No. 21A_____

IN THE

Supreme Court of the United States

FREDRIC N. ESHELMAN

Applicant,

v.

PUMA BIOTECHNOLOGY, INC.

Respondent.

On Application for Stay

EMERGENCY APPLICATION FOR A STAY OF THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT PENDING DISPOSITION OF FORTHCOMING PETITION FOR A WRIT OF CERTIORARI AND REQUEST FOR AN ADMINISTRATIVE STAY

RESPONSE REGARDING ADMINISTRATIVE STAY REQUESTED BY AUGUST 4, 2021

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August 2, 2021

PARTIES TO THE PROCEEDING

Applicant is Dr. Fredric N. Eshelman. Respondent is Puma Biotechnology, Inc.

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To the Honorable Chief Justice John G. Roberts, Jr., as Circuit Justice for the United States Court of Appeals for the Fourth Circuit:

Pursuant to Supreme Court Rule 23, 28 U.S.C. § 2101(f), and the All Writs Act, 28 U.S.C. § 1651, Dr. Fredric N. Eshelman respectfully applies for a stay of the mandate of the United States Court of Appeals for the Fourth Circuit pending the timely filing and disposition of his forthcoming petition for a writ of certiorari and any further proceedings in this Court. Dr. Eshelman also respectfully requests an administrative stay while the Court considers this Application.[1] Dr. Eshelman requests that the Court act on his request for an administrative stay by August 4, 2021, as the Fourth Circuit's mandate will issue on August 5, 2021.

INTRODUCTION

This Application (like Dr. Eshelman's forthcoming petition for a writ of certiorari) arises from the Fourth Circuit's unprecedented vacatur of a jury's compensatory and punitive damages awards to Dr. Eshelman based on a sufficiency-of-the-evidence challenge that, under this Court's precedent—as extended and applied by no fewer than eight Circuit Courts—Defendant-Respondent Puma was foreclosed from making because Puma chose not to move for judgment as a matter of law under Rule 50 before the district court. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400-05 (2006). And this Application (like Dr. Eshelman's forthcoming petition) further arises from the Fourth Circuit's vacatur of the jury's damages awards

[1] Respondent Puma Biotechnology, Inc. opposes Dr. Eshelman's application for a stay and opposes his request for an administrative stay to allow this Court time to consider his application.

based on a transparent and constitutionally impermissible substitution of its own judgment for the jury's judgment and the district court's broad discretion, in derogation of Dr. Eshelman's Seventh Amendment rights. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438-39 (1996).

Following a five-day trial before The Honorable Judge James C. Dever, III, in which a jury unanimously found Puma liable for defaming Dr. Eshelman and awarded Dr. Eshelman $15.85 million in compensatory damages and $6.5 million in punitive damages, the Eastern District of North Carolina entered judgment for Dr. Eshelman. (DC Dkt. 395.) *Puma chose not to move for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) or Rule 50(b)*; following entry of judgment, Puma moved only under Rule 59 for a new trial or, in the alternative, remittitur. (DC Dkts. 416, 436.)

Judge Dever entered a 44-page opinion denying Puma's Rule 59 motion. (App. 1a-44a.) In his opinion, Judge Dever surveyed "the very unique facts of this case," including Puma's CEO's "disastrous" testimony. (*Id.* at 30a-34a.) The court further "recite[d] the 146 stipulated facts" that the jury received because they "provide necessary background information and help to explain the jury's verdict." (*Id.* at 10a.) With regard to Puma's challenge to the sufficiency of the evidence supporting the jury's damage awards, the court held that Puma failed to "cit[e] ***any*** persuasive factor to support its argument." (*Id.* at 30a.)[2] Explaining the testimony that the jury saw,

[2] Emphasis added unless otherwise noted.

the district court made the first-hand observation that "[y]ou needed to see it to understand it completely." (*Id.* at 34a.)

The court further explained that even had evidence of actual harm been lacking (and it was not), North Carolina law "presumes that damages result from the publication of a libelous *per se* statement" such that "a plaintiff is not required to present evidence 'as to any resulting injury.'" (*Id.* at 29a (collecting cases).) And the court explained that, under this Court's precedent, "[j]uries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred." (*Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974)). Puma appealed, contending that there was insufficient evidence to support the jury's damages awards.

The Fourth Circuit affirmed the district court's liability judgment for Dr. Eshelman and against Puma but vacated the damages judgment. (App. 45a-61a.) In so doing, the court, in a footnote, rejected Dr. Eshelman's argument that, under *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006)—in which this Court held that a party's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence"—Puma waived its sufficiency-of-the-evidence challenge to the jury's damages awards by choosing not to move for judgment as a matter of law under Rule 50. (App. 54a n.2.) The court then proceeded to vacate the jury's damages awards as supported by insufficient evidence and ordered a new trial on remand, without offering remittitur. In so doing, the court did not even mention (much less properly review for just abuse of discretion) the district court's

detailed explanation of "the very unique facts of this case," its first-hand observations about Puma's "disastrous" testimony, its admonition about the trial testimony that "[y]ou needed to see it to understand it completely," or its explanation of the types of evidence that juries may consider under North Carolina law when determining damages and conclusion that, as to each, Puma failed to "cit[e] any persuasive factor to support its argument." (*Id.* at 30a, 34a.) The Fourth Circuit ignored all of that, and thereby strayed from the required abuse of discretion review and infringed Dr. Eshelman's Seventh Amendment rights.

