No. 21A14

In The
Supreme Court of the United States

FREDRIC N. ESHELMAN,
Applicant,

v.

PUMA BIOTECHNOLOGY, INC.,
Respondent.

RESPONSE TO 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

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Puma Biotechnology, Inc. states that it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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

Pursuant to this Court's August 4, 2021, order, Puma Biotechnology, Inc. respectfully submits the following response in opposition to Dr. Fredric N. Eshelman's emergency application for a stay of the mandate of the United States Court of Appeals for the Fourth Circuit pending the filing and disposition of his forthcoming petition for a writ of certiorari.

INTRODUCTION

Eshelman's forthcoming petition for certiorari raises a question not actually implicated by this case—and on which the circuits are not actually divided. His entire argument for certiorari and reversal rests on the false premise that Puma could have filed a Rule 50 motion to challenge the jury's wildly excessive verdict. But no such motion was possible—a Rule 50 motion must initially be filed *before the jury deliberates*, and at that point Puma could not have known that the jury would reach an excessive verdict. Instead, as both the district court and Fourth Circuit recognized, Puma properly filed a Rule 59 motion challenging the verdict after trial. And then it properly appealed the denial of that motion. Eshelman's argument that Puma waived its Rule 59 new trial motion by failing to bring a Rule 50 motion for judgment as a matter of law misunderstands the differences between the two rules. His stay application is meritless and should be denied.

First, there is no prospect this Court will grant certiorari and reverse the Fourth Circuit's decision. The Fourth Circuit rejected Eshelman's Rule 50 waiver argument in a two-sentence footnote that Eshelman fails to quote in his application:

> Eshelman argues that Puma waived its damages arguments when it failed to move for judgment as a matter of law. *But that Rule 50 argument applies to challenges to the sufficiency of the evidence, not to Rule 59 motions alleging an excessive damages verdict.*

Appendix to Stay Application ("Appx.") 54a n.2 (emphasis added). That holding recognized that Puma's excessive-verdict argument was properly raised via Rule 59. And it was plainly correct as to waiver: Requiring a Rule 50 motion as a predicate to a Rule 59 challenge to an excessive damages award would mean parties could *never* bring such challenges, because (1) a Rule 50 motion must initially be made "*before* the case is submitted to the jury," Fed. R. Civ. P. 50(a)(2) (emphasis added), and (2) it is impossible to know that a verdict is excessive until the jury deliberates and reaches that verdict. Rule 59 is the appropriate mechanism for preserving a challenge to a jury's excessive verdict.

Eshelman states that his forthcoming petition for certiorari will ask this Court to resolve whether a party's failure to comply with Rule 50 forecloses its ability to challenge the "sufficiency of the evidence" supporting a damages award. Stay Application ("Appl.") 4 (citation omitted). But this case does not implicate that question, because—as the Fourth Circuit recognized—Puma brought a Rule 59 challenge "alleging an excessive damages verdict," *not* a Rule 50 challenge "to the sufficiency of the evidence." Appx. 54a n.2. Eshelman does not acknowledge the Fourth Circuit's (accurate) characterization of Puma's motion, let alone explain why it is mistaken. And Eshelman's claimed "Circuit split" (Appl. 4 (emphasis omitted)) about Rule 50 does not exist. The circuits apply this Court's decision in *Unitherm*

Food Systems, Inc. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006), in a uniform and uncontroversial manner, and none of Eshelman's cited cases shows otherwise.

Second, even if Eshelman had a meritorious issue for certiorari, he would suffer no irreparable harm from the denial of a stay. Eshelman wants to block the Fourth Circuit from issuing the mandate so that the district court cannot release the supersedeas bond Puma was forced to obtain to secure the now-vacated judgment. But that supersedeas bond is unnecessary: Contrary to Eshelman's assertions, Puma is most certainly *not* "on the brink of insolvency," Appl. 24, and in fact its financial position is strong.

As Eshelman belatedly disclosed in his supplemental letter, on July 23, 2021, Puma received approval to borrow up to $125 million from a well-respected lender in the healthcare industry, who determined after extensive due diligence that Puma was an appropriate candidate for such funding. That decision—by a sophisticated lender with every incentive to accurately assess Puma's business—belies any claim that Puma would be unable to satisfy the judgment in the extremely unlikely event this Court were to grant certiorari and reverse. Moreover, the supersedeas bond is expensive—costing more than $407,000 per year—and wasteful to maintain. The parties are now litigating, in the Fourth Circuit, who should bear the past costs associated with that bond. *See* Puma's Mot. for Allocation of Costs under R. 39(a)(4) ("Mot. for Costs"), ECF No. 58; Order Requesting Response to Mot. for Costs, ECF No. 59. But however costs are allocated, it serves no end to force *either* party to make

ongoing payments while Eshelman pursues a long-shot certiorari petition with virtually no prospect of success. The stay application should be denied.

