IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

IN RE: TESTOSTERONE REPLACEMENT THERAPY PRODUCTS LIABILITY LITIGATION	MDL No. 2545 Master Docket Case No. 1:14-cv-01748 Honorable Matthew F. Kennelly
This document applies to: *Mitchell v. AbbVie*, Case No. 1:14-cv-09178	

PLAINTIFF'S MOTION TO AMEND JUDGMENT TO CONFORM THE DAMAGES TO THE UNDISPUTED EVIDENCE OR IN THE ALTERNATIVE FOR A NEW TRIAL ON COMPENSATORY DAMAGES

August 21, 2017

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INTRODUCTION

With this motion, Plaintiff Jesse Mitchell seeks to conform the verdict to the evidence, by amending the award of economic damages to $136,408, as reflected in the undisputed evidence of medical bills submitted at trial. Mitchell brought this action alleging he suffered a heart attack as a result of his AndroGel usage. At trial, he asserted three claims, sounding in (1) strict liability; (2) negligence; and (3) fraudulent misrepresentation. *See* Jury Instructions at 10, 12-16 (attached as Exhibit A); Trial Transcript ("Tr.") at 3197-3202 (Tr. excerpts attached as Exhibit B). After a three-week trial, the jury returned a verdict for Mr. Mitchell on his fraudulent misrepresentation claim. *See* Verdict Form (attached as Exhibit C). The jury was instructed that, "[t]o prevail on this claim, Mr. Mitchell must prove each of the following elements by clear and convincing evidence." *See* Ex. A at 16; Tr. 3202. The jury was then instructed that one of the elements plaintiff was required to prove was that "Mr. Mitchell was damaged as a direct result of his and/or his physician's reliance on the representation." *Id.* at 16; Tr. 3202. After finding for Plaintiff on this claim, the jury awarded $0 non-economic damages, $0 economic damages, and $150,000,000 punitive damages. *See* Ex. C.

The jury was instructed that "[e]conomic damages are the objectively verifiable monetary losses that the plaintiff has incurred or will probably incur" and that they should consider "[t]he reasonable value of necessary medical and other healthcare and services for the treatment of Mr. Mitchell necessitated by his heart attack" in determining the amount. Ex. A at 19-20; Tr. 3206. At trial, the undisputed evidence was that Mr. Mitchell's medical bills associated with his heart attack totaled $136,408. *See* Ex. D. This evidence was summarized in closing argument as follows:

> The economic damages, those are a little more easy to calculate. You'll have those back there. Those are the medical bills that Mr. Mitchell incurred, and if you look at those exhibits and you total them up, they're $136,408. That's the total of the medical bills. That's the economics.

Tr. 3251; *see also* Medical Billing Records, Trial Exhibits 2501 and 2502 (attached as Exhibit D). Because the jury found that Plaintiff was damaged by Defendants' conduct and because the evidence of his medical bills was undisputed, Plaintiff respectfully requests that the Court amend

the judgment to reflect Mr. Mitchell's undisputed economic damages. Alternatively, Plaintiff requests a new trial on the issue of compensatory damages.

LEGAL STANDARD

Rule 59 permits a district court to alter or amend a judgment or order a new trial on some of the issues if the verdict is against the weight of the evidence or if for other reasons the trial was not fair to the moving party. *See* Fed. R. Civ. P. 59(a)–(b), (e); *Pickett v. Sheridan Health Care Ctr.*, 610 F.3d 434, 440 (7th Cir. 2010).

Rule 59(e) enables a district court to amend a judgment to correct errors prior to appeal, thus sparing the parties and the appellate courts the burden of further proceedings. *Russell v. Delco Remy*, 51 F.3d 746, 749 (7th Cir. 1995). Alternatively, courts "will set aside a verdict as contrary to the manifest weight of the evidence only if no rational jury could have rendered the verdict." *Lewis v. City of Chicago Police Dep't*, 590 F.3d 427, 444 (7th Cir. 2009) (internal quotation marks omitted). However, "verdicts are to be interpreted to avoid inconsistency" and "jurors are presumed to have followed their instructions." *Jamsports and Entm't, LLC v. Paradama Prods., Inc.*, 382 F.Supp.2d 1056, 1060 (N.D. Ill. 2005) (Kennelly, J.), *citing Freeman v. Chicago Park Dist.*, 189 F.3d 613, 615 (7th Cir. 1999).

