No. 21A14

IN THE
Supreme Court of the United States

FREDRIC N. ESHELMAN

Applicant,

v.

PUMA BIOTECHNOLOGY, INC.

Respondent.

On Application for Stay

REPLY IN SUPPORT OF 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

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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:

Dr. Fredric N. Eshelman respectfully submits this reply in support of his emergency application 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.

INTRODUCTION

Puma's opposition to Dr. Eshelman's Application for a Stay, in which Puma asserts that "[Dr.] Eshelman's forthcoming petition for certiorari raises a question not actually implicated by this case—and on which the circuits are not actually divided" (Opp. 1), proceeds from a series of deeply flawed and false premises.

First, although Puma concedes (as it must) that in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006) , this Court held that a party's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence," *id.* at 404, Puma contends that *Unitherm* "has no application here" because its argument that the jury's damages awards were excessive is"not [] a sufficiency-of-the-evidence challenge" (Opp. 15). But Puma is incorrect. Puma argued that the jury's damages awards were excessive *because* they are "unsupported by evidence" and "the evidence showed ... that Eshelman's reputation remained fully intact" such that "there is no basis [for the jury] to infer that Eshelman suffered millions of dollars in harm." (Puma CA4 Opening Br. 4, 49 [CA4 Dkt. 16].) Puma did ***not*** contend that the damages awards were excessive *because* of jury passion and prejudice, *or because*

punitive damages were disproportionate to compensatory damages, *or because* the jury awarded damages for legally uncompensable harms, *or because* of any other reason. Puma contends that the jury's damages awards are excessive because—***and only because***—there is insufficient evidence to support them, as the Fourth Circuit panel expressly recognized: Puma contended that "the jury awarded excessive damages *that the evidence could not justify*." (App. 55a.) Under *Unitherm*—as extended and applied by no fewer than eight Circuits—Puma is "foreclose[d]" from raising that sufficiency challenge on appeal because it did not raise it in a Rule 50 motion. Puma cannot employ Rule 59 to make an end-run around its Rule 50 failures to avoid this conclusion.

Second, Puma relatedly contends that *Unitherm* cannot apply here because it could not possibly have "brought a Rule 50[] 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,'" and Rule 50(b) is available only to 'renew' a challenge that was initially made under Rule 50(a)." (Opp. 10.) But Puma incorrectly frames the issue. Puma contends that the jury's damages awards are excessive *because* there is insufficient evidence—in fact, Puma argues "no evidence"—of harm to Dr. Eshelman. And parties can, and routinely do, challenge the sufficiency of the evidence (including evidence of damages) in Rule 50(a) and Rule 50(b) motions. *E.g.*, *Crew Tile Distrib., Inc. v. Porcelanosa L.A., Inc.*, 763 F. App'x 787, 800 (10th Cir. 2019) (observing that defendant challenged sufficiency of the evidence of damages in Rule 50(a) motion and holding that because it failed to renew that challenge in its Rule 50(b) motion, it "did

not preserve the issue for appeal"). Citing *Unitherm*, a majority of Circuits have held that if a defendant does not raise its sufficiency-of-the-evidence challenge to damages in Rule 50 motions, it is foreclosed from raising the challenge on appeal—***including in cases where the defendant raised that challenge in a Rule 59 motion.*** *E.g.*, *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, 676, 680 (5th Cir. 2016).

Third, Puma asserts that "there is no circuit split" on the issue Dr. Eshelman will raise in his petition because "the circuits are aligned on the issue this Court actually resolved [in *Unitherm*]—whether a party's failure to file a Rule 50(b) motion somehow precludes it from appealing the denial of a Rule 59 motion." (Opp. 16.) But Puma's argument proceeds from the deeply flawed premise that all Rule 59 motions are the same. They are not. And Puma's own caselaw confirms exactly that. Although Puma quotes a Third Circuit case as holding that "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'" (Opp. 16 (quoting *Pediatrix Screening, Inc. v. TeleChem Int'l, Inc.*, 602 F.3d 541, 547 (3d Cir. 2010)), it ***deliberately omits*** from its quotation the Third Circuit's caveat that there is "one exception" to that rule: *Unitherm* precludes "relief under Rule 59" where a party challenges the sufficiency of the evidence. *Pediatrix*, 602 F.3d at 547 & n.10. Puma's caselaw does *not* undermine the entrenched Circuit split on question Dr. Eshelman's petition will actually present: whether under *Unitherm*—as extended and applied by eight Circuit Courts (but contrary to its application by three

Circuit Courts)—a party's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence" supporting *a damages award*. If anything, Puma's caselaw suggests that split is more entrenched.