STATEMENT OF THE CASE

A. Factual Background

Puma is an up-and-coming biotechnology firm that develops life-saving treatments for breast cancer. Over the past several years, Puma has spent hundreds of millions of dollars on the research and development of innovative products to fight cancer.[1] Eshelman is a North Carolina investor and businessman. In October 2015, Eshelman initiated an acrimonious proxy contest, seeking to expand Puma's Board and place himself and his slate of nominees on the Board. *See* JA1665.[2]

During the proxy contest, Puma learned that Eshelman had previously been CEO of a company that oversees clinical drug trials, when serious fraud was discovered in a drug trial it was managing. In his capacity as CEO, Eshelman was called upon to testify about the company's role in the fraud at a congressional hearing. *See* JA1568-601 (transcript of hearing). At the hearing, various members of Congress expressed frustration and anger that the company and others had "direct knowledge of serious misconduct and possible fraud," yet failed to notify the FDA. JA1574.

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[1] *See* Puma Biotechnology, Inc., Form 10-K (Mar. 1, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001401667/000156459021009840/pbyi-10k_20201231.htm.

[2] "JAxx" refers to the Joint Appendix filed in the Fourth Circuit, ECF No. 17, and "Dkt. No." refers to United States District Court for the Eastern District of North Carolina No. 16-cv-18.

Eshelman eventually conceded that it was "[his] responsibility" to ensure the fraud was properly reported. JA1598.

Puma found the information it had learned about the clinical trial fraud sufficiently troubling that it chose to include that information in a shareholder PowerPoint presentation about Eshelman's proxy contest. The presentation explained that Eshelman had been CEO of the company when it "managed a clinical trial" in which fraud was uncovered. JA77. It noted that an investigator had been convicted of fraud, and further stated that, in his capacity as CEO, "Eshelman was forced to testify before Congress regarding [the company's] involvement in this clinical trial fraud in 2008." *Id.* In a bullet point below that statement, the presentation noted that Eshelman "was replaced as CEO of [the company] in 2009." *Id.* On the next slide, Puma provided further information about the clinical trial fraud, including hyperlinks to the congressional testimony so readers could research the issues and reach their own conclusions. JA78. The final bullet explained that "Puma's Board does not believe that someone who was involved in clinical trial fraud that was uncovered by the FDA should be on the Board of Directors of a public company; particularly a company that is in the process of seeking FDA approval." *Id.*

B. Procedural Background

In February 2016, Eshelman sued Puma in the Eastern District of North Carolina for defamation based on the statements in the PowerPoint. JA40-93. The district court granted partial summary judgment to Eshelman, holding that two of Puma's statements were defamatory per se. JA620, 624.

In light of the summary judgment order, the only issues left for trial were falsity, actual malice, and damages. Before trial, Puma's trial counsel inexplicably agreed to a set of inaccurate—and highly prejudicial—stipulations prepared by Eshelman's counsel, including a false stipulation that Puma "purposefully avoided numerous sources that would have rebutted its accusations about Dr. Eshelman." JA770 (capitalization normalized); *see generally* JA751-73. Those stipulations led the jury to return a liability verdict in favor of Eshelman and severely limited Puma's ability to challenge that verdict on appeal. *See, e.g.*, Puma CA4 Opening Br. ("Opening Br.") 17 n.4, ECF No. 16.[3]

North Carolina authorizes so-called "presumed damages" for defamation per se, under which the law "'presumes that general damages actually, proximately, and necessarily result'" from the defamation and "'no proof is required' to support the precise amount of a damages award." Appx. 56a (quoting *Flake v. Greensboro News Co.*, 195 S.E. 55, 59 (N.C. 1938)). Because no proof of harm is required, there is no basis for seeking judgment as a matter of law under Rule 50 when a defamation per se plaintiff fails to introduce such evidence. Nonetheless, juries are not allowed to pluck presumed damages awards out of thin air: North Carolina law requires juries to "evaluate 'the probable extent of actual harm in the form of loss of reputation or standing in the community, mental or physical pain and suffering, [and]

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[3] Puma has brought claims against its trial counsel for malpractice based on his negligent agreement to the stipulations. *See* Eshelman Notice of Suppl. Authority, ECF No. 46 (Exhibit A, *Puma Biotechnology, Inc. v. Hedrick Gardner Kincheloe & Garofalo, L.L.P. and David L. Levy*, 20 CVS 12456 (Super. Ct. of Mecklenburg Cnty., N.C.)).

inconvenience or loss of enjoyment,'" and to award "an amount that 'is a direct and natural consequence of the libel.'" *Id.* at 57a (quoting jury instructions).

At trial, Eshelman failed to offer the jury any basis to properly judge the extent of his actual harm. *See id.* at 54a-57a. Nonetheless, the jury returned a verdict of $15.85 million in presumed compensatory damages and $6.5 million in punitive damages. *Id.* at 55a. This award is the single largest jury damages award for defamation in North Carolina history, by a wide margin. *See id.*

After the verdict, Puma filed a Rule 59(a) motion for a new trial or, in the alternative, remittitur, arguing that the jury's $22.35 million damages verdict was arbitrary and excessive. The district court rejected Puma's attack on the damages awards.

