No. ____

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

TATA CONSULTANCY SERVICES LIMITED &
TATA AMERICA INTERNATIONAL CORPORATION
(DBA TCS AMERICA),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case involving a proven theft of trade secrets and other state law torts, a properly-instructed jury awarded plaintiff Epic Systems Corporation ("Epic") $140 million in compensatory damages. The jury also awarded punitive damages, which the district court reduced to $280 million through its application of a Wisconsin statute that caps punitive damages at two times the compensatory award. On appeal, defendant Tata Consulting Services ("TCS") did not contest liability but challenged the compensatory and punitive damage awards. The Seventh Circuit upheld the compensatory award and upheld Epic's entitlement to punitive damages. It found, however, that despite the Wisconsin statute, which placed TCS on notice of the risk a jury could award punitive damages up to the defined multiple, the Due Process Clause of the United States Constitution prohibited an award of punitive damages in an amount greater than the amount of the compensatory award. The question presented is as follows:

> Does a state statute that expressly caps punitive damages at two times compensatory damages satisfy the notice requirement of the Due Process Clause such that a punitive damages award that complies with the statute is constitutionally sound under the Due Process Clause?

PARTIES TO THE PROCEEDING

Petitioner, plaintiff-appellee/cross-appellant below, is Epic Systems Corporation.

Respondents, defendants-appellants/cross-appellees below, are Tata Consultancy Services Limited & Tata America International Corporation (d/b/a TCS America).

CORPORATE DISCLOSURE STATEMENT

Epic Systems Corporation is privately-held. No publicly-held entity owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Epic Systems Corp. v. Tata Consultancy Services Ltd. & Tata America International Corp., d/b/a TCS America*, No. 14-CV-748 (W.D. Wis.) (judgment entered October 3, 2017; post-trial motions decided September 29, 2017 and March 22, 2019); and

- *Epic Systems Corp. v. Tata Consultancy Services Ltd. & Tata America International Corp., d/b/a TCS America*, Nos. 19-1528 & 19-1613 (7th Cir.) (opinion filed August 20, 2020, amended opinion filed November 19, 2020, final rehearing petition denied November 30, 2020).

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of Supreme Court Rule 14.1(b)(iii).

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OPINIONS BELOW

This Seventh Circuit's original opinion in this case, *Epic Systems Corp. v. Tata Consultancy Services Ltd.*, is reported at 971 F.3d 662 (7th Cir. 2020).

The Seventh Circuit's final opinion, amended upon the denial of rehearing en banc, is reported at *Epic Systems Corp. v. Tata Consultancy Services Ltd.*, 980 F.3d 1117 (7th Cir. 2020). Pet. App. 1a-52a.

The opinions of the district court are reported at:

- *Epic Systems Corp. v. Tata Consultancy Services Ltd.*, No. 14-cv-00748, 2017 WL 4357993 (W.D. Wis. Sep. 29, 2017 (Opinion and Order Regarding Post-Trial Motions, September 29, 2017) Pet. App. 57a-86a.[1]

- *Epic Systems Corp. v. Tata Consultancy Services Ltd.*, No. 14-cv-00748, 2019 WL 1320297 (W.D. Wis. Mar. 22, 2019) (Opinion and Order Regarding Renewed Post-Trial Motions, March 22, 2019) Pet. App. 94a-114a.

STATEMENT OF JURISDICTION

The Seventh Circuit issued its original opinion on August 20, 2020, a modified opinion on November 19, 2020 (Pet. App. 1a-52a), and issued orders denying rehearing and rehearing en banc on November 19 and

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[1] Citations to "R._" are to the docket number of the record in the district court proceeding, *Epic Systems Corp. v. Tata Consultancy Systems Limited et al.*, No. 3:14-cv-00748 (W.D. Wis.).

November 30, 2020, Pet. App. 53a-54a; Pet. App. 55a-56a. On March 19, 2020, this Court "extended" the deadline to file any petition for a writ of *certiorari* on or after that date "to 150 days." This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Due Process Clause in the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV.

Wisconsin law limits the amount of punitive damages a plaintiff may recover. The Wisconsin statute provides, in relevant part:

> (6) Limitation on damages. Punitive damages received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater. This subsection does not apply to a plaintiff seeking punitive damages from a defendant whose actions under sub. (3) included the operation of a vehicle, including a motor vehicle as defined under s. 340.01(35), an off-highway motorcycle, as defined in s. 23.335(1)(q), a snowmobile as defined under s. 340.01(58a), an all-

> terrain vehicle as defined under s. 340.01(2g), a utility terrain vehicle as defined under s. 23.33(1)(ng), and a boat as defined under s. 30.50(2), while under the influence of an intoxicant to a degree that rendered the defendant incapable of safe operation of the vehicle. In this subsection, "intoxicant" has the meaning given in s. 30.50(4e).

Wis. Stat. § 895.043(6).

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In awarding punitive damages, "[e]lementary notions of fairness enshrined in" the Due Process Clause "dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). *See also State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003).

Effectuating these principles, Wisconsin established statutory limits on punitive damages. At all times relevant to this lawsuit, and with limited exceptions not applicable here, a Wisconsin statute capped punitive damages at $200,000 or two times the compensatory award, whichever is greater.

In this case, the district court entered the jury's $140 million compensatory award. The Seventh Circuit affirmed. Pet. App. 14a-23a. The district court accepted the jury's verdict that Epic was entitled to punitive damages under Wisconsin law. Again, the Seventh Circuit affirmed. Pet. App. 31a-39a. Applying Wisconsin's statute, the district court reduced the jury's award of punitive damages to two times the compensatory award. *See id.* at 31a. The Court of Appeals agreed the award complied with Wisconsin's statutory cap. *Id.* at 51a.

The Seventh Circuit nonetheless held that the punitive damage award was unlawful. The Seventh Circuit imported a multi-factor test designed to limit a jury's standardless imposition of punitive damages and engaged in its own discretionary analysis. Although

such awards have been permitted for hundreds of years, the Seventh Circuit overrode the jury's judgment to invalidate a two to one punitive damages award. It held in this case that the Due Process Clause does not permit the award of punitive damages to exceed a one to one ratio of compensatory to punitive damages. *Id.* at 50a-51a, *id.* at 51a, n.6.

No decision of this Court has rejected a punitive damage award of two times compensatory damages. No decision of this Court, or any other, has found that a jury's award in compliance with a state's statutory ratio violates due process.

The Seventh Circuit's belief that the Due Process Clause would require a free-wheeling inquiry into, and ultimate invalidation of, a punitive damages award of two times the compensatory award cannot be squared with history. As this Court noted in *Gore*, "[s]ome 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages." *Gore*, 517 U.S. at 580-81. Federal statutes—from patent to antitrust—authorize or require similar multiples of exemplary damages.

The Seventh Circuit's unprecedented substitution of its judgment for the judgment of the jury and the Wisconsin legislature conflicts with decisions of this Court and other courts evaluating punitive damages under the Due Process Clause, while calling into question a long tradition of statutes permitting treble damages (or other multiples) in cases involving economic loss.

This Court should grant *certiorari* to address whether the Due Process Clause authorizes a court to order a reduction of punitive damages notwithstanding that a statute gave the defendant fair notice of the severity of the penalty it faced.

STATEMENT OF THE CASE

A. TCS's Theft Of Epic's Trade Secrets.

Epic is a worldwide leader in electronic medical records. Pet. App. 3a. Healthcare providers use Epic's software to maintain the records of hundreds of millions of patients. *Id.* at 3a-4a. Epic licenses its software to clients, and customizes its software based on each organization's needs. *Id.*

The complexity of Epic's health record system requires customers to update and test their systems. *Id.* at 3a. Frequently, customers hire consultants to assist in this process. Pet. App. 4a. Epic provides its clients with access to a web portal called "UserWeb," which contains confidential information about Epic's software, but Epic restricts access to UserWeb to those individuals who possess Epic credentials. *Id.* at 3a-4a. Epic does not permit consultants to access certain features of Epic's software. *Id.* at 4a.

Kaiser Permanente, Epic's largest client, licensed a version of Epic's software. *Id.* at 4a. Kaiser hired Tata Consulting Services ("TCS") to assist it in implementing Epic's software across Kaiser's extensive managed healthcare organization. *Id.* at 4a-5a. TCS is a worldwide consulting business that, in the year prior to

trial, earned $3.5 billion on total revenues of $15 billion. R.870; R.898 at 106:17-21. In addition to providing information technology services, TCS has its own competing electronic health record software. Pet. App. 5a. Aware of this conflict, Epic refused to permit TCS access to confidential information on UserWeb. TCS requested greater access. *Id.* at 5a-6a. Epic refused. *Id.*

Without permission, TCS obtained unauthorized access to UserWeb. *Id.* at 6a. TCS carried out its scheme by hiring an employee of another software firm who had previously obtained access to UserWeb by falsely identifying himself as a Kaiser employee. *Id.* Once hired, and at the direction and with the approval of senior TCS managers, TCS shared the employee's login credentials with dozens of TCS employees who thereby gained unauthorized access to UserWeb. *Id.* at 6a-7a. TCS then downloaded thousands of documents containing hundreds of thousands of pages of information from UserWeb. *Id.* at 6a. Among the documents TCS downloaded were those showing critical features of Epic's software. *Id.* at 6a-7a. TCS used at least some of this information to assist in its attempt to enter the United States electronic health records market, to steal Epic's clients, and to address gaps in its own software. *Id.* Epic spent hundreds of millions of dollars developing the confidential information that TCS accessed and copied. Pet. App.66a-67a.

Ultimately, TCS's conduct came to the attention of a TCS employee not involved in the scheme. Pet. App. 7a-8a. He reported his concerns to TCS, which did not remedy the situation. *Id.* at 26a. The TCS whistle-blower advised Kaiser and ultimately Epic. *Id.* at 8a.

After an investigation confirmed the TCS whistle-blower's account, Epic filed this suit. *Id.*

B. Proceedings In The District Court.

Alleging claims under Wisconsin law, Epic sued TCS in 2014 alleging theft of trade secrets and other claims. Pet. App. 8a-9a.

Discovery did not go smoothly. During the discovery process, Epic learned that TCS had failed to preserve relevant evidence. *Id.* at 9a. Despite being a skilled technology consulting company, TCS failed to preserve electronic records that would have identified the TCS employees who accessed UserWeb, as well as what information was obtained. Pet. App. 20a. Instead, TCS allowed critical information showing the extent of TCS's theft of trade secrets and its use of that information to be overwritten, and their data lost, rather than preserved. As directed by TCS management, TCS pursued a self-described strategy to "suppress the truth." Pet. App. 74a-75a. The district court ultimately sanctioned TCS for its conduct. Pet. App. 9a. The court instructed the jury that it could, in defined circumstances, draw an adverse inference against TCS based on its discovery misconduct. *Id.*

The case went to trial in 2016. The district court bifurcated the trial into liability and damage phases. After the liability phase, the jury returned a verdict in favor of Epic on all claims. *Id.*

In the damage phase, the jury heard evidence concerning Epic's injury. *Id.* at 9a-11a. TCS did not

present an alternative damage theory. *Id.* at 11a. After deliberations, the jury awarded Epic a total of $240 million in compensatory damages in two categories: $140 million for damages relating to TCS's use of Epic's information in developing its comparative analysis of the capabilities of Epic's software to its own, and $100 million in damages for other uses of Epic's information. *Id.* On post-trial motions, the district court upheld the $140 million award, but it set aside the $100 million in damages for the other uses of Epic's information. *Id.* at 12a. On appeal, the Seventh Circuit affirmed these rulings of the district court. *Id.* at 14a-31a.

C. Punitive Damage Award.

This petition concerns the punitive damages aspect of the jury's verdict.

Wisconsin law permits a jury to award punitive damages to a plaintiff on certain tort claims, including the claims Epic proved at trial. Pet. App. 31a-39a. Under Wisconsin law, a jury may award punitive damages where the defendant acted maliciously or in intentional disregard of the plaintiff's rights. Wis. Stat. § 895.043(6); Pet. App. 73a-75a.

Epic presented substantial evidence from which a reasonable jury could conclude TCS intentionally disregarded Epic's rights. The evidence showed TCS and its employees knew they were acting in violation of Epic's rights without any even arguably legitimate purpose. Pet. App. 74a. The district court concluded there was "ample basis" for the jury to find by a clear and convincing evidence standard that TCS was aware

its employees were "blatantly disregarding Epic's right to restrict access and use of its trade secrets and confidential information, and TCS chose to take no steps to stop it." *Id.* at 75a. The district court held Epic was entitled to recover punitive damages, finding TCS's argument to the contrary was "meritless, if not frivolous." *Id.* at 73a.

In assessing the amount of punitive damages, Wisconsin law permits a jury to consider the grievousness of the defendant's acts, its malicious intent, whether the award reflects a reasonable relationship to the compensatory award, the potential damage that might have resulted from the defendant's wrongful acts, the relationship of the award to other penalties, and the wealth of the wrongdoer. *Kimble v. Land Concepts, Inc.*, 845 N.W.2d 395, 400 (Wis. 2014) (citation omitted). The jury was instructed on these elements of Wisconsin law. R.872 at 5-6. TCS did not object to the jury instruction. Pet. App. 73a.

In addition to evidence showing TCS's intentional and malicious violation of Epic's rights, the jury heard evidence supporting the need for a substantial punitive damage award to punish and deter TCS. The jury heard TCS had accessed and copied information critical to the value of Epic's records software business. Pet. App. 74a. The jury heard that TCS's employees forwarded Epic's confidential documents to individuals who did not even work for TCS. *Id.* at 80a. The district court found this evidence, coupled with the uncertainty as to the nature of TCS's internal use of Epic's materials, supported finding TCS's actions exposed Epic to extraordinary potential damages. *Id.* The jury also heard evidence of

TCS's wealth. In the most recent year before trial, TCS reported net profit of $3.5 billion on revenue in excess of $15 billion. Pet. App. 79a; R.898 at 106:17-21 (revenue); R.898 at 106:17-21 (profit).

The jury awarded Epic punitive damages of $700 million. Pet. App. 11A. In its first post-trial motion, TCS argued the Wisconsin statute required the court to reduce the punitive damage award to conform to the statutory ratio. Pet. App. 75a. Epic acknowledged the statutory cap applied to the award. *Id.* Having eliminated the $100 million award of additional compensatory damages, the district court applied the Wisconsin statutory cap to the remaining $140 million compensatory award and reduced the punitive damage award to $280 million. Pet. App. 12a. The district court found that this award complied with Wisconsin law and the requirements of the Due Process Clause. Pet. App. 75a-80a.

D. Proceedings In The Seventh Circuit.

TCS appealed and Epic cross-appealed. The Seventh Circuit made the following rulings that are not at issue in this petition: (1) it affirmed the jury's compensatory award of $140 million, Pet. App. 14a-23a; (2) it affirmed the district court's finding that Epic was entitled to punitive damages, *id.*, Pet. App. 36a-39a; (3) it affirmed that the award of punitive damages complied with Wisconsin law, Pet. App. 33a-36a; and (4) it rejected Epic's cross-appeal of the district court order setting aside the additional $100 million in compensatory damages. Pet. App. 23a-31a.

The Seventh Circuit then turned to the amount of punitive damages the jury awarded. Citing this Court's rulings in *Gore*, 517 U.S. at 568, and *Campbell*, 538 U.S. at 416-17, the Seventh Circuit held that the $280 million award of punitive damages violated the United States Constitution. Pet. App. 40a-51a. Focusing on the fact that the compensatory damages were large and the underlying claim involved economic loss, the Seventh Circuit remanded the case for the entry of a new punitive damage award not to exceed a one-to-one ratio to the affirmed compensatory damages of $140 million. *Id.* at 52a.

Epic sought rehearing on this limited issue. Epic argued that because Wisconsin had a defined statutory cap, TCS was on notice both of the conduct that could trigger punitive damages and the severity of the penalty that Wisconsin could impose. The statute provided the notice required by the Due Process Clause. Where the jury was properly instructed and the judgment complied with the Wisconsin statute, as was the case here, the concerns this Court has identified in applying the Due Process Clause to awards of punitive damages were fully met. *See* Seventh Circuit Dkt. No. 19-1528, App. Dkt. 59 (Epic Rehearing Pet.).

The Seventh Circuit ordered a response from TCS and issued a modified opinion reflecting minor changes from its original opinion. *See id.* App. Dkt. 60; Pet. App. 1a-52a. But the Seventh Circuit did not retreat from its holding that the Due Process Clause did not permit the entry of an award of punitive damages of two times the compensatory damages, even though the punitive

damage award fully complied with the Wisconsin Statute.[2] *See* Pet. App. 40a-51a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With This Court's Decisions And Decisions Of Other Courts Of Appeals.

This Court has held the Due Process Clause applies to the award of punitive damages. In doing so, this Court has explained the constitutional limitation on punitive damages protects the right of civil defendants to receive adequate pre-deprivation notice.

Wisconsin law provides unambiguous notice of the circumstances in which a court may award punitive damages, and that those damages may equal, but not exceed, two times the compensatory award. This Court should grant *certiorari* because the Seventh Circuit's holding that an award that complies with the Wisconsin statute nonetheless violates the Due Process Clause is inconsistent with decisions of this Court and other courts of appeals.

[2] TCS sought rehearing of other aspects of the Seventh Circuit's opinion. Seventh Circuit Dkt. No. 19-1528, App. Dkt. 57 (TCS Rehearing Pet.). The Seventh Circuit did not invite a response to TCS's petition and denied the petition for rehearing in a separate order issued on November 30, 2020. Pet. App. 55a-56a.

A. This Court Has Held That The Due Process Clause Requires That A Defendant Receive Notice Of The Potential Severity Of A Punitive Damage Award.

Over the past three decades, this Court has considered whether punitive damage awards are subject to limitations under the Due Process Clause on four occasions. Twice it has held that such an award runs afoul of the constitutional limit. This Court's decisions make clear that the Constitution limits a lower court's ability to award punitive damages where those damages exceed the defendant's prior notice of the potential for punitive damages.

This Court first addressed the issue in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), an insurance fraud case. There, the Court observed that "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Id.* at 18. But the Court ultimately upheld a punitive damage award that was more than four times the compensatory damage award. *Id.* at 23-24.

Two years later, in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), a divided Court rejected the argument that a punitive damage award that was 526 times greater than the award of compensatory damage was "so excessive that it must be deemed an arbitrary deprivation of property without due process of law." *Id.* at 453.

In 1996, this Court further clarified the basis for construing the Due Process Clause to limit punitive damages. *Gore*, 517 U.S. at 563. In *Gore*, the jury awarded compensatory damages of $4,000; the lower court upheld $2 million in punitive damages. *Id.* at 567. This Court reversed, explaining that the amount of punitive damages is a concern under the Due Process Clause because "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574.

In its most recent case addressing the issue, *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), this Court reiterated that fair notice is the due process principle at stake. *Id.* at 416-17. The Court repeated *Gore*'s holding that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* The Court added that "common-law procedures" and the "imprecise manner in which punitive damages systems are administered" are insufficient to avoid the indiscriminate imposition of punitive damages, with the resulting risk of a grossly excessive award that "furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* at 417-18, *citing Haslip*, 499 U.S. at 42 (O'Connor, J., dissenting).

To be sure, the Court in *Gore*, and again in *Campbell*, directed lower courts to consider "guideposts" in evaluating punitive damage awards entered on common law claims. But the Court declined to impose substantive limits; instead, those guideposts provide direction for determining whether a defendant had fair notice. In *Gore*, for instance, the Court reversed the award of punitive damages because each of the guideposts "indicate[] that BMW did not receive adequate notice of the magnitude of the sanction that [the state] might impose" for the violations of the state's law. 517 U.S. at 574-75.

B. The Decision Below Conflicts With Decisions Of This And Other Courts, Including Decisions Applying Statutory Caps.

Wisconsin Statute Section 895.043 placed TCS on notice of the possibility that wrongful conduct could give rise to a punitive damage award of up to twice the compensatory award. Wis. Stat. § 895.043(6). At all times relevant to this dispute, TCS was aware not only that its conduct could result in punitive damages, but also of the severity of the penalty the State of Wisconsin authorized juries to impose.[3] The notice provided by the

[3] The statute reflects a legislative balancing of the considerations addressed by this Court in *Gore*, *Campbell*, and in other cases. Wisconsin law permits the jury to consider factors addressed by this Court in developing the guideposts, but further constrains the award to a specific range defined by the statute. *Compare Kimble*, 845 N.W.2d at 400 (directing consideration of the grievousness of the act, degree of malicious intent, the actual damage and potential damage that may have been caused, the ratio of the award to penalties that could be imposed for comparable misconduct, and the

statute, as well as the procedural protections afforded TCS throughout the trial, post-trial proceedings, and on appeal, which TCS has never questioned, satisfied the due process requirements this Court has identified and guarded against any arbitrary imposition of punitive damages.

The Seventh Circuit, however, applied an understanding of the Due Process Clause unmoored from the fair notice rationale explained in *Gore* and *Campbell*, and unsupported by any other due process principle. The result is an opinion without precedent and inconsistent with the decisions of this and other Courts.

