" (emphasis added)). That reasoning is exactly correct under *Unitherm*—but is irreconcilable with the Fourth Circuit's suggestion that filing a Rule 59 motion can salvage a defaulted sufficiency of the evidence argument that was not properly raised in a Rule 50 motion at trial.

II. This Court's Intervention Is Imperative to Preserve the Constitutionally Protected Role of the Jury, Especially in Cases Involving Intangible Damages.

The Seventh Amendment protects "the right of trial by jury" and provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the

United States, than according to the rules of the common law." U.S. Const. amend. VII. Consistent with that foundational guarantee, this Court has held that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Rule 50 relief is an extraordinary remedy because it involves the court either declining to submit an issue to the jury at all (under Rule 50(a)) or overriding the jury's determination after seeing all the evidence (under Rule 50(b)). It is thus imperative for courts to ensure scrupulous compliance with all procedural requirements when a party seeks—as Puma does here—to take an issue away from the jury based on alleged insufficiency of the evidence. Simply put, the right to a jury trial is "'so fundamental and sacred to the citizen'" that it must be "'jealously guarded by the courts.'" *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 352 (1979) (citation omitted).

Concerns about preserving the constitutionally protected role of the jury are heightened in cases like this one that involve intangible damages such as harm to a person's reputation—cases in which the jury is uniquely suited to determine a just award after seeing the evidence and witnesses first-hand. As this Court has recognized, "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted." *Dun & Bradstreet, Inc. v.*

Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985); *see also Flake v. Greensboro News Co.*, 195 S.E. 55, 59 (N.C. 1938) (damages allowed in defamation *per se* cases "whenever the immediate tendency of the publication is to impair plaintiff's reputation, although no actual pecuniary loss has in fact resulted"). Similar concerns arise in cases (also like this case) involving psychological harm or emotional distress; courts must be "deferential to the fact finder because the harm is subjective and evaluating it depends considerably on the demeanor of the witnesses." *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 476 (11th Cir. 1999) (citation omitted); *see also Marable v. Walker*, 704 F.2d 1219, 1220-21 (11th Cir. 1983) (plaintiff's testimony that he was embarrassed and humiliated by defendant's conduct was sufficient to support compensatory damages award).

Multiple Justices of this Court have noted that defamation-plaintiffs already face numerous obstacles to recovery, many of which are questionable as a matter of first principles. *See Berisha v. Lawson*, 141 S. Ct. 2424, 2424-25 (2021) (Thomas, J., dissenting from denial of certiorari) (questioning constitutional basis for "actual malice" requirement); *id.* at 2428-29 (Gorsuch, J., dissenting) (same). And, even for those few plaintiffs—like Dr. Eshelman—who make it to a jury and win damages at trial, "nearly one out of five today will have their awards eliminated in post-trial motions practice." *Id.* at 2428. Any verdict that makes it all the way through the trial court (again like Dr. Eshelman's) is then "still likely to be reversed on appeal." *Id.* Ultimately, "it appears just 1 out of every 3 jury awards now survives appeal." *Id.*

In short, notwithstanding the profound harms to a person's reputation that can result from the publication of false statements—and notwithstanding the jury's unique competence in identifying and assessing damages for those falsehoods—defamation-plaintiffs like Dr. Eshelman continue to face numerous obstacles to their ultimate recovery. The decision below provides yet another means for a defendant to evade accountability for its wrongdoing.

Moreover, the Fourth Circuit's decision results in a significant injustice for Dr. Eshelman. This case has been pending since early 2016. Notwithstanding the affirmed findings that Puma defamed Dr. Eshelman and acted with actual malice, Dr. Eshelman—a septuagenarian who is eager to put this matter behind him once and for all—will now be forced to start from square one on damages. Indeed, the Fourth Circuit's opinion is especially problematic because the court held the damage award to be unsupported by the evidence but gave no guidance about what amount of damages it believed *would* be permissible. The parties will thus be relegated to potentially years of additional litigation with no guidance to ensure that any subsequent damage award will pass muster under the Fourth Circuit's insufficiently deferential standard of review.

* * *

This Court should grant certiorari to ensure full compliance with *Unitherm* and prevent defendants from nullifying a jury's damage award based on defaulted sufficiency-of-the-evidence arguments that never should have been considered on appeal in the first place.

CONCLUSION

The Court should grant the petition for certiorari.

JEFFREY M. HARRIS
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22201
(703) 243-9423

ELIZABETH M. LOCKE, P.C.
Counsel of Record
JOSEPH R. OLIVERI
CLARE LOCKE LLP
10 Prince Street
Alexandria, VA 22314
(202) 628-7400
libby@clarelocke.com

Date: October 18, 2021

Counsel for Petitioner

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 20-1329 & No. 20-1376

[Filed June 23, 2021]

No. 20-1329

FREDRIC N. ESHELMAN,

Plaintiff – Appellee,

v.

PUMA BIOTECHNOLOGY, INC.,

Defendant – Appellant,

and

ALAN H. AUERBACH,

Defendant.

No. 20-1376

FREDRIC N. ESHELMAN,

Plaintiff – Appellant,

v.

PUMA BIOTECHNOLOGY, INC.,

Defendant – Appellee,

and

ALAN H. AUERBACH,

Defendant.

PUBLISHED

Appeals from the United States District Court for the Eastern District of North Carolina, at Wilmington. James C. Dever, III, District Judge. (7:16-cv-00018-D)

Argued: May 4, 2021 Decided: June 23, 2021

Before GREGORY, Chief Judge, and MOTZ and THACKER, Circuit Judges.

Affirmed in part, vacated in part, and remanded for further proceedings by published opinion. Judge Motz wrote the opinion, in which Chief Judge Gregory and Judge Thacker joined.

ARGUED: Roman Martinez, LATHAM & WATKINS LLP, Washington, D.C., for Appellant/Cross-Appellee. Elizabeth Marie Locke, CLARE LOCKE LLP, Alexandria, Virginia, for Appellee/Cross-Appellant. **ON BRIEF:** Charles S. Dameron, Margaret A. Upshaw, LATHAM & WATKINS LLP, Washington, D.C., for Appellant/Cross-Appellee. Joseph R. Oliveri, CLARE LOCKE LLP, Alexandria, Virginia, for Appellee/Cross-Appellant.

DIANA GRIBBON MOTZ, Circuit Judge:

In 2019, a jury found Puma Biotechnology, Inc. had defamed Fredric Eshelman and ordered Puma to pay Eshelman $22.35 million in compensatory and punitive damages. This verdict constituted the largest damages award in a defamation suit in North Carolina history. Puma appeals, challenging the jury verdict on a number of grounds, including excessiveness. For the reasons that follow, we affirm the liability verdict but vacate the damages award and remand the case to the district court for further proceedings consistent with this opinion.

I.

This lawsuit arises from an investor presentation created by Puma, a pharmaceutical company, in the midst of a proxy contest with Eshelman, a Puma

shareholder. Eshelman is also the founder of Pharmaceutical Product Development ("PPD"), another pharmaceutical company. In 2015 and 2016, Eshelman attempted to take over the Puma board through a proxy contest.

In response, Puma invited its shareholders to visit a link on its investor-relations website where it had published an investor presentation. The presentation discussed events from a decade earlier; specifically, that PPD had contracted with another pharmaceutical company to determine the safety and effectiveness of the drug Ketek. During the Ketek clinical trials, which occurred while Eshelman was CEO of PPD, a clinical investigator falsified documents. According to Eshelman, and later the jury, he was not involved in the fraud. To the contrary, an FDA Special Agent testified that PPD reported the fraud.

The Puma presentation, however, indicated that Eshelman had been culpably involved in the Ketek clinical-trial fraud. Three slides in the presentation were titled "Eshelman Continues to Demonstrate a Lack of Integrity." One of those slides stated that "[a]s [CEO] of PPD, Eshelman was forced to testify before Congress regarding PPD's involvement in this clinical trial fraud in 2008," and that "Eshelman was replaced as CEO for PPD in 2009." Another slide stated that "Puma's Board does not believe that someone who was involved in clinical trial fraud that was uncovered by the FDA should be on the Board of Directors of a public company; particularly a company that is in the process of seeking FDA approval."

Visitors to Puma's website viewed the page where the presentation was published at least 198 times. Puma also filed the presentation with the SEC, which made it permanently accessible on its website.

Eshelman, a resident of North Carolina, initiated this diversity action. He alleges state-law claims of defamation against Puma, which is incorporated in Delaware and has its principal place of business in California, and Alan Auerbach, Puma's CEO, who resides in California. Puma moved to dismiss the suit for lack of personal jurisdiction; the district court denied the motion.

Following cross-motions for summary judgment, the court held that two of Puma's statements were defamatory *per se*: (1) "Puma's statement that [Eshelman] was 'involved in clinical trial fraud,'" and (2) "Puma's statement that [Eshelman] was 'replaced as CEO of PPD in 2009 after being forced to testify regarding fraud in 2008.'" The case proceeded to a jury trial to determine whether Puma's statements were false and made with actual malice, and if so, the amount of damages to be awarded to Eshelman. The jury returned a verdict for Eshelman and awarded him $15.85 million in compensatory damages and $6.5 million in punitive damages.

Puma moved for a new trial or remittitur and Eshelman moved for attorneys' fees. The district court denied all motions, and the parties now appeal.

II.

Puma first challenges the district court's denial of Puma's motion to dismiss for lack of personal

jurisdiction. We review *de novo*. *CFA Inst. v. Inst. of Chartered Fin. Analysts of India*, 551 F.3d 285, 292 (4th Cir. 2009).

Puma has waived its personal jurisdiction claim. In a pretrial order, the parties stipulated to jurisdiction, agreeing that "[t]he Court has jurisdiction of the parties," and "[a]ll parties are properly before the Court."

In *Petrowski v. Hawkeye-Sec. Ins. Co.*, the Supreme Court considered a similar claim. 350 U.S. 495 (1956) (per curiam). The *Petrowski* defendant had specifically stipulated that it "voluntarily submits to the jurisdiction of the . . . court," *id.* at 496, but after a trial on the merits, it contested personal jurisdiction. The Supreme Court rejected the defendant's attempt to roll back its stipulation, concluding that it had, "by its stipulation, waived any right to assert a lack of personal jurisdiction." *Id.*

So too here: Puma cannot now dispute that to which it has already agreed.

III.

Puma next argues that it is entitled to a new trial on liability for two reasons. First, it contends that the district court erred in its summary judgment determination that the two investor presentation statements were defamatory *per se*. Second, it argues that the verdict form prejudicially misrepresented those statements. We reject both claims.

A.

At summary judgment, the district court determined that two statements from the investor presentation were defamatory *per se*: "(1) Puma's statement that [Eshelman] was 'involved in clinical trial fraud,' and (2) Puma's statement that [Eshelman] was 'replaced as CEO of PPD in 2009 after being forced to testify regarding fraud in 2008.'"[1]

We review *de novo*, *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir.1990), and because we sit in diversity, we apply North Carolina substantive law, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938). In North Carolina, "[w]hether a publication is libelous *per se* is a question of law for the court." *Boyce & Isley, PLLC v. Cooper*, 568 S.E.2d 893, 899 (N.C. Ct. App. 2002).

To resolve this question, a court begins by asking if each of the statements is "subject to only one

---

[1] Eshelman argues that Puma has failed to preserve this issue for our consideration because Puma seeks review of the district court's denial of summary judgment after a full trial and final judgment. Such orders generally are not appealable. *See Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 422 (4th Cir. 2005). However, Puma and Eshelman filed cross-motions for summary judgment on the same issue. That is, Puma argued that its statements were not defamatory and Eshelman argued that they were not only defamatory, but defamatory *per se*. Thus, when the district court ruled in favor of Eshelman, it denied Puma's motion, but it also granted in part Eshelman's motion. And when "appeal from a denial of summary judgment is raised in tandem with an appeal of an order granting a cross-motion for summary judgment, we have jurisdiction to review" that denial. *Monahan v. County of Chesterfield*, 95 F.3d 1263, 1265 (4th Cir. 1996) (citing *Sacred Heart Med. Ctr. v. Sullivan*, 958 F.2d 537, 543 (3d Cir. 1992)).

interpretation" "when considered alone without innuendo, colloquium or explanatory circumstances" by "ordinary people." *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405, 409–10 (N.C. 1984).

Puma argues that both statements are capable of more than one interpretation. Puma notes that its statement that Eshelman was "*involved in* clinical trial fraud" does not explicitly claim that he "*committed* trial fraud." For this reason, Puma contends the statement could be interpreted to say that Eshelman was an innocent bystander and not culpable of the fraud. Similarly, Puma argues that the statement that Eshelman was "replaced as CEO of PPD" cannot be defamatory *per se* because it does not say Eshelman was fired; it only says he was "replaced."

But this is not how an ordinary person would "naturally understand" the presentation. *Flake v. Greensboro News Co.*, 195 S.E. 55, 60 (N.C. 1938). The three slides at issue are entitled "Eshelman Continues to Demonstrate a Lack of Integrity." The second slide states that Eshelman was CEO of PPD during the Ketek clinical trial, and that "[f]raud was uncovered in this trial by the FDA's Office of Criminal Investigation." The next four bullet points explain various aspects of the fraud. The slide next states that "Eshelman was forced to testify before Congress regarding PPD's involvement in this clinical trial fraud in 2009." The slide ends with a sub-bullet point stating that "Eshelman was replaced as CEO of PPD in 2009." With no "explanatory circumstances," *Renwick*, 312 S.E.2d at408–09, the ordinary reader would presume that Eshelman was removed as CEO due to the fraud.

