No.

In the Supreme Court of the United States

HCP, INC.,
Petitioner,

v.

VENTAS, INC.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a diversity case, the standard for reviewing sufficiency of the evidence under Federal Rule of Civil Procedure 50 is governed by federal law, as the Third, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits have held, or by state law, as the Sixth Circuit has held.

2. Whether it is permissible under Rule 54(b) to order entry of partial final judgment on compensatory damages and to remand for a new trial solely on punitive damages for the same claim.

3. Whether the Seventh Amendment prevents a federal court from splitting a single claim between two juries by ordering a new trial solely on punitive damages.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner HCP, Inc. states the following:

HCP, Inc. is a publicly held company that has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Petitioner HCP, Inc. ("HCP") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a) is reported at 647 F.3d 291. The district court's decision denying HCP's motion for judgment as a matter of law or for a new trial on liability (Pet. App. 69a-86a), and its decision granting HCP's motion for judgment as a matter of law on punitive damages (Pet. App. 93a-94a n.5, 100a-121a), are unreported.

JURISDICTION

The court of appeals entered its judgment on May 17, 2011. Pet. App. 1a. Rehearing and rehearing en banc were denied on June 27, 2011. Pet. App. 137a-138a. On September 13, 2011, Justice Kagan extended the time to file a petition to and including October 25, 2011. No. 11A285. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULES AND CONSTITUTIONAL PROVISION INVOLVED

Relevant portions of Federal Rules of Civil Procedure 50 and 54, and the Seventh Amendment, are reproduced in the Appendix (Pet. App. 139a-141a).

INTRODUCTION

The Sixth Circuit's decision in this case upheld a $101.7 million compensatory damages award, overturned the district court's determination that there was insufficient evidence to support punitive damages, and remanded for a new trial solely on punitive damages. In so ruling, the Sixth Circuit misapplied Federal Rule of Civil Procedure 50, ignored the requirements of Rule 54(b), and contravened the Seventh Amendment.

Those rulings present three important questions that have divided the courts of appeals: (1) whether a federal court exercising diversity jurisdiction should use federal or state standards for sufficiency of the evidence when deciding a motion for judgment as a matter of law; (2) whether Rule 54(b), which governs multiple claims, permits entry of partial final judgment on compensatory damages for a single claim to be followed by a separate trial on punitive damages for the same claim; and (3) whether the Seventh Amendment prevents a federal court from splitting a claim by ordering a punitive-damages-only new trial before a new jury. The Sixth Circuit's answers to those questions profoundly misallocate responsibility among juries, trial judges, and appellate courts. The Court should grant the petition to resolve these important issues of federal procedure and constitutional law.

STATEMENT

This case arises out of an international corporate takeover battle between petitioner HCP and respondent Ventas, Inc. to acquire a third company.

I. THE COMPETITION FOR SUNRISE

A. The Auction

In late 2006, Sunrise Senior Living Real Estate Investment Trust ("Sunrise"), a Canadian real estate investment trust or "REIT," conducted an auction for selected bidders.[1] Pet. App. 2a. Subject to approval by two-thirds of Sunrise's voting unitholders,[2] the winning bidder would acquire all of Sunrise's assets. *Id.* at 2a-3a.

HCP and Ventas are the two largest U.S. REITs specializing in healthcare-related properties. Aggressive competitors for portfolios of such properties, both participated in Sunrise's auction. Pet. App. 3a. HCP and Ventas signed confidentiality agreements with Sunrise (but not with each other) that contained standstill agreements prohibiting them from making or announcing any bid outside the auction process and from disclosing information related to the auction process. *Ibid.* Ventas's agree-

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[1] A REIT is a pass-through entity that acquires or finances income-producing real estate using capital from multiple investors. See 26 U.S.C. §§ 856-859.

[2] "A unitholder is an owner of units in an investment trust, similar to a shareholder holding shares in a corporation." Pet. App. 3a n.1.

ment provided that it could submit a higher bid if it was outbid by another party. *Ibid.* HCP's agreement had no such provision. *Ibid.*

At the end of the process, Sunrise required the bidders to submit binding bids. Pet. App. 4a. As a practical matter, that required bidders to negotiate an agreement with Sunrise Senior Living, Inc. ("SSL"), the third party that managed and operated Sunrise's properties, before submitting final bids. *Ibid.* Because it did not reach an agreement with SSL, HCP did not submit a bid by the January 14, 2007 deadline. *Ibid.* Ventas submitted a bid of $15.00 per unit,[3] and Sunrise's board accepted Ventas's bid contingent on approval by two-thirds of its unitholders. *Id.* at 6a.[4]

On February 13, 2007, HCP's board approved an offer of $18.00 per unit, conditional on HCP reaching an agreement with SSL. Pet. App. 7a. After markets closed on February 14, HCP communicated the $18.00 offer to Sunrise and issued a press release announcing its $18.00 bid. *Id.* at 7a-8a. The press release stated that HCP's bid was a "significantly higher price and is otherwise identical to" Ventas's, and it attached the offer letter that HCP had sent to Sunrise. *Id.* at 8a. It also expressed HCP's belief that, "[b]ecause of HCP's superior financial condition and access to funds and its experience in large acquisitions," its bid "has greater certainty of completion than the proposed Ventas transaction." *Ibid.* That same evening, HCP confirmed to Sunrise "that its bid was con-

[3] Bid amounts are in Canadian dollars. The judgment is in U.S. dollars.

[4] If Sunrise were to accept a better offer, Ventas would be entitled to a termination payment of approximately $40 million. C.A. App. 307, 308, 326-327.

ditioned upon reaching an agreement with SSL." *Id.* at 9a.

Before the markets opened the next day, Sunrise issued a press release stating that it would not consider HCP's offer until HCP confirmed that its offer was not contingent on reaching agreement with SSL. Pet. App. 9a. After the markets opened, Sunrise's price rose from just below $15.00 ($14.91) per unit to approximately $18.00 per unit. *Ibid.*; Ventas C.A. Br. 16. On February 19, Sunrise issued another press release again confirming that HCP's offer was "expressly conditional" on HCP reaching an agreement with SSL and that "certain agreements among the various parties" might prevent HCP from negotiating with SSL. Pet. App. 10a. There was no statistically significant change in Sunrise's unit price in response to this press release. *Id.* at 41a.

B. The Canadian Declaratory Judgment Lawsuits

The interested parties sought clarification from Canadian courts on whether Sunrise could consider HCP's bid. On February 19, 2007, Sunrise filed suit in Ontario Superior Court seeking a declaration that HCP was permitted to negotiate with SSL (the third-party manager), and HCP supported Sunrise's position. Pet. App. 11a. On February 21, 2007, SSL likewise filed suit seeking court permission to negotiate with HCP. The same day, Ventas asked the same court for a declaration that Sunrise was obligated to enforce its standstill agreement with HCP. *Id.* at 41a. The next day, Ventas issued a press release claiming that HCP's bid was barred by the standstill agreement. C.A. App. 1228-1229.

On March 5, 2007, the Ontario Superior Court ruled that Sunrise must enforce its standstill agreement with HCP until Sunrise's unitholders approved or rejected

Ventas's $15.00 bid. Pet. App. 11a; Dist. Ct. Dkt. #193-6 at 25. HCP withdrew its offer to purchase Sunrise. Pet. App. 11a. On March 26, 2007, the Ontario Court of Appeal affirmed. *Ibid.* Even with HCP's offer withdrawn, the price of Sunrise's shares remained at or above $16.50 per unit, well above Ventas's offer of $15.00. *Id.* at 41a.

C. Ventas's Acquisition Of Sunrise

Meanwhile, on March 7, 2007, unitholder voting began on Ventas's $15.00 bid for Sunrise. Pet. App. 11a. By April 9, four large institutional investors had voted against Ventas's bid, effectively defeating the proposal. *Ibid.*

On April 5, 2007, Ventas filed a separate $250 million lawsuit against Sunrise for its actions in facilitating HCP's competing bid, which HCP had withdrawn almost a month earlier. Pet. App. 11a n.3.

On April 11, Ventas increased its bid from $15.00 to $16.50. Pet. App. 12a. Ventas then settled its $250 million lawsuit against Sunrise, contingent on Sunrise's unitholders approving Ventas's new $16.50 bid. *Id.* at 11a n.3. Sunrise's unitholders approved that new offer on April 19, and the deal closed one week later. *Id.* at 12a.

In an email to her employees, Ventas's CEO proclaimed that Ventas's Canadian suit had "made groundbreaking merger and acquisition law (internationally)" and that Ventas had "vanquished our biggest competitor." Tr.6A 159-161.

II. PROCEEDINGS BELOW

A. District Court

On May 3, 2007, a week after the deal closed, Ventas sued HCP in the U.S. District Court for the Western District of Kentucky for (1) tortious interference with contract and (2) tortious interference with prospective business advantage under Kentucky law. Pet. App. 12a. The district court granted HCP summary judgment on the contract-interference claim. The suit proceeded to trial on a single count of tortious interference with prospective business advantage. *Id.* at 13a.

1. *The Punitive Damages Ruling*

After the close of evidence, the district court ruled that Ventas had not presented sufficient evidence to support punitive damages. Pet. App. 13a. Applying a standard of "clear and convincing evidence," the district court examined whether "the real purpose of * * * [HCP's] February 14th bid was not at all to purchase [Sunrise] but, in fact, some other destruction to the market or purely a vindictive or malicious act against Ventas." *Id.* at 121a. The court held that there was "insufficient evidence to establish oppression and the kind of fraud and malice required [for] punitive damages." *Id.* at 120a-121a. The court noted that "there could be different interpretations of that press release and what it really meant. Obviously Sunrise REIT, who read it pretty carefully, wasn't clear of what it meant. That kind of conduct to me does not provide the kind of evidence which would in any way, shape or form seem to rise to the punitive level." *Id.* at 111a.

2. *The Verdict*

The jury returned a verdict for Ventas, awarding compensatory damages of $101,672,807.00. Pet. App. 14a. That figure represented the $1.50 per-unit increase in Ventas's bid (from $15.00 to $16.50) multiplied by the total number of Sunrise units. *Ibid.*

3. *The Rule 50 Motion*

The district court denied HCP's renewed motion for judgment as a matter of law under Fed. R. Civ. P. 50. Pet. App. 69a-86a. The district court emphasized that "this case and its trial presented very close, challenging and hotly contested issues of fact and law." *Id.* at 70a. Under Kentucky law, tortious interference with prospective business advantage requires proof that the defendant engaged in "significantly wrongful conduct," such as "fraudulent misrepresentation, deceit, and coercion." *Ibid.* Finding the evidence of such conduct sufficient, the court noted that the press release stated that HCP's proposal was "identical" to Ventas's except for the higher price, that it was a "superior proposal," and that it had "'a greater certainty of completion." The court also observed that the press release did not expressly state that HCP's $18.00 offer was conditional on reaching agreement with SSL. *Id.* at 71a-72a.

The district court held that there was sufficient evidence of causation—*i.e.*, that wrongful conduct, rather than "some other force," caused "the interference with [Ventas's] reasonable expectancy" that Sunrise's unitholders would approve its $15.00 bid. Pet. App. 72a. The district court observed that causation "was certainly a difficult issue throughout the case." *Ibid.* Ventas and HCP agreed that Sunrise's unitholders would not approve Ventas's offer of $15.00 if the market price of Sunrise's units remained above $15.00. Tr.7B 6, 8, 19-20 (Ventas's expert). Ventas urged that HCP's alleged misrepresentations had pushed Sunrise's unit price above $15.00, killing its deal. HCP insisted that Ventas had failed to separate the effects of alleged misrepresentations from the effects of other factors—including truthful representations—that would have pushed the price past

$15.00 and killed the deal even absent any misrepresentations.

The district court sided with Ventas, invoking the testimony of Ventas's expert that, if there had been no misrepresentations in HCP's press release, the "raise in [Sunrise's] stock price would not have been *as significant*." Pet. App. 73a (emphasis added). The court, however, never identified any evidence suggesting that, absent the alleged misrepresentations, the price of Sunrise's units would not have crossed the fatal $15.00 threshold in any event.

B. The Sixth Circuit

The Sixth Circuit affirmed in part and reversed in part. Pet. App. 1a-68a.

1. *Rule 50 And Sufficiency Of The Evidence For Liability*

On appeal, HCP again urged that Ventas had not proved causation. The panel explained that, under circuit precedent, it was required to apply Kentucky's state-law standard for reviewing the sufficiency of the evidence: "Our case law establishes that 'in diversity cases, where the Rule 50(b) motion is based on a challenge to the sufficiency of the evidence, a state-law standard of review applies.'" Pet. App. 36a (quoting *Hartford Fin. Servs. Grp., Inc.* v. *Cleveland Pub. Library*, 168 F. App'x 26, 30-31 (6th Cir. 2006)). Noting that "most if not all of our sister circuits disagree" and require use of the federal sufficiency standard instead, the panel opined that "[o]ur sister circuits appear to have the better view." *Id.* at 36a n.11.

Under the Kentucky standard, "a motion for a directed verdict * * * should be granted only if there is *a complete absence of proof* on a material issue in the action, or if *no disputed issue of fact* exists on which reasonable minds could differ." Pet. App. 37a (quotation marks omitted) (emphasis added). Thus, unlike the federal standard—which requires that "a reasonable jury * * * have a legally sufficient evidentiary basis," Fed. R. Civ. P. 50(a)(1)—the lenient Kentucky standard will uphold a verdict unless there is "a complete absence of proof" or "no disputed issue of fact."

Applying that Kentucky standard, the court rejected HCP's argument that Ventas failed to prove causation because it never separated the impact of any misrepresentations from that of truthful information. Pet. App. 38a. A jury, the panel held, could conclude that HCP never stated an unencumbered willingness to pay $18.00 per unit and that, in any event, "HCP's announcement of its proposed 'transaction' was contaminated by fraud, misrepresentations, and concealment." *Id.* at 38a-39a. HCP's press release, the court stated, did not disclose that the offer was contingent "on reaching an agreement with SSL," that "HCP and SSL had previously failed to reach agreement during the auction process," that they had a "tense relationship," and that HCP's bid might be barred by its standstill agreement with Sunrise. *Id.* at 39a. "Other conduct," the panel added, "casts further doubt on the genuineness of [HCP's] offer." *Id.* at 40a.

Still applying the state-law sufficiency standard, the panel also rejected HCP's argument that any misrepresentations were corrected before the unitholder vote. Pet. App. 41a. The panel stated that "the public never learned of the difficulties HCP would likely face in reaching an agreement with SSL." *Ibid.* The panel also asserted that Sunrise's units remained above Ventas's $15.00 offer price even after HCP's offer was withdrawn because "the effects of HCP's wrongful conduct lingered on the market." *Id.* at 42a-43a.[5]

2. *Punitive Damages*

Turning to Ventas's cross-appeal, the panel ruled that the district court erred in granting HCP judgment as a matter of law on punitive damages. Again applying Kentucky's lenient state-law sufficiency standard, the panel held that HCP was entitled to judgment as a matter of law on punitive damages only if "there [wa]s a complete absence of proof on a material issue in the action, or if no disputed issue of fact exist[ed] upon which reasonable minds could differ." Pet. App. 46a (quoting *Estate of Riddle* v. *S. Farm Bureau Life Ins. Co.*, 421 F.3d 400, 408 (6th Cir. 2005)).

Observing that Ventas sought "punitive damages on the sole basis of fraud," the panel declared that "[t]he record is replete with evidence of intentional misrepresentations, deceit, and/or concealment of material facts by HCP." Pet. App. 47a, 48a. In support, the panel cited the same facts that had led it to sustain liability for tortious interference: the press release's failure to state expressly that HCP's offer was conditional on reaching agreement with SSL, HCP's prior experiences with SSL, and the standstill agreement that had been construed to prohibit HCP's public bid. The panel also reiterated its view that "HCP's conduct suggested that its purported offer of $18.00 was not genuine." *Id.* at 50a. The panel concluded that "[t]he jury reasonably could have found

[5] In a brief concurrence, Judge Merritt opined that, "as to footnote 11"—where the panel addressed the standard for sufficiency of the evidence on liability—"the result would be the same whether we apply a state-law standard as a matter of substance or a federal law standard as a matter of procedure." Pet. App. 68a. The majority did not join that statement.

that absent the fraudulent character of HCP's public announcement, the market price of Sunrise would not have increased, or would not have increased as dramatically." *Id.* at 52a.

3. *Rule 54(b) And Punitive-Damages-Only Remand*

Without briefing on the issue, the panel ruled that the compensatory award "previously entered by the district court * * * shall stand as a partial final judgment under Rule 54(b) of the Federal Rules of Civil Procedure." Pet. App. 67a. The panel stated:

> Although the case shall be remanded * * * we find no reason to disturb the final judgment previously entered on the original jury verdict. Accordingly, the judgment as previously entered by the district court shall constitute a final partial judgment pursuant to Rule 54(b) * * * .

Id. at 44a. The panel then remanded "for a trial solely on the question of punitive damages." *Id.* at 67a.

4. *Rehearing Petition*

Rehearing and rehearing en banc were denied on June 27, 2011. Pet. App. 137a-138a.

REASONS FOR GRANTING THE WRIT

The opinion below takes the wrong side in three circuit splits over important and recurring—indeed, fundamental—issues of civil procedure. The opinion injects state law into federal civil procedure where a uniform federal standard should control; it opens the door to artificial splitting of an individual claim into separate judgments; and it strips defendants in punitive damages cases of the protections afforded them by the Seventh Amendment.

First, as the opinion below explicitly recognizes, the Sixth Circuit has adopted the minority position in a long-standing and acknowledged circuit split over whether, in diversity actions, federal or state law supplies the standard for reviewing sufficiency of the evidence under Rule 50. This Court has repeatedly recognized the issue's importance. And, as the panel conceded, the Sixth Circuit's minority position is ill-advised. Under the framework set forth in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), and *Hanna* v. *Plumer*, 380 U.S. 460 (1965), federal law governs procedural issues such as the Rule 50 standard. This case presents a compelling vehicle for resolution of that longstanding circuit conflict because the issue could be outcome determinative.

Second, the opinion below conflicts with the decisions of three other circuits on the scope of Rule 54(b). That rule permits entry of a partial final judgment only "[w]hen an action presents *more than one claim* for relief." Fed. R. Civ. P. 54(b) (emphasis added). Three other circuits have concluded that, under that Rule's plain language, demands for compensatory and punitive damages arising from a single claim cannot be divided into separate judgments. Because the panel's *sua sponte* entry of "partial final judgment" on appeal here cannot be reconciled with those cases or the Rule's text, review is warranted.

Third, given the inseparability of the demands for compensatory and punitive damages on a single claim, neither the Seventh Amendment nor this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), permits retrial on punitive damages alone. The Sixth Circuit's contrary ruling does not merely violate the Constitution and this Court's precedents. It also conflicts with the judgments of other circuits and gives plaintiffs who have been awarded compensatory damages but denied punitive damages a powerful incentive to pursue failed punitive damages demands on appeal.

I. THIS COURT SHOULD DECIDE WHETHER A STATE OR FEDERAL STANDARD APPLIES TO RULE 50 MOTIONS IN DIVERSITY CASES

For decades, federal courts have been divided on whether a state-law or federal standard for sufficiency of the evidence controls in diversity cases. The panel acknowledged that its ruling on that issue conflicts with the decisions of most other circuits and that those other courts have "the better view." Yet the conflict persists. Because the choice of the proper standard could be outcome determinative—both on punitive damages and the $101.7-million compensatory award—this case is an ideal vehicle to settle this important *Erie* question.

A. The Courts Of Appeals Are Divided On This Important Issue

"Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996). The courts of appeals are intractably divided on whether, under *Erie*, the standard for reviewing evidentiary sufficiency on a motion for judgment as a matter of law in diversity cases is governed by state or federal law. The panel here applied longstanding Sixth Circuit precedent holding that, "in diversity cases, where the Rule 50(b) motion is based on a challenge to the sufficiency of the evidence, a state-law standard of review applies." Pet. App. 36a (quotation marks and citations omitted).

That squarely conflicts with decisions of the Third, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits, all of which hold that the federal standard controls. See *Rotondo* v. *Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992) ("This court applies the federal standard for judging the sufficiency of the evidence in diversity actions."); *Charleston Area Med. Ctr., Inc.* v. *Blue Cross & Blue Shield Mut. of Ohio, Inc.*, 6 F.3d 243, 247 (4th Cir. 1993) ("In diversity cases in which the sufficiency of the evidence to create a jury question is presented, this court resolves the issue based on the federal rule."); *Mathis* v. *Exxon Corp.*, 302 F.3d 448, 453 (5th Cir. 2002) ("Although this is a state-law issue, the standard for granting j.m.l. is a question of federal law."); *Miller* v. *Republic Nat'l Life Ins. Co.*, 789 F.2d 1336, 1340 (9th Cir. 1986) ("In determining whether a directed verdict is appropriate, we apply federal law even though this is a diversity case."); *Specialty Beverages, L.L.C.* v. *Pabst Brewing Co.*, 537 F.3d 1165, 1175 (10th Cir. 2008) ("In diversity cases, the substantive law of the forum state governs the analysis of the underlying claims, * * * but federal law controls the ultimate, procedural question whether judgment as a matter of law is appropriate."); *Jones* v. *Miles Labs., Inc.*, 887 F.2d 1576, 1578 (11th Cir. 1989) ("In diversity cases, the standard is a matter of federal law.").[6]

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[6] The Sixth Circuit repeatedly has questioned "the continued validity" of its contrary rule. *Toth* v. *Yoder Co.*, 749 F.2d 1190, 1194 n.2 (6th Cir. 1984); see *Ridgway* v. *Ford Dealer Computer Servs., Inc.*, 114 F.3d 94, 97 n.3 (6th Cir. 1997); *Garrison* v. *Jervis B. Webb Co.*, 583 F.2d 258, 261 n.4 (6th Cir. 1978). But it nonetheless has declined every opportunity to "examine th[e] issue since *Hanna* v. *Plumer*, 380 U.S. 460, 466-69 (1965)." *Gold* v. *Nat'l Sav. Bank of City of Albany*, 641 F.2d 430, 434 n.3 (6th Cir. 1981).

Compounding the confusion, the First, Seventh, and Eighth Circuits appear to oscillate between federal and state-law standards. In *Ashley* v. *R.D. Columbia Associates*, 54 F.3d 498 (8th Cir. 1995), the Eighth Circuit agreed with the Sixth Circuit: In diversity cases, it held, "a federal district court applies the sufficiency standard of the state in which it sits." *Id.* at 501. But some later Eighth Circuit cases apply the federal standard. See, *e.g.*, *Marvin Lumber & Cedar Co.* v. *PPG Indus., Inc.*, 401 F.3d 901, 906 (8th Cir. 2005); *Arabian Agric. Servs. Co.* v. *Chief Indus., Inc.*, 309 F.3d 479, 482 (8th Cir. 2002).

Conversely, in *Mayer* v. *Gary Partners & Co.*, 29 F.3d 330, 334 (7th Cir. 1994), the Seventh Circuit purported to resolve an internal conflict by adopting the federal standard. Since *Mayer*, however, at least three Seventh Circuit decisions have applied a state standard. See *Orix Credit Alliance, Inc.* v. *Taylor Mach. Works, Inc.*, 125 F.3d 468, 474 (7th Cir. 1997); *Suzik* v. *Sea-Land Corp.*, 89 F.3d 345, 348 (7th Cir. 1996); *Winger* v. *Winger*, 82 F.3d 140, 143 (7th Cir. 1996). The same disarray is evident in the First Circuit. Compare *Ed Peters Jewelry Co.* v. *C&J Jewelry Co.*, 215 F.3d 182, 190 (1st Cir. 2000) (federal standard), with *De Medeiros* v. *Koehring Co.*, 709 F.2d 734, 737 (1st Cir. 1983) (state standard).[7]

Leading treatises and commentators recognize the conflict. See 9B C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 2525, at 419, 432-433 (3d ed. 2008) (noting that "the federal courts are not yet in agreement" and urging that the federal standard should control): 9 J.

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[7] The Second and D.C. Circuits have declined to take a position, finding that the federal and state standards in their jurisdictions are the same. *Martinelli* v. *Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 429 (2d Cir. 1999); *Cotton* v. *Buckeye Gas Prods. Co.*, 840 F.2d 935, 937 (D.C. Cir. 1988).

Moore et al., MOORE'S FEDERAL PRACTICE § 50.80, at 50-109 to -110 (3d ed. 2011) ("To date, the Supreme Court has not resolved the disagreement."); S. Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery*, 47 SMU L. Rev. 271, 326 (1994) ("The better view seems to be that federal standards should define the propriety of a federal jury's action * * * .").

In recent years, this Court has clarified the uniform federal standard for addressing the sufficiency of allegations in pleadings. See *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009); *Erickson* v. *Pardus*, 551 U.S. 89 (2007) (*per curiam*); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007). It also has clarified the uniform standard for determining the quantum of proof necessary to avoid summary judgment. *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986). But discord remains over how to evaluate the sufficiency of the evidence when deciding whether to grant judgment as a matter of law during and after trial in diversity cases. The persistence of the Rule 50 conflict—and the volume of cases involved (virtually every federal diversity trial)—make clear the need for this Court's intervention on this important *Erie* issue.

B. This Case Presents An Excellent Vehicle For Resolving The Conflict

This Court identified the standard under Rule 50 as an "important question" more than half a century ago, *Dick* v. *N.Y. Life Ins. Co.*, 359 U.S. 437, 445 (1959), and once granted certiorari to resolve it, *Mercer* v. *Theriot*, 377 U.S. 152, 156 (1964) (*per curiam*). This case is a compelling vehicle for finally resolving the circuit conflict. The issue arises in a case involving "difficult" and "hotly contested" issues, Pet. App. 70a, 72a, where the standard applied could determine the outcome.

