UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

IN RE: TESTOSTERONE REPLACEMENT THERAPY PRODUCTS LIABILITY LITIGATION	**CASE NO. 1:14-CV-01748** **MDL 2545** **JUDGE MATTHEW F. KENNELLY** **This Document Relates to:** ***Mitchell* v. *AbbVie*,** **Case No. 1:14-cv-09178**

DEFENDANTS' MOTION TO STRIKE THE PUNITIVE DAMAGES AWARD AND ENTER JUDGMENT FOR ABBVIE AS A MATTER OF LAW PURSUANT TO RULE 59(e) OR, IN THE ALTERNATIVE, RULE 50(b), AND MEMORANDUM OF LAW IN SUPPORT

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Defendants AbbVie Inc. and Abbott Laboratories (collectively, "AbbVie") respectfully move the Court to strike the punitive damages award and enter judgment for AbbVie as a matter of law pursuant to Federal Rule of Civil Procedure Rule 59(e) or, in the alternative, Rule 50(b).

PRELIMINARY STATEMENT

After a 13-day trial, the Court submitted to the jury three claims: strict liability, negligence and fraudulent misrepresentation. The jury found for AbbVie on the strict liability and negligence claims, and found for Plaintiff on the fraudulent misrepresentation claim. The jury awarded Plaintiff $0 as compensatory damages and $150,000,000 as punitive damages. Such a verdict "[o]bviously" cannot stand because "punitive damages can't lawfully be awarded when no compensatory damages are awarded." *Pileco, Inc.* v. *Slurry Sys., Inc.*, 804 F.3d 889, 892 (7th Cir. 2015). Because the law prohibits a verdict awarding punitive damages in the absence of compensable injury, the jury's punitive damages award constitutes a "manifest legal error." The Court should therefore amend the judgment to vacate the punitive damages award. Furthermore, there is no basis in the trial record to support an award of punitive damages in this case: Plaintiff failed to prove the existence of any intentionally fraudulent conduct by AbbVie or that any such conduct affected Plaintiff's decision to use AndroGel or his doctor's decision to prescribe it. For each of these independent reasons, the punitive damages award should be stricken.

Furthermore, because the jury unequivocally concluded that Plaintiff's compensatory damages were zero, AbbVie is entitled to a judgment in its favor. The jury's affirmative finding that Plaintiff suffered zero compensatory damages necessarily means that Plaintiff failed to meet his burden of proof on an essential element of his claim: that he was damaged. As a result, there is no basis to support a judgment for the Plaintiff. This conclusion is independently confirmed by the trial record. No reasonable jury could have concluded that AbbVie made a material false

misrepresentation to Plaintiff and/or his prescribing physician, and Plaintiff failed to present any evidence that he or his prescribing physician relied on, or even saw, any false representation by AbbVie. Judgment as a matter of law for AbbVie therefore should be granted, for each of those independent reasons.

In the alternative, the Court should enter a "take nothing" judgment that preserves the jury's finding of liability for the Plaintiff on his fraudulent misrepresentation claim and the jury's award of zero compensatory damages. There is simply no valid legal basis for Plaintiff to collect any damages (compensatory or punitive) or for Plaintiff to seek, or for the Court to order, a new trial, which "would do nothing more than give the plaintiffs a second bite at the apple." *Strange* v. *Collins*, No. 04-4017, 2007 WL 1412541, at *1-2 (C.D. Ill. May 7, 2007). As set forth below, there is no inconsistency in the jury's verdict that would support a new trial, and Plaintiff waived his right to request a new trial by failing to object to the verdict at the time it was entered.

BACKGROUND

A. The Court's Preliminary Instruction to the Jury on Plaintiff's Fraudulent Misrepresentation Claim

Trial in this action began on July 5, 2017. At trial, Plaintiff Jesse Mitchell asserted three claims against AbbVie: strict liability, negligence, and fraudulent misrepresentation. (Tr. 187:16-18.) Plaintiff's fraudulent misrepresentation claim alleged that AbbVie's marketing campaign for AndroGel misled doctors and consumers to believe that AndroGel was safe and effective for men with age-related hypogonadism, which Plaintiff alleged was inconsistent with AndroGel's label indication. Before trial began, the Court instructed the jury that to prevail on his fraudulent misrepresentation claim, Plaintiff had to prove each of the following elements by clear and convincing evidence under Oregon law: (1) AbbVie made a false representation regarding a material matter; (2) AbbVie knew the representation was false or made the

representation recklessly without knowing if it was true or false; (3) AbbVie knew that it was misleading Plaintiff and/or his physician or recklessly disregarded whether it was misleading Plaintiff and/or his physician; (4) Plaintiff and/or his physician reasonably relied on the representation; and (5) Plaintiff was damaged as a direct result of his and/or his physician's reliance on the representation. (Tr. 191:4-22.) In addition, the Court instructed the jury that to prevail on any of his claims, including fraudulent misrepresentation, Plaintiff had to prove that AndroGel was a but-for cause of his heart attack. (Tr. 191:23-192:3.)

B. Plaintiff's Fraudulent Misrepresentation Evidence

In an effort to support his fraudulent misrepresentation claim, Plaintiff presented evidence from three witnesses. *First*, Plaintiff's expert Dr. Kessler suggested that some of AbbVie's unbranded materialss were misleading, but he failed to identify any branded materials for AndroGel (*i.e.*, materials specifically referencing AndroGel) that were misleading, and failed to identify any actual material false statement[1] in any of AbbVie's branded or unbranded materials.[2] (*See* Tr. at 904:25-906:6, 980:8-981:3.) *Second*, Plaintiff himself testified about his history of using AndroGel, but admitted that he (1) had never heard of the drug before his physician prescribed it to him, (2) never saw any "Low-T" or AndroGel materials before he began using AndroGel, (3) did not remember seeing any AndroGel marketing campaigns during the time he used the drug, and (4) used AndroGel solely because his doctor prescribed it. (Tr. at 2135:20-2136:9.) *Finally*, Plaintiff presented the deposition testimony of his treating physician, Dr. Canzler, whose prescription was necessary for him to receive AndroGel. Dr. Canzler

[1] Instead of identifying any specific false statement in any actual advertisement, Plaintiff's expert Dr. Kessler simply testified that it "would be false or misleading" for AbbVie to promote AndroGel to patients with age-related hypogonadism because doing so "implies" that it is "safe and effective for [that] indication." (Tr. at 859:11-16.)

[2] Dr. Kessler admitted that unbranded materials by definition do not encourage the use of a specific product. (*See* Tr. at 856:10-18.)

testified that when he diagnosed Plaintiff with hypogonadism and prescribed him AndroGel, he relied on his medical knowledge and clinical experience with his other patients, and not on any AbbVie marketing materials or any information from AbbVie sales representatives. (Tr. at 2060:17-19, 2061:7-14, 2062:7-14, 2065:11-17.)