As explained below, there is not just "a reasonable probability" but a substantial likelihood that this Court will grant Dr. Eshelman's forthcoming petition for a writ of certiorari. Dr. Eshelman's petition will ask this Court to resolve an ***eight-to-three Circuit split*** on whether, under *Unitherm* (which involved a sufficiency-of-the-evidence challenge to *liability*) a party's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence" supporting *a damages award*. Eight Circuits have held that *Unitherm* forecloses such a challenge[3] and, following the Fourth Circuit decision below, three Circuits have held that it does

[3] *See, e.g.*, *RFF Fam. P'ship, LP v. Ross*, 814 F.3d 520, 536 (1st Cir. 2016); *Gleason v. Norwest Mortg., Inc.*, 253 F. App'x 198, 202 (3d Cir. 2007); *OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*, 841 F.3d 669, 680 (5th Cir. 2016); *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 804 (7th Cir. 2016); *Bennett v. Nucor Corp.*, 656 F.3d 802, 813 (8th Cir. 2011); *Noyes v. Kelly Servs., Inc.*, 349 F. App'x 185, 188 (9th Cir. 2009); *Crew Tile Distrib., Inc. v. Porcelanosa L.A., Inc.*, 763 F. App'x 787, 800 (10th Cir. 2019); *Rosenberg v. DVI Receivables XIV, LLC*, 818 F.3d 1283, 1292 (11th Cir. 2016).

not.[4] Moreover, Dr. Eshelman's petition will request resolution of that deep, entrenched Circuit split in a challenge that directly implicates his "fundamental and sacred"[5] Seventh Amendment rights to have a jury decide facts supporting his damages awards—rights that the Fourth Circuit infringed by, as its opinion make clear, substituting its own judgment for the jury's judgment and the broad discretion of the district court. And Dr. Eshelman's petition will present these questions in the context of the type of case—a defamation case—in which multiple Justices have expressed interest in granting certiorari to limit appellate review of a jury's findings.

As also explained below, because of *Unitherm*'s clear and unambiguous holding, its grounding in over half a century of this Court's Rule 50 jurisprudence, the fact that its logical and jurisprudential underpinnings apply with equal force to sufficiency-of-the-evidence challenges to damages awards, and the fact that eight Circuit Courts have applied *Unitherm* to foreclose sufficiency-of-the-evidence challenges to damages when a party failed to file a Rule 50 motion in the district court, there is at least a "fair prospect" that this Court will reverse the Fourth Circuit's decision below. And in light of this Court's repeated admonition that the Seventh Amendment requires that "primary responsibility for" reviewing damages awards for compliance with the law be "lodge[d] in the district court, not the court of appeals," with the district court's judgment reviewed only "under an abuse-of-discretion standard," *Gasperini*, 518 U.S. at 438, there is at least a "fair prospect" that even if this Court were to resolve the

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[4] *Peterson v. W. TN Expediting, Inc.*, --- F. App'x ----, 2021 WL 1625226, at *4 (6th Cir. Apr. 27, 2021); *Medisim Ltd. v. BestMed, LLC*, 758 F.3d 1352, 1359 (Fed. Cir. 2014) (applying Second Circuit law); App. 54a n.2.

[5] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 352 (1979).

Circuit split over *Unitherm* against Dr. Eshelman and the majority of Circuits, this Court would still reverse the Fourth Circuit's judgment on the merits.

Finally, as explained below, Dr. Eshelman will be irreparably harmed if this Court does not stay the Fourth Circuit's mandate. Dr. Eshelman's damages judgment against Puma is secured by a $29.5 million supersedeas bond that Puma has argued is released upon issuance of the Fourth Circuit's mandate,[6] and Puma's most recent Quarterly Report (Form 10-Q) indicates that it is on the brink of insolvency, with assets less liabilities of just $16.4 million—far less than Dr. Eshelman's judgment of $22.5 million plus interest—substantially all of its personal property pledged as security to loans, and at least $67 million in debt obligations maturing by the end of this year alone.[7] Moreover, Puma was recently found liable for securities fraud and is facing damages that it estimates as high as $51.4 million—but for which it has allocated an "accrued legal verdict expense" of just $24.9 million.[8] Thus, if Puma's supersedeas bond is released (as Puma has argued happens upon issuance of the Fourth Circuit's mandate) and Dr. Eshelman prevails on his petition for certiorari, he will be irreparably harmed. *See, e.g.*, *Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301,

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[6] Puma's Mot. to Approve Supersedeas Bond & Stay Execution of Judgment Pending Disposition of Post-Trial Mots. & Appeal (Apr. 22, 2019) (DC Dkt. 420); Order Granting Mot. to Approve Supersedeas Bond (May 9, 2019) (DC Dkt. 434) ("Order Approving Puma's Bond").

[7] Puma Biotechnology, Inc., Quarterly Report (Form 10-Q) at 20, 22, 25 (May 6, 2021) ("Puma March 2021 Quarterly Report"), *available at* https://s24.q4cdn.com/201644000/files/doc_financials/2021/q1/b4b1d01c-af87-4242-9fbb-ec4ac34f6eb5.pdf.

[8] *Hsu v. Puma Biotech., Inc.*, No. 15-cv-865 (C.D. Cal.); Puma March 2021 Quarterly Report at 21, 37.

1304 (2010) (Scalia, J., in chambers) (staying mandate and finding irreparable harm where money "cannot be recouped"); *Mori v. Int'l Bhd. of Boilermakers*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers) (staying mandate and finding irreparable harm where money "would be very difficult to recover"); *see also Books v. City of Elkhart*, 239 F.3d 826, 829 (7th Cir. 2001) (Ripple, J., in chambers) (staying mandate even where movant "presents a weak case for a grant of certiorari" because of irreparable harm absent a stay).

OPINIONS BELOW

The district court (Dever, J.) entered judgment on the jury's verdict for Dr. Eshelman and against Puma on March 25, 2019. (DC Dkt. 395.) The district court entered its 44-page Opinion and Order denying Puma's Rule 59 motion on March 2, 2020. (App. 1a-44a.) The district court's opinion is reported at 2020 WL 1031471.