ARGUMENT

I. THIS COURT SHOULD AMEND THE JUDGMENT TO REFLECT THE UNDISPUTED EVIDENCE OF ECONOMIC DAMAGES

Pursuant to Rule 59(e), the Court should amend the judgment to award Plaintiff $136,408 in economic compensatory damages on his claim for fraudulent misrepresentation. This is proper because the jury's verdict on liability for fraudulent misrepresentation is well-supported and the amount of economic damages is not disputed. In this circumstance, a new trial is unnecessary, as the Court may simply conform the economic damages verdict to the undisputed evidence. *See Liriano v. Hobart Corp.*, 170 F.3d 264, 272-73 (2d Cir. 1999) ("When a jury has already found liability, federal courts may make . . . adjustments" as to undisputed amounts); *EEOC v. Massey Yardley Chrysler Plymouth*, 117 F.3d 1244, 1252-53 (11th Cir. 1997) (amendment of verdict

proper "where the jury has found the underlying liability and there is no genuine issue as to amount of damages."); *Taylor v. Green*, 868 F.2d 162, 165 (5th Cir. 1989) ("when the amount of damages is not disputed and a party is entitled to damages under the verdict as a matter of law, we may award that undisputed amount"); *Moreau v. Oppenheim*, 663 F.2d 1300, 1311 (5th Cir. 1981) (affirming trial court's award of attorney's fees where there was no genuine factual issue as to the amount); *Polaroid Corp. v. Schuster's Express, Inc.*, 484 F.2d 349, 350 (1st Cir. 1973) (affirming award of damages without submission to jury where measure of damages was "a question of law for the court to decide"); *Decato v. Travelers Ins. Co*., 379 F.2d 796, 798 (1st Cir. 1967) (where the jury has properly determined liability and there is no valid dispute as to the amount of damages, court may increase damage award); *Rocky Mountain Tool & Machine Co. v. Tecon Corp.*, 371 F.2d 589, 598 (10th Cir. 1966) (affirming trial court's increased damage award where jury had determined liability and the amount of liability was established by law); *see also LaSalle National Bank v. Massachusetts Bay Insurance Company*, No. 90-cv-2005, 1997 WL 619856, at *5 (N.D. Ill., Sept. 30, 1997) ("Where the parties do not dispute the appropriate level of damages, the court may bypass a new trial on damages by simply amending a jury's verdict with respect to damages."); 58 Am.Jur.2d New Trial §460 (amount of judgment may be adjusted "where the amount of damages is undisputed at trial or liquidated or is reasonably susceptible to precise calculation").[1]

[1] Although some courts have used the term "additur" in this situation, others have held that an increase in the damages award to reflect an undisputed amount is not an additur. *See Liriano,* 70 F.3d at 272-73 ("no true additur" where the court "simply adjust[s] the jury award to account for a discrete item that manifestly should have been part of the damage calculations and as to whose amount there was no dispute"); *Reichenpfader v. Paccar, Inc.*, 872 F. Supp. 328, 330 (E.D. La. 1994) (court "[wa]s not making an additur" by amending the verdict by increasing the total verdict by the amount of plaintiff's medical expenses; instead, it was "merely amending the judgment to reflect" the undisputed evidence of plaintiff's medical expenses.)

But whether characterized as an "additur" or not, a district court's amendment of a judgment to reflect an undisputed damage amount falls outside the general principle set forth in *Dimick v. Schiedt*, 293 U.S. 474 (1935). *See Liriano*, 170 F.3d at 272-73; *Massey Yardley Chrysler Plymouth*, 117 F.3d at 1252-53; *Taylor*, 868 F.2d at 165; *Moreau*, 663 F.2d at 1311; *Polaroid Corp.*, 484 F.2d at 350; *Decato v.*

A. The Jury's Verdict on Liability Is Well-Supported

The jury's finding of liability on the fraudulent misrepresentation claim was unequivocal. The verdict form shows that the jury found for Plaintiff on the claim for fraudulent misrepresentation. *See* Ex. C.