On July 17, 2017, AbbVie moved for judgment as a matter of law pursuant to Rule 50(a) on the grounds that, *inter alia*, Plaintiff failed to present sufficient evidence to support the false statement, reliance and but-for causation elements of his fraudulent misrepresentation claim, and the intent element required for an award of punitive damages. (MDL ECF No. 2082.)[3]

C. The Court's Charge to the Jury

At the close of evidence, the Court again instructed the jury. The Court repeated the elements that Plaintiff had to prove by clear and convincing evidence to prevail on his fraudulent misrepresentation claim (Tr. 3201:24-3202:2, 3202:6-21), and explained that "clear and convincing evidence" meant "that the party must prove that the proposition is highly probable. This is a higher burden of proof than preponderance of the evidence." (Tr. at 3198:6-10; *see also* Tr. 3202:25-3203:1.) With regard to compensatory and punitive damages, the Court instructed the jury as follows:

> If you find in favor of Mitchell and against AbbVie on one or more of Mr. Mitchell's claims, then you must decide whether Mr. Mitchell has been damaged and, if so, the amount of his damages resulting from his heart attack . . . .
>
> There are two types of compensatory damages alleged in this case, economic and non-economic . . . . Of these two types of damages, you should consider only those you find to have been sustained by Mr. Mitchell as a result of AbbVie's fault . . . .
>
> In addition to compensatory damages, Mr. Mitchell is seeking an award of punitive damages. If you find that AbbVie's conduct was fraudulent, intentional, or willful and wanton and that AbbVie's conduct proximately caused injury to Mr. Mitchell, and if you believe that justice and the public good require it, you

[3] The motion has not been ruled upon.

> may award an amount of money that will punish AbbVie and discourage it and others from similar conduct . . . .
>
> In arriving at your decision as to the amount of punitive damages, you should consider the following three questions. The first question is the most important to determine the amount of the punitive damages: No. 1, how reprehensible was AbbVie's conduct? No. 2, what actual and potential harm did . . . AbbVie's conduct cause to the plaintiff in this case? . . . And, No. 3, what amount of money is necessary to punish defendant and to discourage defendant and others from future wrongful conduct?

(Tr. 3204:14-3205:1, 3206:14-3207:17.) The Court further instructed the jury, in connection with the verdict form, that it was to consider punitive damages "only if you found for the plaintiff on one or more claims and have determined to award punitive damages." (Tr. 3209:24-3210:2.)

Counsel then delivered closing arguments, and the jury began to deliberate. During deliberations, the jury submitted a question that was summarized for the record as follows: "If, underlined, then it says, How are punitive damages, if they are awarded, and then below that, in obviously a different handwriting, it says, Original verdict sheet." (Tr. 3323:4-7.) The Court directed the jury to consult the punitive damages instruction. (Tr. 3324:6-15.)

D. The Jury's Verdict

After deliberating for several hours, the jury returned a liability verdict in favor of AbbVie on the strict liability and negligence claims and in favor of Plaintiff on the fraudulent misrepresentation claim. (Tr. 3325:12-20.) The jury awarded $0 in economic compensatory damages and $0 in non-economic compensatory damages, but awarded $150,000,000 in punitive damages. (Tr. 3325:21-3326:2.)

The Court excused the jury (Tr. 3326:23), after which, AbbVie's counsel moved the Court to enter judgment in favor of AbbVie based on the jury's finding of $0 in compensatory damages (Tr. 3327:8-10). Plaintiff's counsel did not object to the jury's verdict or to defense

counsel's request. The Court entered judgment on the verdict as the jury delivered it, and directed counsel for AbbVie to file a post-trial motion under Rules 59 and 50. (*See* Tr. 3327:12-16.)

LEGAL STANDARD

Rule 59(e) empowers district courts to alter or amend judgments upon the timely motion of a party. *See* Fed. R. Civ. P. 59(e); *see also* Advisory Comm. Note to Subdivision (e) ("This subdivision . . . makes clear that the district court possesses the power . . . to alter or amend a judgment after its entry.").[4] "The decision whether to grant or deny a Rule 59(e) motion is entrusted to the sound judgment of the district court, and [will be reversed] only for an abuse of discretion." *Matter of Prince*, 85 F.3d 314, 324 (7th Cir. 1996).

A district court should grant a Rule 59(e) motion where the movant demonstrates a "manifest error of law." *See Boyd* v. *Tornier, Inc.*, 656 F.3d 487, 492 (7th Cir. 2011); *Moro* v. *Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996); *see also* Wright & Miller, *Grounds for Amendment or Alteration of Judgment*, 11 Fed. Prac. & Proc. Civ. § 2810.1 (3d ed.) (observing that a "basic ground" on which a court may grant a Rule 59(e) motion is when it is "necessary to correct manifest errors of law . . . upon which the judgment is based"). The Seventh Circuit has defined a manifest legal error as "the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto* v. *Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000).

Rule 50(b) permits a party to renew a motion for judgment as a matter of law that was not granted before the case was submitted to the jury. Fed. R. Civ. P. 50(b). Judgment as a matter of law should be granted unless the jury "was presented with a legally sufficient amount of evidence from which it could reasonably derive its verdict." *Black & Decker Inc.* v. *Robert*

[4] "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). Because AbbVie files this motion 28 days after the July 24, 2017 entry of judgment, it is timely filed. *See* ECF Nos. 86, 87.

Bosch Tool Corp., 476 F. Supp. 2d 887, 891 (N.D. Ill. 2007) (quoting *Zelinski* v. *Columbia 300, Inc.*, 335 F.3d 633, 638 (7th Cir. 2003)). A jury may not base its verdict on "pure speculation." *Walker* v. *Bd. of Regents of Univ. of Wis. Sys.*, 410 F.3d 387, 396 (7th Cir. 2005). A court should overturn a jury verdict when a party has been fully heard on an issue, failed to present enough evidence to support a particular verdict, and "no rational jury" could have reached that verdict. *Id.* at 393; *Filipovich* v. *K & R Express Sys., Inc.*, 391 F.3d 859, 863 (7th Cir. 2004); *Pandya* v. *Edward Hosp.*, 1 F. App'x 543, 545 (7th Cir. 2001).

"In considering a motion for judgment as a matter of law, the court must review all the evidence in the record, drawing all inferences in favor of the nonmoving party and disregarding all evidence favoring the moving party that the jury was not required to believe." *Hossack* v. *Floor Covering Assocs.*, No. 03 C 3067, 2004 WL 2423825, at *1 (N.D. Ill. Oct. 22, 2004). The court must "weigh the evidence to the extent of determining whether the evidence to support the verdict is substantial; a mere scintilla of evidence will not suffice." *La Montagne* v. *Am. Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984); *Filipovich*, 391 F.3d at 863.

ARGUMENT

I.
THE COURT SHOULD VACATE THE PUNITIVE DAMAGES AWARD

A. AWARDING PUNITIVE DAMAGES ABSENT COMPENSATORY DAMAGES IS A MANIFEST LEGAL ERROR

The jury's decision to award Plaintiff punitive damages despite awarding no compensatory damages is a "manifest legal error" because it constitutes a "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto*, 224 F.3d at 606. Specifically, awarding punitive damages when no compensatory damages are awarded violates the well-established and binding rule that punitive damages may not lawfully be awarded unless the plaintiff has suffered compensatory economic harm. This rule has long been recognized as

(1) a substantive principle of Illinois law, (2) binding Seventh Circuit precedent, and (3) a logical consequence of constitutional due process principles. Indeed, the United States Supreme Court has recognized that compensatory damages are a prerequisite to punitive damages, holding that "[p]unitive damages should ***only be awarded*** if the defendant's culpability, ***after having paid compensatory damages***, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *See State Farm* v. *Campbell*, 538 U.S. 408, 419 (2003) (emphasis added); *Estate of Moreland* v. *Dieter*, 395 F.3d 747, 757 (7th Cir. 2005) (same).