In addition, Puma's Opposition does not even attempt to meaningfully address the fact that Dr. Eshelman's petition will request resolution of that entrenched Circuit split in a challenge that directly implicates his "fundamental and sacred"[1] Seventh Amendment rights to have a jury decide facts supporting his damages awards—instead relegating that response to footnotes. (Opp. 14 n.6, 20 n.9.) The Fourth Circuit's opinion—which did not even mention Judge Dever's opinion denying Puma's Rule 59 motion and detailing "the very unique facts of this case" based on his first-hand observations of testimony that "[y]ou needed to see [] to understand [] completely" (App. 30a, 34a)—makes plain that it did not review Judge Dever's opinion (much less review it for just abuse of discretion), and instead improperly directly reviewed the jury's verdict and substituted its judgment for that of the jury. The Fourth Circuit thereby infringed Dr. Eshelman's Seventh Amendment rights in the exact situation in which multiple Justices have called for this Court to grant certiorari to rein in such improper, overly aggressive appellate review. *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).

Finally, Puma's assertion that Dr. Eshelman will not suffer irreparable harm absent a stay blinks reality. Puma completely ignores its recent public filings

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

disclosing its financial deterioration and dire financial straits. Remarkably, Puma asserts that the fact it just took on $100 million in *new debt* to pay off an outstanding $100 million loan—plus $9.2 million in interest and fees—demonstrates that its financial condition is *good* because "[l]enders generally do not offer financing to companies 'on the brink of insolvency.'" (Opp. 23.) But Puma fails to disclose that its new loan is *secured* by substantially all of its assets, including all of its intellectual property (which it did not pledge for its previous loan). And while Puma boasts that it "reported over $151.5 million in *total* revenue" over the first six months of this year (Opp. 22), it hides its *net* revenue figures and SEC disclosure that it "believes that it will *continue to incur net losses* and *may incur negative net cash flows*" for years.[2]

ARGUMENT

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

A. Dr. Eshelman's Petition Will Squarely Present the Question Whether This Court's Holding in *Unitherm*—As Extended and Applied by Eight Circuits—Forecloses Puma's Appeal.

Puma does not (and cannot) dispute that 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 Rule 50 motion may challenge the sufficiency of the evidence sustaining a verdict on appeal. And Puma does not (and cannot) dispute that this Court squarely held that a defendant may not: a party's

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

"failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence." *Id.* at 404. Although *Unitherm* only addressed a sufficiency-of-the-evidence challenge to a *liability* verdict, its logic and jurisprudential underpinnings apply equally to foreclose such challenges to *damages* verdicts—as no fewer than eight Circuits have applied *Unitherm*.[3] (Three Circuits have held otherwise.[4])

Puma tries to avoid *Unitherm* and the question of its applicability to damages challenges that Dr. Eshelman's petition will present by contending that "Eshelman's forthcoming petition ... raises a question not actually implicated by this case" because *Unitherm* "has no application here." (Opp. 1, 15.) Puma bases that meritless contention on the equally meritless premise that its challenge to the excessiveness of the jury's damages awards is "not [] a sufficiency-of-the-evidence challenge." (Opp. 15).

But Puma's argument that the jury's damages awards are excessive ***is***, without a doubt, a sufficiency-of-the-evidence challenge. That is plain from its Fourth Circuit briefing. Puma argued that "the jury's damages verdict was wildly excessive" *because* "[t]he nearly $16 million presumed damages award is unsupported by evidence."

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[3] *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; *Rosenberg v. DVI Receivables XIV, LLC*, 818 F.3d 1283, 1292 (11th Cir. 2016).

[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.

