RECORD NO. 04-1433 & 04-1434

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

LOWRY'S REPORTS, INC.,

Plaintiff-Appellee/Cross-Appellant

v.

LEGG MASON, INC.

and

LEGG MASON WOOD WALKER, INC.,

Defendants-Appellants/Cross-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS/APPELLANTS URGING REVERSAL

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INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center based in Washington, D.C. The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy.

Together, WLF and AEF have participated as *amici curiae* in numerous cases concerning the imposition and review of punitive damages, including some of the seminal due process cases reviewed by the Supreme Court of the United States, such as BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996), Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001), and State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). WLF and AEF have an interest in ensuring that damage awards are imposed only where warranted and that the amount of such awards are not excessive or arbitrary. In order to ensure that the imposition and amount of punitive damage awards are lawful, they should be scrutinized with sufficiently meaningful and determinate standards so that the constitutional rights of litigants are protected and so that the public may have confidence that the civil justice system produces fair and rational outcomes.

The source of authority to file this brief is Fed. R. App. Proc. 29(a) in that the brief is being filed with the consent of all the parties.

INTRODUCTION

An employee of Legg Mason made an error in judgment. Against company policy respecting copyrighted works, Ms. Olszewski posted plaintiff's copyrighted periodical (the *Report*) on a company intranet site and forwarded the *Report* to her assistant so that he could print a copy for her benefit. There apparently is no dispute that she was unaware that her actions would violate copyright law. Nonetheless, the plaintiff urged the jury to punish Legg Mason (under the doctrine of vicarious liability), and the jury obliged.

The Copyright Act's statutory damages provision (17 U.S.C. § 504(c)) permits a vast range of damages -- $200 to $150,000 per infringed work -- where the jury finds that the infringement was "willful" (which in this case was met by "recklessness"). Where, as here, the copied work is a serial publication, there easily may be a large number of infringed works, with the consequence that the range of damages will expand exponentially. In this case, because of the serial nature of the newsletter copied by Ms. Olszewski, 240 editions of the *Report* were copied, producing a staggering statutory range of about $36 million.

The jury, having been instructed that it could issue any award in that range that it deemed "just" for purposes of "punishment" and "deterrence," responded by awarding the plaintiff a total of about $20,000,000. The staggering size of the sanction shows why close judicial scrutiny of damage awards is necessary both to

safeguard a defendant's constitutional rights and to maintain the public's confidence that the civil justice system produces fair and rational outcomes. Unfortunately, however, the district court essentially abdicated its duty to review *the size* of the jury's awards to determine whether they are excessive. The court failed to review the amount of the awards under the *constitutional* standard of review governing punitive awards, and the court also failed to review the awards under the *common law* standard (developed under Rule 59 of the Federal Rules of Civil Procedure) which requires a court to exercise its "independent judgment."

Under the standard applied by the district court, once the jury's finding of willfulness is upheld, judicial review ends, and there is no further review of *the size* of the award -- not even to determine (under traditional common-law standards) whether the award would work an injustice. This standard of *non*-review is erroneous. It cannot be squared with recent Supreme Court precedent, and it is contrary to the standard this Court has traditionally applied under Rule 59. This Court's guidance on the appropriate standard of review for statutory damage awards is critically important for promoting predictability and stability in the law. While the *Amici* believe that the Court should vacate the judgment in its entirety because the Appellants have shown that the trial was permeated by crucial errors that produced the massive verdict, the focus of this brief is on the review standards that govern in an excessiveness challenge.

BACKGROUND

I. THE JURY'S AWARDS ARE SUBSTANTIALLY PUNITIVE IN NATURE

Punitive damages are awarded to punish and deter misconduct. Cooper Industries, Inc., 532 U.S. 424 (2001) (punitive damages are defined as "'private fines' intended to punish the defendant and deter future wrongdoing"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (same). Here, the district court charged the jury that its award should reflect this dual punitive rationale of punishment and deterrence. See 10/3 Tr. 141-43. Pursuant to that directive, the plaintiff repeatedly urged the jury to issue a sizeable verdict that would punish Legg Mason. See, e.g., 10/3 Tr. 58 (plaintiff characterizes Legg Mason as a "large and wealthy" corporation and urges the jury that Legg Mason "needs to be punished in a way that Legg Mason is going to sit up and take notice"); 9/29 Tr. 20 (plaintiff emphasizing "the need to punish ... really massive companies like Legg Mason"). The jury heeded that request with a massive sanction.