Like Rule 12(b)(6) and Rule 56, Rule 50 establishes the federal court as a disciplined gate-keeper. Under Rule 50, a court must grant judgment as a matter of law if it determines that there is not "a legally sufficient evidentiary basis to find for the [nonmoving] party on [an] issue." Fed. R. Civ. P. 50(a)(1). By contrast, the Kentucky standard is extraordinarily permissive: "a trial judge cannot enter a directed verdict unless there is a *complete absence of proof on a material issue* or if *no disputed issues of fact exist* upon which reasonable minds could differ." *Bierman* v. *Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998) (emphasis added). The Sixth Circuit's erroneous invocation of that state-law standard in this case could affect the sufficiency inquiry for both punitive damages and compensatory damages.

1. *Punitive Damages*

As this Court explained in *Anderson* v. *Liberty Lobby,* the federal standard for "ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." 477 U.S. at 252. Thus, under the federal Rule 50 standard, HCP's motion on punitive damages must be reviewed through the lens of the "substantive evidentiary standard of proof that would apply at the trial" under Kentucky law, which is "clear and convincing" proof. Ky. Rev. Stat. Ann. § 411.184(2); Pet. App. 47a.

But Ventas urged that the state sufficiency standard should govern and that, because Kentucky does not follow *Anderson* v. *Liberty Lobby*, courts "should *not* take into account the clear-and-convincing standard in ruling on a Rule 50(a) motion." Ventas C.A. Reply Br. 6-7.[8] Ventas argued instead that, notwithstanding the clear-and-convincing burden of proof at trial, "[u]nder Kentucky law, a party is entitled to have its punitive damages claim submitted to the jury 'if there is *any evidence* to sustain it.'" *Id.* at 6 (quoting *Shortridge* v. *Rice*, 929 S.W.2d 194, 197 (Ky. App. 1996)). Consistent with Ventas's position, the panel's discussion of the sufficiency of the evidence for punitive damages recites the same lenient Kentucky standard the panel employed when reviewing the sufficiency of the evidence on liability: whether there was "a complete absence of proof" or "no disputed issue of fact * * * on which reasonable minds could differ." Pet. App. 46a. Although the panel recognized that the clear-and-convincing standard applies *at trial*, *id.* at 47a, the panel did not apply that requirement or *Anderson* in its Rule 50 analysis.

Whether a court takes the clear-and-convincing standard of proof into account (by applying the federal standard for sufficiency) often has the potential to change the outcome. Here, for example, the district court found the trial evidence sufficient to deny HCP's Rule 50 motion with respect to liability, which was subject only to a preponderance standard at trial. Pet. App. 70a-73a. But when the district court correctly applied the elevated clear-and-convincing standard on the issue of punitive damages, it held that the *very same* evidence was *insuffi-*

[8] Other States reject the *Anderson* v. *Liberty Lobby* standard. See *Bolt* v. *Influence, Inc.*, 43 P.3d 425, 427-28 (Or. 2002); *Cartwright* v. *Equitable Life Assurance Soc'y*, 914 P.2d 976, 993 (Mont. 1996). If the Sixth Circuit is correct that state law should govern Rule 50 motions, federal courts applying the law of those States in diversity cases will be required to reject application of *Anderson* to Rule 50 motions as well.

cient to create a jury issue and granted HCP judgment on punitive damages as a matter of law. *Id.* at 120a-121a. That difference in results is a powerful indication that the standard of review could be determinative.

Moreover, when Ventas sought punitive damages at trial on the theory that HCP's $18.00 bid was a "sham," the district court rebuffed that theory, repeatedly finding "no evidence" to support it.[9] Yet the Sixth Circuit relied on that "sham" theory, finding Ventas's demand for punitive damages was supported because of evidence that allegedly "cast further doubt on the genuineness" of HCP's offer. Pet. App. 50a; see *id.* at 38a-40a. Where, as here, the district court repeatedly found there was "no evidence" to support a theory even under a *preponderance* standard, it defies credulity to suggest that the evidence was so compelling as to meet the *clear-and-convincing* standard applicable under *Anderson* v. *Liberty Lobby* and the federal Rule 50 standard. If ever there were a case where the standard could make a difference, this is it.

2. *Compensatory Damages*

Application of the federal standard likewise could affect the analysis of evidentiary sufficiency on compensatory damages. The district court identified causation as a particularly "difficult issue," Pet. App. 72a, in a case

[9] See, *e.g.*, Pet. App. 103a ("[T]here's no evidence that I know of that the $18 bid was insincere."); *id.* at 105a ("I haven't seen a bit of evidence * * * that suggests * * * that as far as the $18 price, HCP could not have paid it, and would not have paid it"); *id.* at 106a ("[Y]ou are suggesting that this was a complete fraud * * * . * * * I don't see the evidence."). The district court thus granted judgment as a matter of law to HCP on Ventas's claim of "malice," finding Ventas had failed to prove HCP did not act "at least in part to advance [HCP's] interest in competition." *Id.* at 94a n.5.

pervaded by "very close, challenging and hotly contested issues of fact and law," *id.* at 70a. Courts applying the federal standard in other cases involving the effects of representations on stock prices repeatedly have found causation evidence like Ventas's—evidence that fails to separate the impact of alleged misrepresentations from other factors—insufficient.[10] It is precisely in such a

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[10] Under the common-law standard governing state tort and federal securities claims alike, Ventas was required to "prove that [the alleged] misrepresentation (or other fraudulent conduct) proximately caused" the allegedly injurious change in price. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005); see *Flegles, Inc.* v. *TruServ Corp.*, 289 S.W.3d 544, 553 (Ky. 2009). Federal courts applying the federal sufficiency standard under Rules 50 and 56 require evidence separating the impact of various factors on share price to show that the alleged "fraud and not some non-compensable cause" produced the injurious price change, *In re Williams Sec. Litig.—WCG Subclass*, 558 F.3d 1130, 1143 (10th Cir. 2009)—*i.e.*, "that it was the *very facts about which the defendant lied* which caused [plaintiff's] injuries," *Tricontinental Indus., Ltd.* v. *PricewaterhouseCoopers, LLP*, 475 F.3d 824, 842 (7th Cir. 2007) (emphasis added); see, *e.g.*, *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 393-94 (9th Cir. 2010); *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 554 (S.D.N.Y. 2008), *aff'd* 597 F.3d 501 (2d Cir. 2010).

Applying the correct Rule 50 standard, rather than the Kentucky standard, plainly could have affected the outcome in this case. To establish causation, Ventas had to prove "that the harm would not have occurred"—that unitholders would have approved its $15.00 bid—absent HCP's alleged misrepresentations. *Flegles*, 289 S.W.3d at 553. The parties agreed that "[a]s long as the [market] price [for Sunrise units] [wa]s above 15, the 15 deal [wa]s dead." HCP C.A. Br. 36 (quoting Ventas's expert, Tr.7B at 6). In this case, Sunrise units were trading just under $15.00 per unit (at $14.91) before HCP's press release, and rose to nearly $18.00 afterwards. Ventas thus needed to show that the increase above the $15.00 threshold was not attributable to nonactionable factors—such as truthful information in HCP's press release and the fact that Sunrise now was potentially the object of renewed competition. But Ventas never did that: Its expert *conceded* that he made no attempt to separate or measure the "very close case," *id.* at 86a, that the correct federal standard would profoundly affect the analysis. Indeed, while Judge Merritt stated that he would reach the same result on compensatory damages under either standard, *id.* at 68a, the majority conspicuously declined to join that statement. Because application of the federal Rule 50 standard could change the outcome on punitive and compensatory damages alike, this case is a compelling vehicle for resolving the longstanding split.

II. THE COURT SHOULD ADDRESS WHETHER RULE 54(b) PERMITS ENTRY OF PARTIAL FINAL JUDGMENT ON COMPENSATORY DAMAGES BEFORE TRIAL OF PUNITIVE DAMAGES ON THE SAME CLAIM

The decision below also creates a conflict on whether Rule 54(b) permits the entry of a separate final judgment on compensatory damages while the plaintiff pursues punitive damages on the same claim. Rule 54(b) provides that "[w]hen an action presents *more than one claim* for

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effects of truthful versus untruthful information, and admitted that any declines in Sunrise's price from its high of $18 to $16.50 were attributable to the fact that "the general market was also declining," not to the revelation of any fraud. Tr.7B at 8, 60. And the record refuted any claim that Sunrise's price would not have crossed $15.00 absent the alleged misrepresentation—Sunrise's price remained well above $15.00 *after* the contingency in HCP's offer was highlighted, *after* Ventas issued a press release arguing that HCP's bid was barred by the standstill agreement, *after* the Canadian courts agreed with Ventas's position, and indeed *after* HCP had withdrawn its bid altogether. Pet. App. 41a. Even if there were sufficient proof of causation under *Kentucky's* "complete absence of proof" standard, a court applying the *federal* Rule 50 standard could readily conclude that—given Ventas's failure to disaggregate the effect of allegedly false statements—there was insufficient evidence from which a jury could determine whether the price of Sunrise's shares would have increased past the fatal $15.00 threshold (just $.09) absent any misstatement at all.

relief * * * the court may direct entry of a final judgment as to *one or more, but fewer than all*, claims * * * only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b) (emphasis added). Invoking Rule 54(b) *sua sponte*, the Sixth Circuit ruled that "final partial judgment" should be entered on Ventas's demand for compensatory damages before its claim for punitive damages is retried. Pet. App. 44a, 67a.

That ruling conflicts with the plain language of the rule, this Court's decisions, and decisions from three other circuits. This case involves a single claim—tortious interference with prospective business advantage. Pet. App. 13a. Rule 54(b)'s predicate—that the "action present[ ] more than one claim for relief"—thus is not satisfied. As this Court has held, "a complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief." *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 743 n.4 (1976). Nothing in Rule 54(b) permits a court to enter final judgment as to one, but not all, theories of damages on a single claim for relief.

The Third, Ninth, and Tenth Circuits therefore have held that Rule 54(b) does not permit a district court to separately enter judgment on demands for compensatory and punitive damages on the same legal claim. See *Sussex Drug Prods.* v. *Kanasco, Ltd.*, 920 F.2d 1150, 1155 (3d Cir. 1990) ("When liability rests on the same transaction * * * , a count for punitive damages, although of a different order than compensatory damages, does not constitute a separate claim under Rule 54(b). Rather, this is simply an example of an attempt to split a cause of action."); *Ariz. State Carpenters Pension Trust Fund* v. *Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991) ("[T]he punitive damage count is not a separate claim."); *Livesay* v.

Shollenbarger, 19 F.3d 1443 (10th Cir. 1994) (table), 1994 WL 56923, at *3 ("[P]unitive damages sought by the plaintiff * * * do not constitute a separate claim * * * .").

The Sixth Circuit's contrary decision also conflicts with leading treatises. See 10 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 2657, at 79-81 (3d ed. 1998) ("[W]hen plaintiff is suing to vindicate one legal right and alleges several elements of damage, only one claim is presented and subdivision (b) does not apply."); 10 J. Moore et al., MOORE'S FEDERAL PRACTICE § 54.22[2][a], at 54-40 to -42 (3d ed. 2011).

In addition to the financial impact of altering the timing of payment—particularly important in a case, such as this one, involving compensatory damages of over $100 million—the Sixth Circuit's split-creating decision will have other adverse effects. Under the Sixth Circuit's holding, every verdict on compensatory damages will be immediately appealable if entered as a partial final judgment, even if there is a motion pending regarding punitive damages, and even if trial is bifurcated between compensatory damages and punitive damages. At the very least, the Sixth Circuit's ruling will generate extensive additional litigation seeking entry of partial final judgments, creating the very danger of piecemeal litigation that the Federal Rules and this Court's jurisprudence on interlocutory appeals strive to avoid. See, *e.g.*, *Mohawk Indus., Inc.* v. *Carpenter*, 130 S. Ct. 599, 605 (2009) ("Permitting piecemeal, prejudgment appeals * * * undermines efficient judicial administration and encroaches upon the prerogatives of district court judges, who play a special role in managing ongoing litigation." (quotation marks omitted)). Review is warranted.

III. THIS COURT SHOULD ADDRESS WHETHER THE SEVENTH AMENDMENT PERMITS A NEW TRIAL LIMITED TO PUNITIVE DAMAGES

The Sixth Circuit's attempt to divide the indivisible also led it to take the wrong side in another circuit split, ordering a remand for a punitive-damages-only retrial that cannot be reconciled with the Seventh Amendment.

The Seventh Amendment provides that, "[i]n suits at common law, * * * the right of trial by jury shall be preserved." U.S. Const. amend. VII. This Court has long interpreted the Seventh Amendment to "preserv[e]" "the right which existed under the English common law when the Amendment was adopted." *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (quoting *Balt. & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657 (1935)). To safeguard the jury's paramount role, English common law did not permit courts to deem some claims (or parts of claims) final while others were retried. "[T]here was no practice of setting aside a verdict in part" so as to allow retrial of one element of the jury's decision. *Gasoline Prods. Co.* v. *Champlin Ref. Co.*, 283 U.S. 494, 497 (1931).

Gasoline Products recognized a limited exception to that historical prohibition. A new trial on fewer than all issues is permissible under the Seventh Amendment only if "it clearly appears that the issue to be retried is so *distinct and separable* from the others that a trial of it alone may be had without injustice." 283 U.S. at 500 (emphasis added). In that case, this Court held that the issue of damages on a counterclaim could not be remanded for retrial unless the issue of liability on the counterclaim also was retried to the same jury: "the question of damages on the counterclaim is so interwoven with that of [counterclaim] liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Ibid.*

There is a clear circuit split on the applicability of *Gasoline Products*—and the Seventh Amendment—to demands for compensatory and punitive damages arising from a single claim. In contrast to the Sixth Circuit here, the Third Circuit has long held that "the determination of the amount of punitive damages, if any, * * * cannot appropriately take place except in connection with the consideration by the jury of the whole question of the defendant's liability and of all the circumstances which it is asserted give rise to that liability." *Smyth Sales, Inc.* v. *Petroleum Heat & Power Co.*, 141 F.2d 41, 45 (3d Cir. 1944); see also *Simone* v. *Golden Nugget Hotel & Casino*, 844 F.2d 1031, 1040-1041 (3d Cir. 1988) (Because "the jury would have to assess the conduct of the [defendant] to determine whether it acted with malice or in willful disregard" when deciding punitive damages, "[t]he issues of liability and damages are interwoven warp and woof."); *Spence* v. *Bd. of Educ.*, 806 F.2d 1198, 1202 (3d Cir. 1986) ("[T]o prove that the defendants' conduct warranted punitive damages, plaintiff would have to present to the jury all the facts leading up to defendants' decision to transfer her. Thus, the liability and damages issues are not so easily separable * * * .").

The Tenth Circuit likewise has emphasized the indivisibility of compensatory and punitive damages. In *Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), the court upheld a decision to retry the entire case, including punitive damages:

> A punitive damage claim * * * is part and parcel of a liability determination and does not have any independent being until a jury has decided * * *

> that not only was a defendant's conduct negligent, but that it was gross, willful, wanton or malicious. Proof of gross, willful, wanton or malicious conduct by a defendant is not separate from proof of a defendant's negligence. The evidence proving negligence establishes liability and the degree of negligence is determinative in the award of punitive damages. Upon remand in this case, the entire issue of liability was subject to retrial.

Id. at 1554; see also *Malandris* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1177-1178 (10th Cir. 1981) (en banc) (absent a remittitur, "there should be a new trial on all issues since we feel that a new trial on less than all the issues could not be had without confusion and uncertainty, which would amount to a denial of a fair trial").

Similarly, Eighth Circuit cases have required that compensatory damages be retried with punitive damages. In *Western Fireproofing Co.* v. *W.R. Grace & Co.*, 896 F.2d 286, 293-294 (8th Cir. 1990), the court concluded "in the circumstances" before it that "the question of punitive damages is not sufficiently distinct from the question of liability for fraud and tortious interference to permit a new trial on the issue of punitive damages alone." Other Eighth Circuit decisions have ruled similarly. See *McDonald* v. *Johnson & Johnson*, 722 F.2d 1370, 1388 (8th Cir. 1983) ("In our original opinion we affirmed the fraud count but granted a new trial on the punitive damages awarded under the fraud recovery. We now agree with J & J that we have severed issues that are effectively intertwined."); *Slater* v. *KFC Corp.*, 621 F.2d 932, 938 (8th Cir. 1980) ("[T]he issues of damages and liability in this case are so interwoven as to require a new trial on both."); *Nodak Oil Co.* v. *Mobil Oil Corp.*, 533

F.2d 401, 411 (8th Cir. 1976) ("Inasmuch as the issues of liability, actual damages and punitive damages are intertwined, the new trial should encompass all issues.").[11]

In conflict with these decisions, some courts—like the Sixth Circuit here—have remanded for retrial on punitive damages only. In doing so, they sometimes have limited such retrials based on their own interpretation of the "injustice" factor in the *Gasoline Products* test. For example, the Seventh Circuit has attempted to fashion procedures that allow damages-only retrials:

> The new jury shall be instructed that the relevant issues of liability have been previously decided and shall be instructed as to the legal basis of defendants' liability. These instructions shall not, however, preclude the free presentation of evidence and information from the liability phase to the extent such evidence is relevant * * * in any way to damages.

Watts v. *Laurent*, 774 F.2d 168, 181 (7th Cir. 1985).

The Second, Fourth, and Fifth Circuits, meanwhile, ask whether the error requiring reversal could have affected the other portions of the verdict, allowing a limited retrial on damages whenever there is no relation-

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[11] *In re Prempro Products Liability Litigation*, 586 F.3d 547 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 3467 (2010), concluded, without analysis, that "a new trial may be had on punitive damages alone without injustice to the parties." *Id.* at 573. *Prempro*, a multidistrict litigation case, did not address or overrule circuit precedent that punitive damages issues ordinarily are inextricably interwoven with liability determinations. Still another Eight Circuit panel was "troubled * * * with the interplay between the considerations involved in compensatory and punitive damages" but, in that case, remanded for retrial on punitive damages. *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 871 F.2d 1368, 1376 (8th Cir. 1989).

ship between the error requiring reversal and the issues resolved by the jury. See, *e.g.*, *Diamond D. Enters. USA, Inc.* v. *Steinsvaag*, 979 F.2d 14, 17 (2d Cir. 1992) ("[A] new trial on damages only is not proper if * * * it appears that the error on the damage issue may have affected the determination of liability." (quotation marks omitted)); *Atlas Food Sys. & Servs., Inc.* v. *Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 599-600 (4th Cir. 1996) ("Considerations of economy, fairness, and repose may provide justification for preserving a jury's liability determination * * * where there is no substantial indication that the liability and damage issues are inextricably interwoven, or that the first jury verdict was the result of a compromise of the liability and damage questions." (quotation marks omitted)); *Williams* v. *Slade*, 431 F.2d 605, 608 (5th Cir. 1970) ("[A] court may properly award a partial new trial only when the issue affected by the error could have in no way influenced the verdict on those issues which will not be included in the new trial."). Those decisions are not readily squared with *Gasoline Products*, which focused on whether *issues*, not *errors*, were interwoven.[12]

Federal judges, moreover, have noted the need for greater guidance on this fundamental Seventh Amend-

[12] Underscoring the confusion, the Ninth Circuit has not adopted a clear rule. Compare *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302, 306 (9th Cir. 1961) (declining to "say that in no circumstances can a separate jury determine the issue of damages after another jury has determined the issue of liability," but nonetheless holding "that under the circumstances presented * * * the issues of liability and damages, exemplary or normal, are not so distinct and separable that a separate trial of the damage issues may be had without injustice"), with *EEOC* v. *Wal-Mart Stores, Inc.*, 156 F.3d 989 (9th Cir. 1998) (reversing denial of punitive damages and remanding without inquiry into inextricability of punitive damages and liability).

ment issue. See, *e.g.*, *Pryer* v. *C.O. 3 Slavic*, 251 F.3d 448, 461 (3d Cir. 2001) (Mansmann, J., dissenting in part) ("Assessment of the degree to which facts concerning liability and damages are interrelated seems a quixotic venture with little direct bearing on the justice or injustice of separate trials; and it does not lead to any workable standard."); *Olsen* v. *Correiro*, Civ. No. 92-10961, 1995 WL 62101, at *3 (D. Mass. Feb. 3, 1995) ("The 'interwoven' test is quite difficult to apply in practice."). The division and confusion over whether the Seventh Amendment permits retrying punitive damages separately from compensatory damages and liability—a division of a single claim that would have been impossible at common law when the Seventh Amendment was adopted—is by itself ample grounds for review.

Review is particularly warranted because retrial of punitive damages separately from compensatory damages and liability violates the core guarantee of the Seventh Amendment that "the right of trial by jury shall be preserved." As a matter of constitutional command and state law, the determination of punitive damages requires a plenary consideration of the defendant's conduct. See, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003) (Constitution requires evaluation of "the degree of reprehensibility of the defendant's misconduct"); Ky. Rev. Stat. Ann. § 411.184(2) (punitive damages require finding, "by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud, or malice"). To the extent that the jury considering punitive damages is given instructions on the first jury's decision about the defendant's conduct, however, the second jury's evaluation of the defendant's conduct for punitive damages purposes is necessarily circumscribed, in violation of the Seventh Amendment's central protection.

In this case, for example, the jury considering punitive damages will be asked to consider much of the same conduct as the first jury—*i.e.*, HCP's press releases and other conduct related to HCP's bid in a vigorous takeover battle. If the second jury is "instructed" on what the first jury allegedly found about this conduct, HCP will be deprived of its Seventh Amendment right to have the punitive damages jury give plenary consideration to its conduct, in sharp conflict with the common law role of juries, with the Seventh Amendment, and with *Gasoline Products*.

Circumscribing a jury's evaluation of a defendant's conduct when the jury considers punitive damages also conflicts with a defendant's due process rights. As this Court has explained, punitive damages are imposed to punish and deter the wrongful conduct that harmed the plaintiff. *State Farm*, 538 U.S. at 423; *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007). A second jury cannot impose punishment for the conduct underlying a compensatory award, taking account of (among other things) that conduct's "reprehensibility," *State Farm*, 538 U.S. at 423, without being able to draw its own conclusions about the nature of that conduct.

This is especially true where, as here, the jury returns a general verdict in response to a pastiche of wrongfulness theories, including HCP's responsibilities under its confidentiality and standstill agreements; different alleged misstatements in HCP's press release; alleged omissions from that press release (including failure to mention allegedly "strained relations" that might prevent agreement with SSL); and claims about HCP's mental state and motives. Pet. App. 32a-34a. There was no special verdict here. Thus, if the second jury is instructed about the first jury's decision, there will be no way to determine what the first jury actually found or relied on. All of these problems can be avoided by hewing to the historical understanding of the Seventh Amendment—that punitive damages cannot be retried separately from compensatory damages and liability because they are inextricably interwoven.

Moreover, the punitive-damages-only remand creates incentives for plaintiffs to appeal failed punitive damages claims. Under the historic common-law rule, litigants like the counter-claimant in *Gasoline Products* must put the entire verdict at risk if they challenge one element of an interwoven verdict or judgment. Under the Sixth Circuit's decision, plaintiffs have carte blanche to appeal failed punitive damages demands with no possibility that interwoven elements of the same claim will be at risk.

This Court has not considered the core Seventh Amendment issue decided by *Gasoline Products* since the 1930s. Particularly if—contrary to the view of numerous courts of appeals but consistent with the court of appeals' decision here—*Gasoline Products* permits compensatory and punitive damages on a single claim to be tried to different juries, that framework should be revisited in favor of a standard that is more faithful to the Seventh Amendment. For that reason too, the petition should be granted.

CONCLUSION

The Sixth Circuit has profoundly misallocated responsibilities between jury and judge, between trial court and appellate court, and between first jury and second jury. It has erroneously surrendered uniform federal procedural standards in evaluating the sufficiency of the evidence in diversity cases and instead has adopted state standards; it has permitted the artificial segmentation of single claims through a misreading of Rule 54(b); and it has stripped juries of their proper constitutional role.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 2011

APPENDIX

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APPENDIX A
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOS. 09-6385, 09-6413

VENTAS, INC.,
Plaintiff-Appellee/Cross-Appellant,

v.

HCP, INC., FKA HEALTH CARE PROPERTY INVESTORS, INC.,
Defendant-Appellant/Cross-Appellee.

Appeal from the United States District Court for the Western District of Kentucky at Louisville.
No. 07-00238—John G. Heyburn II, District Judge.

ARGUED: MARCH 10, 2011
DECIDED AND FILED: MAY 17, 2011

Before MERRITT, CLAY, and GRIFFIN, Circuit Judges.

CLAY, J., delivered the opinion of the court, in which GRIFFIN, J., joined. MERRITT, J. (p. [67a]), delivered a separate opinion concurring in the result and much of the reasoning of the majority opinion.

OPINION

CLAY, Circuit Judge. In this diversity action, Defendant HCP, Inc. appeals a $101,672,807.00 judgment entered by the district court for Plaintiff Ventas, Inc. following a jury trial on Ventas' claim of tortious interference with a prospective advantage, and Ventas cross-appeals. HCP attacks the judgment on the basis of *res judicata*; the sufficiency of the evidence; and the jury instructions. Ventas seeks to augment the judgment with punitive damages, additional compensatory damages, and prejudgment interest.

For the reasons discussed below, the judgment of the district court is **AFFIRMED**, but the district court's decision to preclude Ventas from seeking punitive damages is **REVERSED**, and the case is **REMANDED** with instructions that the matter proceed to trial on the single issue of punitive damages. The judgment as previously entered by the district court shall stand as a partial final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

BACKGROUND

In late 2006, Sunrise Senior Living Real Estate Trust ("Sunrise"), a Canadian real estate investment trust, conducted a confidential auction of its assets. The parties to this appeal, Plaintiff Ventas, Inc. ("Ventas") and Defendant HCP, Inc. ("HCP"), both large American real estate investment trusts specializing in healthcare-related properties, participated in the auction. The auction was to proceed in two rounds. During the first round, several prospective buyers, including Ventas and HCP, would be invited to submit non-binding bids to acquire Sunrise. From these initial bids, Sunrise would select a smaller group of prospective buyers to participate in the second round, in which each remaining participant could submit a final bid. Sunrise would enter into a purchase agreement with the winning bidder, subject to approval by two thirds of Sunrise's voting unitholders.[1]

The auction procedures required each participant to sign a confidentiality agreement, which included a standstill provision ("Standstill Agreement") that would, among other things, prohibit the participant from making or announcing any bid outside of the auction process for a period of 18 months following the conclusion of the auction. The Standstill Agreement also proscribed any actions that would require Sunrise to publicly announce a bid outside of the auction process.