There is, moreover, ample evidence in the record to support this verdict. As the Court instructed the jury, there were five elements to the fraudulent misrepresentation claim:

> (1) AbbVie made a false representation regarding a material matter. As used in this case, a false representation of a material matter is one that would be likely to affect the conduct of a reasonable person in deciding whether to prescribe or take a prescription medication;
>
> (2) AbbVie knew that the representation was false or made the representation recklessly, without knowing if it was true or false;
>
> (3) AbbVie knew that it was misleading Mr. Mitchell and/or his physician, or recklessly disregarded whether it was misleading Mr. Mitchell and/or his physician;
>
> (4) Mr. Mitchell and/or his physician reasonably relied on the representation; and
>
> (5) Mr. Mitchell was damaged as a direct result of his and/or his physician's reliance on the representation.

See Ex. A at 16; Tr. 3202. Plaintiff offered more than sufficient proof on each of these elements.

Plaintiff's proof of AbbVie's false representations, and its knowledge and reckless disregard of their falsity, began with cross-examination of AbbVie's own employees, Dr. Steven Wojtanowski, and James Hynd. Through examination of Dr. Wojtanowski, Plaintiff proved that AbbVie knew—as early as 2000—that: (1) there was no evidence that AndroGel was safe and effective for so-called "age-related hypogonadism" or the mere "signs and symptoms" of hypogonadism (*e.g.*, erectile dysfunction, low libido, mood, muscle strength, body composition, etc.); (2) AndroGel has never been indicated for those uses; and (3) promotion of those uses would have been improper. *See, e.g.*, Tr. 334:1-10; 337:14-16; 338:3-13; 340:2-11; 341:2-342:11; 342:23-343:7; 401:17-20; 402:4-11; 415:16-21; 444:16-23; 483:21-484:17; 771:3-7. Additionally, as of at least 2004, the FDA explicitly put AbbVie on notice of the potential cardiovascular risks

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Travelers Ins. Co., 379 F.2d at 798; *Rocky Mountain Tool & Machine*, 371 F.2d at 598; *LaSalle National Bank*, 1997 WL 619856, at *5; *see also* 58 Am.Jur.2d New Trial §460.

posed by AndroGel, *see id.* at 362:22-368:7, and specifically advised the company that AndroGel was indicated only for "true" hypogonadism. *See id.* at 584:5-8; *see also* Tr. 335:2-9 (FDA tells doctors that patients should be informed of risks); *id.* at 336:14-19 and 368:13-22 (acknowledging long-term studies have never been done). The FDA definitively rejected AbbVie's request for the indication of "age-related hypogonadism." *Id.* at 385:24-386:8. And Defendants' communications on AndroGel never conveyed to patients and consumers, like Plaintiff, that the drug was not safe and effective for the symptoms of aging and age-related hypogonadism. *Id.* at 526:19-527:15; 532:19-533:4.

The evidence further showed that the company understood that the market for classical hypogonadism was a limited population and that the "potential for off-label use of AndroGel is enormous." Tr. 520:13-523:7; *see also* 857:23-869:4. Notwithstanding AbbVie's clear knowledge about the limitations of its product, AbbVie pushed the ADAM ("Androgen Deficiency in the Aging Male") questionnaire into physicians' offices, overtly marketing for age-related hypogonadism. *Id.* at 429:10-23; 455:11-17. Indeed, AbbVie "targeted" men for a variety of off-label conditions. *See id.* at 480:23-481:13. Even when Dr. Wojtanowski internally raised concerns about use of the phrase "low T" in AndroGel promotion, requesting to move away from that term, the company ignored that suggestion and continued in its approach. *See id.* at 478:9-479:21.

Through cross examination of Mr. Hynd, AbbVie's Vice President of Sales and Marketing, the jury heard at length about AbbVie's unbranded or "disease state" promotional efforts, which "plant[ed] the company's message in various newspapers and TV and radio ads," *see* Hynd Dep. excerpt played at trial (transcript attached as Exhibit E) at 678:11-679:2. Mr. Hynd also conceded that the company endeavored to "link" unbranded marketing to branded marketing. *Id*. at 683:22-684:12 and 686:8-14.