In fact, no one disputes that the aggregate $20,000,000 award is *overwhelmingly* punitive in nature -- even assuming the award does include any and all actual damages sustained by the plaintiff. Legg Mason reasonably calculates that actual damages from all the relevant infringements totaled no more than $59,100, and therefore if the jury's award does include actual damages, then $19,666,170 of the award -- **99.56%** -- necessarily is a penalty. Even under the

plaintiff's plainly erroneous calculation of actual damages (among other defects, the calculation is mostly predicated on conduct that is *not* actionable for statutory damages), about $13,000,000 of the aggregate award is punitive and non-compensatory (even assuming, again, that the jury's award includes any and all actual damages).[1]

The punitive nature of the verdict is particularly manifest with respect to the jury's Phase II and Phase III awards, which is where the jury meted out the bulk of its punishment. In those phases the jury awarded $13,800,000 on what were, at most, $4,900 in actual damages (*i.e.*, seven lost subscriptions). In other words, even if the Phase II and Phase III awards include actual damages, then at least 99.96% of those awards constitutes a penalty. With respect to Phase II alone, the jury sanctioned Legg Mason with a penalty in excess of *ten and a half million dollars* based on the fact that Ms. Olszewksi's computer auto-forwarded the *Report* to six colleagues over a period lasting less than a year.

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[1] None of this award could be based on any profits earned by Legg Mason, *i.e.*, a theory of disgorgement. The district court ruled before trial that the plaintiff was not entitled to recover any of Legg Mason's profits, because the plaintiff had failed to produce competent proof that there was a causal nexus between the infringing conduct and Legg Mason's gross revenue. Lowry's Reports, Inc. v. Legg Mason, Inc., 271 F.Supp. 2d 737, 751-52 (D. Md. 2003). That was a correct application of the law. See Bouchat v. Baltimore Ravens Football Club, Inc., 346 F.3d 514, 519-26 (4th Cir. 2003).

II. THE DISTRICT COURT FAILED TO REVIEW THE SIZE OF THE AWARDS TO DETERMINE WHETHER THEY ARE EXCESSIVE

The entirety of the district court's excessiveness review is quoted below:

> When a jury's intent findings are sustainable, an award within the statutory range is entitled to substantial deference. Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., 74 F.3d 488, 496 (4th Cir. 1996), cert. denied 519 U.S. 809, 117 S.Ct. 53, 136 L.Ed.2d 16 (1996). There was evidence from which the jury could have concluded that Legg Mason's employees' conduct was unreasonable and in bad faith. [Citations omitted] Further, there is evidence that Legg Mason willfully infringed Lowry's copyrights. [Citations omitted] Legg Mason concedes that the statutory damages award was within the limits set by Congress in the Copyright Act. [Citations and footnote omitted] Accordingly, because the jury's finding of willfulness is sustainable, and the award is within the statutory range, it is entitled to substantial deference. Superior Form Builders, Inc., 74 F.3d at 496.
>
> The jury was not required to believe Legg Mason's assertions that the repeated infringement was due to its oversights and set its damages award accordingly. Further, the evidence indicated that Legg Mason was a sophisticated entity that repeatedly infringed Lowry's copyrights, even when asked to stop. In light of this evidence, the Court will not modify the jury's award or order a new trial because of its size.

Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F.Supp. 2d 455, 458-59 (D. Md. 2004).

