**16-4070**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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LAURA DZIADEK,

*Plaintiff/Appellee*,

v.

THE CHARTER OAK FIRE INSURANCE COMPANY, d/b/a Travelers,
*Defendant/Appellant.*

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On appeal from the United States District Court for the District of South Dakota,
No. 4:11-CV-04134-RAL

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**MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN TORT REFORM ASSOCIATION, AND THE AMERICAN INSURANCE ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT/APPELLANT**

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The Chamber of Commerce of the United States of America ("the Chamber"), the American Tort Reform Association ("ATRA"), and the American Insurance Association ("AIA") respectfully move for leave to file an *amicus curiae* brief in support of defendant/appellant The Charter Oak Fire Insurance Company.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three

million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Founded in 1986, ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than two decades, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important civil justice issues.

AIA, which was founded in 1866, is a leading national trade association representing some 320 property and casualty ("P&C") insurance companies. These members range in size from small companies to the largest insurers with global operations and collectively underwrite more than $125 billion in direct P&C insurance premiums nationwide, including almost 20 percent of commercial lines insurance in South Dakota. AIA advocates sound public policies on behalf of its members in legislative and regulatory forums nationwide and files *amicus curiae*

briefs in significant cases before federal and state courts on issues of importance to the P&C insurance industry and marketplace.

Few issues are of more concern to U.S. business than those pertaining to the fair administration of punitive damages. Collectively or individually, *amici* regularly file *amicus* briefs in significant punitive damages cases, including all of the Supreme Court's punitive damages cases in the past three decades.

The federal courts have endeavored over the past few decades to develop a framework for reviewing punitive awards to ensure that they are imposed in a reasonable, fair, and consistent way. The Supreme Court took great strides in that direction when it adopted three guideposts to assist courts in deciding whether a punitive award is excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive to compensatory damages; and (3) the civil penalties applicable to comparable conduct. However, issues regarding the proper application of these guideposts persist.

The proposed *amicus* brief addresses two errors that the district court made in the application of the ratio guidepost. First, it improperly included in the denominator of the ratio an award of prejudgment interest that plaintiff received under South Dakota law. The above-market statutory rate of 10% awarded here grossly overstated any economic loss plaintiff may have suffered as a result of Charter Oak's alleged delay in disclosing the availability of UIM coverage.

Accordingly, including the above-market award of prejudgment interest in the denominator of the ratio distorted the due process inquiry and prevented the district court from reliably determining whether the punishment imposed on the defendant bears a reasonable relationship to the harm that the defendant's conduct allegedly caused the plaintiff. More broadly, adding prejudgment interest to the denominator undermines the Supreme Court's goal of ensuring consistency of punitive awards across similar cases because the constitutionally permissible award could vary wildly depending on the happenstance of whether the state in which the case was filed uses a market or above-market rate for prejudgment interest—or doesn't allow prejudgment interest at all, as is often the case when the plaintiff's claim is not for a liquidated sum.

Second, the district court mistakenly assumed that any single-digit ratio of punitive to compensatory damages is presumptively constitutional. Decisions of the Supreme Court, this Court, and other Courts of Appeals make clear that the punitive award in a case like this—in which the compensatory damages are substantial and the conduct is not particularly reprehensible relative to the conduct in other punitive damages cases—should normally be limited to no more than the amount of compensatory damages.

The *amicus* brief also addresses several errors made by the district court in applying the reprehensibility guidepost. Most fundamentally, the district court

failed to compare the alleged conduct here—low level misconduct in the handling of an insurance claim—with other punishable acts such as discrimination or physical assault. The district court's analysis of the five reprehensibility factors identified by the Supreme Court was also systematically mistaken. The court found physical harm and disregard for a risk to health or safety because plaintiff felt emotional distress. It found financial vulnerability even though there is no evidence that defendant targeted plaintiff because she was vulnerable. And it found repeat misconduct even though there is no evidence of a pattern of similar activity by defendant's claims staff. On each of these points, the district court's conclusion is contrary to prevailing law interpreting the reprehensibility guidepost. The conduct here does not satisfy any of those reprehensibility factors. And, when compared to other punishable conduct, it is on the far low end of the reprehensibility spectrum.

The proposed *amicus* brief addresses each of these points in greater depth and detail and we believe that it will assist the Court in addressing these issues.