Dr. Kessler's testimony fleshed out the story of AbbVie's marketing and its misrepresentations even further. FDA put AbbVie on notice in 2000, at the time of AndroGel's initial approval, that it would be "misleading" to suggest the drug is indicated for age-related hypogonadism or to "promote" it for that condition. *See* Tr. 839:22-840:9. Nonetheless, as the jury

saw and heard, AbbVie engaged in unabashed selling strategies to "create a medical need" for AndroGel and then to "sell market expansion first and AndroGel second." Tr. 869:10-873:24. The jury heard testimony that all of AbbVie's various promotional efforts worked together to successfully create the very market expansion the company set out to achieve. *See* Tr. 854:11-21 (business plans covered broad range of promotional and advertising material); Tr. 862:16-866:20 (Solvay bought AndroGel to treat "andropause" and by 2002 were shifting focus to primary care physicians, direct to consumer advertising and andropause); 902:17-903:10.

Moreover, Dr. Kessler noted that the growth of the TRT market generally and AndroGel sales specifically were not due to an increase in diagnosis of FDA-approved conditions for AndroGel. *See* Tr. 903:11-904:18. Dr. Kessler testified about the different promotional avenues available to a pharmaceutical company like AbbVie—*e.g.*, television, magazine ads, and brochures in doctors' offices—and their purpose to attempt to influence physician behavior. *See* Tr. 855:1-25. He explained AbbVie's creation of the "Andropause Task Force," which undertook to create physician treatment guidelines for TRT, hire KOLs ("Key Opinion Leaders") in the medical community, and generally, "drive the behavior of physicians" and "begin market expansion." Tr. 877:16-880:8. Based upon his review of AbbVie's marketing and promotional materials, Dr. Kessler opined that AbbVie marketed and promoted AndroGel for conditions outside the approved labeling and for symptoms and co-morbidities for which safety and efficacy had not been proven. *See* Tr. 857:23-859:16; *see also* Tr. 1884:12-1886:13 (Dr. Pence testifying that AbbVie never established safety and efficacy).

The jury saw repeated examples of AbbVie's off-label strategies and marketing pieces. *See, e.g.*, Tr. 882:1-885:2; 892:13-897:18; s*ee also* Tr. 2904:10-2905:10 (Dr. Arrowsmith-Lowe conceding that promotion for age-related hypogonadism would be off-label, and that it is not appropriate for drug companies to promote off-label because doing so means you are promoting to a group for which the drug has not been proven safe and effective). Ultimately, Dr. Kessler opined that AbbVie's marketing and promotional efforts for AndroGel were "false and misleading." Tr. 904:25-906:26.

In short, the jury was presented with substantial evidence relating to AbbVie's promotional reach, market expansion strategies and intent, and false and misleading messaging about the safe and effective uses of AndroGel. The record evidence shows that, for more than a decade, AbbVie's goal was to present AndroGel as a fountain of youth for aging males and a cure-all for a litany of non-indicated conditions. The jury's findings that AbbVie made false representations regarding a material matter; that it knew its representations were false or acted recklessly without regard for the truth; and that it knew it was misleading patients or doctors, or recklessly disregarded whether this was the case, were all supported by the evidence.

The evidence also supported the jury's finding of reliance. Indeed, the testimony of Plaintiff and Dr. Canzler regarding what they knew, the sources of information to which they were exposed, and what contributed to their joint decision-making support the jury's finding of reliance. In 2007, Plaintiff began using AndroGel according to Dr. Canzler's prescription. *See* Tr. 2100:22-2101:1. Plaintiff elected to accept the prescription based upon Dr. Canzler's recommendation, relying upon and trusting Dr. Canzler's medical judgment. *See* Tr. 2139:11-22. Consistent with AbbVie's messaging to the medical community and Dr. Canzler, Plaintiff believed that by taking AndroGel he would "feel a little bit better and a little bit stronger and a little bit more – more energy." Tr. 2113:5-12. Indeed, Plaintiff believed the drug was safe and effective for someone like him. *See* Tr. 2133:2-10. Furthermore, Dr. Canzler did not relay to Plaintiff any risk of heart attack (nor could he have, as the label made no mention of the risk); had he done so, Plaintiff would have elected not to use AndroGel. *See* Tr. 2112:9-20.