On the third slide, Puma asserts that a PPD associate "sent evidence of fraud to PPD management, which was ignored." The slide then states that "Eshelman denied before Congress that fraud had occurred," links to Eshelman's congressional testimony, and concludes with a statement that "Puma's Board does not believe that someone who was involved in clinical trial fraud that was uncovered by the FDA should be on the Board of Directors of a public company." In this "context," *Boyce & Isley, PLLC*, 568 S.E.2d at 897, the presentation is susceptible to only one reasonable interpretation: that Eshelman's "involvement in clinical trial fraud" was sinister.

Each statement is thus capable of a singular interpretation. Under well-established North Carolina law, we next inquire if that interpretation "(1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace." *Renwick*, 312 S.E.2d at 408–09 (citing *Flake*, 195 S.E. at 60). We have little trouble concluding that the statements at issue — at a minimum — impeach Eshelman in his profession. *See Badame v. Lampke*, 89 S.E.2d 466, 468 (N.C. 1955) (statement that plaintiff engaged in "shady deals" was defamatory *per se*); *Clark v. Brown*, 393 S.E.2d 134, 137 (N.C. 1990) (statement that plaintiff was fired for being incompetent was libel *per se*).

Thus, because the investor presentation statements were susceptible of only one reasonable interpretation, and that interpretation was defamatory, we affirm the

district court's determination that the statements were defamatory *per se*.

B.

Puma also contends that asserted errors in the verdict form warrant a new trial. We "holistically" review a verdict form for abuse of discretion. *Benjamin v. Sparks*, 986 F.3d 332, 346–47 (4th Cir. 2021). We must evaluate "whether the form 'adequately presented the contested issues to the jury when read as a whole and in conjunction with the general charge, whether submission of the issues to the jury was fair, and whether the ultimate questions of fact were clearly submitted to the jury.'" *Id.* (quoting *Horne v. Owens Corning Fiberglas Corp.*, 4 F.3d 276, 284 (4th Cir. 1993)).

Puma asserts two errors; both arise from the instruction that the jury determine whether Puma's statements that "Eshelman was 'replaced as CEO of PPD' after being 'involved in clinical trial fraud'" were false and made with actual malice. First, Puma contends that the district court erred in inserting "after being" between the quoted material. Second, Puma argues that the district court never determined that the statement "Eshelman was 'replaced as CEO of PPD' after being 'involved in clinical trial fraud'" was defamatory *per se* because at summary judgment it had separately analyzed the statements "Eshelman was 'replaced as CEO of PPD in 2009 after being forced to testify regarding fraud in 2008'" and "Eshelman was 'involved in clinical trial fraud.'"

These quibbles do not render the verdict form unclear or the verdict unfair. The district court carefully delineated between Puma's statements and the court's summary by its use of quotation marks. Moreover, the jury received a copy of the investor presentation and was properly instructed to consider the quoted statements "in the context of the entire presentation." Accordingly, when "read as a whole," the verdict form "adequately presented" Puma's statements to the jury. *Horne*, 4 F.3d at 284. Thus, we reject Puma's challenge to the verdict form.

IV.

We now reach the crux of this appeal: Puma's contention that the jury award was excessive and that the district court erred in denying its motion for a new trial or remittitur.[2]

We review for abuse of discretion, *Fontenot v. Taser Int'l, Inc.*, 736 F.3d 318, 334 (4th Cir. 2013), and apply "state law standards," *Konkel v. Bob Evans Farms Inc.*, 165 F.3d 275, 280 (4th Cir. 1999) (citing *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 435–39 (1996)). Rule 59(a) of the North Carolina Rules of Civil Procedure permits a new trial for "[m]anifest disregard by the jury of the instructions of the court," "[e]xcessive or inadequate damages appearing to have been given

---

[2] Eshelman argues that Puma waived its damages arguments when it failed to move for judgment as a matter of law. But that Rule 50 requirement applies to challenges to the sufficiency of the evidence, not to Rule 59 motions alleging an excessive damages verdict. *See Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 160–61 (4th Cir. 2012).

under the influence of passion or prejudice," or "[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law." N.C. Gen. Stat. § 1A-1, Rule 59(a)(5)–(7). Here, in manifest disregard of the jury instructions, the jury awarded excessive damages that the evidence could not justify.

We start with the observation that the jury's $22.35 million award — $15.85 million for compensatory damages and $6.5 million for punitive damages — is exceptionally large. No North Carolina jury has awarded anything close to such an amount in a defamation case. The next highest jury awards that have been upheld on appeal are an order of magnitude lower. *See Hien Nguyen v. Taylor*, 723 S.E.2d 551, 556 (N.C. Ct. App. 2012) (upholding $1 million in compensatory damages per plaintiff); *see also Desmond v. News & Observer Publ'g Co.*, 846 S.E.2d 647 (N.C. Ct. App. 2020) (affirming judgment of $1.5 million in compensatory damages). One would expect ample evidence of the harm suffered by Eshelman to support a jury award ten times the size of the largest defamation awards in North Carolina history.

But there is no evidence justifying such an enormous award. Eshelman estimated that his damages were $7.5 million before trial, $100 million at his deposition, and $52 million at closing argument. Yet he provided no support for any of these very different and fluctuating estimates.

Although Eshelman testified on his own behalf that he suffered "incalculable" damage to his reputation, when asked for support for that assertion, he said he did not "have any idea" about "any kind of financial or

economic harm [he suffered] as a result of these statements." He also was unable to name any person who refused to do business with him, or any person who had knowledge of damage to his reputation.

Eshelman offered testimony from only one person who had read the presentation: his friend, Kenneth Lee. Lee testified not only that he did not believe that Eshelman committed fraud, but also that Eshelman had a "very generous [public] persona" and remained a "leader in the industry" after the publication of the defamatory statements. In sum, neither Eshelman nor his witness identified any lost business opportunities, damaged relationships, or foregone contracts resulting from the investor presentation.

Moreover, Puma presented evidence that after publication of the presentation, Eshelman continued to serve on boards of at least seven companies, and that he received numerous accolades in the following years. These accolades included "CEO of the Year" from the Council on Entrepreneurial Development, a Star News Lifetime Achievement Award, an honorary degree, and induction into the North Carolina Business Hall of Fame. The record thus indicates that Eshelman's reputation remained both commendable and intact after the publication.

North Carolina law "presumes that general damages actually, proximately, and necessarily result" from defamation *per se*. *Flake*, 195 S.E. at 59. The doctrine of presumed damages means that "no proof is required" to support the precise amount of a damages award. *Id*. But, nevertheless, the North Carolina pattern jury instructions for libel make clear that a

plaintiff must demonstrate that the award it seeks "is a direct and natural consequence of the libel." N.C.P.I.—Civ. 806.83. *See also Hien Nguyen*, 723 S.E.2d at 559 (the "party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty"); *Mann v. Swiggett*, 2012 WL 5507255, at *4 (E.D.N.C. Oct. 9, 2012).

Here the jurors could not have calculated the $22.35 million in damages with the requisite level of certainty because they received no evidence sufficient to support a multimillion-dollar damages award. The district court properly instructed the jury as to presumed damages. Consistent with North Carolina pattern jury instructions, the court told the jurors that presumed damages "unavoidably include[] an element of speculation." *Eshelman v. Puma Biotechnology, Inc.*, No. 2:16-CV-00018-D, Dkt. 286 at 21–22; *see also* N.C.P.I.—Civ. 806.83. However, the court also instructed the jury that it was nonetheless required to evaluate "the probable extent of actual harm in the form of loss of reputation or standing in the community, mental or physical pain and suffering, . . . inconvenience or loss of enjoyment which [Eshelman] has suffered or will suffer in the future as a result of the [Puma's] publication of the libelous statements." *Id.* Finally, the court instructed the jury that it must award the plaintiff an amount that "is a direct and natural consequence of the libel of [Eshelman] by [Puma]." *Id.*

A jury cannot faithfully complete this task when there is no evidence whatsoever of actual harm sufficient to support the damages award. *See MyGallons LLC v. U.S. Bancorp*, 521 F. App'x 297, 305 (4th Cir. 2013) ($4 million general damages verdict for defamation *per se* would be "excessive" because it had "no support in the record"); *see also Fontenot*, 736 F.3d at 334–35 (jury award amounted to "pure conjecture" because plaintiff provided no supporting evidence).

Eshelman relies on a number of defamation cases where larger jury awards were approved. *See, e.g.*, *Cantu v. Flanigan*,705 F. Supp. 2d 220 (E.D.N.Y. 2010) ($150 million compensatory damages award); *Anagnost v. The Mortg. Specialists, Inc.*, No. 2162016cv00277, 2017 WL 7690898 (N.H. Super. Ct. Sept. 29, 2017) ($105 million compensatory damages award), *aff'd*, 2018 WL 4940850 (N.H. Sept. 25, 2018); *Wynn v. Francis*, No. B245401, 2014 WL 2811692, at *1 (Cal. Ct. App. June 23, 2014) ($17 million presumed damages award). But these out-of-state awards are inapposite. All involved defamatory statements published in widely circulated newspapers, on billboards, on television, or on popular websites. At trial, Eshelman failed to demonstrate similar widespread publication.

The trial record shows that the website linking to the investor presentation at issue here was viewed only 198 times. The Puma presentation is permanently available on the SEC website, but Eshelman has made no attempt to quantify the number of people who have viewed, or will view, it there. And if many people had seen the presentation on the SEC website, we would

expect to see some evidence of its effect on Eshelman's reputation.

Where North Carolina courts have awarded million-dollar damages awards for defamation, there has been little doubt that the defamatory statements were widely publicized. *See Desmond v. News & Observer Publ'g Co.*, 823 S.E.2d 412, 438 (N.C. Ct. App. 2018) ($1.6 million in compensatory damages for two defamatory articles published in major regional newspaper stating plaintiff had falsified evidence and committed perjury); *Hien Nguyen*, 723 S.E.2d at 556 ($1 million in compensatory damages per plaintiff for a DVD that falsely showed plaintiffs conducting a wrongful and racially motivated arrest; the video profited $40 million for the defendant).

Moreover, the defamation cases in North Carolina yielding far lower damages awards involve statements which, at least on their face, seem considerably more harmful than those here. For example, in *Lacey v. Kirk*, the jury awarded $50,000 in compensatory damages for statements by the defendant that the plaintiff had committed murder. 767 S.E.2d 632, 648 (N.C. Ct. App. 2014). And in *Kroh v. Kroh*, the plaintiff accused the defendant of molesting his children as well as the family dog; the defendant was awarded $20,000 in compensatory damages. 567 S.E.2d 760, 762 (N.C. Ct. App. 2002).

Eshelman has failed to offer evidence of widespread circulation or comparable harm as a "direct and natural consequence[s] of the libel." *MyGallons LLC*, 521 F. App'x at 305. Accordingly, the district court

abused its discretion in failing to grant Puma's motion for a remittitur or new trial.

V.

We now turn to the remedy. When an appellate court concludes that a jury's damages award is excessive, "it is the court's duty to require a remittitur or order a new trial." *Cline v. Wal–Mart Stores, Inc.*, 144 F.3d 294, 305 (4th Cir. 1998).

Because the Seventh Amendment preserves for the plaintiff his jury right, "the preferable course, upon identifying a jury's award as excessive, is to grant a new trial *nisi remittitur*, which gives the plaintiff the option of accepting the remittitur or of submitting to a new trial." *Id.*; *see also* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2820 (2d ed. 1995). In determining the appropriate amount for remittitur, a court looks to "the outermost award that could be sustained." *Konkel*, 165 F.3d at 282. This course of action thus has the practical advantage of notifying the parties of the upper limit of damages that will withstand scrutiny, while comporting with the Seventh Amendment. *See Kennon v. Gilmer*, 131 U.S. 22 (1889); *see also Defender Indus. v. Nw. Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991) (en banc).

However, "our options in remedying an excessive verdict are not unlimited," *Cline*, 144 F.3d at 305 n.2, and identifying the outermost award that can be sustained presents considerable difficulty in this case. For the reasons explained above, we find no evidence to support the amount awarded by the jury. By the same

token, we cannot ourselves determine with the requisite level of certainty what amount may compensate Eshelman for the defamatory statements. And under North Carolina law, punitive damages depend in part on compensatory damages, N.C. Gen. Stat. § 1D-35(2), so we also cannot identify an appropriate remitted punitive damages award. Thus, while ordering a new trial *nisi remittitur* is an "option," *Cline*, 144 F.3d at 305 n.2, it is an option we reject in this case. *See Knussman v. Maryland*, 272 F.3d 625, 642 (4th Cir. 2001); *see also Kennon*, 131 U.S. at 29.

Instead, we vacate the compensatory and punitive damages awards and remand the case to the district court for a new trial on damages.[3]

---

[3] As a result of our decision to remand this case for a new trial, "the basis for the district court's denial of attorney fees no longer exists." *Sasaki v. Class*, 92 F.3d 232, 243 (4th Cir. 1996). Accordingly, we do not address Eshelman's cross-appeal challenging denial of attorneys' fees.

Because we order a new trial, we do resolve his conditional cross-appeals. Eshelman first argues that the district court erred in determining that a crudely worded email from Auerbach to his attorneys was privileged attorney-client information. Reviewing for abuse of discretion, *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 349 (4th Cir. 2014), we reject this claim. For the reasons stated by the district court, the e-mail constituted a privileged communication under North Carolina law. Eshelman next argues that the district court should have nevertheless allowed him to publish parts of the email to the jury. But, because the district court correctly determined that the email is privileged in its entirety, it is not admissible evidence, even for the purposes of impeachment. *State v. Lowery*, 723 S.E.2d 358, 363 (N.C. Ct. App. 2012). Accordingly, we reject Eshelman's conditional cross-appeals.