1. Epic is not aware of any decision of any Court, including this Court, finding a punitive damage award that complies with a statutory ratio violates the Due Process Clause. Where the statute provides unambiguous prior notice to the defendant of the possible scope of punitive damages that its conduct may trigger, the notice justification for due process review is satisfied. Wisconsin's two to one statutory ratio prevents TCS from reasonably claiming it was not on notice of the potential severity of its punishment, and indeed it has never asserted that. Unlike the defendants in *Gore* and *Campbell*, TCS could look to the statute

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bad actor's ability to pay) and R.872 at 6 (jury instruction directing consideration of grievousness of acts, actual or potential damage, and ability to pay) *with Gore*, 517 U.S. at 575-85 (consideration of same factors). Compared to cases applying the *Gore* guideposts to varying factual circumstances, *see infra* pp. 21-22, the Wisconsin statute provided notice that was precise and guarded against the indiscriminate imposition of punitive damages.

books for the range of potential punitive damages. The Wisconsin statute gave TCS clear, fair notice of the potential punishment it faced if it stole trade secrets and confidential information Epic spent hundreds of millions of dollars to create. TCS cannot claim surprise that it was punished within the clear boundaries set by statute.

The Seventh Circuit lost sight of the reason for constitutional review of punitive damage awards in the first place: to assure that the defendant is on notice of the potential severity of the punishment that state law allows. In place of a clear and certain statute, the Seventh Circuit substituted its interpretation of the indefinite "guideposts" this Court has stated are instructive where the law imposes no limit on a fact-finder's discretion to award punitive damages.

The Seventh Circuit's ruling is inconsistent with cases applying a different type of statutory cap. The Wisconsin statute, as do many other state laws, defines a maximum ratio of punitive to compensatory damages.[4] Other damage caps limit the total amount of compensatory and punitive damages a plaintiff may recover. In cases challenging awards under these

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[4] For example, statutes range from the two to one ratio codified in Wisconsin to five to one. *See, e.g.*, Oh. Rev. Code § 2315.21(D)(2)(a) (two to one); Tenn. Code Ann. § 29-39-104(a)(5) (same); Idaho Code Ann. § 6-1604(3) (three to one); Ind. Code § 34-51-3-4 (same); N.C. Gen. Stat. Ann. § 1D-25 (same); Alaska Stat. § 09.17.020(f) (same); Nev. Rev. Stat. § 42.005 (same); S.C. Code Ann. § 15-32-530(A) (same); Ala. Code § 6-11-21(d) (same); and N.J. Stat. Ann. § 2A:15-5.14 (five to one).

statutes, courts have recognized the *Gore* factors have limited, if any, applicability.

In *Abner v. Kansas City Railroad Co.*, 513 F.3d 154 (5th Cir. 2008), a Title VII discrimination case, the plaintiff was awarded $1 in nominal damages and $125,000 in punitive damages. *Id.* at 156. Based on the combination of the statutory cap and the high threshold of culpability for any award of punitive damages, the Fifth Circuit found the award was consistent with due process. *Id.* at 164-65. The court explained that "[g]iven that Congress has effectively set the tolerable proportion, the three factor *Gore* analysis is relevant only if the statutory cap itself offends due process." *Id.* at 164. In the case of a statutory ratio, the statute establishes the tolerable proportion and, consistent with due process, gives notice to the defendant of potential severity of punishment.[5]

The Ninth Circuit reached a similar conclusion in *Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014) (en banc). In that case, the district court upheld a jury award of $1 in nominal damages and reduced the punitive damages to comply with the statutory total damage cap of $300,000. *Id.* at 1053. On appeal, defendants challenged the punitive damage award under *Gore* and *Campbell*. The en banc Ninth Circuit affirmed the judgment. It held that its review "is different when we consider a punitive damages award arising from a

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[5] *Abner* suggests this case may present a different question if the state statute permitted an "intolerable" ratio. In this case, however, where the statutory ratio is two to one, this issue is not present.

statute that rigidly dictates the standard a jury must apply in awarding punitive damages and narrowly caps hard-to-quantify compensatory damages and punitive damages." *Id.* at 1055. In light of the statutory cap, which the court observed gave the defendant adequate notice of the severity of penalty that may be imposed, the court held the "rigid application of the *Gore* guidepost is less necessary or appropriate."[6] *Id.* at 1056.

The Second Circuit has also recognized that a statutory cap changes the analysis, a principle the Seventh Circuit ignored. *Luciano v. Olsten Corp.*, 110 F.3d 210 (2d Cir. 1997). In *Luciano*, the Second Circuit addressed a dollar-amount cap and concluded that a court should reduce an award of punitive damages below the relevant statutory cap only where that award would "shock the judicial conscience and constitute a denial of justice," for example where it would "result in financial ruin of the defendant" or "constitute a disproportionately large percentage of a defendant's net worth," substituting a different standard for *Gore*'s

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[6] Some courts have considered the *Gore* guidepost in these contexts, but in so doing, have not reduced punitive damages. For example, in *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 831 (7th Cir. 2013), a case TCS cited below, the jury awarded $10,000 in compensatory damages and $500,000 in punitive damages. The district court reduced the punitive damages to $200,000 to comply with a statutory cap. Defendant appealed; the EEOC did not cross-appeal. The Seventh Circuit declined to reduce the punitive damages any further. *Id.* at 838-40. It held that under the third *Gore* factor, which looks to legislative direction, the legislature's statutory cap provided the clearest direction as to the appropriate punitive damage award. That analysis supports honoring the Wisconsin statutory cap in this case.

guideposts entirely. *Id.* at 221. Wisconsin law expressly permits consideration of a defendant's ability to pay, providing a common law basis for a jury or a reviewing court to avoid the risk of ruinous punitive damages identified by the Second Circuit. *Kimble*, 845 N.W.2d at 400.[7]

The decisions in *Abner*, *ASARCO*, and *Luciano* recognize that the *Gore* guideposts have limited, if any, applicability to the review of punitive damages awarded under a statutory cap. At a minimum, these decisions of the Second, Fifth, and en banc Ninth Circuits demonstrate a clear conflict with the Seventh Circuit's approach.

2. Even in the absence of statutory caps, courts have approved similar punitive awards. No decision of this Court has rejected a punitive damage award that presents a two to one ratio. In *Haslip*, the Court upheld the punitive damage award of more than four times compensatory damages. 499 U.S. at 23. And the Court has upheld awards reflecting higher multiples. *See TXO Production Corp.*, 509 U.S. 443 (1993) (affirming, in a fractured decision, an award for $19,000 in compensatory damages and $10 million in punitive damages—a ratio of 526 to 1).

Other courts of appeals have upheld substantial punitive damage awards involving ratios of two to one or

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[7] In this case, financial ruin is not an issue. TCS has never asserted that paying $280 million in punitive damages would impoverish it. The jury heard evidence that TCS's *profit* in 2014 was in excess of $3.5 billion. R.898 at 106:17-21.

greater. For example, the Ninth Circuit concluded that the ratio resulting from a $2.6 million punitive damage award compared to a $360,000 compensatory damage award—"slightly more than seven to one"—was not constitutionally excessive. *Zhang v. Am. Gem Seafoods Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) ("We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case."). The Eleventh Circuit found a ratio of punitive to compensatory damages of five to one to be constitutional in a pollution case. *Action Marine Inc. v. Cont'l Carbon, Inc.*, 481 F.3d 1302, 1321-22 (11th Cir. 2007); *see also Cote v. Philip Morris USA, Inc.*, 985 F.3d 840 (11th Cir. 2021) (upholding punitive damages award of approximately $20.7 million, or roughly 3.3 times the amount of compensatory damage award). Further, the Ninth Circuit in *Ramirez v. TransUnion LLC* concluded that a punitive damages award resulting in a four to one ratio for violations of the Fair Credit Reporting Act was constitutionally sound. 951 F.3d 1008, 1037 (9th Cir.), *cert. granted on different issue*, 141 S. Ct. 972 (2020). *See also Brand Mktg. Grp. LLC v. Intertek Testing Servs., N.A., Inc.*, 801 F.3d 347, 362-66 (3d Cir. 2015) (upholding a punitive to compensatory ratio of approximately five to one); *Rainey v. Taylor*, 941 F.3d 243, 255 (7th Cir. 2019) (upholding a ratio of approximately six to one).

C. The Decision Below Is Inconsistent With The History And Tradition Of Statutes Authorizing Punitive or Exemplary Damages.

The Seventh Circuit's substitution of its judgment for the judgment of the jury and the Wisconsin legislature, and its resulting reduction of the punitive damage award, ignore hundreds of years of history and tradition permitting exemplary damages of twice the compensatory award—that is, treble damages—in circumstances such as these. This Court has recognized the "long pedigree" of "English statutes authorizing the award of multiple damages for particular wrongs." *Gore*, 517 U.S. at 580-81. The Court has described a "long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, triple, or quadruple damages to deter and punish." *Campbell*, 538 U.S. at 425.

This longstanding tradition is a continuing one. State legislatures have authorized punitive awards of double, triple, or more damages in various contexts, including those resulting in economic harm. *See, e.g.*, N.J. Stat. Ann. § 2A:15-5.14 (capping punitive damages at five times the amount of compensatory damages); Alaska Stat. § 09.17.020(f-g) (capping punitive damages at three or four times the amount of compensatory damages awarded, depending on the underlying facts); *see also* Idaho Code Ann. § 6-1604(3); Ind. Code § 34-51-3-4; N.C. Gen. Stat. Ann. § 1D-25 (each providing for punitive damages up to three times the amount of compensatory damages awarded); S.C. Code Ann. § 15-32-530 (setting

punitive damages caps at three times and four times the amount of compensatory damages).

And the tradition supports awarding treble damages for wrongs resulting in only economic loss. For example, the Sherman Act, as amended by the Clayton Act, *requires* a prevailing party in a private antitrust action to recover "threefold the damages by him sustained" in addition to the cost of the suit and reasonable attorney's fees. 15 U.S.C. § 15(a) (providing that the prevailing party "shall recover threefold damages"). Similarly, patent laws authorize treble damages, as does the RICO statute. *See* 35 U.S.C. § 284 (providing for up to treble damages for patent infringement); 18 U.S.C. § 1964(c) (providing that a prevailing plaintiff "shall recover threefold the damages he sustains" in a private RICO action). As here, damages awarded under these federal statutes permitting treble damages compensate a plaintiff for injuries that are typically economic. Even where such awards are substantial, they are statutorily permitted and have not been found to infringe upon a defendant's due process rights.[8] The same also is true with Wisconsin's statutory cap permitting treble damages.

The long tradition of permitting, and sometimes requiring, treble (or higher) damages in cases involving substantial economic loss should inform the meaning of

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[8] *See, e.g.*, *Hewlett-Packard Co. v. Quanta Storage, Inc.*, 961 F.3d 731 (5th Cir. 2020) (affirming judgment of $438,650,000 on compensatory award of $176 million); *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002) (affirming $1.05 billion judgment on compensatory award of $350 million).

due process rights, just as this Court has considered prior practice and has been mindful of the tradition of punitive damages in prior decisions. *See, e.g.*, *Haslip*, 499 U.S. at 9-12; *see generally Town of Greece v. Galloway*, 572 U.S. 565, 576-77 (2014) (in Establishment Clause case, Court holds Constitution must be interpreted in light of historical practices and understandings). This case provides the Court with the opportunity to reinforce that historical tradition and limit lower courts' *ad hoc* dissection of jury awards already deemed reasonable under state statutory caps, which themselves provide the notice due process requires in connection with an award of punitive damages.

D. If The Decision Below Is Consistent With *Gore* And *Campbell*, The Court Should Reconsider Those Decisions.

The Seventh Circuit's decision should be reviewed because it conflicts with the decisions of this Court, the constitutional underpinnings of any review of punitive damages under the Due Process Clause, and decisions of other courts of appeals. If, however, this Court concludes that the Seventh Circuit's decision is consistent with *Gore*, *Campbell*, and other precedents, this Court should reconsider those cases in the context of statutes providing notice of the range of acceptable punitive damages and limiting the range of potential punishment.

The Seventh Circuit's decision permits an appellate court to apply its own judgment, constrained only by individualistic guideposts, to reject a punitive damage

award otherwise authorized by statute and found by the jury to be supported by the evidence. If permitted to stand, the Seventh Circuit's decision will empower courts reviewing verdicts entered on statutory causes of action and other claims constrained by statutes to substitute their own judgment for the considered judgment of the political branches. In cases with statutory caps, courts do not act in a vacuum—the legislature has already defined the applicable limits. If the decision below is consistent with this Court's precedents, the Court should reconsider those precedents and decide whether the Due Process Clause operates as an independent, substantive limitation, notwithstanding state and federal statutes authorizing specific, defined punishment for violations of the law.

II. This Case Presents An Appropriate Vehicle For Review.

Although this case may have begun as a factually and legally complicated dispute, it has narrowed to the single issue raised in this petition regarding the application of *Gore* and *Campbell* to statutory caps providing notice of punitive damages.

Liability is no longer disputed, as TCS has now conceded liability. The Seventh Circuit has determined that the award of compensatory damages was correct as a matter of Wisconsin law. The Seventh Circuit also has resolved issues relating to Epic's entitlement to punitive damages. That Court has rejected TCS's claim that certain issues relating to punitive damages must be retried. At this stage, there are no issues that would

interfere with this Court's consideration of the single issue raised in this petition.

The case thus cleanly presents the legal issue of whether there is any role for due process review where the legislature has enacted a reasonable cap on punitive damages that gives all entities subject to its laws ample notice of the potential for punitive damages and the potential severity of any punitive damage award. Moreover, the statutory ratio selected by the Wisconsin Legislature—a ratio of two to one—does not approach the limits of this Court's prior cases. To the contrary, the Wisconsin statutory ratio is in accord with established law stretching back decades, if not centuries, permitting or requiring such punitive or exemplary damages in similar circumstances.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

April 6, 2021

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APPENDIX

Appendix A

In the United States Court of Appeals For the Seventh Circuit

Nos. 19-1528 & 19-1613

EPIC SYSTEMS CORP.,

Plaintiff/Counterclaim Defendant-Appellee/Cross-Appellant,

v.

TATA CONSULTANCY SERVICES LTD. & TATA AMERICA INTERNATIONAL CORP. D/B/A TCS AMERICA,

Defendants/Counterclaim Plaintiffs-Appellants/Cross-Appellees.

Appeals from the United States District Court for the Western District of Wisconsin.
No. 14-cv-748 – William M. Conley, *Judge*.

ARGUED JANUARY 16, 2020 – DECIDED AUGUST 20, 2020

AMENDED NOVEMBER 19, 2020

Before FLAUM, MANION, and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. Without permission from Epic Systems, Tata Consultancy Services ("TCS")[1] downloaded, from 2012 to 2014, thousands of documents containing Epic's confidential information and trade secrets. TCS used some of this information to create a "comparative analysis"—a spreadsheet comparing TCS's health-record software (called "Med Mantra") to Epic's software. TCS's internal communications show that TCS used this spreadsheet in an attempt to enter the United States health-record-software market, steal Epic's client, and address key gaps in TCS's own Med Mantra software.

Epic sued TCS, alleging that TCS unlawfully accessed and used Epic's confidential information and trade secrets. A jury ruled in Epic's favor on all claims, including multiple Wisconsin tort claims. The jury then awarded Epic $140 million in compensatory damages, for the benefit TCS received from using the comparative-analysis spreadsheet; $100 million for the benefit TCS received from using Epic's other confidential information; and $700 million in punitive damages for TCS's conduct.

Ruling on TCS's motions for judgment as a matter of law, the district court upheld the $140 million

[1]Tata Consultancy Services Limited is an Indian company; Tata America International Corp. is a New York corporation that is wholly owned by Tata Consultancy Services. We refer to these companies collectively as "TCS."

compensatory award and vacated the $100 million award. It then reduced the punitive-damages award to $280 million, reflecting Wisconsin's statutory punitive-damages cap. Both parties appealed different aspects of the district court's rulings.

We agree with the district court that there is sufficient evidence for the jury's $140 million verdict based on TCS's use of the comparative analysis, but not for the $100 million verdict for uses of "other information." We also agree with the district court that the jury could punish TCS by imposing punitive-damages. But the $280 million punitive-damages award is constitutionally excessive, so we remand to the district court with instructions to reduce the punitive damages award.

I. BACKGROUND

Epic Systems is a leading developer of electronic-health-record software. This software aims to improve patients' quality of care by keeping relevant information about patients— like patient schedules and billing records—in a central location. Epic provides versions of this software to some of the top hospitals in the United States. Each customer licenses from Epic software applications (modules) to fit the customer's specific needs. The customer can then customize the software to ensure it operates properly within the customer's organizational structure.

The complexity of Epic's health-record system requires Epic's customers to consistently update and test their systems. To facilitate this process, Epic

provides its customers with access to a web portal called "UserWeb." UserWeb provides various resources—including administrative guides, training materials, and software updates—and it also supplies an online forum where Epic's customers can share information.

Along with these helpful resources, UserWeb contains confidential information about Epic's health-record software. To protect this information, Epic restricts who can access the UserWeb portal. Epic's customers, who have access, are required to maintain the confidentiality of this information, and they are expected to allow specific individuals access to this sensitive information on a "need-to-know" basis only.

To guard this confidentiality, Epic allows only credentialed users to access UserWeb; to get credentialed, users must prove they are either a customer or a consultant. Customers get access to all features and documents related to the modules they license from Epic. Consultants—who are hired by customers to implement and test Epic's software—cannot access features like the discussion forum and training materials.

In 2003, Kaiser Permanente—the largest managed-healthcare organization in the United States—obtained a license from Epic to use KP HealthConnect, a Kaiser-specific version of Epic's electronic-health-record software. Because of Kaiser's size, implementation of KP HealthConnect is highly complex; testing and tweaking it after each update is complicated and time consuming.

For help with these tasks, Kaiser hired TCS in 2011. TCS provides information-technology services, like software testing and consulting, on a global basis. But TCS also has its own electronic-health-record software, Med Mantra, which at the time was predominately sold in India.

Epic was aware of this conflict of interest and was concerned about TCS's relationship with Kaiser. Still, Kaiser used TCS to test KP HealthConnect. But to fulfill its obligation of confidentiality to Epic, Kaiser imposed rules for TCS to follow while working on Kaiser's account.

First, TCS was required to perform all services related to KP HealthConnect at Kaiser offices in the United States or off-shore development centers—approved facilities outside the United States.

Second, TCS was required to follow strict security protocols at the offshore development centers. Desktop computers used to work on KP HealthConnect could be used only for Kaiser-related work. To ensure these computers could not access the internet or TCS's email system, a firewall was installed. Other computers at the offshore facilities could access TCS's network and email system but were not allowed to access KP HealthConnect material.

TCS, while operating under these strict requirements, provided testing and support services to Kaiser. But TCS employees claimed they could perform the required tasks more efficiently if they had full access

to UserWeb. Kaiser repeatedly asked Epic to grant TCS this access; Epic repeatedly declined to do so.

Unsatisfied with this lack of access, in late 2011, TCS found a way to gain unfettered access to all the information available on UserWeb: the key was Ramesh Gajaram. TCS hired Gajaram to work on the Kaiser account from an offshore development center in Chennai, India. Before working for TCS, Gajaram worked for a different company that also helped Kaiser test KP HealthConnect. While working for that company, Gajaram falsely identified himself to Epic as a Kaiser employee, and Epic granted Gajaram full access to UserWeb.

Gajaram informed his superior at TCS, Mukesh Kumar, that he still had access to UserWeb. At Kumar's request, Gajaram accessed the UserWeb portal. Gajaram also shared his login credentials with other employees at the Chennai off-shore development center. A few years later, Gajaram transferred to TCS's Portland, Oregon office; he again shared his UserWeb login credentials with at least one other TCS employee.

Thanks to Gajaram's actions, dozens of TCS employees gained unauthorized access to UserWeb. And from 2012 to 2014, TCS employees accessed UserWeb thousands of times and downloaded over 6,000 documents (1,600 unique documents) totaling over 150,000 pages. These documents contained Epic's confidential information, including some of its trade secrets. And not all of this information related to TCS's work for Kaiser; employees downloaded information

related to a medical-laboratory module that Kaiser does not license from Epic.

This unauthorized access came to light in early 2014, when Philip Guionnet, a TCS employee, attended meetings concerning the Med Mantra software. At the first meeting, Guionnet observed a demonstration of Med Mantra for Kaiser executives. Guionnet was "astounded"; he had seen Med Mantra several times before and believed the software had dramatically improved.

After this meeting, Guionnet was concerned that "some of the information from Kaiser had been used to improve Med Mantra." So, Guionnet visited the Med Mantra product development team. During his visit, a TCS employee showed Guionnet a spreadsheet that compared Med Mantra to Epic's electronic-health-record software. The spreadsheet compared, in some detail, the functionalities of the two products. Guionnet believed this spreadsheet confirmed his suspicion that information regarding Kaiser's version of Epic's software had been used to improve Med Mantra. Guionnet then asked for a copy of this spreadsheet. What he received instead was a less-detailed document referred to as the "comparative analysis."

The comparative analysis—a key document in this appeal—was created as a part of TCS's effort to see if it could sell Med Mantra in the United States. Specifically, TCS wanted to sell Med Mantra directly to Kaiser, who was using Epic's software, and wanted to be sure that "key gaps" in Med Mantra were addressed before this attempted sale. So, TCS gave a consultant from the Med

Mantra team the task of creating a comparison between Med Mantra and Epic's software. In doing so, this employee worked with "Subject Matter Experts"—employees who had experience with Epic's software—and created the comparative analysis that was ultimately sent to Guionnet.

The comparative analysis is an 11-page spreadsheet that compares Med Mantra to Epic's software. The first page lists 33 modules, and it notes whether the module is available in Med Mantra and Epic's software; the next 10 pages list Med Mantra's functions and note whether Epic's software contains the same functions. Multiple TCS employees confirmed that the information used in this comparative analysis is not publicly available.[2]

Guionnet—after attending these meetings and viewing the comparative analysis—reported his concerns in June 2014 to TCS, Kaiser, and Epic employees. Epic and Kaiser immediately investigated Guionnet's claim and discovered that TCS employees had gained unauthorized access to UserWeb. But TCS employees were less than forthcoming during Kaiser's investigation; multiple TCS employees lied to investigators about TCS's access to UserWeb.