The Fourth Circuit issued its opinion and judgment affirming the district court's liability judgment for Dr. Eshelman and against Puma but vacating the damages judgment on June 23, 2021. (App. 45a-61a.) The Fourth Circuit's opinion is reported at 2 F.4th 276.

The Fourth Circuit denied Dr. Eshelman's petition for *en banc* hearing or panel rehearing—in which he raised the deep, entrenched Circuit split over this Court's decision in *Unitherm*—in a one-sentence Order. (App. 63a.) Dr. Eshelman moved the Fourth Circuit to stay issuance of its mandate pending disposition of his forthcoming petition for certiorari, and the Fourth Circuit called for a response to his motion from Puma (COA Dkt. 56), but the court then denied Dr. Eshelman's motion in a one-

sentence order before Puma submitted its response. (App. 64a.) This Application follows.

JURISDICTION

This Court has jurisdiction to review the Fourth Circuit's order denying a stay under Supreme Court Rule 23, 28 U.S.C. § 2101(f), and 28 U.S.C. § 1651.

STATEMENT OF THE CASE

Following a five-day trial, an eleven-member jury, after deliberating eleven hours, unanimously found that Puma Biotechnology defamed Dr. Fredric Eshelman by falsely accusing him of fraud and being replaced as CEO of the company he founded as a result—in an Investor Presentation Puma broadly distributed to shareholders, industry analysts, the SEC, and "on the internet where it can easily be reviewed, re-published, and called up in electronic searches" forever. (App. 27a.)

The jury heard from numerous witnesses, received voluminous exhibits, and considered a whopping 146 stipulated facts. (*Id.* at 3a, 30a.) "The evidence showed that Eshleman built an extraordinary reputation over a 40-year period," and "[t]o be accused of fraud" went "to the heart of [his] career." (*Id.* at 30a, COA Dkt. 17 at 1356:10-19.) Based on the evidence, the jury awarded Dr. Eshelman $15.85 million in compensatory damages and $6.5 million in punitive damages. (App. 4a.)

Puma did not file any Rule 50 motion. Instead, Puma chose to only file, after entry of judgment, a Rule 59 motion for a new trial or, in the alternative, remittitur. (*See* DC Dkt. 416.) In addition to raising various challenges to liability,

Puma contended that there was insufficient evidence to sustain the jury's compensatory and punitive damages awards.

In a 44-page opinion, the district court (Dever, J.) denied Puma's Rule 59 motion. With regard to Puma's challenge to the sufficiency of the evidence to sustain the jury's damages verdict, the court explained that "the very unique facts of this case, including the 146 stipulations and the extensive trial record" were more than sufficient to sustain the jury's damages awards. (App. 30a.) The district court "recite[d] the 146 stipulated facts" that the jury received because they "provide necessary background information and help to explain the jury's verdict" and discussed in detail the evidence in the trial record. (*Id.* at 10a-28a.) Among other things, the district court specifically cited Puma's CEO's "disastrous" testimony, and, explaining based on its first-hand observations the testimony that the jury saw, the court admonished that "[y]ou needed to see it to understand it completely." (*Id.* at 34a.) After setting forth the types of evidence that juries may consider under North Carolina law when determining damages, the court explained that Puma failed to "cit[e] any persuasive factor to support its argument." (*Id.* at 30a.) Ultimately, the district court concluded:

> The jury deliberated for over eleven hours before determining liability and the amount of Eshelman's [] damages, and *Puma does not raise a persuasive argument* to set aside the jury's verdict. *In fact, this court could not locate a single case applying North Carolina law in which a trial court remitted a jury's award of presumed damages or a North Carolina appellate court reduced such an award.* Accordingly, in light of the stipulations, the evidence produced at trial, the credibility of the witnesses, and North Carolina law, the court declines to set aside the jury's [] damages award[s].

(App. 31a.)

Puma's appeal launched a broadside attack on the jury's considered verdict and the district court's thorough opinion refusing to set it aside by renewing Puma's sufficiency-of-the-evidence challenge, as the Fourth Circuit panel recognized: Puma contended that "the jury awarded excessive damages that the evidence could not justify." (*Id.* at 55a.) Puma based its sufficiency-of-the-evidence challenge on its contention that there was insufficient evidence that Dr. Eshelman suffered *pecuniary* harm—although ***none*** is required for presumed damages (even a "substantial" amount of damages) under North Carolina law and this Court's precedent.[9] Puma ignored all other cognizable defamation damages it had agreed that the court and jury must consider—and invited the Fourth Circuit to do the same.

The Fourth Circuit panel accepted Puma's invitation, and in so doing both committed grave error and deepened a clear Circuit split. ***First***, the panel, in a footnote, rejected Dr. Eshelman's argument that, under *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006), Puma waived its sufficiency-of-the-evidence challenge to the jury's damages awards by choosing not to move for judgment

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

as a matter of law under Rule 50. (App. 10a n.2.) In so doing, the panel disregarded this Court's holding in *Unitherm* (in the context of a sufficiency-of-the-evidence challenge to liability) that a party's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence," 546 U.S. at 404, and the holdings of no fewer than eight Circuit Courts that have applied *Unitherm*'s holding to foreclose sufficiency-of-the-evidence challenges to damages awards when a party chooses not to (or fails to) file a Rule 50 motion before the district court. (*See supra* n.3; *infra* Part I.) The Fourth Circuit became the third Circuit to hold *Unitherm* inapplicable to such a challenge. (*See supra* n.4; *infra* Part I.)