In sum, we affirm the liability judgment of the district court, vacate the damages award, and remand for a new trial on damages.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:16-CV-18-D

[Filed March 2, 2020]

FREDRIC N. ESHELMAN,	)
	)
Plaintiff,	)
v.	)
	)
PUMA BIOTECHNOLOGY, INC.,	)
	)
Defendant.	)
	)

ORDER

On October 28, 2015, Fredric N. Eshelman ("Eshleman" or "plaintiff"), a pharmacist and venture capitalist, submitted a proposal to the shareholders of Puma Biotechnology, Inc. ("Puma" or "defendant") to increase the size of Puma's board of directors from five to nine seats, while nominating himself and three other people to the additional four seats. See [D.E. 370-1] ¶¶ 46-50. Puma vigorously opposed Eshelman's proposal and published an investor presentation about Eshleman in January 2016 on its own website and the website of the Securities and Exchange Commission

("SEC"). See id. at ¶¶ 51, 55, 58, 130-45. One of Puma's slides stated that "Eshelman's misrepresentations are no surprise given his history," that Eshelman was the Chief Executive Officer ("CEO") of Pharmaceutical Product Development, LLC ("PPD") "when it managed a clinical trial during the development of the antibiotic drug Ketek," that "[f]raud was uncovered in this trial by the FDA's Office of Criminal Investigation," that "[a]s [CEO]" of PPD, Eshelman was "forced to testify before Congress regarding PPD's involvement in this clinical trial fraud in 2008," and that "Eshelman was replaced as CEO for PPD in 2009." Id. at ¶ 58. Another slide stated that "Puma's Board does not believe that someone who was involved in clinical trial fraud that was uncovered by the FDA should be on the Board of Directors of a public company; particularly a company that is in the process of seeking FDA approval." Id. at ¶ 58.

On January 20, 2016, Eshleman wrote Puma and demanded a retraction and requested an apology. See id. at ¶ 143. Puma refused in a letter that it published with the SEC. See id. at ¶¶ 144-45. On February 3, 2016, Eshleman sued Puma for defamation. See id. at ¶ 146; [D.E. 1] 5.

In this diversity action, North Carolina law applies. On September 28, 2018, the court granted in part and denied in part Eshelman's motion for partial summary judgment and denied Puma's motion for summary judgment [D.E. 304]. The court held that Puma's allegedly defamatory statements concerned Eshelman and that Puma published the allegedly defamatory statements. See [D.E. 306] 20. The court also held that

two of Puma's statements were libelous per se. See id. at 20-24.

As for Puma's statement that Eshelman was "involved in clinical trial fraud," the court held that the statement is libel per se because fraud is an infamous crime that involves dishonesty. Id. at 23; see Badame v. Lampke, 242 N.C. 755, 757, 89 S.E.2d 466, 468 (1955); Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 30, 568 S.E.2d 893, 898 (2002); Raymond U v. Duke Univ., 91 N.C. App. 171, 182, 371 S.E.2d 701, 709 (1988); Gibby v. Murphy, 73 N.C. App. 128, 131-32, 325 S.E.2d 673, 675-76 (1985). When Puma said that "Puma's Board does not believe that someone who was involved in clinical trial fraud that was uncovered by the FDA should be on the Board of Directors of a public company" as part of a series of slides impugning Eshelman's integrity, Puma accused Eshelman of fraud. [D.E. 3 70-1] ¶ 58. The court also held that whether this statement was false and made with actual malice were jury questions, but as a matter of law the statement that Eshelman was "involved in clinical trial fraud" is libel per se. See [D.E. 306] 23; Badame, 242 N.C. at 757, 89 S.E.2d at 468; Boyce & Isley, PLLC, 153 N.C. App. at 30, 568 S.E.2d at 898; Raymond U, 91 N.C. App. at 182, 371 S.E.2d at 709; Gibby, 73 N.C. App. at 131-32, 325 S.E.2d at 675-76.

As for Puma's statement that Eshelman was "replaced as CEO of PPD in 2009 after being forced to testify regarding fraud in 2008," the court rejected Puma's argument that the word "replaced" in this statement does not mean "fired." [D.E. 306] 23. Stating that a CEO was "replaced" "after being forced to testify

regarding fraud in 2008" impeaches that person in his trade or profession. See id. at 23-24; Badame, 242 N.C. at 757, 89 S.E.2d at 468; Boyce & Isley, PLLC, 153 N.C. App. at 30, 568 S.E.2d at 898; Raymond U, 91 N.C. App. at 182, 371 S.E.2d at 709; Gibby, 73 N.C. App. at 131-32, 325 S.E.2d at 675-76. The court also held that whether this statement was false and made with actual malice were jury questions, but as a matter of law, the court held that this statement is libel per se. See [D.E. 306] 23-24.

The trial began on March 11, 2019. Before trial, the parties entered 146 stipulations. See [D.E. 370-1]. At trial, the court received the stipulations as a joint exhibit of stipulated facts. See id. Additionally, Eshleman presented six witnesses, and the court received twenty-five exhibits from Eshleman. Puma presented seven witnesses, and the court received eighteen exhibits from Puma. See [D.E. 429-31]. During closing argument, Eshleman argued that the two statements at issue were false and that Puma made them with actual malice and requested $52,000,000 in compensatory damages. See [D.E. 431] 183-224. Puma argued in opposition.

On March 15, 2019, after extensive deliberations, the jury returned a verdict in favor of Eshelman on his defamation claim against Puma. In its verdict, the jury answered three issues. Issue one was, "When read in the context of the entire presentation, were defendant Puma Biotechnology, Inc.'s statements that plaintiff Fredric N. Eshelman was 'replaced as CEO of PPD' after being 'involved in clinical trial fraud' false?" The jury answered, "Yes" to issue one. See id. Issue two

was, "Did defendant Puma Biotechnology, Inc. act with actual malice when it accused plaintiff Fredric N. Eshelman of being 'replaced as CEO of PPD' after being 'involved in clinical trial fraud'?" The jury answered, "Yes" to issue two. See id. Issue three was, "What amount of compensatory damages is plaintiff Fredric N. Eshelman entitled to recover from defendant Puma Biotechnology, Inc.?" The jury answered "$15,850,000." Id.

The jury then considered punitive damages. See [D.E. 433]. Eshleman introduced one additional exhibit, and the court instructed the jury that it could consider the other trial evidence in considering the issue of punitive damages. See id. at 22. Eshleman then argued in favor of punitive damages and requested $100,000,000 in punitive damages. See id. at 22-28. Puma argued in opposition. See id. at 29-35. After deliberating, the jury awarded Eshleman $6,500,000 in punitive damages. See id. at 57-58; [D.E. 389]. On March 25, 2019, the court entered judgment pursuant to the jury verdict. See [D.E. 395].

On April 3, 2019, Eshelman moved for an award of reasonable attorneys' fees under N.C. Gen. Stat. § 1D-45 [D.E. 397]. On April 8, 2019, Eshelman filed a memorandum in support [D.E. 405]. On April 29, 2019, Puma responded in opposition [D.E. 426]. On May 13, 2019, Eshelman replied [D.E. 435]. On May 17, 2019, Puma supplemented its response [D.E. 437]. On May 30, 2019, Eshelman replied to Puma's supplement [D.E. 438].

On April 8, 2019, Eshelman timely moved for $205,903.55 in costs [D.E. 403]. On April 22, 2019,

Puma moved to disallow some of the costs [D.E. 414] and filed a memorandum in support [D.E. 415]. On April 29, 2019, Eshelman responded in opposition [D.E. 425]. On April 22, 2019, Puma moved for a new trial or, in the alternative, remittitur [D.E. 416]. On May 17, 2019, Puma filed a memorandum in support [D.E. 436]. On June 7, 2019, Eshelman responded in opposition [D.E. 439]. On June 21, 2019, Puma replied [D.E. 440]. On June 21, 2019, Puma moved for a hearing concerning its motion for a new trial or, in the alternative, remittitur [D.E. 441]. Finally, on April 22, 2019, Eshelman moved to amend the judgment to include prejudgment interest [D.E. 418] and filed a memorandum in support [D.E. 419].

The court has reviewed the entire record. As explained below, the court denies Eshelman's motion for attorneys' fees, grants Eshelman's motion for costs, denies Puma's motion to disallow costs, denies Puma's motion for a new trial or remittitur, grants Eshelman's motion to amend the judgment to include prejudgment interest, and denies Puma's motion for a hearing.

I.

Eshelman seeks $3,075,897.85 in attorneys' fees under N.C. Gen. Stat. § 1D-45. See [D.E. 405] 1. Under N.C. Gen. Stat § 1D-45, "[t]he court shall award reasonable attorney[s'] fees against a defendant who asserts a defense in a punitive damages claim that the defendant knows or should have known to be frivolous or malicious." N.C. Gen. Stat. § 1D-45. "A defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of it." Rhyne v. K-Mart Corp., 149 N.C. App. 672, 689, 562

S.E.2d 82, 94 (2002) (alteration and quotation omitted), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004); see Raynor v. G4S Secure Sols. (USA) Inc., 327 F. Supp. 3d 925, 946 (W.D.N.C. 2018); Bryan v. Bryan No. 1:11CV141, 2013 WL 1010481, at *1 (W.D.N.C. Mar. 14, 2013) (unpublished); Messer v. Pollack, 809 S.E.2d 375, 2018 WL 710051, at *2 (N.C. Ct. App. Feb. 6, 2018) (unpublished table decision); Fed. Point Yacht Club Ass'n v. Moore, 244 N.C. App. 543, 781 S.E.2d351, 2015 WL 8755698, at *7 (Dec. 15, 2015) (unpublished table decision); Philips v. Pitt Cty. Mem'l Hosp., Inc., 242 N.C. App. 456, 458, 775 S.E.2d 885, 884 (2015). "A defense is malicious if it is wrongful and done intentionally without just cause or excuse or as a result of ill will." Rhyne, 149 N.C. App. at 689, 562 S.E.2d at 94 (quotation omitted); see Raynor, 327 F. Supp. 3d at 946.

Because "punitive damages are intended to punish a litigant for conduct that had already occurred by the time that the litigation had commenced," a court "focuses on the conduct of the party during litigation" to determine whether to award reasonable attorneys' fees under N.C. Gen. Stat. § 1D-45. Raynor, 327 F. Supp. 3d at 946 (quotations omitted). Courts applying N.C. Gen. Stat § 1D-45 have awarded attorneys' fees when a party "[k]nowingly and intentionally commit[s] perjury on the stand on matters related to the punitive damages defense" and when a party "persistently den[ies] a fact alleged by plaintiff but then later confess[es] to such acts." Id.; see Fed. Point Yacht Club Ass'n, 2015 WL 8755698, at *7-8; Philips, 242 N.C. App. at 458, 775 S.E.2d at 884; Bryan, 2013 WL 1010481, at *1. At the same time, courts distinguish

between a party engaging in "malicious acts or practices as a corporation" which do not warrant awarding attorneys' fees under N.C. Gen. Stat. § 1D-45, and a party asserting a malicious or frivolous defense. Rhyne, 149 N.C. App. at 689, S62 S.E.2d at 95.

Eshelman argues that he is entitled to an award of reasonable attorneys' fees under N.C. Gen. Stat § 1D-45. In support, Eshelman alleges that Puma only stipulated to certain facts on "the eve of trial after three years of litigation," concealed facts during discovery, "malicious[ly]" denied facts at summary judgment, did not make a good faith effort to resolve the claim at mediation, and refused to stipulate to certain facts. [D.E. 405] 3-10. Additionally, Eshelman alleges that Puma's Chief Executive Officer Alan Auerbach ("Auerbach") "repeatedly contradicted the stipulated facts and his own prior sworn deposition testimony" (i.e., committed perjury) when Auerbach testified at trial. Id. at 10-15.

Eshelman concedes that Puma's defenses were not frivolous. See [D.E. 438] 1-2. As for whether Puma's defenses were malicious, the decision to go to trial by itself does not constitute a malicious defense. Although Eshelman cites examples of allegedly malicious conduct, the court declines to find Puma's conduct malicious. Cf. Rhyne, 149 N.C. App. at 689-90, 562 S.E.2d at 95. Moreover, although Eshelman vigorously cross-examined Auerbach and exposed Auerbach as a non-credible witness, the court declines to find that Auerbach's testimony rises to the level of perjury that would justify awarding attorneys' fees to Eshelman.

Accordingly, the court denies Eshelman's motion for attorneys' fees under N.C. Gen. Stat. § 1D-45.

II.

Federal Rule of Civil Procedure 54(d)(1) governs a post-judgment motion for an award of costs. See Fed. R. Civ. P. 54(d)(1). Rule 54(d)(1) provides that "costs—other than attorney's fees—should be allowed to the prevailing party." Id. A "prevailing party" is "a party in whose favor a judgment is rendered" or "one who has been awarded some relief by the court." Buckhannon Bd. & Care Home, Inc. v. W. Va Dep't of Health & Human Res., 532 U.S. 598, 603 (2001) (quotation and alteration omitted). Rule 54(d)(1) creates "a presumption in favor of an award of costs to the prevailing party." Teague v. Bakker, 35 F.3d 978, 996 (4th Cir. 1994); see Delta Air Lines, Inc. v. August, 450 U.S. 346, 352 (1981); Cherry v. Champion Int'l Corp., 186 F.3d 442, 446 (4th Cir. 1999).

Federal courts may assess only those costs listed in 28 U.S.C. § 1920. See 28 U.S.C. § 1920; Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 301 (2006); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-43 (1987), superseded on other grounds by statute, 42 U.S.C. § 1988(c); Herold v. Hajoca Corp., 864 F.2d 317, 323 (4th Cir.1988).[1] Local Civil Rule 54.1

[1] Taxable costs under section 1920 include:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

"further refines the scope of recoverable costs." Howard v. College of the Albemarle, No. 2:15-CV-39-D, 2017 WL 3754620, at *1 (E.D.N.C. Aug. 29, 2017) (unpublished) (quoting Earp v. Novartis Pharm. Corp., No. 5:11-CV-680-D, 2014 WL 4105678, at *1 (E.D.N.C. Aug. 19, 2014) (unpublished)); see Local Civil Rule 54.1.[2]

---

(4) Fees for exemplification and the costs of making copies of.any materials where the copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 . . . ;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services . . .