A few months later, Epic filed suit against TCS, alleging that TCS used fraudulent means to access and steal Epic's trade secrets and other confidential

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[2] In fact, TCS was barred from arguing that the comparative analysis was created from information in publicly available sources because it failed to "direct the court to *any* evidence that the comparative analysis was created from such sources."

information. During a contentious year-and-a-half discovery process, Epic learned that TCS had failed to preserve relevant evidence. The district court sanctioned TCS for its discovery failures by ultimately providing the jury with an adverse-inference instruction:

> If you find by a preponderance of the evidence that Epic has proven TCS both: (1) intentionally destroyed evidence (or intentionally caused evidence to be destroyed), and (2) caused the evidence to be destroyed in bad faith, then you may assume that this evidence contained information helpful to Epic and harmful to TCS.

The district court bifurcated proceedings into a liability phase and a damages phase. The liability phase began in April 2016. The jury returned a verdict in favor of Epic on all claims, including those under Wisconsin law for breach of contract, fraudulent misrepresentation, misappropriation of trade secrets, unfair competition, deprivation of property, and unjust enrichment.

Before the damages phase of trial, Epic presented the district court with evidence it sought to present to the jury regarding the benefit TCS received by using Epic's confidential information and trade secrets. Epic's expert, Thomas Britven, initially based his damages calculation on costs Epic incurred developing the modules underlying *all* the documents TCS stole. But the district court concluded that the evidence did not support Epic's broad claims of the use to which TCS put the stolen information. The district court accordingly

rejected Epic's initial damages proffer but gave Epic another opportunity to present evidence of TCS's uses of the stolen information and the value of those uses to TCS.

Epic went back to the drawing board and returned to the district court with a new, more limited theory of damages. Britven based his new calculation on only the confidential information and trade secrets that were incorporated into the comparative analysis spreadsheet. This calculation still used a proxy for the benefit TCS received: the costs Epic incurred in developing these specific software modules—accounting for coding costs that did not benefit TCS and technology decay over time. The district court accepted this "ratchet[ed] back" damages theory, noting the new calculation "more approximates what was actually received and apparently used by [TCS] both in the comparative model but also what were ongoing discussions by marketing people within [TCS]."

During the damages trial, Epic presented two witnesses: Stirling Martin and Britven. Martin used a chart that both identified which Epic modules were reflected in TCS's downloads and identified, with a checkmark, which of these modules were reflected in the comparative analysis. Martin testified about what stolen information was incorporated into the comparative analysis. Britven then presented a calculation of the value TCS received by avoiding research and development costs they would have incurred without the stolen information. First, Britven identified how much it cost Epic to develop the modules related to the trade secrets and confidential information

that made their way into the comparative analysis. Then, Britven adjusted this number based on certain coding costs (which conferred no benefit on TCS) and the decay in the value of technology over time. He reached an approximate benefit to TCS of about $200 million.

TCS called its damages expert—Brent Bersin—to testify about the value of the benefit TCS received related to the comparative analysis. Bersin testified that Epic was not entitled to an award of economic damages, but he also testified that Britven incorrectly calculated the damages. Specifically, Bersin pointed out that Britven's calculation failed to account for reduced labor costs in India; TCS could pay its India-based engineers about 30% to 40% less than Epic would have to pay its engineers to develop the same software.

At the end of the damages trial, the district court gave the jury a special-verdict form concerning compensatory damages. The jury was asked to determine the amount of damages, if any, to which Epic was entitled based on (a) the "Benefit of TCS's Use of [the] Comparative Analysis," and (b) the "Benefit of TCS's Use of Other Confidential Information." The jury was also asked to determine whether Epic should be awarded punitive damages, and if so, in what amount.

The jury returned a $940 million total damages award: $140 million for uses of the comparative analysis, $100 million for uses of "other" confidential information, and $700 million in punitive damages. The district court entered an injunction prohibiting TCS from using, possessing, or retaining any of Epic's trade secrets or confidential information.

The court then addressed several post-trial motions, including TCS's three motions for judgment as a matter of law on liability and damages. Fed. R. Civ. P. 50(a). The district court upheld the jury's liability verdict and its $140 million compensatory-damages award based on TCS's uses of the comparative analysis, which contained Epic's information. But the district court struck the $100 million compensatory award for "other uses" of Epic's confidential information and also reduced the punitive-damages award to $280 million based on a Wisconsin statutory cap on punitive damages. *See* Wis. Stat. § 895.043(6).

TCS then filed a post-judgment motion under Rules 50(b) and 59, again seeking judgment as a matter of law, or in the alternative, a new trial. But this motion "largely repeat[ed] the same arguments previously raised in [TCS's] Rule 50(a) motion." The district court denied this new motion, leaving intact the $140 million compensatory award based on the comparative analysis. It also upheld the previously reduced $280 million punitive-damages award, noting that its prior decision to vacate part of the compensatory-damages award "does not undermine the jury's award of punitive damages."

II. ANALYSIS

Both parties appealed different aspects of the district court's post-trial rulings. TCS challenges the district court's decision to leave intact the $140 million compensatory award related to the comparative analysis. TCS also challenges the district court's punitive damages decisions. On cross-appeal, Epic challenges the district court's decision to vacate the $100

million compensatory award based on "other uses" of Epic's confidential information.

We first note what law applies to these appeals. Jurisdiction in this case is based on diversity of citizenship and a federal question (with supplemental jurisdiction over the state-law claims). When hearing state-law claims that arise under diversity jurisdiction, 28 U.S.C. § 1332, or supplemental jurisdiction, *id.* § 1367, federal courts are "obliged to follow state decisional law, as well as all other state law." *Houben v. Telular Corp.*, 309 F.3d 1028, 1032 (7th Cir. 2002). And when a federal jury awards compensatory damages based on a state-law claim, state law applies to our review of that damages award. *Kaiser v. Johnson & Johnson*, 947 F.3d 996, 1019 (7th Cir. 2020). Similarly, when state law provides the basis for liability, the punitive-damages award must be consistent with state law. *See Kapelanski v. Johnson*, 390 F.3d 525, 534 (7th Cir. 2004).

Epic's damages award for unjust enrichment was based on its claims under Wisconsin law for misappropriation of its trade secrets and confidential information. And its award of punitive damages had to be based on Epic's Wisconsin law "trade secrets, fraudulent misrepresentation[,] and unfair competition claims."

Wisconsin law therefore applies to the parties' substantive challenges of these damages awards. With that in mind, we address the parties' challenges to the district court's decisions regarding compensatory damages. We then turn to TCS's arguments concerning punitive damages.

A. "Comparative Analysis" Compensatory Award

The jury awarded Epic $140 million in compensatory damages based on the benefit TCS derived from using the comparative analysis, which contained some of Epic's confidential information. The district court upheld this award on two occasions: first, when ruling on TCS's post-trial motion for judgment as a matter of law, Fed. R. Civ. P. 50(a); and second, when ruling on TCS's renewed motion for judgment as a matter of law, *id.* 50(b), and motion for a new trial, *id.* 59.

We review a district court's denial of a motion for judgment as a matter of law *de novo*. *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 822 (7th Cir. 2016); *see also Abellan v. Lavelo Prop. Mgmt., LLC*, 948 F.3d 820, 827 (7th Cir. 2020) (applying Rule 50 and reviewing the district court's decision *de novo* when state substantive law applied). "Thus, like the district court, we decide whether the jury had 'a legally sufficient evidentiary basis' for its verdict." *May v. Chrysler Grp., LLC*, 716 F.3d 963, 971 (7th Cir. 2013) (per curiam) (quoting Fed. R. Civ. P. 50(a)(1)). In doing so, we construe all evidence in the record—and inferences that can be reasonably drawn from that evidence—in favor of the party that prevailed at trial on the issue; that party here is Epic. May, 716 F.3d at 971. This is a high burden for the moving party to satisfy: we reverse the verdict "only if no rational jury could have found in [Epic's] favor." *Andy Mohr Truck Ctr., Inc. v. Volvo Trucks N. Am.*, 869 F.3d 598, 602 (7th Cir. 2017). Additionally, we review a district court's denial of a motion for a new trial under Rule 59 for an abuse of discretion. *Abellan*, 948 F.3d at 830.

TCS argues it is entitled to judgment as a matter of law on this compensatory-damages award because there is no logical connection between the basis for liability and the jury's damages verdict. Specifically, TCS argues that a reasonable jury could not find that TCS received a $140 million benefit by incorporating Epic's confidential information and trade secrets into what TCS characterizes as a "stale marketing document."

Unjust enrichment damages are available as a remedy for a defendant's misappropriation of trade secrets, Wis. Stat. § 134.90, and are also available as a remedy for Wisconsin tort claims, *see Pro-Pac, Inc. v. WOW Logistics Co.*, 721 F.3d 781, 786 (7th Cir. 2013). An action for recovery seeking unjust enrichment damages is "grounded on the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust." *Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987).

Because the recovery of unjust enrichment damages is grounded in equitable principles, Wisconsin law limits the measure of unjust enrichment damages to the value of the "benefit conferred upon the defendant." *Mgmt. Comput. Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67, 79–80 (Wis. 1996); *cf. Halverson v. River Falls Youth Hockey Ass'n*, 593 N.W.2d 895, 900 (Wis. Ct. App. 1999) ("Making improvements alone does not prove the [defendant] received any benefit from them."). Unjust enrichment damages must be proven with reasonable certainty, *Mgmt. Comput. Servs.*, 557 N.W.2d at 80, and any costs the plaintiff may have incurred are "generally irrelevant," *Lindquist Ford, Inc.*

v. Middleton Motors, Inc., 557 F.3d 469, 477 (7th Cir. 2009).

But the reasonable value of the benefit conferred on a defendant can be measured in a variety of ways. In ordinary unjust enrichment cases involving money or services, the amount of recovery "is the amount of money advanced or the reasonable value of the services rendered." *Shulse v. City of Mayville*, 271 N.W. 643, 647 (Wis. 1937). In other cases, a benefit is conferred under circumstances in which the "benefactor reasonably believes that he will be paid," so the benefactor may be entitled to receive damages equaling "the market value of the benefit." *Cosgrove v. Bartolotta*, 150 F.3d 729, 734 (7th Cir. 1998). And the Restatement of Restitution and Unjust Enrichment—which Wisconsin courts treat as persuasive authority, *see, e.g.*, *Buckett v. Jante*, 767 N.W.2d 376, 382–83 (Wis. Ct. App. 2009)—provides many examples of how to calculate the benefit conferred on a defendant depending on the context in which that benefit is received. *See, e.g.*, Restatement (Third) of Restitution and Unjust Enrichment § 41 (2011) (providing guidance on how to calculate the benefit conferred on the defendant in cases involving the misappropriation of financial assets).

Simply put, there is no single way to measure the benefit conferred on a defendant; the measurement is context dependent. The important considerations are that a judge or jury calculates the benefit to the defendant—not the loss to the plaintiff—and that this calculation is done with reasonable certainty. *See, e.g.*, *Mgmt. Comput. Servs.*, 557 N.W.2d at 80 (holding that evidence of lost profits is insufficient for a "fair and

reasonable approximation of unjust enrichment damages" because "unjust enrichment is not measured by the plaintiff's loss"); *W.H. Fuller Co. v. Seater*, 595 N.W.2d 96, 100 (Wis. Ct. App. 1999) (remanding with instructions for the trial court to first determine which of the plaintiff's services the defendant actually benefited from and then determine the value of that benefit).

Following this general approach, we have noted at least one way a plaintiff may prove the amount of benefit conferred on the defendant when the case involved misappropriation of trade secrets. In *3M v. Pribyl*, we upheld the jury's liability finding concerning the defendant's misappropriation of 3M's trade secret (operating procedures and manuals). 259 F.3d 587, 595–97 (7th Cir. 2001) (applying Wisconsin trade secret law). We found in the record sufficient evidence that the defendants used the misappropriated operating procedures and manuals to gain "a significant head start in their operation." *Id.* at 596. While this trade secret was not used directly to develop a new product and was not tied to any of the defendant's specific profits, we affirmed the jury's liability verdict, and also noted that damages were awarded based on "what it would have cost the defendants to independently develop the trade secrets at issue." *Id.* at 607.

So, avoided research and development costs have been awarded when the defendants gained a significant head start in their operations.

TCS believes that avoided research and development costs are not a reasonable proxy for the benefit it

received from the comparative analysis. TCS assumes that Epic could prove only that the comparative analysis was used as a "stale marketing document." Additionally, TCS argues that Britven— Epic's damages expert— made a fundamental error under Wisconsin law: he based his unjust enrichment damages on Epic's *cost* rather than TCS's *benefit*. So, TCS reasons, the damages awarded based on this calculation must fail as a matter of law.

We disagree. Calculating the benefit conferred on a defendant to determine unjust enrichment damages is a context-specific analysis. Under Wisconsin law, the jury could award avoided research and development costs based on TCS gaining a "significant head start in [its] operation." *Id.* at 596. And, viewing the evidence in the light most favorable to Epic, the jury would have a sufficient basis to award Epic $140 million in compensatory damages based on the "head start" TCS gained in development and competition. That "head start," the jury could conclude, came from TCS's use of the comparative analysis and thus the stolen information incorporated into that analysis. Furthermore, the jury could base its award on the benefit TCS received from avoided research and development costs, not the cost Epic incurred when creating the same information.

Let's turn from the legal theory that supports the jury verdict to the evidence that supports the damages award. First, Epic presented evidence that TCS stole confidential information and trade secrets from Epic's UserWeb. Gajaram, a TCS employee, testified that he improperly obtained credentials that allowed him to view UserWeb in its entirety. Gajaram also testified

that he shared his credentials with other TCS employees. Stirling Martin, Epic's senior vice president, testified that he determined TCS employees downloaded at least 1,600 unique files from UserWeb in two years. Martin confirmed that these files contained confidential information, including trade secrets.

The jury also saw slides from a TCS PowerPoint presentation showing that TCS strategized as to how it could start selling electronic-health-record software in the United States. TCS noted in this PowerPoint, however, that there were "key gaps" in Med Mantra that TCS would need to address before selling it to United States companies. In a deposition played for the jury, a TCS employee confirmed that TCS wanted to "implement" Med Mantra at Kaiser, one of Epic's biggest customers, and that he was asked to create the comparative analysis to help achieve this goal. This employee also testified that he refused to create the comparative analysis because he did not want to get in trouble for disclosing Epic's confidential information. Still, the jury saw internal emails showing that TCS found a willing participant and the comparative analysis was created.

The jury also heard Guionnet testify that TCS wanted to find a way to implement "Med Mantra, either as a whole or in modules, in the U.S." To that end, Guionnet testified that TCS worked with DaVita to develop a lab module. And the PowerPoint slides shown to the jury show that TCS—as a part of its United States entry strategy—would use DaVita "as a reference site to promote Lab Management solution[s] to Hospitals and Independent Laboratories." This lab module was a

success; an email shown to the jury indicated that TCS planned on "marketing the [l]ab product as a starter immediately to position [itself] in the Provider space."

Additionally, Epic presented evidence that, based on TCS's discovery violations, would allow it to draw an adverse inference against TCS. The jury heard evidence that TCS failed to preserve proxy logs that would have indicated who accessed UserWeb and when. It also heard that TCS failed to preserve the contents of its computer hard drives. So, the jury could conclude that TCS destroyed evidence of additional downloaded documents that "contained information helpful to Epic and harmful to TCS."

The jury could conclude, based on all the evidence we've described, that TCS used Epic's stolen confidential information, including trade secrets, to create the comparative analysis. Then, the jury could infer from the evidence that the comparative analysis was used for a variety of purposes. These purposes include: attempting to sell Med Mantra to Kaiser, one of Epic's largest customers; attempting to enter the United States market and compete directly with Epic; and addressing any key gaps in Med Mantra, potentially by improving the product. These findings are bolstered by the adverse inference against TCS—an inference that would allow the jury to conclude that more documents harmful to TCS existed.

The jury could therefore find that TCS's benefit, based on TCS's use of the comparative analysis, was a "head start" in competition and development. Indeed, the evidence allowed a jury to conclude that TCS used

Epic's confidential information to thoroughly evaluate what it would take to compete in a new market. In other words, a jury could conclude that TCS had a free shot—using stolen information—to determine whether it would be profitable to improve Med Mantra and implement a variety of tactics to enter the United States electronic-health-record market. Based on these intermediate findings, a jury could determine that a reasonable valuation of this benefit is the cost TCS avoided by not having to develop this information by itself.

And the jury could value that benefit—avoided research and development costs—at $140 million. Martin testified that information taken from UserWeb was incorporated into the comparative analysis. He explained that the stolen information corresponded to specific modules of Epic's software; so, Martin broke down for the jury which information, corresponding to specific modules, had been embedded in the comparative analysis. Martin then showed the jury an exhibit on which he placed a checkmark by each module of Epic's software that he believed made its way into the comparative analysis.

Britven then calculated TCS's benefit from avoiding the cost of researching and developing the stolen modules that were incorporated into the comparative analysis. He started by calculating Epic's cost in developing all of the information taken by TCS; he then reduced that number to reflect only the cost Epic incurred from developing modules incorporated into the comparative analysis. A few more reductions were made: one subtracting the costs of Epic's coding that

TCS did not receive, and one reflecting the decayed value of technology over time. Britven concluded, based on this calculation, that TCS received a $200 million benefit even though "Epic incurred [$]306 million to develop those same trade secrets and confidential information."

TCS's expert, Bersin, testified about what he believed to be missing from Britven's calculation: a labor-cost reduction. He explained that Med Mantra's development team is located in India, where labor costs are 30–40% less than in the United States, where Epic developed its software. So, he reasoned, TCS's avoided research and development costs should be 30–40% less than the $200 million Britven calculated. And applying a 30% reduction to Britven's $200 million benefit value leaves you with an estimated $140 million in avoided research and development costs—the exact amount of damages awarded by the jury.

In sum, the jury had a sufficient basis to reach the $140 million "comparative analysis" compensatory award. TCS's argument to the contrary relies on the assumption that the comparative analysis was used as nothing more than a stale marketing document. But the jury was presented with evidence that would allow it to conclude the comparative analysis was not just a stale marketing document; the comparative analysis—and therefore Epic's information—was used to help TCS evaluate its United States entry strategy and potentially even address key gaps in Med Mantra by improving the product. The evidence also allowed the jury to conclude that avoided research and development costs were a reasonable valuation of the benefit TCS

received from using the comparative analysis, which contained stolen information. Likewise, using avoided research and development costs as the valuation of TCS's benefit, the jury could have reached a $140 million compensatory award. Importantly, it could do so without equating Epic's development costs ($306 million, by Britven's estimate) to TCS's benefit from using Epic's information in the comparative analysis. So, we agree with the district court's decisions to uphold this damages verdict and deny TCS's motion for a new trial.

TCS's next argument concerns the punitive-damages award. But before we shift to punitive damages, we address Epic's cross-appeal of the district court's decision to vacate the jury's $100 million compensatory-damages award for TCS's "other uses" of Epic's confidential information.

B. "Other Confidential Information" Compensatory Award

The district court presented the jury with a special-verdict form that allowed it to award damages based on (a) the benefit of TCS's use of the comparative analysis and (b) the benefit of TCS's use of other confidential information. The district court included "part b" of the verdict because "there was some evidence that other confidential information was disseminated 'out beyond the specific people who discussed the comparative analysis.'"

The jury initially awarded $100 million for "the benefit of TCS's use of other confidential information" in

addition to the $140 million awarded for the "benefit of TCS's use of [the] comparative analysis." But, in partially granting TCS's Rule 50 motion for judgment as a matter of law, the district court held that this $100 million award for benefits from "other information" was too speculative and was "tied to no evidence of specific use at all."

We review a district court's decision to grant judgment as a matter of law *de novo*. *Passananti v. Cook County*, 689 F.3d 655, 659 (7th Cir. 2012). "Our job is to assure that the jury had a legally sufficient evidentiary basis for its verdict." *Filipovich v. K & R Express Sys., Inc.*, 391 F.3d 859, 863 (7th Cir. 2004). In deciding a Rule 50 motion, we "construe[] the evidence strictly in favor of the party who prevailed before the jury" and we do not make credibility determinations or reweigh the evidence. *Passananti*, 689 F.3d at 659. Still, "a verdict supported by no evidence or a mere scintilla of evidence will not stand." *Martin v. Milwaukee County*, 904 F.3d 544, 550 (7th Cir. 2018).

The specific verdict at issue here is the jury's award of compensatory damages apart from those based on the comparative analysis. Under Wisconsin law, compensatory damages must be "proved with reasonable certainty." *Novo Indus. Corp. v. Nissen*, 140 N.W.2d 280, 284 (Wis. 1966). This does not require the plaintiff to prove damages with "mathematical precision; rather, evidence of damages is sufficient if it enables the jury to make a fair and reasonable approximation." *Mgmt. Comput. Servs.*, 557 N.W.2d at 80.

Epic—to prove it was entitled to unjust enrichment damages for TCS's use of other confidential information—needed to show that TCS used confidential information that was *not* incorporated into the comparative analysis. Epic says the jury heard evidence that would allow it to conclude that other confidential information—that was not incorporated into the comparative analysis—was used to improve Med Mantra. Epic points to Guionnet's testimony, testimony that TCS assigned a Med Mantra team member to the Kaiser account, testimony about TCS's downloading of information unrelated to its work for Kaiser, and the adverse-inference jury instruction in support of this theory. Epic also points to evidence it believes the jury could have used to reasonably determine that TCS received a $100 million benefit based on its use of this alleged other confidential information. But we believe the evidence isn't enough to support the jury's $100 million award.