From Dr. Wojtanowski, the jury heard general testimony about the role of AbbVie's sales representatives in detailing prescribers like Dr. Canzler, *see* Tr. 530:7-19, and the AndroGel sales aids and branded materials that AbbVie representatives routinely delivered to physicians. *See* Tr. 474:25-475:8 and 555:12-559:12 (detailing the Welcome Back campaign). The jury also heard testimony specifically relating to interactions between AbbVie's sales representatives and Dr. Canzler, who was "receptive" to the company's messaging and was being visited by representatives once or twice a month. *See* Tr. 557:4-559:17. In fact, AbbVie sales representatives

visited Dr. Canzler on a total of 140 occasions. *See* Tr. 2070:12-14. AbbVie's call notes specifically document AbbVie's presentation to Dr. Canzler of its "Welcome Back" advertising campaign and his participation in the promotions created for this particular campaign, which included promotional material to be given by the doctor to his patients. *See* Trial Exhibits 81 and 2589 (attached as Exhibit F); *see also* Tr. 555:12-559:17. For his part, Dr. Canzler testified unequivocally that he relies on pharmaceutical sales representatives for information. When asked by counsel "to what degree do you rely on sales representatives for information regarding the medications that you prescribe?" his answer was clear: "I find them a valuable resource." *See* Tr. 2064:17-24. Dr. Canzler further testified that AbbVie sales representatives would leave posters, questionnaires and other materials relating to AndroGel and the "symptoms of hypogonadism." *See* Tr. 2067:6-16. And while he could not specifically remember the title "ADAM," he remembered the substance of AbbVie's AndroGel questionnaire for Androgen Deficiency in the Aging Male. *See* Tr. 2067:17-2068:16. Dr. Canzler elaborated on the "intense" AndroGel marketing that pushed patients into his office for prescriptions. *See* Tr. 2068:17-2070:11. One of AbbVie's sales representatives characterized Dr. Canzler as "one of my best AndroGel writers." Tr. 2072:21-2073:6. Moreover, and importantly, when asked to recall the "benefits" of AndroGel that Dr. Canzler discussed with Plaintiff, he recited off-label symptoms, consistent with AbbVie's market expansion campaign: stamina, strength, energy, and libido. *See* Tr. 2045:5-13.

The totality of the evidence presented to the jury was thus more than sufficient to show reliance. Through its sales force, AbbVie had direct and continued reach into Dr. Canzler's waiting room and examination room, visiting him on dozens of occasions and delivering materials relating to AndroGel and the signs and symptoms of "low T." In Dr. Canzler, AbbVie's messaging found a "receptive" ear, engendering a trust that the messengers were "valuable resources." And Dr. Canzler was "intensely" exposed to AbbVie's promotion both inside and outside of his office. In turn, Plaintiff trusted and relied on Dr. Canzler. Thus, the jury's finding that Plaintiff or his doctor relied on AbbVie's misrepresentations in taking or prescribing AndroGel was supported by the evidence.

Finally, the jury's finding that AbbVie's fraudulent misrepresentations caused injury to the Plaintiff was also well-supported by the evidence. Following detailed explanation of the medical and scientific proofs concerning AndroGel and heart attack, Dr. Hossein Ardehali testified that "AndroGel was a cause of Mr. Mitchell's heart attack." Tr. 1400:3-4; *see also* Tr. 1617:6-7; Tr. 1800:25-1801:3. He further testified that this opinion was "based on a reasonable degree of medical probability." Tr. 1400:5-7. While acknowledging that he could not offer his opinion with 100% certainty, Dr. Ardehali stated that "[W]hat I can say is based on the totality of the evidence we have, there is enough evidence to conclude that testosterone causes myocardial infarction or can cause myocardial infarction, and *it's the cause of the heart attack of Mr. Mitchell*." Tr. 1620:22-1621:1 (emphasis added).

In light of this evidence, the jury's finding of liability on the claim for fraudulent misrepresentation was proper and well-supported.