28 U.S.C. § 1920.

[2] Local Civil Rule 54.1(c)(1) provides a non-exhaustive list of normally recoverable costs:

(a) those items specifically listed on the bill of costs form. The costs incident to the taking of depositions (when allowable as necessarily obtained for use in the litigation) normally include only the reporter's fee and charge for the original transcript of the deposition;

(b) premiums on required bonds;

(c) actual mileage, subsistence, and attendance allowances for necessary witnesses at actual costs, but not to exceed the applicable statutory rates, whether they reside in or out of the district;

(d) one copy of the trial transcript for each party represented by counsel.

Local Civil Rule 54.1(c)(1). Local Civil Rule 54.1(c)(2) also identifies items "normally not taxed, without limitation" as

Eshelman lists various costs totaling $205,903.55 on his bill of costs: fees of the clerk ($593.00), fees for service of summonses and subpoenas ($3,819.75), fees for printed or electronically recorded transcripts necessarily obtained for use in the case ($53,953.01), fees and disbursements for printing ($43,078.76), fees for witnesses ($80.00), fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case ($97,116.53), docket fees under 28 U.S.C. § 1923 ($22.50), and costs as shown on Mandate of Court of Appeals ($1,840.00). See [D.E. 403] 1-2. Such fees are recoverable. See 28 U.S.C. § 1920; Local Civil Rule 54.1; Howard, 2017 WL 3754620, at *1 (collecting cases); Silicon Knights. Inc. v. Epic Games, Inc., 917 F. Supp.2d 503, 511-15 (E.D.N.C. 2012), aff'd, 551 F.App'x 646 (4th Cir. 2014) (per curiam) (unpublished). Accordingly, the court grants Eshelman's motion for costs, denies Puma's motion to disallow costs, and awards Eshelman $205,903.55 in costs under section 1920 and Local Civil Rule 54.1.

(a) witness fees, subsistence, and mileage for individual parties, real parties in interest, parties suing in representative capacities, and the officers and directors of corporate parties;

(b) multiple copies of depositions;

(c) daily copy of trial transcripts, unless prior court approval has been obtained.

Local Civil Rule 54.1(c)(2).

III.

A court "may, on motion, grant a new trial on all or some of the issues . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). Remittitur "is the established method by which a trial judge can review a jury award for excessiveness" and order "a new trial unless the plaintiff accepts a reduction in an excessive jury award." Atlas Food Sys. & Servs. Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 593 (4th Cir. 1996); see Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 430-31 (1996); Sociedad Espanola de Electromedicina y Calidad, S.A. v. Blue Ridge X-Ray Co., 226 F. Supp. 3d 520, 527 (W.D.N.C. 2016). A district court may, in its discretion, grant a new trial if the verdict "(1) is against the clear weight of the evidence; (2) is based upon false evidence; or (3) will result in a miscarriage of justice." U.S. Equal Emp't Opportunity Comm'n v. Consol Energy, Inc., 860 F.3d 131, 145 (4th Cir. 2017); see Fed. R. Civ. P. 59(a)(1)(A); Gasperini, 518 U.S. at 438-39; Huskey v. Ethicon, Inc., 848 F.3d 151, 158 (4th Cir. 2017); see also Knussman v. Maryland, 272 F.3d 625, 639 (4th Cir. 2001); Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 301 (4th Cir. 1998); Atlas Food Sys. & Servs., Inc., 99 F.3d at 594; Variety Stores, Inc. v. Wal-Mart Inc., 359 F. Supp. 3d 315, 325 (E.D.N.C. 2019); Sociedad Espanola, 226 F. Supp. 3d at 527; SAS Inst. Inc. v. World Programming Ltd., No. 5:10-CV-25-FL, 2016 WL 3435196, at *2 (E.D.N.C. June 17, 2016) (unpublished). A district court may "weigh evidence and assess credibility in ruling on a motion for a new trial." Bristol Steel & Iron Works v. Bethlehem Steel Corp., 41 F.3d 182, 186 (4th Cir. 1994)

(quotation omitted); see Finch v. Covil Corp., 388 F. Supp. 3d 593, 608--09 (M.D.N.C. 2019).

Puma argues that the court should grant its motion because the jury's award of compensatory and punitive damages was excessive and unlawful, "the jury's liability findings were against the clear weight of the evidence, and the verdict was marred by instructional, evidentiary, and other errors that prejudiced Puma and impeded a fair trial." [D.E. 436] 3.

A.

Before the court addresses Puma's motion, the court recites the 146 stipulated facts in this case. See [D.E. 370-1]. These stipulated facts provide necessary background information and help to explain the jury's verdict.

EXHIBIT OF STIPULATED FACTS

Puma Biotechnology, Inc.

1. Defendant Puma Biotechnology, Inc. ("Puma") is a publicly-traded for profit biopharmaceutical corporation incorporated in Delaware with its principal place of business in Los Angeles, California.

2. Puma's lead product is neratinib (branded as NERLYNX), which is for the extended adjuvant treatment of early stage, HER2-positive breast cancer.

3. Since founding Puma in 2010, Alan Auerbach has been Puma's President, Chief Executive

Officer ("CEO"), Secretary, and Chairman of its Board of Directors.

4. From 2012 to 2014, Puma paid Mr. Auerbach compensation valued at more than $52 million.

5. From 2012 to 2017, Puma paid Mr. Auerbach compensation valued at more than $73 million.

6. In 2018, Mr. Auerbach received base pay of $757,260.

7. Between 2011 and 2013, Mr. Auerbach recommended that Puma shareholders elect Jay Moyes and Troy Wilson to Puma's Board of Directors.

8. Before he recommended that Puma's shareholders elect Mr. Moyes to the Board, Mr. Auerbach and Mr. Moyes had been good friends for years, and it was Mr. Auerbach who first asked Mr. Moyes if he was interested in joining Puma's Board.

9. Mr. Auerbach introduced Troy Wilson to Puma's Board of Directors in October 2013, and Mr. Wilson was approved to join Puma as a director shortly thereafter.

10. In April 2015, Adrian Senderowicz joined Puma's Board at Mr. Auerbach's request.

11. In September 2015, Frank Zavrl joined Puma's Board at Mr. Auerbach's request.

12. Before joining Puma's board, Mr. Zavrl had been a partner at Adage Capital Management

("Adage Capital"), Puma's largest initial stockholder.

13. Mariann Ohanesian has been the senior director of investment relations for Puma since November 2011.

14. Charles Eyler has been the senior vice president and finance, administration, and corporate treasurer for Puma Biotechnology, Inc. since September 2011.

Dr. Fredric Eshelman

15. Plaintiff Dr. Fredric Eshelman is a resident of, and is domiciled in, Wilmington, North Carolina.

16. Dr. Eshelman has spent more than forty years working in the pharmaceutical profession, developing medicines and bringing them to market, monitoring clinical trials, and investing in new pharmaceutical products.

17. In 1985, Dr. Eshelman founded Pharmaceutical Product Development ("PPD"), a North Carolina based contract research organization ("CRO"). A "CRO" is a group that helps companies run clinical trials or preclinical trials.

18. From 1990 to 2009, Dr. Eshelman served as CEO of PPD.

19. Dr. Eshelman served as the Executive Chairman of PPD's board of directors from 2009-

2011, when PPD was sold to two private equity firms.

20. Dr. Eshelman was the founding chairman of Furiex Pharmaceuticals, Inc. ("Furiex"), and served as the Chairman of the board of directors of Furiex from 2009 to 2014.

21. In 2014, Dr. Eshelman founded Eshelman Ventures, LLC, a company focused on investing in healthcare companies.

Puma's Dealings With Dr. Eshelman and Other Stockholders

22. Puma reported in its March 3, 2014 10-K, "We believe that there are approximately 36,000 patients in the United States and 34,000 patients in the European Union, or EU, with newly diagnosed HER2-positive breast cancer, representing an estimated total market opportunity between $1 billion and $2 billion."

23. On August 11, 2014, Puma announced that it expected to file a New Drug Application ("NDA") with the United States Food and Drug Administration ("FDA") for neratinib during 2015.

24. On November 10, 2014, Puma announced that it would increase its research and development budget to support the development of neratinib and preparation of its NDA.

25. On December 2, 2014, Puma announced that it intended to "delay its proposed timeline for

filing the NDA [for neratinib] until the first quarter of 2016."

26. After the "first quarter of 2016" arrived and passed Puma announced that it "anticipate[d] submitting a New Drug Application (NDA) to the FDA in mid-2016."

27. Puma did not submit its NDA for neratinib to the FDA until July 21, 2016.

28. On July 21, 2014, Puma's stock price was less than $60 per share.

29. On July 22, 2014, Puma and Mr. Auerbach represented that the drug and placebo disease-free survival rates were "in line" with prior Herceptin Adjuvant Studies, i.e., clinical trials for an FDA approved early-stage breast cancer treatment.

30. On July 23, 2014, Puma's stock price exceeded $230 per share.

31. On July 23, 2014, the value of Adage Capital's investment in Puma increased by approximately $950 million.

32. Mr. Zavrl remembers July 23, 2014 "[k]ind of like the birth of [his] children" because he was out on a fishing trip with his son and "came back $100 million richer" as a result of his stockholdings in Puma.

33. On July 30, 2014, *Forbes* reported that Puma's and Auerbach's July 22, 2014 announcement had caused Puma's stock price to

increase significantly, making Mr. Auerbach an "Overnight Billionaire," in an article for which Mr. Auerbach was interviewed and did not dispute the reported numbers.

34. Between May 18 and 19, 2015, Dr. Fredric Eshelman invested nearly $9 million in Puma.

35. On June 1, 2015, two weeks after Dr. Eshelman purchased Puma's shares, the American Society of Clinical Oncology ("ASCO") held a conference. During the conference, it was revealed that the disease-free survival rates for neratinib were far inferior to the Herceptin Adjuvant Studies, rather than "in line" with them, as Mr. Auerbach had previously claimed.

36. An investor blog later reported:

> Puma has a reputation of being very selective with data releases and allegedly denied attendance to an investor event taking place around the time of ASCO to those that were not bulls on the stock. The company additionally allegedly selectively released data to a number of sell-side analysts after a negative reaction to an ASCO abstract release as a way to provide support to the company's poor performing stock . . . these seem to me to display a pattern of secrecy that makes an investor question if management is being fully honest with shareholders and disclosing all information (including negative clinical information) when it

> should. Some in the investment community would note that this reputation is one thing that makes them especially concerned about the data from the NSABP FB-7 trial that Puma had originally stated it would release to investors back in Q4 2013. These investors would suggest that Puma has avoided releasing this data, as it is poor.

37. On June 1, 2015, when Puma announced the clinical data related to the "extent of the benefit for ExteNET in the trial" at the ASCO conference, investors were disappointed with the results.

38. Mr. Gross, the founder of Puma's then-largest stockholder, Adage Capital, was disappointed with the June 1, 2015 ASCO conference data release, which had wiped out $250 million of the value of Adage Capital's investment in Puma. But when he asked to speak with Mr. Auerbach at the ASCO conference, Mr. Auerbach said, "you have 30 seconds" and then "started to count, one, two, three." That was "a very, very difficult conversation," and Adage Capital was "very, very frustrated with Alan."

39. When confronted with Mr. Gross's video testimony about Mr. Auerbach counting "one, two, three" at the ASCO conference, Mr. Auerbach yelled, **"FALSE! FALSE! FALSE!"** while the video of Mr. Gross's testimony played on.

40. Mr. Gross explained that, with Puma, "it happens quite frequently that, the company sets expectations, and they're disappointed—investors are disappointed by the actual results. It happens all the time." Mr. Gross testified that "this was a recurring pattern with Alan Auerbach, in his . . . disclosures to investors, and then the actual results when we saw them."

41. Adage Capital offered to restrict its stock (remove its ability to trade its shares in order to gain access to nonpublic information) so that it could review Mr. Auerbach's slide decks prior to presenting them to the public to help Mr. Auerbach better manage investors' expectations, but Mr. Auerbach "want[ed] no part of that."

42. Frustrated with Puma's stock price and Mr. Auerbach's mismanagement, Dr. Eshelman began speaking about Puma to Mr. Gross, whom he had previously met because of Dr. Eshelman's positions as the CEO of Furiex Pharmaceuticals, Inc. and as a director for The Medicines Company.

43. Mr. Gross, who understood Dr. Eshelman to have a reputation for caring "more about shareholders getting a good return on their investment than he cares about management remaining entrenched and in charge of the company," spoke with Dr. Eshelman several times about Puma.

44. Beginning in June 2015, Puma and Mr. Auerbach were repeatedly sued for securities

fraud in publicly-filed complaints alleging that they had "made false and/or misleading statements" regarding the clinical trial for their flagship drug, neratinib, on July 22, 2014.

45. On February 4, 2019, a unanimous jury found that Puma and Mr. Auerbach had committed securities fraud on July 22, 2014 by knowingly misleading the public about the effectiveness of neratinib.

The Consent Solicitation

46. On July 16, 2015, Dr. Eshelman sent a stockholder's "books and records" request to Puma pursuant to Delaware Code section 220.

47. Puma's outside counsel, Latham & Watkins, advised Puma regarding Dr. Eshelman's books and records request.

48. By October 22, 2015, Dr. Eshelman had invested considerable money to purchase shares of Puma.

49. As of October 28, 2015, Dr. Eshelman had served as the Non-Executive Chairman of the Medicines Company and on the Boards of the following companies: AeroMD Inc.; Cellective Biotherapy, Inc.; Dignify Therapeutics, Inc.; Eyenovia, Inc.; GI Therapeutics, Inc.; Innocrin Pharmaceuticals, Inc.; Medikidz USA, Inc.; Meryx, Inc. and Neoantigenics LLC. As of October 28, 2015, Dr. Eshelman also served on the advisory Board of Auven Therapeutics.