Worse still, the Fourth Circuit panel then proceeded to substitute its own judgment for the jury's judgment and the district court's broad discretion, and vacated the jury's damages awards—without even attempting to address the overwhelming majority of the damages evidence presented to the jury and without considering the district court's 44-page opinion upholding the jury's verdict, notwithstanding the "abuse of discretion" standard of review mandated by the Seventh Amendment. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279-80 & nn.25-26 (1989). And the panel did so while ignoring North Carolina law and Supreme Court precedent that "substantial" damages are appropriate for defamation *per se* even where (unlike here) there is "no proof" of actual harm. (*See* cases cited *supra* n.8.)

In light of the clear Circuit split that the Fourth Circuit opinion below deepened and the court's infringement of Dr. Eshelman's "fundamental and sacred"[10] Seventh Amendment rights to have a jury decide facts supporting his damages award—with the jury's findings reviewed only by the district court under an abuse-of-discretion standard and the district court's order refusing to set aside the jury's verdict reviewed by the circuit court only under an abuse-of-discretion standard, *Gasperini*, 518 U.S. at 438—Dr. Eshelman petitioned the Fourth Circuit for *en banc* hearing or, alternatively, panel rehearing. But the court denied his petition.

Dr. Eshelman then moved the Fourth Circuit to at least stay its mandate to allow this Court to consider his forthcoming petition for certiorari, which will ask this Court to resolve the eight-to-three Circuit split on whether, under *Unitherm*, a party's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence" supporting *a damages award*—a split on which the Fourth Circuit is now in the distinct minority—and will ask this Court to uphold Dr. Eshelman's Seventh Amendment rights. But the court denied his motion. This Application follows.

STANDARDS FOR GRANTING RELIEF

To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show "(1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers)

[10] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 352 (1979).

(granting application to stay Fourth Circuit's mandate). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

REASONS FOR GRANTING THE STAY APPLICATION

The Court should stay the Fourth Circuit's mandate pending the filing and disposition of Dr. Eshelman's forthcoming petition for certiorari because (1) Dr. Eshelman's petition will request resolution of a deep, entrenched Circuit split in a challenge directly implicating his Seventh Amendment rights such that there is at least "a reasonable probability" that this Court will grant certiorari; (2) the panel decision below is in the distinct minority of that Circuit split and this Court's reasoning in *Unitherm* fully supports the conclusion that a party's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence" applies to sufficiency-of-the-evidence challenges to damages awards—and even on the merits, the Fourth Circuit's opinion makes clear that it strayed from the required abuse-of-discretion standard of review, thereby infringing Dr. Eshelman's Seventh Amendment rights; and (3) there is not just "a likelihood" that Dr. Eshelman will suffer irreparable harm absent a stay (which is all that is required), but a certainty that he will be irreparably harmed if his application for a stay of the Fourth Circuit's mandate is denied given Puma's extraordinarily weak financial position. *See King*, 567 U.S. at 1302.

I. There Is a Reasonable Probability That This Court Will Grant Dr. Eshelman's Forthcoming Petition for a Writ of Certiorari.

In determining whether there is a reasonable probability that the Court will grant certiorari, the Court considers whether the Circuit Court decision below is "in conflict with the decision of another [Circuit Court] on the same important matter" or "has decided an important question of federal law ... in a way that conflicts with relevant decisions of this Court," or "an exercise of this Court's supervisory power" is warranted. Supreme Ct. R. 10; *accord Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction ... is to resolve conflicts among the United States courts of appeals[.]").

This condition is easily satisfied here because Dr. Eshelman's forthcoming petition for certiorari will present important questions of federal law on which there is a deep, entrenched Circuit split and on which the Fourth Circuit's decision is in the distinct minority and conflicts with a decision of this Court.

In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), this Court answered the question whether a defendant who failed to (or chose not to) file a motion for judgment as a matter of law under Rule 50 may challenge the sufficiency of the evidence sustaining an adverse jury verdict on appeal. The Court expressly held that a defendant may not: a party's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence." *Id.* at 404.

The Court based its holding on the purposes of Rule 50 and the ends that the rule serves. The Court explained:

> Federal Rule of Civil Procedure 50 sets forth the procedural requirements for challenging the sufficiency of the evidence in a civil jury trial and establishes two stages for such challenges—prior to submission of the case to the jury, and after the verdict and entry of judgment. Rule 50(a) allows a party to challenge the sufficiency of the evidence prior to submission of the case to the jury.... Rule 50(b) ... sets forth the procedural requirements for renewing a sufficiency of the evidence challenge after the jury verdict and entry of judgment.

Id. at 399-400. Thus, the Court explained, "the 'requirement of a timely application for judgment after verdict is not an idle motion' because it 'is ... an essential part of the rule, firmly grounded in principles of fairness." *Id.* at 401 (quoting *Johnson v. N.Y., N.H. & H.R. Co.*, 344 U.S. 48, 53 (1952)).

Emphasizing the necessity of filing a Rule 50 motion in the district court if a party wants to subsequently challenge the judgment on appeal, the Court surveyed its Rule 50 jurisprudence[11] and concluded:

> this Court's observations about *the necessity of a postverdict motion under Rule 50 (b)*, and the benefits of the district court's input at that stage, *apply with equal force whether a party is seeking judgment as a matter of law or simply a new trial.*

Id. at 402. The Court then concluded, in no uncertain terms:

> [A] party may only pursue on appeal a particular avenue of relief available under Rule 50 (b), namely, the entry of judgment *or a new trial,*

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[11] The Court reviewed its prior holdings that "'[i]n the absence of [a Rule 50(b)] motion' an 'appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand,'" *Unitherm*, 546 U.S. at 400-01 (quoting *Cone v. W.V. Pulp & Paper Co.*, 330 U.S. 212, 218 (1947); and that "a party's failure to file a Rule 50(b) motion deprives the appellate court of the power to order the entry of judgment in favor of that party where the district court directed the jury's verdict, and where the district court expressly reserved a party's preverdict motion for a directed verdict and then denied that motion after the verdict was returned," *id.* at 401 (citing *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948), and *Johnson v. N.Y., N.H. & H.R. Co.*, 344 U.S. 48 (1952)).