(Puma CA4 Opening Br. 4 [CA4 Dkt. 16].) Puma argued that the jury had "no basis to infer that Eshelman suffered millions of dollars in harm" *because* "the evidence showed the exact opposite—that Eshelman's reputation remained fully intact." (*Id.* at 49.) Puma argued that the "damages awards are excessive" *because* "Eshelman presented no evidence at trial of any harm, and the evidence affirmatively rebutted the notion that he suffered any." (*Id.* at 20.) And so on. And contrary to Puma's claim, the Fourth Circuit expressly recognized Puma's appeal was a sufficiency-of-the-evidence challenge: Puma contended that "the jury awarded excessive damages *that the evidence could not justify*." (App. 55a.)

Equally tellingly, Puma did not argue that the jury's damages awards were "excessive" on any other basis even though "excessiveness" can be challenged on grounds other than evidentiary sufficiency. For example, Puma did ***not*** argue that the jury's damages awards were excessive because they "reflected the jury's passion and prejudice." *See King v. McMillan*, 594 F.3d 301, 313 (4th Cir. 2010). Puma did ***not*** argue that the jury's damages awards were excessive because the jury awarded damages for legally uncompensable harms. *See Celeste v. E. Meadow Union Free Sch. Dist.*, 373 F. App'x 85, 89 (2d Cir. 2010). Puma did ***not*** argue that that the jury's damages awards were excessive because they were "based ... on an improper predicate due to erroneous jury instructions." *See White v. Ford Motor Co.*, 312 F.3d 998, 1028 (9th Cir. 2002), *amended*, 335 F.3d 833 (9th Cir. 2003). Puma did ***not*** argue that the jury's punitive damages awards were excessive as disproportionate to compensatory damages. *See Williams v. First Advantage LNS Screening Sols. Inc.*,

947 F.3d 735, 754 (11th Cir. 2020). And Puma did ***not*** argue that the jury's damages awards were excessive for any other reason. Just evidentiary sufficiency. Period. *Unitherm*'s holding—if applied to sufficiency-of-the-evidence challenges to damages as the First, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits (but not the Second, Fourth, or Sixth Circuits) have applied it—squarely forecloses Puma's appeal.

Puma also tries to avoid this conclusion by arguing that *Unitherm* cannot foreclose its appeal because it could not have "brought a Rule 50[] 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,'" and under Rule 50(b) it can only "*renew* a challenge ... made under Rule 50(a)." (Opp. 10.) But Puma frames the issue incorrectly.

Puma does not simply challenge the jury's damages awards as "excessive." Nor does it challenge the jury's damages awards as excessive for some reason that was unknowable until after jury returned its verdict (whether juror passion or prejudice, because punitive damages were disproportionate to compensatory damages, or some other reason). Puma challenges the jury's damages awards as excessive *because* there was insufficient evidence—or even no evidence—to support them. Of course, parties can—and routinely do—challenge the sufficiency of the evidence (including evidence of damages) in Rule 50(a) and Rule 50(b) motions. *E.g.*, *Crew Tile Distrib., Inc. v. Porcelanosa L.A., Inc.*, 763 F. App'x 787, 800 (10th Cir. 2019) (observing that defendant challenged sufficiency of the evidence of damages in Rule 50(a) motion and holding that because it failed to renew that challenge in its Rule 50(b) motion, it "did

not preserve the issue for appeal"); *Helionetics, Inc. v. Paige & Assocs., Corp.*, 100 F.3d 962 n.3 (9th Cir. 1996) ("[defendant's] assertion about excessive damages [in its Rule 59 motion] is repetitious of its [Rule 50 motion's] claim that there was insufficient evidence" of damages).

Puma's assertion that it could not have challenged the sufficiency of the evidence of damages in a Rule 50 motion is nonsensical. And Puma knows it—as evidence by the fact that it has sued its trial counsel for malpractice because he failed to "file a Rule 50(a) motion,"[5]and has plead in its malpractice complaint that trial counsel's failure forecloses its challenge to the sufficiency of the evidence on appeal.

B. Dr. Eshelman's Forthcoming Petition Will Squarely Present an Entrenched Circuit Split.

Puma's contention that "there is no circuit split" that Dr. Eshelman's petition will raise likewise proceeds from a false premise. (Opp. 15.) According to Puma, "the circuits are aligned on the issue this Court actually resolved [in *Unitherm*]—whether a party's failure to file a Rule 50(b) motion somehow precludes it from appealing the denial of a Rule 59 motion." (Opp. 16.) This is so, Puma asserts, because:

> 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).