First, "Illinois law does not permit an award of punitive damages in the absence of compensatory damages." *Price* v. *Philip Morris, Inc.*, 848 N.E.2d 1, 60 (Ill. 2005) (Karmeier, J., concurring) (citing *Lowe* v. *Norfolk & W. Ry. Co.*, 421 N.E.2d 971 (Ill. App. Ct. 1981)); *In re Application of Busse*, 464 N.E.2d 651, 655 (Ill. App. Ct. 1984); *Florsheim* v. *Travelers Indem. Co. of Ill.*, 393 N.E.2d 1223, 1233 (Ill. App. Ct. 1979)). Illinois appellate courts have recognized this principle for over a century. *See Hayman* v. *Autohaus on Edens, Inc.*, 734 N.E.2d 1012, 1015 (Ill. App. Ct. 2000) ("Punitive damages are in addition to compensatory damages and cannot be allowed unless actual damage is shown.") (internal citation omitted); *Mitchell* v. *Elrod*, 655 N.E.2d 1104, 1108 (Ill. App. Ct. 1995) ("A long line of cases has held that punitive damages may not be recovered in the absence of compensatory damages."); *Sorkin* v. *Blackman, Kallick & Co.*, 540 N.E.2d 999, 1004 (Ill. App. Ct. 1989) ("[I]t is the law that punitive damages may not be recovered in the absence of actual or compensatory damages."); *Tonchen* v. *All-Steel Equip., Inc.*, 300 N.E.2d 616, 624 (Ill. App. Ct. 1973) ("As early as 1873 . . . the [Illinois Supreme Court] held that exemplary damages could not be awarded in the absence of finding of actual damage. This rule has been followed consistently in Illinois down to the last case reported on this question[.]").

Second, applying Illinois law, binding Seventh Circuit precedent has recognized the same rule: "[P]unitive damages can't lawfully be awarded when no compensatory damages are awarded." *Pileco*, 804 F.3d at 892; *see also By-Prod Corp.* v. *Armen-Berry Co.*, 668 F.2d 956, 961 (7th Cir. 1982) (holding that under Illinois law "no punitive damages may be awarded in the absence of actual damages"); *Rice* v. *Nova Biomedical Corp.*, 38 F.3d 909, 919 (7th Cir. 1994) ("The basic rule in Illinois is that punitive or exemplary damages may not be awarded in the absence of actual damages.") (quoting *Tonchen*, 300 N.E.2d at 624); *see also RKI, Inc.* v. *Grimes*, 200 F. Supp. 2d 916, 928 (N.D. Ill. 2002) (holding same); *Livers* v. *Wu*, 6 F. Supp. 2d 921, 938 (N.D. Ill. 1998) ("[F]or an award of punitive damages to be sustained, actual or compensatory damages must have been awarded.").

Third, this rule is consistent with well-settled principles of due process, which place constitutional limits on punitive damages awards. Among the due process principles that govern punitive damages is the requirement that punitive damages "must bear a 'reasonable relationship' to compensatory damages." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 580 (1996). Because punitive damages must be reasonably tied to compensatory damages, the Supreme Court has observed that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mut. Auto Ins.* v. *Campbell*, 538 U.S. 408, 425 (2003); *see also Keeling* v. *Esurance Ins. Co.*, 660 F.3d 273, 275 (7th Cir. 2011) (noting that "the Supreme Court once suggested that a multiplier of four is close to the constitutional limit" but later "suggested that a larger (but ***still single-digit***) ratio could be allowable") (emphasis added). An award of punitive damages in the absence of compensatory damages *necessarily* fails this constitutional requirement. In that instance, punitive damages bear *no* relationship (let alone a "reasonable" relationship) to compensatory damages, and the

ratio of punitive damages to compensatory damages necessarily exceeds "the constitutional limit." Judge Posner has explained this concept as follows:

> [W]ithout proof of 'actual damage' punitive damages can't be awarded . . . . ***[T]here are constitutional limits on the ratio of punitive to compensatory damages. The ratio of $20 million to zero is not two to one or a hundred to one or 20 million or any other number to one; it is undefined, like any other division by zero.***

Pileco, 804 F.3d at 892 (emphasis added) (citing *BMW*, 517 U.S. at 580–83; *Keeling*, 660 F.3d at 275).

For all of these reasons, the jury's decision to award punitive damages absent compensatory damages constitutes a "manifest legal error."[5]

B. THE COURT SHOULD AMEND THE JUDGMENT TO VACATE THE MANIFESTLY ERRONEOUS PUNITIVE DAMAGES AWARD

To correct the manifest legal error in the verdict, this Court should vacate the punitive damages award pursuant to Rule 59(e). Although Rule 59(e) refers to "altering" or "amending" a judgment, it empowers district courts to vacate an award or a judgment as well. *See A.D. Weiss Lithograph Co.* v. *Ill. Adhesive Prods. Co.*, 705 F.2d 249, 250 (7th Cir. 1983) ("[M]ost cases hold, and we agree, that Rule 59(e) can be used . . . to ask that a judgment be set aside in its entirety."); Wright & Miller, *Grounds for Amendment or Alteration of Judgment*, 11 Fed. Prac. & Proc. Civ. § 2810.1 (3d ed.) ("The rule also has been interpreted as permitting a motion to vacate a judgment rather than merely amend it.").

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[5] As discussed *infra* at n.7, AbbVie respectfully preserves its argument that the Court erred by holding that Illinois law governed punitive damages. AbbVie notes that an award of punitive damages absent compensatory damages would similarly constitute a manifest legal error under Oregon law. *See, e.g.*, *Crouter* v. *United Adjusters, Inc.*, 485 P.2d 1208, 1215 (Or. 1971) ("[P]unitive damages are not recoverable in the absence of proof of actual damages."); *Bldg. Structures, Inc.* v. *Young*, 968 P.2d 1287, 1289 (Or. 1998) (same). And, of course, the constitutional due process prohibition against upholding the punitive damages award here applies no matter what state's law does.

Indeed, numerous courts have held that the appropriate remedy in this circumstance is to vacate or strike the punitive damages award. *See, e.g., Strange* v. *Collins*, No. 04-4017, 2007 WL 1412541, at *1-2 (C.D. Ill. May 7, 2007) (addressing an award of punitive damages absent compensatory damages under Illinois law, and holding that "[t]he proper remedy for the jury's error is amendment of the judgment, striking the award of punitive damages"); *Kemner* v. *Monsanto Co.*, 576 N.E.2d 1146, 1153–54 (Ill. App. Ct. 1991) ("The jury found that the plaintiffs suffered no noneconomic damage, and, since there are no underlying compensatory damages, no punitive damage award can stand . . . . We hold that the trial court erred and abused its discretion in not granting a judgment *n.o.v.*") (emphasis in original); *Calderon* v. *Perfect Equip. & Prod. Supply, Inc.*, No. 05-2179, 2008 WL 3992784, at *1 (D.P.R. Aug. 22, 2008) ("Rule 59(e) allows the court to vacate judgments, *inter alios*, 'where the movant shows a manifest error of law' . . . . [T]he jury verdict rendered in this action awarding only punitive damages to plaintiff . . . is contrary to law and must *per force*, be vacated.") (citations omitted).[6]

C. PLAINTIFF'S FAILURE OF PROOF AT TRIAL SEPARATELY SUPPORTS THE ENTRY OF JUDGMENT AS A MATTER OF LAW FOR ABBVIE ON PUNITIVE DAMAGES

Judgment as a matter of law for AbbVie on the punitive damages claim is warranted for an additional, independent reason, pursuant to Rule 50(b). Plaintiff failed to prove that AbbVie's conduct was "fraudulent, intentional, or willful and wanton," as required to impose punitive damages under Illinois law.[7] (Tr. at 194:6-12.) As discussed *infra* Section II(B)(1), Plaintiff

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[6] To be clear, the jury was not instructed that it could not award punitive damages unless it awarded compensatory damages, and thus was not aware that it was committing "manifest legal error." (*See* ECF No. 84 at 21.) Striking the jury's punitive damages award thus in no way suggests that the punitive damages award is inconsistent with jury's finding of zero compensatory damages.