As is evident from that passage, the court essentially fused what should have been two separate inquiries: (i) whether there was evidence sufficient to support liability for willful infringement, and, if so, (ii) whether the amount of the award was too large. The court determined, at step one, that there was substantial

evidence to support the finding of "willful" infringement which triggered the aggravated statutory range ($200 to $150,000 per work). But the court then held that any jury award not exceeding the statutory maximum is entitled to "substantial deference," and in applying this "substantial deference" standard, the court did not look at the size of the awards but instead simply returned to the willfulness issue, reiterating that "the evidence indicated that Legg Mason was a sophisticated entity that repeatedly infringed Lowry's copyrights, even when asked to stop." (See block quote above.) The district court utterly failed to examine *the size* of the awards -- for example, the court did not inquire whether it would work an injustice to impose a ten and a half million dollar penalty (in Phase II) for Ms. Olszewski's inadvertent failure to disable the auto-forwarding function on her computer, which for a period of less than one year continued to forward the *Report* to six coworkers in her group.

ARGUMENT

The "substantial deference" standard applied by the district court effectively amounts to no review at all. Under the district court's analysis, once liability for statutory damages is established, judicial review ends -- *i.e.*, if the jury is authorized to make an award of statutory damages, the jury may impose any award or penalty within the statutory range, and the size of that award or penalty will be immune from judicial review. A court could never order a remittitur except in the

rare case where the jury defies the court's instruction by imposing an award in excess of the statutory maximum.

In holding that statutory damage awards are reviewed with such "substantial deference," the district court relied on this Court's decision in Superior Form, where this Court held that "broad deference" should be given to a copyright award that falls within a statutory range.[2] As discussed below in Part I, insofar as Superior Form may be read to preclude meaningful review of the size of statutory damage awards under Rule 59, particularly awards that are substantially punitive in character, the case is in tension with subsequent Supreme Court decisions and with other decisions of this Court respecting the proper standard for excessiveness review. At any rate, as discussed in Part II, Superior Form cannot be cited as authority on the standard governing *constitutional* challenges to a statutory award, because a constitutional issue was not before the Court in Superior Form and, indeed, Superior Form pre-dated the Supreme Court's seminal decision in BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (striking down a punitive damage award as excessive under the due process clause and announcing the constitutional standard of review governing excessiveness challenges to punitive awards).

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[2] Even this Court in Superior Form undertook a more substantial review of the $400,000 statutory award in that case than did the court below with respect to nearly $20,000,000 in statutory awards. See 74 F.3d at 496-97.

I. THE HYPER-DEFERENTIAL STANDARD OF REVIEW APPLIED BY THE DISTRICT COURT CANNOT BE SQUARED WITH RECENT SUPREME COURT PRECEDENT OR WITH ESTABLISHED LAW IN THIS CIRCUIT APPLYING RULE 59

A. Superior Form's Precedential Underpinning Has Eroded

In articulating the standard of review, Superior Form cited the Supreme Court's 1935 decision in Douglas v. Cunningham, 294 U.S. 207, a copyright case. At the time of the Douglas decision, trial judges determined the amount of statutory damages to award, and they did so in the exercise of their discretion based on what they deemed to be "just." See Douglas, 294 U.S. at 210 ("The trial judge may allow such damages as he deems to be just [within the statutory range] . . . . In other words, the employment of the statutory yardstick, within set limits, is committed solely to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion."). Until 1998, it was unsettled whether juries were even permitted to impose statutory damages in copyright cases. In Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998), however, the Supreme Court held that there is a Seventh Amendment right to have a jury impose statutory damages in a copyright case.

In the former regime where judges imposed statutory damages for copyright infringement, perhaps it made sense to accord judges broad discretion in their determination of what damages were "just" under the circumstances. After all, there is a long history of trial judges enjoying broad discretion to impose

punishment within a range fixed by the legislature. See Apprendi v. New Jersey, 530 U.S. 466, 481 (2000). There is also a practical reason for giving broader deference to judge-assessed awards: judges tend to have greater expertise and an institutional advantage which may lead to more consistent and predictable results. See Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 593-95 (4th Cir. 1996). The same cannot be said of a jury empanelled for a single case. See id.; NIMMER ON COPYRIGHT § 14.04[C][2] ("Given that the core of statutory damages under Section 504(c) is that Congress authorized judges to exercise their discretion, partially in light of precedent as reflected in other cases, on what basis is such 'discretion' to be transferred to a jury, which unlike the judge has no institutional mechanism for distinguishing and relying on precedent from other cases?"). Furthermore, unlike juries, judges can explain their decisions in a way that permits some appellate review. As the Seventh Circuit observed in the only other case that Superior Form cited in support of a deferential standard of review:

> [C]oncerns of due process and the opportunity for meaningful, if limited, appellate review contemplate that the district court would provide *some* explanation of the factual findings that underlie this exercise of discretion to award greater than minimum statutory damages.