As invitees to the preliminary stages of the auction, both Ventas and HCP independently negotiated and entered into Standstill Agreements with Sunrise. Neither was a party to the other's Standstill Agreement. HCP's Standstill Agreement permitted HCP to make only one final bid, but Ventas' Standstill Agreement permitted Ventas to make a second final bid if Sunrise accepted a competing offer after Ventas made its initial final bid.

Ventas and HCP each made a preliminary bid for Sunrise. HCP offered $16.25 per unit, and Ventas offered $13.25 per unit.[2] Each bid was expressly conditioned upon the bidding party reaching an agreement with Sunrise Senior Living, Inc. ("SSL"), a third party that managed Sunrise's properties under long-term management contracts. Following a review of the preliminary bids, Sunrise invited Ventas and HCP to proceed to the second round. Ventas and HCP were the only participants in the second round.

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[1] A unitholder is an owner of units in an investment trust, similar to a shareholder owning shares in a corporation.

[2] All dollar amounts hereinafter are in Canadian currency unless otherwise indicated.

During this round, Sunrise required each party to submit a final, binding bid by January 14, 2007. The requirement of a binding bid had the practical effect of forcing a bidding party to first reach an independent agreement with SSL. As the district court explained, "[g]iven the complex agreements that provide SSL with rights that encumber, restrain, and burden Sunrise [ ] and the Sunrise [ ] properties, it is easy to see why Sunrise [ ] would desire to have its buyer establish the feasibility of taking ownership of Sunrise [ ] prior to submitting a final bid, rather than later citing inability to work with SSL as a reason for backing out of the sale." (R. 34 at 2 n.2.)

Ventas reached an agreement with SSL, but HCP failed to do so. Although HCP and SSL engaged in negotiations, the negotiations "blew up" just prior to the final bid deadline. (Tr.4B at 69.) It appears that negotiations collapsed when issues relating to another real estate portfolio became intertwined in the Sunrise negotiations. This other portfolio, referred to as the "CNL Properties," was a multi-billion dollar property portfolio purchased by HCP in 2006 and managed by SSL. (Tr.2B at 23.) During the negotiations, HCP "had an existing signed agreement with [SSL] on [the] CNL portfolio but that was under negotiation to be revised." (Tr.4B at 70.) In its negotiations regarding the CNL Properties, HCP sought to "get the cost structure of [SSL] consistent with the cost structure of other senior housing operators." (Tr.5A at 77.)

The parties dispute the source of the breakdown in negotiations between HCP and SSL. Each assigns fault to the other. According to HCP, it had "reached an agreement" with SSL as to the Sunrise properties "early the week of January 8th" (Tr.4B at 69), but SSL, at the eleventh hour, demanded "concessions in separate negotiations concerning other properties." (HCP Br. at 6 (citing Tr.4B at 69; Tr.5B at 42).) This, HCP contends, doomed the negotiations because the cost of the concessions "approached $200 million." (Tr.4B at 129.)

According to Ventas, it was HCP, not SSL, that derailed the negotiations. HCP Chairman and Chief Executive Officer ("CEO") Jay Flaherty admitted that he was playing "hardball" with SSL during the negotiations by, for instance, sending numerous notices to SSL that terminated, or purported to terminate, management contracts with SSL relating to other properties owned by HCP. (Tr.5A at 75-82.) The night before the final bid deadline, at 8:00 p.m. on January 13, 2007, HCP sent SSL a counter-proposal that included substantially different terms than the parties had previously discussed. (R. 481 at 267-78.)

A senior vice president at SSL, Christopher Feeney, recalled that HCP's last-minute proposal included a 30-year right of first offer on development properties. (*Id.* at 268-75.) Feeney explained that the proposed terms were unacceptable—"actually worse" than HCP's prior proposal—and remarked, referring to HPC: "I had never had seen a party engage in a series of negotiations and then introduce something that is completely out of left field with the hope of signing it in a day." (*Id.*) Feeney concluded that HCP was not "acting in good faith." (*Id.* at 277.) SSL informed HCP via email that it would not agree to the proposed terms; HCP did not respond. (*Id.* at 277-78.) At the time of trial, HCP was embroiled in litigation against SSL to terminate certain management contracts. (Tr.5A at 107.)

HCP withdrew from the auction process after it was unable to reach an agreement with SSL. Although Sunrise offered to "provide some additional time" for HCP to attempt to reach an agreement with SSL, HCP CEO Flaherty "indicated that, no, that they were moving on to other things." (Tr.2A at 39.) At that time, Andrew Phillips, a financial advisor to Sunrise, asked Flaherty "if there was a different price, that is, a lower price, at which he would be prepared to offer that would somehow offset any risk that HCP might be taking by going into a transaction" without having reached a deal with SSL. (*Id.*) Flaherty responded, "no, that . . . his board . . . had indicated that th[e] agreement had to be completed." (*Id.*)

On January 14, 2007, having reached an agreement with SSL, Ventas submitted an unconditional bid to acquire Sunrise at $15.00 per unit, for a total purchase price of $1,137,712,410.00. Ventas' offer of $15.00 per unit was approved by the Sunrise Board of Trustees that same day, and Ventas and Sunrise entered into a binding agreement (the "Purchase Agreement"), in which Ventas agreed to purchase Sunrise for $15.00 per unit, subject to approval by two-thirds of Sunrise's voting unitholders. Section 4.1 of the Purchase Agreement required Sunrise to use best efforts to secure unitholder approval of the Purchase Agreement. Although Sunrise remained free to respond to unsolicited offers, Section 4.4 required Sunrise to abstain from activities in furtherance of alternative bids and to enforce any existing Standstill Agreements with third parties.

On January 15, 2007, Sunrise and Ventas publicly announced the Purchase Agreement in a press release. Shortly thereafter, Sunrise informed HCP of the existence of the Purchase Agreement and of the continued viability of the Standstill Agreement between HCP and Sunrise. The Canadian financial markets reacted positively to the news of the proposed acquisition: units of

Sunrise, which had been trading at approximately $10.50 per unit during the confidential auction, increased to approximately $15.00 per unit after the deal was announced.

Initially, unitholder approval of the Purchase Agreement seemed to be a foregone conclusion. (*See, e.g.*, Tr.7A at 87-99 (testimony of Ventas' expert, opining that the Ventas offer had a 95% expectation of approval).) The offer represented the "full price" of Sunrise. (Tr.6A at 80.) The 50% premium over Sunrise's market price before the deal was "record-breaking." (Tr.3A at 80.) No similar deal had ever been rejected by Canadian shareholders. (Tr.11A at 124-25.)

In the weeks following the public announcement of the Purchase Agreement, Sunrise CEO Doug MacLatchy suggested to HCP CEO Flaherty via email that HCP make a bid for Sunrise. (R. 485-2 at 384-85.) According to HCP, from approximately January 15, 2007 until February 1, 2007, HCP "went intensively to work with [SSL] to remove the obstacle that had been thrown at [HCP] at the 11th hour on Saturday, January 13th, which related to" the CNL Properties. (Tr.5B at 38.) On February 13, 2007, the HCP Board approved a conditional bid of $18.00 per unit for Sunrise. (*Id.* at 55-56.)

On February 14, 2007, Flaherty advised Sunrise's investment banker that HCP would make an offer of $18.00 per unit, and sent Sunrise a letter explaining the details of HCP's offer and included an unsigned and unconditional purchase agreement. HCP did not disclose that its offer was conditioned on reaching an agreement with SSL.

Sunrise requested that HCP refrain from publicly announcing its offer of $18.00 per unit. That request notwithstanding, HCP issued the following press release on February 14, 2007:

> Health Care Property Investors, Inc. (NYSE: HCP) today announced that it has submitted a proposal to acquire the assets of Sunrise Senior Living Real Estate Investment Trust (TSX: SZR.UN) in a transaction that values each Sunrise [ ] unit at Cdn$18.00. HCP's offer price represents a 20% premium over the Cdn$15.00 price being offered in Sunrise[ ]'s proposed sale to Ventas, Inc.
>
> To underscore the clear superiority of its offer, HCP proposes to enter into an acquisition agreement that reflects its significantly higher price and is otherwise identical to the agreement between Sunrise [ ] and Ventas. HCP's offer values the equity of Sunrise [ ] at appro[xim]ately Cdn$1.4 billion.
>
> HCP's offer has been unanimously approved by HCP's Board of Directors. The offer is not subject to any due diligence or financing contingencies. Because of HCP's superior financial condition and access to funds and its experience in large acquisitions, HCP believes that its proposed acquisition of Sunrise [ ] has greater certainty of completion than the proposed Ventas transaction.

(App. at 454.) The press release also included a copy of the offer letter that Flaherty sent to Sunrise, which stated that HCP was "confident" that it could "enter into arrangements with [SSL] on terms comparable to those entered into by Ventas." Ventas believed that the press release and offer were in violation of the Standstill and Confidentiality Agreements that HCP had with Sunrise.

After HCP issued this press release, Sunrise became concerned about whether HCP's bid contained an undisclosed condition, particularly because HCP had not signed the proposed purchase agreement. Ventas presented evidence at trial that HCP informed Sunrise on numerous occasions that it would transmit a signed, unconditional purchase agreement, but failed to ever do so. At one point, Flaherty told Sunrise that he had actually sent the signed agreement via Federal Express. Sunrise's concerns were soon borne out: later that evening, HCP disclosed to Sunrise that its bid was conditioned upon reaching an agreement with SSL.

Before the markets opened on February 15, 2007, Sunrise issued a press release stating that Sunrise would not consider the offer from HCP until "such time as it receives a confirmation from HCP that their proposal is not conditional on [HCP] reaching an agreement with [SSL]." (*Id.* at 1240; *see also* Tr.2A at 98.)

Once the markets opened on February 15, 2007, the first day of trading since HCP publicly announced its offer of $18.00 per unit, the price of Sunrise increased from approximately $15.00 per unit to approximately $18.00 per unit in the largest trading day in the history of Sunrise. Within two business days of the press release, approximately 40 million units of Sunrise had been exchanged, representing nearly 60% of Sunrise's total outstanding units. Ventas presented evidence that arbitragers from the U.S. had begun to purchase the units of Sunrise.

On February 18, 2007, HCP proposed to SSL that they enter into an agreement that HCP presented as nearly "identical" to the agreement that SSL had reached with Ventas. The proposed agreement, however, demanded certain development rights previously rejected by SSL, and that SSL was unlikely to accept in any future negotiations. (Tr.2A at 107; Tr.3A at 64-66; Tr.3B at 126; Tr.5A at 93-96; R. 481 at 310-313.)

Sunrise issued a second press release on February 19, 2007, stating that the HCP offer was "expressly conditional on HCP entering into" an agreement with SSL, as "certain agreements among the various parties" prevent HCP from negotiating with SSL. (App. at 590; Tr.11A at 49-50.)

On February 20, 2007, HCP informed Sunrise that HCP had proposed an agreement to SSL that was "materially the same" as the agreement between SSL and Ventas. (Tr.5A at 130.) This prompted Sunrise to issue a press release on February 21, 2007, stating that HCP had amended its offer to include an express condition. The press release also stated that HCP "indicated that they are prepared to enter into an agreement with Sunrise Inc. on the terms HCP purports are substantially similar to the agreement entered into between Ventas, Inc. and Sunrise, Inc." (App. at 730A.) Ventas issued its own press release on February 22, 2007, in which Ventas stated that HCP's offer was barred by the Standstill Agreement, and was a conditional offer that was in fact less favorable than its own. (*Id.* at 1228.)

Amidst this flurry of press releases, on February 21, 2007, HCP submitted a proposal to purchase another company, identified as "Slough," for $3.1 billion. (Tr.4B at 96.) HCP did not issue a press release relating to this proposed acquisition. (*Id.*; Tr.9A at 73.) The Slough deal would be announced publicly months later, after which Standard & Poors would immediately place HCP's credit and senior notes on "credit watch." (Tr.9A at 73.)

Meanwhile, Sunrise and Ventas each filed applications in the Ontario Superior Court of Justice, Canada ("Ontario Superior Court"), seeking declarations regarding the continued validity of HCP's Standstill Agreement.[3] Sunrise, which filed its application on February 19, 2007, sought to clarify whether HCP was permitted to negotiate with SSL. Ventas likewise filed an application on February 21, 2007, seeking a declaration that Sunrise was obligated to enforce its Standstill Agreement with HCP.

On March 5, 2007, the Ontario Superior Court ruled as follows: 1) Sunrise must enforce its Standstill Agreement with HCP; 2) the Purchase Agreement was reasonably designed to ensure enforcement of the Standstill Agreements; 3) neither the Standstill Agreement with HCP nor any subsequent action by Sunrise authorized HCP to submit a late bid; and 4) Sunrise conducted the auction in a manner consistent with the Standstill Agreement. As a result of this ruling, on March 7, 2007, HCP withdrew its offer to purchase Sunrise.

Voting on the Purchase Agreement began on or around March 7, 2007, when Sunrise mailed ballots and proxy statements to its unitholders. Four of the largest institutional unitholders—ING, Caisse, Cypress, and Morgan Stanley, which collectively controlled approximately 39% of the vote—voted against the Purchase Agreement. (App. at 1315-17.)

On March 26, 2007, during the voting period, the Ontario Court of Appeal affirmed the decision of the Ontario Superior Court, holding as follows: 1) the HCP Standstill Agreement precluded HCP from submitting a subsequent bid and the Purchase Agreement required Sunrise to enforce the HCP Standstill Agreement; 2) the require-

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[3] Additionally, on April 5, 2007, Ventas filed an action against Sunrise in the Canadian courts, claiming damages of $250 million from Sunrise's efforts to facilitate HCP's bid. This matter was resolved with Ventas' ultimate purchase of Sunrise for $16.50 per unit.

ment that Sunrise enforce the Standstill Agreement against HCP is balanced and objectively reasonable in the context of the auction; and 3) Sunrise acted reasonably in designing and conducting the auction process so as to maximize value.

By April 9, 2007, a sufficient number of proxies had been entered against the Purchase Agreement to prevent its approval. (Tr.4A at 119; App. at 742.) On April 11, 2007, to salvage the deal and avoid injury to its reputation, Ventas increased its original offer of $15.00 per unit to $16.50 per unit. The unitholders approved Ventas' increased offer on April 19, 2007, and the deal closed on April 26, 2007.

Ventas commenced this diversity action under 28 U.S.C. § 1332 soon thereafter. On May 3, 2007, Ventas filed a Complaint against HCP in the district court, asserting Kentucky state law claims of tortious interference with contract, and tortious interference with a prospective advantage. Ventas alleged that HCP improperly interfered with its valid expectancy that the Sunrise unitholders would approve its $15.00 per unit offer to purchase Sunrise, causing Ventas to raise its offer to $16.50 per unit.

On July 2, 2007, HCP moved to dismiss the Complaint, arguing *res judicata* and failure to state a claim. The district court denied the motion. On July 25, 2008, the district court granted HCP leave to file counterclaims against Ventas, alleging that Sunrise—whose liabilities Ventas had assumed—misled HCP about the fairness of the auction process. On March 25, 2009, upon Ventas' motion for judgment on the pleadings, the district court dismissed HCP's counterclaims, reasoning that HCP's allegations were not cognizable under Kentucky law.

On May 14, 2009, the parties cross-moved for summary judgment. HCP argued that *res judicata* precluded Ventas' claims and that Ventas could not prove tortious interference with contract. Ventas sought summary judgment on its claim of tortious interference with a prospective advantage, as well as on HCP's "non-damages affirmative defenses." Ventas also sought resolution of numerous issues of collateral estoppel stemming from the Canadian litigation.

In a memorandum and opinion dated July 15, 2009, the district court granted summary judgment for HCP on Ventas' claim of tortious interference with contract, but permitted Ventas' claim of tortious interference with a prospective advantage to proceed to trial. In so doing, the district court held that Ventas could not seek consequential damages based on increased financing costs that it incurred as a result of any delay in the closing of the Sunrise auction. Additionally, the district court once again rejected HCP's claim of *res judicata*.

A jury trial commenced on August 18, 2009 and lasted until September 4, 2009. On August 28, 2009, the district court granted judgment as a matter of law for HCP on the issue of punitive damages, holding that Ventas had not presented sufficient evidence to present the issue to the jury.

Towards the end of the trial, the parties contested the substance of the jury instructions. The central issue was whether the district court should instruct the jury in accordance with § 767 or § 768 of the Restatement (Second) of Torts. Both sections impose liability for tortious interference, but § 767 is a generally applicable section, while § 768 treats tortious interference as between competitors and imposes a higher standard for liability. The district court resolved the question in favor of § 768, but also instructed the jury as to "some of the factors enumerated in section 767 [as] helpful guideposts for examining the alleged wrongfulness of HCP's actions." The district court also held, as a matter of law, that: 1) Ventas and HCP were competitors; 2) the actions of Ventas and HCP did not "create or continue an unlawful restraint of trade;" and 3) the purpose of any tortious interference by HCP was "at least in part to advance [HCP's] interest in competition." (R. 450 at 6 n.5.)

On September 4, 2009, the jury returned a verdict for Ventas in the amount of $101,672,807.00 (U.S.), apparently calculating Ventas' damages as follows:

Purchase Agreement Price	$15.00 / unit
Actual Purchase Price	$16.50 / unit
Difference (damage)	$1.50 / unit
Number of Units Outstanding	75,847,494
Damage to Ventas (units x damage per unit)	$113,771,241.00
Conversion Rate (4/26/07)	$1.00 (Can.) = $0.89366 (U.S.)
Total Damages (U.S.)	**$101,672,807.00 (U.S.)**

(*See* Tr.7A at 59.) (The district court, not the jury, performed the currency conversion.)

The parties filed post-trial motions. HCP sought judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure based on the sufficiency of the evidence, and, once again, *res judicata*. HCP alternatively sought a new trial based on claimed deficiencies in the jury instructions; erroneous evidentiary rulings; and the overall weight of the evidence. Ventas moved to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure, requesting that the district court: 1) convert damages from Canadian to U.S. dollars as of the date of judgment rather than the date of injury;

and 2) award prejudgment interest on the jury verdict. On November 16, 2009, the district court denied both parties' post-trial motions. This timely cross-appeal followed.

DISCUSSION—APPEAL BY HCP

The Court first turns to the issues that HCP raises on appeal. HCP argues that the district court erroneously: 1) concluded that Ventas' claims were not barred by *res judicata*; 2) instructed the jury on the elements of "improper interference" and "but-for" causation; and 3) denied HCP judgment as a matter of law on the element of causation. Because we find that these arguments lack merit, we **AFFIRM** the judgment below in its entirety.

I. Res Judicata

We begin our analysis with HCP's argument that Ventas' claim is barred by the doctrine of *res judicata*. According to HCP, Ventas could have—and should have—asserted its tortious interference claims when it filed its application in the Ontario Superior Court on February 21, 2007. The district court rejected this argument, and we now **AFFIRM**.

A. Standard of Review and Legal Standard

The district court's application of the doctrine of *res judicata* is reviewed *de novo*. *Bragg v. Flint Bd. of Educ.*, 570 F.3d 775, 776 (6th Cir. 2009). Under Kentucky law,[4] *res judicata* consists of two distinct compo-

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[4] A federal court sitting in diversity applies the choice of law rules of the forum state to determine questions of *res judicata*. *See Taveras v. Taveraz*, 477 F.3d 767, 783 (6th Cir. 2007). Here, the parties did not brief whether Kentucky, as the forum state, would apply its own *res judicata* law or that of Ontario in determining the preclusive effect of the prior Canadian action. The parties have instead assumed, as did the district court, that Kentucky and Ontario would apply the same rules of *res judicata*. For purposes of this appeal, we

nents, claim preclusion and issue preclusion. Kentucky courts generally follow the Restatement (Second) of Judgments (1982) for purposes of applying *res judicata*.[5] This appeal raises only claim preclusion, which, under Kentucky law, bars the litigation of "entire claims that were brought or should have been brought in a prior action." *Morgan v. Standard Elec. Co., Inc.*, 62 F. App'x 110, 111 (6th Cir. 2003). Under Kentucky law, for claim preclusion to bar a subsequent action:

> First, there must be identity of parties. Second, there must be identity of the two causes of action. Third, the action must be decided upon its merits. In short, the rule of res adjudicata does not act as a bar if there are different issues or the questions of law presented are different. Likewise, it has long

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need not disturb this assumption. *See C.D. Herme, Inc. v. R.C. Tway Co.*, 294 S.W.2d 534, 538 (Ky. 1956) (holding that where the parties fail to argue that the law of a jurisdiction other than Kentucky governs, the Kentucky Supreme Court will "assume[] that the [law of the other jurisdiction] is the same as that of Kentucky.").

[5] *See, e.g.*, *Smith v. Bob Smith Chevrolet, Inc.*, 275 F. Supp. 2d 808, 813 (W.D. Ky. 2003); *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 371 & n.9, 14, 31 (Ky. 2010); *Berrier v. Bizer*, 57 S.W.3d 271, 280-81 (Ky. 2001); *Yeoman v. Commonwealth Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 193 (Ky. 1994); *Watts By and Through Watts v. K, S & H*, 957 S.W.2d 233, 237 (Ky. 1997); *ESI Cos., Inc. v. Ray Bell Const. Co. Inc.*, No. 2008-CA-00176-MR, 2009 WL 4060478, at *8 (Ky. Ct. App. Nov. 25, 2009); *Parker v. Carrington*, No. 2004-CA-002614-MR, 2006 WL 2517898, at *2 (Ky. Ct. App. Sept. 1, 2006); *Black v. CMT Trucking*, No. 2004-CA-001079-WC, 2005 WL 267568, at *5 (Ky. Ct. App. Feb. 4, 2005); *Wheeler v. Wheeler*, 154 S.W.3d 291, 294 (Ky. Ct. App. 2004); *Hauling v. Powell*, No. 2002-CA-002340, 2003 WL 21204976, at *6 (Ky. Ct. App. May 23, 2003); *Dennis v. Fiscal Court of Bullitt Cnty.*, 784 S.W.2d 608, 609-10 & n.2 (Ky. Ct. App. 1990); *Rev. Cabinet, Commonwealth of Ky. v. Samani*, 757 S.W.2d 199, 202 (Ky. Ct. App. 1988).

> been recognized that a party may not split his cause of action, therefore, if a cause of action should have been presented and the party failed to do so and the matter should again arise in another action, it will be held that the first action was res adjudicata as to all causes that should have properly been presented.

Newman v. Newman, 451 S.W.2d 417, 419 (Ky. 1970).

B. Application

The district court concluded that *res judicata* is inapplicable because Ventas' claim of tortious interference was not ripe on February 21, 2007, when Ventas filed its application in the Ontario Superior Court. The district court relied upon the well-settled principle that *res judicata* "cannot be used to cut off a cause of action before it accrues." *Watts By & Through Watts*, 957 S.W.2d at 237. On appeal, the parties dispute whether Ventas' claims of tortious interference were ripe on February 21, 2007.

The parties and the district court, however, have overlooked the well-settled rule that an action for declaratory relief does not have preclusive effect in a subsequent litigation between the same parties. Under § 33 of the Restatement (Second) of Judgments,

> [a] plaintiff who wins declaratory judgment may go on to seek further relief, even in an action on the same claim which prompted the action for a declaratory judgment. This further relief may include damages which had accrued at the time the declaratory relief that could have been requested initially.

Restatement (Second) of Judgment § 33, cmt. (c). The Restatement expressly permits claim splitting where, as here, the first action sought only declaratory relief. *Id.* (stating that "a declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced.").

Consistent with Kentucky's general adherence to the Restatement (*see supra* note 5 (collecting cases)), Kentucky has "adopted essentially the same rule [as Restatement § 33]," even though Kentucky has done so without expressly referencing the Restatement. *See Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co.*, 547 F.3d 48, 56 (1st Cir. 2008) (discussing Kentucky law). In *Cooke v. Gaidry*, 218 S.W.2d 960 (Ky. 1949), for example, the Kentucky high court held that "suits for declaratory judgments" under state law do not fall within the general rule that "a former judgment is conclusive not only of all matters actually adjudicated thereby, but in addition, as to all matters which could have been presented for adjudication in the original action." *Id.* at 961-62 (holding that prior declaratory judgment action on a lease did not preclude a subsequent action for damages). The rule as stated in *Cooke* is oft-repeated and is now well-settled Kentucky law.[6] *See, e.g.*, *Holbrook v. Shelter Ins. Co.*, 186 F. App'x 618, 622 (6th Cir. 2006); *City of Paducah v. Elec. Plant Bd. of the City of Paducah*, 449 S.W.2d 907, 910 (Ky. 1970).

[6] The Kentucky rule is consistent with the majority rule. As the First Circuit recently noted, the "vast majority of states that have addressed this problem unapologetically apply a special rule of claim preclusion, consistent with that of section 33 of the Second Restatement, in the declaratory judgment context." *Hartford Fire Ins. Co.*, 547 F.3d at 56; *see also Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 196 (2d Cir. 2010); *Am. Forest Council v. Shea*, 172 F. Supp. 2d 24, 29 (D.D.C. 2001) ("Where a party asks only for declaratory relief, courts have limited the preclusive effect to the matters declared, hence permitting a later action seeking coercive relief based on the same cause of action.").

It is undisputed in the instant case that the prior proceedings in Canada were declaratory in nature. (HCP Br. at 13; Ventas Br. at 62.) In fact, the Ontario Superior Court expressly stated that Ventas "applie[d] for a declaration" as to the parties' obligations under the various agreements. *See Ventas, Inc. v. Sunrise Senior Living Real Estate Invest. Trust*, 07-CL-6893 (Ont. Sup. Ct. Mar. 6, 2007). It is thus clear that the prior Ontario action does not have preclusive effect under Kentucky law,[7] and does not bar Ventas' present tort action against HCP. *See Stericycle, Inc. v. City of Delavan*, 120 F.3d 657, 659 (7th Cir. 1997) ("The effect of such a declaration . . . is not to merge a claim in the judgment or to bar it.") (internal quotation marks and citation omitted).