> when that party has complied with the Rule's filing requirements by requesting that particular relief below.

Ibid. (emphasis in original). In so holding, the Court expressly rejected the dissent's suggestion that "courts of appeals [may] consider the sufficiency of the evidence underlying a civil jury verdict notwithstanding a party's failure to comply with Rule 50" by some other means as "foreclosed by authority of this Court." *Id.* at 402 n.4.

The *Unitherm* Court, to be sure, only had occasion to address a sufficiency-of-the-evidence challenge to a *liability* verdict, not the question of whether the same standard applies to a sufficiency-of-the-evidence challenge to a *damages* award. Nevertheless, no fewer than eight Circuits have interpreted *Unitherm* to foreclose sufficiency-of-the-evidence challenges *to damages awards* if the defendant did not challenge the sufficiency of that evidence in a Rule 50 motion in the district court, including in cases where the defendant moved for a new trial under Rule 59:

- *RFF Fam. P'ship, LP v. Ross*, 814 F.3d 520, 536-37 (1st Cir. 2016) (citing *Unitherm* and refusing to consider argument that "there was no evidence before the jury that would allow the jury to return a verdict of less than $866,000 in damages" because that argument was not made in party's Rule 50 motion);

- *Gleason v. Norwest Mortg., Inc.*, 253 F. App'x 198, 202 (3d Cir. 2007) (citing *Unitherm* and refusing to consider argument that "the evidence presented at trial was insufficient as a matter of law for the jury to find that [defendant] suffered any loss" even though defendant made a Rule 59 motion; party is "precluded from making this [sufficiency] challenge due to its failure to file a Rule 50(b) motion");

- *OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*, 841 F.3d 669, 676, 680 (5th Cir. 2016) (citing *Unitherm* and refusing to consider "challenge[] [to] the jury's award of $8 million" that "there was no competent evidence for the jury to come to this conclusion" even though defendant made Rule 50(b) and Rule 59 motions, because defendant did not file a Rule 50(a) motion);

- *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 804 (7th Cir. 2016) (citing *Unitherm* and refusing to consider "challenge to the sufficiency of the evidence" supporting damages award because defendant "failed to make a proper motion under [Rule] 50(a)");

- *Bennett v. Nucor Corp.*, 656 F.3d 802, 813 (8th Cir. 2011) (citing *Unitherm* and refusing to consider "argument [] that there was insufficient evidence to support the jury's award of punitive damages" because defendant "failed to" file a Rule 50 Motion; as such, "we are without power to disturb the district court's entry of judgment on the jury's punitive damages award");

- *Noyes v. Kelly Servs., Inc.*, 349 F. App'x 185, 188 (9th Cir. 2009) (citing *Unitherm* and refusing to consider defendant's "challenge[] [to] the sufficiency of the evidence to support the amount of compensatory damages" because defendant did not make sufficiency challenge in a Rule 50 motion);

- *Crew Tile Distrib., Inc. v. Porcelanosa L.A., Inc.*, 763 F. App'x 787, 800 (10th Cir. 2019) (citing *Unitherm* and refusing to consider defendant's argument that "[plaintiff] did not offer sufficient evidence of damages" because "a party may not raise a sufficiency of the evidence claim on appeal without having [made it] in a Rule 50 (b) motion"); and

- *Rosenberg v. DVI Receivables XIV, LLC*, 818 F.3d 1283, 1292 (11th Cir. 2016) (citing *Unitherm* and refusing to consider defendant's "challenge [to] the sufficiency of the evidence presented at trial" supporting "damages award" because defendant failed to make a "Rule 50(b) motion, despite every opportunity to do so").

By contrast, the Sixth Circuit and the Federal Circuit (applying Second Circuit law) have held that although a party who fails to challenge the sufficiency of the evidence in a Rule 50(a) motion may be precluded from challenging it in a Rule 50(b) motion, that party is not foreclosed from obtaining a new trial based on a sufficiency-of-the-evidence challenge and the Circuit court is not foreclosed from reviewing that argument. *See Peterson v. W. TN Expediting, Inc.*, --- F. App'x ----, 2021 WL 1625226, at *2 n.1 (6th Cir. Apr. 27, 2021) ("If [defendant] thought that [plaintiff] had not provided enough evidence to support ... an award of punitive damages, it should have

moved for judgment as a matter of law before the case was sent to a jury. Since it did not, its only option after trial (and on appeal) was to move for a new trial."); *Medisim Ltd. v. BestMed, LLC*, 758 F.3d 1352, 1357 (Fed. Cir. 2014) (citing *Unitherm* and holding that defendant's failure to challenge the sufficiency of the evidence under Rule 50(a) precluded its sufficiency challenge under Rule 50(b) (and entry of judgment thereon) but did not preclude grant of new trial based on sufficiency-of-the-evidence challenge or review thereof).

The Fourth Circuit, in its decision below, joined the Sixth Circuit and the Federal Circuit (applying Second Circuit law) on the minority end of this well-defined Circuit split, thus making a strong case for certiorari review to resolve this critical issue of federal law. *See Braxton*, 500 U.S. at 347.