On appeal to the Fourth Circuit, Puma renewed its challenge to the excessive damages verdict, arguing that the district court abused its discretion in denying Puma's Rule 59 motion. *See* Opening Br. 45-57. In response, Eshelman argued that Puma had waived its ability to contest the damages award by failing to move for relief under Rule 50 at trial. Eshelman CA4 Response Br. 48-49, ECF No. 23. Puma's reply explained that Puma had properly challenged the damages award as excessive by filing a motion under Rule 59, not Rule 50, in the district court, *see* Mem. in Supp. Mot. New Trial 3-20, Dkt. No. 436, and that Puma had every right to appeal the district court's denial of that Rule 59 motion. Puma CA4 Response and Reply Br. ("Reply Br.") 30-31, ECF No. 24; *see also Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 593-94 (4th Cir. 1996).

The Fourth Circuit's decision agreed with Puma's refutation of the waiver argument in a short footnote, stating:

> Eshelman argues that Puma waived its damages arguments when it failed to move for judgment as a matter of law. But that Rule 50 requirement applies to challenges to the sufficiency of the evidence, not to Rule 59 motions alleging an excessive damages verdict.

Appx. 54a n.2 (citation omitted).

Proceeding to the merits, the Fourth Circuit then overturned the damages award. The court agreed with Puma that the district court "abused its discretion in failing to grant Puma's motion for a remittitur or new trial," because the jury "awarded excessive damages" and "received no evidence sufficient to support a multi-million-dollar damages award." *Id.* at 59a, 55a, 57a. Although "Eshelman estimated that his damages were $7.5 million before trial, $100 million at his deposition, and $52 million at closing argument," he "provided no support for any of these very different and fluctuating estimates." *Id.* at 55a. Instead, Eshelman testified at trial that "he suffered 'incalculable' damage to his reputation," but failed to identify "any lost business opportunities, damaged relationships, or foregone contracts," or to demonstrate "widespread publication." *Id.* at 55a-56a, 58a. In fact, the record indicated that "Eshelman's reputation remained both commendable and intact." *Id.* at 56a. The record thus could not "support a jury award ten times the size of the largest defamation awards in North Carolina history." *Id.* at 55a. Indeed, the court emphasized, cases involving statements "considerably more harmful than those here" have yielded awards of only $50,000 and $20,000 in damages. *Id.* at 59a. The Fourth

Circuit thus vacated the damages award and remanded for a new trial on damages. *Id.* at 61a.[4]

Eshelman filed a petition for panel rehearing or rehearing en banc, reiterating his Rule 50 waiver argument and asserting a circuit split. The Fourth Circuit denied that petition. *Id.* at 63a. Eshelman then moved for a stay of the mandate, which the Fourth Circuit also denied. *Id.* at 64a.

ARGUMENT

To obtain a stay of the mandate pending disposition of a petition for certiorari, a movant "must demonstrate (1) a 'reasonable probability' that this Court will grant certiorari, (2) a 'fair prospect' that the Court will reverse the decision below, and (3) a 'likelihood that irreparable harm [will] result from the denial of a stay.'" *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1301 (2014) (Roberts, C.J., in chambers) (alteration in original) (citation omitted). "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). Eshelman cannot satisfy any of the requirements for a stay: His forthcoming certiorari petition is meritless, there is no prospect this Court will reverse, and Eshelman will suffer no irreparable harm from the denial of a stay.

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[4] The Fourth Circuit rejected Puma's personal-jurisdiction argument as waived based on its trial counsel's stipulation in the pretrial order and rejected Puma's challenges to the liability verdict on the merits. Appx. 49a-54a.

I. THERE IS NO PROSPECT THAT THIS COURT WILL GRANT CERTIORARI OR REVERSE

The Fourth Circuit's rejection of Eshelman's Rule 50 argument was plainly correct, and there is no reasonable prospect that this Court will grant certiorari and reverse that determination.

A. The Fourth Circuit's Ruling On The Rule 50 Issue Was Correct

The Fourth Circuit correctly held that Puma was entitled to appeal the district court's denial of Puma's "Rule 59 motion[] alleging an excessive damages verdict." Appx. 54a n.2. Contrary to Eshelman's argument, Puma could not have brought a Rule 50(a) motion challenging the excessiveness of the jury's verdict, because Rule 50(a) motions must be filed "*before* the case is submitted to the jury." Fed. R. Civ. P. 50(a)(2) (emphasis added). And Puma could not have brought a Rule 50(b) motion after trial bringing that challenge either, because Rule 50(b) is available only to "*renew[]*" a challenge that was initially made under Rule 50(a). Fed. R. Civ. P. 50(b) (emphasis added); *see also OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*, 841 F.3d 669, 680 (5th Cir. 2016). Instead, the only proper vehicle for Puma's challenge to the excessiveness of the verdict was a post-trial motion for a new trial under Rule 59. That is precisely what Puma filed.