B. The Amount of Economic Damages Is Not Disputed

Although the jury's finding on liability for fraudulent misrepresentation was supported by the evidence, its award of $0 in economic compensatory damages was not. It was undisputed that Plaintiff incurred $136,408 in medical bills as a result of his heart attack. Nor is there any doubt that these expenses were attributable to AbbVie's fraudulent misrepresentations, because the jury's finding of liability on this claim encompassed a finding that "Mr. Mitchell was damaged as a direct result of his and/or his physician's reliance on the representation." Ex. A at 16; Tr. 3202. Further, the jury was specifically instructed:

> Each of Mr. Mitchell's claims requires him to prove by a preponderance of the evidence (for the first and second claims) or by *clear and convincing evidence* (for the third claim) that *AbbVie's conduct was a cause of his heart attack*. AbbVie's conduct was a cause of Mr. Mitchell's heart attack if the heart attack would not have occurred but for AbbVie's conduct. Conversely, AbbVie's conduct was not a cause of Mr. Mitchell's heart attack if it would have occurred without AbbVie's conduct.

Id. (emphasis added). Thus, in finding for Plaintiff on the third claim, the jury specifically found, *by clear and convincing evidence*, that Plaintiff's heart attack was caused by AbbVie's conduct.

See Jamsports, 382 F. Supp. 2d at 1060 ("jurors are presumed to have followed their instructions.").

In light of that finding, the award of $0 in economic damages was clearly the result of an oversight. It was undisputed that the medical bills submitted at trial were incurred because of the heart attack. Nor did AbbVie question the amount of the medical bills or offer an alternative calculation of Plaintiff's economic damages at trial. The jury's $0 economic damage verdict is contrary to reason and contrary to the weight of the evidence presented at trial, *all* of which showed that Plaintiff incurred medical expenses of $136,408.

C. This Court Should Amend the Verdict to Reflect the Undisputed Economic Damages

This Court should amend the judgment and award Plaintiff $136,408 in economic damages in connection with his claim for fraudulent misrepresentation. As discussed above, where the amount of damages for a given liability finding is undisputed, it is appropriate for the Court to amend the damages verdict as needed to conform to the undisputed evidence. Under the circumstances of this case, it would serve no purpose to conduct a re-trial of this issue because Plaintiff would be entitled to summary judgment with respect to the amount of his medical expenses. Here, simply amending the damage award avoids the wasteful steps of ordering a new trial on economic damages and then granting a summary judgment. *See Massey Yardley*, 117 F.3d at 1253 (explaining that new trial would be a "mere formality" where damages were undisputed and liability was established); *Decato*, 379 F.2d at 798 ("the court is in effect simply granting summary judgment on the question of damages"); *Taylor*, 868 F.2d at 165 ("It would be a mere formality to order a partial new trial limited to the issue of damages when the court could immediately thereafter grant summary judgment for the undisputed amount"); *Moreau*, 663 F.2d at 1311 (same); *LaSalle Nat'l Bank v. Mass. Bay Ins. Co.*, No. 90C2005, 1997 WL 619856, *5 (N.D. Ill. Sept. 30, 1997) ("Where the parties do not dispute the appropriate level of damages, the court may bypass a new trial on damages by simply amending a jury's verdict with respect to damages.").

The *Liriano* case, a decision of the Second Circuit, is particularly instructive. Like this case, *Liriano* was a product liability case. The jury found for the plaintiff but, in making its damage calculation, overlooked a $21,252.34 hospital bill that was undisputed. The trial judge increased the verdict by the amount of the bill. 170 F.3d at 266. On appeal, the defendants argued that the judge's increase of the damage award made by the jury was impermissible. The Second Circuit disagreed and upheld the amendment, explaining:

> The district court did not divine a figure and then make the defendants choose between an increased damage award and a new trial. It simply adjusted the jury award to account for a discrete item that manifestly should have been part of the damage calculations and as to whose amount there was no dispute. When a jury has already found liability, federal courts may make such adjustments. . . .

Id. at 272-73.

As in *Liriano*, amendment of the amount of economic damages to reflect undisputed medical bills is appropriate in this case. The jury's liability finding with respect to fraudulent misrepresentation was unequivocal and amply supported by the evidence. The award of zero damages here, by contrast, was clearly against the weight of the evidence because the amount of Mr. Mitchell's medical bills were undisputed. As in *Liriano*, no purpose would be served by a new trial because the amount of Plaintiff's economic damages – his medical bills – was not and cannot be disputed.