Moreover, the *amici* have an interest in the proper resolution of these issues that transcends that of Charter Oak. Collectively, *amici*'s members regularly find themselves embroiled in punitive damages litigation. What this Court says about the ratio and reprehensibility guideposts in this case will govern all future cases involving *amici*'s members in this Circuit and could influence litigation involving

*amici*'s members in other Circuits. Accordingly, *amici* have a strong interest in presenting the Court with their analysis of these important, recurring issues.

Counsel for defendant consents to the filing of this *amicus* brief. Counsel for plaintiff indicated that they could not consent to the filing of the brief without first reviewing the proposed brief.

## CONCLUSION

The Court should grant permission to file the proposed *amicus* brief.

Dated: February 21, 2017

Respectfully submitted.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

s/ Evan M. Tager
Evan M. Tager

**16-4070**

**IN THE UNITED STATES COURT OF APPEALS**
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v.

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# BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN TORT REFORM ASSOCIATION, AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF DEFENDANT/APPELLANT


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## CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

The American Tort Reform Association is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

The American Insurance Association is a nonprofit corporation organized under the laws of Delaware. It has no parent company and has issued no stock.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

## TABLE OF AUTHORITIES
## (continued)

**Page(s)**

## TABLE OF AUTHORITIES
## (continued)

**Page(s)**



**STATUTES**

## INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Founded in 1986, American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than two decades, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important civil justice issues.

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[1] No party or counsel for a party in the pending appeal authored the proposed *amicus* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than the *amici curiae*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

The American Insurance Association ("AIA"), which was founded in 1866, is a leading national trade association representing some 320 property and casualty ("P&C") insurance companies. These members range in size from small companies to the largest insurers with global operations and collectively underwrite more than $125 billion in direct P&C insurance premiums nationwide, including almost 20 percent of commercial lines insurance in South Dakota. AIA advocates sound public policies on behalf of its members in legislative and regulatory forums nationwide and files *amicus curiae* briefs in significant cases before federal and state courts on issues of importance to the P&C insurance industry and marketplace.

Few issues are of more concern to U.S. business than those pertaining to the fair administration of punitive damages. Collectively or individually, *amici* regularly file *amicus* briefs in significant punitive damages cases, including all of the Supreme Court's punitive damages cases in the past three decades.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The federal courts have endeavored over the past few decades to develop a framework for ensuring that punitive damages are imposed in a reasonable, fair, and consistent way. The Supreme Court took great strides in that direction when it adopted three guideposts to assist courts in deciding whether a punitive award is excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the

ratio of punitive to compensatory damages; and (3) the civil penalties applicable to comparable conduct. However, issues regarding the proper application of these guideposts persist.

Here, the district court made two errors in applying the ratio guidepost. First, it improperly included in the denominator of the ratio an award of prejudgment interest that plaintiff received under South Dakota law. Even assuming that prejudgment interest can fairly be regarded as compensatory when set at market rates, the above-market statutory rate of 10% awarded here grossly overstated any economic loss plaintiff may have suffered as a result of Charter Oak's alleged delay in disclosing the availability of UIM coverage. Accordingly, including the above-market award of prejudgment interest in the denominator of the ratio distorted the due process inquiry and prevented the district court from reliably determining whether the punishment imposed on the defendant bears a reasonable relationship to the harm that the defendant's conduct caused the plaintiff. More broadly, adding prejudgment interest to the denominator undermines the Supreme Court's goal of ensuring consistency of punitive awards across similar cases because the constitutionally permissible award could vary wildly depending on the happenstance of whether the state in which the case was filed uses a market or above-market rate for prejudgment interest—or doesn't allow prejudgment interest at all, as is often the case when the plaintiff's claim is not for a liquidated sum.

Second, the district court mistakenly assumed that any single-digit ratio of punitive to compensatory damages is presumptively constitutional. Decisions of the Supreme Court, this Court, and other Courts of Appeals make clear that the punitive award in a case like this—in which the compensatory damages are substantial and the conduct is not particularly reprehensible relative to the conduct in other punitive damages cases—should normally be limited to no more than the amount of compensatory damages.