Moreover, Dr. Eshelman's petition will request resolution of this deep Circuit split in a challenge that directly implicates his "fundamental and sacred" Seventh Amendment rights. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 352 (1979). This Court has held that "[w]ithin the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for" reviewing damages awards for compliance with the law, and further explained that "[t]rial judges have the 'unique opportunity to consider the evidence in the living courtroom context,' while appellate judges see only the 'cold paper record.'" *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996). Thus, this Court has held that Seventh Amendment mandates that the Circuit Courts may only "review the district court's determination [refusing to vacate a jury's damages

award] under an abuse-of-discretion standard," with "the benefit of every doubt [given] to the judgment of the trial judge." *Id.* at 437-39.

The Fourth Circuit panel below strayed from that limited scope of review—as reflected in its opinion that ignored the district court's 44-page opinion denying Puma's Rule 59 Motion. As explained above, the district court's opinion detailed the "the very unique facts of this case, including the 146 stipulations and the extensive trial record" that "provide necessary background information and help to explain the jury's verdict"—and laid out the district court's first-hand observations of Puma's "disastrous" testimony, admonishing that "[y]ou needed to see it to understand it completely." (App. 10a, 30a, 34a.) The district court's opinion likewise surveyed the types of evidence that juries may consider under North Carolina law when determining damages and concluded, as to each of them, that Puma failed to "cit[e] any persuasive factor to support its argument." (*Id.* at 30a.)

The Fourth Circuit ignored all of that. It did not review the district court's opinion upholding the jury's damages awards at all, much less only review it for abuse of discretion. The result is the gross infringement of Dr. Eshelman's Seventh Amendment right to have the jury determine the facts and decide the damages to which he is entitled—a constitutional issue ripe for this Court's review.

Finally, and further bolstering the case for certiorari, Dr. Eshelman presents this clear Circuit split and this constitutional question regarding appellate review of a jury's award in the very type of case—a defamation case—in which multiple Justices have expressed an interest in limiting appellate review of a jury's findings. *See, e.g.*,

Berisha v. Lawson, 141 S. Ct. 2424, 2428-29 (2021) (Gorsuch, J., dissenting from denial of certiorari); *id.* at 2424-25 (Thomas, J., dissenting from denial of certiorari); *see also* Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 L. & Soc. Inquiry 197, 205-09 (1993). As Justice Gorsuch has decried:

> For those rare plaintiffs able to secure a favorable [defamation] verdict, nearly one out of five today will have their awards eliminated in post-trial motions practice. And any verdict that manages to make it past all that is still likely to be reversed on appeal. Perhaps in part because this Court's jurisprudence has been understood to invite appellate courts to engage in the unusual practice of revisiting a jury's factual determinations *de novo*, it appears just 1 of every 10 jury awards now survives appeal.

Berisha, 141 S. Ct. at 2428 (Gorsuch, J., dissenting from denial of certiorari).

In sum, there is at least "a reasonable probability" that this Court will grant Dr. Eshelman's forthcoming petition for a writ of certiorari.

II. There Is At Least a "Fair Prospect" That This Court Will Reverse the Fourth Circuit's Judgment and Reinstate the District Court's Judgment on the Jury's Verdict.

Dr. Eshelman's Application for a stay should also be granted because there is at least a "fair prospect" that this Court will reverse the Fourth Circuit decision below (and reinstate the district court's judgment on the jury's verdict). *See King*, 567 U.S. at 1302. Notably, to satisfy this condition, an applicant need not show a certainty or even probability of success—just a "not entirely insubstantial" or "fair" prospect of reversal. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). And an applicant can make that showing even where the panel decision below was unanimous and "[n]o judge ... requested a vote for rehearing en banc." *United States*

ex rel. Chandler v. Cook Cty., 282 F.3d 448, 450 (7th Cir. 2002) (Ripple, J., in chambers).

As explained above, this Court's holding in *Unitherm* was clear and unambiguous: a party's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence." 546 U.S. at 404. And it was expressly grounded in over half a century of this Court's Rule 50 jurisprudence. Moreover, the logic and jurisprudential underpinning of *Unitherm*'s holding—which the Court made in the context of a challenge to the sufficiency of the evidence regarding liability (the only question presented in the case before the Court)—apply with equal force to challenges to the sufficiency of the evidence supporting damages awards. Indeed, eight Circuit Courts have recognized exactly that by holding that *Unitherm* forecloses sufficiency-of-the-evidence challenges to damages awards where a party did not raise that challenge in a Rule 50 motion. (*See supra* Part I.) Here, again, Puma chose not to file any Rule 50 motion.

There is certainly at least a "fair prospect" that this Court would take the logical step of applying its *Unitherm* holding that a party's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence," 546 U.S. at 404, to challenges to the sufficiency of the evidence of damages—in full accord with the logic and jurisprudence underlying *Unitherm* and just as the majority of Circuit Courts have done.

Likewise, this Court has recognized that a person's Seventh Amendment rights are "so fundamental and sacred" that they "should be jealously guarded by the courts,"

Parklane Hosiery, 439 U.S. at 352, and admonished that the Seventh Amendment requires that "primary responsibility for" reviewing damages awards for compliance with the law be "lodge[d] in the district court, not the court of appeals," with the district court's judgment reviewed only "under an abuse-of-discretion standard" with "the benefit of every doubt [given] to the judgment of the trial judge," *Gasperini*, 518 U.S. at 438-39. Yet review of the Fourth Circuit opinion below makes plain that that court strayed far from that limited scope of review. Accordingly, there is certainly at least a "fair prospect" that even if this Court resolved the Circuit split over *Unitherm* against Dr. Eshelman and the majority of Circuits, this Court would still reverse the Fourth Circuit's judgment on the merits.