II. ALTERNATIVELY, PLAINTIFF REQUESTS A NEW TRIAL ON THE ISSUE OF COMPENSATORY DAMAGES

In the event the Court does not amend judgment to conform the economic damages to the undisputed evidence as requested above, Plaintiff requests that the Court grant a new trial on the issue of economic and non-economic compensatory damages. Where a jury verdict is amply supported on the issue of liability but against the weight of the evidence on the issue of damages, "a trial court may order a new trial limited to the issue of damages." *LaSalle Nat'l Bank*, 1997 WL 619856, *4. For example, in *Rosario v. Livaditiz*, 963 F.2d 1013, 1021 (7th Cir. 1992), the Seventh Circuit ordered a new trial on damages where it found "ample evidence in the record to support the jury's finding" of liability but the jury failed to award even nominal damages on those claims: "A finding of liability … is conspicuously inconsistent with an assessment of zero damages for

those violations since the jury was required to find that the class suffered an injury … before finding [the schools] liable."

Here, too, the jury was instructed that it had to find that Mr. Mitchell suffered an injury – a heart attack – before finding AbbVie liable. *See* Ex. A at 16-17. As in *Rosario*, the jury's verdict on compensatory damages is contrary to the evidence. The jury found AbbVie liable but awarded no compensatory damages, even though the economic damages were undisputed and there was evidence of non-economic damages as well. In the event that the Court does not bypass a new trial on damages by simply amending the jury's verdict to reflect the undisputed economic damages, Plaintiff requests a new trial on the issue of compensatory damages, both economic and non-economic.

A. The Weight of the Evidence Demonstrated that Mr. Mitchell Suffered Harm as a Result of Defendants' Fraudulent Misrepresentations

If the Court considers a new trial, the Court should set aside the $0 dollar findings on both economic and non-economic damages and order a new trial limited to the issue of compensatory damages. The jury found AbbVie is liable to Mr. Mitchell for causing his heart attack, yet the jury did not award him any damages for the medical bills associated with that heart attack. As discussed above, AbbVie never contested the amount of medical bills, which totaled $136,408. The jury's $0 economic damage verdict is contrary to reason and contrary to the weight of the evidence presented at trial, *all* of which showed that Plaintiff incurred medical expenses of $136,408. If the Court chooses not to adjust the economic damages verdict, it should set aside the $0 award and order a new trial on the issue of compensatory damages. *See Rosario*, 963 F.2d at 1021.

Similarly, if the Court sets aside the $0 award on economic damages (and does not merely increase the award to $136,408), it should also set aside the $0 award on non-economic compensatory damages and include such damages in any new trial. That is so because the jury's finding on non-economic damages was also against the weight of the evidence.

Mr. Mitchell offered extensive evidence about the heart attack he suffered and its consequences. Specifically, Plaintiff testified that on the day of his heart attack he began suffering

severe pain across his entire chest that was worse than any pain he had experienced in his life. Tr. 2118:4-8. Upon waking up following several days in a coma, Plaintiff testified that he was on a ventilator and still suffering from pain in his chest and left arm, which was swollen and discolored. Tr. 2121:2-2122:1; 2122:19-23. After being released from the hospital, Plaintiff remained out of work for three months while he recuperated from the heart attack he suffered. This time spent out of work caused him a great deal of additional anxiety and financial hardship. Tr. 2125:21-2126:10. Plaintiff ultimately returned back to work on a part-time basis until he was able to resume his normal job responsibilities. Tr. 2126:11-19.

Additionally fearful of a future heart attack, Mr. Mitchell has sought medical treatment for cardiovascular scares he has suffered since his heart attack in 2012. Tr. 2127:5-2129:25. Plaintiff's expert cardiologist confirmed that Plaintiff's fears are well founded. Dr. Ardehali testified that Mr. Mitchell, having suffered a heart attack, is at increased risk of a future cardiovascular event or suffering cardiovascular related death. Tr. 1619-1620:1.