Eshelman's argument that Puma somehow waived its right to challenge the excessiveness of the jury's verdict by not making a Rule 50 motion makes little sense. Indeed, Eshelman fundamentally confuses Rule 50 and Rule 59. A defendant can seek judgment under Rule 50 when his contention is that there is *no* legally sufficient evidence by which a reasonable jury could award *any* damages to the plaintiff; in such

cases, the defendant will seek "[j]udgment as a [m]atter of [l]aw" as to damages. Fed. R. Civ. P. 50(a); *Ortiz v. Jordan*, 562 U.S. 180, 189 (2011). Although Rule 50(b)(2) gives the district court discretion to award a new trial (instead of judgment) under Rule 50, such relief is appropriate "only if the moving party would be entitled to judgment as a matter of law [under the Rule 50 standard]." 9B Arthur R. Miller, *Federal Practice and Procedure* § 2538 (3d ed. 2021, online).

In situations where there *is* legally sufficient evidence by which a jury could award some damages—but the amount actually awarded is excessive—the defendant can instead seek a new trial or remittitur through a post-trial motion under Rule 59. *See Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 593-94 (4th Cir. 1996); *see generally United States ex rel. Cody v. ManTech Int'l, Corp.*, 746 F. App'x 166, 184 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 304 (2019); *Miller v. Huron Reg'l Med. Ctr.*, 936 F.3d 841, 847-48 (8th Cir. 2019). Relief under Rule 59 is appropriate when "the verdict is against the weight of the evidence," "the damages are excessive," or when, "for other reasons, the trial was not fair." 11 Mary Kay Kane, *Federal Practice and Procedure* § 2805 (3d ed. 2021, online); *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 433 (1996) (reaffirming trial court's discretion "'to grant a new trial if the verdict appears . . . against the weight of the evidence,'" including "overturning verdicts for excessiveness" (citation omitted)). It does not require the moving party to establish that the evidence was so one-sided that the case should never have gone to a jury and it should have been awarded an outright judgment. 11 *Federal Practice and Procedure* § 2806 ("On a motion for a new trial—unlike a motion

for judgment as a matter of law—the judge may set aside the verdict even though there is substantial evidence to support it.").

The distinction between these two types of challenges—under Rules 50 and 59, respectively—is particularly pertinent here, because "North Carolina law 'presumes that general damages actually, proximately, and necessarily result' from defamation *per se*." Appx. 56a (citation omitted). Nominal damages are thus always potentially warranted for defamation per se. Because evidence of damages is not required, a party *cannot* bring a viable Rule 50 challenge to the sufficiency of evidence supporting damages in defamation per se cases.[5] A party *can*, however, bring a post-trial Rule 59 challenge arguing that the jury's actual damages award is excessive. *See, e.g.*, *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 734 (7th Cir. 2004) (remitting excessive presumed damages award); *MyGallons LLC v. U.S. Bancorp*, 521 F. App'x 297, 307 (4th Cir. 2013) (vacating general damages award in defamation case for excessiveness).

The Fourth Circuit faithfully applied these principles when rejecting Eshelman's waiver argument. Specifically, it explained that the requirement that a

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[5] Eshelman's attempt to suggest that Puma's excessiveness challenge was actually a sufficiency-of-the-evidence challenge (*see* Appl. 10) is thus meritless. Puma's challenge was to the *amount* of the award, not the fact of the award, as is evident from the Fourth Circuit's holding. *See* Appx. 55a ("[T]here is no evidence justifying *such an enormous award*."); *id.* (holding that the "jury awarded *excessive* damages"); *id.* ("One would expect ample evidence of the harm suffered by Eshelman *to support a jury award ten times the size of the largest defamation awards* in North Carolina history.") (emphases added). Of course, in making that challenge, Puma repeatedly emphasized the absence of record evidence supporting Eshelman's claim of harm. Opening Br. 47-50; Reply Br. 32-36. But it made those points in service of its Rule 59 motion, not as part of a request for judgment as a matter of law.

party move for judgment as a matter of law is a "Rule 50 requirement" that "applies to challenges to the sufficiency of the evidence, *not* to Rule 59 motions alleging an excessive damages verdict." Appx. 54a n.2 (emphasis added). In reaching that conclusion, the court cited *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 160-61 (4th Cir. 2012), which correctly explained that failure to make a Rule 50 motion "does not bar . . . claims of error that do not challenge the sufficiency of the evidence."

Eshelman offers no credible explanation for why Puma was required to file a pre-verdict Rule 50 motion as a prerequisite to its post-verdict Rule 59 motion challenging the jury's award as excessive. Eshelman tries to root his argument in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), where this Court held that a litigant "may not challenge the sufficiency of the evidence on appeal on the basis of the District Court's denial of its Rule 50(a) motion," *id.* at 405, but must instead renew that challenge before the district court in a Rule 50(b) motion to preserve its arguments for appeal. *Unitherm* has no application here, because the only motion at issue was a Rule 50 motion, and the appealing party in that case had not preserved a request for a new trial under Rule 59. *See id.* at 396, 398-99 & n.2.