50. On October 28, 2015, Dr. Eshelman filed a Preliminary Consent Statement with the United States Securities and Exchange Commission ("SEC"), proposing that Puma's stockholders vote to increase the size of Puma's Board from five to nine directors and elect Dr. Eshelman, James Daly, Seth Rudnick and Ken Lee to fill the proposed additional four director seats (the "Consent Solicitation").

51. Mr. Auerbach expressed his frustrations, to both Puma's Board and Charles Eyler that Dr. Eshelman's Consent Solicitation was "a major distraction," and "utterly ridiculous."

52. In early November 2015, Ms. Ohanesian asked Benjamin Matone of NASDAQ Corporate Solutions to obtain "sell-side notes" (industry research) to gather information on Dr. Eshelman and PPD.

53. On November 12, 2015, Ms. Ohanesian sent an email calling Dr. Eshelman "quite annoying."

54. On November 17, 2015, Ms. Ohanesian sent an email calling Dr. Eshelman a "fool."

55. Puma's outside counsel, Latham & Watkins, advised Puma regarding Puma's response to Dr. Eshelman's Consent Solicitation.

56. On December 23, 2015, Institutional Shareholder Services ("ISS") issued its recommendation against Dr. Eshelman's Consent Solicitation, while acknowledging that "[m]uch of [Puma's] stock price volatility driving

the consent solicitation appears to have resulted from two specific events: Puma's stock shot up nearly 300 percent in July 23, 2014, following the company's announcement that trial results 'demonstrated that treatment with neratinib resulted in 33% disease-free survival versus placebo,' and in the first week of June 2015, Puma stock dropped nearly 30%, following the presentation of neratinib data at the American Society of Clinical Oncology (ASCO) Annual Meeting. Since then the company's stock price has continued a gradual decline." The ISS report also acknowledged that Dr. Eshelman's "assertion that Puma's board composition is still not optimal may hold some truth."

57. After ISS-issued its recommendation, Mr. Gross texted Mr. Zavrl: "We finally had contact [with ISS] yesterday, hence you see their recommendation today . . . ."

Puma's Research Regarding and Publication of the Presentation

58. On January 7, 2016 Puma published an investor presentation entitled, "Continued Focus on Developing Shareholder Value" ("Presentation"), which included the following slides:

Eshelman Continues to Demonstrate a Lack of Integrity (cont'd)

- A whistleblower from PPD, Ann Marie Cisneros—a clinical trial associate for PPD—

testified that she sent evidence of fraud to PPO management, which was ignored

- "[b]ased upon what I observed and learned in monitoring the Kirkman-Campbell site, Dr. Kirkman-Campbell indeed had engaged in fraud . . . I knew it, PPD knew it"
- Cisneros' Testimony: http://www.circare.org/foia5/cisneros_testimony_20070213.pdf*

- Eshelman denied before Congress that fraud had occurred at the time despite Cisneros' e-mail to PPD management summarizing fraudulent practices and "red flags"
  - Eshelman's Video Testimony:
    - Part 1: https://www.youtube.com/watch?v=mzOB1X7hLMs*
    - Part 2: https://www.youtube.com/watch?v=GeM9ZDMBc0M*
    - Part 3: https://www.youtube.com/watch?v=FhEOvN8ceAE*
  - Eshelman's Statement and Testimony:
    - https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg48587.htm*

- Puma's Board does not believe that someone who was involved in clinical trial fraud that was uncovered by the FDA should be on the

Board of Directors of a public company; particularly a company that is in the process of seeking FDA approval

*Please paste the links above into your browser to view the content.

13

Eshelman Continues to Demonstrate a Lack of Integrity (cont'd)

Eshelman's misrepresentations are no surprise given his history

- Eshelman was Chief Executive Officer (CEO) of Pharmaceutical Product Development (PPD) when it managed a clinical trial during the development of the antibiotic drug Ketek for the treatment of outpatient upper respiratory infections and pneumonia
    - Fraud was uncovered in this trial by the FDA's Office of Criminal Investigation
- Fraud with the trial included:
    - Fabrication of data at one clinical site (investigator convicted of fraud)
    - Manipulation of data at another site (investigator had medical license suspended)

- Fraud occurred at highest enrolling site

- As Chief Executive Officer of PPD, Eshelman was forced to testify before Congress regarding PPD's involvement in this clinical trial fraud in 2008
  - Eshelman was replaced as CEO of PPD in 2009

---

59. The drafting of the Presentation was done by Mr. Auerbach with consultation and advice from Latham & Watkins.

60. No member of the Board of Directors of Puma or anyone else from Puma asked any questions about the statements that Mr. Auerbach had made about Dr. Eshelman and the Ketek clinical trial in the Presentation.

The Ketek Clinical Trial

61. On November 1, 2001, Aventis Pharmaceuticals Inc. ("Aventis") hired PPD to monitor Study 3014, a clinical trial of Ketek, an antibiotic that Aventis had developed for the treatment of upper-respiratory tract infections.

62. The Ketek clinical trial had approximately 25,000 study subjects enrolled by nearly 2,000 physicians who were the principal investigators ("PIs") for the trial.

63. Dr. Kirkman-Campbell was one of the PIs on the Ketek clinical trial.

64. At the time she was a PI on the Ketek clinical trial, Dr. Kirkman-Campbell was not on a blacklist maintained by the FDA, the Institutional Review Board, or anyone else. All of the PIs on the Ketek clinical trial, including Dr. Kirkman-Campbell, were required to attend training for the Ketek clinical trial.

65. An "Institutional Review Board" or "IRB" is a group of people who monitor a clinical trial.

66. Dr. John Reynolds, a pharmacovigilance and drug safety professional who worked for PPD, was in charge of analyzing and reviewing lab values for the Ketek clinical trial.

67. On February 13, 2002, PPD's Dr. Reynolds emailed Aventis's Study Manager Nadine Grethe and voiced his concern that Dr. Kirkman-Campbell had not actually recruited the number of patients into the study that she had reported.

68. Dr. Reynolds spoke with Ann Marie Cisneros (a PPD employee and clinical research associate ("CRA")) and Abby Wear (a PPD employee and site management CRA) to discuss potential issues with Dr. Kirkman-Campbell's site and to help prepare Ms. Cisneros for an upcoming site review at Dr. Kirkman-Campbell's office.

69. On February 18, 2002, Ms. Cisneros conducted a site review at Dr. Kirkman-

Campbell's office. She reported various issues she identified at the site to the IRB.

70. On Wednesday, February 20, 2002, Dr. Reynolds analyzed data from Dr. Kirkman-Campbell's site, which led him to believe that Dr. Kirkman-Campbell may have been engaging in "blood splitting," *i.e.,* assigning certain blood samples to multiple patients. He reported his concerns to Aventis's Nadine Grethe via email the next Monday.

71. On February 27, 2002, PPD employee Jessica Lasley sent an email titled "Teleconference to discuss findings from monitoring Kirkman-Campbell" to Aventis employees Nadine Grethe and Ranjan Khosla, copying PPD personnel Ann Marie Cisneros, John Reynolds, Robert McCormick, Cathy Tropmann, Teresa Dunlap, Melinda Edwards, and Mary Price. The email stated: "We would like to hold a teleconference with you to review some of the information that is of concern to us . . . Ann Marie [Cisneros] and John [Reynolds] had assembled some examples of this information that we can share with you. Let us know when it would. be possible to discuss this with you. We have attached a summary of Ann Marie's findings during her visit." A summary of Ann Marie Cisneros's findings was attached to the email.

72. PPD held a teleconference with Aventis on March 4, 2002 to discuss PPD's concerns about Dr. Kirkman-Campbell's trial site. On behalf of PPD, the participants on the teleconference were

Dr. John Reynolds, Ann Marie Cisneros, Abby Wear, and Robert McCormick. The Aventis representatives on the teleconference were Nadine Grethe, William Stager, M. Shoemaker, M. Aschenbrenner, and Rajan Khosla. During the teleconference, Dr. Reynolds and Ms. Cisneros elaborated on the issues and concerns that PPD had previously reported to Aventis via email. After the teleconference, a written "Investigative Plan" was developed in which Aventis was to perform a statistical analysis of the lab data; to ensure that a follow-up letter was sent to the Dr. Kirkman-Campbell site asking for a written explanation of issues; and to review the follow-up letter before it was sent to ensure that all outstanding issues had been addressed and appropriate follow up was requested.

73. Ms. Cisneros left PPD shortly after the March 4, 2002 teleconference and has no knowledge of what took place at PPD or Aventis after that teleconference.

74. Data from the Ketek clinical trial was submitted to the FDA.

75. Beginning in 2002, Special Agent Robert West of the FDA's Office of Criminal Investigations led an investigation into the Ketek clinical trial.

76. Special Agent West began his career as a criminal investigator in the U.S. Army, where he served by conducting criminal investigations for

more than twenty-one years. After retiring from the Army in 1996, he was hired by the FDA's Office of Criminal Investigations, where he served for another twenty years, received multiple promotions, and handled criminal investigations into clinical trial fraud and other matters.

77. Over the course of his forty-one-year career, Special Agent West has conducted close to ten thousand investigations, at least half of which he led.

78. Special Agent West describes himself as "very detail-oriented" and, in conducting investigations, he follows the trail as it leads him, interviewing everyone who needs to be interviewed. Special Agent West tries, to the best of his ability, to conduct his investigations objectively, ethically, and thoroughly.

79. Special Agent West's investigation into the Ketek clinical trial was conducted by a team of approximately twenty-five federal agents who spent between 20,000 and 30,000 hours working on the case, reviewing close to one million documents, and interviewing Dr. Kirkman-Campbell's staff and patients, PPD employees, and Aventis employees.

80. Special Agent West prepared written reports and memoranda of interviews in connection with his investigation of the Ketek clinical trial.

81. Special Agent West personally interviewed Aventis personnel including Nadine Grethe and Ranjan Khosla.

82. Special Agent West personally interviewed PPD personnel including Ann Marie Cisneros, Dr. John Reynolds, Cathy Tropmann, and Robert McCormick.

83. Special Agent West obtained a search warrant to search Dr. Kirkman-Campbell's clinic and home. Through use of that search warrant, he found in Dr. Kirkman-Campbell's home a record that had been missing from her clinic, as well as some medication for the Ketek study.

84. The Office of Criminal Investigations accepted Special Agent West's recommendation and later opened an investigation into Aventis; that investigation was led by Special Agent Douglas Loveland.

85. The FDA did not rely on the data from Study 3014 in approving Ketek.

86. Ketek remained on the market until March 11, 2016 when it was discontinued for business reasons.

Congressional Testimony About the Ketek Clinical Trial

87. On February 13, 2007, Ann Marie Cisneros testified before a Congressional committee about the Ketek clinical trial.

88. Ms. Cisneros also submitted a statement, dated February 13, 2007, in which she wrote, "what brings me here today is my disbelief at Aventis's statements that it did not know that fraud was being committed. Mr. Chairman, I knew it, PPD knew it, and Aventis knew it."

89. On February 12, 2008, Ms. Cisneros, Special Agent West, Special Agent Loveland, and Dr. Eshelman testified before a Congressional committee about the Ketek clinical trial. Their testimony was included in a hearing transcript titled, "Ketek Clinical Study Fraud: What Did Aventis Know?"

90. The 2008 Congressional hearing transcript indicated that Ms. Cisneros had previously testified in a Congressional hearing.

91. The 2008 Congressional hearing transcript indicated that on the Ketek clinical trial, Aventis was the drug sponsor, PPD was the CRO, and Copernicus was the IRB.

92. The 2008 Congressional hearing transcript included the following testimony from Ms. Cisneros:

> While at the site, I was so concerned about patient safety, I called Copernicus Independent Review Board or IRB to express my concerns and seek guidance. An IRB, which is under contract to the drug sponsor, has as its primary purpose patient advocacy. It is allowed to contact patients directly and is duty-bound to

> report to the FDA any unanticipated problems involving risk to subjects and serious noncompliance with regulations.

93. The 2008 Congressional hearing transcript included the following testimony from Ms. Cisneros:

> I e-mailed a summary of my site visit findings to Robert McCormick, head of quality assurance at PPD, and copied Aventis personnel. I also participated in a teleconference between PPD and Aventis, at which I discussed issues identified in my site visit.
> At some point after that, I understand that Aventis took site management responsibilities away from PPD because Dr. Campbell would not cooperate with anyone but the sponsor.

94. The 2008 Congressional hearing transcript included the following:

> MR. WALDEN. Thank you, Mr. Chairman. Ms. Cisneros, you participated in that conference call with Aventis in March of 2002 to discuss concerns with Dr. Kirkman-Campbell's site, correct?
>
> MS. CISNEROS. Correct.
>
> MR. WALDEN. And what follow-up did Aventis decide to do to address PPD's concerns?

> MS. CISNEROS. Well, unfortunately, I left PPD shortly after that teleconference, so I am not quite sure what took place after that teleconference.

Before Publishing the Presentation, Puma Knew About the Congressional Testimony Regarding the Ketek Clinical Trial

95. Before publishing the Presentation, Mr. Auerbach read Ms. Cisneros's February 13, 2007 statement.

96. Before publishing the Presentation, Mr. Auerbach read the entire transcript of the February 12, 2008 Congressional hearing titled "Ketek Clinical Study Fraud: What Did Aventis Know?"