While the proper monetary award for Plaintiff's pain and suffering may be disputed, the evidence clearly showed pain, suffering, and/or distress attendant to Mr. Mitchell's heart attack (and its aftermath), which the jury found was caused by his use of AndroGel.[2] Because the amount of such damages is not undisputed, Plaintiff recognizes that the Court may not simply correct this portion of the jury's verdict. But if there is to be a new trial on economic damages in any event, then both of the compensatory damage awards should be set aside and be addressed at the new trial. *See Bedenfield v. Shultz*, 272 F. Supp. 2d 753, 754–55 (N.D. Ill. 2003) (where there was no denying that plaintiff had suffered physical injuries as the result of defendant's conduct and jury

[2] As the jury was instructed, non-economic damages include "[a]ny pain, mental suffering, emotional distress, and/or humiliation that Mr. Mitchell has sustained from the time he was injured until the present and that Mr. Mitchell will sustain in the future as a result of his injuries;" and "[a]ny inconvenience and interference with Mr. Mitchell's normal and usual activities apart from activities in a gainful occupation that you find have been sustained from the time he was injured until the present and that he probably will sustain in the future as a result of his injuries." Ex. A at 19; Tr. 3205-06.

found for plaintiff on liability, award of only nominal damages was against the manifest weight of the evidence and new trial on damages was appropriate).

B. Any New Trial Should Be Limited to the Issue of Compensatory Damages

To the extent the Court considers ordering a new trial on compensatory damages (in lieu of simply amending the judgment to add the amount of undisputed medical expenses, as Plaintiff requests above), the Court should not order a new trial on liability or punitive damages. As noted above, the jury's finding of liability is clear and well supported and there is no basis to set it aside. *See Rosario*, 963 F.2d at 1022 ("Given that there is ample evidence in the record to support the jury's finding of RICO liability on Counts I and II, we believe a new trial is warranted as to damages only.").

As such, the Court should limit any retrial to the distinct issue of compensatory damages, on which the jury's determination was against the weight of the evidence. *See Love v. Westville Correctional Center*, 103 F.3d 558, 561 (1996) (recognizing district court's discretion to order a new trial as to damages only, while instructing second jury to accept first jury's liability findings); *see also McClain v. Owens-Corning Fiberglas Corp.*, 139 F.3d 1124, 1128 (7th Cir. 1998) (affirming district court's exercise of discretion in limited retrial to distinct and separable issue of damages in wrongful death action); *LaSalle Nat'l Bank*, 1997 WL 619856, *4. In this case, the issues of liability and compensatory damages are clearly distinct. The finding of liability required Plaintiff to prove a false representation regarding a material matter; knowledge or reckless disregard of the falsity on AbbVie's part; knowledge or reckless disregard on AbbVie's part that Plaintiff or his doctor was being misled; reliance; and the fact of damage. The damages inquiry, by contrast, focused on the injury suffered by Plaintiff when he had his heart attack and the further consequences thereof.

Similarly, the punitive damage award should not be part of any new trial. Rather, the jury's award with respect to punitive damages is amply supported by the evidence. As discussed above, the jury heard at great length from Dr. Kessler and AbbVie's own witnesses relating to, *inter alia*,

its insidious, off-label market expansion crusade; its unwarranted representations of efficacy and assurances of safety to the populations to which it was promoting the drug; the serious safety concerns attendant to AndroGel use of which AbbVie was aware; and its deliberate avoidance of material studies to fully characterize these risks. As the Court stated at summary judgment, "[a] reasonable jury could find this conduct sufficiently willful or outrageous to support a claim for punitive damages." CMO No. 47, Doc. No. 1896, at *53 (*citing Proctor v. Davis*, 682 N.E.2d 1203, 1216 (1997)).

Given the evidence supporting it, the Court need not, and should not, set aside the punitive damage portion of the verdict. Rather, any new trial should be limited to the particular issue on which the verdict was against the weight of the evidence: compensatory damages. *See Proler v. Modern Equip. Co.*, 602 F. Supp. 1388 (E.D. Wis. 1985) (where jury found for plaintiff and awarded both compensatory and punitive damages, court set aside compensatory award as against the weight of evidence and ordered new trial on compensatory damages only).

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests the Court amend the judgment to award Plaintiff $136,408 in economic damages or, alternatively, grant a new trial only on the issue of compensatory damages.

August 21, 2017

Respectfully submitted,

/s/ Trent B. Miracle

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2017, I electronically transmitted the foregoing document to the Clerk of the United States District Court using the CM/ECF system for filing and service to all parties/counsel registered to received copies in this case.

/s/ Brendan A. Smith
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