Accordingly, we **AFFIRM** the decision of the district court [ ] as a matter of Kentucky law, declining to accord preclusive effect to the prior Canadian litigation. *See Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002) ("[W]e are free to affirm the judgment on any basis supported by the record.").

II. Jury Instructions

We now turn to HCP's argument that the district court erred as a matter of Kentucky law in its instructions to the jury. Specifically, HCP asserts that the district court improperly instructed the jury on two of

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[7] As noted *supra* note 4, the Court assumes, as the parties and district court did, that Kentucky law governs the application of *res judicata* in this case. Nonetheless, even if Ontario law so governed, it appears that Ontario law would not give the prior action preclusive effect. (*See, e.g.*, R. 28, Ex. 9 at 8 ("The courts of Ontario, and the courts elsewhere in Canada, have been cautious about applying the cause of action estoppel branch of the doctrine of *res judicata* in circumstances in which the prior proceeding was an application . . . rather than an action.") (collecting cases) (Decl. of John W. Morden, former Assoc. Chief Justice of Ontario).)

the elements of tortious interference under Kentucky law, namely "improper interference" and "but-for" causation. As we explain below, we find no error in the district court's jury instructions.

A. Standard of Review

We review the "legal accuracy of jury instructions de novo," *United States v. Blanchard*, 618 F.3d 562, 571 (6th Cir. 2010), and the denial of a proposed jury instruction for abuse of discretion. *See United States v. Adams*, 583 F.3d 457, 468-69 (6th Cir. 2009). Reversal of a judgment on the basis of an erroneous jury instruction may occur "only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *United States v. Harrod*, 168 F.3d 887, 892 (6th Cir. 1999) (internal quotation marks and citation omitted).

B. Tortious Interference Under Kentucky Law

Because the district court's jury instructions were based on Kentucky law, we first review the relevant state law on which the jury was instructed. Under Kentucky law, liability for tortious interference arises when a party improperly interferes with a valid expectancy of another. *See Nat'l Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 857 (Ky. 1988). In *Hornung*, the Kentucky Supreme Court first recognized the tort, expressly adopting §§ 766, 767 and 773 of the Restatement (Second) of Torts. *Id.*

Section 766B sets forth the basic elements of a tortious interference claim:

> **§ 766B: Intentional Interference with Prospective Contractual Relation**
>
> One who intentionally and *improperly interferes* with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary

> harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

Restatement (Second) of Torts § 766B (emphasis added).

Section 767 elaborates on the element of "improper interference" set forth in § 766B:

> **§ 767. Factors In Determining Whether Interference Is Improper**
>
> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.

Id. § 767. Summarizing these factors, the Kentucky Supreme Court has held that "improper interference" under § 766B requires the plaintiff to "'show malice or some significantly wrongful conduct.'" *Leo J. Brielmaier Co.*

v. Newport Hous. Auth., 173 F.3d 855 (6th Cir. 1999) (table) (quoting *Hornung*, 754 S.W.2d at 859); *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 487 (Ky. 1991) (defining "unlawful means" as including fraud, deceit, and coercion).

In the case of a tortious interference claim between competitors, § 768 holds plaintiffs to a more exacting standard. Section 768 makes clear that "competition is not an improper basis for interference," Restatement (Second) of Torts § 768, cmt. (a), and provides, in pertinent part:

> **§ 768. Competition As Proper or Improper Interference**
>
> (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor . . . *does not interfere improperly* with the other's relation if
>
> (a) the relation concerns a matter involved in the competition between the actor and the other and
>
> (b) the actor does not employ *wrongful means* and
>
> (c) his action does not create or continue an unlawful restraint of trade and
>
> (d) his purpose is at least in part to advance his interest in competing with the other.

Restatement (Second) of Torts § 768 (emphasis added). It is unclear whether the Kentucky Supreme Court would apply § 768, or how § 768 may otherwise impact the factors set forth in § 767.

C. Jury Instructions

HCP requested that the district court instruct the jury under § 768. Ventas objected, arguing that § 767 sets forth the proper legal standard. The district court noted that Kentucky law was unclear on this point, and proceeded to "predict how Kentucky courts would resolve which section properly articulates the analysis for the facts at issue in this case." (R. 450 at 2); *see also Bailey v. V & O Press Co., Inc.*, 770 F.2d 601, 604 (6th Cir. 1985) (stating that federal courts should look to "all relevant data" when predicting a state supreme court's decision, including state appeals court rulings, restatements of the law, academic publications, and the majority rule).

HCP argued below, as it does now on appeal, that the commentary to § 767 directs courts to apply § 768 in the case of a tortious interference claim between competitors. *See* Restatement (Second) of Torts § 767, cmt. (a). The relevant commentary states that, in cases between competitors, § 768 "supplant[s] the generalization expressed" in § 767. *Id.*

The district court held as a matter of Kentucky law that "the appropriate use of sections 767 and 768 is to apply section 768 as the test for whether the defendant's conduct was improper. However, section 767 can still be used to illuminate the requirements of section 768." (R. 450 at 4.) The district court accordingly instructed the jury pursuant to § 768, but used "some of the factors enumerated in section 767 [as] helpful guideposts for examining the alleged wrongfulness of HCP's actions." (*Id.*)

In its instructions to the jury, the district court first set forth the elements that Ventas was required to prove to prevail on its tortious interference claim:

> One, Ventas had a reasonable likelihood or probability of acquiring Sunrise [ ] at $15 per unit; two, HCP knew about the probable acquisition of Sunrise [ ]; three, HCP intentionally and improperly in-

> terfered with Ventas'[ ] acquisition of Sunrise [ ] at $15 per unit; four, HCP's improper interference prevented Ventas from acquiring Sunrise [ ] at $15 per unit; and five, HCP's improper interference was a substantial factor in causing Ventas'[ ] damages.

(Tr.12B at 100.) The district court then turned to the issue of competition:

> Ventas and HCP were business competitors generally, and were competing here to acquire Sunrise [ ]. Improper interference, as referenced in element number three, has a special meaning among competitors. In these circumstances then, the only way to find in favor of Ventas is to find that HCP employed—I put it in quotes because it's a defined term—"significantly wrongful means" to interfere with Ventas'[ ] acquisition of Sunrise [ ] at $15 per unit.[[8]]
>
> For purposes of this instruction, "significantly wrongful means" includes conduct such as fraudulent misrepresentation, deceit and coercion. Among other things, you may consider the parties' conduct, motive and the circumstances of the transaction to illuminate whether HCP's conduct amounts to significantly wrongful means. To the extent you consider a party's motive in causing harm, it must be based on actual evidence of motive rather than a witness'[ ] opinion of another's motive.

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[8] Although "malice" would also be sufficient to show "improper interference" under Kentucky law, the district court determined that HCP did not act with "malice" because it did not act with the sole purpose of harming Ventas. (*See* R. 450 at 6 n.5.) The parties do not appeal that decision.

> Now, as part of element number 3 . . . Ventas must also show that HCP intended to improperly interfere with the acquisition of Sunrise [ ]. As the word "intent" is used there, HCP's conduct must be intentional . . . HCP's conduct was intentional if its purpose was to improperly interfere with Ventas'[ ] acquisition of Sunrise [ ] or if HCP knew the improper interference was certain or substantially certain to occur.

(*Id.* at 101-02 (paragraph breaks added).)

Additionally, the district court gave the following instruction concerning the Canadian litigation between the parties:

> The parties to this action have previously resolved related issues in the Canadian court system. The important facts of these cases are as follows: In the week after HCP made its $18 topping bid, Sunrise [ ] sought guidance from a Canadian court in interpreting its confidentiality agreement with HCP and its purchase agreement with Ventas. In that case Sunrise [ ] and HCP generally took the position that the confidentiality agreement and the purchase agreement did not prohibit HCP's $18 bid. Ventas took the opposite position.
>
> The Canadian court found: One, HCP's confidentiality agreement precluded it from making the $18 topping bid. By making the bid, HCP breached its confidentiality agreement with Sunrise [ ]. Two, the purchase agreement between Sunrise [ ] and Ventas prohibited Sunrise [ ] from submitting HCP's bid to its unitholders. Finally, three, Sunrise['s] auction process leading to the Ventas purchase agreement was objectively reasonable and fair.

(*Id.* at 103.) The district court then discussed the relevance of the breach of contract:

> HCP did breach its confidentiality agreement by submitting the February 14 topping bid. This fact alone is not sufficient to establish tortious interference. However, it may be considered along with the other evidence in determining whether HCP engaged in improper interference.

(*Id.* at 103-04.)

D. Application

HCP attacks the jury instructions on four grounds: 1) that the district court improperly blended §§ 767 and 768 of the Restatement (Second) of Torts; 2) that the instructions erroneously permitted the jury to consider HCP's breach of its contract with Sunrise as improper conduct; 3) that the district court permitted the jury to consider motive without providing the proper legal standard; and 4) that the district court failed to adequately explain the element of causation. We now review each of these assignments of error, and reject each as meritless.

1. "Blending" of Sections 767 and 768

HCP first argues that the jury instructions were erroneous because the district court "blended" §§ 767 and 768 instead of relying exclusively on § 768. Before considering the propriety of the district court's hybrid approach, we must consider the threshold issue of whether the district court properly looked to § 768 in the first instance. As explained below, we find no error in the district court's decision to apply § 768 as a matter of Kentucky law.

Although the Kentucky Supreme Court has not considered whether to apply § 768 in cases involving competitors, the reported cases on the issue have predicted that the state high court would apply § 768. *See, e.g.*, *Brake Parts, Inc. v. Lewis*, Nos. 09-132 & 10-212, 2011 WL 42973, at *3 (E.D. Ky. Jan. 6, 2011) ("Kentucky courts would utilize the Section 768 factors as the appropriate factors for evaluating the legality of competitive conduct."); *Midwest Agency Servs., Inc. v. JP Morgan Chase Bank, N.A.*, No. 2:09-135, 2010 WL 935450, *9 (E.D. Ky. Mar. 11, 2010) (citing *AMC of Louisville, Inc. v. Cincinnati Milacron, Inc.*, No. 3:97-CV-343, 2000 WL 33975582, at *7-8 (W.D. Ky. Jan. 25, 2000) (relying on Section 768 in considering a tortious interference claim between competitors under Kentucky law)).

We believe that these decisions make the proper prediction. Kentucky courts generally follow the Restatement (Second) of Torts, which, of course, includes Section 768, and nothing of which we are aware suggests that Kentucky courts would not apply that section under the facts of this case. Indeed, the Restatement's heightened scrutiny of claims between competitors under § 768 is consistent with Kentucky's strong interest in robust competition.[9] *See, e.g.*, *ATC Distrib. Grp., Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 717 (6th Cir. 2005) ("[S]imply attempting to advance one's own legitimate economic interests at the expense of

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[9] Kentucky courts have consistently recognized a strong state interest in promoting competition across many areas of the law. *See, e.g.*, *Anderson v. Jett*, 12 S.W. 670, 672 (Ky. 1889) ("Rivalry is the life of trade. The thrift and welfare of the people depend upon it."); *see also Ky. Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803, 810 (Ky. 2010) (insurance law); *Covington Inn Corp. v. White Horse Tavern, Inc.*, 445 S.W.2d 135, 137 (Ky. 1969) (unfair competition); *Gen. Elec. Co. v. Am. Buyers Co-op., Inc.*, 316 S.W.2d 354, 360 (Ky. 1958) ("Our economic system is founded upon competition—'the life of trade.'"); *Love v. Kozy Theater Co.*, 236 S.W. 243, 246 (Ky. 1921).

another's interests does not constitute malice.") (applying Kentucky law); *Brooks v. Patterson*, 29 S.W.2d 26, 29 (Ky. 1930) (distinguishing cases where the alleged injury resulted from an "outgrowth of competition in business" from those where it was "brought about by the exercise of either fraud or force."); *accord Carvel Corp. v. Noonan*, 350 F.3d 6, 18-20 (2d Cir. 2003) (stating that "[t]he Restatement's distinction between competitors and non-competitors is intended to strike a balance between protecting economic relationships and encouraging competitive behavior in the market.").

Having determined that Kentucky law would look to § 768 in cases between competitors, we now turn to HCP's argument that the district court erred by also considering § 767. Specifically, HCP contends that it was error to instruct the jury on certain factors listed in § 767 to define "significantly wrongful means" within the meaning of § 768. HCP's argument relies principally on commentary to § 767, which states that § 768 "supplant[s]" § 767 in cases of competitors. *See* Restatement (Second) of Torts § 767, cmt. (a). HCP contends that the word "supplant" is dispositive and renders § 768 inapplicable to claims as between competitors. We disagree with HCP's myopic reading of, and unreasonable reliance on, one word in the commentary.[10]

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[10] As the district court explained, courts have interpreted the commentary in a variety of ways. Some courts have "strictly interpreted" it to render § 767 inapplicable if the parties are competitors (R. 450 at 3 (citing, *inter alia*, *Pino v. Prudential Ins. Co. of Am.*, 689 F. Supp. 1358, 1362 (E.D. Pa. 1988)), while other courts have used the § 767 factors to supplement the standard set forth in § 768, or to provide an affirmative defense of competition. (*Id.* (citing, *inter alia*, *Buztronics, Inc. v. Theory3, Inc.*, No. 104CV1485, 2005 WL 1865512, at *6 (S.D. Ind. Aug. 5, 2005).)

Section 768 does not define "wrongful means," and in fact places no limitation whatsoever on the factors that a jury might consider to determine whether the interference of a competitor was wrongful. Without any instruction regarding the meaning of "significantly wrongful conduct," the jury would have been left without any guidance. *See Bucyrus-Erie Co. v. Gen. Prods. Corp.*, 643 F.2d 413, 418 (6th Cir. 1981) ("The purpose of jury instructions is to inform the jury on the law and to provide proper guidance and assistance in reaching its verdict.").

In seeking guidance, the district court properly looked to § 767, as many other courts have done, to illuminate the meaning of "wrongful" conduct under § 768. *See, e.g.*, *Franklin Music v. Am. Broad. Cos., Inc.*, 616 F.2d 528, 545 (3d Cir. 1979); *Buztronics*, 2005 WL 1865512, at *6; *White Sands Grp., L.L.C. v. PRS II, L.L.C.*, Nos. 1080312 & 1080673, 2009 WL 2841114, at *11 (Ala. Sept. 4, 2009); *Siren, Inc. v. Firstline Sec., Inc.*, No. 06-1109, 2006 WL 3257440, at *6 (D. Ariz. May 17, 2006); *RTL Distrib., Inc. v. Double S Batteries, Inc.*, 545 N.W.2d 587, 591 (Iowa Ct. App. 1996); *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 546 N.E.2d 33, 37 (Ill. Ct. App. 1989).

Part of the same Restatement, § 767 immediately [precedes] § 768, and both sections relate to tortious interference. Section 768 stands simply as "special application of the factors determining whether an interference is improper or not, as stated in § 767." Restatement (Second) o[f] Torts § 768, cmts. (a) ("Like § 767, this Section speaks of an interference that is improper or not.") and (b). Section 768 itself refers to § 767 in its discussion of wrongful means. *See* Restatement (Second) of Torts § 768, cmt. (b) ("The predatory means discussed in § 767, Comment c, physical violence, fraud, civil suits and criminal prosecutions, are all wrongful in the situation covered by this Section."). Moreover, § 767 specifically defines "improper interference," a phrase also used in § 768, and that the Kentucky Supreme Court has interpreted to mean "wrongful," the operative word under § 768. *Cf. Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) (noting the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

Finally, we address HCP's policy argument that the "district court's [ ] effort to 'blend' § 767 with § 768 diluted the competitive protections § 768 is designed to provide." (HCP Br. at 50.) We do not agree. To the extent the district court's hybrid approach *may* have increased the likelihood of liability under the facts of this case, the approach did not dilute the competitive protections of § 768. Robust competition may also require regulation, and unfair competitive practices certainly do not fall within the protections of § 768. Although courts should be circumspect in adjudicating claims between competitors, wrongful and anti-competitive conduct should not be insulated from liability. Indeed, the public interest in full and fair competition is furthered by imposing liability on a market player, such as HCP, for fraudulently leveraging a public market to sabotage a competitor, as liability for such conduct will deter similar future conduct and promote economic certainty in the marketplace.

Under these circumstances, we find that the district court properly resolved the interplay between §§ 767 and 768 as a matter of Kentucky law by instructing the jury pursuant to § 768 and also using certain factors listed in § 767 to explicate § 768.

2. Breach of Contract

HCP next argues that the district court erred by allowing the jury to consider HCP's breach of its Standstill Agreement with Sunrise as wrongful conduct sufficient to establish "improper interference." HCP's objection focuses on the following instruction given by the district court:

> HCP did breach its confidentiality agreement by submitting the February 14 topping bid. This fact alone is not sufficient to establish tortious interference. However, it may be considered along with the other evidence in determining whether HCP engaged in improper interference.

(Tr.12B at 103-04.) Instead of this instruction, HCP had requested an instruction that its breach of the Standstill Agreement with Sunrise "does not constitute wrongful means for purposes of Ventas'[ ] claim." HCP argues that the district court's instruction was erroneous because a breach of contract with a third party is not sufficient to satisfy the requirement of "improper interference." *See, e.g.*, W*indsor Sec., Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 664 (3d Cir. 1993).

HCP's argument fails as a matter of fact, and as a matter of law. First, HCP's argument rests on a misreading of the record: the district court did not permit the jury to consider HCP's breach of the Standstill Agreement with Sunrise as sufficient to establish "significantly wrongful" conduct. The jury instructions explicitly defined "significantly wrongful means" to include "fraudulent misrepresentation, deceit and coercion," and stated that breach of the Standstill Agreement "alone is not sufficient to establish tortious interference." (Tr.12B at 103-04.)

Second, the district court did not commit legal error by permitting the jury to consider HCP's breach of its contract with Sunrise "along with the other evidence in determining whether HCP engaged in improper interference." (*Id.* at 104.) Although the relevance of a breach of contract with a third party in a tortious interference action has not been examined by many courts, other courts have similarly held that such a breach is evidence of "improper interference." *See, e.g.*, *Kapunakea Partners v. Equilon Enters. LLC*, 679 F. Supp. 2d 1203, 1217 (D. Haw. 2009); *Foam Supplies, Inc. v. Dow Chem. Co.*, No. 4:05CV1772, 2008 WL 3159598, at *7 (E.D. Mo. Aug. 4, 2008); *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 306 (Utah 1982); *Island Air, Inc. v. LaBar*, 566 P.2d 972, 980 (Wash. Ct. App. 1977). HCP cites no case that holds a breach of contract with a third party is completely irrelevant.

As the district court observed, to ignore HCP's breach of its contract with Sunrise would "create an artificial reality within the case." (R. 520 at 9.) HCP's breach of its Standstill Agreement with Sunrise illuminates the anti-competitive activities in which HCP engaged and is central to an understanding of Ventas' allegations of fraud and deception. As Ventas argued at trial, HCP misled the market by making public statements that were contrary to its obligations under the Standstill Agreement without disclosing the existence of the agreement or other relevant information. *See, e.g.*, *Hornung*, 754 S.W.2d at 859 ("[M]alice may be inferred in an interference action by proof of lack of justification.").

Accordingly, because the jury instruction regarding the relevance of HCP's breach the Standstill Agreement was an accurate and clear statement of the law, HCP's argument is without merit.

3. Motive

HCP next argues that the district court erred by allowing the jury to consider HCP's motive without also "advis[ing] the jury . . . that the defendant's motive is not a sufficient basis for liability unless the defendant acted solely to inflict harm." (HCP Br. at 56 (emphasis omitted).) As described above, the district court instructed the jury, in pertinent part, as follows:

> Among other things, you may consider the parties' conduct, motive and the circumstances of the transaction to illuminate whether HCP's conduct amounts to significantly wrongful means.

(Tr.12B at 101-02.)

HCP contends that the district court should have instructed the jury that HCP did not act solely to injure Ventas. HCP asserts that the jury was "left free to punish HCP [because HCP] may have been motivated not merely to acquire Sunrise, but also in part to disadvantage Ventas." (HCP Rep. at 33-34.) This, according to HCP, would not amount to "improper interference" because a defendant does not engage in "improper interference" if "his purpose is at least in part to advance his interest in competing with the other." Restatement (Second) of Torts § 768(1)(d).

We find HCP's argument unavailing. The district court did not instruct the jury that it may find "improper interference" on the basis of motive alone. Nor do the jury instructions reasonably suggest that the jury was permitted to do so. Instead, the district court instructed the jury that "the only way to find in favor of Ventas is to find that HCP employed—I put it in quotes because it's a defined term—'significantly wrongful means' to interfere with Ventas'[ ] acquisition of Sunrise [ ] at $15 per unit." (Tr.12B at 101.)

The district court defined "significantly wrongful means" to include fraudulent misrepresentation, deceit and coercion. It was only after defining "significantly wrongful means" that the district court instructed the jury that HCP's motive may be relevant in determining whether it engaged in the type of conduct necessary to create liability. *See, e.g.*, *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999) (noting that intent is relevant to fraud under Kentucky law). Nothing in the district court's jury instructions suggested that any degree of motive, without more, would be sufficient to establish "improper interference."

Accordingly, because the jury instructions regarding the relevance of HCP's motive were an accurate and clear statement of the law, HCP is not entitled to relief on the basis of this instruction.

4. Causation

Finally, HCP argues that the district court failed to adequately instruct the jury on the element of "but-for" causation. HCP requested the following jury instruction:

> If you are satisfied from the evidence that other factors, *including truthful information in HCP's offer and press release*, would have been sufficient to cause Sunrise['s] unitholders not to accept Ventas'[ ] $15 offer, then you will find for HCP[.]

(R. 430 at 4 (emphasis added).) The district court declined to give the proposed instruction, and instead instructed the jury as follows:

> Now, in element 4, to find that HCP prevented Ventas from acquiring Sunrise [ ] at $15 a unit, you must determine that but for HCP's improper interference, Ventas would have acquired Sunrise [ ] at $15 per unit. This but-for test means that if HCP's

> improper interference had never occurred, Ventas would have acquired Sunrise [ ] at $15 a unit.

(Tr.12B at 102-03.) HCP argues that the district court's instruction was erroneous because it did not require the jury to "separate the effect of the allegedly false representations from that of truthful statements." (HCP Br. at 59.)

We are unpersuaded by HCP's argument. Consistent with HCP's request during trial, the district court instructed the jury that in order to recover, Ventas must show that HCP's "improper interference," if any, was the but-for cause of Ventas' injury. This is an accurate statement of Kentucky law. The district court previously instructed the jury with regard to "improper interference," and it was properly left to the jury to determine whether any of HCP's conduct amounted to "improper interference," and whether any such "improper interference" was the but-for cause of Ventas' injury.

Although the district court did not specifically enumerate "truthful information" as a relevant consideration, as HCP requested, it was not an abuse of discretion for the district court to decline to give this specific instruction. The instruction as given was clear and accurate, and enumerating one factor that may favor HCP, without enumerating others that may favor Ventas, could have unduly prejudiced Ventas by suggesting to the jury that the press release indeed contained independently truthful information.

Accordingly, the district court did not err in its instructions regarding the element of causation.

III. Sufficiency of the Evidence

We next turn to the sufficiency of the evidence. HCP contends that the district court erred in denying its motion for judgment as a matter of law on the element of causation under Rule 50(b) of the Federal Rules of Civil Procedure. For the reasons discussed below, we find that the jury verdict on the element of causation was supported by sufficient evidence.

A. Standard of Review

Our case law establishes that "in diversity cases, where the Rule 50(b) motion is based on a challenge to the sufficiency of the evidence, a state-law standard of review applies."[11] *Hartford Fin. Servs. Grp., Inc. v. Cleveland Pub. Library*, 168 F. App'x 26, 30-31 (6th Cir. 2006);

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[11] Our case law is unambiguous on this point, but most if not all of our sister circuits disagree. *See, e.g.*, *Specialty Beverages, L.L.C. v. Pabst Brewing Co.*, 537 F.3d 1165, 1175 (10th Cir. 2008) ("In diversity cases, the substantive law of the forum state governs the analysis of the underlying claims, including specification of the applicable standards of proof, but federal law controls the ultimate, procedural question whether judgment as a matter of law is appropriate."); *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 401 F.3d 901, 906 (8th Cir. 2005); *Fruend v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003) ("We conclude that the district court erred in permitting California law to trump Federal Rule 50."); *Mathis v. Exxon Corp.*, 302 F.3d 448, 453 (5th Cir. 2002); *Ed Peters Jewelry Co., Inc. v. C & J Jewelry Co., Inc.*, 215 F.3d 182, 193 (1st Cir. 2000); *Alfaro v. Wal-Mart Stores, Inc.*, 210 F.3d 111, 114 (2d Cir. 2000); *accord Herron v. S. Pac. Co.*, 283 U.S. 91, 94-95 (1931) (stating that a federal court sitting in diversity is "not subject" to a state rule that a court "shall not direct a verdict, where the evidence is such that a verdict the other way would be set aside"). Our sister circuits appear to have the better view. Although a federal court sitting in diversity applies the substantive law of the forum state, the federal court ordinarily applies its own rules of procedure to adjudicate the dispute. *See, e.g.*, *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442-45 (2010) (citing, *inter alia*, *Hanna v. Plumer*, 380 U.S. 460, 463-64 (1965)). We are bound by prior decisions of this Court that apply a so-called "state law standard" for judgment as a matter of law under Rule 50, but perhaps this Circuit's *en banc* Court will in the future reconsider the issue.

see also In re Brown, 342 F.3d 620, 626 (6th Cir. 2003) (citing *Morales v. Am. Honda Motor Co., Inc.*, 151 F.3d 500, 506 (6th Cir. 1998)). Under Kentucky law,

> a motion for a directed verdict . . . should be granted only if there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable minds could differ. In deciding such a question, every favorable inference which may reasonably be drawn from the evidence should be accorded the party against whom the motion is made.

Morales, 151 F.3d at 506 (internal quotation marks and citations omitted).