Let's start with Guionnet's testimony. Guionnet—a TCS manager responsible for the Kaiser account—testified that he attended a meeting where Med Mantra was presented to Kaiser executives. He left the meeting "astounded"; Med Mantra had improved significantly since the last time he had seen the software, and he "was concerned that some of the information from Kaiser had been used to improve Med Mantra." Guionnet then met with members of the Med Mantra team. A TCS employee—introduced to Guionnet as the "interface between Med Mantra" and the Kaiser team—showed Guionnet a "comparison ... between Med Mantra and

Epic." Guionnet "basically ... knew" at that point that TCS had improperly used Epic's information.

In a portion of Guionnet's deposition played for the jury, Guionnet confirmed that he more than suspected that Epic's information was used to improve Med Mantra: "it's knowledge." He stated that Epic's "workflow, data model, functionalities, [and] test scripts" were used in Med Mantra's development. But when pressed about how he knew Epic's information was used to improve Med Mantra, Guionnet consistently responded by saying "I don't remember," "I don't remember the details," or by saying he would have to go back and look at his emails.

Guionnet then confronted TCS's president with information about TCS's misconduct. But rather than initiating an investigation, TCS's president transitioned Guionnet away from the Kaiser account and told him that if he did not transition "peacefully," he would be "put ... in a corner" and TCS would "make [his] life miserable."

This evidence is missing something: any proof that TCS used any confidential information besides the information incorporated into the comparative analysis. Guionnet testified that he knew TCS used Epic's information to improve Med Mantra, but the evidence indicated that his knowledge came from reviewing the comparative analysis, only. And when pressed at his deposition about how he knew that Med Mantra improved, Guionnet provided nothing but a lack of memory and some general statements that Med Mantra had improved. Basically, Guionnet was unable to tie

what he perceived to be Med Mantra's significant improvements to any "other information" besides the comparative analysis.

Guionnet's testimony about his meeting with the Med Mantra team does not add any support for the verdict. Guionnet testified that at this meeting, he received a detailed run-down of Med Mantra's functionality. Additionally, a TCS employee showed him a spreadsheet comparing Med Mantra to Epic's software. But this information is related to TCS's use of the comparative analysis; it has nothing to do with Epic's other confidential information. Guionnet's testimony thus supports an inference that TCS used Epic's confidential information, but only the information that was incorporated into the comparative analysis.

Epic next points to evidence that TCS assigned members of the Med Mantra team to the Kaiser account. Guionnet testified that "DV" Prasad "was a member of the Med Mantra team who was planted in [the Kaiser] organization." And in a deposition played for the jury, Prasad stated that Reddy, a senior TCS executive, asked him to prepare a presentation comparing Med Mantra and Epic. Prasad then confirmed that he "never did" prepare the presentation because he knew it was "not right." But even without Prasad's compliance, Reddy found a willing employee and created the comparative analysis.

Guionnet testified that he later caught wind that Prasad— a member of the Med Mantra team—was planted in the Kaiser organization. Guionnet attempted to get rid of Prasad immediately; the head of TCS's

healthcare unit denied this request, leaving this "plant" on the Kaiser team.

This evidence, contrary to Epic's argument, has nothing to do with TCS's uses of "other information." Reddy made his intentions clear: Prasad was to use Epic's confidential information to compare Med Mantra to Epic's software before attempting to sell Med Mantra to Kaiser. This evidence shows only that Epic's confidential information made its way into the comparative analysis, which was then used as part of an overall market-entry strategy. Rather than proving that "other information" was used, this evidence simply provides additional support for the jury's compensatory-damages award for TCS's use of the comparative analysis. So again, we see no evidence tying any of Epic's other stolen confidential information to any use outside of the comparative analysis.

In another attempt to show TCS used other confidential information to improve Med Mantra, Epic points to evidence regarding TCS's laboratory module. First, Epic points to TCS's PowerPoint, which acknowledges that there were key gaps in Med Mantra that needed to be addressed. And Martin testified that TCS employees stole information regarding Epic's laboratory product, Beaker. Guionnet testified that TCS had partnered with DaVita to create its own laboratory module. This project, however, fell behind and was described as "well below average" by an independent third party. Still, an email from a TCS employee showed that TCS was "very seriously thinking" about "marketing the Lab product as a starter immediately to position [TCS] in the Provider space." TCS later

licensed the DaVita laboratory module to another United States company, Quest Diagnostics.

But this is where evidence concerning Beaker ends. Epic asserts that the mere fact that TCS downloaded information about Beaker shows that "TCS used [its] confidential information and trade secret information to improve the lab product it developed for DaVita." Yet Epic fails to provide any examples of how Epic's modules or information, including the Beaker module, could be tied to uses or improvements involving the DaVita project. So, Epic presented evidence only that TCS downloaded information concerning Beaker; but it does not present evidence that TCS *actually used* this information. Without a link from this information to any use, Epic's evidence does not support a finding that TCS used "other confidential information."

Epic attempts to plug the evidentiary holes described above by pointing to the adverse-inference instruction. It's true that—given the district court's instruction—the jury heard evidence supporting an inference that TCS destroyed documents that were harmful to TCS and helpful to Epic. But even with this inference, there is still no concrete evidence showing that TCS used Epic's "other information."

Epic is thus left asking a jury to award damages based solely on speculation as to what *might* be contained in the destroyed documents. And if this type of broad adverse inference based on the destruction of evidence—standing alone—were enough to support a jury's damages verdict, a jury could hypothetically award a plaintiff any amount of damages based on any

theory of liability. This would be antithetical to the purpose of adverse-inference instructions: sanctioning misconduct while *leveling* the evidentiary playing field. *See Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001).

To be clear, evidence supporting an adverse inference, combined with other relevant circumstantial evidence, may be a sufficient evidentiary basis for a jury's verdict. *See Aspen Tech., Inc. v. M3 Tech., Inc.*, 569 F. App'x 259, 266 (5th Cir. 2014) (finding the jury had a legally sufficient basis for its verdict based on circumstantial evidence and two adverse-inference instructions); *cf. Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998) ("[A]t the margin, where the innocent party has produced some (not insubstantial) evidence in support of his claim, the intentional destruction of relevant evidence ... may push a claim that might not otherwise survive summary judgment over the line."). But the destruction of evidence—by itself—is insufficient to support a jury's verdict as a matter of law. *Cf. Kronisch*, 150 F.3d at 128 ("We do not suggest that the destruction of evidence, standing alone, is enough to allow a party who has produced no evidence—or utterly inadequate evidence—in support of a given claim to survive summary judgment on that claim."). *See generally HK Sys., Inc. v. Eaton Corp.*, 553 F.3d 1086, 1088 (7th Cir. 2009) (noting that the standard is the same for summary judgment and for judgment as a matter of law).

So, if Epic were truly using the adverse inference to plug evidentiary holes, this verdict might survive. But the other evidence on which Epic relies provides

"utterly inadequate" support for a finding that TCS used confidential information apart from that incorporated into the comparative analysis. *Kronisch*, 150 F.3d at 128. As a result, Epic seeks to use the adverse inference not just to plug evidentiary holes but to hold all the water for a finding that TCS used other confidential information. But Epic cannot rely on an adverse inference to do so much.

In sum, Epic has not provided more than a mere scintilla of evidence in support of its theory that TCS used any of its other confidential information. This portion of the jury's damages award cannot stand. With compensatory damages sorted out, we now turn to punitive damages.

C. Punitive Damages

In addition to the $240 million awarded in compensatory damages, the jury initially awarded Epic $700 million in punitive damages. The district court cut that award to $280 million based on a Wisconsin law capping statutory damages at two times the amount of compensatory damages, Wis. Stat. § 895.043(6).[3] The district court then denied TCS's renewed motion for judgment as a matter of law under Rule 50(b) and TCS's motion for a new trial under Rule 59; the court accordingly left the $280 million punitive-damages award intact, reasoning in part that its decision to vacate the jury's $100 million compensatory award for use of

[3] Recall that the district court also reduced the compensatory award by $100 million, leaving $140 million in compensatory damages and $280 million in punitive damages.

"other information" did not affect the jury's punitive damages verdict.

Whether the district court erred in denying TCS's Rule 50 motion is a question of law that we review *de novo*. *Valdivia v. Twp. High Sch. Dist. 214*, 942 F.3d 395, 396 (7th Cir. 2019). In reviewing this decision, "[w]e view the facts and evidence in the light most favorable to [Epic], as the litigant who prevailed before the jury." *Id.* To the extent TCS asked the district court for a new trial regarding punitive damages under Rule 59, we review the district court's decision to deny this motion for an abuse of discretion. *Abellan*, 948 F.3d at 830. And because the punitive damages stand on Wisconsin causes of action, the punitive-damages award must be consistent with Wisconsin law. *See Kapelanski*, 390 F.3d at 534.

TCS presents four arguments challenging the $280 million punitive-damages award: First, TCS argues that, to receive punitive damages under Wisconsin law, the plaintiff must prove an actual injury—which Epic did not do. Second, TCS argues that the punitive-damages award here must be set aside because it may have been based on a claim that cannot support punitive damages as a matter of law. Third, TCS argues that the punitive-damages award must be vacated and retried in light of the district court's decision to vacate the $100 million compensatory-damages award. Finally, TCS argues the punitive-damages award is constitutionally excessive. We take each in turn.

1. "Actual Injury" Requirement

TCS argues that the punitive-damages award fails as a matter of law because Epic failed to prove an "actual injury." TCS contends that under Wisconsin law, an actual injury and a damages award reflecting redress for this injury are "threshold requirements before punitive damages may be awarded." TCS reasons that, because Epic did not suffer an actual injury and instead was awarded damages solely based on the benefit TCS received, Epic cannot receive punitive damages.

But Wisconsin law is not as exacting as TCS argues. Rather, Wisconsin law requires—for punitive damages to be awarded—the imposition of compensatory damages. TCS first cites to *Tucker v. Marcus* for the proposition that a plaintiff must prove "some actual injury *which would justify an award of actual or compensatory damages* before punitive damages may be awarded. " 418 N.W.2d 818, 823 (Wis. 1988) (quoting *Hanson v. Valdivia*, 187 N.W.2d 151, 155 (Wis. 1971)). However, *Tucker* makes clear that the threshold requirement for punitive damages is an "'award' of actual or compensatory damages" rather than an injury to the plaintiff. *Tucker*, 418 N.W.2d at 827. In fact, the Wisconsin Supreme Court specifically held that—even though the jury found "there had been injury suffered"—"punitive damages were inappropriately allowed in this case" because the plaintiff could not recover "actual damages." *Id.* at 823.

In a more recent decision, the Wisconsin Supreme Court affirmed that compensatory damages are a sufficient predicate for punitive damages. "[W]e have

held that 'where there exists a "cause of action," but the action is not one for which the *recovery of compensatory damages is justified*, punitive damages cannot be awarded.'" *Groshek v. Trewin*, 784 N.W.2d 163, 173 (Wis. 2010) (emphasis added) (quoting *Tucker*, 418 N.W.2d at 824). *Groshek*, like *Tucker*, holds that the availability of punitive damages is governed by whether compensatory damages are recoverable, and not by whether an "actual injury" has been inflicted. *See Groshek*, 784 N.W.2d at 173; *cf. Tucker*, 418 N.W.2d at 830 (Heffernan, C.J., dissenting) ("Today's majority holds that [actual damages] should be defined in a manner that no punitive damages may be awarded in the absence of a recovery for compensatory damages.").

Since *Groshek*, we have further expounded on when punitive damages are appropriate under Wisconsin law. In *Pro-Pac, Inc. v. WOW Logistics Co.*, we stated that punitive damages are recoverable under Wisconsin law regardless of whether damages are based on "gain to [the defendant] (*i.e.*, restitutionary damages) or loss to [the plaintiff] (*i.e.*, compensatory damages)." 721 F.3d 781, 788 (7th Cir. 2013). This is true because Wisconsin law allows "awards of punitive damages when 'compensatory damages' are imposed," and Wisconsin defines compensatory damages to include compensation, indemnity, and restitution. *Id.*

So, TCS is incorrect that Wisconsin law requires Epic to prove an "actual injury" to obtain punitive damages. Instead, punitive damages are available when compensatory damages are imposed, as they were in this case. Epic is therefore not barred from recovering punitive damages simply because compensatory

damages were awarded for TCS's benefit rather than any injury Epic sustained.

2. Claims that Support Punitive Damages

TCS next argues that the punitive-damages award must be set aside because it might have been based on one of Epic's claims that does not support punitive damages as a matter of law. Specifically, TCS points out that Epic's unjust enrichment claim does not support punitive damages, and there is no way to know—based on the generality of the jury's punitive-damages verdict—if that is the claim the jury used to support punitive damages.

We can quickly dispose of this argument. The jury was specifically instructed that it could only award punitive damages "with respect to Epic's trade secrets, fraudulent misrepresentation[,] and unfair competition claims." "Jurors are presumed to follow a court's instructions." *Seifert ex rel. Scoptur v. Balink*, 869 N.W.2d 493, 504 (Wis. Ct. App. 2015); *see also Schandelmeier-Bartels v. Chi. Park Dist.*, 634 F.3d 372, 388 (7th Cir. 2011) ("[W]e presume that juries follow the instructions they are given."). So we may presume that the jury based its punitive-damages award on these claims, and not on the unjust enrichment claim.

And Epic's claims for trade secrets, fraudulent misrepresentation, and unfair competition all allow recovery of damages on a theory of gain to the defendant. Wis. Stat. § 134.90(4) (damages for a violation of Wisconsin's trade secrets act include "unjust enrichment caused by the violation"); *Pro-Pac*, 721 F.3d

at 786 (restitutionary damages, *i.e.* damages based on the defendant's benefit, are recoverable "as compensation for tort claims"). As discussed above, punitive damages can be awarded when compensatory damages—including damages based on a defendant's gain—are imposed. *Pro-Pac*, 721 F.3d at 788.

TCS does not dispute that Epic's trade secrets, fraudulent misrepresentation, and unfair competition claims support an award of punitive damages; in fact, it admits these claims "could support punitive damages." And because the jury was instructed to base punitive damages on these claims only, the punitive-damages award was not based on a claim that does not support punitive damages as a matter of law.

3. Conduct on which Punitive Award is Based

TCS next argues that the punitive-damages award must be vacated and retried in light of the district court's decision—which we affirm—to vacate the $100 million damages award for TCS's uses of other confidential information. TCS argues that when the jury determined punitive damages, it had in mind a broader range of conduct "than was legally sustainable." And because we cannot know whether the jury's punitive-damages decision was based on "a permissible or impermissible claim or theory," we must vacate the punitive award and remand for the issue to be retried.

But this argument fundamentally misunderstands punitive damages. Punitive damages are imposed to "punish[] unlawful *conduct* and deter[] its repetition." *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*,

661 N.W.2d 789, 798 (Wis. 2003) (emphasis added); *see also Kemezy v. Peters*, 79 F.3d 33, 34 (7th Cir. 1996) ("The standard judicial formulation of the purpose of punitive damages is that it is to punish the defendant for reprehensible conduct and to deter [the defendant] and others from engaging in similar conduct."). Stated differently, punitive damages are based on the defendant's conduct underlying a plaintiff's claims, not on the claims themselves.

And the cases TCS cites in support of its argument provide further support for this understanding of punitive damages. Take *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989), as an example. The jury in that case found Phillips Petroleum liable for fraud, breach of the duty of good faith and fair dealing, tortious interference, and negligence. *Id.* at 1370. The jury also awarded Robertson Oil punitive damages. *Id.* But on appeal, the Eighth Circuit affirmed only the theory of tortious interference with a business relationship. *Id.* at 1375. And Phillips's conduct "relevant to an award of punitive damages necessarily differ[ed] according to the various theories of liability on which the jury based its verdict." *Id.* at 1376. So, because the court could not "ascertain what conduct of Phillips was determined by the jury to merit punitive damages," the Eighth Circuit ordered the district court to retry punitive damages. *Id.*

The Eighth Circuit in *Robertson Oil* did not require a retrial of punitive damages simply because it found that some of the theories of liability failed as a matter of law. Instead, the emphasis was on the *conduct* underlying these theories. Because the court could not

be sure which of Phillips's conduct led the jury to believe punitive damages were necessary, and some of that conduct did not warrant damages as a matter of law, a new trial was necessary. This understanding of punitive damages holds true throughout the cases TCS cites in support of its argument. *See, e.g.*, *CGB Occupational Therapy, Inc. v. RHA Health Servs. Inc.*, 357 F.3d 375, 390 (3d Cir. 2004) (reversing punitive damages because it was unclear which act of tortious interference formed the basis of punitive damages when the plaintiff interfered with two distinct contracts); *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 30 (1st Cir. 2002) (affirming a harassment claim, reversing a retaliation claim because there was no evidence of an adverse personnel action, and requiring a new trial on punitive damages because the court could not be sure if punitive damages were based on the erroneous retaliation finding).

So, a punitive-damages award requires a new trial only when (1) the claims of liability supporting punitive damages are based on different underlying conduct by the defendant, and (2) one of those claims (and therefore the conduct underlying that claim) is found to be unsupported as a matter of law. TCS argues that different conduct underlies the two separate compensatory-damages awards, and we cannot know which conduct led the jury to award punitive damages.

But the conduct underlying both compensatory-damages awards was the same. One compensatory-damages award was based on the "benefit of TCS's use of [the] comparative analysis" and the other was based on the "benefit of TCS's use of other confidential information." The key distinction between these two

compensatory awards is *information*, not conduct. By awarding damages for TCS's uses of "other confidential information," the jury did not have to find any uses—or any conduct—that differed from the uses and conduct underlying the comparative-analysis portion of the compensatory award. Based on reasonable inferences drawn in Epic's favor, a jury could conclude that TCS used the comparative analysis (and therefore Epic's information incorporated into that analysis) to improve its marketing strategy, to try to enter the United States market, and to generally improve Med Mantra before attempting to sell it to Kaiser. And these are the only uses that can be found in the record; TCS does not point us to a single use of Epic's information that is not also a use that the jury could reasonably infer stemmed from the comparative analysis.

So, the overall conduct underlying these two verdicts is the same. TCS stole thousands of Epic's documents, lied about it, covered it up, and used Epic's information in a variety of ways. This course of conduct is the same regardless of whether the jury incorrectly found that this course of conduct included the use of a few more pieces of Epic's information. Whether the jury found that TCS received an additional benefit based on other confidential information does not affect the jury's assessment of TCS's overall conduct. So, our determination that TCS did not use "other confidential information" does not disturb the jury's punitive-damages award.

4. Constitutionality of the Punitive-Damages Award

TCS finally argues that the punitive-damages award of $280 million violates its due process rights under the federal constitution and Wisconsin law. We review these questions *de novo*. *Rainey v. Taylor*, 941 F.3d 243, 254 (7th Cir. 2019); *Trinity Evangelical Lutheran Church*, 661 N.W.2d at 799.

As we reminded the litigants in *Saccameno*, "the Constitution is not the most relevant limit to a federal court when assessing punitive damages, as it comes into play 'only after the assessment has been tested against statutory and common-law principles.'" *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1086 (7th Cir. 2019) (quoting *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 625 (7th Cir. 2000)). "The Constitution is the only federal restraint on a state court's award of punitive damages," but federal judges are not restricted to reducing punitive damages in a federal case. *Id.* (citing *Perez*, 223 F.3d at 625). Indeed, "[a] federal court ... can (and should) reduce a punitive damages award sometime before it reaches the outermost limits of due process." *Id.* (citing *Perez*, 223 F.3d at 625; *Payne v. Jones*, 711 F.3d 85, 97–100 (2d Cir. 2013)).

The Due Process Clause of the Fourteenth Amendment imposes constitutional limitations on punitive damages. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–17 (2003). Punitive damages may be imposed to further a state's legitimate interests in imposing punishment for and deterring illegal conduct, but punitive damages violate due process

when the award is "'grossly excessive' in relation to these interests." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). The Supreme Court, in testing awards of punitive damages for compliance with due process, has established three "guideposts": "(1) the reprehensibility of the defendant's conduct; (2) the disparity between the actual harm suffered and the punitive award; and (3) the difference between the award authorized by the jury and the penalties imposed in comparable cases." *Rainey*, 941 F.3d at 254 (citing *Gore*, 517 U.S. at 575). Wisconsin courts apply a "virtually identical test." *Trinity Evangelical Lutheran Church*, 661 N.W.2d at 800.[4]

The Supreme Court's first guidepost—reprehensibility of the defendant's conduct—is the most important. *Gore*, 517 U.S. at 575. In determining the reprehensibility of the defendant's conduct, we consider five factors: whether

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct

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[4] Wisconsin courts consider the factors most relevant to the case at hand, with those factors coming from the following list: (1) the grievousness of the acts, (2) the degree of malicious intent, (3) whether the award bears a reasonable relationship to the award of compensatory damages, (4) the potential damage that might have been caused by the act, (5) the ration of the award to civil or criminal penalties that could be imposed for comparable misconduct, and (6) the wealth of the wrongdoer. *Trinity Evangelical Lutheran Church*, 661 N.W.2d at 800.

> involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Campbell, 538 U.S. at 419. If none of these factors weigh in favor of the plaintiff, the award is "suspect." *Id.* And even if one factor weighs in the plaintiff's favor, that may not be enough to sustain the punitive award. *Id.* And finally, since a plaintiff is presumed to be made whole by the compensatory award, punitive damages should be awarded only if the defendant's conduct is "so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.*

The first factor asks us to consider if the harm was physical as opposed to economic. *Id.* Conduct producing physical harm is more reprehensible than conduct producing economic harm. *See Gore*, 517 U.S. at 576. Epic did not suffer physical harm as a result of TCS's conduct. So this factor weighs against finding TCS's conduct reprehensible.