Eshelman points to language from *Unitherm* stating that the Court's "observations about the necessity of a postverdict motion under Rule 50(b) . . . apply with equal force whether a party is seeking judgment as a matter of law *or simply a new trial*." Appl. 15 (emphasis altered). Eshelman misreads the italicized language, which is *not* a reference to a request for a new trial under Rule 59, but rather to new-trial relief that is potentially available, as an alternative to judgment as a matter of

law, under Rule 50 itself. *See* Fed. R. Civ. P. 50(b)(2) (noting that "[i]n ruling on [a] renewed motion [under Rule 50(b)], the court may . . . order a new trial"); 9B *Federal Practice and Procedure* § 2538 (discussing trial court's discretion to order a new trial under Rule 50). As noted, the only request for a new trial at issue in *Unitherm* was made under Rule 50—*not* under Rule 59.

Notably, the *Unitherm* Court's principal rationale for requiring a Rule 50(b) motion in these circumstances was that "[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." 546 U.S. at 401 (alteration in original) (quoting *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947)). That rationale is fully served by a post-verdict Rule 59 motion, which—just like a post-verdict Rule 50(b) motion—allows the district court to rule on a litigant's request for a new trial "in the first instance." *Id.* (citation omitted). Nothing in *Unitherm* requires a Rule 50 motion as a prerequisite for appealing the denial of a Rule 59 motion that challenged an excessive verdict.

In short, Eshelman offers no credible argument that the Court erred in holding that Puma fully preserved its right to appeal the denial of its Rule 59 motion. And he certainly makes no showing of a "fair prospect" that five Justices would agree with his waiver argument on the merits. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).[6]

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[6] Eshelman also suggests this Court may reverse the Fourth Circuit's judgment "on the merits" because that court failed to sufficiently defer to the district court's judgment. Appl. 22. There is no reason this Court would resolve such a case-specific

B. There Is No Circuit Split

Despite the substantial flaws in Eshelman's Rule 50 argument, he nonetheless insists that this Court is likely to grant certiorari because the Fourth Circuit's ruling implicates a "deep, entrenched Circuit split" over the proper application of *Unitherm*. Appl. 14. Specifically, Eshelman alleges an "eight-to-three Circuit split" on the question "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*." *Id.* at 4 (alteration in original) (citation omitted). Eshelman is mistaken.

For starters—and as noted above—the Fourth Circuit's opinion does not implicate the proposed question presented at all. The court rightly concluded that Puma was *not* bringing a sufficiency-of-the-evidence challenge under Rule 50, but rather a challenge to an excessive damages verdict under Rule 59. Appx. 54a n.2. It is thus irrelevant whether failure to comply with Rule 50 forecloses a sufficiency-of-the-evidence challenge, and the purported "circuit split" provides no basis for certiorari. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.4(G) (11th ed. 2019, online) (explaining that a "reason for denying certiorari is that the case at hand does not fairly present the legal question over which there is a conflict").

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and fact-bound question. And there is no prospect this Court would reverse: The Fourth Circuit carefully considered the record, *see* Appx. 55a-59a; reviewed the district court's denial of Puma's Rule 59 motion for abuse of discretion; and properly applied North Carolina state law, in accordance with *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), Appx. 54a.

Moreover, the circuits are aligned on the issue this Court actually resolved—whether a party's failure to file a Rule 50(b) motion somehow precludes it from appealing the denial of a Rule 59 motion. As the Third Circuit explained in *Pediatrix Screening, Inc. v. TeleChem International, Inc.*, the courts of appeals "generally have concluded that *Unitherm*'s holding is limited to Rule 50 and insufficiency of the evidence" and does not "preclude the ability to review relief under Rule 59." 602 F.3d 541, 547 (3d Cir. 2010), *overruled on other grounds by Ortiz v. Jordan*, 562 U.S. 180 (2011).[7]

The cases Eshelman cites on the "minority" side of the purported circuit split illustrate this rule. Appl. 18. In *Medisim Ltd. v. BestMed, LLC*, a Federal Circuit case applying Second Circuit law, the court applied the normal *Unitherm* rule, holding that one of the parties had forfeited its Rule 50 sufficiency-of-the-evidence challenge by failing to file a motion under Rule 50(a). 758 F.3d 1352, 1356-57, 1359 (Fed. Cir. 2014). But the court then affirmed the district court's conditional grant of

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[7] *See also T. Levy Assocs., Inc. v. Kaplan*, 755 F. App'x 116, 119-20 (3d Cir. 2018) (finding Rule 50 sufficiency challenge forfeited under *Unitherm* but explaining that a "party who fails to move for judgment as a matter of law under Rule 50 can still petition the district court under Rule 59"); *Lund v. Henderson*, 807 F.3d 6, 12 n.3 (1st Cir. 2015) (explaining that litigant's failure to move for judgment under Rule 50 did not prevent court "from reviewing for an abuse of discretion" the denial of his Rule 59 motion for a new trial); *Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 397 n.2 (6th Cir. 2008) (noting that *Unitherm* only addresses pre-verdict motions based upon the sufficiency of the evidence), *cert. denied*, 555 U.S. 1138 (2009); *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 939 (7th Cir. 2006) (limiting *Unitherm* to "the situation of a litigant seeking a new trial on the basis of the insufficiency of the evidence"), *cert. denied*, 549 U.S. 1180 (2007); *Hi Ltd. P'ship v. Winghouse of Fla., Inc.*, 451 F.3d 1300, 1302 (11th Cir. 2006) (applying *Unitherm* but distinguishing circumstances in which a party makes a "post-verdict motion for a new trial" in the district court).