B. Application

HCP argues that Ventas presented insufficient evidence of but-for causation, which required Ventas to prove that, "but for HCP's improper interference, Ventas would have acquired Sunrise [ ] at $15 per unit." (Tr.12B at 102-03 (jury instruction).) According to HCP, Ventas failed to prove causation in two principal ways: first, Ventas did not separate the impact of any misrepresentations by HCP from that of any truthful disclosures by HCP; and second, HCP corrected any misrepresentations in the market prior to the unitholder vote on Ventas' offer. We address each argument in turn.

1. Impact of Claimed Truthful Disclosures

In its first argument, HCP contends that Ventas was "required to prove that significantly wrongful conduct—alleged misrepresentations, not truthful disclosures—caused its injury," and that Ventas failed to carry this burden. (HCP Br. at 27-28.) Put another way, HCP asserts that Ventas failed to offer any proof that would allow the jury to separate the impact of any misrepresentations from that of any truthful statements. This is significant, HCP argues, because its February 14, 2007 press release contained the truthful statement that HCP was willing to pay $18.00 per unit for Sunrise. HCP asserts that the unitholders rejected Ventas' initial offer "for the obvious reason that HCP was willing to pay more." (*Id.* at 27.) Investor reliance on such a truthful statement, HCP continues, is insufficient to support the verdict because it cannot amount to "improper interference." (*Id.* at 27-28 (citing Restatement (Second) of Torts § 772(a) & cmt. (b)).)

HCP relies on this Court's decision in *Technology for Energy Corp. v. Scandpower*, 880 F.2d 875 (6th Cir. 1989). In *Scandpower*, we held that the presence of a truthful statement that accompanied a false statement defeated the element of causation in that case because the truthful statement "alone was sufficient to 'doom' [the] bid." *Id.* at 878. HCP argues that this case is analogous to *Scandpower* as "no Sunrise unitholder testified that its vote was affected by any alleged misrepresentation." (HCP Br. at 31.)

We find HCP's argument unavailing. HCP's argument rests on the faulty factual premise that HCP was "willing to pay $18 per unit of Sunrise," and that this stated willingness was independently truthful. (*See id.* at 30.) Indeed, the jury could reasonably have found that HCP made no such statement, and that even if it did, the statement was not independently truthful.

The jury could reasonably have found that HCP never stated that it was "willing" to pay $18.00 per unit. HCP's February 14, 2007 press release merely stated that HCP had "submitted a proposal to acquire the assets of [Sunrise] in a transaction that values each [ ] unit at Cdn$18." (App. at 454-55.) The press release then described the proposed transaction as containing an "acquisition agreement that . . . is otherwise identical to the agreement between Sunrise [] and Ventas." It further stated that HCP was "confident" that it would reach a deal with SSL and that its proposed acquisition of Sunrise had a "greater certainty of completion" than the Ventas transaction. The press release only references the offer of $18.00 per unit as part of an overall "transaction."

Even if the jury found that HCP had stated its willingness to pay $18.00 per unit, the jury reasonably could have also found that such a statement was not truthful. HCP never made an unencumbered assertion that it was willing to pay $18.00 per unit, and the jury could reasonably have found that HCP's announcement of its proposed "transaction" was contaminated by fraud, misrepresentations, and concealment. *See Dennis v. Thomson*, 43 S.W.2d 18, 23 (Ky. 1931) ("[C]ausing a false impression constitutes a palpable fraud, even though the statement is true as far as it goes, since such concealment is in fact a false representation of that which is disclosed, as the whole truth.").

HCP failed to disclose in its February 14, 2007 press release that its offer was conditioned on reaching an agreement with SSL. HCP also failed to disclose that HCP and SSL had previously failed to reach an agreement during the auction process; that HCP and SSL otherwise had a tense relationship that could frustrate future attempts to negotiate an agreement; and that HCP was a party to a Standstill Agreement with Sunrise that may have prohibited HCP from making an offer for Sunrise in the first place. Rather than disclosing these details, HCP misled the market by announcing that the terms of its proposed acquisition of Sunrise were "identical to the transaction entered into by Ventas," and the proposed acquisition itself had "greater certainty of completion."

Moreover, HCP's conduct at the time of its purported offer casts further doubt on the genuineness of its offer. HCP never sent Sunrise a signed, unconditional offer. The purchase agreement that HCP sent to Sunrise made no mention of a condition. Sunrise described HCP's omission of a signature as "unprecedented" (Tr.3A at 47) and tantamount to a "bait and switch." (App. at 456.) When confronted about the missing signature, HCP CEO Flaherty falsely stated to Sunrise's banker that he had sent a signed agreement via Federal Express. Flaherty subsequently admitted, however, that he did not do this and in fact was not authorized by HCP to make an unconditional bid. (Tr.4B at 32-34.) Ventas also presented evidence that HCP stated it was "moving on to other things" in January of 2007 after it was unable to reach an agreement with SSL, and in fact, on February 21, 2007, made a $3.1 billion proposal to buy another company, referred to as "Slough." (Tr.2A at 39; Tr.4B at 96.)

2. Impact of Claimed Corrective Disclosures

HCP next argues that the subsequent disclosures of truthful information about its offer broke the chain of causation as a matter of law. Specifically, HCP asserts that any misrepresentations contained in its February 14, 2007 press release were corrected prior to the unitholder vote on the Ventas deal. HCP cites the testimony of certain unitholders to suggest that unitholders were aware of the conditional nature of the offer shortly after HCP's February 14, 2007 press release. (*See, e.g.*, HCP Br. at 34-35 (citing, *inter alia*, R. 486 at 188-89 (Morgan Stanley).) To the extent that any confusion lingered in the market, HCP notes that the condition was explicitly referenced in a February 19, 2007 press release by Sunrise, and a February 22, 2007 press release by Ventas. (App. at 590, 1228-29.) The proxy statements sent to unitholders on or about March 6, 2007 also discussed the existence of the condition. (*Id.* at 1240-54.)

HCP relies heavily on the market price of Sunrise during the relevant period. After HCP publicly announced its bid, the market price of Sunrise increased from approximately $15.00 per unit to $18.00 per unit, and remained at that approximate price until the unitholders rejected the Ventas deal. HCP notes that Ventas' expert admitted that he failed to find any statistically significant drop in the price of Sunrise after HCP disclosed that its bid was conditional. Because the alleged corrective disclosures had no effect on the stock price, HCP contends that "any alleged misrepresentations either did not mislead or 'were immaterial as a matter of law.'" (HCP Br. at 42 (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997).)

We again find HCP's argument unavailing. The purported corrective disclosures—none of which were made by HCP directly—do not disprove causation as a matter of law. The jury could reasonably have found that any purported corrections were "incomplete and did not neutralize the effect of HCP's fraud on proxy voting that started on March 7." (Ventas Br. at 40.) This would explain why the market price of Sunrise did not fall significantly after the market learned of the existence of the condition, and therefore why HCP's argument fails to show a break in the chain of causation. We note the many reasons that doom HCP's argument on appeal.

First, the public never learned of the difficulties that HCP would likely face in reaching an agreement with SSL and thus in satisfying the condition. Although investors may have come to know of the existence of the conditional nature of HCP's offer, investors never learned the details of the troubled relationship between HCP and SSL, or that HCP's insistence on certain development rights threatened to prevent a deal from materializing as quickly as HCP suggested that it would, if a deal materialized at all. Even if the jury were to credit HCP's argument that it was SSL, not HCP, that caused the breakdown of the original negotiations, the difficult relationship between the parties, regardless of the cause of the difficulty, could likely frustrate future negotiations.

Moreover, to the extent the public learned of the existence of the condition, the jury could reasonably have found that HCP falsely suggested to the market that it would remove the condition. On February 28, 2007, for instance, Flaherty suggested, in a letter to Sunrise that was made public, that HCP might be "willing to remove the closing condition" (App. at 733.) But Flaherty admitted at trial that he did not make an unconditional offer because he was not sufficiently confident that HCP would reach a deal with SSL, and in fact was not authorized to make a binding offer. (*See, e.g.*, Tr.4A at 75.)

Second, Ventas presented evidence that, in the aftermath of HCP's wrongful conduct, investors recognized that Ventas would be forced to raise its bid to complete the transaction so as to avoid injury to its reputation. (*See, e.g.*, *id.* at 101-03, 112; Tr.7B at 18.) This would suggest that the effects of HCP's wrongful conduct lingered in the market because investors sought to capitalize on its effects on Ventas' original offer.

Third, the on-going litigation in Canada was not resolved until approximately two weeks after voting on the Ventas deal had begun. This timeline may have suggested to unitholders that the HCP deal was viable. Because HCP disclosed neither the difficulties it would likely en-counter in reaching an agreement with SSL, nor any other factual barrier to the agreement, the pendency of the Canadian proceedings may explain why Sunrise's unit price did not fall.

Finally, HCP's initial misleading statements changed the unitholder composition of Sunrise, which made approval of Ventas' $15.00 per unit offer highly unlikely. In the 48 hours after HCP announced its offer, over 40 million units of Sunrise changed hands, representing the largest day in the trading history of Sunrise. The evidence suggests that these new unitholders were largely arbitragers from the United States and had little incentive to accept Ventas' $15.00 bid, even after HCP withdrew its offer. As the district court observed, "[t]he jury could reasonably decide that in the absence of this market shift, which it decided was caused by [HCP's] significantly wrongful conduct, [Ventas'] $15 offer would have been approved." (R. 520 at 5.)

HCP asserts "those new unitholders could not have affected the outcome of the vote" because the four largest unitholders "by themselves cast more than sufficient votes to defeat Ventas'[ ] offer." (HCP Br. at 45-46 (emphasis omitted).) But Ventas presented evidence that its initial offer of $15.00 was a good price to the unitholders and was recognized as such by the market and certain institutional unitholders. (*See, e.g.*, R. 482 at 102-03 (testimony of representative from Caisse, the largest Canadian unitholder, that he would have initially recommended approval); Tr.7A at 87-95 (testimony of Ventas' expert, opining that the Ventas offer had a 95% expectation of approval).) To the extent HCP cites competing testimony, the jury was not compelled to credit this speculative testimony, particularly in light of Ventas' evidence suggesting the opposite. Moreover, Ventas presented evidence that the institutional investors never learned of the obstacles that might prevent the condition from being realized, namely the difficult relationship between HCP and SSL. Such knowledge alone could have caused the unitholders to doubt the viability of the HCP offer and thus vote in favor of the Ventas deal. Institutional investors, for instance, testified that they believed a deal with HCP might still be viable even after HCP withdrew its bid. (*See, e.g.*, Tr.3A at 78.)

In light of the totality of the evidence presented at trial, the jury arrived at a reasonable conclusion regarding the element of causation. The jury had sufficient evidence to find that HCP's "improper interference" caused injury to Ventas. Accordingly, we find that Ventas presented sufficient evidence to support a jury finding of causation, and **AFFIRM** the decision of the district court on that basis.

IV. Summary

For the reasons set forth above, we **AFFIRM** the judgment of the district court in the amount of $101,672,807.00 in favor of Ventas. Although the case shall be remanded, as discussed below, we find no reason to disturb the final judgment previously entered on the original jury verdict. Accordingly, the judgment as previously entered by the district court shall constitute a final partial judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 54(b) ("[T]he court may direct entry of a final judgment as to one or more, but fewer than all, claims . . . if the court expressly determines that there is no just reason for delay.").

DISCUSSION—CROSS-APPEAL BY VENTAS

As an initial matter, we note HCP's argument that Ventas has waived the issues it raises on cross-appeal because Ventas' arguments are "based largely on cryptic assertions and unexplained citations." (HCP Rep. at 43 (citing *El-Moussa v. Holder*, 569 F.3d 250, 257 (6th Cir. 2009).) Although Ventas' briefing left much to be desired, we nonetheless find that the issues raised by Ventas on cross-appeal are properly presented.

We now turn to those issues. Ventas challenges the judgment below on the basis that the district court erroneously precluded it from recovering additional damages. Specifically, Ventas argues that the district court erred by: 1) refusing to submit the issue of punitive damages to the jury; 2) converting its damages from Canadian to U.S. dollars based on the exchange rate as of the date of injury, rather than the date of judgment; 3) precluding Ventas from seeking compensatory damages based on increased financing costs and currency market fluctuations; and 4) declining to award prejudgment interest.

As explained below, we conclude that the district court erred by not submitting the issue of punitive damages to the jury, therefore requiring us to **REVERSE** the decision below as to punitive damages, and **REMAND** for further proceedings. We **AFFIRM** in all other respects.

I. Punitive Damages

Ventas argues that there was sufficient evidence of fraud to submit the issue of punitive damages to the jury. The district court disagreed and granted judgment as a matter of law to HCP on the issue of punitive damages.[12]

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[12] Although the issue was presented to the district [court] in a motion *in limine* filed by HCP, the disposition of the motion is properly reviewed as one for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure. Both parties agree. (R. 439; HCP Mot. at 4 (noting that the district court previously "granted a directed verdict on punitive damages"); Ventas Rep. at 5-

See Fed. R. Civ. P. 50(a). Upon review, we conclude that the district court erred in granting judgment as a matter of law in this instance.

A. Standard of Review

"The question of whether there was sufficient evidence to support a punitive damages award is a question of law, which we review de novo." *Virostek v. Liberty Twp. Police Dep't*, 14 F. App'x 493, 508 (6th Cir. 2001). Because we are sitting in diversity, "we use the standards for a judgment as a matter of law applicable under the law of the forum state." *Dewit v. Morgen Scaffolding, Inc.*, 78 F.3d 584 (6th Cir. 1996) (table); *see also Estate of Riddle ex rel. Riddle v. S. Farm Bureau Life Ins. Co.*, 421 F.3d 400, 407-08 (6th Cir. 2005); *Arms v. State Farm Fire & Cas. Co.*, 731 F.2d 1245, 1248 (6th Cir. 1984). As we have explained:

> Under Kentucky law, a motion for a directed verdict—the same thing as a motion for judgment as a matter of law under Rule 50(a)—should be granted only if there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable minds could differ. In deciding such a question, "every favorable inference which may reasonably be drawn from the evidence should be accorded the party against whom the motion is made.

Estate of Riddle, 421 F.3d at 408 (quoting *Adam v. J.B. Hunt Transp., Inc.*, 130 F.3d 219, 231 (6th Cir. 1997))

8.) HCP's motion was based on an argument of insufficient evidence, and the district court granted the motion during trial on that basis. *See* Fed. R. Civ. P. 50(a) (providing that a district court may grant judgment as a matter of law on any issue for which it finds that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.").

(internal quotation marks, citations, and alterations omitted).

B. Punitive Damages Under Kentucky Law

Before turning to the evidentiary record, we outline the applicable legal standard governing punitive damages under Kentucky law. Kentucky has long-recognized the availability of punitive damages in tort actions. *See, e.g.*, *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 388 (Ky. 1985) (collecting cases); *Engleman v. Caldwell & Jones*, 47 S.W.2d 971, 972 (Ky. 1932).

In 1988, Kentucky abrogated the common law of punitive damages with the enactment of Kentucky Revised Statute ("K.R.S.") §§ 411.184, *et seq*. The statute defines punitive damages as those "damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future." K.R.S. § 411.184(1)(f); *see also Young v. Vista Homes, Inc.*, 243 S.W.3d 352, 366-76 (Ky. Ct. App. 2007). The party seeking punitive damages "shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud, or malice." K.R.S. § 411.184(2).

Here, Ventas seeks punitive damages on the sole basis of fraud. Under the statute, "[f]raud means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff." K.R.S. § 411.184(1)(b). This standard appears similar to that required to impose tort liability for fraud under Kentucky law, which requires a showing of the following by clear and convincing evidence:

> (a) material representation; (b) which is false; (c) known to be false or made recklessly; (d) made

> with inducement to be acted upon; (e) acting in reliance thereon; and (f) causing injury.

Rickert, 996 S.W.2d at 468; *see also Miller's Bottled Gas, Inc. v. Borg-Warner Corp.*, 817 F. Supp. 643, 646 (W.D. Ky. 1993).

Additionally, although not expressly stated in the statute, Kentucky law requires a plaintiff seeking punitive damages to prove that the relevant actions of the defendant were the proximate cause of the resulting injury to the plaintiff. *See, e.g.*, *Jackson v. Tullar*, 285 S.W.3d 290, 297 (Ky. Ct. App. 2007).

C. Application

Based on the applicable law, the issue we confront is whether sufficient evidence exists that 1) HCP "acted towards Ventas" with fraud; 2) HCP had the "intention of causing injury" to Ventas; and 3) HCP's fraud proximately caused Ventas' injury. *See* K.R.S. § 411.184(1)(b); *Jackson*, 285 S.W.3d at 297. Viewing the evidence in the light most favorable to Ventas, as we must in reviewing this issue, we find that the issue of punitive damages should have gone to the jury.[13] *See Estate of Riddle*, 421 F.3d at 410 (remanding case for trial on punitive damages).

The record is replete with evidence of intentional misrepresentations, deceit, and/or concealment of material facts by HCP. *See Rickert*, 996 S.W.2d at 468 (noting the following as relevant to a finding of fraud: "character of the testimony, the coherency of the entire case as well as the documents, circumstances and facts presented"); *Cintas Corp. v. Sitex Corp.*, No. 2005-CA-002377, 2005-

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[13] In light of our holding, we need not consider Ventas' argument that the district court applied an erroneous legal standard as to the availability of punitive damages under Kentucky law.

CA-002415, 2007 WL 3226984, at * 1 (Ky. Ct. App. Nov. 2, 2007) (upholding punitive damage award on tortious interference claim between competitors).

We begin by noting the testimony of Michael Warren, the Chairman of Sunrise. Warren testified that after being approached by HCP about its interest in making a topping bid, Warren requested that HCP not make its bid public and instead engage in confidential negotiations. When HCP refused, Warren was "flabbergasted" and "surprised." (Tr.3A at 35-36.) This was the "first time" Warren had ever known a participant in a confidential auction process to make an unauthorized public bid. (*Id.* at 35.) Warren also testified that Flaherty falsely stated to Sunrise that Flaherty had sent a signed, unconditional offer to Sunrise. Flaherty admitted at trial that he was not authorized to make an unconditional bid.

Moreover, as discussed *supra* pages [35a-44a], the jury could reasonably conclude, based on the evidence, that HCP's February 14, 2007 press release was contaminated by fraudulent misrepresentations, and concealment. *See Anderson v. Wade*, 33 F. App'x 750 (6th Cir. 2002) (upholding punitive damages award under Kentucky law, where defendant intentionally concealed material facts and made material misrepresentations in the sale of land). Without repeating our entire discussion, we again note that HCP's announcement of its purported offer of $18.00 per unit failed to disclose material facts known to HCP, including: 1) that its offer of $18.00 per unit was conditional on HCP reaching an agreement with SSL; 2) that HCP's prior experiences with SSL suggested that it would be difficult for HCP and SSL to reach an agreement; and 3) that HCP was a party to a Standstill Agreement that likely prohibited its public offer. (*See, e.g.*, Tr.2B at 89 (testimony of Sunrise's independent investment banker, stating that HCP's 2/14/07 press release was "misleading"). HCP instead misrepresented that its offer was largely "identical" to that made by Ventas, and that the HCP transaction had a "greater certainty of completion." HCP never corrected the record directly, and in fact maintained that its offer was superior. (*See, e.g.*, Tr.5A at 25-27.) Flaherty admitted that he was not sufficiently "confident" of reaching an agreement with SSL to make an unconditional bid. (Tr.4B at 64.)

We also believe that a reasonable jury could conclude that HCP engaged in its fraudulent conduct with the intention of inflicting harm on Ventas. Indeed, as we discussed, *supra* at pages [35a-44a], HCP's conduct suggests that its purported offer of $18.00 per unit was not genuine: the purported offer was not signed, which a knowledgeable witness described as "unprecedented" (Tr.3A at 47); HCP's CEO informed Sunrise that he had sent a signed contract to Sunrise, when in fact he had not; and HCP's CEO admitted that he was not authorized to make an unconditional bid for Sunrise. As Sunrise's CEO testified at trial about his experience with HCP:

> after you've been through all of that, you know, the conclusion that you come to as a business person is that these people are not real, they are not reliable, and so we were not going to attach our star to HCP.

(*Id.* at 82.) In fact, a financial advisor from Sunrise testified that, in January of 2007, HCP CEO Flaherty declined an offer of additional time to attempt to reach an agreement with SSL, stating that HCP was "moving on to other things." (Tr.2A at 39.)

HCP's investment banker reported to his colleagues that, although HCP remained focused on acquiring Sunrise, "at a minimum, they plan on causing the other side to have to pay more." (App. at 362.) HCP's CEO code-named its topping bid strategy as "project show me what you got, yoe mama," referring to the female CEO of Ventas. (Tr.4B at 126.) HCP believed that it would be "hosed" if Ventas acquired Sunrise (*id.* at 156), as it might allow Ventas to "catch" HCP in the marketplace. (*Id.* at 102.) Sunrise's CEO testified at trial that he did not believe HCP's offer for Sunrise to be bona fide, and suggested that HCP's bid "drove up the market . . . and killed the $15 bid." (Tr.3A at 81.) A managing director of ING, one of the largest unitholders, testified about the possibility that HCP had used ING to cause Ventas to pay more for Sunrise. (R. 487 at 146.) A senior executive of HCP suggested that it "would be okay if she ended up in 17.50." (Tr.5A at 135-37.)

Finally, based on the evidence, a reasonable jury could conclude that HCP's fraud was the proximate cause of Ventas' injury. The jury found that HCP's tortious interference caused Ventas to pay an additional $1.50 per unit of Sunrise beyond its initial offer of $15.00 per unit. Although Sunrise units were trading at approximately $15.00 per unit after Ventas announced its proposed acquisition, the price per unit increased by 20% to approximately $18.00 per unit after HCP made its unauthorized public offer on February 14, 2007. The price would never return to $15.00 per unit, and Ventas would eventually raise its offer to $16.50 per unit to complete the acquisition.

If the question had been presented to the jury, the jury could reasonably have found that it was the fraudulent character of HCP's conduct that proximately caused the injury to Ventas. As discussed above, the evidence suggests that HCP's public announcement of its offer was more than a simple breach of its Standstill Agreement with Sunrise, but instead was a fraudulent act designed to mislead the market and harm Ventas. The fraud contained in the February 14, 2007 press release caused the market price of Sunrise to increase from $15.00 to $18.00. The jury could reasonably have found that absent the fraudulent character of HCP's public announcement, the market price of Sunrise would not have increased, or would not have increased as dramatically. Additionally, the jury could have reasonably found that HCP never directly corrected its fraud, allowing some if not all of the effects of the fraud to linger in the market and continue to operate against Ventas.

This is not a case where the alleged fraud by the defendant was collateral to the plaintiff's injury. For instance, in *Hardaway Management v. Southland*, 977 S.W.2d 910, 916-17 (Ky. 1998), the Kentucky Supreme Court denied recovery of punitive damages in a wrongful termination action under a state employment law. The only evidence of fraud was a termination letter from the employer that falsely stated the reasons for the plaintiff's termination. *Id.* at 916. The court disallowed punitive damages because the false statements did not cause any injury to the plaintiff. *Id.* at 917. The court reasoned that even if the statements "were intended to prevent [the plaintiff from] recovering damages for her wrongful discharge, they failed in their intended effect." *Id.*

Unlike *Hardaway Management*, HCP's alleged fraud in this case was the direct cause of Ventas' injury. Simply put, the jury could reasonably find that the fraud itself was the primary vehicle by which HCP inflicted injury on Ventas. Absent the intentional misrepresentations, deceit, and/or concealment by HCP, which we detail above, the market may well have reacted less favorably to HCP's purported offer of $18.00 per unit, or may perhaps have dismissed HCP's offer altogether. *Cf. Bierman v. Klapheke*, 967 S.W.2d 16, 19-20 (1998) (upholding punitive damages award, where the fraudulent acts exacerbated any injury that may have occurred).

In light of the evidence presented at trial, we believe it was error for the district court to prevent the jury from considering an award of punitive damages. Accordingly, we **REVERSE** the decision of the district court as to punitive damages, and **REMAND** with instructions that the matter proceed to trial on the single issue of punitive damages. *See Estate of Riddle*, 421 F.3d at 410 (remanding case for trial on punitive damages). On remand, the district court shall be guided in part by K.R.S. § 411.186, which sets forth numerous factors that the jury "should consider" if the jury decides to award punitive damages.

II. Applicable Exchange Rate

Ventas appeals the district court's decision to apply the U.S./Canadian exchange rate as of the date of injury, rather than the date of judgment. Because the decision of the district court rests on an interpretation of state law, we review *de novo*. *See Competex, S.A. v. Labow*, 783 F.2d 333, 334 (2d Cir. 1986) (stating that "[b]ecause determination of the date on which to convert a foreign currency debt into dollars is a substantive question," federal courts sitting in diversity will apply state law).

In the proceedings below, the parties disputed the exchange rate applicable to Ventas' damages. Ventas sought to apply the exchange rate as of the date of judgment, while HCP sought to apply the exchange rate as of the date of injury. The district court agreed with HCP, and held that "[t]he proper exchange rate for Ventas'[ ] damages is determined on the date of injury," which was April 26, 2007, the date that the Sunrise unitholders approved Ventas' revised offer of $16.50 per unit. The district court relied upon the rule set forth in two older Supreme Court cases, that if the cause of action arises under U.S. law, then the conversion date is the date of injury. *See, e.g.*, *Die Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517 (1926); *Hicks v. Guinness*, 269 U.S. 71 (1925).

On appeal, Ventas argues that the district court should have used the date of judgment exchange rate. Ventas contends that the Supreme Court cases cited by the district court are not controlling because "state law governs the appropriate currency rate in diversity cases." (Ventas Br. at 71.) Ventas asserts that Kentucky would follow the commentary to § 823 of the Restatement (Third) of Foreign Relations Law (1987), which states that "if the foreign currency has appreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of judgment or the date of payment." Restatement (Third) of Foreign Relations Law § 823, cmt. (c).