The district court also made a number of errors in applying the ratio guidepost. Most fundamentally, it failed to compare the alleged conduct here—low level misconduct in the handling of an insurance claim—with other punishable acts such as discrimination or physical assault. The district court's analysis of the five reprehensibility factors identified by the Supreme Court was also systematically mistaken. The court found physical harm and disregard for a risk to health or safety because plaintiff felt emotional distress. It found financial vulnerability even though there is no evidence that defendant targeted plaintiff because she was vulnerable. And it found repeat misconduct even though there is no evidence of a pattern of similar activity by defendant's claims staff. On each of these points, the district court's conclusion is contrary to prevailing law interpreting the reprehensibility guidepost. The conduct here does not satisfy any of those

reprehensibility factors. And, when compared to other punishable conduct, it is on the far low end of the reprehensibility spectrum.

## ARGUMENT

### I. Above-Market Prejudgment Interest Should Not Be Included In The Denominator When Calculating The Ratio Of Punitive To Compensatory Damages.

The fundamental question underlying constitutional review of punitive awards for excessiveness is "whether [the] particular award is greater than reasonably necessary to punish and deter." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991). When "a more modest punishment for [the defendant's] reprehensible conduct could have satisfied the State's legitimate objectives," then a reviewing court should reduce the award to that amount and "go[] no further." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-20 (2003); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 584 (1996) ("The sanction imposed … cannot be justified … without considering whether less drastic remedies could be expected to achieve [punishment and deterrence]."); *cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008) (recognizing "the need to protect against the possibility … of [punitive] awards that are unpredictable and unnecessary, either for deterrence or for measured retribution").

To aid courts in determining whether a punitive award exceeds the amount necessary to punish and deter, the Supreme Court has identified three

"guideposts": (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive to compensatory damages; and (3) the civil penalties applicable to comparable conduct. *BMW*, 517 U.S. at 574-75. Although courts reviewing a punitive award must conduct an "[e]xacting" review using these guideposts (*State Farm*, 538 U.S. at 418), they must be applied with an eye to their ultimate purpose—to help courts rationally and consistently answer the relevant constitutional question: whether the State's legitimate interests in punishment and deterrence can be accomplished by a lower award.

The ratio guidepost, in particular, helps courts to answer that question by directing them to consider whether the punishment being imposed on the defendant bears a reasonable relationship to the harm that the defendant's conduct caused the plaintiff. *See, e.g.*, *BMW*, 517 U.S. at 574-75. It would affirmatively undermine the purpose of that guidepost to include in the denominator of the ratio amounts that do not represent an actual harm caused by the defendant's conduct but instead already serve to punish and deter the defendant's conduct.

### A. Above-market prejudgment interest overstates the actual harm suffered by the plaintiff and already serves a punitive function.

The district court included prejudgment interest in the denominator of the ratio guidepost on the ground that South Dakota's prejudgment interest statute "is designed to compensate the injured party." *Dziadek v. Charter Oak Fire Ins. Co.*, 2016 WL 5818535, at *15 (D.S.D. Sept. 30, 2016). *Amici* do not dispute that, as a

general matter, "[t]he essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss." *Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 195 (1995).

Here, however, there is no reasonable dispute that the 10% rate of prejudgment interest awarded by the district court under South Dakota law grossly overstates plaintiff's actual economic loss and has an almost entirely punitive effect.[2] As a point of reference, the interest rate on a federal judgment entered on December 15, 2009—the date from which the trial court measured interest in this case—would have been 0.32%. *See* 28 U.S.C. § 1961 and http://www.utd.uscourts.gov/documents/int2009.html. And the Federal Reserve's prime rate on that date was 3.25%. *See* https://fred.stlouisfed.org/series/PRIME. The prime rate did not change until December 17, 2015, when it was increased to 3.5%. *Id.* By any measure, the interest awarded to plaintiff in this case contains a large windfall that far outstrips any actual economic harm she may have suffered

[2] Charter Oak has maintained that plaintiff was not entitled to receive policy benefits in December 2009 even if she had been fully informed of their potential availability. *See* Defendant's Brief at 19-28. To the extent that plaintiff was not entitled to actually receive benefits until about the time that they actually were paid in 2012, the prejudgment interest award would be entirely, and even more clearly, punitive in nature. Our argument here, however, does not depend on whether plaintiff actually suffered a loss of the time-value of money but rather on the overcompensation for any such loss by virtue of South Dakota's above-market statutory interest rate.

from the lost time-value of insurance benefits she claims could have been accessed sooner.