97. Mr. Auerbach "assumed that the work done by the FDA" was both factual and accurate.

Puma Has a Multi-Million Dollar Multi-Year Contract with PPD and Multiple Points of Contact at PPD, But Never Asked Anyone at PPD About Dr. Eshelman

98. Puma has "been working with contract research organizations" from the day it was founded.

99. Mr. Auerbach is "knowledgeable about the relationship between a drug sponsor and a contract research organization on clinical trials."

100. Puma hired PPD as a CRO on the clinical trial of Puma's flagship drug, neratinib.

101. In the beginning of their contractual relationship— from 2012-2014—Puma hired PPD to provide regulatory strategy and overall clinical trial management related to the development and subsequent FDA approval of neratinib.

102. To date, Puma has received CRO services worth roughly $16 million from PPD.

103. Puma entered into a "MASTER CONTRACT SERVICES AGREEMENT" with PPD, on September 25, 2012, and Puma renewed its contract with PPD on April 25, 2014 and September 28, 2016.

104. Mr. Auerbach signed the amendments that extended Puma's contract with PPD.

105. Puma maintains that its Master Contract Services Agreement with PPD is confidential and should be concealed from the public.

106. Paragraph 2.4 of the Master Contract Services Agreement between PPD and Puma — entitled Regulatory Contacts—states:

> Puma will be solely responsible for all contacts and communications (including submissions of information) with any regulatory authorities with respect to matters relating to Services.
>
> Unless required by applicable law, Service Provider will have no contact or communication with any regulatory

> authority regarding Services without the prior written consent of Puma, which consent will not be unreasonably withheld.
>
> Unless prohibited by applicable law, Service Provider will consult with Puma regarding the response to any inquiry or observations from any regulatory authority relating in any way to Services and will allow Puma at its discretion to participate and, to the extent such inquiry is directly related to the Services, control, any further contacts or communications relating to Services.

107. Puma's contract with PPD provides that it "will expire on the later of (a) six years from the Effective Date or (b) the completion of all Services under all Statements of Work executed by the parties prior to the sixth anniversary of the Effective Date."

108. The earliest the Master Contract Services Agreement between PPD and Puma could end is six years after September 28, 2016.

109. Beginning in 2014, as Puma commenced Phase II pivotal trial of neratinib, Puma became "disenchanted with the CRO that was managing the trial in the U.S., Latin America, and [the] Pacific Rim, and [Puma] changed CROs and employed PPD to manage said trial."

110. In 2014, representatives from Puma traveled to North Carolina and conducted a quality audit of PPD.

111. Puma's quality assurance audits typically last for several days.

112. Since 2014, Puma and PPD have conducted bi-weekly teleconferences.

113. Puma has more than 600 pages of business records relating to its relationship with PPD.

114. Representatives from Puma and PPD held several face-to-face meetings in North Carolina between 2014 and 2016.

115. Puma has ongoing business communications with PPD representatives in North Carolina.

116. Puma had six or eight points of contact with PPD who were located in North Carolina.

117. Puma was introduced to PPD through Richard Phillips, who was an employee of PPD before becoming an employee of Puma. Puma never asked Mr. Phillips about Dr. Eshelman before January 2016.

118. No one from Puma ever asked anyone from PPD about Dr. Eshelman before January 2016.

Puma Did Not Ask Any of Its North Carolina Contacts About Dr. Eshelman

119. Puma has contracted with Biologics, Inc., a North Carolina corporation for clinical research

services. No one at Puma reached out to Puma's North Carolina contacts at Biologics, Inc. to ask whether they knew anything about Dr. Eshelman before January 2016.

120. Puma bas contracted with Rho, Inc., a North Carolina corporation, for biostatistical analysis. Puma's points of contact at Rho, Inc. were located in North Carolina. No one at Puma reached out to Puma's North Carolina contacts at Rho, Inc. to ask whether they knew anything about Dr. Eshelman before January 2016.

121. Puma has contracted with Cato Research, a company headquartered in North Carolina. Puma's points of contact at Cato Research were located in North Carolina. No one at Puma reached out to Puma's North Carolina contacts at Cato Research to ask whether they knew anything about Dr. Eshelman before January 2016.

122. Puma has contracted with Personalized Medicines Partners, a North Carolina Company, for consulting services. No one at Puma reached out to their points of contact at Personalized Medicine Partners in North, Carolina about Dr. Eshelman before January 2016.

Puma Purposefully Avoided Numerous Sources That Would Have Rebutted Its Accusations About Dr. Eshelman

123. No one at Puma reached out to Ann Marie Cisneros or Special Agent Robert West before Puma published the Presentation.

124. Mr. Auerbach never asked Mr. Gross if he knew Dr. Eshelman, if he had ever heard of Dr. Eshelman, if Dr. Eshelman had been involved in fraud, or anything else about Dr. Eshelman.

125. Mr. Auerbach never bothered to look for Dr. Kirkman-Campbell's indictment, even though it is publicly available, and Mr. Auerbach's staff would have pulled it for him if he had asked.

126. While drafting the Presentation, Mr. Auerbach reviewed Ms. Cisneros's February 13, 2007 Congressional statement that says: "In my eight years in clinical research work this is the only instance I've come across of such bad behavior by a drug sponsor. I feel I can speak for those who agonized over this situation when I say we are pleased that Dr. Kirkman-Campbell is serving prison time for her actions. But what brings me here today is my disbelief at Aventis's statements that it did not know that fraud was being committed. Mr. Chairman, I knew it, PPD knew it, and Aventis knew it."

127. A draft of the Presentation from 1:04 a.m. on January 6, 2016 stated:

- A whistleblower from PPD, Ann Marie Cisneros, testified that she sent evidence of fraud to the head of quality assurance at PPD and to personnel at Aventis, which was ignored by both organizations.

128. Mr. Auerbach revised that paragraph to read as follows: "A whistleblower from PPD, Ann Marie Cisneros— a clinical trial associate for

PPD— testified that she sent evidence of fraud to PPD management, which was ignored.

- A whistleblower from PPD, Ann Marie Sisneros, - a clinical trial associate for PPD - testified that she sent evidence of fraud to ~~the head of quality assurance at~~ PPD ~~and to personnel at Aventis~~ management, which was ignored ~~by both organizations~~.

129. The final version of the Presentation that Puma published contains no references to Aventis and omits all details of PPD's numerous reports to Aventis.

Scope of Publication

130. Puma published the Presentation on its website at the "Consent Revocation" portion of Puma's website at the following URL: http://investor.pumabiotechnology.com/consent-revocation.

131. From January 7, 2016 through February 2, 2016, there were 85-page views of the "Consent Revocation" portion of Puma's website located at investor.pumabiotechnology.com/consent-revocation. Those page views included users from: (1) Janus, an institutional investor; (2) UBS, a brokerage firm; (3) Comerica, a bank; (4) CSFB, Credit Suisse First Boston; (5) Amgen, a large biotechnology company; and (6) RBCCM, a bank. Those page views included users in New York City, El Monte, Los Angeles, San Francisco, Denver, Washington, D.C., Hong Kong, Atlanta, Madrid, Mumbai, and Portland.

Puma's page view data does not include views of its website that may have occurred after February 2, 2016 or views of the Presentation on the SEC's website.

132. Between January 7, 2016 and July 11, 2016, there were 198-page views of the "Consent Revocation" portion of Puma's website located at investor.pumabiotechnology.com/consent-revocation. Those page views included users in New York City, Washington, D.C., Los Angeles, Raleigh, Durham, Chicago, and Milwaukee.

133. Puma also published the Presentation at the "SEC Filings" portion of Puma's website at the following URL: http://investor.pumabiotechnology.com/secfilings. The Presentation was available for download at this location.

134. Puma posted the "Consent Revocation" and "SEC Filings" URLs under the "Investors" tab on its website. From January 7, 2016 through February 2, 2016, there were 436 views of the "Investors" tab on Puma's website. Those page views included users located in California, New York, Massachusetts, Maryland, Texas, Florida, Illinois, Arizona, North Carolina, Virginia, and England.

135. Puma filed the Presentation with the SEC on January 7, 2016.

136. Puma's page view data does not include how many times the Presentation may have been downloaded and distributed from either of

the locations from which it was available on Puma's website or how many times the Presentation may have been downloaded and distributed from the SEC's website.

137. At Puma's direction, Revocation Cards and Revocation Statements were mailed to Puma's shareholders, including shareholders in North Carolina; those materials directed Puma's stockholders to the "Investors" tab of Puma's website where Puma posted the Presentation.

138. Puma published its Revocation Statement under the "Consent Revocation" portion of its website.

139. At the request of Mr. Auerbach, Puma sent the Presentation to Vanguard—an investment manager—on January 13, 2016.

140. When asked what he understood Puma to be saying in the Presentation, Mr. Gross testified that, "They believe that his associates at PPD and PPD's association with Ketek made [Dr. Eshelman] a party to fraud."

> [I]t's a very spurious relationship anyways, just because he's CEO of the company, and that company – if you know how PPD works, it's a contract research organization. So anybody inside the company can commit fraud. You know, they could go out and steal – the could shoplift. It doesn't make the CEO responsible for that. So even when I read

> this back then, this is, you know, ridiculous.
> ...
>
> Well, Puma's board is making the connection between, again, the CEO of a company, the conduct of that company, of somebody inside that company, not necessarily systematically, and, therefore, it's a spurious connection, but they've chosen to decide to connect the two, which I would say the same thing I said on the other one. Anybody who is . . . practiced in . . . the business wouldn't necessarily blame the CEO for the conduct of a single trial or a single . . . person or . . . clinical trial, especially if it's a contract research organization.

141. Mr. Gross would "absolutely not" support someone who had been involved in fraud to be a director on the board of one of the companies in which Adage Capital invests. When evaluating whether Adage Capital should invest in a company, the fact that one of the company's directors had been involved in fraud would absolutely impact whether he chose to invest in the company.

142. Puma's Presentation is publicly available on the internet where it can easily be reviewed, re-published, and called up in electronic searches.

143. On January 20, 2016, Dr. Eshelman sent Puma a retraction demand, requesting an apology and retraction of Puma's defamatory Presentation.

144. On January 26, 2016, Mr. Auerbach emailed Puma's Board:

> On Friday we received a letter from our good buddy Fred Eshelman where he has asked that we retract all of the negative statements that we have made about him in our Investor Presentations and issue an apology to him. If we do not, he is threatening to sue us. Note that his letter (attached) did not come from an attorney, like his other letters did, but instead directly from him. As you can see in our attached response to him, all of our comments were based on publicly available information, hence we have done nothing wrong. We will be filing this 14A tomorrow after the market close with his letter and o[u]r response to it.

145. On January 27, 2016, Puma filed a Form 14A with the SEC. The filing attached a letter from Puma's outside counsel, Latham & Watkins, to Dr. Eshelman, and published the following statements to a global internet audience:

> **LATHAM & WATKINS LLP**
>
> ...

> Dear Mr. Eshelman:
>
> As you know, our firm represents Puma Biotechnology, Inc. ("Puma"). Your January 20, 2016 letter to Mr. Alan Auerbach of Puma has been referred to our attention for handling. Your demands that Puma retract its investor presentation filed with the U.S. Securities and Exchange Commission on January 7, 2016 (the "Investor Presentation") and issue an apology are rejected. Puma stands by the truth of the statements contained in the Investor Presentation.
> ...
>
> In addition, Puma has uncovered additional, public, and true information about you and your past activities which would be relevant to your shareholder proposal and prior comments in this regard. Puma will be compelled to ensure that shareholders are aware of this information if you persist with further public statements or filings about Puma, its Board, and its management.

146. On February 3, 2016, Dr. Eshelman filed this defamation lawsuit against Puma. [D.E. 370-1].

B.

As for Puma's argument that the jury's award of compensatory damages was excessive, the court reviews the jury's award applying North Carolina law.

See Gasperini, 518 U.S. at 430-31, 438-39 (state standards for reviewing damages awards are substantive under Erie R.R. v. Tompkins, 304 U.S. 64 (1938)); Fontenot v. Taser Int'l, Inc., 736 F.3d 318, 334-35 (4th Cir. 2013); Konkel v. Bob Evans Farms, Inc., 165 F.3d 275, 280-81 (4th Cir. 1999). Although the court may, in its discretion, set aside an excessive judgment, North Carolina trial courts "have traditionally exercised their discretionary power to grant a new trial in civil cases quite sparingly in proper deference to the finality and sanctity of the jury's findings." Worthington v. Bynum, 305 N.C. 478,487, 290 S.E.2d 599, 605 (1982); see Finch, 388 F. Supp.3d at 621-23.

The court determined that the two statements at issue in the trial were libelous per se. See Order [D.E. 306] 20-24. At trial, the parties presented evidence on three issues: whether Puma's statements were false, whether Puma made the statements with actual malice, and what amount of compensatory damages, if any, Eshelman was entitled to recover. See [D.E. 372-74, 388, 429-31]. The court instructed the jury that compensatory damages "include matters such as loss of reputation, or standing in the community, mental or physical pain and suffering, inconvenience, or loss of enjoyment which cannot be definitively measured in monetary terms." [D.E. 386] 21; see N.C. Pattern Jury Inst. - Civ. 806.83. The court instructed the jury that Eshelman need not specifically prove his compensatory damages, that the jury should estimate "the probable extent of actual harm" to Eshelman, and that the jury may award Eshelman nominal damages. [D.E. 386] 21-22. The jury deliberated for over eleven hours on the

three issues. See [D.E. 378-79, 432-33].[3] The jury found that Puma's statements were false and that Puma made the statements with actual malice. See [D.E. 388]. The jury awarded Eshelman $15,850,000 in compensatory damages. See id.