Although no Kentucky law is on point, we find that the district court correctly predicted that Kentucky would select the exchange rate from the date of injury. Nothing in Kentucky jurisprudence suggests that the state would rely on a comment to the Restatement (Third) of Foreign Relations, particularly in the face of Supreme Court precedent to the contrary. *See, e.g.*, *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 852-53 (6th Cir. 2002) (predicting that the Kentucky Supreme Court would reject a certain rule because, among other reasons, the U.S. Supreme Court had done so); *accord Siematic Mobelwerke GmbH & Co. KG v. Siematic Corp.*, 669 F. Supp. 2d 538, 542 (E.D. Pa. 2009) ("In the absence of pertinent state law precedent, federal courts in diversity suits have frequently adopted the federal approach.") (collecting cases from courts applying the laws of Minnesota, Illinois, Colorado, Missouri, Tennessee, and Florida); *Elite Entm't, Inc. v. Khela Bros. Entm't, Inc.*, 396 F. Supp. 2d 680, 694 (E.D. Va. 2005) ("Courts generally agree that the judgment day interest rate is relevant only when the cause of action arises entirely under foreign law.") (predicting Virginia law).

Furthermore, because the purpose of compensatory damages is to make the victim whole, selecting the date of injury for purposes of the exchange rate would better approximate the damage sustained by the victim since such an approach looks to the point at which the victim was injured.[14] The date of judgment is merely an arbitrary and speculative future date that is determined by variables unrelated to the underlying injury, including litigation posturing and docket pressures. Setting the currency conversion rate as of the date of injury provides for greater certainty in economic relationships, allowing market players to more accurately assess their risks. It also prevents bad faith attempts to, for instance, delay the entry of judgment to engage in currency speculation.

Accordingly, we **AFFIRM** the district court decision to apply the date of injury rule for currency conversion as a matter of Kentucky law.

III. Compensatory Damages

Ventas appeals the district court's decision to deny Ventas recovery of certain claimed compensatory dam-

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[14] In this regard, we note that Kentucky provides for prejudgment interest in many cases, which is intended to compensate the plaintiff for any delay in obtaining relief. *See, e.g.*, *Curtis v. Campbell*, 336 S.W.2d 355, 361 (Ky. 1960) ("[E]quity and justice demand that one who uses the money or property of another for his own benefit, particularly in a business enterprise, should at least pay interest for its use in the absence of some agreement to the contrary.").

ages. Specifically, the district court precluded Ventas from recovering: 1) "the increased cost in U.S. dollars for the $15.00 component of the purchase price on April 26, 2007 as compared to the April 2, 2007 contracted-for closing date;" and 2) "the loss suffered by Ventas because HCP's improper interference delayed Ventas'[ ] planned equity raise to finance the acquisition." We now **AFFIRM.**

A. Legal Standard for Compensatory Damages Under Kentucky Law

We briefly review the applicable law governing compensatory damages. Under Kentucky law, a successful tort plaintiff may recover compensatory damages arising from the defendant's tortious conduct. The existence of these damages must be proved to a "reasonable certainty." *See, e.g.*, *Morgan v. Lanham*, No. 2008-CA-001412, 2011 WL 918735, at *18 (Ky. Ct. App. Mar. 18, 2011) (emphasis omitted).

Additionally, the defendant's tortious conduct must be the proximate cause of the damages. As the Kentucky Supreme Court has explained, "[p]roximate cause . . . consists of a finding of causation in fact, i.e., substantial cause," as well as legal causation, meaning "the absence of a public policy rule of law which prohibits the imposition of liability." *Deutsch v. Shein*, 597 S.W.2d 141, 144 (Ky. 1980). With regard to legal causation, Kentucky courts look to foreseeability: "it is not necessary that the defendant should have been able to anticipate the precise injury sustained, or to foresee the particular consequences, but only that the injury is a natural and probable consequence" of the tortious conduct. *Louisville Gas & Elec. Co. v. Roberson*, 212 S.W.3d 107, 112 (Ky. 2006) (Wintersheimer, J., concurring) (citing *Eaton v. Louisville & N. R. Co.*, 259 S.W.2d 29 (Ky. 1953)); *see also Pile* *v. City of Brandenburg*, 215 S.W.3d 36, 42 (Ky. 2006) (noting that an intervening cause may break the chain of causation if it is of an "independent origin, unassociated" with the underlying tortious conduct).

B. Increased Costs to Finance Acquisition Due to Delay

Ventas first argues that it is entitled to "damages from the increased cost of financing the transaction." (Ventas Br. at 74.) Ventas explains as follows:

> HCP's deceptive press release forced Ventas to delay, from February 22[, 2007] to May 18, 2007, its planned sale of equity to finance the acquisition. As a result, Ventas incurred substantially higher financing costs as its stock value declined.

(*Id.* at 72.) The district court granted summary judgment for HCP on this claim.

We review the district court's grant of summary judgment *de novo*. *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 792 (6th Cir. 2009). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, "show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a).

The district court acknowledged that "HCP's topping bid delayed any plan Ventas may have had to issue shares in February[of 2007]," but granted summary judgment because it found no evidence that "establishes an actual date for issuing shares." The district court reasoned that the "evidence does not suggest that HCP knew of any actual plan by Ventas[ ] to issue equity in this transaction, [n]or does any evidence suggest that HCP would know the timing on that issuance."

Therefore, the district court found, "Ventas'[ ] issuance of shares was not clearly foreseeable." The district court also held that HCP's "acts [were] not substantial factors in bringing about the harm" for which Ventas seeks compensation, and that "Ventas received full market value for the shares when issued."

On appeal, Ventas argues that it "presented ample evidence that it planned to raise equity in late February 2007 to finance the acquisition." Ventas cites, with little explanation, an affidavit from its CEO; a presentation to the Ventas Board; and correspondence about a planned $1 billion equity raise. (Ventas Br. at 73-74 (citing App. at 748-50, 844-46; R. 193, Ex. 65 ¶¶ 4-6, 9 & Ex. C).) Ventas also notes that it was "hell bent" on proceeding with an equity raise. (*Id.* at 74 (citing record evidence).) Additionally, Ventas argues that the record contains "ample evidence of foreseeability," and cites: 1) a January 17, 2008 analysis from HCP's investment bankers "showing that Ventas would finance the acquisition through $1.059 billion of 'New Common Equity Issued;'" (*id.* (citing App. 366, R. 193, Ex. 104)); and 2) the testimony of HCP's CEO, stating that he expected Ventas' stock price to decline after HCP's public offer. (*Id.* (citing Tr.4B at 154).)

Having reviewed the record, we find that the district court properly granted summary judgment for HCP on this claim for damages. Kentucky law "does not tolerate uncertainty as to the fact of damage," *Lanham*, 2011 WL 918735, at *18 (emphasis omitted), and as such, Ventas must show, with a "reasonable certainty," that it sustained damages in the first instance. *See id.* Based on our review of record, we conclude that no reasonable jury could find, with any reasonable certainty, that Ventas had decided to conduct an asset sale to take place at any particular time. Without the record supporting such a finding, Ventas' claim for damages arising out of the timing of its claimed asset sale fails as a matter of law.

The evidence relied upon by Ventas in support of this claim for damages is wholly speculative and does not purport to identify a planned date for the equity offering. (*See, e.g.*, App. at 844 ("considering asset sales"); *id.* at 1387 ("examining a number of different options").) In fact, Ventas' CEO acknowledged in an email that the planned equity raise could well occur after February 22, 2007: she stated on February 3, 2007 that Ventas seeks "maximum flexibility to hit the market for debt and/or equity securities (which *might even* be prior to the closing)," then scheduled for April 2, 2007. (*Id.* at 750 (emphasis added).)

Accordingly, we **AFFIRM** the grant of summary judgment for HCP on Ventas' claim for damages due to a claimed delay in its equity raise.

C. Increased Costs of the Original $15.00 Purchase Price in U.S. Dollars

Ventas next argues that it is entitled to damages based on the "increased cost of the original $15.00 purchase price in U.S. dollars," as a result of exchange rate fluctuations in the international currency markets. (*See* Ventas Br. at 69.) Ventas explains as follows:

> Ventas cont[r]acted to acquire Sunrise on April 2, 2007 for $15 per share, a total of C$1,137,712,410 . . . plus assumption of Sunrise's debt. HCP's interference forced Ventas to delay the closing to April 26[, 2007]. By April 26, 2007, the value of the U.S. dollar declined against the Canadian dollar from .89366 to .86565. The C$1,137,712,410 price cost $31,867,325 more in U.S. dollars on April 26[, 2007] than on April 2[, 2007].

(*Id.* (internal record citations omitted).)

In an August 27, 2009 oral ruling, the district court denied Ventas' claim for this measure of damages. The court reasoned that Ventas did not have an "expectancy that could be proven to acquire the company on a specific date and certainly not at a particular value of the Canadian dollar." (Tr.7A at 28.) Rather, the district court held, Ventas' "expectancy was to purchase the company at $15 Canadian." (*Id.* at 50.) The district court also noted that "the risk of currency changes is a risk everybody faced." (*Id.*)

Ventas makes two arguments on appeal. The first is factual, that whether Ventas had a contractual expectation that the acquisition would close on April 2, 2007 is "a fact issue for the jury." (Ventas Br. at 69.) The second is legal, that "a decline in currency value is a direct and foreseeable consequence of a delay in contractual performance and is compensable." (*Id.* (citing *Walther & Cie v. U.S. Fid. & Guar.*, 397 F. Supp. 937, 945 (M.D. Pa. 1975).) Ventas contends that the tortfeasor "should bear the risk of fluctuations in market prices during a period of delay caused by its wrongful conduct." (*Id.* (citing *Payne v. Wood*, 62 F.3d 1418 (6th Cir. 1995) (table).) Additionally, Ventas argues that "the increased currency cost was part of Ventas'[ ] reasonable costs to mitigate its loss by extending the shareholder vote on approval of the deal at $16.50." (*Id.* (citing *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1237-38 (10th Cir. 2006); Restatement of Torts § 919).)

We reject Ventas' arguments and affirm the decision of the district court. As an initial matter, we agree with the district court that, as a matter of law, Ventas "did not have a contractual expectancy" to acquire Sunrise "on a specific date and certainly not at a particular value of the

Canadian dollar." (Tr.7A at 28.) The sole claim at trial was for tortious interference with a prospective advantage, which by its terms requires the plaintiff to prove an expectancy with which the defendant tortiously interfered. "The right to recover . . . consequential damages can hardly be divorced from the tort that allegedly caused them," *QSI-Fostoria D.C., LLC v. Gen. Elec. Cap. Bus. Asset Funding Corp.*, 389 F. App'x 480, 486 (6th Cir. 2010), and as the district court aptly noted:

> It seems to me that in the tort of the expectancy . . . the expectancy sued upon is the expectancy to purchase the company, to acquire the company, and to acquire the company at 15. I don't think there was an expectancy that could be proven to acquire the company on a specific date and certainly not at a particular value of the Canadian dollar. So I think that in terms of the tort of tortious interference with business expectancy, that expectancy that I have been defining it is to acquire the company at 15.

It is undisputed that Ventas voluntarily obligated itself in the Purchase Agreement to acquire Sunrise, a Canadian company, at a fixed amount of Canadian dollars. (App. at 281.) The Purchase Agreement with which HCP tortiously interfered did not address the risk of currency fluctuations. Ventas cites to no evidence that it selected April 2, 2007 as the original closing date because of any expectation that the exchange rates would be of a certain value. Because Ventas' underlying tort claim alleges interference with an agreement completely divorced from the international currency markets, Ventas' instant claim for damages fails as a matter of law. *Cf. Humphrey*, 272 U.S. at 519 ("A suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here.").

Moreover, any subjective expectation that Ventas had of closing the deal on April 2, 2007 was destroyed by its own actions. On March 24, 2007, Ventas sent a letter to Sunrise in which it expressly "waive[d] its right" under the Purchase Agreement to insist that [ ] Sunrise convene a unitholder meeting by March 31, 2007, which would permit the closing to occur on April 2, 2007. (App. at 1294-95.) Ventas instead requested that Sunrise postpone the unitholder meeting until April 11, 2007, so that the parties could update proxy materials to: 1) disclose that Sunrise's "financial performance in the fourth quarter is materially worse than street estimates;" and 2) describe the decision of the Ontario Court of Appeal. The letter explained that "Ventas believes that it would be appropriate to give Unitholders 10 business days after release of the financial and other information described [in the letter] to evaluate such information." (*Id.* at 1295.)

Furthermore, although Kentucky courts have not addressed the question, we believe that Kentucky law would deny recovery of compensatory damages arising from currency market fluctuations wholly unrelated to the defendant's conduct. These damages are unforeseeable. *See, e.g.*, *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 83 P.3d 322, 344-45 (Or. 2004) (holding that claimed damages caused by market forces during a delay caused by a defendant were unforeseeable as a matter of law). Ventas offers no citation to anything in the record to suggest otherwise. (Ventas Br. at 69-70; Ventas Rep. at 18-21.)

We considered a similar issue in *Layne v. Bank One, Kentucky, N.A.*, 395 F.3d 271 (6th Cir. 2005) (applying

Kentucky law). In *Layne*, two individuals obtained a loan from a bank that was secured by their pledge of shares of stock in an internet company as collateral. The internet bubble burst in February of 2001, and as a result, the value of the collateral substantially declined. The loans eventually went into default, after which the debtors discussed with the bank either paying down the balance, or pledging additional collateral, rather than have the bank liquidate the collateral. The discussions were unsuccessful, and the bank liquidated the shares for a fraction of their former price.

The debtors brought a diversity action in federal court against the bank alleging, among other things, breach of a duty under Kentucky law to preserve the value of their collateral. The district court granted summary judgment to the bank on this claim, and we affirmed. We held, as a matter of Kentucky law, that the duty of preservation does not extend to protecting against market declines. *Id.* at 276. The investment risk, we held, is properly placed on the borrower "given the volatility of the stock market." *Id.* at 277 (internal quotation marks and citation omitted). We then set forth a general rule that stock market fluctuation is unforeseeable as a matter of law, where the defendant has no knowledge of a pre-defined event that will impact the value of the security. *See id.* at 277 n.7 (internal quotation marks and citations omitted).

The same reasoning applies with equal force to the present case. The risk of market fluctuations is an uncontrollable, background risk that lurks in every commercial transaction. *See, e.g.*, *In re Callister*, 15 B.R. 521, 533 (Bankr. D. Utah 1981) (stating that a market player is "at the mercy of events beyond its control"). More importantly, the risk is constant, and no more affects a plaintiff on one day rather than the next. Although the risk may have enured to Ventas' detriment in this case, Ventas "could have received a windfall had the fluctuation differed." *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 714 (9th Cir. 1992).

We believe that it is only when a defendant's conduct is connected to the movements in the markets, or the defendant has knowledge of a pre-determined future event, that Kentucky courts will permit recovery of consequential damages arising from market fluctuations.[15] *See Layne*, 395 F.3d at 276-77 & n.7. *Cf. Burstyn v. Worldwide Xceed Grp., Inc.*, No. 01 CV 1125, 2002 WL 31191741, at *6 (S.D.N.Y. Sept. 30, 2002) (holding, in the securities law context, that "the misrepresentations, and not the market forces behind the dot com collapse, must be the proximate cause of plaintiffs' injuries"). Here, it is undisputed that HCP's tortious conduct was not directed at the currency markets; Ventas makes no allegation that HCP's tortious conduct in any way affected the U.S./Canadian dollar exchange rate. HCP's conduct simply "provide[d] the occasion by which the injury was made possible." *Clay v. Chesapeake & O. Ry. Co.*, 239 S.W.2d 231, 232 (Ky. 1951).

Accordingly, we **AFFIRM** the grant of judgment as a matter of law for HCP on Ventas' claim for damages on account of fluctuations in the currency markets.

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[15] Our prediction about Kentucky law on this point comports with the general rule that, "'[w]hen given a choice between an interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability, we should choose the narrower and more reasonable path.'" *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 577 (6th Cir. 2004) (quoting *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1412 (7th Cir. 1994) (en banc)).

IV. Prejudgment Interest

Ventas appeals the denial of its Rule 59(e) motion for an award of prejudgment interest under state law. Because the Court is sitting in diversity, prejudgment interest is governed by state law. *See Conte v. Gen. Housewares Corp.*, 215 F.3d 628, 633 (6th Cir. 2000). We review the denial of a Rule 59(e) motion for an abuse of discretion. *See U.S. Fire Ins. Co. v. City of Warren*, 87 F. App'x 485, 493 (6th Cir. 2003). As applied to prejudgment interest, a district court abuses its discretion if it declines to award prejudgment interest that is mandatory under state law. *See id.*

"Under Kentucky law, if the claim is liquidated, interest follows as a matter of right, but if it is unliquidated, the allowance of interest is in the discretion of the trial court." *Hale v. Life Ins. Co. of N. Am.*, 795 F.2d 22, 24 (6th Cir. 1986). As the Kentucky Supreme Court has explained:

> Precisely when the amount involved qualifies as "liquidated" is not always clear, but in general "liquidated" means "made certain or fixed by agreement of parties or by operation of law." Common examples are a bill or note past due, an amount due on an open account, or an unpaid fixed contract price.

Nucor Corp. v. Gen. Elec. Co., 812 S.W.2d 136, 141 (Ky. 1991).

The district court in the instant case correctly concluded that Ventas' claim is unliquidated and therefore Ventas was not entitled to prejudgment interest as a matter of right. Although, as Ventas argues, the jury may have resorted to "simple arithmetic" to calculate damages in this case, Kentucky law is clear that "in determining if a claim is liquidated or unliquidated, one must look at the nature of the underlying *claim*, not the final award." *3D Enters.[] Contracting Corp. v. Louisville & Jefferson Cnty. Metro. Sewer D[ist].*, 174 S.W.3d 440, 450 (Ky. 2005) (emphasis in original).

The value of Ventas' underlying tort claim was neither "agreed upon by the parties [nor] fixed by operation of law or the parties." *Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co.*, 598 F.3d 257, 275 (6th Cir. 2010). Indeed, Ventas sought to recover damages beyond the $1.50 per unit increase in its offer, and, as the district court explained, the jury was free under the applicable law to award Ventas less than $1.50 per share if it found that Ventas could have offered a lower price to acquire Sunrise. (Tr. 11B at 17); *see also Prosoft Automation, Inc. v. Logan Aluminum*, No. 03-CV-142, 2006 WL 1228773, at *2 (W.D. Ky. Apr. 28, 2006) ("[A]lthough the jury ultimately awarded Prosoft the full amount requested as compensation for [certain hours worked,] they were not reduced to a certainty in amount *prior to trial*.") (emphasis in original).

Accordingly, the district court's denial of an award of prejudgment interest to Ventas is **AFFIRMED.**[16]

V. Summary

For the reasons set forth above, the grant of judgment as a matter of law on the issue of punitive damages is **REVERSED**, and the case is **REMANDED** with instructions that the matter proceed to trial on the single

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[16] Ventas argues only that it was entitled to prejudgment interest as a matter of law. Ventas makes no argument that the district court should have, in the exercise of its discretion, awarded prejudgment interest. For this reason, we need not consider whether the district court erred in not doing so, although even if we were to consider the issue, nothing in the record suggests an abuse of discretion. *See Travelers Prop. Cas. Co. of Am.*, 598 F.3d at 276.

issue of punitive damages. The remaining decisions of the district court discussed herein are **AFFIRMED**.

CONCLUSION

For the reasons discussed above, the judgment of the district court is **AFFIRMED**, but the district court's decision to preclude Ventas from seeking punitive damages is **REVERSED**, and the case is **REMANDED** for a trial solely on the question of punitive damages. The judgment of the district court as previously entered by the district court on September 8, 2009 shall stand as a partial final judgment under Rule 54(b) of the Federal Rules of Civil Procedure.[17]

CONCURRENCE

MERRITT, Circuit Judge, concurring.

I agree with the result and much of the reasoning of Judge Clay's well-written opinion in this case, but I do not concur in the language of footnote 17 suggesting that counsel for both parties have "flouted the rules" and

[17] In light of the disposition of this appeal, HCP's motion to strike three paragraphs of Ventas' Reply Brief is **DENIED as moot**. We feel compelled, however, to note that the parties have filed nearly 100 pages of additional argument on this issue, complete with a panoply of uninvited conditional briefing that culminated in a sur-reply. Surely scores if not hundreds of attorney hours were devoted to this completely collateral and immaterial issue. We have not been asked to consider the reasonableness of counsels' time or actions in litigating this motion, but will simply note that counsels' conduct speaks for itself. We also will note, as we did at oral argument, that counsel for both parties have flouted the rules of this Court by filing *numerous* unauthorized letters, responses, and replies under the guise of Rule 28(j), but that contain additional argumentation not properly authorized under Rule 28(j), which only permits a party to advise the Court of supplemental authority under specified conditions. We trust that counsel will review the rules of this Court should counsel have occasion to appear before us in the future.

improperly run up the number of hours spent on the case. As a matter of fairness, I would not draw those inferences without knowing the details of counsel's work and charges and without giving counsel an opportunity to explain their actions.

Also, as to footnote 11, I would point out that the result would be the same whether we apply a state-law standard as a matter of substance or a federal law standard as a matter of procedure.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:07-CV-238-H

VENTAS, INC.,
Plaintiff,

v.

HCP, INC.,
Defendant.

NOVEMBER 17, 2009

MEMORANDUM OPINION

The parties expertly tried this case to a jury for nearly three weeks and that jury returned a significant verdict in favor of Plaintiff, Ventas, Inc. Specifically, the jury found that Plaintiff, which had entered a deal subject to unitholder approval to purchase Sunrise REIT, a healthcare real estate investment trust, for $15 per unit, had a valid expectation that deal would be approved and that Defendant, HCP, Inc., acted in a significantly wrongful manner that improperly interfered with Plaintiff's valid business expectation.[1] The jury awarded Plaintiff compensatory damages of over $101,000,000.00. Defendant now moves this Court for judgment as a matter of law

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[1] A more detailed analysis of the facts of this case can be found in the Court's previous opinions.

under Federal Rule of Civil Procedure 50(b) or, alternatively, a new trial under Rule 59. Additionally, the parties jointly move the Court to supplement the record with certain documents and Plaintiff moves to amend the judgment.

The Court recognizes that this case and its trial presented very close, challenging and hotly contested issues of fact and law. Although reasonable people could have examined the evidence and come to different conclusions than the one this jury reached, the Court believes that sufficient evidence supported the jury's conclusions. The Court has already addressed many of the issues Defendant raises, either in other Memorandum Opinions or at trial. Upon reconsideration, the Court stands by its previous rulings and will not repeat itself except as needed. None of the other claimed errors justifies the relief requested. Overall, the Court concludes that the parties received a fair trial.

I.

Defendant's first and most fundamental argument is that Plaintiff failed to prove HCP used significantly wrongful means in interfering with Plaintiff's business expectancy. The Court instructed the jury under Kentucky law that significantly wrongful conduct required conduct such as fraudulent misrepresentation, deceit and coercion. Defendant does not argue that this is an incorrect statement of the law. Rather, Defendant asserts that the language of the press release it submitted was entirely truthful and no reasonable person could find that it was misleading. This is a purely factual dispute and so long as sufficient evidence existed for a reasonable juror to find in Plaintiff's favor, the Court cannot reverse the jury's decision. *Barnes v. City of Cincinnati*, 401 F.3d

729, 736 (6th Cir. 2005). There is no doubt that one could view the evidence from different perspectives.

In the end, Plaintiff convinced the jury to filter the evidence from its perspective. The press release included language indicating that Defendant's proposal was "identical" to the Plaintiff's that it was a "superior proposal" and that there was a "greater certainty of completion" than Plaintiff's deal. The jury could easily find these statements were false and misleading. Evidence showed that Defendant's deal was conditional and Defendant did not list those conditions in its press release. Moreover, evidence indicated that there was no certainty of success on the deal and, in fact, Canadian courts later found that Defendant could not legally submit the offer. This evidence allowed a reasonable juror to determine that Defendant's actions constituted fraudulent misrepresentations. As Kentucky's then-highest court held, "causing a false impression constitutes a palpable fraud, even though the statement is true as far as it goes, since such concealment is in fact a false representation of that which is disclosed." *Dennis v. Thomson*, 43 S.W.2d 18, 23 (Ky. 1931).

In addition to the misleading press release, Plaintiff presented evidence, such as lying about sending a signed, unconditional offer to Sunrise REIT and failing to ever publicly correct its press release, which would support the conclusion that Defendant intended to mislead the public. This evidence, too, supports the jury's determination that Defendant acted with significantly wrongful means. The combination of this evidence permits the jury's conclusion that the press release was misleading and deceitful. Defendant presented plausible but ultimately unpersuasive explanations.

Perhaps most importantly, the Court believes that the jury might well have placed significant reliance on the testimony of Mr. Michael Warren, who stated that he had never seen the type of tactics utilized by Defendant in his thirty years of business experience and that he was "flabbergasted" by Defendant's behavior. Mr. Warren was a particularly impressive witness who presented himself almost as an independent observer of events. The jury is the proper decision-maker on issues of credibility and importance of the evidence. Combined with the other relevant evidence, the testimony of Mr. Warren allowed the jury to find that Defendant's actions were significantly wrongful. The fact that plenty of evidence could also suggest a different result does not change the validity of the jury's conclusions.

II.

Second, Defendant argues that there was no evidence of causation. This was certainly a difficult issue throughout the case, but the jury determined that the significantly wrongful conduct of Defendant, and not some other force, caused the interference with Plaintiff's reasonable business expectancy of acquiring Sunrise REIT at $15 per unit. The Court believes that the jury's decision was reasonable in light of the evidence and will not overturn it.

Primarily, Defendant argues that had just the truthful portion of its press release gone public—that Defendant was willing and able to pay $18 per unit for Sunrise REIT—the result would have been the same as the press release going public with misleading information. While this is certainly a reasonable possibility, it is not the only reasonable possibility. Plaintiff presented expert testimony that had all the conditions of the $18 offer been made public initially, including the standstill agreement that likely prohibited consideration of the offer, the raise in the stock price would not have been as significant and the unitholder base would not have changed so dramatically. If that were the case, the damage to Plaintiff's expectancy would likely not have occurred.