Broadcast Music, Inc. v. Star Amusements, Inc., 44 F.3d 485, 488 (7th Cir. 1995) (pre-Feltner decision where the district judge fixed the copyright damages) (emphasis in original).

For the foregoing reasons, the Supreme Court's 1935 Douglas decision has dubious precedential force in the context of a statutory award fixed *by a jury*. This is particularly the case with an award that has a significant *punitive* dimension, as discussed below.

B. There Is No Principled Basis For Giving Substantial Deference To The Amount Of A Jury's Punitive Award

Where, as here, a jury is instructed to come up with a dollar amount that it thinks may be "just" for purposes of "punishment" and "deterrence" (10/3 Tr. 141-43 (jury charge below)), there is no legitimate policy basis for giving "substantial deference" to the jury's number. This point was underscored by the Supreme Court in Cooper Industries, supra, a decision reported years after Superior Form.

Cooper Industries involved a federal jury's award under the Lanham Act. The jury was instructed to award an amount of punitive damages, and the jury awarded $4.5 million. The defendant challenged the punitive award as excessive, and the district court upheld the award. The Ninth Circuit held that the district court did not abuse its discretion in declining to reduce the amount of punitive damages. 532 U.S. at 429-31. The issue before the Supreme Court was whether the court of appeals should have reviewed the excessiveness challenge *de novo* rather than for abuse of discretion. The Supreme Court held that there is no legitimate basis for adopting an abuse-of-discretion standard and that punitive damage awards must be reviewed *de novo*.

In reaching that holding, the Court observed that a jury's determination of the amount of money warranted to punish and deter is not a "factual finding." Id. at 437-39. To the contrary, the Court explained that while "[a] jury's assessment of the extent of a plaintiff's injury is essentially a factual determination," the jury's "imposition of punitive damages is an expression of its moral condemnation." Id. at 432. Consequently, meaningful judicial review of a punitive award does not interfere with the jury's historical fact finding function.

Because the jury's determination of the amount of money appropriate for punishment and deterrence is not a factual finding, there is no legitimate basis for according unbridled discretion to a jury's determination of what it deems to be a "just" penalty. To the extent Superior Form can be read to require such unbridled discretion, it is in tension with Cooper Industries.

C. A Hyper-Deferential Standard Of Review Is Impossible To Reconcile With The Well-Established Common Law Standards Developed Under Rule 59

"In the federal courts ... judges review the size of damage awards." Honda Motor Co. v. Oberg, 512 U.S. 415, 426 (1994). This has been the established practice in this country following the common law of England. See generally id. at 421-26 (discussing that history and observing, "Judicial review of the size of punitive damage awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded.").

Over time, courts developed common law standards to curb excessive damage awards, and these standards have been applied under Rule 59 for years. This Court, applying Rule 59, has emphasized the important role that a court plays in reviewing a jury's punitive award even in a *non*-constitutional challenge to the size of the award. See, e.g., Atlas Food Sys. & Serv., Inc. v. Crane Nat. Vendors, Inc., 99 F.3d 587, 593-95 (4th Cir. 1996). In Atlas Food, this Court observed, based on long-standing precedent, that when a defendant raises an excessiveness challenge to a jury's punitive award pursuant to Rule 59, "it is the duty of the judge to set aside the verdict and grant a new trial, if *he* is of the opinion that" the "jury's award will result in a miscarriage of justice." Id. at 594 (citing Aetna Casualty & Sur. Co. v. Yeatts, 122 F.2d 350, 352-53 (4th Cir. 1941)) (emphasis added). In reiterating the propriety of the miscarriage-of-justice standard, this Court observed:

> [P]olicy-related elements [of a punitive damage award] -- e.g., the likelihood that an award will deter the defendant or others from engaging in similar conduct -- are not factual questions and, therefore, **are more appropriately decided by the trial judge**. **The judge's unique vantage point and day-to-day experience with such matters lend expertise and consistency.**
>
> **Therefore, when reviewing the *amount* of a jury's punitive damage award under Federal Rule of Civil Procedure 59, the district court has a participatory decisionmaking role that it does not have when reviewing a jury's findings based solely on facts.** Because the jury's determination of the amount of such an award is almost entirely ungrounded in the factual record, a court cannot generally test the amount of a punitive damage award against record facts to conclude whether, for example, a jury's $10 million award or $1

> million award is the correct one. And a jury, which is called upon to make that "sentencing" type of judgment only in the single case before it, is relatively ill-equipped to do so. On the other hand, the district courts not only see punitive damage awards daily, but themselves are required frequently to impose penalties for punishment and deterrence in a wide array of circumstances, both in civil and in criminal contexts. Indeed, in criminal cases, our system gives juries virtually no input, except in capital cases, to determine the amount of penalties. That division of responsibility in criminal cases influences our conclusion that **in civil cases, judges should at least participate through their review responsibility in establishing a penalty amount.**
>
> Thus, we conclude that punitive damage determinations involve a partnership between a jury and trial judge, each with a comparative institutional advantage, in which the judge inevitably enjoys the final word. While a district court must give due respect to a jury's comparative advantages in initially deciding upon the amount of punitive damages to award, **the court may depart from that award to the extent that it concludes that its own comparative advantages warrant such a departure**. Accordingly, we conclude that while a jury is authorized to award punitive damages on a framework of liability and the factors supplied by [the substantive] law, **the judgment a jury makes as to the *amount* is reviewable by federal trial courts under [Rule] 59 less deferentially than are factual findings which may be measured against the factual record.** The court's review of the amount of a punitive damages award should involve comparison of **the court's independent judgment on the appropriate amount** with the jury's award to determine whether the jury's award **is so excessive as to work an injustice**.

Id. at 594-95 (citation omitted; bold emphasis added). Applying the "independent judgment" standard, thes Court concluded in Atlas Food that the district court did not err in holding that the jury's punitive damage award was excessive.

Moreover -- and this is significant -- this Court has applied that same "independent judgment" standard in the context of a challenge to a statutory damage award that fell *within the statutory range*. Cline v. Wal-Mart Stores, Inc., 144 F.3d 294 (4th Cir. 1998). In Cline the jury found that the defendant unlawfully discriminated against the plaintiff-employee in violation of his rights under the Americans With Disabilities Act (ADA). The ADA (like Title VII) imposes a statutory cap on the total amount of compensatory and punitive damages for a given claim; in Cline, the statutory maximum was $300,000. See 42 U.S.C. § 1981a(b)(3). Judgment was entered against the defendant on the ADA claim for that maximum amount, consisting of $117,500 for compensatory damages and $182,500 for punitive damages. Cline, 144 F.3d at 300. The defendant challenged the award's size, not on constitutional grounds, but under the common law, and this Court, in an opinion written by Judge Murnaghan, reduced the award under Rule 59 standards. This Court held that both the compensatory and the punitive components of the award were too large -- even though the award did not exceed the statutory maximum. Id. at 304-07.

After cutting the compensatory award, id. at 304-06, the Cline Court examined the punitive award. Id. at 306-07. Observing that "a jury's determination of punitive damages is not factual," but instead is "'an almost unconstrained judgment or policy choice about the severity of the penalty to be

imposed,'" the Court said that the award must be reviewed under the "miscarriage of justice" standard. Id. Significantly, the Court then confirmed that this standard entails an "independent judgment" by the court: "Applying this standard, we must compare our '**independent judgment**' of an appropriate punitive damages award to the award actually given by the jury, **to determine whether the award is so excessive as 'to work an injustice**.'" Id. (emphasis added). The Court then applied that standard with reasoning that should resonate in this case:

> [W]e find the jury's award of $182,500 in punitive damages to be excessive. Although Wal-Mart's actions in demoting Cline are sufficiently egregious to justify an award of punitive damages, and the amount of punitive damages should be sufficient to punish and deter Wal-Mart's conduct, we find that an award in the amount given by the jury would result in a miscarriage of justice. **Taking into consideration the harm suffered by Cline; the degree of Wal-Mart's indifference towards Cline's rights under the ADA; and the policy judgments inherent in any award of punitive damages, we find that $50,000 is the outermost punitive damages award that could be sustained.**

Id. (emphasis added). (That amount, incidentally, was a multiple of five times the amount of compensatory damages allowed on that claim. Id. at 306.) The Court's exercise of its "independent judgment" and its matter-of-fact review for excessiveness in Cline did not entail undue deference to the jury -- even though the jury's award did not exceed the maximum amount permitted by statute.