Because the above-market award of prejudgment interest grossly overstates any actual financial harm that plaintiff may have suffered, and thus already serves a punitive function, it would defeat the purpose of due process review to include the above-market award of prejudgment interest in the denominator of the ratio. Doing so would result in a ratio that no longer represents a comparison of the punishment being imposed on the defendant with the harm caused by the defendant's conduct. Instead, the punishment side of the equation would be artificially reduced and the compensation side artificially inflated. That would rob the ratio guidepost of its constraining force in this and any other case in which prejudgment interest is imposed at a rate that materially exceeds the market rate.

Including an above-market award of interest in the denominator of the ratio guidepost also would undermine the Supreme Court's goal of ensuring the consistency and predictability of punitive awards across similar cases. *See, e.g.*, *Exxon Shipping*, 554 U.S. at 499-500 (expressing concern with "fairness as consistency" and lamenting that "[t]he real problem is the stark unpredictability of punitive awards" and the lack of "consistent results in cases with similar facts"); *State Farm*, 538 U.S. at 417 (identifying "the imprecise manner in which punitive damages systems are administered" as a central motivation for the Supreme

Court's guideposts); *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (review of punitive damages awards "helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself") (internal quotation marks omitted).

For example, if this Court were to accept the district court's conclusion that a ratio of approximately 4:1 is consistent with due process, then the "constitutional limit" on the punitive award in this case would fluctuate by over $1,000,000—over 33%—depending entirely on the happenstance that it was filed in South Dakota—which has adopted a 10% rate for prejudgment interest—instead of next door in Iowa—where prejudgment interest tracks the one-year treasury constant maturity index plus 2% and is awarded only from the date of commencement of the action (Iowa Code § 668.13).[3] The scope of that arbitrary discrepancy would only grow with the size of the compensatory damages and the length of time over which prejudgment interest is awarded.

[3] Because judgment was entered in this case in September 2016, the applicable interest rate under Iowa law would have been 2.57%. *See* http://www.iowacourts.gov/For_Attorneys/District_Court_Resources/Post_Judgment_Interest_Table/. Setting aside other difference in how Iowa sets the amount of interest (which would reduce the award even further), the change in rate alone, from 10% to 2.57%, would have reduced the prejudgment interest award in this case to $99,590.51. That is $287,921.19 less than was awarded under South Dakota law. Thus, if those amounts were included in the denominator of a 4:1 ratio, the constitutional limit on a punitive award would vary by $1,151,684.76 depending on which side of the border between South Dakota and Iowa the district court happened to be sitting.

And to make things even more arbitrary, South Dakota does not permit prejudgment interest on damages that are "intangible"—"such as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation or financial standing, loss of enjoyment of life, or loss of society and companionship." S.D. Codified Law § 21-1-13.1. So the effect of treating prejudgment interest as compensatory damages for ratio purposes would be to authorize higher amounts of punitive damages in cases involving predominantly economic injury than in cases involving predominantly non-economic injury—even though the Supreme Court treats the former as generally involving lower reprehensibility (*see State Farm*, 538 U.S. at 419).

For all of these reasons, as well as the ones set forth in Charter Oak's brief, the Court should exclude the award of prejudgment interest from the denominator of the ratio.

### B. If the Court concludes that some amount of prejudgment interest should be included in the denominator of the ratio, it should use a market rate for determining that amount and add the balance of the prejudgment interest—the effect of which is entirely punitive—to the numerator.

If, notwithstanding the foregoing arguments, the Court concludes that some amount of prejudgment interest should be included in the denominator, the fact remains that the bulk of ***this*** award of prejudgment interest goes beyond fair compensation and instead is entirely punitive. Accordingly, if the Court decides to

account for prejudgment interest in the ratio, it should first use a market rate of interest to determine the amount to be included in the denominator and then add the balance of the award of prejudgment interest to the numerator. Such an approach would result in a more accurate and consistent comparison of the money that is being exacted from the defendant by way of punishment to the actual harm suffered by the plaintiff because of the defendant's conduct.

In this case, that would mean using an interest rate of no more than 3.5% for purposes of determining the lost time-value of money to be included in the denominator, while adding the difference between the actual above-market award and that amount to the numerator.

## II. The Ratio Of Compensatory To Punitive Damages Should Not Exceed 1:1 When, As Here, The Compensatory Damages Are Substantial.