But Puma blatantly misrepresents Pediatrix. In full, the two sentences Puma quotes from *Pediatrix* provide:

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[5] CA4 Dkt. No. 46 ¶¶29, 39, 43(e) (Notice of Suppl. Authority, *Puma Biotech., Inc. v. Hedrick Gardner Kincheloe & Garofalo LLP.*, No. 20-CVS-12456 (N.C. Super. Ct. Mecklenburg Cty.)).

> Courts of appeals that have examined the issue generally have concluded that *Unitherm*'s holding is limited to Rule 50 and insufficiency of the evidence. They do not, ***with one exception***, preclude the ability to review relief under Rule 59.

602 F.3d at 547. And the *Pediatrix* court followed those sentences with a footnote collecting cases holding that ***the "one exception" where* Unitherm*'s holding precludes "relief under Rule 59" is where a party challenges the sufficiency of the evidence——the exception Puma deliberately omits from its quotation.*** *Id.* at 547 n.10; *Metcalf v. Bochco*, 200 F. App'x 635, 637 n.1 (9th Cir. 2006) ("*Unitherm* is inapposite" where defendants do *not* "challenge the sufficiency of the evidence[.]").

Puma's own caselaw thus confirms the false premise on which its argument rests. Not all Rule 59 motions are the same. Although *Unitherm* may not preclude appellate review of the denial of Rule 59 motions that raise challenges *other than* sufficiency-of-the-evidence challenges absent a Rule 50 motion—as in the caselaw Puma cites[6]—that is irrelevant here. The fact remains that caselaw from eight Circuits holds that when a defendant fails to file Rule 50(a) and Rule 50(b) motions, *Unitherm* ***does foreclose*** sufficiency-of-the-evidence appeals, including such challenges to damages awards and including in cases where the defendant filed a

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[6] *See* Opp. at 16 (citing *Bryant v. Dollar Gen. Corp.,* 538 F.3d 394, 397 n.2 (6th Cir. 2008) (challenge to jury instructions, "not a question going to the sufficiency of the evidence"); *T. Levy Assocs., Inc. v. Kaplan*, 755 F. App'x 116, 119-20 (3d Cir. 2018) (Rule 59 motion argued "prejudicial error" in jury instructions and inconsistent verdicts on claims); *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 939 (7th Cir. 2006) ("*Unitherm* does not foreclose the ability of the appellate court to order a new trial where evidence was improperly admitted," but does foreclose appeal where "a litigant seek[s] a new trial on the basis of the insufficiency of the evidence."); *Hi Ltd. P'ship v. Winghouse of Fla., Inc.*, 451 F.3d 1300, 1302 (11th Cir. 2006) (*Unitherm* "[c]larif[ied]" that this Court's "'cases addressing the requirements of Rule 50'" do not permit *any* relief" when the defendant fails to file a Rule 50(b) motion).

Rule 59 motion. *E.g.*, *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" because "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); Application at 16-17 (collecting cases). These courts have held that *Unitherm* forecloses those challenges in no uncertain terms: "[A] post-verdict motion under Rule 50(b) is ***an absolute prerequisite*** to any appeal based on insufficiency of the evidence." *Crowley v. Epicept Corp.*, 883 F.3d 739, 751 (9th Cir. 2018); *McLendon v. Big Lots Stores, Inc.*, 749 F.3d 373, 374-75 (5th Cir. 2014) ("Absent a [Rule] 50(b) motion, we are 'powerless' to compel, on the basis of insufficiency of the evidence, the district court to ... order a new trial.").

Indeed, Puma's discussion of the caselaw in Dr. Eshelman's Application reaffirms the deep Circuit split that his petition will present. Puma agrees that the caselaw Dr. Eshelman cited from the First, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits hold that *Unitherm* forecloses a challenge to the

sufficiency of the evidence supporting a damages award where the defendant fails to raise that challenge in Rule 50(a) and Rule 50(b) motions. (Opp. 17-19.)