Under North Carolina law, damages are presumed in libel per se claims. See Renwick v. News & Observer Publ'g Co., 310 N.C. 312, 316, 312 S.E.2d 405,408 (1984); Flake v. Greensboro News Co., 212 N.C. 780, 785, 195 S.E. 55, 59 (1938). Because the law presumes that damages result from the publication of a libelous per se statement, a plaintiff is not required to present evidence "as to any resulting injury." Boyce & Isley, PLLC, 153 N.C. App. at 30, 568 S.E.2d at 898; see Renwick, 310 N.C. at 316, 312 S.E.2d at 408; Roth v. Greensboro News Co., 217 N.C. 13, 22, 6 S.E.2d 882, 888 (1940); Flake, 212 N.C. at 785, 195 S.E. at 59 ("The law presumes that general damages actually, proximately, and necessarily result from an unauthorized publication which is libelous per se and they are not required to be proved by evidence since they arise by inference of law, and are allowed whenever the immediate tendency of the publication is to impair plaintiff's reputation, although no actual pecuniary loss has in fact resulted."); cf. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("Juries may award substantial sums as compensation for supposed

---

[3] On the fourth day of the trial, the jury deliberated from 9:45 a.m. to 5:02 p.m. See [D.E. 378, 432]. On the fifth day of the trial, the jury deliberated from 9:01 a.m. to 10:39 a.m. and from 10:50 a.m. to 1:26 p.m. See [D.E. 379,433].

damages to reputation without any proof that such harm actually occurred."); N.C. Pattern Jury Inst. - Civ. 806.83. Puma concedes that "presumed damages are not required to be proved by evidence" and that "such damages are inherently speculative and imprecise." [D.E. 436] 8 (quotation omitted).

The Restatement (First) of Torts lists factors that the trier of fact may consider in determining the amount of presumed damages. These factors include "the character of the plaintiff and his general standing and reputation in the community," "the character of the defamatory publication and the probable effect of the language used as well as the effect which it is proved to have had," "the area of dissemination and the extent and duration of the circulation of the publication," whether the defendant "made a public retraction or apology," whether the defendant unsuccessfully argued that the statement was true, and whether the plaintiff was "engaged in a trade, business, or profession." Restatement (First) of Torts § 621 cmt. c (Am. Law. Inst. 2019). These factors comport with North Carolina law. See N.C. Pattern Jury Inst. - Civ. 806.83; [D.E. 386) 21-22.

Puma argues that the jury's compensatory damages award was "excessive" without citing any persuasive factor to support its argument. That Eshelman did not prove his actual damages at trial is inherent in the law of libel per se in North Carolina and does not warrant a new trial. See, e.g., Renwick, 310 N.C. at 316, 312 S.E.2d at 408; Roth, 217 N.C. at 22, 6 S.E.2d at 888; Flake, 212 N.C. at 785, 195 S.E. at 59; Boyce & Isley, PILC, 153 N.C. App. at 30, 568 S.E.2d at 898. Under

North Carolina law. damages are presumed in libel per se cases specifically because of the difficulty of determining the harm that publishing a libelous statement causes. Additionally, the jury was entitled to consider the very unique facts of this case, including the 146 stipulations and the extensive trial record.

The evidence showed that Eshleman built an extraordinary reputation over a 40-year-period. Eshelman rose from humble beginnings in North Carolina to train as a pharmacist and then founded PPD. Eshleman developed PPD from a one-man consulting company into a publically traded multibillion dollar contract research organization. During his lengthy career, Eshelman became a noted CEO, philanthropist, board member, and investor. He is prominently involved in the community, including at the University of North Carolina at Chapel Hill which named its Pharmacy School after him. As witness Judd Hartman testified, Eshleman was "the founder of [PPD]" and "dedicated his life, [and] his professional career to the industry, [and] was passionate and committed to ethical clinical research and ethical business conduct." [D.E. 430] 11-13. Witness Kenneth Lee testified that Eshleman had an "excellent" reputation and was considered a "leader in the industry." [D.E. 429] 102-15.

Puma's Chief Executive Officer Alan Auerbach personally drafted the defamatory statements, and Puma permanently published the defamatory statements on Puma's website and the SEC's web site, which have global reach. The statements can be reviewed and republished forever. See,e.g., [D.E. 370-1]

¶¶ 58-59, 125-39. The jury found that Puma's statements were false and made with actual malice. See [D.E. 388]. Puma has never retracted the false statements or apologized for making them. Rather, Auerbach testified, and Puma unsuccessfully argued, that the statements were and are true.

The jury deliberated for over eleven hours before determining liability and the amount of Eshelman's compensatory damages, and Puma does not raise a persuasive argument to set aside. the jury's verdict. In fact, this court could not locate a single case applying North Carolina law in which a trial court remitted a jury's award of presumed damages or a North Carolina appellate court reduced such an award. Accordingly, in light of the stipulations, the evidence produced at trial, the credibility of the witnesses, and North Carolina law, the court declines to set aside the jury's compensatory damages award. See Worthington, 305 N.C. at 487, 290 S.E.2d at 605; Finch, 388 F. Supp. 3d at 621-23; accord Cantu v. Flanigan, 705 F. Supp. 2d 220, 226-31 E.D.N.Y. 2010) (jury award of $150 million for general damages was not excessive for defaming a businessman by falsely accusing him of corruption); Anagnost v. The Mortgage Specialists. Inc., No. 216201CV0027, 2017 WL 7690898 (N.H. Super. Ct. Sept. 29, 2017) (unpublished) (award of$105 million in general damages not excessive for falsely accusing a local developer, a cardealer, and a banker of dealing drugs and related crimes); Wynn v. Francis, No. B245401, 2014 WL 2811692, at *4-10 (Cal. Ct App.

June 23, 2014) (affirming $17 million award for presumed damages for oral accusation of fraud).[4]

C.

As for Puma's argument that the jury's award of punitive damages was excessive, the court applies North Carolina law. See Gasperini, 518 U.S. at 430-31, 438-39. The court's instructions on punitive damages comported with N.C. Gen. Stat. § 1D-35. See [D.E. 387] 12-13. The jury deliberated for over an hour and awarded Eshelman $6,500,000 in punitive damages. See [D.E. 379, 389, 433].

Under North Carolina law, a Jury may award punitive damages "to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C. Gen. Stat. § 1D-1. In determining the amount of punitive damages, a jury must consider the purposes of punitive damages and may consider only evidence that relates to the following:

---

[4] The cases that Puma cites in support of setting aside the verdict are factually and legally distinguishable. See, e.g., MyGallons LLC v. U.S. Bancorp., 521 F. App'x 297, 304-06 (4th Cir. 2013) (per curiam) (unpublished); Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681, 687-90 (4th Cir.1989); Mann v. Swiggett, No. 10-CV-182, 2012 WL5512453, at *1 (E.D.N.C. Nov. 14, 2012) (unpublished); Beach v. Hughes, 199 N .C. App. 615, 687 S.E.2d 319 (2009) (unpublished); Boileau v. Seagrave, 193 N.C. App. 454, 667 S.E.2d341 (2008)(unpublished); Kroh v. Kroh, 152 N.C. App. 347, 355-58, 567 S.E.2d 760, 765-67 (2002); McLean v. Mechanic, 116 N.C. App. 271, 272-76, 447 S.E.2d 4S9, 461-62 (1994).

a. The reprehensibility of the defendant's motives and conduct.

b. The likelihood, at the relevant time, of serious harm.

c. The degree of the defendant's awareness of the probable consequences of its conduct.

d. The duration of the defendant's conduct.

e. The actual damages suffered by the claimant.

f. Any concealment by the defendant of the facts or consequences of its conduct

g. The existence and frequency of any similar past conduct by the defendant.

h. Whether the defendant profited from the conduct.

i. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.

Id. § 1D-35(1)-(2). In reviewing a punitive damages award, the court also must assess the constitutionality of the award under the Due Process Clause. See, e.g., BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 & n.22 (1996); Equal Emp't Opportunity Comm'n v. Fed. Express Corp., 513 F.3d 360, 376 (4th Cir. 2008). Reviewing courts must consider the degree of reprehensibility of the defendant's misconduct, the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and the difference between the punitive damages awarded

by the jury and the civil penalties authorized or imposed in comparable cases. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003). "The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct," which may be evidenced by the defendant's "intentional malice, trickery, or deceit" Id. at 419 (quotation omitted). In comparing a compensatory damages award to a punitive damages award, "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution . . . ." Id. at 425.

Eshelman presented compelling evidence that Puma, through Auerbach who is Puma's most senior employee and drafted the defamatory presentation himself, acted with actual malice in making the statements about Eshelman. See, e.g., [D.E.. 359] ¶¶ 124-30; [D.E. 370-1] ¶¶ 123-29. For example, Eshelman presented an e-mail that Auerbach wrote shortly before Puma published the statements in which Auerbach stated that he was "just getting warmed up" and that he was going to "f*** this Eshelman guy up. Bad." [D.E. 431] 65. The jury was entitled to discredit Auerbach's explanation for this e-mail and other evidence contemporaneous with the publication reflecting Puma's malice. Moreover, Auerbach was a particularly non-credible witness. In fact, it is really hard to describe how incredible (i.e., disastrous) a witness Auerbach was. You needed to see it to understand it completely. For example, Auerbach indignantly and repeatedly contradicted his deposition testimony and facts to which Puma stipulated. See

[D.E. 431] 6-7, 9-10, 15-17, 19-20, 24-27, 29-44, 45-53, 55-56, 57-59, 60-63, 64-67, 68-99, 100-14, 115-23, 124-28, 167-69. Auerbach did not testify credibly, and was impeached repeatedly during cross examination. See id. Moreover, Eshelman presented compelling evidence about the reprehensibility and duration of Puma's conduct and Puma's ability to pay. See, e.g., [D.E. 370-1] ¶¶ 130-38, 142, 145-46.

In light of the stipulations, the evidence presented at trial, and the credibility of the witnesses, the punitive damages award was not excessive. The jury properly considered evidence pursuant to N.C. Gen. Stat § 1D-35, carefully deliberated, and reached a unanimous verdict. Eshelman presented compelling evidence of the reprehensibility of Puma's motives and conduct, the likelihood of serious harm to Eshelman, Puma's awareness of the probable consequence of its actions, the duration of Puma's conduct, and Puma's ability to pay. Additionally, the jury's punitive damages award totals less than half of its compensatory damages award, and does not violate the Due Process Clause. Cf. Campbell, 538 U.S. at 418-19. Moreover, the court rejects Puma's argument that the punitive damages award is simply "too high." On the unique facts of this case, the jury's punitive damages award was not a miscarriage of justice, and the court declines to set it aside.

D.

As for Puma's argument that the jury's findings on falsity and actual malice were against the clear weight of the evidence, the court has considered the stipulations, the evidence presented at trial, and the

credibility of the witnesses. As for the falsity of the statements, the court credits the overwhelming evidence that Puma's statements were false. The evidence includes the testimony of Judd Hartman ("Hartman"), general counsel and Chief Administrative Officer of PPD, that PPD did not fire or replace Eshelman as CEO but instead promoted him to Executive Chairman of PPD's Board of Directors. See [D.E.429] 123-25. The court also credits Hartman's testimony and Special Agent Robert West's testimony that Eshelman was not involved in clinical trial fraud. See [D.E. 429] 125; [D.E.430] 24; [D.E. 375-1] 12-13, 15. The court also credits Eshelman's testimony about the antibiotic drug Ketek and the ensuing FDA investigation. See, e.g., [D.E. 430] 194-96. The stipulations and exhibits bolster these conclusions. See, e.g., [D.E. 370-1] ¶¶ 64-72.

The jury carefully and thoughtfully considered the evidence. The jury rejected Puma's evidence and argument that the statements, when read in the context of the entire presentation, were true. Cf. [D.E. 388]. Accordingly, the court finds that the jury's determination that Puma's statements were false is not against the clear weight of the evidence.

As for actual malice, abundant evidence supports the jury's verdict. First, before publishing the statements about Eshleman, Puma's attorneys informed its Board and Mariann Ohanesian informed Auerbach that Eshleman had served as Executive Chairman of PPD from 2009 until 2011. See PX-314, at 12; PX-217; [D.E. 376-1] 1, 7. Second, the parties stipulated that Auerbach had read "the entire

transcript of the February 12, 2008 Congressional hearing titled 'Ketek Clinical Study Fraud: What Did Aventis Know?'" before publishing the defamatory presentation, that Auerbach "assumed that the work done by the FDA was both factual and accurate," and that Puma purposefully avoided numerous sources that would have rebutted Puma's accusations about Eshelman. [D.E. 370-1] ¶¶ 96-97, 124-30.

Tellingly, Puma stipulated that it had worked with contract research organizations ("CROs") since its founding, see id. ¶ 98, and that Auerbach knew the relationship between a CRO and a drug sponsor on a clinical trial. See id.¶ 99. Nonetheless, Puma omitted facts from the SEC presentation about Eshleman that would have revealed the falsity of Puma's accusations about Eshleman. Moreover, Puma stipulated that PPD had reported the issues that it had concerning the clinical drug trial concerning Aventis, but Puma deleted that fact from its SEC presentation about Eshelman. See id. ¶¶ 126-29; PX-42; PX-193. Furthermore, Puma (which had an ongoing, multi-year, multimillion dollar contract with PPD as a CRO) knew that PPD could not communicate directly with the FDA without its client's consent. See [D.E. 370-1] ¶¶ 98-108. The jury was entitled to find that Puma attached hyperlinks to the 2008 Congressional testimony but omitted material facts relevant to understanding that testimony in order to bolster Puma's assertion that Eshleman had been forced to testify and had been "replaced as CEO" after being involved in "clinical trial fraud." See PX-42.