In *State Farm*, the Supreme Court "addressed [the ratio] guidepost with markedly greater emphasis and more constraining language" than it had in previous cases, "tighten[ing] the noose" that it previously had thrown around the problem of excessive punitive awards. *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005). Specifically, *State Farm* reiterated the Supreme Court's prior statement that a punitive award of four times compensatory damages is generally "close to the line of constitutional impropriety" and indicated that, though "not binding," the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to 3:1) is "instructive." 538 U.S. at 425. More

to the point here, *State Farm* also "emphasizes and supplements" *BMW* "by holding that '[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Bains LLC v. ARCO Prods. Co.*, 405 F.3d 764, 776 (9th Cir. 2005) (quoting *State Farm*, 538 U.S. at 425).

Likewise, the Supreme Court in *Exxon Shipping* reiterated *State Farm*'s statement that "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 554 U.S. at 501 (internal quotation marks and alterations omitted); *see also id.* at 514 & n.28 (quoting the same language and stating that "[i]n this case, then, the constitutional outer limit may well be 1:1").[4]

To be sure, these principles do not establish a rigid mathematical formula for calculating punitive damages, but instead create a rough framework under which the maximum permissible ratio depends principally on two variables: the degree of reprehensibility of the conduct and the magnitude of the harm caused by the conduct (here, as in most cases, the amount of the compensatory damages). The

[4] Although the Supreme Court reviewed the punitive award in *Exxon Shipping* under federal maritime law rather than the Due Process Clause, the Court's considered discussion of the due process standard should be given significant weight by this Court. Indeed, the Supreme Court's concern in *Exxon Shipping*—that the current punitive damages system is not producing "consistent results in cases with similar facts" (554 U.S. at 500)—applies with even greater force in the context of due process.

maximum permissible ratio is directly related to the degree of reprehensibility and inversely related to the harm caused. In other words, for any particular degree of reprehensibility, as the compensatory damages increase, the maximum permissible ratio decreases. And for any particular amount of compensatory damages, the lower on the reprehensibility spectrum the conduct falls, the lower the constitutionally permissible ratio. Illuminating this principle, the Second Circuit has explained that a 10:1 ratio might be permissible had the conduct before it caused only $10,000 in compensable harm, while a 1:1 ratio would be "very high" if the compensatory damages had been $300,000. *Payne v. Jones*, 711 F.3d 85, 103 (2d Cir. 2013). The court concluded that, "given the substantial amount of the compensatory award"—$60,000—a 5:1 ratio "appears high" (*id.*); ultimately, it ordered a remittitur to $100,000, representing a ratio of 1.67:1 (*id.* at 106).

Thus, when *State Farm* and *Exxon Shipping* stated that a ratio of 1:1 may be the constitutional limit when compensatory damages are substantial, they were describing an outer bound for *all* such punitive awards. It follows that when compensatory damages are substantial and reprehensibility is *not* high, an even lower ratio may be required. That is the only way to maintain proportionality between reprehensibility and ratio—ensuring that more egregious conduct is punished more severely. Here, for example, where the compensatory damages are

very substantial but the conduct is far from the high end of the spectrum of punishable conduct, a ratio below 1:1 likely is required.[5]

Since *State Farm*, many courts—including this one—have concluded that, when compensatory damages are substantial, a ratio of 1:1 or lower marks the outer limit of due process. For example, in *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004), the plaintiff, a victim of racial harassment, was awarded $600,000 in compensatory damages and over $6,000,000 in punitive damages. The Court accepted that the defendant's conduct in *Williams* was despicable: The plaintiff's supervisor "regularly swore at him and berated him in front of other employees" and "treated [the plaintiff] and other black employees with special scorn"; the supervisor and other employees "regularly used racially demeaning language around [the plaintiff]"; "there was a pervasive practice of using a double standard for evaluating and disciplining white and black employees"; "white managers were extended privileges, like travel at company expense, unavailable to black employees"; and "black employees were given shorter breaks than white

[5] By definition, any case in which the amount of punitive damages is at issue involves conduct that a fact-finder has determined to be culpable. The reprehensibility guidepost requires courts to perform a comparative analysis, assessing the conduct at issue against the range of conduct involved in other cases in which punitive damages have been imposed. We discuss below (at pages 19-24) why the district court's reprehensibility analysis was mistaken and why the conduct here is at the low end of the reprehensibility spectrum when compared to other conduct for which punitive damages may be imposed.

employees." *Id*. at 795, 798. Nevertheless, this Court held that a 1:1 ratio was the most that was permitted under *State Farm*, explaining:

> [The plaintiff's] large compensatory award … militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." [The plaintiff] received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on [his] harassment claim be remitted to $600,000.