III. Dr. Eshelman Will Be Irreparably Harmed Absent a Stay—and the Equities Further Favor a Stay.

Finally, there is not just a "*likelihood* of irreparable harm [to Dr. Eshleman] if the [Fourth Circuit's mandate] is not stayed"—which is all that is required for this condition to be satisfied, *Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)—but a certainty that Dr. Eshelman will be irreparably harmed if the Fourth Circuit's mandate is not stayed pending decision on his forthcoming petition for a writ of certiorari. And notably, a strong showing of a likelihood of irreparable harm can justify staying the mandate even where, unlike here, an applicant "presents a weak case for a grant of certiorari." *Books v. City of Elkhart*, 239 F.3d 826, 829 (7th Cir. 2001) (Ripple, J., in chambers). In a "close case," the Court must "balance the

equities" and "explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker*, 448 U.S. at 1308.

Here, Dr. Eshelman will certainly be irreparably harmed if the Court does not stay the Fourth Circuit's mandate because Dr. Eshelman's damages judgment against Puma is secured by Puma's $29.5 million supersedeas bond that Puma has argued is released upon issuance of the Fourth Circuit's mandate, and Puma's recent SEC filings indicate that it is in such dire financial condition that if its supersedeas bond is released and Dr. Eshelman's damages judgment is then reinstated, Dr. Eshelman will be unable to collect on that judgment. *E.g.*, *Phillip Morris*, 561 U.S. at 1304 (staying mandate and finding irreparable harm where money "cannot be recouped"); *Mori v. Int'l Bhd. of Boilermakers*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers) (staying mandate and finding irreparable harm where money "would be very difficult to recover").

After Dr. Eshelman obtained the jury verdict and judgment in his favor for $22.85 million (plus over $4 million in prejudgment interest and costs plus post-judgment interest),[12] Puma was required to post a supersedeas bond in the amount of $29.5 million (roughly 110% of the judgment plus interest) to stay execution of that judgment.[13] According to the district court's order approving that bond, "Puma's

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[12] Judgment (May 25, 2019) (DC Dkt. 395); Order (Mar. 2, 2020) (DC Dkt. 445) (amending judgment to add $3,994,646.58 in prejudgment interest and $205,903.55 in costs).

[13] Puma's Mot. to Approve Supersedeas Bond & Stay Execution of Judgment Pending Disposition of Post-Trial Mots. & Appeal (Apr. 22,2019) (DC Dkt. 420)

; Order Granting Mot. to Approve Supersedeas Bond (May 9, 2019) (DC Dkt. 434) ("Order Approving Puma's Bond").

supersedeas bond" was "approved as security for the judgment pending disposition of any post-trial motions, as well as disposition of this case on appeal."[14] Puma has already argued, in moving for costs associated with that bond,[15] that even though the Fourth Circuit affirmed Dr. Eshelman's liability judgment against it, its supersedeas bond will release upon vacatur of Dr. Eshelman's $22.85+ million damages judgment, which will occur upon issuance of the Fourth Circuit's mandate.

Release of Puma's supersedeas bond will irreparably harm Dr. Eshelman because, as demonstrated by Puma's public filings, Puma's financial situation has deteriorated so substantially since Dr. Eshelman obtained his judgment against it that Puma now appears on the brink of insolvency and will be unable to pay Dr. Eshelman's judgment if its bond is released and that judgment is reinstated. Puma's 2020 Annual Report (Form 10-K), filed March 31, 2021, paints a grave picture of Puma's finances and ability to pay Dr. Eshelman's judgment if its supersedeas bond were to be released.[16] Puma's 2020 Annual Report discloses that, among other things, Puma has:

- Total liabilities of $250.2 million with assets of just $244.2 million for total equity of *negative $6 million*;[17]
- An operating loss of $30.4 million and a net loss of $60 million;[18]

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[14] Order Approving Puma's Bond ¶1.

[15] Puma Biotechnology, Inc.'s Motion for Allocation of Costs Under Rule 39(a)(4) at 2-3 (July 29, 2021) (COA Dkt. 58).

[16] Puma Biotechnology, Inc., Annual Report (Form 10-K) (Mar. 31, 2021) ("Puma 2020 Annual Report"), *available at* https://www.sec.gov/ix?doc=/Archives/edgar/data/1401667/000156459021009840/pbyi-10k_20201231.htm.

[17] *Id.* at 62.

- Outstanding debt and lease obligations of over $156 million, of which over $28.5 million come due this year and an additional nearly $90 million come due in the next one to three years;[19] and

- An outstanding securities fraud judgment against it for which Puma estimates damages between $28.4 and $51.4 million.[20]

Puma's most recent Quarterly Report (Form 10-Q) paints a similarly grave picture of Puma's finances and ability to pay Dr. Eshelman's judgment if its supersedeas bond were to be released.[21] Puma's Quarterly Report discloses that, among other things, Puma has:

- Total assets less liabilities of just $16.4 million (far less than the amount of Dr. Eshelman's judgment);[22]

- "*[I]ncurred significant operating losses* since its inception" and "believes that it will *continue to incur net losses* and *may incur negative net cash flows* from operating activities through the drug development process and global commercialization";[23]

- Has pledged "substantially all of [its] personal property other than [its] intellectual property" and "65% of [its] issued and outstanding capital stock of [its] subsidiaries Puma Biotechnology Ltd. and Puma Biotechnology B.V." to secure a $100 million credit facility (at an "effective interest rate" of "12.75%") under which "[n]o additional money remains available to [it]";[24]

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[18] *Id.*

[19] *Id.* at 71.

[20] *Hsu v. Puma Biotech., Inc.*, No. 15-cv-865 (C.D. Cal.); Puma 2020 Annual Report at 58.

[21] Puma Biotechnology, Inc., Quarterly Report (Form 10-Q) (May 6, 2021), *available at* https://s24.q4cdn.com/201644000/files/doc_financials/2021/q1/b4b1d01c-af87-4242-9fbb-ec4ac34f6eb5.pdf.