Defendant also argues that causation was not proven because the "truth" about the $18 offer was on the market long before any unitholder vote ever would have occurred. Thus, according to Defendant, there was no damage from any misleading statements. However, Plaintiff presented evidence that the misleading statements, especially the language that the deal at $18 had a great certainty of getting done, caused an entirely new unitholder base. In fact, it is undisputed that within 48 hours of Defendant's press release, over forty million shares changed hands. Plaintiff presented evidence that such a change meant the new uni[t]holders had little to no incentive to accept a $15 bid, even after it became clear Defendant's bid would not be considered. The jury could reasonably decide that in the absence of this market shift, which it decided was caused by Defendant's significantly wrongful conduct, Plaintiff's $15 offer would have been approved.

III.

Defendant next argues that Plaintiff's claim was barred in its entirety by res judicata. Defendant has raised this issue twice before. The Court paid considerable attention to the issue both times before rejecting it. (DN # 34 & 220.) The Court found that Plaintiff was not required to bring this action as a part of previous Canadian litigation because that litigation occurred before Plaintiff's injury ripened. Defendant now argues that Plaintiff claimed at trial its injury had occurred as soon as the press release was made, which was before the

Canadian litigation. However, as this Court previously found,

> At the time of the Canadian proceedings in late February and early March, 2007, the conduct ultimately alleged to be tortious may have occurred, but no harm had yet befallen Plaintiff. . . . [U]ntil Plaintiff actually paid more for its acquisition of Sunrise REIT than originally anticipated in the Purchase Agreement . . . it could not be said that any damage had occurred.

(DN # 34 at 5.) For the reasons set forth in that Memorandum Opinion, the Court reaffirms its decision that res judicata does not bar Plaintiff's claim.

IV.

Alternatively, Defendant requests a new trial because the verdict was against the clear weight of the evidence. Largely, Defendant relies on the testimony of executives from Morgan Stanley and ING, the two largest unitholders of Sunrise REIT, that they likely would not have approved Plaintiff's $15 per unit deal even if Defendant had never announced an $18 deal. Once again, Defendant makes arguments that could have convinced the jury, but did not.

While it is certainly true that without approval from one of these two companies the deal could not have gone through, it was for the jury to determine the credibility of the Morgan Stanley and ING testimony. Plaintiff presented ample evidence that the $15 per unit offer was a good price and significantly more than any unitholder had ever paid for Sunrise REIT units. Moreover, the testimony of Morgan Stanley's representative, Mr. Bigman, could have been interpreted as equivocal and his demeanor during examinations may have permitted the jury to reasonably doubt his credibility. Given the credibility questions raised by the testimony and the evidence presented by Plaintiff, the weight of the evidence was sufficient to support the jury's decision and no new trial is required.

V.

A new trial is also requested based on alleged prejudicial errors in the jury instructions.[2] As this Court has stated,

> Jury instructions must "adequately inform the jury of the relevant considerations and provide the jury with a sound basis in law with which to reach a conclusion." A jury verdict will be reversed on account of improper instructions "only if the instructions, when viewed as a whole, were confusing, misleading and prejudicial."

Burke v. U-Haul Intern., Inc., 501 F. Supp. 2d 930, 935 (W.D. Ky. 2007) (quoting *Roberts ex rel. Johnson v. Galen of Virginia, Inc.*, 325 F.3d 776, 787 (6th Cir. 2003)). Before examining the specific allegations of Defendant, the Court makes two observations. First, the instructions, for the most part, represented the substance of the instructions that Defendant requested. Second, the Court previously issued a Memorandum Opinion detailing the reasoning for the instructions selected and the Court reaffirms that Memorandum Opinion. (DN # 450.)

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[2] There has been some discussion in the briefing related to the preliminary drafts of the instructions shared with counsel prior to giving the final instructions to the jury. Given the complex nature of this case, the Court believed that allowing the parties to weigh-in on the proper drafting of the instructions at all relevant stages was more beneficial than simply examining the initial requests made by the parties. However, those preliminary drafts were never shared with the jury. Only the final instructions were given to the jury and only those instructions can be the basis for any error.

A.

Defendant first contends that the Court erred in failing to instruct the jury that it found, as a matter of law, that Defendant [did not] act[ ] maliciously. Under Kentucky law, improper interference can be shown in one of two ways: (1) the defendant acted maliciously, or (2) the defendant acted with significantly wrongful means. *NCAA v. Hornung*, 754 S.W.2d 855, 859 (Ky. 1988). To establish malice as it is used in the tort of improper interference, the plaintiff must show that the defendant acted for the *sole purpose* of harming the plaintiff. The Court held as a matter of law that Defendant did not act for the *sole purpose* of harming Plaintiff. Thus, the Court did not instruct the jury on this issue, but rather instructed the jury that to find improper interference it had to find Defendant acted with significantly wrongful[ ] means. Defendant now complains that the Court was required to instruct the jury that it found Defendant did not act maliciously.

Defendant is correct that the Court's pre-trial instructions to the jury identified malice as a possible basis for improper interference. However, the Court also instructed the jury that the final instructions may change from those original instructions. Instead of specifically telling the jury that the Court found Plaintiff failed to meet its burden to show malice, which may have unfairly prejudiced Plaintiff, the Court simply omitted malice from the instructions. This omission helped ensure the jury was not confused by an issue that was no longer in the case. Moreover, it complied with Kentucky's bare bones approach to jury instructions. "[J]ury instructions should not contain an abundance of detail, but should provide only the bare bones of the question for jury determination." *King v. Ford Motor Co.*, 209 F.3d 886, 897

(6th Cir. 2000). The *only* question for jury determination was whether Defendant's conduct was significantly wrongful, so the Court instructed only on that issue. It was not error to do so.

Defendant's primary complaint with regard to the malice instruction is that the Court also instructed the jury that it was permitted to consider Defendant's motive in deciding whether Defendant's conduct was wrongful. Because the Court determined Defendant did not act for the *sole purpose* of harming Plaintiff, Defendant contends its motives were necessarily proper and the Court should not have permitted the jury to consider Defendant's motives with respect to the significantly wrongful means analysis of improper interference. Defendant misunderstands the effect of the Court's ruling. Simply because Defendant's *sole purpose* was not to harm Plaintiff does not mean that Defendant's motives were irrelevant. Rather, it could have been part of Defendant's intent to cause harm to Plaintiff and such intent certainly makes it more likely Defendant's conduct was significantly wrongful. As explained in the Court's Memorandum Opinion addressing the jury instructions (DN # 450), Restatement (Second) of Torts § 767 specifically lists the party's motive as a proper consideration for finding improper interference and those factors provide guideposts for the jury even where the improper interference is between competitors.[3]

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[3] Defendant also contends that Plaintiff argued the malice theory in its closing argument and that requires a new trial. However, as the Court has previously held, Plaintiff's arguments were within the bounds of the law and Plaintiff focused [its] argument on motive as it implies significantly wrongful conduct.

B.

Defendant has other issues with the Court's instructions concerning the Court's handling of the Canadian litigation. The Court devoted considerable attention to resolving these issues prior to trial and handling them during trial.

First, Defendant argues that the Court prejudicially erred in instructing the jury that Defendant's breach of contract could be considered as evidence of significantly wrongful conduct. Canadian Courts previously found that Defendant breached its standstill agreement with Sunrise REIT when it submitted its $18 topping bid. Throughout the trial, Defendant maintained that its breach of contract could not constitute improper interference and, in fact, could not be considered in determining whether Defendant's conduct was significantly wrongful. While the Court agrees with Defendant that breach of contract itself cannot constitute improper interference, Defendant has offered no authority stating that the jury could not consider it. Indeed to ignore the fact of a court determined breach would create an artificial reality within the case.

The Court concluded that the jury should be able to consider all events relevant to HCP's conduct. The few courts to consider the issue agree that the breach of contract is relevant. *See Island Air., Inc. v. LaBar*, 566 P.2d 972, 980 (Wash. Ct. App. 1977) (considering breach of contract as relevant in finding improper interference between competitors); *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 309 (Utah 1982) ("A deliberate breach of contract, even when employed to secure economic advantage, is not, *by itself*, an 'improper means.' . . . Neither a deliberate breach of contract nor an immediate purpose to inflict injury which does not predominate over a legitimate economic end will, by itself, satisfy this element of the tort. *However, they may do so in combination.*") (emphasis added). The Court's instructions complied with these legal principles.[4]

Defendant also contends that the Court's instruction[s] on other Ontario court rulings were improper as was the Court's exclusion of certain evidence based on the Ontario proceedings. This was a difficult issue throughout the case. However, the court has previously ruled on the effect of the Canadian litigation (*see* DN # 34 & 220) and the instructions complied with those rulings. These instructions were necessary to prevent juror confusion.[5]

C.

Causation is the next instruction to which Defendant objects. Defendant contends that the Court should have been more specific in its instruction regarding the "but-for" element of tortious interference. However, the Court instructed the jury, as Defendant requested, that the significantly wrongful conduct of Defendant must

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[4] Specifically, the Court instructed, "HCP did breach its confidentiality agreement by submitting the February 14 topping bid. This fact alone is not sufficient to establish tortious interference. However, it may be considered along with the other evidence, in determining whether HCP engaged in improper interference.

[5] To the extent Defendant complains of the Court's refusal to submit an instruction that Sunrise REIT would have been required under Canadian disclosure law to inform unitholders of any additional bids, even if they could not be considered, the Court finds that the disclosure law is unclear. This deals intensely with fiduciary duties and is a factually driven determination that would likely require its own trial. Even if it were clear that the law would have required disclosure, there is no evidence that the details actually would have been disclosed. Thus, the Court could not give the requested instruction.

have been the "but-for" cause of Plaintiff's injuries for Plaintiff to succeed. The Court then defined this term by stating, "This but for test means that if HCP's improper interference had never occurred, Ventas would have acquired Sunrise REIT at $15 per unit." This instruction was ample to guide the jury on finding causation. While other instructions might have been given, Kentucky law does not require any of them.

VI.

Defendant also requests a new trial based on certain of Plaintiff's arguments during closing. The Court has previously ruled that those arguments were within the permissible bounds of closing argument and, even if impermissible, the jury's instruction gave sufficient guidance for considering the evidence properly. (DN # 449.) Only one of these arguments needs further examination at this time. During rebuttal, Plaintiff's counsel argued that the jury should "send a message" from Louisville, Kentucky, to Defendant's headquarters in Long Beach, California, and to Wall Street that this is not proper competition. Defendant contends that such an argument was improper and designed to inflame the passions of the jury.

While the Court agrees that the "send a message" argument was likely improper, *see McCabe v. Mais*, 580 F. Supp. 2d 815, 834-35 n. 13 (N.D. Iowa 2008), the Court does not believe that such statements warrant a reversal of the jury verdict and award of a new trial to Defendant.

> In determining whether there is a reasonable probability that the verdict of a jury has been influenced by improper conduct, warranting a new trial, the Court must examine, on a case-by-case basis, the totality of the circumstances, including the nature of the comments, their frequency, their possible

> relevancy to the real issues before the jury, the manner in which the parties and the Court treated the comments, the strength of the case (e.g. whether it is a close case), and the verdict itself.

Michigan First Credit Union v. Cumis Ins. Soc. Inc., No. 05-CV-74423, 2009 WL 164088, at * 7 (6th Cir. June 15, 2009) (citing *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 756 (6th Cir. 1980)). In *Cumis*, the defendant complained about an improper analogy used by the plaintiff's counsel in closing. The Court stated,

> Here, the analogy used by [the plaintiff's] counsel consumed little more than one page in a transcript of argument that exceeded one hundred pages; the analogy followed a trial that spanned three weeks. . . . [E]ven where closing argument does rise to the level of misconduct, the misconduct is not prejudicial unless it is "so pronounced and persistent that it permeates the entire atmosphere of the trial."

Id. at * 7-8 (quoting *United States v. Lynch*, Nos. 85-5171, 85-5196, 85-5217, 1986 WL 17300 (6th Cir. July 8, 1986)). The facts of this case are similar. Plaintiff did not make the "send a message" argument until his rebuttal, the total of which was approximately five minutes. The trial spanned three weeks. There is simply no evidence that Plaintiff's argument "permeated the entire atmosphere of the trial" or caused the jury to make its determination on improper grounds. "[E]ven if prejudice otherwise could be found in the [argument] at issue, any prejudice was cured by the Court's specific instruction to the jury that attorney comments were not evidence and that only evidence was to be considered." *Id.* at *8. The Court gave such an instruction and believes the jury followed it.

Moreover, other Courts have found that the "send a message" argument does not warrant a new trial. *See Nice v. ZHRI, Inc.*, 105 F. Supp. 2d 1028, 1029 (E.D. Ark. 2000) ("[I]t is appropriate to ask the jury to 'send a message' if counsel is not seeking an inappropriate punitive damage award."); *Alkire v. Mariott Intern., Inc.,* No. 03-1087, 2007 WL 1041660, at * 7 (D.D.C. April 5, 2007) (finding that argument that jury should send a message regarding the type of behavior engaged in was aimed more at negligence than damages and did not warrant a new trial); *Third Wave Tech., Inc. v. Stratagene Corp.*, 405 F. Supp. 2d 991, 1010 (W.D. Wis. 2005) (finding the plaintiff's argument that jury should "send a strong message to [the defendant] and to the other [people like the defendant] out there" that this behavior is unacceptable did not warrant a new trial because the plaintiff limited the argument to "teaching defendant and others that there is a consequence" to their behavior).

Plaintiff's argument in this case closely resembles the arguments in the cited cases. Plaintiff clearly was not seeking additional damages as the Court limited the maximum damages to those Plaintiff requested in closing. Additionally, the argument was aimed at stopping Defendant's type of behavior, not awarding Plaintiff additional sums to punish Defendant and others. Finally, the case of *Strickland v. Owens Corning*, 142 F.3d 353 (6th Cir. 1998), is illustrative. There, the Sixth Circuit considered whether a new trial was warranted based on the plaintiff's argument that the jury had "an opportunity . . . to tell Owens Corning, to tell the world where you stand, whether you stand for safe products and decency." The Court found that such statements did not warrant a new trial because the plaintiff was not requesting punitive damages. *Id.* at 359. The Court believes that the substance of the argument in *Strickland* is the same as the substance of the argument in this case, and like *Strickland*, a new trial is not warranted here.[6]

VII.

The parties have jointly moved the Court to supplement the record with certain documents. These documents can be grouped into three categories: (1) a pre-trial motions checklist provided by the Court to the parties on August 18, 2009, (2) drafts of the jury instructions the Court submitted to the parties before issuing the final instructions, and (3) letters sent by the parties' counsel to the Court addressing certain objections and motions.

The Court will supplement the record with the letters from the parties' counsel. Those letters reflect objections of the parties and arguments made to the Court; they are proper for appellate review. The Court will also supplement the record with the pre-trial motions checklist, but cautions that some of the rulings may have changed as the trial progressed and the nature of the evidence became clearer. Only the final rulings of the Court should be subject to proper review. The Court will not, however, supplement the record with the drafts of the jury instructions. Those drafts were provided to counsel in an effort to work with counsel to determine the best drafting of the instructions on this complicated case. Those drafts were never presented to the jury and had no role in the decision of the jury. Thus, they are irrelevant to any

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[6] With respect to a new trial, Defendant finally contends that certain other evidentiary rulings were erroneous and prejudicial. The Court stands by the evidentiary rulings that it made throughout the trial for the reasons stated at the time the rulings were made.

issue on appeal. Only the final jury instructions actually given to the jury can be considered for error.

VIII.

The final issue before the Court is Plaintiff's motion to alter or amend the judgment to provide full compensation. Plaintiff makes two requests: (1) to convert damages from Canadian dollars to U.S. dollars on the date of judgment as opposed to the date of injury, and (2) award Plaintiff prejudgment interest. The Court has previously examined the first issue in a Memorandum Opinion dated August 27, 2009 (DN # 379) and determined that the proper date for conversion is the date of injury. For the reasons set forth in that opinion, the Court finds that the appropriate date of conversion is the date of injury, April 26, 2007, which was the date used to calculate the damages awarded by the jury.

As for the second issue, prejudgment interest is available as a matter of right where the plaintiff's damages are liquidated. *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136, 141 (Ky. 1991). Generally, liquidated damages are damages "made certain or fixed by agreement of [the] parties or by operation of law. Common examples are a bill or note past due, an amount due on an open account, or an unpaid fixed contract price." *Id.* (quotation omitted). The Kentucky Supreme Court has further defined liquidated damages: "Liquidated claims are of such a nature that the amount is capable of ascertainment by mere computation, can be established with reasonable certainty, can be ascertained in accordance with fixed rules of evidence and known standards of value, or can be determined by reference to well-established market values." *3D Enterprises Contracting Corp. v. Louisville & Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 450 (Ky. 2005).

Plaintiff argues that the only damages it could recover in this case were fixed at the difference in acquiring Sunrise REIT at $15 per share as opposed to $16.50 per share and that such damages squarely fit within the concept of an "amount . . . capable of ascertainment by mere computation." *Id.* To be certain, these are the damages the jury awarded. However,

> It must be remembered that, in determining if a claim is liquidated or unliquidated, one must look at the nature of the underlying *claim*, not the final award. That is, the fact that we have ultimately determined that 3D is entitled to the liened funds should not be construed as confirmation that the original claim was liquidated.

Id. (emphasis in original). The damages awarded were not "fixed by operation of law" like damages arising from a past due note or a fixed contract. Here, there was no breach of a specific contract that required Defendant to pay Plaintiff a specific amount. It was never set that Plaintiff would have to pay an additional $1.50 per unit because of Defendant's conduct. This case is somewhat analogous to a case where the defendant's breach of contract requires plaintiff to pay a third party additional money to finish the contract. There, the amount plaintiff had to pay was determined well before trial, but that does not make those damages liquidated. *See Prosoft Automation, Inc. v. Logan Aluminum, Inc.*, No. 1:03-CV-142-R, 2006 WL 1228773, at *2 (W.D. Ky. April 28, 2006) ("[A]lthough the jury ultimately awarded Prosoft the full amount requested as compensation for those hours, they were not reduced to a certainty in amount *prior to trial*.") (emphasis in original). The same is true here.

Prejudgment interest may also be awarded in the Court's discretion as a matter of equity. *Nucor*, 812

S.W.2d at 143-44. Courts in Kentucky rarely award prejudgment interest as a matter of equity and this Court declines to do so as well. The damages involved were not liquidated, Defendant caused no undue delays in the trial of the case and the evidence presented a very close case regarding liability. On balance, the Court finds that equity does not warrant prejudgment interest.

The Court will issue an Order consistent with this Memorandum Opinion.

November 16, 2009 /s/

John G. Heyburn II, Judge
United States District Court

APPENDIX C
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:07-CV-238-H

VENTAS, INC.,
Plaintiff,
v.
HCP, INC.,
Defendant.

SEPTEMBER 8, 2009

MEMORANDUM OPINION

Plaintiff Ventas, Inc.'s ("Ventas") only remaining claim against Defendant HCP, Inc. ("HCP") is for tortious interference with prospective business relations. The alleged tortious conduct occurred once Ventas and Sunrise REIT ("Sunrise") had signed a purchase agreement that awaited unitholder approval of Ventas's $15 per unit bid for Sunrise's assets. After the purchase agreement had been signed, but before the unitholders could approve the transaction, HCP sent Sunrise a bid for $18 per unit. Having progressed to trial, the parties now debate the proper jury instruction on the elements of tortious interference with prospective business relations. In particular, the parties dispute whether section 767 or section 768 of the Restatement (Second) of Torts provides the proper factors for assessing the nature of the interfering conduct and what form of causation is required to establish the claim. Kentucky courts have never directly addressed the first of these issues.

I.

Under Kentucky law, liability for tortious interference arises when a party improperly interferes with a valid business expectancy. *See NCAA v. Hornung*, 754 S.W.2d 855, 857 (Ky. 1988). To prevail on such a claim, the plaintiff "must show malice or significantly wrongful conduct" on the part of the defendant. *Id.* at 859. In crafting this language to support a claim of tortious interference, the Kentucky Supreme Court officially adopted sections 766, 767 and 773 of the Restatement (Second) of Torts to define the tort. *Id.* Section 766B sets forth the basic elements of [ ] a tortious interference claim.[1] One of those elements, improper interference, is then elaborated on by Section 767, which sets forth seven factors to be considered when determining whether general interference is improper.[2] *Id.*; Restatement (Second) of Torts § 767.

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[1] Section 766B is entitled "Intentional Interference with Prospective Contractual Relation." It reads:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

[2] Section 767 is entitled "Factors in Determining Whether Interference Is Improper." The factors are:

> (a) the nature of the actors['] conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,

Section 768 provides guidance when the circumstances concern competition, mainly whether the specific competition is proper.[3] Restatement (Second) of Torts § 768. Kentucky courts have not officially adopted Section 768 and have not spoken to the necessary interplay between Sections 767 and 768. Therefore, the Court must predict how Kentucky courts would resolve which section properly articulates the analysis for the facts at issue in this case.

Tortious interference is designed to protect the integrity of existing business relationships. This interest must be balanced, however, with society's strong interest in competition. To that end, section 768 specifically tailors the 767 factors to interference involving business competitors. *See Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1197 (Colo. Ct. App. 2009) (making a similar statement). The provisions themselves, however, are unclear on how the Court should use the two sets of factors in instructing the jury.

(d) the interests sought to be advanced by the actor,

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties.

[3] Section 768 is entitled "Competition As Proper or Improper Interference." It provides that competition is proper if:

(a) the relation concerns a matter involved in the competition between the actor and the other and

(b) the actor does not employ wrongful means and

(c) his action does not create or continue an unlawful restraint of trade and

(d) his purpose is at least in part to advance his interest in competing with the other.

The first indication of how the Court should use the sections can be found in the comments to the sections. The comments to section 767 state that 768 supplants the general factors outlined in section 767. Restatement (Second) of Torts § 767 cmt. a. Some courts have strictly interpreted this comment and concluded that situations where the parties are business competitors and the alleged intentional interference is with a prospective business relationship, section 767 simply does not apply. *See e.g. Pino v. Prudential Ins. Co. of Am.*, 689 F. Supp. 1358, 1362 (E.D. Pa. 1988); *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 501 (Colo. 1995); *Brookeside Ambulance, Inc. v. Walker Ambulance Serv.*, 678 N.E.2d 248, 253 (Ohio Ct. App. 1996); *Harris Group, Inc.*, 209 P.3d at 1196; *RTL Distrib., Inc. v. Double S Batteries, Inc.*, 545 N.W.2d 587, 591 (Iowa Ct. App. 1996) (but incorporating 767 factors to determine "wrongful means" under section 768). Other courts, however, have considered the factors outlined in section 768 as supplementary to section 767 or used them to define the defense of competition. *See e.g. Siren, Inc. v. Firstline Sec., Inc.*, 2006 WL 3257440, *6 (D. Ariz. 2006) (treating competition as a defense); *Buztronics, Inc. v. Theory3, Inc.*, 2005 WL 1865512, *6 (S.D. Ind. 2005) (identifying section 768 as a "'non-exhaustive' set of factors to consider as part of a 'balancing process' in determining whether an alleged tortious interference lacks justification."); *Maximus, Inc. v. Lockheed Info. Mgt. Sys. Co., Inc.*, 493 S.W.2d 375, 415 (Va. 1997) (treating competition as a defense); *Soap Co. v. Ecolab, Inc.*, 646 So.2d 1366, 1371 (Ala. 1994) (stating that competition is an affirmative defense).

Clearly, there are multiple ways of addressing the interplay between sections 767 and 768. In fact, the comments to section 768 recognize the lack of consensus as to whether "competition is an affirmative defense to be raised and proved by the defendant or is simply not improper conduct inconsistent with the American system of free enterprise." Restatement (Second) of Torts § 768 cmt. a. For the reasons stated below, the Court finds that the appropriate use of sections 767 and 768 is to apply section 768 as the test for whether the defendant's conduct was improper. However, section 767 can still be used to illuminate the requirements of section 768.

The comments to section 767 that state that section 768 supplants section 767 are highly instructive. The Kentucky Supreme Court has previously adopted section 767, *Hornung*, 754 S.W.2d at 857, and there is no indication that Kentucky would not follow the comments to section 767 or 768. Moreover, the *Hornung* case itself is instructive when it held that "it is clear that to prevail a party seeking recovery must show malice or some significantly wrongful conduct." *Id.* at 859. While the court claimed to be adopting section 767 as defining tortious interference with prospective business relations, this language used by the court follows almost precisely with the language of section 768 and is identical to the instruction the Court has given in this case.[4] The case provides a strong indication that Kentucky would adopt a similar instruction given the facts of this case.

Next, the Court is persuaded by the reasonable and logical explanation of the interplay between sections 767 and 768 given by the Second Circuit in *Carvel Corp. v.*

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[4] The Court notes that section 768 uses the phrase "wrongful means" not "*significantly* wrongful means." The Court has used the phrase "*significantly* wrongful means" in the instructions because that is the language used by the Kentucky Supreme Court. *Hornung*, 754 S.W.2d at 859.

Noonan, 350 F.3d 6 (2d Cir. 2003). As the Second Circuit noted,

> [T]he Restatement further distinguishes between generic instances of interference and those special (although more frequently encountered) instances in which the plaintiff and defendant are market competitors. . . . [I]f the plaintiff claims that a *competitor* interfered with its prospective economic relations . . . then the Restatement counsels that liability should only obtain where the defendant 'employed wrongful means.' Wrongful means include a subset of the improper conduct listed in the § 767 commentary . . . . The Restatement's distinction between competitors and non-competitors is intended to strike a balance between protecting economic relations and encouraging competitive behavior in the market. Interference with prospective economic relations is, one might argue, the *sine qua non* of competition—and thus should bring liability only where the conduct is highly reprehensible.

Id. at 18-20 (emphasis in original). The court explains that under New York law, it is the plaintiff who bears the burden of establishing that the defendant's conduct was improper under the section 768 requirements. *Id.* at 19. While this Court recognizes that the discussion found in *Carvel* is in no way binding on Kentucky, the *Carvel* approach is well reasoned and the best approach for dealing with tortious interference with prospective business relations under the facts of the present case. As the *Carvel* court noted, strong policy reasons support a more stringent showing of improper interference when the parties are competitors. *Id.* at 20. Kentucky courts would no doubt agree with this policy of protecting proper competition.