[7] AbbVie respectfully maintains that it was erroneous for the Court to apply Illinois punitive-damage law to the claims of an Oregon man who used AndroGel and had his heart attack in Oregon. Given these significant Oregon contacts, Illinois choice-of-law principles direct Oregon law to apply to all issues in this case, including punitive damages. *Hammond* v. *Sys. Transp., Inc.*, 879 N.E.2d 893 (Ill. 2007). Under Oregon law, a drug

provided no evidence of any "false" statements. Nor did he identify any evidence that AbbVie intended to cause harm. Before trial, Plaintiff proffered a punitive-damages case premised on allegations of "off-label" promotion for "age-related hypogonadism." (Pl.'s Proffer Regarding The Case Against AbbVie For Punitive Liability, at 3-5, ECF No. 19.) But only 10 of the 32 proffered "punitive-damage" documents were actually used in Plaintiff's case-in-chief, and he did not link any of these allegations or evidence to his own case. No promotional materials influenced his decision to take AndroGel (which he admittedly used solely based on his doctor's recommendation), Dr. Canzler did not determine that he suffered from "age-related hypogonadism," and there was no direct evidence that Dr. Canzler saw any of the marketing or medical literature submitted by counsel in their punitive-damage proffer (and Dr. Canzler testified his prescription decision was based solely on his medical knowledge and clinical experience with his other patients). *See infra* Section II(B)(2).

Because Plaintiff failed to prove the existence of any intentionally fraudulent conduct by AbbVie, or that any such conduct affected his decision to use AndroGel or his doctor's decision to prescribe it, no reasonable jury could have found the factual predicate necessary for punitive damages in this case. As a result, AbbVie is entitled to judgment as a matter of law.

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manufacturer "shall not be liable for punitive damages" where the drug "[w]as manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the [FDA]," or "[i]s generally recognized as safe and effective" by the FDA. *See* O.R.S. § 30.927(1)(a)-(b). There is no dispute that since AndroGel's initial approval in 2000, at all times it has remained approved as safe and effective by the FDA, and has been accompanied by FDA-approved labeling. There is a limited statutory exception that permits punitive damages where the plaintiff has proven by clear and convincing evidence that the defendant "knowingly in violation of applicable federal [FDA] regulations withheld from or misrepresented to the agency or prescribing physician information known to be material and relevant to the harm which the plaintiff allegedly suffered." O.R.S. § 30.927(2). This exception does not apply here, where Plaintiff has not advanced any preempted "parallel" claim that AbbVie violated FDA regulations or withheld information from the FDA. Indeed, Plaintiff specifically disavowed that AbbVie did so. (*See* PSC's Mem. of Law in Opp. to Mot. of AbbVie Defs. on Pls.' Failure to Warn Claims MDL ECF No. 1807, at 23.) And as noted above, there is no evidence, much less clear and convincing evidence, to establish that AbbVie made misrepresentations, or withheld information from Dr. Canzler. Further, it would violate due process to allow punitive damages here, when the place where Plaintiff resides and had his heart attack disallows such recovery. *Cf. BMW of N. America, Inc.* v. *Gore*, 517 U.S. 559, 572-75 (1996).

Finally, because there is no link between the supposed "punitive-damages evidence" and the facts relevant to Plaintiff's care and treatment, it would violate due process to allow any punitive damages award in this case. As the Supreme Court has cautioned:

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the [Plaintiff], not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.

State Farm, 538 U.S. at 422-23; *see also Philip Morris USA* v. *Williams*, 549 U.S. 346, 353-58 (2007) (holding due process bars punitive-damages award that punishes for harm caused to others). Thus, AbbVie is entitled to judgment as a matter of law on the alternative ground that the purported "punitive-damages evidence" Plaintiff provided to the jury violates AbbVie's due process rights. In addition, as explained above, AbbVie's due process rights would be violated by sustaining the jury's punitive damages award because it bears no relationship to the compensatory award as required by Supreme Court precedent. *See State Farm*, 538 U.S. at 425.

In sum, the manifest legal error in a verdict awarding punitive damages but no compensatory damages is a sufficient basis to strike the punitive damages award, under Rule 59(e), and Plaintiff's failure of proof provides an alternative basis for the Court to enter judgment as a matter of law for AbbVie as to punitive damages, under Rule 50(b).

II.
THE COURT SHOULD ENTER JUDGMENT IN FAVOR OF ABBVIE

A. THE JURY VERDICT OF ZERO COMPENSATORY DAMAGES SUPPORTS JUDGMENT IN FAVOR OF ABBVIE

The jury awarded Plaintiff $0 in compensatory damages and, as explained above, Plaintiff is not entitled to any punitive damages. Because Plaintiff is to be awarded no relief, the

Court should—in addition to striking the punitive damages award, as set forth above—enter judgment in favor of AbbVie on the fraudulent misrepresentation claim.

By entering a compensatory damage award of $0, the jury clearly and unambiguously found that Plaintiff did not suffer *any* economically compensable damage. As a result, there is no legally valid basis for any judgment in Plaintiff's favor, on liability or damages. "[B]ecause damages are an essential element of a tort claim, the finding of zero damages means that plaintiffs failed to meet their burden of proof." *Collins*, 2007 WL 1412541, at *2. In this situation, the appropriate outcome is the entry of judgment "in favor of defendant[s] and against plaintiffs." *Id.*; *see, e.g.*, *Ira Green, Inc.* v. *Military Sales & Serv. Co.*, C.A. No. 10-207-M, 2013 WL 5912525, at *2 (D.R.I. Oct. 16, 2013) (entering judgment in favor of defendant where jury found liability but no damages); *see also Calderon*, 2008 WL 3992784, at *1 (vacating punitive damages award under Rule 59(e) due to lack of compensatory damages and then vacating judgment and dismissing complaint).[8]

B. ABBVIE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFF'S FRAUD CLAIM

While the jury's clear and unequivocal finding of zero compensatory damages is a sufficient basis for the Court to enter judgment for AbbVie under Rule 59(e), Plaintiff's failure of proof at trial as to key elements of his liability claim—like his failure of proof as to punitive damages—provides an additional, independent basis for the entry of judgment as a matter of law under Rule 50(b).

[8] As with striking the punitive damages award, entering judgment in AbbVie's favor does not require this Court to find any inconsistency between the jury's liability finding and its zero compensatory damages finding. In fact, for all the reasons described in Part III, *infra*, those two findings can—and, indeed, must—be reconciled as a *factual* matter. But the fact that the jury plausibly could have believed that it could find liability without finding any compensable damages does not change the fact that *the law* demands judgment for AbbVie on liability, as a plaintiff cannot get judgment in his favor when the jury unambiguously finds that he failed to prove an essential element of his claim.