a new trial under Rule 59, explaining that a court may "order a new trial" under Rule 59's stringent standards "even if no motion for JMOL was made under Rule 50(a)." *Id.* at 1359. And in *Peterson v. West TN Expediting, Inc.*, the Sixth Circuit likewise held that the defendant had forfeited its Rule 50 sufficiency-of-the-evidence challenge by failing to move for judgment as a matter of law. No. 20-5845, 2021 WL 1625226, at *2 (6th Cir. Apr. 27, 2021). In light of that forfeiture, the defendant's "only option after trial (and on appeal) was to move for a new trial" under Rule 59. *Id.* at *2 n.1.[8] Those holdings are consistent with *Unitherm* and the law of other circuits. There is no disagreement that Rule 59 relief is available even without a Rule 50(b) motion.

None of Eshelman's cited cases are to the contrary or reflect a split over *Unitherm*. As explained above, *Unitherm* involved a situation in which the party filed a pre-verdict Rule 50(a) motion, but did not file a post-verdict Rule 50(b) motion or a request for a new trial under Rule 59. 546 U.S. at 396. The Court held that a litigant "may not challenge the sufficiency of the evidence on appeal on the basis of the District Court's denial of its Rule 50(a) motion," without renewing that challenge in a post-verdict motion to the district court under Rule 50(b). *Id.* at 405-06.

The cases Eshelman cites (at 16-17) show that the courts of appeals have applied that rule in a uniform and unremarkable manner. In *Rosenberg v. DVI Receivables XIV, LLC*, for example, the Eleventh Circuit declined to consider the defendants' sufficiency-of-the-evidence challenge to a damages award because the

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[8] *See Peterson v. W. TN Expediting, Inc.,* No. 1:18-cv-01164, 2020 WL 3492026, at *1 (W.D. Tenn. June 26, 2020) (making clear that new trial motion was filed under Rule 59(a)).

defendants failed to file a timely Rule 50(b) motion. 818 F.3d 1283, 1292 (11th Cir. 2016). Similarly, in *Bennett v. Nucor Corp.*, the Eighth Circuit declined to consider a sufficiency-of-the-evidence challenge to a punitive damages award because the party "did not file a renewed motion for judgment as a matter of law after the entry of judgment." 656 F.3d 802, 813 (8th Cir. 2011), *cert. denied*, 566 U.S. 906 (2012); *see also Crew Tile Distrib., Inc. v. Porcelanosa L.A., Inc.*, 763 F. App'x 787, 800 (10th Cir. 2019) (declining to consider argument that there was not "sufficient evidence of damages" because party "did not renew its sufficiency of the evidence claim in a Rule 50(b) motion"); *Gleason v. Norwest Mortg., Inc.*, 253 F. App'x 198, 202 (3d Cir. 2007) (finding sufficiency-of-the-evidence challenge "foreclosed" due to party's failure to file a Rule 50(b) motion); *Noyes v. Kelly Servs., Inc.*, 349 F. App'x 185, 188 (9th Cir. 2009) (declining to consider sufficiency-of-the-evidence challenge raised "for the first time on appeal").

Several of Eshelman's other cases involve the slightly inverse—but equally unremarkable—scenario in which a party filed a Rule 50(b) motion, but failed to first raise the issue in a Rule 50(a) motion. In those circumstances, courts decline to reach the issue because a party cannot "renew a motion it never made." *OneBeacon Ins. Co.*, 841 F.3d at 680 (declining to address issue never raised in Rule 50(a) motion); *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 804 (7th Cir. 2016) (finding sufficiency-of-the-evidence argument "waived" by party's failure to "make a proper motion" under Rule 50(a), such that party "had no motion to renew under Rule 50(b) after the verdict"); *RFF Family P'ship, LP v. Ross*, 814 F.3d 520, 536-37 (1st

Cir. 2016) (declining to address argument where Rule 50(a) motion was not "sufficient" to put district court on notice of argument later made in Rule 50(b) motion and on appeal).

Contrary to Eshelman's assertion (at 17-18), the Second, Fourth, and Sixth Circuits routinely apply *Unitherm*'s rule in exactly the same way as other circuits. *See, e.g.*, *Knight v. State Univ. of New York at Stony Brook*, 880 F.3d 636, 642-43 (2d Cir. 2018) (party's failure to file a motion under Rule 50(b) "barred" sufficiency-of-the-evidence challenge); *Leevson v. Aqualife USA Inc.*, 770 F. App'x 577, 580-81 (2d Cir. 2019) (same result as to challenge to verdict awarding damages for withheld commissions); *Belk*, 679 F.3d at 154 (party's "failure to move pursuant to Rule 50(b) forfeit[ed]" challenge to award of profits on appeal); *Price v. City of Charlotte*, 93 F.3d 1241, 1248-49 (4th Cir. 1996) (party must raise "the reason for which it is entitled to judgment as a matter of law in its Rule 50(a) motion . . and reassert that reason in its Rule 50(b) motion after trial"), *cert. denied*, 520 U.S. 1116 (1997); *Ayers v. City of Cleveland*, 773 F.3d 161, 168 (6th Cir. 2014) (party's failure to make renewed motion under Rule 50(b) forfeited defendants' sufficiency-of-the-evidence challenge).