[22] *Id.* at 2.

[23] *Id.* at 7.

[24] *Id.* at 21-22, 33-34.

- A contractual obligation under a licensing agreement with Pfizer "to make substantial payments [to Pfizer] upon the achievement of certain milestones totaling approximately $187.5 million if all such milestones are achieved";[25]

- At least $67 million in debt obligations maturing by the end of this year alone;[26] and

- A still-outstanding securities fraud judgment against it for which Puma estimates damages between $24.9 and $51.4 million.[27]

Moreover, Puma's Quarterly Report reveals that although Puma estimates damages from the class-action securities fraud case in which it was found liable to "range from $24.9 million to $51.4 million," Puma has allocated an "accrued legal verdict expense" of just $24.9 million to that liability.[28] Puma has done so even though the final claims report in that case reflects damages of $50.5 million and a Proposed Judgment of $42 million plus substantial interest has been filed in it.[29]

In short, Puma's public disclosures about its finances, outstanding debt, and contractual obligations make clear that if its supersedeas bond is released—which Puma has argued happens upon issuance of the Fourth Circuit's mandate—Dr. Eshelman will be unable to recover his judgment against Puma should this Court grant certiorari and reverse the Fourth Circuit. As such, Dr. Eshelman would be

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[25] *Id.* at 25.

[26] *Id.* at 20, 22, 25.

[27] *Hsu v. Puma Biotech., Inc.*, No. 15-cv-865 (C.D. Cal.); Puma March 2021 Quarterly Report at 37.

[28] Puma March 2021 Quarterly Report at 21, 37.

[29] *See* Supplemental Claims Report, *Hsu v. Puma Biotech., Inc.*, No. 8:15-cv-865 (C.D. Cal. Oct. 9, 2020) (Dkt. 800); Proposed Judgment at 1, *Hsu v. Puma Biotech., Inc.*, No. 8:15-cv-865 (C.D. Cal. June 28, 2021) (Dkt. 835-1).

irreparably harmed, and issuance of the Fourth Circuit's mandate should be stayed. *E.g.*, *Phillip Morris*, 561 U.S. at 1304; *Mori*, 454 U.S. at 1303.

Moreover, even if the question of the harm to Dr. Eshelman were a "close case" (and it is not), "the equities" strongly weigh in favor of staying the Fourth Circuit's mandate. *Rostker*, 448 U.S. at 1308. As described above, the harm to Dr. Eshelman absent a stay will be severe and irreparable. There is no question Puma is liable for its false and defamatory statements. By contrast, Puma would not be harmed if a stay is granted. A stay would simply maintain the status quo for a little while longer in a case that has been litigated for over five years. Any "delay" in resolution caused by a modest stay pending decision on Dr. Eshelman's forthcoming petition for certiorari would neither harm nor prejudice Puma. *See Phillip Morris*, 561 U.S. at 1305 (granting stay where "[r]efusing a stay may visit an irreversible harm on applicants, but granting it will apparently do no permanent injury to respondents").

In addition, "the interests of the public" weigh in favor of staying the mandate. *Rostker*, 448 U.S. at 1308. Upon issuance of the mandate, this case will be remanded to the district court, which will have to design (and conduct) a retrial on damages with no guidance from the Fourth Circuit as to the contours of that retrial or what amount of damages that court would allow on subsequent appeal. "[G]iven the remedial task before the parties—a task that necessarily will require great wisdom and thoughtfulness by all the parties and their counsel [and the district court]—the public interest is best served by affording [Dr. Eshelman] a full opportunity to seek review in the Supreme Court" in the first instance. *Books*, 239 F.3d at 829; *see also Mikutaitas*

v. United States, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers) (granting stay where "[i]t does not appear that the [non-movant] will be significantly prejudiced by an additional short delay").

IV. The Court Should Grant an Administrative Stay To Allow Full Consideration of This Application Before the Fourth Circuit Issues Its Mandate

Finally, the Court should grant a brief administrative stay to enable full consideration of the merits of this Application. As the above discussion makes clear, this Application (like Dr. Eshelman's forthcoming petition for a writ of certiorari) presents substantial and important legal issues to the Court. Dr. Eshelman has expeditiously made and filed this Application, but the Fourth Circuit's mandate will issue in just three days, on Thursday, August 5, 2021. As such, and in light of the irreparable harm that Dr. Eshelman will suffer if that mandate issues, this Court should grant a brief administrative stay of the Fourth Circuit's mandate while it considers this Application.

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In sum, Dr. Eshelman, a septuagenarian who has secured an affirmed liability-judgment against Puma, is more anxious than anyone—and has more incentive than anyone—to move this case quickly to conclusion. After litigating this case for over five years, Dr. Eshelman wants nothing more than to collect the damages to which he is entitled and move on with his life. But Dr. Eshelman submits that—because his forthcoming petition for certiorari will request resolution of a deep, entrenched Circuit split in a challenge that directly implicates his "fundamental and sacred" Seventh

Amendment rights, because there is *at least* a "fair prospect" that this Court will reverse the Fourth Circuit, and because Dr. Eshelman will be irreparably harmed if his application for a stay is not granted—the only proper way (and the most expeditious way) to bring this case to a just conclusion is, at this time, to stay issuance of the Fourth Circuit's mandate pending decision on Dr. Eshelman's forthcoming petition for a writ of certiorari.

CONCLUSION

This Court should stay the Fourth Circuit's mandate pending the timely filing and disposition of Dr. Eshelman's forthcoming petition for a writ of certiorari and any further proceedings in this Court.

The Court also should issue an administrative stay while it considers this application.

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Respectfully Submitted,

/s/ Elizabeth M. Locke, P.C.

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