*Id*. at 799 (citation omitted); *see also Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (reducing $15 million punitive award to $5 million where compensatory damages were $4,025,000 and explaining that although the defendant's deceptive marketing of cigarettes "was highly reprehensible," "a ratio of approximately 1:1 would comport with the requirements of due process" because "[f]actors that justify a higher ratio, such as the presence of an 'injury that is hard to detect' or a 'particularly egregious act [that] has resulted in only a small amount of economic damages,' are absent here") (quoting *BMW*, 517 U.S. at 582) (second alteration in original).

The Supreme Court of South Dakota also has recognized that "where there was a substantial compensatory damage award containing a punitive element which fully compensated [the plaintiff] for the harm caused"—in that case a $25,000 emotional-distress award for invasion of privacy—then "'a punitive

damages award at or near the amount of compensatory damages' is justified." *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003) (quoting *State Farm*, 538 U.S. at 425).[6]

These cases confirm that the district court's deferential ruling, which allowed a ratio of 4.3:1 to stand (after including the above-market award of prejudgment interest in the denominator), is out of line with modern decisions applying the Supreme Court's due process guideposts.[7] If a ratio of 1:1 was the

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[6] Had the present case been filed in state court, *Roth* would be controlling and the punitive damages would be limited to, at most, the amount of compensatory damages (however calculated). That is another respect in which allowing the district court's *laissez-faire* approach to stand would lead to arbitrary results.

[7] Other illustrative decisions of the federal courts of appeals include *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1068 (10th Cir. 2016) (reducing $22.5 million punitive award against one defendant to amount of compensatory damages attributable to that defendant—$1,950,000); *Burton v. Zwicker & Assocs.*, 577 F. App'x 555, 566 (6th Cir. 2014) (affirming reduction of $600,000 punitive award to $350,000, the amount of compensatory damages); *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1206-08 (10th Cir. 2012) (reducing $2,000,000 punitive award to amount equal to the $630,307 compensatory award); *Morgan v. New York Life Ins. Co.*, 559 F.3d 425, 441-43 (6th Cir. 2009) (vacating $10,000,000 punitive award that was 1.67 times the compensatory award and remanding with instructions to enter remittitur in an amount not more than compensatory damages); *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 56 (1st Cir. 2009) (reducing $350,000 punitive award to $35,000, which equaled the compensatory damages); *Zakre v. Norddeutsche Landesbank Girozentrale*, 344 F. App'x 628, 631 (2d Cir. 2009) (affirming reduction of punitive award from $2.5 million to $600,000 where compensatory damages were approximately $1.5 million); *Jurinko v. Medical Protective Co.*, 305 F. App'x 13, 27-32 (3d Cir. 2008) (reducing 3.13:1 ratio to 1:1 where compensatory damages and attorneys' fees totaled approximately $2 million); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 487 (6th Cir. 2007) (reversing punitive award that was 9.5 times the

most that was allowed in *Boerner*, *Williams*, and *Roth*, the ratio here should be no higher. The compensatory damages here unquestionably are substantial (even excluding the prejudgment interest), the conduct is not exceptionally egregious compared to other cases in which punitive damages are awarded (far from it), and the outside limit for the ratio accordingly should be 1:1 or lower.

Moreover, a further downward adjustment is appropriate in a case, like this, in which the "compensatory" damages already contain a strong punitive element. Courts have recognized that "when the compensatory damages are substantial *or already contain a punitive element*, lesser ratios 'can reach the outermost limit of the due process guarantee.'" *Simon*, 113 P.3d at 77 (emphasis added); *see also, e.g.*, *Roth*, 667 N.W.2d at 671; *Walker v. Farmers Ins. Exch.*, 153 Cal. App. 4th 965, 974 (2007) (affirming reduction of punitive damages to 1:1 ratio because award of emotional distress damages added "a punitive element to respondents' recovery of compensatory damages").

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compensatory damages and holding that "[i]n this case where only one of the reprehensibility factors is present, a ratio in the range of 1:1 to 2:1 is all that due process will allow"); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 152-53, 157 (6th Cir. 2007) (ordering remittitur of $2,628,600 punitive award to no more than $400,000, where compensatory damages were $400,000); *DiSorbo v. Hoy*, 343 F.3d 172, 176-77, 189 (2d Cir. 2003) (ordering remittitur of compensatory award to $250,000 and remittitur of punitive damages from $1,275,000 to $75,000). There are many additional decisions of federal district courts and state appellate courts reducing punitive awards to the amount of the compensatory damages or below.