Turning to the second factor, we do not believe that TCS's conduct evinced an indifference to or a reckless disregard of the safety of others. Epic does not attempt to persuade us otherwise. This factor also weighs against finding TCS's conduct reprehensible.

The third factor—the financial vulnerability of the target of the defendant's conduct—stands for the proposition that conduct is more reprehensible if it impacts financially vulnerable plaintiffs. *See, e.g.*, *Saccameno*, 943 F.3d at 1087; *EEOC v. AutoZone, Inc.*,

707 F.3d 824, 839 (7th Cir. 2013). Epic, one of the largest producers of electronic-health-record software, is not financially vulnerable. This factor again weighs against finding TCS's conduct reprehensible.

Applying the fourth factor, TCS's conduct did involve a repeated course of wrongful acts. Epic presented evidence that TCS knew it lacked authority to access confidential information from UserWeb. Yet TCS employees still accessed and downloaded Epic's confidential information for years, downloading over 1,600 unique documents from UserWeb and gaining access to information that Epic specifically forbid TCS from accessing. This factor weighs in favor of finding TCS's conduct reprehensible and provides support for some award of punitive damages.

As for the last factor—whether the harm was the result of intentional malice, trickery or deceit, or mere accident—TCS argues that Epic suffered no harm. Specifically, TCS contends that because Epic was not deprived of the enjoyment of its software, did not lose business, and did not face any new competition, there could not have been any harm to Epic. But even though it is hard to quantify, Epic likely suffered a competitive harm; TCS, a potential competitor, had access to Epic's confidential information for years without Epic's knowledge. This gave TCS insight into the strengths and weaknesses of Epic's software, regardless of whether TCS was able to turn that knowledge into a direct economic harm to Epic. *Cf. United Tech. Corp. v. U.S. Dept. of Def.*, 601 F.3d 557, 564 (D.C. Cir. 2010) (discussing, for purposes of what constitutes "confidential information" under an exemption to the

Freedom of Information Act, what constitutes substantial competitive harm). We can also think of at least one economic harm, albeit minor, that Epic suffered as a result of TCS's conduct. Epic, after it became aware of TCS's unlawful access to UserWeb, had to expend time and resources investigating the extent to which TCS had accessed Epic's confidential information and trade secrets.

And these harms were the result of TCS's repeated, intentional attempts to deceive Epic. *See Gore*, 517 U.S. at 576 (noting that deceit is more reprehensible than negligence). Epic repeatedly denied Kaiser's and TCS's requests to allow TCS access to UserWeb. But TCS gained access to UserWeb through other means, using Gajaram's account, which he obtained by falsely identifying as a Kaiser employee. The jury heard testimony that Gajaram's account information was shared throughout TCS and was frequently used to download and share Epic's confidential information.

TCS employees also lied to prevent Kaiser and Epic from discovering that TCS had access to Epic's UserWeb. A TCS employee testified that his manager told him to hide the truth from investigators. This employee obeyed these instructions and lied to investigators, telling them that he had only accessed UserWeb one time when he knew he had accessed it more than once.

The harms to Epic resulted from TCS's deceitful conduct. This factor weighs in favor of finding TCS's conduct reprehensible and supports some award of punitive damages.

In sum, we agree with the district court that TCS's conduct warrants punishment. But TCS's conduct was not reprehensible "to an extreme degree." *Saccameno*, 943 F.3d at 1088. TCS caused no physical harm to Epic. TCS also did not recklessly disregard the safety of others. And Epic is not a financially vulnerable plaintiff. But TCS's conduct consisted of a repeated course of wrongful actions spanning multiple years. TCS's conduct was also intentional and deceitful, not negligent. We therefore conclude that TCS's conduct justifies punishment, though not in the amount of a $280 million punitive-damages award.

Turning to the Supreme Court's second guidepost, we analyze the ratio of punitive damages to the "harm, or potential harm" inflicted on the plaintiff. *Campbell*, 538 U.S. at 424. In most cases, the compensatory-damages award approximates the plaintiff's harm. In those cases, identifying the ratio is straightforward: we compare compensatory and punitive-damages awards. *See, e.g.*, *Rainey*, 941 F.3d at 255. But in some cases, the jury's compensatory-damages award does not reflect the plaintiff's quantifiable harm. Still, we may account for that harm in the harm-to-punitive-damages ratio. *See Sommerfield v. Knasiak*, No. 18-2045, 2020 WL 4211297, at *5 (7th Cir. July 23, 2020).

The circumstances of this case, however, present an unusual issue in determining the amount of "harm" under this guidepost. The jury awarded $140 million in compensatory damages based on the benefit to TCS, not because of any harm suffered by Epic. This award, then, does not reflect Epic's harm. And if Epic suffered quantifiable economic harm, that harm is significantly

smaller than $140 million, which would in turn drastically change the relevant ratio. If we had to quantify that harm to arrive at the appropriate ratio, applying the second due-process guidepost would pose a challenging task.

But TCS makes no argument here—and did not argue to the district court—that we should compare any number besides compensatory damages to the punitive-damages award. *See Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) (underdeveloped arguments are waived). In fact, most of its argument under this guidepost emphasizes the size of the compensatory award as a reason the punitive-damages award violates due process. TCS has thus waived any argument that the compensatory award is the incorrect denominator in the ratio analysis. And at least one other court has compared an unjust enrichment award to the punitive-damages award under this guidepost when state law allowed punitive damages to be imposed for the underlying claim. *See Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1351 (Fed. Cir. 2001) (concluding it is appropriate to base punitive damages on an unjust enrichment award when the defendant's gain "is logically related" to the plaintiff's "harm or potential harm"), *vacated*, 538 U.S. 974 (2003), *remanded to* 345 F.3d 1366 (2003) (reaching the same result as to punitive damages). So, we will conduct the ratio analysis using the $140 million compensatory award as the denominator.

In conducting this analysis, the Supreme Court has declined to set a fixed ratio limiting punitive damages. *Campbell*, 538 U.S. at 425 ("[T]here are no rigid

benchmarks that a punitive damages award may not surpass ... ."). The Supreme Court has, however, noted that "few awards exceeding a single-digit ratio between punitive and compensatory damages ... will satisfy due process." *Id.*

The punitive award in this case—after the district court lowered it to comply with Wisconsin's statutory cap on punitive damages—is two times the ultimate compensatory award. Our court and Wisconsin courts have upheld significantly higher ratios. *See, e.g.*, *Rainey*, 941 F.3d at 255 (affirming a 6:1 ratio); *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676–78 (7th Cir. 2003) (affirming a 37:1 ratio); *Kimble v. Land Concepts, Inc.*, 845 N.W.2d 395, 412 (Wis. 2014) (finding a 3:1 ratio appropriate and constitutional); *Trinity Evangelical Lutheran Church*, 661 N.W.2d at 803 (affirming a 7:1 ratio).

But the compensatory damages here are high. The Supreme Court has noted that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425. And the $140 million award in this case far exceeds what other courts have considered "substantial." *See Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1069 (10th Cir. 2016) ("[I]n many cases, compensatory damages less than $1,000,000 have also been considered substantial."). In fact, neither party points us to any comparable cases in

which any court has upheld a 2:1-or-higher ratio resulting in over $200 million in punitive damages.[5]

Many courts have instead found awards "substantial" and imposed a 1:1 ratio based on significantly lower compensatory awards. *See Saccameno*, 943 F.3d at 1090 (gathering cases where courts have imposed a 1:1 ratio when the compensatory award is less than $1 million); *cf. Estate of Moreland v. Dieter*, 395 F.3d 747, 756–57 (7th Cir. 2005) (affirming a $15 million punitive-damages award that was "a fraction of the underlying compensatory damages award" and was based on "truly reprehensible" conduct). Still, the precise award must be based on "the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Campbell*, 538 U.S. at 425; *cf. Sommerfield*, 2020 WL 4211297, at *6 (noting that sanctions should be based on the wrong done rather than the defendant's wealth).

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[5] Epic only cites to one case with a relatively comparable award, *Yung v. Grant Thornton, LLP*, 563 S.W.3d 22, 73 (Ky. 2018) (upholding $80 million in punitive damages, resulting in a 4:1 ratio). It's true that in *Yung*, like in this case, only the last two reprehensibility factors weighed in favor of allowing punitive damages. *Id.* at 67. But the economic harm suffered by the plaintiffs in *Yung* distinguishes that case from the circumstances here. In *Yung*, the plaintiffs suffered substantial, quantifiable economic harm, including millions of dollars in taxes, interest, and fees owed to the IRS. *Id.* at 57. Here, there is hardly evidence that Epic suffered any economic harm; the compensatory award was based on TCS's benefit. And any potential future economic harm has not been quantified.

The facts and circumstances of this case do not justify awarding $280 million in punitive damages. As noted above, three of the five reprehensibility factors weigh against the reprehensibility of TCS's conduct. TCS's conduct was reprehensible, but not to an extreme degree. *See, e.g., Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 490 (6th Cir. 2007) (based on "the low level of reprehensibility of defendants' conduct, a ratio of closer to 1:1 or 2:1 is all that due process can tolerate in this case"). *But see, e.g., Rainey*, 941 F.3d at 255 ("the truly egregious nature" of the defendant's acts of sexual objectification and assault justified "the size of [the] punitive award even with [a] significant compensatory award"); *Mathias*, 347 F.3d at 675–78 (affirming a 37:1 ratio in part because the motel company refused to have bed bugs in hotel rooms exterminated when it was aware of the risk to its customers).

And although TCS's actions did harm Epic, that harm does not support the size of the punitive-damages award. *Cf. Rainey*, 941 F.3d at 254–55 (affirming a punitive-damages award six times larger than the $1.13 million compensatory award in part because the plaintiff suffered "pain and humiliation" as a result of the defendant's groping and acts of sexual objectification); *In re Exxon Valdez*, 472 F.3d 600, 623–25 (9th Cir. 2006), *amended* 490 F.3d 1066, (reducing punitive damages to $2.5 billion, reflecting a 5:1 ratio with compensatory damages, where the plaintiff caused severe economic harm and emotional harm to thousands of people by spilling 11 million gallons of crude oil into United States waters).

We therefore conclude that a 2:1 ratio exceeds the outer-most limit of the due process guarantee in this case because TCS's conduct, while reprehensible, was not egregious, and multiplying the substantial compensatory award—calculated on the basis of TCS's benefit rather than Epic's loss—is unnecessary to reflect Epic's uncertain economic harm. *See Campbell*, 538 U.S. at 425; *Saccameno*, 943 F.3d at 1090. Instead, the ratio relative to the $140 million compensatory award should not exceed 1:1 in this case. *See Saccameno*, 943 F.3d at 1090 (concluding that the ratio "should not exceed 1:1" where the compensatory award was "substantial"). It should be noted, though, that "[w]hat counts as substantial depends on the facts of the case, and an award of this size (or larger) might not mandate a 1:1 ratio on another set of facts." *Id.*

We now turn to the final guidepost: the difference between the punitive award authorized by the jury and civil penalties imposed in comparable cases. Although "this guidepost generally deserves less weight than the other two," *Rainey*, 941 F.3d at 255, it serves an important purpose: to "allow[] courts to show 'substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *AutoZone*, 707 F.3d at 840 (7th Cir. 2013) (quoting *Gore*, 517 U.S. at 583).

TCS has made no argument about this guidepost and has thus waived any argument that it points toward the award being unconstitutional. Although TCS has not pointed us to a single relevant civil penalty for comparison, we recognize that both the $280 million award the district court entered, and a $140 million

award that would reflect a 1:1 ratio, comply with Wisconsin's statutory cap on punitive damages. That cap is one indication of what the Wisconsin legislature has judged to be an inappropriate sanction for reprehensible conduct: any punitive award exceeding a 2:1 ratio is inappropriate. Wis. Stat. § 895.043(6); *see AutoZone*, 707 F.3d at 840 ("We recognize that this statutory cap suggests that an award of damages at the capped maximum is not outlandish.").[6] So, the final guidepost does not point toward a $280 million or $140 million punitive-damages award being unconstitutional.

In sum, considering the factors together, we conclude that the maximum permissible award of punitive damages in this case is $140 million—a 1:1 ratio relative to the compensatory award. And TCS only mentions Wisconsin law to point out that Wisconsin courts apply a test substantively identical to the federal test analyzed above. So, TCS has waived any argument that Wisconsin law might produce a different result. We therefore remand for the district court to amend its judgment and reduce punitive damages to, at most, $140 million.

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[6] TCS does not challenge the constitutionality of the Wisconsin statute that sets this cap, and we do not question it either. The protections afforded by the Constitution are not fixed to a particular ratio. *See Campbell*, 538 U.S. at 425. As such, the due-process guarantee may be more protective than a statutory cap in one case but less protective in another. Today, we hold only that, although the Wisconsin statute permits a 2:1 ratio, the constitutional protection under these circumstances goes further.

III. CONCLUSION

The jury heard plenty of evidence that TCS stole Epic's confidential information and incorporated it into a comparative-analysis spreadsheet. And, drawing all inferences in favor of Epic, the jury could conclude that TCS used the comparative analysis for a variety of purposes, including the improvement of Med Mantra. However, the jury did not hear any evidence that would allow it to infer that any of Epic's other information was used by TCS.

Pursuant to the reasoning set forth above, the judgment of the district court upholding the jury's $140 million compensatory-damages award connected to the comparative analysis is AFFIRMED; and, the judgment of the district court vacating the jury's $100 million compensatory damages award for TCS's use of other information is also AFFIRMED.

Further, the judgment of the district court awarding $280 million in punitive damage is VACATED as it exceeds the outermost limit of the Due Process guarantee in the Constitution; and, the issue of the amount of punitive damages is REMANDED with instruction to the district court to reduce the punitive-damages award consistent with the analysis in this opinion.

Appendix B

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 19, 2020

Before

JOEL M. FLAUM, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

Nos. 19-1528 & 19-1613

EPIC SYSTEMS CORP., *Defendants/ Counterclaim Plaintiffs-Appellants/Cross-Appellees.*[*]	Appeals from the United States District Court for the Western District of Wisconsin.
v.	No. 14-cv-748
TATA CONSULTANCY SERVICES LTD. & TATA AMERICA	William M. Conley, *Judge*.

[*] *Plaintiff/Counterclaim Defendant-Appellee/Cross-Appellant.*

INTERNATIONAL CORP.
D/B/A TCS AMERICA,
Defendants/
Counterclaim Plaintiffs-
Appellants/Cross-
Appellees.

ORDER

Epic Systems Corporation filed a petition for rehearing and rehearing en banc on September 3, 2020, and on October 2, 2020, Tata Consultancy Services Limited and Tata America International Corporation filed an answer to the petition. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing is therefore DENIED.

Appendix C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 30, 2020

Before

JOEL M. FLAUM, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

Nos. 19-1528 & 19-1613

EPIC SYSTEMS CORP., *Plaintiff/Counterclaim Defendant-Appellee/ Cross-Appellant*,	Appeals from the United States District Court for the Western District of Wisconsin.
v.	No. 14-cv-748
TATA CONSULTANCY SERVICES LTD. & TATA AMERICA INTERNATIONAL CORP. D/B/A TCS AMERICA, *Defendants/ Counterclaim Plaintiffs-Appellants/Cross-Appellees*.	William M. Conley, *Judge*.

ORDER

Tata America International Corporation and Tata Consultancy Services Limited filed a petition for rehearing and rehearing en banc on September 3, 2020. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing en banc is therefore DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EPIC SYSTEMS CORPORATION, Plaintiff, v. TATA CONSULTANCY SERVICES LIMITED and TATA AMERICA INTERNATIONAL CORPORATION d/b/a TCA America, Defendants.	OPINION AND ORDER 14-CV-748-wmc

From the outset of this lawsuit, Epic Systems Corporation, a leading provider of medical records software to the U.S. healthcare industry, has asserted a variety of federal and state law claims arising out of defendants repeatedly accessing Epic's web portal without authorization while servicing a mutual client. Epic claims that Tata Consultancy Services Limited and Tata America International Corporation (collectively "TCS"), a much larger, India-based company and its smaller U.S. arm, respectively, used the confidential, propriety information obtained through that portal to help develop their own, competitive software product

and for other improper purposes.[1] After this court granted partial summary judgment on liability as to certain of Epic's claims and on elements of other claims, the remainder proceeded to a jury trial. (3/2/16 Op. & Order (dkt. #538).) Following a 10-day trial, the jury returned a liability verdict in favor of plaintiff on all remaining claims (dkt. #855), and awarded compensatory damages of $240,000,000 and punitive damages of $700,000,000. (Dkt. #871.) The court also entered injunctive relief, permitting ongoing monitoring of TCS to assure no further use of Epic's stolen information. (Dkt. #888; Am. Injunction (dkt. #959).)

There remain several, post-trial motions still pending before the court, the most significant being: (1) defendants' motions for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) as to the jury's liability and damages verdicts (dkt. ##830, 843, 913); (2) plaintiff's motion for attorneys' fees and costs (dkt. #916); and (3) defendants' motion for clarification of the court's injunction order (dkt. #962). For the reasons that follow, the court will deny defendants' Rule 50(a) motion as to liability, and will deny in part and grant in part defendants' motion as to damages, reducing the jury's compensatory damage award to $140 million and the punitive damages award to the statutory cap of $280 million, but otherwise leaving the jury verdict intact. The court will further deny plaintiff's motion for attorneys' fees and costs, finding that the adverse inference instruction to the jury when coupled with the

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[1] A detailed explanation of the underlying facts can be found in the court's summary of facts in its summary judgment decision (dkt. #538), which were largely confirmed at trial.

jury's sizeable punitive damages award is a sufficient sanction for TCS's discovery abuses. Finally, with respect to defendants' motion for clarification, the court will grant that motion and respond to the defendants' specific questions below.

OPINION

I. Rule 50(a) Motions

Under Federal Rule of Civil Procedure 50(a), a court may "enter judgment against a party who has been fully heard on an issue during a jury trial if 'a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.'" *Schandelmeier-Bartels v. Chi. Park Dist.*, 634 F.3d 372, 376 (7th Cir. 2011) (quoting Fed. R. Civ. P. 50(a)). In considering a Rule 50 motion, however, the court is to "construe the facts strictly in favor of the party that prevailed at trial," including drawing "[a]ll reasonable inferences in that party's favor and disregarding all evidence favorable to the moving party that the jury is not required to believe." *May v. Chrysler Group, LLC*, 692 F.3d 734, 742 (7th Cir. 2012) (internal citations and quotation marks omitted). In particular, the court is not to make credibility determinations or weigh the evidence; it need only determine whether "more than 'a mere scintilla of evidence' supports the verdict." *Id.* (quoting *Hossack v. Floor Covering Assoc. of Joliet, Inc.*, 492 F.3d 853, 859 (7th Cir. 2007)). Said another way, the court's "job is to decide whether a highly charitable assessment of the evidence supports the jury's verdict or if, instead, the jury was irrational to reach its conclusion." *May*, 692

F.3d at 742. Set against this high bar, defendants' motion largely falls short.

A. Liability[2]

i. Misappropriation of Trade Secrets Claim

Defendants contend that plaintiff failed to prove by a preponderance of the evidence "(1) that TCS 'used' the Alleged Trade Secrets and (2) that the Alleged Trade Secrets" satisfy the definition in the Wisconsin Uniform Trade Secrets Act. (Defs.' Mot. (dkt. #843) 2.) Defendants' first contention is the least persuasive since plaintiff had no obligation to demonstrate use or disclosure *if* the trade secrets were acquired using "improper means." (*See* Closing Instructions at 8-9; *see also* 3/2/16 Op. & Order (dkt. #538) 57-58.) On the question of "improper means," plaintiff put forth ample evidence for a reasonable jury to find that TCS acquired trade secrets through misrepresentation, as well as through multiple breaches of its duty to maintain the secrecy of confidential information provided for the sole purpose of servicing a mutual client. Moreover, even if plaintiff were required to show actual misuse to prove its claim, the court again finds more than sufficient evidence from which a reasonable jury could find improper use for reasons explained in the court's opinion and order on summary judgment and in multiple orders

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[2] Defendants actually filed two, essentially duplicative motions for judgment as a matter of law on liability. (Dkt. ##830, 843.) The latter one contains additional citations to the trial record. The court has reviewed both, but relies on the second for purposes of addressing defendants' arguments.

on TCS's motions *in limine*. (*See* 3/2/16 Op. & Order (dkt. #538) 40-42, 58-59; 3/23/16 Op. & Order (dkt. #703) 20.) Indeed, in light of the jury's entitlement to reach an adverse inference, as it was free to do after TCS's repeated, egregious failures to maintain and allow timely access to relevant discovery materials (3/23/16 Op. & Order (dkt. #709)), the court is hard-pressed to understand defendants' argument to the contrary. Finally, and again contrary to defendants' suggestions, TCS's evidence that *some* of the wrongfully obtained, confidential documents were used for a "legitimate purpose" does *not* preclude a reasonable jury from finding that the documents were also used for an impermissible purpose. (Defs.' Br. (dkt. #843) 4 (describing TCS's expert's testimony about legitimate use of documents in servicing a mutual client).)