1. No Reasonable Jury Could Have Concluded That AbbVie Made a Material, False Misrepresentation

Among other elements, Plaintiff had to prove by clear and convincing evidence that AbbVie made a "material misrepresentation that was ***false***."[9] *Strawn* v. *Farmers Ins. Co. of Or.*, 258 P.3d 1199, 1209 (Or. 2011) (emphasis added); *see also Oksenholt* v. *Lederle Labs.*, 656 P.2d 293, 299 (Or. 1982) ("Misrepresentation requires a false representation."); Tr. at 191:4-9 (instructing that fraudulent misrepresentation claim requires clear and convincing proof of a "false representation regarding a material matter"). Oregon imposes a "falsity" standard—allegations of "misleading" or "confusing" statements are not enough. Moreover, the falsity must be contained in an affirmative representation or statement, as opposed to a general impression.[10]

Plaintiff failed to identify any material misrepresentation of fact in any of AbbVie's marketing materials. Indeed, Plaintiff admitted that the evidence supports nothing more than implications that are misleading. (*See* Tr. at 859:11-16.) These admissions, on their own, are sufficient to defeat Plaintiff's claim of fraudulent misrepresentation.

Rather than identify and rely upon actual false representations, Plaintiff's theory at trial was that AbbVie's unbranded marketing materials were "misleading" because they purportedly "implied" or "suggested" that AndroGel was approved to treat "age-related hypogonadism" or "andropause," or symptoms of aging, or "low testosterone," or "Low T." (*See id.*; Tr. at 904:25-905:16.) In addition to not identifying any actual material false statement of fact as the law

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[9] AbbVie expressly preserves all of its summary judgment arguments, including its position that any claim that AbbVie committed fraud by engaging in off-label promotion constitutes an impermissible attempt to bring a private suit for violations of the FDCA and its regulations. (*See, e.g.*, Defs.' Mot. for Summ. J. on Pls.' "Off-Label" Marketing Claims, at 31–34, Feb. 18, 2017, ECF No. 1746.)

[10] While a theory of fraud by omission exists under Oregon law in certain limited situations, *see Ogan* v. *Ellison*, 682 P.2d 760 (1984), Plaintiff never sought for the jury to be instructed on such a theory, and the Court's instruction on fraudulent misrepresentation did not permit the jury to find fraud by omission.

requires, Plaintiff's theory also fails because his sole expert on this issue, Dr. Kessler (i) admitted that unbranded materials by definition do not promote any specific product (*see* Tr. at 856:10-18); (ii) could not point to any unbranded materials in which AbbVie actually said that AndroGel specifically (or testosterone replacement therapy generally) is approved to treat "age-related hypogonadism," or "andropause," or "symptoms of aging;"; and (iii) relied solely on references in those unbranded materials to "low testosterone" or "Low T," signs and symptoms of hypogonadism (or low testosterone), or symptom improvements which are indisputably factually accurate as reflected in the FDA-approved AndroGel label (including the Medication Guide) (Trial Ex. 3048.1) and the Endocrine Society's Clinical Practice Guidelines (Trial Ex. 3154). Moreover, the very same references to low testosterone or Low T, symptoms, and symptom improvements were also made in AbbVie's branded materials and explicitly reviewed by the FDA without comment. (*See* Tr. 980:8-981:3 (conceding that AbbVie's branded materials contained the same information and were approved by the FDA); Trial Ex. 3049.130 (launch ad including same symptoms); Trial Ex. 3050 (launch ad letter from FDA with no comment on inclusion of same symptoms); *see also* Trial Exs. 3077, 3079, 3212, 3218 (correspondence between AbbVie and FDA regarding symptom improvement in branded advertisements).)

Further, Dr. Kessler conceded that AbbVie submitted all of its branded materials to the FDA for review, and that the FDA never told AbbVie that any of those materials were false or misleading. (Tr. at 959:20-25.) Dr. Kessler also identified no instance in which the FDA told AbbVie it was marketing AndroGel for off-label purposes or "over-promoting" it. (Tr. at 956:6-14.) And Plaintiff presented no claim or evidence, through Dr. Kessler or any other witness, that AbbVie failed to follow any specific FDA directive to change or discontinue its materials.[11]

[11] Plaintiff presented no testimony from any other witnesses on this subject, including, interestingly, no opinion from Dr. Pence, whose expert report purported to address AbbVie's marketing.

In closing arguments, AbbVie's counsel explained to the jury that Plaintiff had failed to present evidence of any actual false representation. (Tr. at 3285:15-24). Plaintiff's counsel then had a final opportunity to identify the evidence in his rebuttal. He failed to do so. The only statement Plaintiff's counsel identified on rebuttal was an ad that stated that "AndroGel is proven safe over 42 months in study results." (Tr. at 3315:23-3316:1; Trial Ex. 154.8.) But this statement was also explicitly reflected in the AndroGel label, which affirmed the safety of AndroGel and referred to the 42-month study.[12] (Tr. at 670:5–671:19; Trial Ex. 3101.)

Because Plaintiff failed to present any evidence of a false statement by AbbVie, as required by Oregon law and as set forth in the Court's instruction to the jury, no reasonable jury could have concluded that there was clear and convincing evidence that AbbVie made a false representation of a material matter. AbbVie is thus entitled to judgment as a matter of law on Plaintiff's fraudulent misrepresentation claim on the ground that Plaintiff failed to prove an essential element of his claim. *Cf. In re Fosamax Prod. Liab. Litig.*, 924 F. Supp. 2d 477, 489 (S.D.N.Y. 2013) ("Plaintiff has failed to show that Merck's statement that Fosamax is 'safe and effective for the treatment of osteoporosis and Paget's disease' is false.").

2. There Is No Evidence That Plaintiff or His Prescribing Physician Saw and Relied on Any Material False Misrepresentation by AbbVie

Plaintiff also failed to prove by clear and convincing evidence that he or his prescribing physician saw and relied on any material false misrepresentation when deciding to prescribe or

[12] Even if Plaintiff had been able to identify some statement in AbbVie's advertising that was inconsistent with the AndroGel label, he still would have needed to establish that the statement was false or misleading. The mere fact that a manufacturer makes a statement in an advertisement that is not in the label does not automatically make the advertisement false or misleading. *See, e.g., United States* v. *Caronia*, 703 F.3d 149, 163–64 (2d Cir 2012) (holding that freedom of speech shielded a pharmaceutical marketer from prosecution for promoting off-label indications of a drug) (citing *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 557 (2011)).

use AndroGel.[13] (Tr. at 191:19-20.) Indeed, Plaintiff conceded that he had never heard of AndroGel before Dr. Canzler prescribed it to him. (Tr. at 2135:20-22.) He further affirmed that he relied on Dr. Canzler's judgment—not any statements by AbbVie—when deciding to use AndroGel. (Tr. at 2139:11-22.) Plaintiff did not recall seeing materials for any particular brand of TRT, and although he had a general recollection of seeing TRT materials, he could not remember their content. (Tr. at 2135:23-2136:9.) Plaintiff did not ask Dr. Canzler to prescribe a TRT generally or AndroGel specifically for him. (Tr. at 2135:17-19.) Plaintiff also did not recall seeing any of the specific unbranded materials alleged to be misleading—for example, he did not recall filling out an ADAM questionnaire (one of the unbranded materials that Dr. Kessler referenced) before Dr. Canzler prescribed him AndroGel. (Tr. at 2136:10-12.)[14] Finally, he had no recollection of reading any materials that came with his AndroGel prescriptions. (Tr. at 2139:4-10.) These admissions by Plaintiff, on their own, foreclose the possibility that a reasonable jury could conclude that Plaintiff relied on any purported material false misrepresentation made by AbbVie.