Puma likewise cannot dispute that, as Dr. Eshelman explained in his Application, three other circuits have held the opposite. The Sixth Circuit held in *Peterson v. W. TN Expediting, Inc.*, --- F. App'x ----, 2021 WL 1625226, at *2 n.1 (6th Cir. Apr. 27, 2021), that even where a defendant fails to challenge the sufficiency of the evidence supporting a damages award in a Rule 50 motion, it may nonetheless "after trial (and on appeal) ... [seek] a new trial," and that in *Medisim Ltd. v. BestMed, LLC*, 758 F.3d 1352, 1359 (Fed. Cir. 2014), the Federal Circuit, applying Second Circuit law, held that a court may "order a new trial" under Rule 59 "even if no motion for JMOL was made under Rule 50(a)." And the Fourth Circuit decision below held the same. (App. 54a n.2.) Moreover, the additional Second, Fourth, and Sixth Circuit caselaw that Puma cites (Opp. 19) as supposedly undermining this Circuit split in facts confirms it:

- *Leevson v. Aqualife USA Inc.*, 770 F. App'x 577, 580 (2d Cir. 2019) (defendant challenged legal propriety of awarding commissions to plaintiffs under contract claim; defendant did not challenge sufficiency of evidence supporting damages award);

- *Knight v. State Univ. of N.Y. at Stony Brook*, 880 F.3d 636, 643 (2d Cir. 2018) (defendant argued "the evidence was insufficient to permit the jury to determine that he was not a Stony Brook employee"; defendant did not challenge sufficiency of evidence supporting damages award);

- *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 151, 163 (4th Cir. 2012), as amended (May 9, 2012) (holding defendant's argument regarding "the insufficiency of the evidence to support [plaintiff's] claims," *i.e.*, sufficiency challenge to *liability,* foreclosed by *Unitherm* but allowing "consider[ing] [defendant's] ... damages challenges, which [] are not barred by *Unitherm*");

- *Price v. City of Charlotte*, 93 F.3d 1241, 1249 (4th Cir. 1996) (pre-*Unitherm*, holding that defendant "sufficiently raised and preserved ... for appellate review" its "sufficiency" challenge to the damages award despite not making a Rule 50(b) motion); and

- *Ayers v. City of Cleveland*, 773 F.3d 161, 168 (6th Cir. 2014) (apparent challenge to sufficiency of evidence of liability; no indication defendant challenged damages, and defendant did not make Rule 59 motion).

Dr. Eshelman's forthcoming petition will thus present a deep and entrenched Circuit split. And because the logic and jurisprudential underpinnings of *Unitherm*'s holding that a party's "failure to comply with [FRCP] 50 forecloses its challenge to the sufficiency of the evidence" *of liability*, 546 U.S. at 404, apply with equal force to challenges to the sufficiency of the evidence supporting *damages*—as the majority of Circuits have recognized—there is at least a "fair" prospect that this Court will reverse the Fourth Circuit's decision below to the contrary. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

C. Dr. Eshelman's Petition Will Present an Entrenched Circuit Split That Directly Implicates His Seventh Amendment Rights.

Puma likewise cannot avoid the fact that Dr. Eshelman's petition will present this Circuit split in a challenge directly implicating his "fundamental and sacred" Seventh Amendment rights to have a jury decide facts supporting his damages awards. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 352 (1979). Puma attempts to dodge that fact by asserting, in a footnote, that the standard under which an appellate court reviews a district court's refusal to grant a new trial on damages is a "case-specific and fact-bound question" that "there is no reason this Court would resolve." (Opp. 14 n.6.) But Puma fails to acknowledge that this Court's repeated admonitions that "[w]ithin the federal system, ... Seventh Amendment constraints [] lodge in the

district court, not the court of appeals, primary responsibility for" reviewing damages awards for compliance with the law," and that the Seventh Amendment mandates that Circuit Courts may only "review the district court's [refusal to vacate a jury's damages award] under an abuse-of-discretion standard." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 437-38 (1996). And as multiple Justices have recognized, the circuits have increasingly strayed from that highly deferential standard of review. *See Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting from denial of certiorari) (decrying circuit courts' use of "this Court's jurisprudence" to improperly "revisit[] a jury's factual determinations"); *id.* at 2424-25 (Thomas, J., dissenting from denial of certiorari).