Here, both elements of the "compensatory" damages already serve a punitive function. As discussed above, the award of prejudgment interest far outstrips plaintiff's actual economic losses and already serves to punish the defendant. Indeed, the Supreme Court's observation in *State Farm* that damages for emotional distress are apt to contain "a component" that is "duplicated in the punitive award" (538 U.S. at 426) and that therefore is further justification for limiting the punitive award to an amount "at or near the amount of compensatory damages" (*id*. at 429) applies with even more force to an award of above-market prejudgment interest.

The same is true of the $250,000 that the jury awarded as "out-of-pocket" expenses. That award was largely intended to compensate plaintiff for the attorneys' fees she allegedly was required to pay in order to secure payment of benefits. *Dziadek*, 2016 WL 5818535, at *13. Numerous courts have observed that any award of attorneys' fees "includes a certain punitive element." *Parrish v. Sollecito*, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003); *accord Walker*, 153 Cal. App. 4th at 974 ("there is a punitive element to … compensatory damages," including an award of attorneys' fees); *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383, 389 (2d Cir. 1985) (although "an award of fees under the bad faith exception rests on different principles than does an award of punitive damages," it "has a punitive and deterrent flavor"). Indeed, courts have held that this punitive effect means that a plaintiff who receives an award of attorneys' fees

should receive "a lesser rather than greater award of punitive damages." *Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003). The largely punitive nature of the compensatory damages awarded in this case is further confirmation that the highest constitutionally permissible award of punitive damages is equal to or less than the amount of compensatory damages.

In sum, in this case, in which the conduct barely crosses the line that allows the imposition of punitive liability (if it does cross that line) and the plaintiff already has received a very sizeable compensatory award that undoubtedly contains a significant punitive element, a ratio of 1:1 should be considered the outer limit and the live question should be whether an even lower ratio is called for. Anything more that a ratio of 1:1 would exceed the amount necessary to accomplish South Dakota's interest in punishing and deterring the conduct at issue here.

## III. The Conduct At Issue Here Falls At The Low End Of The Spectrum Under The Supreme Court's Reprehensibility Guidepost.

"The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (internal quotation marks and alterations omitted). Put succinctly, "punitive damages may not be grossly out of proportion to the severity of the offense." *BMW*, 517 U.S. at 576 (internal quotation marks omitted). This core constitutional requirement entails placing the conduct at issue on a spectrum of

reprehensibility, comparing it with other conduct that may be sanctioned with punitive damages.

For example, the Ninth Circuit has concluded that "the reprehensibility of the fraudulent business practices [in *State Farm*]"—which involved an insurer systematically setting out to defraud its insureds—"is ***different in kind*** from the reprehensibility of intentional discrimination on the basis of race or ethnicity" and that the "***gulf*** between the reprehensibility" of these types of misconduct "***is substantial***." *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1043-44 (9th Cir. 2003) (emphasis added).

The district court failed to appreciate that the reprehensibility guidepost calls for this type of comparative inquiry rather than a rote totaling up of reprehensibility factors. *Dziadek*, 2016 WL 5818535, at *14-15. In the scheme of things, the alleged conduct here—misleading an experienced and sophisticated lawyer about the potential availability of insurance coverage for his client—cannot credibly be deemed to be as reprehensible as the vast majority of torts for which punitive damages may be imposed. Indeed, the "gulf" that the Ninth Circuit identified in *Zhang* between economic torts like deceiving insureds about their coverage or liability exposure and other more egregious misconduct is even more pronounced here, where there is no evidence of a systematic and intentional effort to defraud insureds. When compared to other punishable conduct, the conduct here

does not support the punitive damages awarded by the jury—an amount that the Supreme Court considers to be "tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585).

The district court also was wrong about four of the five reprehensibility factors identified in *State Farm*.