Puma also stipulated that it "[p]urposefully avoided numerous sources that would have rebutted its accusation about Dr. Eshleman." See, e.g., [D.E. 3 70-1] ¶¶ 98-125. For example, Puma did not ask Puma contacts at PPD or Puma's contacts within the pharmaceutical industry about Eshleman. Likewise, Puma did not ask Special Agent Robert West who investigated Aventis and the clinical trial fraud of Dr. Kirkman-Campbell. See id. at ¶¶ 118-24. Moreover, Auerbach knew from reading the 2008 Congressional transcript that a federal grand jury in Alabama indicted Dr. Kirkman-Campbell for clinical trial fraud and had named PPD as a victim of Dr. Kirkman-Campbell's fraud. See id. ¶ 96; PX-15 at 8; PX-1. Puma also stipulated that Auerbach "never bothered to look for Dr. Kirkman-Campbell's indictment, even though it is publically available, and Mr. Auerbach's staff would have pulled for him if he had asked." [D.E. 370-1] ¶ 125. Furthermore, Puma stipulated that "[n]o member of the Board of Directors of Puma or anyone else from Puma asked any questions about the statements that Mr. Auerbach had made about Dr. Eshleman and the Ketek clinical trial in the Presentation." Id. at ¶ 60. Puma's stipulations show that it was aware of "key witness[es] and . . . failed to make any effort to interview [them]" and support a finding of actual malice. See Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 692 (1989); see also Curtis Publ'g Co. v. Butts, 388 U.S. 130, 156-58 (1967); Young v. Gannett Satelite Info. Network, Inc., 734 F.3d 544, 548 (6th Cir. 2013).

Puma's refusal to retract the defamatory statements also supports the jury's actual malice finding.

Eshleman's retraction demand specifically referenced Dr. Kirkman-Campbell's indictment and its reference to PPD as a victim of the fraud. See PX-189 at 5-6. In response, Puma filed a public letter with the SEC and doubled-down on "the truth of [its] statements" and threatened to release "additional" information about Eshleman. PX-189 at 7. Puma's response supports the jury's actual malice finding. See, e.g., Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1071-72 (5th Cir. 1987).

Puma's motive to defame Eshleman also supports the jury's actual malice finding. When Eshleman decided to initiate the proxy contest, Puma had missed financial targets and Auerbach appeared to have his own hand-picked Board of Directors. See [D.E. 370-1] ¶¶ 1-14. Puma's Board had rewarded Auerbach with compensation valued at tens of millions of dollars, despite serious allegations of mismanagement, including allegations of Auerbach's own securities fraud following statements that Auerbach made about Puma's drug neratanib. See id. at ¶¶ 4-11, 22-27, 41, 44-45; PX-20; PX-344. In the proxy contest, Eshleman wanted to add four independent directors to the Board to add oversight to Puma's management, including Auerbach. See, e.g., DX-30. The jury was entitled to disbelieve Auerbach's testimony about an alleged motive to tell the truth in the SEC presentation and to believe the opposite. Cf. United States v. Mejia, 82 F.3d 1032, 1038 (11th Cir. 1996) ("A proper inference the jury can make from disbelieved testimony is that the opposite of the testimony is true."), abrogated on other grounds by Bloate v. United States, 559 U.S. 196 (2010). The jury also was entitled to consider that

evidence of motive, with the other substantial evidence in the case, to find actual malice. See, e.g., Connaughton, 491 U.S. at 668, 689-93; Young, 734 F.3d at 548 n.1; Suzuki Motor Corp. v. Consumers Union, 330 F.3d 1110, 1135-36 (9th Cir. 2003).

Puma's stipulations, when coupled with Auerbach's incredible testimony and the other evidence at trial, show that the jury's finding that Puma acted with actual malice was not against the clear weight of the evidence. Accordingly, the court denies Puma's motion for a new trial.

E.

Puma argues that evidentiary, instructional, and other rulings by the court were erroneous and prejudicial. The court rejects the argument.

First, Puma argues that the verdict form improperly combined Puma's statements on the verdict form. The verdict form, however, merely quotes Puma's statements and properly summarizes the statements at issue. See [D.E. 388] 1-2. Moreover, the jury received a copy of Puma's entire presentation and was properly instructed to consider the quoted statements "in the context of the entire presentation." [D.E. 388] 1; see [D.E. 386] 14-15; Badame, 242 N.C. at 757, 89 S.E.2d at 468; Boyce & Isley, 153 N.C. App. at 31, 568 S.E.2d at 899. Relatedly, the court rejects Puma's argument that the statement "Eshelman was replaced as CEO" was not and had not been found defamatory per se. See [D.E. 306] 22-24 (collecting cases).

Second, Puma argues that the court's order excluding Puma's damages expert, Dr. Anil

Shivdasani's ("Shivdasani"), was prejudicial. The court will not recite the entire twelve-page order excluding Shivdasani's testimony and report. See [D.E. 368]. Nonetheless, as the court explained at length in its order excluding Shivdasani's testimony and report, some of Shivdasani's opinions were within the everyday knowledge of the jury. See id. at 8. Moreover, Puma failed to show, inter alia, that other Shivdasani's opinions were the product of reliable methodology. See id. at 9-12. For example, Shivdasani opined that business opportunities correspond to reputation and concluded that, because Eshelman did not experience a decline in business opportunities, he did not suffer reputational harm. See [D.E. 335-1] ¶ 10. But Shivdasani also opined that, even if Eshelman had experienced a decline in business opportunities, "that alone would not constitute sufficient evidence of reputation harm caused by Puma's statements." Id. ¶ 27 n.40. Because Shivdasani's model is premised on the relationship between business opportunities and reputation (i.e., that business opportunities are dependent on reputation), and because Shivdasani concedes in his report that business opportunities are independent of reputation, the court properly excluded Shivdasani's expert opinion and testimony. See [D.E. 368] 9-12; see also Fed. R. Evid. 104(b), 702; Gen. Elec. Co. v. Joiner, 522 U.S. 136, 143-50 (1997).

Third, Puma objects that admission of evidence of a securities fraud judgment against Puma and Auerbach constitutes prejudicial error. Specifically, in February 2019, a federal jury in the United States District Court for the Central District of California found in favor of a plaintiffs' class and against Puma and Auerbach with

respect to a misleading statement that Auerbach and Puma made about neratanib's efficacy and a resulting dramatic decline in Puma's stock price following disclosure of the truth about neratanib. See [D.E. 370-1] ¶¶ 44-45; [D.E. 431] 125-28.

The court rejects Puma's arguments about the admission of the securities fraud litigation for numerous reasons. Initially, the court never limited the admissibility of this evidence to impeachment evidence on cross examination of Auerbach under Federal Rule of Evidence 608. See [D.E. 394] 37-38; [D.E. 360]; [D.E. 371] 17-18.[5] Moreover, Puma waived any objection to

---

[5] Fed. R. Evid. 608 provides:

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

"extrinsic evidence" of the securities fraud litigation when it included such evidence in its exhibits and failed to ask for a limiting instruction at trial. See DX-30. Furthermore, Puma stipulated that, in February 2019, a jury found that Puma and Auerbach committed securities fraud. See [D.E. 3 70-1] ¶¶ 44-45.

The jury in this defamation case was entitled to consider whether Puma and Auerbach's securities fraud motivated, in part, Puma to respond to Eshleman's proxy fight by publishing the defamatory statements about Eshleman. Such evidence is relevant to the issue of Puma's actual malice. See, e.g., Connaughton, 491 U.S. at 667-68. Additionally, any alleged error in permitting the jury to hear about the securities fraud verdict was harmless in that Eshleman properly used the adverse judgment under Rule 608 when cross-examining Auerbach. See Fed. R. Evid. 608(b). Moreover, Puma never requested a limiting instruction.

Next, Puma objects to the jury instructions concerning actual malice and presumed damages. "Instructions will be considered adequate if construed as a whole, and in light of the whole record, they adequately inform the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." Rowland v. Am.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Fed. R. Evid. 608.

Gen. Fin., Inc., 340 F.3d 187, 191 (4th Cir. 2003) (alterations and quotations omitted).

As for Puma's objection to the jury instruction concerning actual malice, Puma's proposed instruction failed to adequately instruct the jury about what constitutes actual malice in a defamation case. See [D.E. 341] 22. In contrast, the court's instructions properly used the phrase "clear and convincing evidence," provided examples of what constitutes actual malice, and, importantly, emphasized what does not constitute actual malice (e.g., "mere negligence," "mere mistake," "a defendant's personal hostility or ill will towards the plaintiff," and a defendant's "failure to investigate"). See [D.E. 386] 18-19. The court cited the controlling legal principles behind each example in the instructions. See [D.E. 430] 216, 221-24. Additionally, the court incorporated nearly all of Puma's proposed instruction concerning the definition of actual malice. Accordingly, the court rejects Puma's attack on the jury instruction concerning actual malice.

As for Puma's objection to the jury instruction concerning presumed damages, Puma's proposed instruction did not contain the "reasonable certainty" language that Puma claims is error to have excluded. See [D.E. 341] 26-28. Indeed, Puma's proposed instruction, which tracks the North Carolina Pattern Instruction, concedes that presumed damages "arise by inference of law and are not required to be specifically proved by evidence," that presumed damages "cannot be measured precisely or definitively in monetary terms," that determining the amount of presumed damages "is not a task which can be completed with

mathematical precision and is one which unavoidably includes an element of speculation," and that the amount of presumed damages "is an estimate, however rough, of the probable extent of actual harm." Id. Thus, Puma waived this objection. See Fed. R. Civ. P. 51(c)(1).

Alternatively, the court's instruction properly informed the jury about presumed damages. Moreover, excluding the phrase "such as one dollar" did not materially change the statement that the jury could award Eshelman nominal damages. Accordingly, the jury instruction concerning presumed damages did not prejudice Puma.

IV.

Eshelman seeks to modify the judgment to include $3,984,646.58 of prejudgment interest for a total award of $26,334,646.58. See [D.E. 418). Rule 59(e) of the Federal Rules of Civil Procedure allows a party to file a motion to alter or amend a judgment "no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). Rule 59(e) permits three grounds for amending a prior judgment: (1) to accommodate an intervening change in controlling law, (2) to account for new evidence that was not available at trial, or (3) to correct a clear error of law or prevent manifest injustice. See Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998); EEOC v. Lockheed Martin Corp., 116 F.3d 110, 112 (4th Cir. 1997); Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993).

North Carolina law governs the award of prejudgment interest in this diversity case. See Hitachi

Credit Am. Corp. v. Signet Bank, 166 F.3d 614, 633 (4th Cir. 1999); Silicon Knights, 917 F. Supp. 2d at 524-25; Hexion Specialty Chems., Inc. v. Oak-Bark Corp., No. 7:09-CV-105-D, 2012 WL 2458638, at *1 (E.D.N.C. June 27, 2012) (unpublished). Under North Carolina law, "[i]n an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied." N.C. Gen. Stat. § 24-5(b); see, e.g., Castles Auto & Truck Serv. Inc. v. Exxon Corp., 16 F. App'x 163, 168 (4th Cir. 2001) (per curiam) (unpublished). Under N.C. Gen. Stat. § 24-5(b), prejudgment interest is mandatory. See Castles Auto & Truck Serv., 16 F. App'x at 168; Hamby v. Williams, 196 N.C. App. 733, 738, 676 S.E.2d 478, 481 (2009). Therefore, a manifest injustice would arise if the court failed to award Eshleman prejudgment interest "at the legal rate." N.C. Gen. Stat.§ 24-5(b); see N.C. Gen. Stat. § 24-1 (setting the legal rate at 8% per annum).

Eshelman filed this action on February 2, 2016, and the court entered judgment on March 2S, 2019. Accordingly, Eshelman is entitled to prejudgment interest at 8% per annum (i.e., $1,268,000 per annum), and the court grants Eshelman's motion to alter the judgment to include $3,984,646.58 in prejudgment interest for a total award of $26,334,646.58.

V.

In sum, the court DENIES Eshelman's motion for attorneys' fees [D.E. 397], GRANTS Eshelman's motion for costs [D.E. 403], DENIES Puma's motion to disallow costs [D.E. 414], DENIES Puma's motion for

a new trial or remittitur [D.E. 416], GRANTS Eshelman's motion to amend the judgment to include prejudgment interest [D.E. 418], and DENIES Puma's motion for a hearing or, in the alternative, remittitur [D.E. 441]. The court AWARDS Eshelman $205,903.55 in costs under 28 U.S.C. § 1920 and Local Civil Rule 54.1. Finally, the court ALTERS the judgment to include $3,984,646.58 in prejudgment interest under N.C. Gen. Stat. § 24-5(b). The clerk: shall close the case.

SO ORDERED. This 2 day of March 2020.

/s/ James C. Dever
JAMES C. DEVER III
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1329 (L)
(7:16-cv-00018-D)

[**FILED July 20, 2021**]

FREDRIC N. ESHELMAN

Plaintiff - Appellee

v.

PUMA BIOTECHNOLOGY, INC.

Defendant - Appellant

and

ALAN H. AUERBACH

Defendant

No. 20-1376
(7:16-cv-00018-D)

FREDRIC N. ESHELMAN)
)
Plaintiff - Appellant)
)
v.)
)
PUMA BIOTECHNOLOGY, INC.)
)
Defendant - Appellee)
and)
)
ALAN H. AUERBACH)
)
Defendant)
)

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Motz, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

FEDERAL RULES OF CIVIL PROCEDURE

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) JUDGMENT AS A MATTER OF LAW.

(1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion*. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) RENEWING THE MOTION AFTER TRIAL; ALTERNATIVE MOTION FOR A NEW TRIAL. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if

the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) GRANTING THE RENEWED MOTION; CONDITIONAL RULING ON A MOTION FOR A NEW TRIAL.

(1) *In General*. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) *Effect of a Conditional Ruling*. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) TIME FOR A LOSING PARTY'S NEW-TRIAL MOTION. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) DENYING THE MOTION FOR JUDGMENT AS A MATTER OF LAW; REVERSAL ON APPEAL. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)