Defendants' second basis for seeking a directed verdict on plaintiff's claim for misappropriation of trade secrets is premised on its claimed failure to take reasonable steps to maintain those secrets. (Defs.' Br. (dkt. #843) 7-10.) While the court agrees with defendants that they have put forth sufficient evidence from which a reasonable jury *could* have found that Epic failed to undertake reasonable efforts to maintain the secrecy of 30-some documents at issue, the evidence was certainly not so legally insufficient as to remove the issue from the jury's consideration. On the contrary, a reasonable jury could well have credited testimony by Epic employees about its efforts to protect the confidentiality of information related to software, both as to specific steps and general commitment to maintaining secrecy. (Trial Tr. (dkt. #889) 101-16

(Stirling Martin's testimony about efforts to maintain confidentiality); *see also* Trial Tr. (dkt. #900) 86-88 (Carl Dvorak testifying Epic is at the "top" of the industry in terms of protecting its confidential information).)

ii. Unfair Competition and Unjust Enrichment Claims

TCS also moves for directed verdict on Epic's unfair competition and unjust enrichment claims on much the same basis, arguing that Epic failed to demonstrate "use of something belonging to Epic . . . to benefit TCS at Epic's expense." (Defs.' Opening Br. (dkt. #832) 10.) The court rejects this motion for the same reasons as well: there is more than sufficient evidence to support the jury's finding that Epic met its burden to prove liability on these claims, especially when considered in light of an adverse inference.

iii. Injury to Business

Defendants next seek judgment as a matter of law on plaintiff's claim of injury to business in violation of Wis. Stat. § 134.01. As the jury instructions explained, this claim requires plaintiff to demonstrate that the two defendants "acted together to injure maliciously another person's reputation, trade, business, or profession." (Closing Instructions at 11.) However, after defendants submitted its Rule 50(a) motion, plaintiff withdrew this claim, thus mooting this isse.

iv. Deprivation of Property

TCS further moves for judgment on Epic's claims for deprivation of property/ civil theft claim in violation of Wis. Stat. §§ 895.446 & 943.20, arguing that the property at issue in this case does not constitute "moveable property" under § 943.20. The court previously considered this argument, rejected it and sees no basis to revisit that ruling. (*See* 4/1/16 Op. & Order (dkt. #776) 7-9.)

v. Fraudulent Misrepresentation

TCS also seeks a directed verdict on plaintiff's fraudulent misrepresentation claim, asserting that Epic neither demonstrated that TCS intended to induce Epic's reliance, nor that Epic's reliance was reasonable. Again, as explained in the court's summary judgment order, Epic's claim is premised on TCS employees misrepresenting that they were "Ramesh Gajaram" and then using his credentials to access Epic's UserWeb without authorization. (3/2/16 Op. & Order (dkt. #538) 54-56.) Epic put forth ample evidence for a reasonable jury to find that TCS and its employees *intended* to induce Epic to rely on that misrepresentation and that Epic's reliance was reasonable. In its brief, TCS contends that Epic failed to put forth any evidence that it intended to "induce Epic to do something that would cause it economic harm." (Defs.' Opening Br. (dkt. #843) 17.) However, that is not the test. The test is whether Epic relied on that misrepresentation and whether its reliance was reasonable. TCS offers no basis for challenging the jury's determination as to either prong of that test.

vi. Breach of Contract and Breach of Duty of Good Faith and Fair Dealing

TCS moves for a directed verdict on these claims on the basis that the evidence foreclosed a finding of improper use. The court rejects this argument for the same reason as explained above with respect to TCS's motion on Epic's misappropriation of trade secrets claim.

vii. Trafficking of Passwords (CFAA Claim)

Finally, TCS moves for judgment on its trafficking of passwords, arguing Epic failed to put forth evidence from which a reasonable jury could conclude that TCS "acted knowingly with intent to defraud." (Defs.' Mot. (dkt. #83) 16 (quoting Closing Instructions at 7).) Because the court continues to find sufficient evidence to support a jury's verdict that TCS employees were specifically motivated to improperly use other's passwords for an improper purpose (*i.e.*, that TCS accessed UserWeb documents for a purpose other than to enable TCS employees to do their jobs for their mutual customer Kaiser), the court rejects this basis for its motion as well.

B. Damages

In addition to filing a motion for judgment as a matter of law with respect to liability, defendants move as to the jury's damages award, lobbing several challenges to the award of both compensatory damages

and punitive damages.[3] The court addresses each category below.

i. Compensatory Damages

First, TCS contends that the court should not have allowed plaintiff to proceed on a damages claim based on the alleged value of the comparative analysis to TCS, because that theory was untimely and prejudiced TCS. After the court found plaintiff's expert's estimate of the value of its stolen confidential and trade secret information was insufficiently tied to evidence of TCS's actual use of that information to proceed before the jury. (4/14/16 Op. & Order (dkt. #860).) The court allowed Epic to make a proffer on damages during the time the jury deliberated on liability. Specifically, Epic narrowed its damages theory to TCS's use of confidential information detailed in Exhibit 39 by doing a comparative analysis of Epic's products against competing products being developed by TCS. (Trial Tr. (dkt. #907) 4-5.)

As explained during that hearing, the court found this revised methodology "ratchet[ed Epic's damages] back to something that more approximates what was actually received and apparently used by your client both in the comparative model but also what [became]

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[3] In addition to filing the Rule 50(a) motion, defendants filed a motion with respect to expert testimony, seeking an order from the court barring plaintiffs' damages case from going to the jury. The court effectively denied that motion in allowing plaintiff to present its damages case to the jury. Regardless, the court reviewed the motion during the course of trial and, for reasons explained in its decision on the Rule 50(a) motion, will also deny that motion.

ongoing discussions by marketing people within [TCS] as a result." (*Id.* at 9.) In addition, this alternative measure more closely followed evidence of TCS's actual use of Epic's propriety information to compete for sales of software to companies for whom TCS was already providing other services. On this basis, therefore, the court permitted Epic to pursue damages based on TCS's use of trade secrets and other confidential information in creating the comparative analysis, and the jury awarded $140,000,000 for that benefit. (Damages Verdict (dkt. #871).)

TCS's assertion that this theory was untimely is belied by TCS's contemporaneous statements during the hearing on the revised damages theory. (*See* Trial Tr. (dkt. #907) 8-9 ("I really don't feel like I'm hearing anything new here."); *id.* at 10 ("[T]here's really nothing new here apart from . . . it's more targeted to [what] Mr. Martin thinks he saw download[ed].").) The court agreed then, and it still does: the revised theory actually *narrowed* Epic's damages claim by anchoring it to proof of actual use of confidential and trade secret information as detailed in the comparative analysis. As such, it was not a new theory, and any claim of prejudice based on this narrowed damage claim being offered untimely is without merit.

For its part, Epic sufficiently describes the evidentiary basis for the $140 million award in its opposition to the Rule 50(a) motion. (Pl.'s Opp'n (dkt. #926) 72-75.) Indeed, this award is fairly straightforward to understand: (a) TCS plainly took and used this information to understand and compare Epic's product to compete effectively with it; (b) the cost of

developing this information was roughly $200 million, but crediting lower costs for IT work in India would still cost $130 to $140 million; (c) during this same time, TCS was actively working to create software to compete with Epic's in the United States and other parts of the world; and (d) a high-ranking official (Phillipe Guionnet) assigned to this task within TCS was frozen out of the effort after raising concerns that TCS's rapid advances in its software could only be explained by appropriating Epic's software advances.

Despite the court's misgiving as to a similar anchor for other claimed uses, the verdict form also allowed the jury to award damages for TCS's use of "other confidential information," for which the jury awarded $100,000,000. (Damages Verdict (dkt. #871).) The court included this subpart over TCS's objection, because there was some evidence that other confidential information was disseminated "out beyond the specific people who discussed the comparative analysis." (Trial Tr. (dkt. #907) 94.) As the court explained during the trial, the purpose of separating out subpart (b) of the compensatory damages award was to give the court some flexibility if it determined that any additional claim of damages were too speculative to uphold. (Trial Tr. (dkt. #898) 87-88.)

Accordingly, the court anticipated TCS would challenge this $100 million award under subpart (b) based on a lack of evidence of use. Instead, TCS chose to swing for the fences (or as Epic's opposition aptly put it, to employ "an 'all-or-nothing' gambit" (dkt. #926 at 16), by challenging evidence that TCS even used Epic's trade secrets or other confidential information to create

the comparative analysis (*see* Defs.' Br. (dkt. #914) 33-36), information the jury found ultimately conferred a $140 million benefit, and for reasons that are not entirely clear, chose *not* to make a discrete challenge to the jury's additional $100 million award.

Even though TCS's own Rule 50(a) submission offers little reason to upset either portion of the jury's compensatory damage award, the court would be remiss not to follow up on its own concerns. Epic obviously understood this, since its opposition to TCS's motion offers a convoluted attempt to tie the jury's $100 million award largely premised on Guionnet's testimony that he saw astonishing improvements to a customer's data model on a young TCS worker's computer screen after accessing Epic's trade secrets. (Pl.'s Opp'n (dkt. #926) 75-78.) Even crediting this testimony and other more amorphous evidence of use of Epic's confidential information in marketing decisions, it already bolsters the jury's sizable award for the benefit received from information at least shown to have been used by TCS. In contrast, the additional $100 million award for benefits obtained from "the rest of the information" that TCS took and used to improve its competing software is tied to no evidence of specific use at all.

That is why, in closing arguments at trial, Epic itself argued the monetary benefit to TCS was $200 million "conferred on TCS when it acquired Epic's trade secrets and confidential information and embedded them in that comparative analysis." (Trial Tr. (dkt. #898) 128.) At no point in closing did Epic's counsel assert that an entire separate value of another $100 million was conferred by virtue of TCS's unspecified use of "other information."

Only in its creative argument in support of that award does Epic offer a logic tree working backward from the jury's $140 million dollar award to justify a further compensatory award abased on amorphous benefits for the 65% portions of the comparative analysis its expert did not value in arriving at an opinion of $200 million for "the Data/Model Data Architecture" column. (Pl.'s Opp'n (dkt. #926) 76-78.)

Even if this *did* explain the jury's thinking, the same problem would remain: it depended on an off-the-cuff, relative assignment of value *to Epic* for the columns in the comparative analysis, not to TCS. Combined with evidence that TCS ultimately chose not to go forward with the competing software product under development, and is enjoined from using any of the stolen information in new products, a further award of $100 million strikes the court as both excessive and without sufficient mooring in the facts of record.

Second, TCS argues that the court should not have allowed plaintiff to proceed on a narrowed damages theory for the same reasons that the court rejected Epic's initial damages theory -- it was not sufficiently related to TCS's use of Epic's trade secrets and other confidential information. As acknowledged during the hearing on Epic's revised damages theory, the court shared that concern. Still, unlike the original, broader damages claim, which was untethered from a showing of use, the revised, narrower claim tied the value of Epic's conditional information, including trade secrets, to a showing of TCS's use of that information in the creation of a comparative analysis (or at least the jury could

reasonably find, especially in light of the adverse inference instruction).

As detailed for the jury in closing and in its opposition brief, Epic presented evidence from which a reasonable jury could infer that its trade secrets and confidential information were used to: (1) inform TCS's U.S. entry strategy, including developing a laboratory module for its principal U.S. health care customer, DaVita, and as importantly, discerning dead ends and what *not* to do; (2) prepare a comparative analysis to insure that TCS's product would be attractive to customers; and (3) improve its Med Mantra product. (Pl.'s Opp'n (dkt. #926) 40-64.)[4] Contrary to TCS's position, there is no basis for requiring Epic to show that TCS was ultimately successful in its use of Epic's confidential information and trade secrets (*i.e.*, that such use was profitable). *See, e.g.*, Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011) ("Enrichment from benefits wrongfully obtained is not

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[4] Epic devotes much of the opposition brief to argue that it need not have shown use in order to be injured and entitled to damages under an unjust enrichment damages theory. (Pl.'s Opp'n (dkt. #926) 26-29.) The court need not reach this argument given that Epic was not prejudiced by any error in instructing the jury that it should "only award damages for the development costs saved by misappropriation of Epic's trade secrets or confidential information if the trade secrets or confidential information were in fact *actually* used by TCS." (Damages Jury Instructions (dkt. #873).) Indeed, Epic's proof to the jury at trial, and as argued in closing, fell into these very same categories of use, resulting in savings made by avoiding Epic's missteps and improvement made by following the path Epic has already blazed. Regardless, for the reasons explained in its prior opinion and order, Epic was required to tie its damages theory to use. (4/14/16 Op. & Order (dkt. #960) 11-13.)

discounted to reflect some lesser value actually realized in advancing the purposes of the defendant."); *Cosgrove v. Bartolotta*, 150 F.3d 729, 734 (7th Cir. 1998) (applying Wisconsin law and holding that, where the defendant obtains a benefit from the plaintiff that "is not rendered gratuitously, as by an officious intermeddler, or donatively, as by an altruist or friend or relative," then the plaintiff "is entitled to demand the restitution of the market value of the benefit"). Moreover, in light of the adverse inference, the jury could reasonably conclude that Epic's trade secrets and other confidential information were used, providing a separate basis for awarding damages.[5]

Third, defendants argue that there was no evidence to support the jury's finding that Epic's trade secrets were used to create the comparative analysis. As an initial matter, the court barred defendants from arguing that the analysis was generated from publicly-available information, having failed to disclose this evidence in its intial Rule 26 disclosures *and* during any point in discovery, despite specific requests to do so. (3/23/16 Op. & Order (dkt. #703) 7-8 (granting in part plaintiff's motion *in limine* to exclude defendants from arguing that "the comparative analysis was created from publicly-available sources absent evidence to support this assertion previously disclosed in response to

[5] As the court noted during one of the hearings on damages at a break in the trial, "there's an awful lot of smoke and the jury is entitled to look for some fire if they can infer it, particularly with respect to . . . the comparison and the fact that there were discussions within the company for that comparison." (*See* Trial Tr. (dkt. #898) 7).)

plaintiff's interrogatories").) Moreover, the jury was instructed on the definition of trade secrets and, as described above, Martin's testimony provided an adequate basis for them to find use of trade secrets in creating the analysis. Finally, because plaintiff advanced claims based on both misappropriation of trade secrets and of other confidential information, the jury's award was not dependent on a finding that trade secrets specifically were used in creating the comparative analysis.

Fourth, TCS argues that the testimony of plaintiff's expert, Mr. Britven, was based on an incorrect assumption that TCS used Epic's trade secrets and other confidential information. (Defs.' Br. (dkt. #914) 37.) The court previously addressed this argument, faulting TCS, at least in part, for its failure to preserve certain evidence and produce other evidence timely, which resulted in Britven being asked to assume use. (4/14/16 Op. & Order (dkt. #860) 6.) Regardless, an expert may premise his or her opinions on factual assumptions, which the proponent of that opinion must then prove through the testimony of other witnesses or documentary evidence. Here, the jury was instructed that they could only award damages if TCS actually used Epic's trade secrets and/or other confidential information, and plaintiff put forth sufficient evidence to permit a reasonable jury to make that finding as detailed above, especially in light of the adverse inference instruction.

ii. Punitive Damages

Defendants also seek an order vacating or at least reducing plaintiff's punitive damages award. As an initial matter, TCS argues that there is no evidence that its conduct was "willful and malicious" to justify a punitive damages award on the misappropriation of trade secrets claim. (Defs.' Br. (dkt. #914) 55 (citing Wis. Stat. § 134.90(4)(b) ("If a violation of sub. (2) is willful and malicious, the court may award punitive damages in an amount not exceeding twice any award under par. (a).")).) This initial argument is meritless, if not frivolous. Even putting aside the issue of whether defendants forfeited the argument by failing to raise it before the verdict question was submitted to the jury (Pl.'s Opp'n (dkt. #926) 80), defendants never objected to the jury instruction allowing for an award of punitive damages based on a finding that "TCS acted maliciously toward Epic or in an intentional disregard of its rights." (Damages Instr. (dkt. #872) 5; *see also* Pl.'s Opp'n (dkt. #926) 81-82 (describing defendants' failure to object).) This failure to object at trial is hardly surprising since, contrary to TCS's characterization now, Epic's request for punitive damages was *not* limited to the misappropriation of its trade secrets claim under § 134.90. Epic also sought punitive damages based on its common law claims for fraudulent misrepresentation and unfair competition. (Damages Instr. (dkt. #872) 5.) As TCS itself acknowledged in post-trial briefing, the "malicious or intentional disregard" standard *is* the appropriate one for an award of punitive damages on these common law claims. (Defs.' Br. (dkt. #914) 56-57.)

Accordingly, there was no timely objection *and* no underlying error in giving that instruction.

As for TCS's contention that there is no evidence supporting the jury's finding that it acted with an *intentional* disregard of Epic's rights, the jury was instructed that to prove "an intentional disregard of the rights," plaintiff must prove by clear and convincing evidence that the defendant acted "with the purpose to disregard the plaintiff's rights" or was "aware that the acts [were] substantially certain to result in the plaintiff's rights being disregarded." (Damages Instr. (dkt. #872) 5.) As detailed in Epic's opposition brief, there was more than sufficient evidence from which a reasonable jury could reach that conclusion on the trial record. (Pl.'s Opp'n (dkt. #926) 83-87.) Specifically, Epic presented evidence that a variety of TCS employees intentionally shared restricted credentials with dozens of unauthorized co-employees, *and* they then gained widespread, unauthorized access to Epic's UserWeb. Moreover, the evidence also supported a finding that many of those employees knew they were both acting in violation of corporate security requirements *and* without any even arguable, legitimate purpose of supporting Epic's software shared customers. Finally, the evidence reflected that TCS employees downloaded more than 6,000 Epic documents, in addition to viewing and copying and pasting information from documents, for reasons at times unrelated to customer support.

Even if this were not enough, the jury further heard evidence that when Epic raised concerns about this conduct, TCS executives and managers engaged in a campaign to " suppress the truth" from investigators.

(Pl.'s Opp'n (dkt. #926) 84.) The evidence also supported a finding that TCS failed to notify Epic of its unauthorized access and that, in its internal investigation, TCS took its employees' denials at face value without conducting an adequate investigation or preserving evidence for Epic to verify its findings. All of this forms a sufficient basis from which the jury could reasonably conclude that TCS intentionally gained access to, misused and then suppressed evidence of misuse of Epic's trade secrets and confidential information. At minimum, the jury had ample basis to find clear and convincing evidence that TCS was sufficiently aware a group of its employees were blatantly disregarding Epic's right to restrict access and use if its trade secrets and confidential information, and TCS chose to take no steps to stop it.

Finally, defendants challenge the amount of the jury's punitive damages award. On this, plaintiff agrees that the award of punitive damages must be capped at no more than two times the amount of compensatory damages as a result of a relatively recent change in Wisconsin law. (Defs.' Br. (dkt. #914) 59 (citing Wis. Stat. § 134.09(4)(b) and § 893.043(6)); Pl.'s Opp'n (dkt. #926) 90 (acknowledging cap under Wisconsin law and seeking award of punitive damages of $480 million).) Having denied defendants' request to vacate the jury's $140 million compensatory award, the question is whether an award of punitive damages capped at $280 million is so excessive as to violate defendants' due process rights.

"A punitive damages award 'is excessive, and therefore violates due process, if it is more than

necessary to serve the purposes of punitive damages, or inflicts a penalty or burden on the defendant that is disproportionate to the wrongdoing.'" *Kimble v. Land Concepts, Inc.*, 2014 WI 21, ¶ 45, 353 Wis. 2d 377, 845 N.W.2d 395 (quoting *Trinity Evangelical Lutheran Church & Sch.-Freistadt v. Tower Ins. Co.*, 2003 WI 46, ¶ 50, 261 Wis. 2d 333, 661 N.W.2d 789). In determining whether a punitive damages award is excessive, Wisconsin courts are to consider: (1) the grievousness of the acts; (2) the degree of malicious intent; (3) whether the award bears a reasonable relationship to the award of compensatory damages; (4) the potential damages that might have been caused by the acts; (5) the ratio of the award to civil or criminal penalties that could be imposed for comparable misconduct; and (6) the wealth of the wrongdoer. *Id.* at ¶ 47. This six-factor test is considered "substantively identical" to the guideposts described by the United States Supreme Court, which consider: "(1) the degree of egregiousness or reprehensibility of the conduct; (2) the disparity between the harm or the potential harm suffered and the punitive damages award; and (3) the difference between the punitive damages and the possible civil or criminal penalties imposed for the conduct." *Id.* at ¶ 46 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).[6]

In terms of the factors concerning the reprehensibility, grievousness and malicious intent on the part of TCS, the Supreme Court described in *BMW* certain factors that may be relevant to determining the

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[6] There appears no dispute that the third guidepost and fifth factor -- concerning the relationship to any civil or criminal penalty -- are not applicable to this case.

reprehensibility of a party's actions, including whether "the conduct involved repeated actions or was an isolated incident" and whether "the harm resulted from intentional malice, trickery or deceit, or mere accident." 517 U.S. at 576-77. Here, plaintiff presented evidence of TCS employees' widespread, knowing and unauthorized access and downloading of Epic's confidential information, with TCS supervisors at least aware of this misconduct and choosing to turn a blind eye to it, if not actively encouraging it, as well as TCS's failure to investigate timely or adequately the unauthorized access and resulting spoliation of evidence.

In response, TCS principally argues that Epic was not as careful as it should have been in protecting its trade secrets and confidential materials. While perhaps in theory this argument might weigh against a significant punitive damages award, the jury was free to, and almost certainly did, reject it by explicitly finding for Epic on its trade secret misappropriation claim, which necessarily required a finding that Epic took steps to maintain the secrecy of its trade secrets. Moreover, evidence of any failure on the part of Epic to protect its confidential information does not undercut the significant evidence of TCS gaining widespread unauthorized access of Epic's UserWeb, much less than using that information to compete.

Courts are also directed to consider whether there is a reasonable relationship between the punitive damages award and compensatory damages. "Wisconsin law expressly rejects the use of a fixed multiplier . . . to calculate the amount of reasonable punitive damages." *Kimble*, 2014 WI 21, ¶ 55. Still, the Wisconsin Supreme

Court in *Kimble* pointed to United States Supreme Court cases that "in practice, [found] few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at ¶ 65 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). Indeed, the Supreme Court found that "[e]ven a punitive damages award of just four times compensatory damages can come 'close to the line' of violating due process." *Id.* (quoting *BMW*, 517 U.S. at 581).