Eshelman's suggestion (at 16) that courts are split on how *Unitherm* applies "where the defendant moved for a new trial under Rule 59" is wholly unsupported by the cases he cites. Indeed, only three of Eshelman's cases involved Rule 59 motions at all, and in each, the Rule 59 motion raised issues separate from those in the Rule 50 motions and was irrelevant to the *Unitherm* question. *See Gleason*, 253 F. App'x at 202-03 (resolving on merits challenge to denial of Rule 59 motion arguing that

portion of verdict was legally inconsistent with jury's findings); *Crew Tile*, 763 F. App'x at 792-95 (resolving on merits challenge to denial of Rule 59 motion arguing that certain evidence was used for improper purposes); *OneBeacon Insurance Co.*, 841 F.3d at 675, 680 (refusing to address arguments for judgment as a matter of law made in Rule 50(b) motion that had not been raised in Rule 50(a) motion, after noting that party had also moved for a new trial under Rule 59).

Crucially, none of Eshelman's cases applying *Unitherm* has held that a Rule 50 motion is required to preserve a party's request for a new trial based on excessive damages when that party made a separate motion for a new trial under Rule 59. On that issue—the one actually presented here—there is no split and no prospect of certiorari or reversal.[9]

II. ESHELMAN WILL SUFFER NO IRREPARABLE HARM FROM THE DENIAL OF A STAY

Eshelman claims a stay is warranted in order to keep in place Puma's $29.5 million supersedeas bond. *See* Appl. 23-27. Puma agrees with Eshelman that if his

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[9] Eshelman also briefly suggests certiorari is warranted because the Fourth Circuit "infringe[d]" his "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." Appl. 19. But Eshelman has not raised or preserved any type of Seventh Amendment challenge in this case, and as noted above, the Fourth Circuit properly reviewed the district court's denial of Puma's motion for a new trial for abuse of discretion, applying North Carolina state law. *See* Appx. 54a. Eshelman's suggestion (at 19-20) that "multiple Justices have expressed an interest in limiting appellate review of a jury's findings" is likewise misguided. Eshelman cites Justice Thomas and Justice Gorsuch's dissents from the denial of certiorari in *Berisha v. Lawson*, 141 S. Ct. 2424 (2021), but there, both Justices expressed an interest in reconsidering the "'actual malice' requirement as it applies to public figures." *Id.* at 2424 (Thomas, J., dissenting from denial of certiorari). That issue has nothing to do with the Rule 50 question Eshelman plans to present in his petition.

stay application is denied and the mandate issues, the bond must be released. *See id.* at 23-24 (recognizing that bond was approved as security "pending disposition of any post-trial motions, as well as disposition of this case on appeal" (citation omitted)); Eshelman CA4 Mot. to Stay Issuance of Mandate 2, 8-9, ECF No. 54. But that is the appropriate result here. The bond (which is for approximately 110% of the $22.35 million judgment plus interest) was intended to secure the damages award. As the Fourth Circuit made clear, however, that award was grossly excessive—the jury "received no evidence sufficient to support a multi-million-dollar damages award." Appx. 57a. Because the damages award has been vacated, there is no longer anything for the bond to secure. And although the Fourth Circuit remanded for a new trial on damages, it is simply implausible that Eshelman will suddenly be able to produce proof sufficient to support another judgment of the same size. Indeed, as the Fourth Circuit explained, defamation cases involving statements "considerably more harmful than those here" have yielded "far lower damages awards," of only $50,000 and $20,000. *Id.* at 59a. There is simply no reason for Puma to maintain a $29.5 million bond to secure a wildly excessive judgment that has now been set aside.

Forcing Puma to keep the bond in place would merely exacerbate the injustice of the excessive verdict. Puma has already paid over $1.2 million in order to maintain the bond. *See* Mot. for Costs 5 (explaining that the appeal bond and letter of credit cost approximately $407,000/year). Keeping the bond in place for months before this Court rules on Eshelman's forthcoming certiorari petition (which may not even be filed for another three months) will result in unnecessary and burdensome costs.

Eshelman claims there is "a certainty" he will suffer irreparable harm absent a stay, because the bond will be released and Puma is in such "dire financial condition" that if this Court overturns the Fourth Circuit's decision and reinstates the jury's verdict, Eshelman "will be unable to collect on th[e] judgment." Appl. 22-23. That is flatly wrong.

First, keeping the bond in place is likely to prove *more* harmful to Eshelman than allowing the mandate to issue and the bond to be released. As Puma has made clear to the Fourth Circuit, all costs for the bond are properly borne by Eshelman under Federal Rule of Appellate Procedure 39(e)(3). *See* Mot. for Costs 4-6. But in reality *neither* party should be forced to incur additional costs for the bond, given the extremely low chance that this Court will grant certiorari and reverse.