That constitutional problem *is*, as Dr. Eshelman explained, "ripe for review." It is *not*, as Puma asserts, simply a one-off case of error correction. And, because this Court has emphasized that Seventh Amendment rights must "be jealously guarded by the courts," *Parklane Hosiery*, 439 U.S. at 352, there is at least a "fair" or "not entirely insubstantial" prospect that even if this Court were to resolve the *Unitherm* Circuit split against the majority of Circuits, it would still reverse the Fourth Circuit's decision below on the merits. *See Rostker*, 448 U.S. at 1308.

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

Puma does not (and cannot) dispute that Dr. Eshelman would be irreparably harmed if this Court reverses the Fourth Circuit but he is unable to collect his judgment. *E.g.*, *Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers); *Mori v. Int'l Bhd. of Boilermakers*, 454 U.S. 1301, 1303 (1981)

(Rehnquist, J., in chambers). And Puma argues that if the Fourth Circuit's mandate issues, its supersedeas bond "must be released." (Opp. 20-21.)

Puma's only argument that Dr. Eshelman will not be irreparably harmed without a stay is that its financial situation is actually *good*, such that Puma would be able to pay Dr. Eshelman's full judgment plus interest. (Opp. 20-24.) But Puma fails to acknowledge its public filings disclosing that it has total assets less liabilities of less than the amount of Dr. Eshelman's judgment, it has "incurred significant operating losses since its inception," it "believes that it will *continue to incur net losses* and *may incur negative net cash flows*" in coming years, it will owe up to $187.5 million in royalties to Pfizer, and it is facing an $50 million federal securities fraud judgment.[7]

Puma ignores all that and blithely asserts that its finances are good because it has positive total (not net) revenue and just took on $100 million in *new debt* from Athyrium Capital to pay off an outstanding $100 million loan—plus $9.2 million in "accrued interest, applicable exit, prepayment[,] and legal fees"[8]—and "[l]enders generally do not offer financing to companies 'on the brink of insolvency.'" (Opp. 23.) But Puma fails to disclose that its new loan is *secured* by substantially all of its assets, *including all its intellectual property*—which Puma did ***not*** to pledge for its previous loan. Thus, Puma no longer has any unencumbered assets that it could sell to pay

[7] Puma March 2021 Quarterly Report at 2, 7, 25, 37.

[8] Puma Biotechnologies Inc., Current Report (Form 8-K) (July 29, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/1401667/000119312521229184/d155853d8k.htm.

Dr. Eshelman's judgment. And Puma fails to disclose that its loan agreement with Athyrium restricts Puma's ability to take on additional debt, so Puma could not secure additional financing to pay Dr. Eshelman's judgment.[9]

In short, Puma's public disclosures make clear that, if its supersedeas bond is released, it will *not* be able to pay Dr. Eshelman's judgment, and Dr. Eshelman will be irreparably harmed. *See Phillip Morris*, 561 U.S. at 1304; *Mori*, 454 U.S. at 1303. Although Puma may stubbornly protest that reality—just as it did when it publicly declared victory after a federal jury unanimously found it liable for securities fraud and damages up to $51.4 million arising out of the same operative facts as this defamation judgment,[10] and just as its CEO did when he "disastrous[ly]" testified below that Puma "ha[s] nothing to be sorry for" in defaming Dr. Eshelman—Puma cannot avoid that reality.[11] And even if this were a "close case" (it is not), "the equities" strongly weigh in favor of staying the Fourth Circuit's mandate to maintain the status quo for just a little while longer to allow this Court to decide whether to address the critical issues of law that Dr. Eshelman's petition will present, and on which the Circuits are deeply divided. *Rostker*, 448 U.S. at 1308.

CONCLUSION

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

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[9] *Id.*

[10] Press Release, Puma Biotechnology, Inc., (Feb. 4, 2019), https://investor.pumabiotechnology.com/news-releases/news-details/2019/Puma-Biotechnology-Announces-Litigation-Victory-with-Jurys-Decision/default.aspx.

[11] App. at 30a-34a.; CA4 Dkt. 17 at 1462:15-1463:3.

Date: August 12, 2021

Respectfully Submitted,

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