The evidence also established that Dr. Canzler relied on his own training, experience, and medical judgment, rather than anything said by AbbVie (let alone a material false statement), when deciding to prescribe AndroGel to Plaintiff. (Tr. at 2065:11-17 (testifying that he made prescribing decisions for Plaintiff based on experience, "as opposed to something sales representatives told" him)); *see also Bradley* v. *Danek Med., Inc.*, No. 96-3121, 1999 WL 1866401, at *5 (W.D. Tenn. Mar. 26, 1999) (concluding that plaintiff asserting fraudulent misrepresentation claim failed to prove reliance because his treating physician "stated that he

[13] AbbVie expressly preserves its argument that the Court should have instructed the jury that Plaintiff's fraudulent misrepresentation claim required proof of reliance by *both* Plaintiff *and* his prescriber. (*See* ECF No. 60, at 4.)

[14] Dr. Canzler confirmed that he did not use the ADAM questionnaire with Plaintiff. (Tr. at 2081:3-5.)

based his decision to recommend the Luque device on the patient's condition and the totality of his education, training, clinical experience, and review of the medical literature"); *Jones* v. *Danek Med., Inc.*, No. CIV.A. 4:96-3323-12, 1999 WL 1133272, at *7-*8 (D.S.C. Oct. 12, 1999). Dr. Canzler testified that he received marketing materials from TRT manufacturers, but he could not recall any of those materials. (Tr. at 2060:17-19.) Dr. Canzler also could not recall whether he ever saw any ads for AndroGel. (Tr. at 2080:3-9.) Dr. Canzler testified that he independently stayed abreast of medical developments (Tr. at 2061:7-14), and he confirmed that he continued to make independent prescribing decisions based on his medical judgment and his experience with other patients, notwithstanding any marketing materials he received (Tr. at 2062:7-14). He never "committed" to using a medication at a sales representative's behest (Tr. at 2071:10-15), and he did not do anything in his practice simply because a representative told him to do so (Tr. at 2082:14-18).

Although Dr. Canzler acknowledged that advertising sometimes would influence men to ask for TRT, Plaintiff testified that he never asked Dr. Canzler for TRTs generally or AndroGel specifically, and that advertising played no role whatsoever in Plaintiff's decision to use AndroGel; nor did it play any role in Dr. Canzler's decision to prescribe the drug. (Tr. at 2069:22-2070:11; *see also* 2135:17-2136:9 (Plaintiff did not ask Dr. Canzler for AndroGel and he saw no AndroGel advertisements).); *In re Neurontin Mktg., Sales Practices & Prod. Liab. Litig.*, 618 F. Supp. 2d 96, 112 (D. Mass. 2009) (dismissing "all fraud claims alleging affirmative misrepresentations or a suppression of information as part of a national marketing campaign because there is no allegation of reliance on specific statements or misrepresentations"); *Se. Laborers Health & Welfare Fund* v. *Bayer Corp.*, 655 F. Supp. 2d 1270, 1283, 1289 (S.D. Fla. 2009).

Additionally, Dr. Canzler testified that he was not confused or misled by the scope of AndroGel's indication. He believed that "age-related" hypogonadism was outside the indication (Tr. at 2079:4-6), and did not recall any representative telling him he should prescribe for "age-related" hypogonadism (Tr. at 2079:11-14). In any event, Plaintiff's theory of an "age-related" fraud is irrelevant in this case, as Dr. Canzler testified that he never diagnosed Plaintiff with—or treated him for—"age-related" hypogonadism. (Tr. at 2078:5-14.) Moreover, any suggestion that Dr. Canzler was somehow deceived or misled by AbbVie's risk information is belied by the fact that he himself warned Plaintiff of the potential cardiovascular risks. (Tr. at 2036:17-2037:5 ("I specifically told [him] that there were risks for heart attack, strokes [and] pulmonary emboli").)

Because Plaintiff failed to provide *any* evidence—let alone the requisite clear and convincing evidence—that either he or his physician relied on any false statement made by AbbVie in connection with the diagnosis, prescription, or use of AndroGel in this case, no reasonable jury could have found in Plaintiff's favor on the fraudulent misrepresentation claim. AbbVie is thus entitled to judgment as a matter of law on the ground that Plaintiff failed to prove the essential reliance element of this claim.

3. Plaintiff Failed to Prove that AndroGel Was a But-For Cause of His Heart Attack

Each of Plaintiff's claims required proof that AndroGel was a cause of his heart attack. (Tr. at 191:23-192:3.) To satisfy this burden under Oregon law, Plaintiff had to prove that the heart attack "would not have occurred but for AbbVie's conduct." *Id.*; *see also Joshi* v. *Providence Health Sys. of Or. Corp.*, 149 P.3d 1164, 1169 (Or. 2006) (concluding but-for standard applies in majority of cases and requires proof that defendant's conduct "more likely than not caused the plaintiff's harm."). The only testimony offered to prove this element was

from Plaintiff's expert, Dr. Ardehali, who was required to rule out the possibility that the heart attack would have occurred even without AndroGel. (Tr. at 191:23-192:3); *Joshi*, 149 P.3d at 1169 ("[T]he defendant's conduct is not a cause of the event, if the event would have occurred without it.").[15]

Dr. Ardehali's opinion failed to satisfy this standard. In fact, Dr. Ardehali ***conceded*** that any one of Mr. Mitchell's many risk factors would have been sufficient to cause the heart attack: "Q: Based on these risk factors, these risk factors as a scientific matter were completely sufficient to cause his heart attack in December of 2012, correct? A: That's fair." (Tr. at 1641:2-5.) This admission means Dr. Ardehali's causation opinion cannot satisfy the Oregon but-for standard, and thus no reasonable jury could have found that AndroGel was a but-for cause of Plaintiff's heart attack.

Dr. Ardehali's testimony further undermined Plaintiff's ability to prove but-for causation. It is undisputed that Mr. Mitchell had several cardiac risk factors before he had his heart attack, including a 34-year smoking history, high blood pressure, high cholesterol, high triglycerides, obesity, a family history of heart disease, and lack of exercise. (Tr. at 1624:13-16, 1632:2-3, 1632:24-1633:12, 1801:19-1802:19.) Dr. Ardehali conceded these risk factors were contributing to plaque formation during the time when Mr. Mitchell was taking AndroGel and leading up to his heart attack in 2012. (Tr. at 1810:19-1811:2.) Dr. Ardehali also agreed that, without AndroGel, Mr. Mitchell's cardiac risk factors gave him a 15-20%, 10-year risk estimate for having a heart attack. (Tr. at 1635:11-14 (14.7%), Tr. at 1641:14-16 (15-20%).) He was 7.5 times more likely to have a heart attack than a similarly-aged man with optimal risk factors. (Tr.

[15] The "substantial factor" standard does not apply in this case. Mr. Mitchell does not allege that AndroGel was one of two (or more) concurring causes of his heart attack (*e.g.*, the classic "two fires" example). *Joshi*, 149 P.3d at 1169. Even if the "substantial factor" standard applied, however, Mr. Mitchell still would have to demonstrate that his heart attack would not have occurred without the alleged conduct, which he failed to do at trial. *See id.* at 1168 (discussing *Simpson* v. *Sisters of Charity of Providence*, 588 P.2d 4 (Or. 1978)).

at 1637:20-24.) Mr. Mitchell's risks increased over time, particularly due to his smoking and age. (Tr. at 1644:24-1645:3.)