Moreover, Eshelman is wrong to claim that he "will be unable to collect" on the judgment in the very unlikely event this Court grants certiorari and reinstates it. Appl. 23. Eshelman claims Puma "appears on the brink of insolvency" based on information in Puma's 2020 Form 10-K, filed March 31, 2021, and Puma's Form 10-Q, filed May 6, 2021, indicating that Puma has "assets less liabilities of just $16.4 million" and $28.5 million in outstanding debt coming due this year. *Id.* at 24-26. That misunderstands Puma's financial situation. For the first six months of 2021, Puma reported over $151.5 million in total revenue and net cash provided by operating activities of $15.6 million.[10] Puma also has an effective shelf registration

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[10] *See* Puma Biotechnology, Inc., Form 10-Q at 7, 33 (Aug. 5, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/1401667/000156459021041634/pbyi-10q_20210630.htm.

statement (File No. 333-257687), which provides it with the potential to raise up to $50 million in additional capital through the sale of shares of its common stock if needed.[11]

Moreover, on July 23, Puma received approval to borrow up to $125 million from Athyrium Capital Management, LP, a well-respected lender in the global healthcare sector with over $4.6 billion in capital.[12] Puma has now used a portion of that new funding to pay off its outstanding debt. The debt "com[ing] due this year" that Eshelman cites in his application thus no longer exists. Appl. 25. And Puma may still obtain another $25 million under the agreement.

Eshelman failed to mention the Athyrium Capital funds in his original application. In a supplemental letter to this Court, Eshelman somehow tries to construe Athyrium Capital's decision to offer Puma $125 million in funding as evidence of Puma's poor financial condition. *See* Eshelman Suppl. Letter (Aug. 4, 2021). But he fails to acknowledge the obvious. Lenders generally do not offer financing to companies "on the brink of insolvency." And here, Athyrium Capital conducted extensive due diligence prior to extending financing to Puma. Eshelman

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[11] *See* Puma Biotechnology, Inc., Form S-3 (July 2, 2021), https://www.sec.gov/Archives/edgar/data/1401667/000119312521207767/d121988ds3.htm.

[12] *See* Puma Biotechnology, Inc., Form 8-K (July 29, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001401667/000119312521229184/d155853d8k.htm; News Release, Puma Biotechnology, *Puma Biotechnology Secures $125 Million Note Purchase by Athyrium Capital* (July 26, 2021), https://pumabiotechnology.com/pr20210726.html; *Puma Biotechnology Secures $125 Million Note Purchase by Athyrium Capital*, Business Wire (July 26, 2021), https://www.businesswire.com/news/home/20210726005120/en (explaining that gross proceeds from the agreement will be "used for general corporate purposes").

is also wrong to suggest it is a "bad sign" that the new funding is secured in part by Puma's intellectual property, *id.*, as companies often pledge their intellectual property in some way when obtaining financing.[13] Athyrium Capital's decision to make $125 million available to Puma provides objective evidence—from a sophisticated lender with every incentive to closely scrutinize Puma's finances—that Puma's prospects are strong.[14]

In short, there is no reason to think Eshelman will be unable to collect on the judgment in the highly unlikely event this Court reinstates it. Eshelman will suffer no irreparable harm absent a stay, and his application should be denied.

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[13] *See, e.g.*, RubinBrown, *Focus on Life Sciences: Intellectual Property as Loan Collateral—Primer to a Growing Form of Asset-Backed Borrowing* (Dec. 19, 2013), https://www.rubinbrown.com/article/1636/Focus-on-Life-Sciences-Intellectual-Property-as-Loan-Collateral-8211-Primer-to-a-Growing-Form-of-Asset-Backed-Borrowing.aspx?articlegroup=1117 (discussing the increase in IP-based lending, including in the pharmaceutical industry); Brian W. Jacobs, Comments, *Using Intellectual Property to Secure Financing after the Worst Financial Crisis Since the Great Depression*, 15 Marquette Intell. Prop. L. Rev. 449, 450-51 (2011) (predicting that "the use of intellectual property as collateral will continue to be more prevalent" as the United States continues to move to a "technology-based economy").

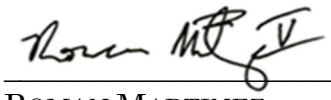
[14] Eshelman's cases do not support his irreparable harm arguments. In *Philip Morris USA Inc. v. Scott*, the Court found irreparable harm where a substantial portion of a class settlement fund would be "irrevocably expended" absent a stay. 561 U.S. 1301, 1304 (2010). And in *Mori v. International Brotherhood of Boilermakers*, the Court similarly found that funds that would be paid out of an escrow account would be "very difficult to recover" absent a stay. 454 U.S. 1301, 1303 (1981). Both cases involved situations where money already reserved for payment would have been depleted without a stay, *not* situations like the one here where Eshelman merely complains that *if* the Court were to grant certiorari and reverse, he might be unable to execute on the judgment.

CONCLUSION

For the foregoing reasons, this Court should deny Eshelman's application for a stay of the Fourth Circuit's mandate pending disposition of his forthcoming petition for certiorari.

August 11, 2021

Respectfully submitted,



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