First, it was mistaken in deeming the first and second factors—physical harm and reckless disregard for the plaintiff's health and safety—to be present based on the plaintiff's emotional distress. *Dziadek*, 2016 WL 5818535, at *14. Notably, the plaintiffs in *State Farm* suffered severe emotional distress from their insurer's deceit, yet the Supreme Court found these factors absent there, concluding instead that "[t]he harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries." 538 U.S. at 426; *see also Jurinko v. Med. Protective Co.*, 305 F. App'x 13, 26 (3d Cir. 2008) (fact that victim "underwent a lengthy trial and suffered embarrassment in his community" did not "constitute physical harm"); *Bach v. First Union Nat. Bank*, 149 F. App'x 354, 364 (6th Cir. 2005) ("Although Bach attempts to argue that the harm caused in this case was both physical and economic because of the resulting emotional distress, this is not the sort of physical injury the *State Farm* case contemplates, and thus, the first factor is not present."); *Burton v. Zwicker & Assocs., PSC*, 978 F. Supp. 2d 759, 774 (E.D. Ky. 2013) ("[plaintiff] may have had

physical manifestations of his emotional distress, but that does not make [defendant's] tortious conduct physical in nature" under first reprehensibility factor), *aff'd*, 577 F. App'x 555 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1531 (2015); *Perkins v. Federal Fruit & Produce Co.*, 2013 WL 2112425, at *7 (D. Colo. May 14, 2013) (explaining that "emotional distress is not the kind of 'physical harm' that the first reprehensibility factor addresses [if] it [does] not result from violence or threats of violence"); *Dixon-Rollins v. Experian Info. Solutions, Inc.*, 2010 WL 3749454, at *9 (E.D. Pa. Sept. 23, 2010) ("Embarrassment and humiliation are not the types of physical injuries contemplated under the reprehensibility analysis.").

Second, the district court was equally mistaken in finding that the third factor—that "the target of the conduct had financial vulnerability" (*State Farm.*, 538 U.S. at 419)—is present. *Dziadek*, 2016 WL 5818535, at *14. Both the Supreme Court and other courts have recognized that this factor requires evidence that the defendant intentionally targeted the victim due to her vulnerability. *See, e.g.*, *BMW*, 517 U.S. at 576 (conduct is more reprehensible if "*the target* is financially vulnerable") (emphasis added); *In re Exxon Valdez*, 490 F.3d 1066, 1087 (9th Cir. 2003) ("there must be some kind of intentional aiming or targeting of the vulnerable" to satisfy this factor), vacated on other grounds by *Exxon Shipping*, 554 U.S. 471; *Eisenhour v. Stafford*, 2013 WL 6212725, at *5 (E.D. Tex.

Nov. 26, 2013) (finding low reprehensibility in part because "the Defendant did not target the Plaintiff because of his financial vulnerability"). There is no such evidence here.

Finally, the court was wrong in concluding that this case implicates the fourth factor (*Dziadek*, 2016 WL 5818535, at *15)—that "the conduct involved repeated actions," as opposed to being "an isolated incident." *State Farm*, 538 U.S. at 419. As numerous courts have observed, that factor is about recidivism, not atomizing a single tort into multiple acts. *See, e.g.*, *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 487 (6th Cir. 2007) ("[t]he repeated conduct factor requires that the similar reprehensible conduct be committed against various different parties rather than repeated reprehensible acts within the single transaction with the plaintiff") (internal quotation marks omitted); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 232 (3d Cir. 2005) ("The 'repeated misconduct' cited in *Gore* involved not merely a pattern of contemptible conduct within one extended transaction …, but rather specific instances of similar conduct by the defendant in relation to other parties."); *Simon*, 113 P.3d at 76 (this factor is not satisfied when the defendant has essentially engaged in a single course of conduct that may "span[] several weeks"); *Park v. Mobil Oil Guam, Inc.*, 2004 WL 2595897, at *13 (Guam Nov. 16, 2004) (repeated misconduct subfactor was not satisfied "[a]lthough the wrongful acts … spanned several years" and inflicted

harm on plaintiff on several separate occasions because "the Supreme Court cases refer to the frequency of *past* similar conduct of the defendant in question, similar to a repeat offender status in a criminal case").

In short, at least four of the *State Farm* factors were absent here. That serves to confirm that Charter Oak's conduct is among the least reprehensible for which punitive damages may be imposed and therefore cannot support anything close to a $2.75 million punishment.

## CONCLUSION

The award of prejudgment interest should not be included in the compensatory damages for purposes of the ratio guidepost, and the punitive damages should be reduced to an amount equal to or less than the compensatory damages.

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Respectfully submitted.

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**CERTIFICATE OF COMPLIANCE**
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I hereby certify that the attached brief is proportionally spaced, has a typeface of 14 points, and contains 5,882 words.

s/ Evan M. Tager
Evan M. Tager

## CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

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