Significantly, Dr. Ardehali conceded that even if Mr. Mitchell had not taken AndroGel, any of his multiple modifiable risk factors would have been sufficient to cause his heart attack. (Tr. at 1639:4-8, 1639:19-21, 1641:2-5.) Dr. Ardehali testified that he would have told Mr. Mitchell in 2012 that he was at a risk of a heart attack "any day" due to his history of cardiac risk factors. (Tr. at 1641:20-24.) Dr. Ardehali could not quantify the degree to which AndroGel allegedly increased the risk of heart attack in Mr. Mitchell. (Tr. at 1649:5-9, 16-19 ("Q: But there isn't science that would enable you to say TRTs or AndroGel bump this risk up by 2 percent or 3 percent, correct? A. Well, there is science that says that it increases the risk of heart attack. Q: Okay. But what I'm saying when you take all of that science together, it doesn't give you an additional number to add on to that 15 to 20 percent risk, correct? A. No, it doesn't give you a number. That's correct.").) Dr. Ardehali also could not quantify the relative increased cardiac risk to Mr. Mitchell due to his obesity, family history of heart disease, or lack of exercise. (Tr. at 1806:1-9, 1806:23-25.)

In sum, Dr. Ardehali's opinion failed to rule out the possibility that Mr. Mitchell's heart attack would have occurred even had he never taken AndroGel, as required by Oregon law. *Joshi*, 149 P.3d at 1169. Put another way, Dr. Ardehali did not, and could not, offer the opinion that Mr. Mitchell would have avoided his heart attack had he not taken AndroGel. (Tr. at 191:23- 192:3 (instructing that Oregon law requires proof that heart attack "would not have occurred but for AbbVie's conduct.").) Rather, Dr. Ardehali conceded that any of Mr. Mitchell's risk factors, standing alone, could have caused the heart attack. (Tr. at 1641:2-5.) Similarly, Dr. Ardehali's opinion failed to establish it is more likely than not that AndroGel caused the heart attack, where Dr. Ardehali could not quantify the role that AndroGel allegedly played. For all of

these reasons, no reasonable jury could have found that Mr. Mitchell's heart attack would not have occurred but for his AndroGel use.

III.
IN THE ALTERNATIVE, THE COURT SHOULD ENTER A JUDGMENT OF LIABILITY WITH ZERO DAMAGES

If the Court declines to enter judgment for AbbVie in full, it could instead preserve the existing judgment in favor of Plaintiff on liability for fraudulent misrepresentation and amend only the damages portion of the judgment—making clear that Plaintiff is to be awarded zero damages (compensatory or punitive) and thus takes nothing on his claims.

The Fourth Circuit affirmed a similar form of judgment in *Vigilant Ins. Co. of New York* v. *McKenney's Inc.*, 524 F. App'x 909 (4th Cir. 2013), which involved a "zero damages negligence verdict." *Id.* at 911, 913. There, as here, the jury was asked to render a verdict on liability and, in a separate part of the verdict form, asked to specify the amount of actual damages, if any, to which the plaintiff was entitled. The jury found in the plaintiff's failure on a claim of negligence, and "entered '$0.00' as the negligence damages amount." *Id.* at 910. Finding no inconsistency in such a verdict, the trial court denied plaintiff's motion for a new trial and entered a judgment of liability but zero damages, and the Fourth Circuit affirmed.[16] *Id.* at 913.

As *Vigilant* and numerous other cases make clear, in the circumstances presented here—where the jury made a clear and affirmative finding of no liability with respect to two of the three claims, and made a clear and affirmative finding that the amount of compensatory damages for the third claim is zero—there is no basis for the Court to order a new trial. To the contrary, the

[16] In the event of such a judgment, Plaintiff's failure to recover any damages would still mean that he is not a "prevailing party" for purposes of awarding costs under Rule 54, particularly given that AbbVie indisputably prevailed on Plaintiff's strict liability and negligence claims. *See Tunison* v. *Cont'l Airlines Corp.*, 162 F.3d 1187, 1188-1191 (D.C. Cir. 1998) (finding that "an empty judgment may provide some moral satisfaction," but it "carries no real relief and thus does not entitle the judgment winner to be treated as a prevailing party.").

Seventh Amendment demands that courts make every effort to harmonize a jury's findings, and allows courts to discard a jury's findings entirely and order a new trial only as a very last resort. As discussed below, ordering a new trial in this case would be inappropriate because (1) the jury's verdict can be reconciled, and (2) Plaintiff waived the right to seek a new trial based on any purported inconsistency by failing to object to the jury's verdict at the time it was entered, before the jury was discharged.

1. The Jury's Verdict Can Be Reconciled

A court "***must reconcile*** apparently inconsistent verdicts" if it is at all possible, and the "party claiming that inconsistent verdicts have been returned is not entitled to a new trial 'unless no rational jury could have brought back' the verdicts that were returned." *Deloughery* v. *City of Chicago*, 422 F.3d 611, 617 (7th Cir. 2005) (emphasis added) (internal citations omitted). As the Seventh Circuit has directed, courts "should do what [they] can to save the verdict against the specter of inconsistency." *Am. Cas. Co.* v. *B. Cianciolo, Inc.*, 987 F.2d 1302, 1306 (7th Cir. 1993). That imperative flows from the Constitution itself, as the Seventh Amendment commands that "[i]n Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII; *see also Atl. & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962) ("Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment."); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) (observing Seventh Amendment "right to have juriable issues determined by the first jury impaneled" and "not reexamined" unless errors warrant new trial).

To be clear, that does not mean that courts cannot modify, alter, or amend a jury's findings when they are inconsistent with *the law*. But the fact that a jury made findings that cannot be *preserved as a legal matter* by no means deprives those findings of the respect that the Seventh Amendment commands. To the contrary, a jury's factual findings—even if *legally* flawed—foreclose reexamination of the same factual issues by another jury unless those findings are so hopelessly inconsistent that no rational jury could have returned them. "Any plausible explanation for the verdict" therefore forecloses a new trial. *Fox* v. *Hayes*, 600 F.3d 819, 844 (7th Cir. 2010).

Here, the jury found AbbVie liable for fraudulent misrepresentation but awarded zero compensatory damages. To deem those findings inconsistent, one would have to conclude that the liability verdict reflects a finding that Plaintiff did, in fact, suffer some form of *compensable* damage. But nothing about the jury's liability finding compels that conclusion. Indeed, the fact that the jury, when asked to specify the amount of both economic and non-economic compensatory damages clearly and affirmatively wrote "$0" not once, but twice, renders such a conclusion *implausible* on its face. And there are several plausible explanations as to why the jury could have believed that it could find liability even if it found no compensatory damages.

First, the jury instructions for compensatory damages stated: "If you find in favor of Mr. Mitchell and against AbbVie on one or more of Mr. Mitchell's claims, then you must decide ***whether*** Mr. Mitchell has been damaged and, ***if so***, the amount of his damages arising from his heart attack." (ECF No. 84, at 19.) It is entirely plausible that the jury interpreted this instruction to allow them to find in favor of Plaintiff on liability but then to award zero damages. The Fourth Circuit reached the same conclusion in parallel circumstances in *Vigilant*. There, as noted above, the jury found for the plaintiff on a negligence claim, which required proof of "damages," but it awarded no damages. *See* Vigilant, 524 F. App'x at 911. The Fourth Circuit

upheld the verdict because the jury was instructed that if it found that the elements of negligence were satisfied "it should then proceed to consider ***whether*** [plaintiff] was entitled to damages." *Id.* at 912–13 (emphasis added). The Court explained that such "instructions can reasonably be understood to have split the elements of negligent conduct from the element of negligence damages, telling the jury that if it first found [the defendant] to have been negligent, it should then proceed to consider whether [the plaintiff] was entitled to damages." *Id.* at 912. With a similar instruction to the jury here, the same reasoning applies.