In light of Wisconsin's statutory cap, however, the ratio of punitive damages to compensatory damages is 2:1. As detailed in plaintiff's opposition, courts have routinely approved of punitive damages awards under Wisconsin law of 2:1 or higher. (Pl.'s Opp'n (dkt. #926) 95 (citing *Kimble*, 2014 WI 21, ¶ 71 (vacating punitive damages award as excessive and reducing it to one consistent with 3:1 ratio); *Trinity Evangelical*, 2003 WI 46, ¶ 65 (affirming punitive damages award with 7:1 ratio); *Schwigel v. Kohlmann*, 2005 WI App 44, ¶ 21, 280 Wis. 2d 193, 694 N.W.2d 467 (affirming award with 30:1 ration for "profoundly egregious conduct"); *Chapes v. Pro-Pac, Inc.*, 473 B.R. 295, 307 (E.D. Wis. 2012) (upholding jury award of punitive damages with 8:1 ratio in case where employee breached fiduciary duty).) With the reduction to the statutory cap to 2:1, therefore, the relationship between compensatory damages and punitive damages here falls well within the range of reasonable punitive awards. If anything, TCS's suppression of evidence that might have justified a higher compensatory award, argues for a larger multiple here.

Having lost that argument (or at least failing to convince this court that an award of less than a 2:1 ratio is necessary), TCS spends much of its brief describing cases in which the punitive damages award was significantly less than the $480 million. (Defs.' Br. (dkt. #914) 62-64, 70-73.) As Epic correctly points out, however, the factors described by the Wisconsin Supreme Court and the United States Supreme Court focus on a relative comparison between compensatory and punitive damage awards, not on the absolute amount of either award. Moreover, the punitive damage awards cited by TCS consist for the most part of cases in which the compensatory damages award is *significantly* lower than the $240 million here, or even the $140 million after reduction by this court. As such, a significantly larger punitive award was to be expected by a reasonable jury.

Of course, these distinctions are broad theoretical considerations and, therefore, they fail to account for the factual differences in each case. For example, courts are directed to consider the wealth of the defendant. Here, TCS has annual revenues in excess of $15 billion. Most, if not all of the defendants in the cases cited by TCS, had significantly lower revenues and net worth. *See* Wis. Stat. § 895.043(4)(a) (considering wealth of a defendant in setting punitive damages award). Consistent with this law, the jury was instructed to "consider the defendants' wealth in determining what sum of punitive damages will be enough to punish it and deter it and others from the same conduct in the future." (Damages Instr. (dkt. #872) 6.) While the jury appears to have

placed significant weight on this factor, the court sees no error in them doing so.[7]

Similarly, in reviewing a punitive damages award, courts are directed to consider the potential damage to Epic. Epic presented evidence that one of TCS's employees forwarded Epic's confidential documents to someone who did not even work for TCS. This evidence, coupled with the uncertainty as to the possible, broader disbursement of Epic documents to a wider group of TCS employees or independent software freelancers, further supports a finding that the punitive damages award addressed potential damage to Epic. (Damages Instr. (dkt. #872) 6 (instructing the jury to consider "the potential damage which could have been done").) After reviewing the factors, therefore the court finds that a punitive damages award of $280 million is not excessive in violation of TCS's due process rights under either state and federal law.[8]

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[7] Relatedly, defendants also contend that the jury, "egged on by Epic's counsel's closing argument, seems to have used evidence of TCS's earnings to express their bias against a business that is not only based out-of-town, but out-of-country, and in favor of a prominent local business." (Defs.' Br. (dkt. #914) 66.) The court was sensitive to defendants' position as out-of-town -- indeed, out-of-country -- litigants, and it attempted to address any bias during *voir dire* and in barring any emphasis on defendants' citizenship during argument. While defendants may speculate that bias influenced the jury's award, there is no credible basis to support it.

[8] Defendants sought leave to file a reply brief to respond to arguments raised in Epic's opposition brief. (Dkt. #934.) Although defendants did not presume to file a proposed brief with their motion, the areas identified by defendants are ones for which the

II. Attorneys' Fees and Costs

In a prior opinion and order, the court denied plaintiff's request for entry of default judgment as a sanction for defendants' repeated, egregious discovery abuses, but: (1) allowed "Epic to present evidence of TCS's failures to investigate and preserve data, documents and other discoverable information to the extent the jury finds this conduct was intentional and undertaken in bad faith"; and (2) agreed to provide the jury with an instruction permitting it to draw reasonable adverse inferences with regard to likely content of the missing information. (3/23/16 Op. & Order (dkt. #709) 4-5; Closing Liability Instr. (dkt. #858) 2-5.) In addition, the court reserved until after trial whether further monetary sanctions were appropriate. While the jury was deliberating on damages, the court invited Epic to submit its attorney's fees documentation, including invoices, if the court opted to award attorney's fees as a sanction. (Trial Tr. (dkt. #898) 153-56.) During that exchange with the parties, and consistent with earlier rulings, the court agreed to take into consideration: (1) any mitigating steps taken by TCS (for example, its subsequent cooperation with the court-sanctioned Stroz investigation); (2) the fact that TCS had already been sanctioned by the adverse inference instruction; and (3) whether a further sanction is warranted in light of the jury's verdict on damages. (*Id*. at 155-56.)

While TCS's failure to preserve evidence and respond timely to discovery requests in this case was

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court does not need further clarification. Accordingly, the court will deny defendants' motion to file a reply brief.

inexcusable, the most serious prejudice done to Epic was hindering its ability to prove specific damages. This prejudice was largely rectified by giving Epic the benefit of an adverse inference instruction, and allowing Epic to proceed on a damages theory that was only narrowed during the course of the trial. Indeed, by virtue of the jury's sizeable award of both compensatory and punitive damages, Epic may have done as well (or better) than it would have had TCS complied with its obligation to preserve and respond timely to discovery. Accordingly, the court finds these prior sanctions sufficient under Rule 37 to both hold TCS accountable for its discovery lapses and to deter similar misconduct in the future, whether by TCS specifically or by other entities more generally, and will deny plaintiff's request for an award of attorney's fees as a further sanction.[9]

[9] As an aside, in its submission, plaintiff also asserts that an award would be appropriate under Wisconsin's civil theft statute, Wis. Stat. § 895.446(3)(b), which provides for an award of "[a]ll costs of investigation and litigation," and under Wisconsin Uniform Trade Secrets Act, Wis. Stat. §134.90(4)(c), which authorizes an award of attorney's fees to a prevailing party where the defendant's misappropriation was "willful and deliberate." (Pl.'s Br. (dkt. #917).) Epic failed to develop the underlying factual basis for either statutory provision, however. As defendants point out in opposition, Wisconsin courts have limited § 895.446(3)(b) to an award of costs, *not* including attorney's fees. *See Kremers-Urban Co v. Am. Employers Ins. Co.*, 119 Wis. 2d 722, 746, 351 N.W.2d 156 (1984). As for the WUTSA, the jury was not asked to make a specific finding of "willful and deliberate" misappropriation of trade secrets, and the court is disinclined to intuit one after the fact. In short, the alternative bases for an award of fees under Wisconsin statutes was developed too little and raised too late to prevail.

III. Clarification of Injunction

Finally, after the court appointed a monitor and issued an amended permanent injunction, TCS filed a motion for clarification, raising specific questions. The court will address each in turn. *First*, TCS seeks clarification at to the court-appointed monitor Samuel Rubin's communications with Epic. Epic may direct Rubin's activities, consistent with those outlined in the permanent injunction. If there is a concern as to whether Rubin's activities extend beyond those contemplated in the injunction, TCS was and remains welcome to raise any concerns with the court, just as Epic may preemptively seek guidance. As for what Rubin may tell Epic, the court understands TCS's concern with his charge in paragraph 5 of the Amended Permanent Injunction, which reads as follows:

> Except by leave of court, the monitor shall not disclose the substance or outcome of its ongoing investigation, except for (1) the procedures or tasks undertaken; and (2) any evidence of violations of the permanent injunction.

(11/2/16 Op. & Order (dkt. #959) 9.) Accordingly, the court will modify that paragraph slightly going forward as follows:

> Except by leave of court, the monitor shall not disclose the substance or outcome of its ongoing investigation except for: (1) the procedures or tasks undertaken; and (2) specific evidence of a violation of the

> permanent injunction. To the extent the monitor may have only general evidence, he should disclose that evidence to the court, at which time the court will determine whether the monitor may disclose the evidence to Epic.

Second, TCS seeks clarification on the starting date and notification obligations for the four-year terms of the injunction. TCS maintains that the start date should be April 27, 2016, the date the original, permanent injunction was entered. The court agrees. As for repetition in paragraphs in the amended permanent injunction requiring TCS to provide written notice to all employees of the injunction, and requiring TCS to provide a report describing the manner and form with which it has complied (11/2/16 Op. & Order (dkt. #959) 9), the issuance of the amended permanent injunction did *not* trigger another notice requirement and report.

ORDER

IT IS ORDERED that:

1) Defendants Tata Consultancy Services Limited and Tata America International Corporation's motions for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) as to the jury's finding of liability (dkt. ##830, 843) are DENIED.

2) Defendants' motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) as to the jury's finding of damages and to strike the

damages phase of testimony of Thomas Britven and Stirling Martin (dkt. #913) is GRANTED IN PART AND DENIED IN PART. The motion is granted as to a reduction of the compensatory damage award by $100 million and as to defendants' request to reduce the punitive damages award to the Wisconsin statutory cap of $280 million. In all other respects, the motion is DENIED.

3) Plaintiff Epic Systems Corporation's motion for attorney fees and costs (dkt. #916) is DENIED.

4) Plaintiff's motion to strike or, in the alternative, for leave to file a short reply (dkt. #932) is DENIED AS MOOT.

5) Defendants' motion for leave to file a reply brief in further support of Rule 50(a) motion as to damages (dkt. #934) is DENIED.

6) Plaintiff's motion to amend/correct order on motion to seal (dkt. #953) is GRANTED. The court's August 17, 2016, order is amended to reflect plaintiff's changes at dkt. #943 at p.3.

7) Plaintiff's motion for appointment of a monitor (dkt. #954) is DENIED AS MOOT.

8) Defendants' motion for clarification (dkt. #962) is GRANTED.

9) Plaintiff's motion for hearing (dkt. #968) is DENIED AS MOOT.

Entered this 29th day of September, 2017.

BY THE COURT:
/*s*/ William M. Conley
WILLIAM M. CONLEY
District Judge

Appendix E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

EPIC SYSTEMS CORPORATION,

Plaintiff,

v.

TATA CONSULTANCY SERVICES LIMITED and TATA AMERICA INTERNATIONAL CORPORATION d/b/a TCA America,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 14-cv-748-wmc

This action came for consideration before the court and a jury with District Judge William M. Conley presiding. Partial judgment was granted by the court. Other issues were tried to a jury, which rendered its verdict, and the court also entered injunctive relief. The court has now resolved all post-judgment issues and enters this judgment.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff Epic Systems Corporation against defendants Tata Consultancy Services Limited

and Tata America International Corporation as to plaintiff's claims for breach of contract, violations of the Computer Fraud and Abuse Act, 19 U.S.C. § 1030(g) claims, violations of the Wisconsin Computer Crimes Act, Wis. Stat. § 943.70(2)(a), fraudulent misrepresentation, misappropriation of trade secrets, unfair competition, unjust enrichment and deprivation of property.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is entered in favor of defendants Tata Consultancy Services Limited and Tata America International Corporation against plaintiff Epic Systems Corporation as to plaintiff's conversion claim.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff Epic Systems Corporation against defendants Tata Consultancy Services Limited and Tata America International Corporation dismissing defendants' counterclaims.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff Epic Systems Corporation against defendants Tata Consultancy Services Limited and Tata America International Corporation in the amount of $420,000,000.00.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff Epic Systems Corporation against defendants Tata Consultancy Services Limited and Tata America

International Corporation, permanently enjoining defendants as follows:

1. This Permanent Injunction shall remain in full force and effect for four years from April 27, 2016, the date the effective date of the original Permanent Injunction.

2. For purposes of this Permanent Injunction, the following terms apply:

a. "Epic" shall mean plaintiff Epic Systems Corporation.

b. "TCS" shall mean Tata Consultancy Services Limited and Tata America International Corporation.

c. "Trade Secret" shall mean the documents contained in Trial Exhibit No. 1247, limited to those documents (or portions of such documents) that are a trade secret as defined in the Wisconsin Uniform Trade Secrets Act, Wis. Stat. § 134.90(1)(c).

d. "Confidential Information" shall mean the documents, including the content of the documents, contained in Trial Exhibit Nos. 2100 and 2101 that (i) are not trade secrets; and (ii) are "confidential information" as defined in the parties' Standard Consultant Agreement (Trial Ex. 3).

3. Except as expressly set forth in the opinion above, TCS and their respective affiliates, successors, officers, agents, servants, employees, and attorneys and any and all other persons who are in active concert or participation with any of them (all collectively referred

to as "Enjoined Parties"), are permanently enjoined, anywhere in the world, from the following:

a. using any Epic Trade Secret or Confidential Information for any reason, including but not limited in the design, development, enhancement, or marketing of any TCS software providing solutions in the areas of electronic health records, electronic medical records, and hospital management systems, or any other healthcare software solutions, including but not limited to Med Mantra (as most broadly defined, including but not limited to, TCS-HIS, Med Mantra in use at Apollo Hospitals in India, British American Hospital in Mauritius, Tata Cancer Hospital in India, Tata Cancer Institute in India, and Med Mantra modules in development at DaVita Healthcare Partners, Inc. and Quest Diagnostics, Inc.) (collectively, "TCS EHR Products");

b. possessing or retaining any Epic Trade Secret or Confidential Information in any form, including on any servers or other electronic computer systems of TCS or any other electronic or hard-copy media at TCS;

c. accessing or attempting to access any non-public Epic servers or systems, including Epic' internet portal known as UserWeb; and

d. permitting any TCS employee or consultant or agent who performed software testing on Epic's software in connection with TCS's work for Kaiser, directly supervised or managed such testing, or otherwise had access to any Epic Trade Secret or Confidential Information, including, but not limited to

Naresh Yallapragada, Venugopal Reddy, and Madhavi Mukerji, to work on, or assist in, directly or indirectly, the design, development, enhancement, or marketing of any TCS EHR Products.

4. For the two years from April 27, 2016, unless extended by the court upon a showing of good cause, TCS shall not resist, hamper, delay, or otherwise interfere with the activities of a monitor to be appointed consistent with the procedure outlined in the above opinion. The monitor shall be paid by Epic and have unfettered access at any time, to monitor TCS's development and implementation of any TCS EHR Products to ensure that TCS does not improperly use any of Epic's Trade Secrets or Confidential Information, as described below. In particular, TCS shall permit the monitor to:

a. Confirm that TCS employees, consultants, and agents do not have access to Epic's internet portal known as UserWeb or to any of Epic's Trade Secret or Confidential Information.

b. Confirm that TCS does not possess or retain any Epic Trade Secret or Confidential Information on any of its servers, shared drives, shared domains, or other places of electronic information storage.

c. Talk with any TCS employee who might be able to assist the monitor in determining whether Epic Trade Secret or Confidential Information was or is being used in the design, development, enhancement, or marketing of any TCS EHR Products. TCS shall provide

the ombudsman or monitor with unfettered access to these TCS employees.

d. Examine, evaluate, and analyze TCS's electronic information, including TCS's proxy logs, domain logs, active directory logs, software, servers, shared drives, and shared domains, to determine whether any Epic Trade Secret or Confidential Information was or is being used or is intended to be used in the design, development, enhancement, or marketing of any TCS EHR Products. TCS shall provide the monitor with unfettered access to this electronic information.

5. Epic shall have the ability to confidentially provide the monitor with the type of information Epic deems necessary to monitor TCS's development and implementation of any TCS EHR Product to ensure that TCS does not improperly use any of Epic's Trade Secret or Confidential Information.

6. Except by leave of court, the monitor shall not disclose the substance or outcome of its ongoing investigation except for: (1) the procedures or tasks undertaken; and (2) specific evidence of a violation of the permanent injunction. To the extent the monitor may have only general evidence, he should disclose that evidence to the court, at which time the court will determine whether the monitor may disclose the evidence to Epic.

7. TCS shall provide written notice to all TCS employees who performed work for Kaiser Permanente and all employees who work (or worked during the

relevant time period) on the design, development, enhancement, or marketing of any TCS EHR Products, that the Permanent Injunction has been issued and its terms.

8. Within 60 court days of the effective date of this Permanent Injunction, TCS shall file and serve a report in writing and under oath setting forth in detail the manner and form with which TCS has complied with the Permanent Injunction.

9. Violation of the Permanent Injunction shall be subject to all applicable penalties, including contempt of court and shifting the reasonable expenses that Epic has paid for the monitor to TCS.

10. This court shall retain continuing jurisdiction over Epic, TCS and the Enjoined Parties and the action for the purpose of enforcing or modifying the Permanent Injunction.

Approved as to form this 2nd day of October, 2017.

/s/ William M. Conley
William M. Conley
District Judge

/s/ Peter Oppeneer — 10/3/17
Peter Oppeneer — Date

Clerk of Court

Appendix F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

EPIC SYSTEMS CORPORATION,

Plaintiff,

v.

TATA CONSULTANCY SERVICES LIMITED and TATA AMERICA INTERNATIONAL CORPORATION d/b/a TCA America,

Defendants.

OPINION AND ORDER

14-cv-748-wmc

After summary judgment, a 10-day trial, an order entering an injunction, and an extensive opinion addressing remaining post-trial motions, the court entered judgment in favor of plaintiff Epic Systems Corporation in the amount of $420 million. In response, defendants Tata Consultancy Services Limited and Tata America International Corporation (collectively "TCS"), filed a sweeping motion pursuant to Federal Rules of Civil Procedure 50(b) and 59, largely repeating the same arguments previously raised in its Rule 50(a) motion and previously rejected by the court. (Dkt. #996.) In more cursory fashion, defendants also move for

reconsideration of the court's order granting plaintiff's motion to dismiss defendants' counterclaims. For the reasons that follow, the court will deny both motions.

OPINION

I. Challenges to Liability Findings

Under Rule 50, judgment may be granted as a matter of law where there is no "legally sufficient evidentiary basis" to uphold the jury's verdict on that issue. Fed. R. Civ. P. 50(a). More specifically, the court is to "examine the evidence presented, combined with any reasonably drawn inferences, and determine whether that evidence sufficiently supports the verdict when viewed in the light most favorable to the non-moving party." *E.E.O.C. v. AutoZone, Inc.*, 707 F.3d 824, 835 (7th Cir. 2013). In doing so, the court is not to make credibility determinations or weigh the evidence. Rather, the court must assure that more than "a mere scintilla of evidence" supports the verdict, *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 859 (7th Cir. 2007), reversing "only if no rational jury could have found for the prevailing party," *AutoZone, Inc.*, 707 F.3d at 835. Moreover, "[b]ecause the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion." *Wallace v. McGlothan*, 606 F.3d 410, 418 (7th Cir. 2010); *see also Thompson v. Mem'l Hosp. of Carbondale*, 625 F.3d 394, 407 (7th Cir. 2010) (refusing to consider the defendant's argument that plaintiff failed to demonstrate that he suffered an adverse employment action, in part, because the defendant did not raise argument in Rule 50(a) motion); Fed. R. Civ. P. 50 cmt.

1991 Amendments ("A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.").

Defendants also move for a new trial under Rule 59, which "may be granted only if the jury's verdict is against the manifest weight of the evidence." *King v. Harrington*, 447 F.3d 531, 534 (7th Cir. 2006) (citing *ABM Marking, Inc. v. Zanasi Fratelli, S.R.L.*, 353 F.3d 541, 545 (7th Cir. 2003)). To meet this standard, defendants must demonstrate that no rational jury could have rendered a verdict against them. *See King*, 447 F.3d at 534 (citing *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 926 (7th Cir. 2004)). Here, again, the court must view the evidence in a light most favorable to plaintiff, leaving issues of credibility and weight of evidence to the jury. *King*, 447 F.3d at 534. "The court must sustain the verdict where a `reasonable basis' exists in the record to support the outcome." *Id.* (quoting *Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir. 2004)).

As further context, during the course of this bifurcated trial, defendants moved for judgment as a matter of law under Rule 50(a). The court implicitly denied these motions by allowing both the liability and the damages phases to go to the jury. After the verdict, the parties extensively briefed defendants' arguments, with full knowledge of the jury's verdicts, and the court ruled on that motion before entering judgment. As such, it is odd for defendants to file another motion, largely repeating verbatim their prior arguments, without, for the most part, acknowledging the court's prior rulings. Rather than repeat its prior explanation for rejecting

defendants' arguments, the court, for the most part, will simply refer to its Rule 50(a) opinion and order.

A. Proof of "Actual Damages"

Defendants argue that the court should enter judgment in their favor on any claims that require a showing that Epic suffered "actual damages" in the form of "losses or other comparable harm." (Defs.' Opening Br. (dkt. #997) 18.) Defendants contend that plaintiff's sole ground for compensatory damages was a disgorgement of benefit theory in connection with its unjust enrichment claim. As such, defendants argue, plaintiff failed to present evidence of actual damages to support its breach of contract, fraudulent misrepresentation, unfair competition, Computer Fraud and Abuse Act ("CFAA") and deprivation of property / civil theft claims.