Cline teaches that even if an award falls within a statutory range, the amount of the award nonetheless may be meaningfully reviewed under Rule 59 to

determine whether the award is excessive. See also Johnson v. Hugo's Skateway, 974 F.2d 1408, 1415 n.6 (4th Cir. 1992) (en banc) ("[w]e cannot say . . . that the mere existence of the cap will in every case, or even in this case, insulate from attack an otherwise arbitrary award of punitive damages").

Lest there be any doubt on this score, it was resolved by the Supreme Court a few years after Cline. In Cooper Industries, supra, the Supreme Court confirmed that ordinary standards governing Rule 59 excessiveness review should apply even to awards falling within a statutory range. Specifically, the Supreme Court recognized that "[a] good many States have enacted statutes that place limits on the permissible size of punitive damages awards," and the Court added:

> **When juries make particular awards within those [statutory] limits, the role of the trial judge** is "to determine whether the jury's verdict is within the confines set by state law, **and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remmittitur should be ordered**."

532 U.S. at 433 (emphasis added). Thus, the Supreme Court recognized that even when a jury imposes a punitive award within a statutory range, it is the district court's responsibility in an excessiveness challenge not merely to determine whether the award falls within the range (which is all the district court below did in assessing *the size* of the award), but also to determine, pursuant to the federal standards developed under Rule 59, whether a new trial should be awarded on the basis that the award, though within the statutory range, is excessive.

* * *

The foregoing authorities show that in a *non*-constitutional challenge to the size of a jury award that is punitive in character, the district court should use its "independent judgment" to determine whether the award is so excessive as to work an injustice -- even if the award happens not to exceed the maximum amount permitted by statute. Superior Form should be read in a way that harmonizes that decision with the foregoing principles, because there is no rational basis for endorsing a *sui generis* hyper-deference standard of review for statutory copyright damages that are punitive in character. Indeed, there is no principled basis for concluding that a punitive award for *copyright infringement* should be evaluated more deferentially than a punitive award for *unlawful discrimination* (under Title VII, the ADA, etc.).[3]

Accordingly, this Court should examine separately each of the three statutory awards in the jury's verdict (Phase I, Phase II, and Phase III) and

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[3] As this Court more recently reiterated in a Title VII case involving a finding of unlawful racial discrimination, "The review of a jury's award of punitive damages is accordingly reviewed '*less deferentially* than are factual findings.'" Bryant v. Aiken Reg. Med. Centers, Inc., 333 F.3d 536, 548 (4th Cir. 2003) (emphasis added). See also Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1354 (7th Cir. 1995) (ordering remittitur of Title VII punitive award even though award was at the statutory cap, because "we do not think [this] case is so egregious that an award at 100 percent of what can legally be awarded ... is appropriate").

determine, in the exercise of this Court's "independent judgment," whether each award is so high as to work an injustice. See Cline, 144 F.3d at 304-06 (after the district court rejected an excessiveness challenge to the ADA awards, this Court reviewed the awards itself, *i.e.*, without remanding, and this Court concluded, after exercising its "independent judgment," that the awards were excessive, and reduced them accordingly). In the course of its (non-constitutional) review, this Court should, at the very least, consider the factors that were considered in Cline. First, as the Cline case instructs, the Court should take "into consideration the harm suffered by [the plaintiff]." Id. at 306-07. Second, the Court should take into consideration "the degree of [Legg Mason's] indifference towards [the plaintiff's] rights under the [Copyright Act]." Id. The latter analysis should consider, among other factors, whether the imposition of vicarious liability on Legg Mason (for Ms. Olszewski's actions) presented a debatable question (given the company's policies against copyright infringement and the swift action it took in removing the intranet posting after being alerted to the copyright violation) and whether reasonable minds could differ in applying the "fair use" defense in this case. "Close calls" on such significant legal questions should tend to suggest a lesser degree of indifference toward the plaintiff's legally protected rights. Once this Court applies the proper standard, there should be no question that the awards are excessive and must be reduced.