Second, although the jury instructions for the fraudulent misrepresentation claim indicated that Plaintiff had to prove by clear and convincing evidence that he was "damaged" as a result of his and/or his physician's reliance on a material false misrepresentation, the instructions did not specify that Plaintiff had to have suffered economically compensable harm. (ECF No. 84 at 16.) This distinction is consistent with "common usage," which "gives damages two meanings, one in reference to the fact of harm and one in reference to the legal recovery." Dan B. Dobbs, *Dobbs Law of Remedies* at § 1.1, 3, n.14. Thus, it is entirely plausible that the jury could have found that Plaintiff suffered some harm that was not economically compensable.

Third, the jury instructions for the fraudulent misrepresentation claim also do not specify that the damage had to arise from his heart attack. (ECF No. 84 at 16.) This distinction is significant, because the jury instructions for compensatory damages limited any such damages to "the amount of [Plaintiff's] damages *arising from his heart attack*." (*Id.* at 19 (emphasis added).) And while the causation instruction did state that each of Plaintiff's claims required him to prove that AbbVie's conduct was a cause of his heart attack, that does not necessarily imply that the jury found that Plaintiff's heart attack was a form of damage that was the "direct result of his and/or his physician's reliance" on any false representation by AbbVie. (Tr.

3202:20-21.)[17] Thus, it is at least plausible that the jury concluded that Plaintiff suffered some other form of "damage" sufficient to support the jury's finding of fraudulent misrepresentation, but not as a result of his heart attack that entitled Plaintiff to any compensatory damage. Indeed, such a finding is fully consistent with the jury's findings for AbbVie on Plaintiff's strict liability and negligence claims.

Finally, the jury's punitive damages award does not create any inconsistencies, either with the jury's liability finding or with its compensatory damages award. The jury instructions on punitive damages specifically mention fraudulent conduct by AbbVie, which may have suggested to the jury that punitive damages would be appropriate if it found fraudulent conduct, irrespective of whether it found compensatory economic damages. (*See* ECF No. 84 at 21.) Indeed, that instruction lists the actual harm to Plaintiff as one of three factors that may be relevant—but not required, and not the "most important" factor—to award punitive damages. (*See id.*) Thus, it is entirely plausible that the jury interpreted the instructions to mean that it is appropriate to award punitive damages based on a finding of fraud, even in the absence of compensatory damages. Although such an interpretation is contrary to the law (as discussed above), it is consistent with the instructions provided to the jury, and thus precludes a finding that the jury's verdict is irreconcilable.[18]

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[17] Furthermore, because the causation instruction came *after* the instruction on the elements of the fraudulent misrepresentation claim (Trial Tr. 3201:24-3203:6), it is plausible that the jury understood a finding of causation not to be an element of that claim but rather to be a prerequisite to awarding compensatory damages, which it declined to do.

[18] In *Deloughery* v. *City of Chicago*, 422 F.3d 611 (7th Cir. 2005), the Seventh Circuit affirmed this Court's conclusion that the jury's verdict was reconcilable after this Court "looked closely at its own instructions," particularly given that the party seeking a new trial never objected to those instructions. *Id.* at 618; *see also Deloughery* v. *City of Chicago*, No. 02 C 2722, 2004 WL 1125897, at *2 (N.D. Ill. May 27, 2004) (Kennelly, J.) ("[T]he jury's verdicts . . . were not inconsistent. The instructions given to the jury on the Title VII claim allowed it to return a verdict for [plaintiff] if it found the City had retaliated . . . . By contrast, the instructions on the § 1983 claim required a finding that [plaintiff's] exercise of her free speech rights was a substantial or motivating factor . . . . [T]he jury reasonably could have found that [the employer] based his decision not to promote [plaintiff] on her filing of charges with the DOJ and the IDHR and did not take into account her anti-

Because there is no irreconcilable inconsistency in the jury's findings, there is no ground for a new trial. To the contrary, granting a new trial in these circumstances would impermissibly give Plaintiff another chance to try a case that the jury has already resolved. As another Illinois district court explained, when "[t]he word 'zero' was written into the space for the dollar amount of their award of such damages," granting a "new trial would do nothing more than give the plaintiffs a second bite at the apple. ***The proper remedy for the jury's error is amendment of the judgment, striking the award of punitive damages***." *Collins*, 2007 WL 1412541, at *1-2 (emphasis added). To do otherwise would result "in a collision with the Seventh Amendment." *Atl. & Gulf Stevedores*, 369 U.S. at 364.

For all these reasons, the jury's verdict is not inconsistent and therefore a new trial is not warranted.

2. Plaintiff Waived the Right to Seek a New Trial on the Ground that the Jury's Verdict Is Inconsistent

Plaintiff has no right to ask this Court to order a new trial, in any event, because Plaintiff waived that right by failing to object to the jury's verdict as inconsistent at the time it was entered, before the jury was discharged.

As the Seventh Circuit has noted, numerous courts have held that "the failure to object to an inconsistent general verdict and to move for resubmission of the case to the jury prior to the jury's discharge constitutes a waiver of such an objection." *Carter* v. *Chi. Police Officers*, 165 F.3d 1071, 1079 (7th Cir. 1998) (collecting cases); *see also, e.g.*, *Kosmynka* v. *Polaris Indus., Inc.*, 462 F.3d 74, 83 (2d Cir. 2006); *Oja* v. *Howmedica, Inc.*, 111 F.3d 782, 790 (10th Cir. 1997); *Home Indem. Co.* v. *Lane Powell Moss & Miller*, 43 F.3d 1322, 1331 (9th Cir. 1995); *Jacobs Mfg. Co.* v. *Sam Brown Co.*, 19 F.3d 1259, 1266 (8th Cir. 1994). The rationale for this

discrimination advocacy within the Police Department."). Here, too, Plaintiff never objected to any of the jury instructions at issue.

rule is that if an objection is raised before the jury is discharged, "the jury can be sent back for further deliberations to resolve the inconsistency." *Pensacola Motor Sales, Inc.* v. *E. Shore Toyota, LLC*, 684 F.3d 1211, 1225 (11th Cir. 2012). Moreover, as the Seventh Circuit has observed, "the requirement of a contemporaneous objection to inconsistent general verdicts certainly serves the interests of finality and efficient use of scarce judicial resources, as well as the interest of eliminating the risk of strategic abuse by litigants." *Carter*, 165 F.3d at 1079. The contemporaneous objection rule is also consistent with the very high standard that a party must meet to demonstrate an inconsistency warranting a new trial, as the rare case in which a jury's findings are truly so hopelessly inconsistent as to be incapable of reconciliation should be evident the moment the verdict is returned.

Here, Plaintiff did not object to the jury's verdict as inconsistent before the jury was discharged—presumably because Plaintiff recognized that the jury's findings are not actually inconsistent. Plaintiff waived his right to ask for a new trial on that ground.

CONCLUSION

For the foregoing reasons, AbbVie respectfully requests that the Court amend the judgment to vacate the punitive damages award. AbbVie further requests that the Court enter judgment in its favor on liability and damages or, in the alternative, enter a zero damages judgment.

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CERTIFICATE OF SERVICE

I, David Bernick, hereby certify that on August 21, 2017, the foregoing document was filed via the Court's CM/ECF system, which will automatically serve and send email notification of such filing to all registered attorneys of record.

/s/ *David Bernick*
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