As an initial matter, defendants continue to blur the distinction between a finding of injury, required for some but not all of the claims, and a finding and measurement of damages. *See United States v. Sapoznik*, 161 F.3d 1117, 1119 (7th Cir. 1998) ("But the question of causation is different, in criminal as in civil law, from the question of quantification. (In tort law the difference is between the fact of injury and the amount of damages.)"). For example, to prove a breach of contract claim under Wisconsin law, the plaintiff need not prove any injury, as this court previously explained. (*See* 3/2/16 Op. & Order (dkt. #538) 46 n.36.) The fact that the jury found defendants *liable* as to all of these claims does not mean the jury was obligated to award damages on all claims. Indeed, the actual damages award more

likely reflects the finding of liability on the unjust enrichment claim, and, specifically, plaintiff's disgorgement of benefit theory. Regardless, as plaintiff points out in its response, none of these claims required proof of the *type* of damages defendants contend is necessary for a finding of liability.

As for proof of damages specifically, while defendants are correct that a plaintiff may recover out-of-pocket losses for its fraudulent misrepresentation and unfair competition claims, that is the not the *sole* available basis of recovery. Instead, a plaintiff may seek damages in the form of the value of the benefit received through the commission of the tort, which is essentially the same as the unjust enrichment disgorgement of benefits theory. *See Pro-Pac Inc. v. WOW Logistics Co.*, 721 F.3d 781, 786 (7th Cir. 2013) (damages for the "value of the benefit" unjustly received are available for tort claims regardless of whether the plaintiff formally alleged an unjust enrichment claim). Similarly, plaintiff's deprivation of property/ civil theft claim under Wis. Stat. § 895.446 requires that a person suffer "damage or loss," but the statute provides that "actual damages" can include the retail value of stolen property, which is analogous with a damages claim premised on the value of the trade secrets and confidential information taken by defendants.

Defendants' challenge to an award on plaintiff's CFAA claim fails for an additional reason. While the CFAA requires that a civil plaintiff suffer "damage or loss," 18 U.S.C.A. § 1030(g), the term "loss" includes:

> any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.

Id. at § 1030(e)(1). Here, defendants stipulated to plaintiff's evidence of a $9,277 loss. (Pl.'s Opp'n (dkt. #1007) 26 (citing Trial Tr. (dkt. #896) 89 (counsel for defendants stating that they are going to "drop the whole matter of . . . the loss" under CFAA claim and the court responding that it will delete the instruction)).) Having stipulated to this loss, defendants cannot now challenge plaintiff's failure to prove "actual damages."

B. Failure to Instruct on "Actual Damages" Element

Closely related to the first challenge, defendants further argue that the court should grant judgment in their favor on the above-mentioned claims because the jury was never asked to find, and never found, that Epic suffered "actual damages." Because the court has rejected defendants' argument that such a finding was required as to each of these claims, however, the court similarly rejects any argument based on the court's failure to instruct the jury or the lack of a jury finding. Critically, with respect to the damages award, the jury was instructed properly that they could award damages for "the value of the benefits obtained by TCS because

of TCS's wrongful conduct." (Damages Instr. (dkt. #872) 3.)

C. Misappropriation of Trade Secrets Claim

Next, defendants again challenge the jury's finding of liability as to the misappropriation of trade secrets claim, Wis. Stat. § 134.90, on the basis that plaintiff failed to demonstrate that it protected the secrecy of these alleged trade secrets. The court previously considered and rejected this argument, and defendants offer no meritorious basis for revisiting it. (*See* 9/29/17 Op. & Order (dkt. #976) 4-5.)

D. Unfair Competition and Unjust Enrichment Claims

Defendants offer three bases for judgment in their favor as to these claims. *First*, defendants contend that plaintiff's unjust enrichment claim fails as a matter of law because the contract between TCS and Epic bars such a claim. Plaintiff contends that this challenge has been waived, having failed to raise it in their original Rule 50(a) motion. However, where the challenge is purely a legal challenge -- not a sufficiency of the evidence or a jury instruction challenge -- the court agrees with defendants that it need not be raised in a Rule 50(a) motion. *See Havco Wood Prod., LLC v. Indus. Hardwood Prod., Inc.*, No. 10-CV-566-WMC, 2013 WL 1497429, at *3 (W.D. Wis. Apr. 11, 2013) (explaining that where a matter of law is raised as a basis for relief, there is no prejudice to the nonmovant) (citing *Warlick v. Cross*, 969 F.2d 303, 308 (7th Cir. 1992)).

Even so, this first challenge fails on its merits. The parties' contract did not govern TCS's impermissible access through the Epic UserWeb portal. Indeed, the record demonstrates that TCS was denied direct access to the UserWeb *despite* its repeated requests. (Trial Ex. 296 at 3 (TCS presentation explaining that because "TCS is not an Epic partner . . . they are not allowed to access Epic Systems Userweb Portal"); Trial Ex. 303 at 6 (TCS acknowledging that because it "could not reach an agreement with EPIC," TCS associates are not "allowed to connect to the EPIC User Web").) Because of this, not only did the contract not cover TCS's impermissible use, but there was no reason for Epic to negotiate away a contractual remedy for unjust enrichments arising out of a fundamental breach of that contract. Regardless, even if recovery were only available as a breach of contract damage, the jury found just such a breach and was entitled to find the benefit conferred on defendants as a result of that breach was the best measure of damages. (*See* Damages Instr. (dkt. #872) 3 (instructing the jury that they may award Epic "the value of the benefits obtained by TCS because of TCS's wrongful conduct," and specifically instructing them that "the appropriate remedy may be the benefits, profits, cost savings, or other advantages gained by TCS because of its use of Epic's confidential information or trade secrets").)

Second, defendants argue that there was insufficient evidence from which a reasonable jury could find a benefit conferred on defendants, namely that defendants used the information obtained to "develop competing software." (Defs.' Opening Br. (dkt. #997) 29.) In its prior

order, the court extensively addressed both the evidence supporting a finding of improper use and what kind of use was required to support a finding of liability as to unjust enrichment and an award of damages on this claim or breach of contract. (9/29/17 Op. & Order (dkt. #976) 4-5 (detailing evidence to support a finding of improper use); 9-10 (explaining evidentiary basis for jury's award of compensatory damages based on the competitive analysis).) Defendants have advanced no reason for the court to revisit this analysis.

Third, with respect to the unfair competition claim, defendants argue that plaintiff failed to put forth any evidence of a competitive use to sustain the jury verdict on that claim. Here, too, as the court explained previously, there was ample evidence to support the jury's award of compensatory damages based on TCS's development of its comparative product analysis, which gave it a leg up in developing both an entry strategy into the U.S. health software market and improving the competitiveness of its Med Mantra software product. (*Id.* at 9-10.)

E. Fraud, CFAA and Deprivation of Property Claims

Defendants also raise various challenges to the jury's finding of liability on plaintiff's fraud, CFAA and deprivation of property claims. *First*, defendants challenge plaintiff's deprivation of property claims under Wis. Stat. § 895.446 because there was no "movable property" involved. The court previously considered this argument and rejected it, and again sees

no grounds for revisiting it. (9/29/17 Op. & Order (dkt. #976) 6 (citing 4/1/16 Op. & Order (dkt. #776) 7-9).)

Second, with respect to the fraudulent misrepresentation claim, defendants argue that judgment should be entered in their favor because plaintiff failed to present evidence of their intent to induce Epic to do something that would cause it economic harm. In particular, defendants argue that the only evidence introduced was their intent to obtain information to help their customer Kaiser. The court previously addressed this argument as well, explaining that the test is whether Epic relied on the misrepresentation and whether its reliance was reasonable. Having already rejected defendants' framing of the legal requirements, defendants offer no further basis to challenge the jury's finding with respect to this claim. (*See* 9/29/17 Op. & Order (dkt. #976) 6-7 (rejecting same argument in Rule 50(a) motion).)

Third, and weakest of all, defendants argue that there is no evidence to support the jury's finding that TCS employees shared passwords with an intent to deceive in violation of the CFAA. Again, this is a well-worn ground, and defendants offer no new basis to challenge the court's previous finding of more than sufficient evidence to conclude that TCS employees were "specifically motivated to improperly use other's passwords for an improper purpose (*i.e.*, that TCS access UserWeb documents for a purpose other than to enable TCS employees to do their jobs for their mutual customer Kaiser)." (*Id.* at 7; *see also id.* at 18 (describing TCS employees' widespread, improper use).)

F. Adverse Inference Instruction

Next, defendants seek judgment as a matter of law on the basis that the court's adverse inference instruction was too broad.[1] Specifically, defendants argue that the adverse inference instruction was a "kind of wild card," invoked to "fill complete holes in the plaintiff's proof." (Defs.' Opening Br. (dkt. #997) 34.) There are several problems with defendants' argument. Initially, as the court previously explained, plaintiff submitted ample evidence to support the jury's findings even without the benefit of the adverse inference instruction. (9/29/17 Op. & Order (dkt. #977) 4-6 (describing evidence to support a jury finding as to the various claims).) More importantly, the jury was properly instructed as to the requirements before making any adverse inference, as well as the reasonable inference the jury may make based on that finding. (*See* Closing Instr. (dkt. #858) 3-4.) Third, plaintiff submitted an evidentiary basis for the jury to conclude that an adverse inference was appropriate (namely, evidence that defendants failed to timely preserve web proxy logs and other electronic data, coupled with evidence of defendants' own, deliberate failure to conduct its own timely investigation) after being put on notice of possible breaches and acts of fraud by its client, Kaiser.

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[1] Defendants also challenge the court's decision permitting an adverse inference instruction and allowing Sam Rubin to testify, since his testimony was premised on the adverse inference instruction. For the reasons previously provided, there were good grounds to provide the adverse inference instruction. (3/23/16 Op. & Order (dkt. #709).) Defendants' briefing provides no basis for reconsidering that decision.

G. Impact on Liability of $100 Million Reduction in Damages Verdict

In its prior opinion and order, the court reduced the compensatory damages award by $100 million, finding that there was not a sufficient evidentiary basis to support the category of damages for defendants' use of "other information." (9/29/17 Op. & Order (dkt. #976) 10-12.) From this decision, defendants now argue that "if the jury found liability on the conduct that was insufficient to support the $100 million award, the underlying liability finding is invalid." (Defs.' Opening Br. (dkt. #997) 37.) This argument is frivolous. This case was bifurcated, with the jury determining liability *before* hearing any evidence or argument or being instructed on damages. As such, those liability findings stand alone, separate and apart from the subsequent determination to award Epic $140 million for use of the competitive analysis and $100 million for use of "other information." The court sees no basis for reconsidering the jury's liability determinations, simply because there was an insufficient basis to assess substantial monetary damages for use of "other information" wrongfully taken by the defendants.

H. New Trial

Alternatively, defendants seek a new trial on liability in a cursory fashion under Federal Rule of Evidence 59. Having found no merit to their arguments in support of judgment as a matter of law in defendants' favor, the court similarly finds no reason to grant a new trial.

II. Challenges to Damages Verdict[2]

A. Evidence of Use of Trade Secrets to Create Comparative Analysis

Defendants argue that to the extent the trade secrets claim was the basis for the jury's damages award, Epic failed to offer any evidence to support a finding that stolen trade secrets were used in making the comparative analysis. Specifically, defendants contend that the testimony of Epic's officer, Stirling Martin, and expert, Wes Rishel, was insufficient to establish a link between the downloaded UserWeb documents containing trade secrets and defendants' development of their comparative product analysis. The court disagrees. Martin testified credibly about the substantial value and importance of the Foundations documents, and in particular the configuration component of Foundations. This formed a sufficient basis for the jury to conclude that defendants used Epic trade secrets in developing their comparative analysis. (Trial Tr. (dkt. #907) 70-71; *see also* Trial Tr. (dkt. #900) 14-15, 27-28; Trial Tr. (dkt. #889) 140.)

While the Seventh Circuit in *IDX Systems Corp. v. Epic Systems Corp.*, 285 F.3d 581 (7th Cir. 2002), rejected the plaintiff's attempt to label its software *in its entirety* a trade secret, here, Epic identified specific documents containing closely guarded trade secrets that

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[2] Defendants renew their argument that the damages case as a whole was unfair in light of the court's original decision to strike the damages phase of the case. The court already rejected this argument for reasons laid out in its prior opinion and order and will not revisit it again. (*See* 9/29/17 Op. & Order (dkt. #976) 8-9.)

cost hundreds of millions to develop and protect, *and* it adequately tied defendants' unauthorized access to those documents to the development of an arguably valuable comparative analysis. Nothing more was required. Moreover, as this court has repeatedly explained, the compensatory damages award could extend beyond the value of the trade secrets to encompass the value of other confidential information obtained improperly. (9/29/17 Op. & Order (dkt. #976) 14.)[3]

B. Britven's R&D Theory

Defendants also challenge the jury's compensatory damages award, arguing that plaintiff's expert Thomas Britven's testimony relied on an assumption not borne out by the evidence -- that defendants "actually used Epic's confidential information for competitive advantage." (Defs.' Opening Br. (dkt. #997) 49.) The court already addressed this argument above, as well as in prior opinions, and found an ample evidentiary basis for the jury to conclude that defendants used plaintiff's trade secrets and other confidential information to develop the comparative analysis, in addition to informing defendants' U.S. entry strategy and

[3] Defendants again challenge the court's decision to prevent defendants' last-minute introduction of evidence supposedly showing that the comparative analysis could have been compiled by publicly-available information. Having amply explained its reasoning for that decision, based primarily on defendants' repeated discovery violations, the court sees no reason to expound on this challenge further. (9/29/17 Op. & Order (dkt. #976) 13-14 (citing 3/23/16 Op. & Order (dkt. #703) 7-8).)

improving its Med Mantra product. (*See supra* Opinion § I.D (citing 9/29/17 Op. & Order (dkt. #976) 4-5, 9-10, 12).)

Nevertheless, defendants persist in arguing that Britven's testimony did not establish that the jury's award actually reflects defendants' cost savings in using plaintiff's confidential information. To the contrary, as explained in the court's prior opinion and order, plaintiff provided an adequate evidentiary basis for the jury to award $140 million in compensatory damages under plaintiff's avoided R&D theory. (9/29/17 Op. & Order (dkt. #976) 9 (setting forth evidence that "the cost of developing this information was roughly $200 million, but crediting lower costs for IT work in India would still cost $130 to $140 million").) As this court has further, repeatedly explained, defendants need not have been successful or profitable in their use of Epic's confidential information to allow for this award. (*Id.* at 12-13 (citing Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011); *Cosgrove v. Bartolotta*, 150 F.3d 729, 734 (7th Cir. 1998)).)

C. Curative Instruction

Next, defendants challenge the court's failure to give a curative instruction as requested by defendants after the closing arguments on liability. Defendants had requested that the court instruct the jury based on a reference made by plaintiff's counsel during the closing argument to the effect that defendants now had Epic trade secrets "just sitting . . . somewhere on a shelf" to be used in the future in developing products. (Defs.' Opening Br. (dkt. #997) 56 (citing Trial Tr. (dkt. #905 at 34); *see also id.* at 98 ("Why would TCS think it's okay to

hide Epic's information until this case is over and then take it off the shelf and aggressively pursue the U.S. market?").) Specifically, defendants proposed the following instruction:

> As you may recall, to prove its unjust enrichment claim, Epic must prove by a preponderance of the evidence that, among other things, it conferred a benefit upon TCS. If the thing that a plaintiff claims is a benefit in fact has no value until it is actually used by the defendant, then the defendant has not been unjustly enriched by mere possession of that thing.

(Defs.' Opening Br. (dkt. #997) 57 (citing Defs.' Request (dkt. #844) 2-3).)

In contrast, the liability instruction for the unjust enrichment claim correctly informed the jury that it had to find a "benefit conferred upon TCS by Epic's confidential non-trade secret information" and that "[a] loss to the plaintiff without an actual benefit to the defendant is *not* recoverable as an unjust enrichment." (Liability Closing Instr. (dkt. #858) 10-11.) As such, defendants' proposed curative instruction was not necessary. More critically -- since this challenge really concerns the jury's award of *damages* -- the jury was further and properly instructed in that phase of the trial that "the value or threat of *future* use, including future sales, does not serve as a basis for an award of compensatory damages, but is rather addressed by the court's injunction." (Suppl. Damages Instr. (dkt. #873) 1.) As such, the jury was appropriately instructed, and

defendants were in no way prejudiced by the court's refusal to give the specific curative instruction they requested.

D. New Trial

Finally, as they did in challenging the liability verdict, defendants move in a cursory fashion for a new trial on compensatory damages. Having rejected the specific bases described above, the court similarly will deny that motion.

III. Challenges to Punitive Damages Award

A. No Waiver

With respect to the jury's punitive damages award, defendants initially contend that they did not waive any challenge because they objected to the punitive damages instruction in their pre-trial submissions, while acknowledging that they never moved for judgment as a matter of law. The court agrees that this early objection would preserve a general challenge to a punitive damages award, although any challenge specific to plaintiff's failure to meet its evidentiary burden would be waived by defendants' failure to bring a timely Rule 50(a) motion. Regardless, defendants' challenges have no merit, as the court explained in its prior opinion and order, and briefly summarizes below.

B. Availability of Punitive Damages

Defendants argue that punitive damages are not available because there are no "actual damages," essentially repeating the argument made at the

beginning of their brief. For the reasons explained above, the court finds no merit in this argument (*see supra* Opinion § I.A) and, therefore, rejects it as a basis for challenging the punitive damages award.

Defendants also argue that a punitive damages award was only available if the compensatory damages award was premised on plaintiff's misappropriation of trade secrets, fraudulent misrepresentations and unfair competition claims because only those claims permit an award of punitive damages under Wisconsin law. As plaintiff explains in its opposition brief, Wisconsin law also allows for the possibility of an award of punitive damages in cases, such as here, where the *compensatory* damages award is restitutionary in nature, and a defendant's conduct merits such an award. (Pls.' Opp'n (dkt. #1007) 81 (discussing *Pro-Pac, Inc. v. WOW Logistics Co.*, 721 F.3d 781, 788 (7th Cir. 2013) ("Regardless of whether the bankruptcy court awards damages premised on gain to WOW (i.e., restitutionary damages) or loss to Pro—Pac (i.e., compensatory damages), punitive damages are also available, if otherwise appropriate.")).)

C. Legally Sufficient Basis

Defendants next argues that plaintiff failed to put forth evidence that their conduct was "willful and malicious," a necessary finding for any punitive damages award premised on misappropriation of trade secrets, or that they acted with an intentional disregard for Epic's rights, as required to support a finding of punitive damages under plaintiffs' common law claims.

Because defendants failed to raise either a challenge to the jury instruction or to the sufficiency of the evidence in a proper pre-verdict Rule 50(a) motion, however, the court agrees with plaintiff that this challenge has been waived. (*See* 9/29/17 Op. & Order (dkt. #976) 15.) For the reasons previously provided, there was nevertheless ample evidence for the jury to conclude that defendants acted with an intentional disregard of Epic's rights. (*Id*. at 16-17.)

D. Impact of Vacating $100 Million Award

Defendants further argue that the punitive damages award must be vacated because of the court's reduction of the compensatory damages award, reasoning that "we know that when the jury determined that punitive damages were warranted, it clearly had in mind a broader range of uses than that which was legally sustainable. And we cannot now know whether these additional (speculative) uses of the information were material to the jury's determination to award punitive damages or to the amount of those damages." (Defs.' Opening Br. (dkt. #997) 67.) Nonsense. The court's decision vacating a portion of the compensatory damages award does not undermine the jury's award of punitive damages, because the jury was not instructed to tie punitive damages to a particular type of use of Epic's trade secrets and confidential information, nor to defendants' use more generally. Moreover, the court previously applied the cap under Wis. Stat. § 134.09(4)(b) and § 893.043(6) to limit the punitive damages award to no more than two times the compensatory damages award. (9/29/17 Op. & Order (dkt. #976) 17.)

E. Grossly Excessive and Due Process Challenge

Finally, defendants contend that the punitive damages award is grossly excessive and in violation of federal and state law requirements. The court has already considered and rejected these concerns in depth in its prior opinion and order. (9/29/17 Op. & Order (dkt. #976) 17-22.)[4]

IV. Motion for Reconsideration of Order Dismissing Counterclaim

In addition to challenging the jury's verdict and entry of judgment on plaintiff's clams, defendants seek relief from the court's dismissal of defendants' counterclaims, arguing that "[a]t a minimum, TCS should have been permitted to seek discovery on its counterclaims and put in evidence in support of them." (Defs.' Original Br. (dkt. #997) 83.) As set forth in its opinion and order on plaintiff's motion to dismiss defendants' counterclaims, the jury's finding of liability and defendants' own representations made during the trial on plaintiff's claims undermine defendants' ability to allege in good faith necessary elements of their counterclaims. (9/29/17 Op. & Order (dkt. #977) 12-14.) As such, the decision to dismiss these counterclaims was not based on any evidentiary failing -- which would be an improper consideration at the pleading stage -- but rather a defect in the pleadings themselves, as described

[4] For these same reasons, the court also rejects defendants' request for remittitur.

in detail in that decision. (*Id.*) Defendants offer no reason to reconsider that ruling here.

ORDER

IT IS ORDERED that defendants Tata Consultancy Services Limited and Tata America International Corporation's motions for judgment as a matter of law pursuant to Fed. R. Civ. Proc. 50(b), for a new trial pursuant to Fed. R. Civ. Proc. 59 and for reconsideration of dismissal of counterclaims pursuant to Fed. R. Civ. Proc. 60 (dkt. #996) are DENIED.

Entered this 22nd day of March, 2019.

BY THE COURT:

/s/ William M. Conley
WILLIAM M. CONLEY
District Judge