II. AN AWARD WITHIN A STATUTORY RANGE IS NOT INSULATED FROM EXCESSIVENESS REVIEW UNDER THE DUE PROCESS CLAUSE

Superior Form cannot be cited as authority on the standard governing in a *constitutional* challenge under the due process clause, because a constitutional challenge was not before the Court in Superior Form and, indeed, the decision in Superior Form pre-dated the Supreme Court's seminal decision in Gore, supra. As Legg Mason demonstrates in its opening brief, it should be beyond question that an award of punitive damages is not insulated from excessiveness review under the due process clause simply because the award does not exceed the maximum amount permitted by statute. There is no basis in law or policy for holding that the size of a punitive award can never violate due process if the award does not exceed the maximum amount permitted by statute. Other courts have applied the Gore guideposts to reduce punitive damage awards under Title VII even though the awards fell within the range permitted by the statute. See, e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 594-98 (5th Cir. 1998) (reducing $100,000 punitive damage award under Title VII even though the jury's award was well below the statutory maximum); Rubinstein v. Administrators of the Tulane Educ. Fund, 218 F.3d 392, 403-09 (5th Cir. 2000) (reducing $75,000 punitive damage award under Title VII even though the jury's award was well below the

statutory maximum). See also Geuss v. Pfizer, Inc., 971 F. Supp. 164, 178-79 (E.D. Pa. 1996) (applying Gore to reduce an ADA punitive award).

This Court should apply the Gore guideposts (as clarified in State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)) to reduce the overwhelmingly excessive punitive awards in this case.[4] This Court can conduct the analysis itself, because the standard of review in a due process challenge to a punitive damage award is de novo. Cooper Industries, supra.

CONCLUSION

The statutory damages in this case are excessive and should be drastically reduced by this Court (that is, in the event the Court does not otherwise vacate the entire judgment based on the evidentiary and other assignments of error advanced by Defendants/Appellants in their appeal).

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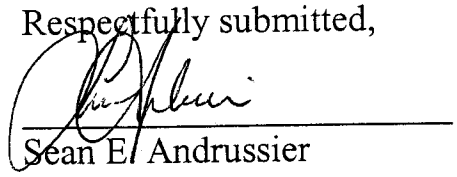
[4] See, e.g., Romo v. Ford Motor Co., 6 Cal.Rptr. 793 (Cal. Ct. App. 2003) (in a case involving physical injury to multiple persons and the death of three individuals, where the defendant was found to have recklessly disregarded the safety and lives of consumers, the appellate court applied the Gore/State Farm analysis itself without remanding to the trial court, determined that the punitive damage award was excessive, and reduced the punitive award by over 90%, to just under $24 million); Daka, Inc. v. McCrae, 839 A.2d 682, 700-01 (D.C. 2003) (ordering remittitur of punitive award under State Farm and holding that "an award in this case that multiplies the sum awarded for compensatory damages by more than a factor of five will bear a very heavy burden of justification").

Dated: July 14, 2004

Respectfully submitted,



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Sean Andrussier

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July 2004, I served this *Amici Curiae* brief on counsel for the parties at the addresses identified below by first class U.S. mail, postage prepaid, and also electronically by sending a PDF file containing the brief to the e-mail addresses shown below:

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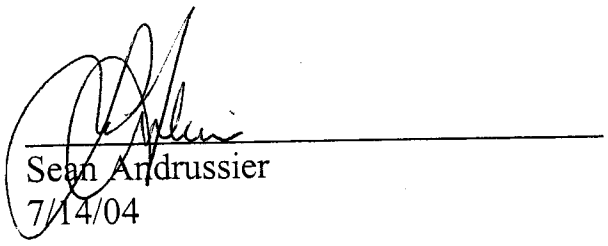

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