In sum, the Court finds that Kentucky would utilize the section 768 factors as the appropriate factors for evaluating the legality of competitive conduct. *Id.* Since Ventas and HCP were competitors in the specific transaction to acquire Sunrise, section 768 provides the relevant factors for assessing the properness of HCP's conduct. While Kentucky courts might adopt the section 768 factors as an affirmative defense, this Court predicts otherwise. The more straight forward and understandable approach is that section 768 contains the thrust of an instruction on intentional interference in the competitor context. Kentucky courts understand that the competitor relationship is different and the jury instructions should be written affirmatively to reflect that. Because the Court has found Ventas and HCP to be competitors as matter of law, Section 768 provides the proper formulation to first assess HCP's conduct.

Nevertheless, the Court believes that some of the factors enumerated in section 767 provide helpful guideposts for examining the alleged wrongfulness of HCP's actions. The factors, such as the parties['] conduct, motives, and the circumstances of the transaction, can be utilized by the jury to determine whether HCP's conduct was "significantly wrongful." Formulating the jury instruction based on this analysis best captures the spirit of the Restatement as adopted by Kentucky and fits with the development of Kentucky's law of intentional interference.[5]

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[5] Having established that section 768 provides the proper jury instruction in this case, the Court has eliminated three of the section 768 factors from consideration by the jury. Section 768 provides that the acts of a competitor can be wrongful if (1) the business relation does not concern a matter involved in the competition between the actor and the other party, (2) the actions create or continue an un-

II.

The other primary issue regarding jury instructions before the Court is the proper definition of causation required for a tortious interference with business relations claim. The parties debate whether section 766B of the Restatement (Second) of Torts requires the plaintiff to prove that "but for" the defendant's improper interference the prospective business relationship would have occurred. In *Gray v. Central Bank & Trust Co.*, 562 S.W.2d 656 (Ky. Ct. App. 1978), the Kentucky Court of Appeals found that a claim for tortious interference with prospective business relationships could not succeed where the plaintiff "utterly failed to prove that they would have been awarded the contract in the absence of [the defendant's] interference." *Id.* at 659. *Gray* clearly calls for a "but for" instruction and fits with the language of the jury instructions crafted for this case.

Additionally, the reasoning for such an instruction is compelling. In *Technology for Energy Corp. v. Scandpower*, 880 F.2d 875 (6th Cir. 1989), the court held that "but for" causation was required because "it prevents the plaintiff from obtaining a 'windfall' in the form of damages for interference with an economic opportunity which it would not have obtained even if the defendant had done nothing wrong."[6] *Id.* at 877. Certainly, this logic applies

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lawful restraint of trade, or (3) the purpose of the interference is not at least in part to advance the interfering party's interest in competition. Restatement (Second) of Torts § 768(1)(a), (c) & (d). The Court has determined as a matter of law that these elements have not been proved at trial in this case.

[6] While the *Scandpower* case involves application of California law and clearly is not binding on Kentucky courts, this Court finds that Kentucky would agree with the basic logic and reasoned analysis set forth in the case.

to the present case. If Ventas never would have succeeded in having its $15 per unit bid approved in the absence of any improper interference by HCP, then Ventas is certainly not entitled to any award on the basis that HCP prevented it from acquiring Sunrise at $15 per unit.

The Court has instructed the jury in accordance with this Memorandum Opinion and more specifically as set forth on the attached instructions.

September 4, 2009 /s/

John G. Heyburn II, Judge
United States District Court

INSTRUCTION NO. 1

Ventas claims that HCP intentionally and improperly interfered with its expectation of acquiring Sunrise REIT at the agreed price of $15 per unit. The law recognizes that everyone has a right to establish and conduct a lawful business, free from unlawful interference. However, the very essence of lawful competition is that it necessarily interferes with prospective business relations of others. Ventas and HCP were competitors. In these circumstances, therefore, to find for Ventas, you must conclude that each of the following elements is more likely true than not:

1. Ventas had a reasonable likelihood or probability of acquiring Sunrise REIT at $15 per unit;

2. HCP knew about the probable acquisition of Sunrise REIT;

3. HCP intentionally and improperly interfered with Ventas's acquisition of Sunrise REIT at $15 per unit;

4. HCP's improper interference prevented Ventas from acquiring Sunrise REIT at $15 per unit; and

5. HCP's improper interference was a substantial factor in causing Ventas's damages. If you find, however, that Ventas has not proved any one or more of these elements, then you must find for HCP.

Some explanation and further definitions are important when discussing the above elements. First, to prove element No. 1, Ventas need not show that the purchase of Sunrise REIT shares at $15 was a certainty. On the other hand, it must certainly show something more than wishful thinking, hope, or optimism. It must show a reasonable likelihood or probability.

Ventas and HCP were business competitors generally, and were competing here to acquire Sunrise REIT. Improper interference, as referenced in element No. 3, has a special meaning among competitors. In these circumstances then, the only way to find in favor of Ventas is to find that HCP employed "significantly wrongful means" to interfere with Ventas's acquisition of Sunrise REIT at $15 per unit.

For purposes of this instruction, "significantly wrongful means" includes conduct such as fraudulent misrepresentation, deceit and coercion. Among other things, you may consider the parties' conduct, motive, and the circumstances of the transaction to illuminate whether HCP's conduct amounts to "significantly wrongful means." To the extent you consider a party's motive in causing harm, it must be based on actual evidence of motive, rather than a witness's opinion of another's motive.

As part of element No. 3, Ventas must also show that HCP intended to improperly interfere with the acquisition of Sunrise REIT. As the word "intent" is used there, HCP's conduct was intentional if its purpose was to improperly interfere with Ventas's acquisition of Sunrise REIT, or if HCP knew the improper interference was certain or substantially certain to result.

In element No. 4, to find that HCP prevented Ventas from acquiring Sunrise REIT at $15 per unit, you must determine that "but for" HCP's improper interference Ventas would have acquired Sunrise REIT at $15 per unit. This "but for" test means that if HCP's improper interference had never occurred, Ventas would have acquired Sunrise REIT at $15 per unit.

If you find that HCP improperly interfered with a valid business expectancy, element No. 5 requires you also determine whether HCP proximately caused Ventas's damages. HCP's conduct is the proximate cause of

Ventas's loss if you find that it was a substantial factor in producing the loss or damage.

I also need to give you information about a case related to this one. The parties to this action have previously resolved related issues in the Canadian court system. The important facts from those cases are as follows: In the week after HCP made its $18 topping bid, Sunrise REIT sought guidance from a Canadian court in interpreting its confidentiality agreement with HCP and its purchase agreement with Ventas. In that case, Sunrise REIT and HCP generally took the position that the confidentiality agreement and purchase agreement did not prohibit HCP's $18 bid. Ventas took the opposite position. The Canadian court found:

1) HCP's confidentiality agreement precluded it from making the $18 topping bid. By making the bid, HCP breached its confidentiality agreement with Sunrise REIT;

2) The purchase agreement between Sunrise REIT and Ventas prohibited Sunrise REIT from submitting HCP's bid to its unitholders; and

3) Sunrise REIT's auction process, leading to Ventas's purchase agreement, was objectively reasonable and fair.

HCP did breach its confidentiality agreement by submitting the February 14 topping bid. This fact alone is not sufficient to establish tortious interference. However, it may be considered along with the other evidence, in determining whether HCP engaged in improper interference.

If you find each of the five elements above to be true, answer "Yes" under Question #1 on the Verdict Form and proceed to Instruction #2. If you do <u>not</u>

find each of the five elements above true, answer "No" under Question #1, sign and date the Verdict Form, and return to the courtroom.

APPENDIX D
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CASE NO. 3:07CV-238-H

VENTAS, INC.,
Plaintiff,

vs.

HCP, INC.,
Defendant.

Volume 8B
Transcript of Jury Trial
Before Honorable John G. Heyburn II
United States District Judge

August 28, 2009
Louisville, Kentucky

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* * *

[3] (Proceedings in open court after recess.)

* * *

[66] THE COURT: * * * I know you have a motion for directed verdict. The one thing I have looked at it is with respect to punitive damages. What's your argument there?

MR. BRADFORD: Your Honor, we do think this case [67] qualifies for punitive damages. I do think that there is evidence of fraud in this case and that there is a basis for a jury to make a determination. At minimum, the standards of reckless conduct and oppressive conduct are certainly present here, and I think the jury ought to be entitled to consider punitive damages. I do think that it would be appropriate to have some kind of special verdict to make sure that that is based upon the appropriate standards, but I think that there's enough evidence in this case.

We have heard directly from Mr. Phillips that he believes that he was lied to directly about that signature that night. I know there's a conflict in the testimony about that. I do think that what has been done here by HCP in terms of the communications to the market, there's evidence that they never intended to pay $18 for these assets, and I think that that is fraud on the market. I think they have a lot of evidence that they wanted to buy the assets, but I think what is very apparent here is they had no real interest in paying $18 for these assets.

THE COURT: I think that's an argument. I don't see any actual—I don't see any actual evidence of that exactly. There are a lot of scenarios that could have occurred, but it's not clear at all that what—that they were making the $18 bid with no intention of not being able to follow through on it or with a fraud on the market. Obviously any [68] sophisticated person would know that there are a lot of possibilities that could have arisen out of this, but one possibility is that they would have been thrown into negotiations with Sunrise about the $18 bid. It seems there were some efforts to do that.

We can argue about the extent to which the market itself was misled, but—I know you've got the argument of fraud and deceit, but I think it is—it's been my belief that whatever the instructions are with regard to tortious interference, that the conduct has to be something beyond that in order to support punitive damages. It doesn't—assuming for the moment that there is sufficient evidence to meet the standard of whatever the standard is on tortious interference, it would seem to me that it would have to be something beyond that in order to support punitive damages. The punitive damages don't automatically flow from the tort.

MR. BRADFORD: Obviously we believe strongly that it doesn't require fraud or deceit and that it's not limited to fraud and deceit for purposes of establishing the tort.

THE COURT: I understand that.

MR. BRADFORD: I do think we can go beyond the bar for establishing the tort in the facts of this case, and particularly if you look at the fact that instead of sitting down in the first place and negotiating with management, they decide to issue a press release that they clearly intend to [69] use to cause the stock price to go up. I don't think there's any doubt about that. They are bragging about it the next day. They are happy it's above $18. If they really wanted to sell at $18, you wouldn't be happy that the price had actually gone above your bid. You would have no interest in pumping the stock price up over your bid.

So that behavior in itself gives rise to an inference that the real intent was to get that stock price high enough to kill the Ventas deal. If they really wanted to get the deal done, it would have been very simple to sit down with SSL beforehand, and then it would have been very easy to say to SSL, "We will do the same deal with you that you did with—

THE COURT: That's really like an alternative. Obviously they could have done that. They could have done that, although we know, in fact, that the—that Sunrise would have been exposing itself to significant risk by sitting down and discussing extensively such a bid. My perception is that's why Sunrise was playing this hands off, give us the unconditional bid; that way we will be forced to talk with you. That's the game they were playing, and they would have been at severe risk of actually sitting down when there was a conditional bid out there.

MR. BRADFORD: That may explain why SSL didn't come to the table, but the question is why then, when HCP made [70] these offers on the 18th and 20th of February, if you recall the letters went to the REIT, and they said, "We will do a deal if SSL would just sign these terms, and we don't even have to sit down and talk to them. They can countersign the agreement." And they put in those agreements terms that they know that SSL has rejected and will never agree to. Even when they get the Ventas agreement, instead of saying, "We will do the same deal with SSL that Ventas did with SSL, they put in terms that they know can never lead to an agreement." It's very easy to announce to the market, I'm going to pay $18, when you are absolutely assured for a wide variety of reasons that it can never, ever come to fruition.

THE COURT: Well, that's not—I don't think that's—it might well be that the terms may or may not be agreed to, but in terms of the 18, there's no evidence that I know of that the $18 bid was insincere, that, number one, they couldn't pay for it, they wouldn't pay for it. There's obviously mixed evidence as to whether the conditions could be satisfied.

MR. BRADFORD: I think Mr. Warren, who was at the center of all of this at the time, was very clear that he understood, and I think some of the testimony you heard from Mr. MacLatchy today reflects this, that they didn't believe for a minute that HCP was there with the $18 bid and that what really happened is that the Ventas deal gets blown up, they [71] know that HCP could clear these conditions up in a heartbeat because they could just agree to the same agreement as Ventas—

THE COURT: I didn't hear MacLatchy say that.

MR. BRADFORD: I'm sorry. I'm going to get to Mr. MacLatchy. He said, "We appealed the case so we could get Ventas to raise the price." What the REIT is doing is saying, "Let's create the illusion that the $18 is still potentially out there so we can get Ventas to raise its price." The point being nobody at the REIT itself, the people who were closest to this conduct, the people who really dealt directly with HCP at the time of these events, Mr. Phillips, Mr. Warren, every one of them believed that HCP was not sincere about the $18. Mr. Warren testified to that directly on the witness stand.

Now, Your Honor can discount the weight of his testimony, the jury can discount the weight, but he said immediately that night when he learned about the condition, he said, "This is bait and switch," and what he was going to do is once Ventas was out of the way, you'll recall this testimony, they were all convinced that then HCP would say, "Well, we are still interested, but it's tougher to get a deal with SSL than we thought it would be, and we might pay you $15, we might pay you $14." They would be the only game in town. That was their MO from the very beginning of getting this—

[72] THE COURT: That's their opinion. That opinion, which is informed speculation, informed belief on their part, doesn't—I don't think that supports punitive damages. That would support your claim if the jury were to believe a whole series of things, plus their own opinion.

Obviously their opinion matters because they were central to this thing.

MR. BRADFORD: If the jury finds that, if the jury finds and it believes that there was never an intent on the part of HCP to pay $18 when they press released to the world that they were going to do that and they protected themselves at all times so they wouldn't have to be there, that really is fraud on the market. Professor Fischel, their expert, I asked him that in his deposition. He's an expert on what is fraud in the market. I said, "If somebody put out a press release saying 'I'm going to pay $18 for these assets' and their strategy was to buy it at a different price and they are doing that to kill the pending deal"—

THE COURT: That's speculation. There is no evidence other than the speculation of the people—and I'm not saying their speculation is worthless. These are smart people. They have been in a lot of deals. It is—what they were thinking may have some—there may be a reason for them to speculate, but I haven't seen a bit of evidence, and there's been a lot of discovery, that suggests that if push came to shove, which it never came to because of the [73] constraints of Sunrise's actions, that as far as the $18 price, HCP could not have paid it, and would not have paid it. I know that's an argument, but I don't think it's a very—a basis for punitive behavior.

MR. BRADFORD: I think the behavior itself qualifies. What Your Honor is addressing is really the level of proof of that behavior. I would acknowledge that this is based upon the conduct of the parties. It's not based upon some document that says, "We won't pay $18." We don't have those e-mails. We don't have a lot of e-mails from Mr. Flaherty for whatever reasons. But we do have behavior that speaks very clearly to this being his intent.

When you think about it just in common sense terms, why would anybody pay a dollar more for these assets than they had to pay? Why would anybody go from $15 to $18—

THE COURT: Lots of reasons. They are very competitive people. The valuations that we have all seen say that $18 was within the outside range of what these could be worth, and in a competitive situation it's also worth something that we beat the other guy. It is a great offer. It turns out it would have been even a worse deal probably, of course, for HCP than it ended up being for Ventas.

MR. BRADFORD: They had the ability to go in steps.

THE COURT: That would have been a stupid thing to [74] do. In the circumstances that was a nonstarter because they had—I think that whoever gave the testimony was correct. At the position they were in, for whatever reason, and it's certainly debatable why they didn't make a bid or why they couldn't, whatever, but once there was a signed contract, once the purchase agreement had been signed, the only way for HCP to win was to make a blockbuster bid.

Now, you are suggesting that this was a complete fraud in a punitive sense. I'm suggesting I don't see the evidence. It may well be that ultimately—I think to show the kind of punitive behavior, you really have to show they absolutely had no intention of even making a deal at all. I think when you make an $18 bid, I think the evidence may well stand for the argument that, you know, maybe we weren't going to have to pay 18, but they were clearly going to have to pay more than 15, a lot more than 15, and who knows where it would end up. But they had to be prepared to pay something substantial, and in order to make Sunrise pay attention to them, knowing the legal constraints they faced, it seems reasonable that they had to make a big bid. Yes, if they had absolutely no intention of following through on that bid, if it was a completely fictitious bid, which is what you—I think somebody called it a fictitious bid, illusory bid, people can have that opinion, but I don't see the evidence that it was such an illusory bid that it would support punitive damages.

[75] MR. BRADFORD: Your Honor, I think there is very strong evidence that it was, in fact, illusory.

THE COURT: In what way?

MR. BRADFORD: In the way that—not in the way they necessarily would have bought the assets at any price. Clearly there's some price at which they would have bought the assets, if it was $12 a share or something. No one is saying that at no price were they interested in the assets. What we are saying is they told the public markets that they had an offer. That's what it was called, an offer, for $18 a share. First of all, an offer is a binding legal obligation. In fact, if you look at the black letter law—this is why the word "illusory" is important, and I think the jury should be instructed on this—when you have a promise where the fulfillment of that promise is within the control of the promissor, that is the definition of an illusory promise or—

THE COURT: I'm sorry to cut you off. You are splitting hairs. You may be making a very correct legal argument that the word they used "offer," that this may or may not qualify as an actual offer. But there are other ways of looking at it. I don't think it was so delusional and so misrepresentative that the conduct was punitive. It did say offer, and maybe you are correct on that, but it also said—it clearly indicated to a careful reader anyway that they had [76] not reached the agreement with SSL. So it was clearly conditional on that. They may have overstated their likely ability to enter that agreement.

The careful reader would clearly know there was a conditionality to the bid. Don't you think?

MR. BRADFORD: That's where we really strongly disagree. Recall the testimony—

THE COURT: I don't know how you can disagree actually. There's an element of conditionality expressed on it.

MR. BRADFORD: They can go unconditional and get their SSL deal done later. That's what Andrew Phillips asked them to do on January 14th. Everybody familiar with this process understood you had two options. You had to get a deal with SSL at some point. There was no reason you had to get it before you did the deal with the REIT. As long as you made an unconditional offer, that's all the REIT cared about.

THE COURT: What more can you say than in the actual, whichever it was, letter or press release, that we haven't reached an agreement yet?

MR. BRADFORD: They say—that's right.

THE COURT: They said, "We are confident."

MR. BRADFORD: "We are confident we are going to reach an agreement." What that implies—

THE COURT: I'm sorry. The implication may be [77] incorrect, but I don't think that is punitive behavior. They may be misleading because if they had no—I think there are—obviously you got an argument. I'm not saying your argument isn't a good argument to make on the underlying claim, but when you disclose the fact that you still—you have an agreement yet to make—

MR. BRADFORD: Of course, everybody knows they didn't have a deal with SSL. That was no surprise to anybody. That's why they didn't bid in January.

THE COURT: That's why they put out the press release.

MR. BRADFORD: Nothing had changed. You heard the testimony about the call to Klaassen and Newell. Nothing substantive was discussed that afternoon of the 14th. From the 14th of January to the time of the press release, they were no closer to a deal with SSL than they had been the night they said they could no longer bid. All of a sudden, they are telling the REIT, "Okay, here's our bid, and we are confident we will get a deal done with SSL." What are you going to think other than they are prepared to sign now and get the deal with SSL later? They must have had a very good conversation—

THE COURT: The degree to which—the degree to which they were correct on their confidence will depend on what the jury thinks about partly whether they were willing to [78] compromise on the two remaining points. If they were—it seems—at least on one of those points, it seems to me that they were overreaching and would have had no choice but to have caved on it. I don't know about the other one. But it seems like on the development rights, as much as, of course, HCP would like the development rights, but this seems—I'm convinced that SSL wasn't going to give those up. It's not a matter of—if they wanted the deal, they were going to have to cave on that, and the jury can believe different things.

MR. BRADFORD: So then to go out and to say this is identical to the Ventas agreement, that they know is an unconditional agreement, and if anybody looks at the agreement, they see a signed, unconditional agreement. There's nothing in the press release about it's not signed. What I found surprising, and I did not expect from the discovery in this case, because when I asked Mr. Flaherty at his deposition, "Why didn't you sign the agreement," he says, "I don't know. I don't recall why I didn't sign the agreement. I didn't even know that the agreement was unconditional." Now he comes in here and says, "There was a clear understanding that we couldn't sign the agreement because this was conditional." That was not clear to anybody at the time until they called him that night and said, "Is it or is it not conditional? Why do you put in the press release [79] that this is identical to an agreement that you know is an unconditional agreement? The only thing the REIT has told you they will take is an unconditional agreement, and then you tell them we are confident we will get the deal done with SSL." The people like Mr. Warren, who were smart enough to pick up on it because they knew who they were dealing with and—

THE COURT: You are bringing a lot into—when you say they knew who they were dealing with, there hasn't been any evidence of who they were dealing with other than the guy was pretty smart and had a big company that was competing strongly to get this asset. Warren and MacLatchy, although they were on the same side, are in completely different positions in terms of the way they were approaching this transaction. Obviously MacLatchy, he's adding up the numbers. First thing he did was get his mathematicians to figure out how much money he was going to make. I assume Warren, who is a big-time guy obviously, he had less stock, less skin in the game, his role was to make sure the process was fair.

MR. BRADFORD: And the shareholders ultimately got the best deal.

THE COURT: But they were approaching it from different—they had different responsibilities, even though they were on the same side. I think their testimony sort of [80] reflects that. I think your arguments to me go to the tortious nature of the conduct, and I'm looking at—I know the arguments—I know that you can make the argument that the conduct was fraudulent and that sort of thing, and that's going to be an argument that can be made irrespective of whether punitive damage is in the case in the end. I'm looking at not—I'm looking for evidence of actual conduct that to me is of a punitive nature and less of what the inference that can be made. It seems to me you have to have actual conduct, and I guess to me whether someone signs something or didn't sign something, and this sort of communication back and forth and how you can interpret a press release when—maybe you and I disagree, but there could be different interpretations of that press release and what it really meant. Obviously Sunrise REIT, who read it pretty carefully, wasn't quite clear of what it meant. That kind of conduct to me does not provide the kind of evidence which would in any way, shape or form seem to rise to the punitive level.

It seems to me that—I don't know why this kind of case should be any different than another case. You have to have something beyond the tortious act to create the punitive damage. At least in Kentucky it has to in some way—I hate to impose the language of Kentucky courts in sort of ordinary cases on what is obviously a very sophisticated transaction [81] that normally doesn't happen in Kentucky, but, you know, the conduct has to be something that is—offends the sensibilities of normal people, not just the sensibilities of people who happened to be in the transaction. I don't think it gets there.

MR. BRADFORD: I think the fact—if these communications had been made only privately to the REIT, that would be one situation. I think the fact that the public is involved here does create a different set of circumstances.

THE COURT: Not one bit of testimony of a person who was offended by the press release or who was, in fact—

MR. BRADFORD: You are going to hear it.

THE COURT: I haven't heard it yet. —who was offended, who was absolutely completely misinformed about this.

MR. BRADFORD: You are going to hear—I would ask you reserve on ruling on this until you have heard that testimony. Both ING and Mr. Bigman of Morgan Stanley will testify when they read this press release they thought they had a clean, unconditional offer.

THE COURT: So what? So what? That doesn't mean anything to me. It doesn't say they are offended. I would be—again, I think we did here—well, I don't think they were—they may have misunderstood it, but they weren't [82] offended by it. Maybe they didn't read it carefully. I don't know. But I think what they focused on was the 18. They can count. These people know how to count. That's why they make a lot of money. They saw 18. They saw 15. They know the difference between the two, multimillion dollars. And they were glad to see it, and they were hoping that even though they saw an element of—who knows what they thought initially.

MR. BRADFORD: There were 30 million shares purchased at $18 or more based upon that press release. The people who bought those shares—

THE COURT: We haven't heard from a single one of them. If we did hear from them, I am just confident if we hear from any of these arbitrageurs, they are betting on the—they are thinking, hey, 18, it's a big company, I know they can pay it, and I'm making an educated bet that the price is going to be higher than 15. And a lot of them made a lot of money because they were correct on that. Some of them lost because they misjudged what was going to happen. Their misjudgment has to do with a lot of things. They probably didn't realize that Ventas was going to have the leverage they did on Sunrise to make them go to court and enforce this agreement. That could have gone a lot of different ways. That's probably a big misjudgment, I bet, on a lot of these arbitrageurs who didn't think, number one, that Ventas would [83] push it and maybe thought that Sunrise would figure out a way to not be pressured.

MR. BRADFORD: This is all remember in the first 24 hours. A lot of this does get sorted out later with the court case. If you look at the bind that happened in the first day of the press release, and that's the 30 million shares, that's really where the injury happens. I would ask Your Honor to let us put into evidence and for Your Honor to consider the analyst reports that came out on the 15th of February because that is the market. When you read every one of those analyst reports—I think we are being severely prejudiced by the jury not seeing what did the market think in that one day, that 24-hour period. Every report says this is a clean, unconditional offer. Would they have—

THE COURT: So if they were wrong, what does that tell you about the analysts?

MR. BRADFORD: The press release was misleading, that the only information they had was the press release and that they were misled by the press release, and that millions of shares were bought at $18 because of that misinformation and the failure to say this is conditional.

THE COURT: These were arbitrageurs. These are some of the most sophisticated—these are specialists. They know—

MR. BRADFORD: Many people other than arbitrageurs [84] who bought on that day. We have testimony 10 million shares were bought by the arbitrageurs. There were 30 million shares that were traded that day. There were many other investors, pension funds, et cetera, that are coming into the market based on a press release that is truly misleading in every sense. It's calculated to mislead by saying it's identical, by saying that it's an offer, by saying—this is another point we haven't talked about, but that press release says this meets the definition of a superior proposal under the Ventas purchase agreement. Well, the definition of a superior proposal under the Ventas purchase agreement, it's got to be unconditional. It can't be an unsigned agreement, and it can't be solicited.

To the extent there was any of this encouragement or solicitation, for all these reasons this could not be a superior proposal. When the analyst read that this is a superior proposal, they can only assume it's got to be unconditional because that's the requirement for making a proposal in this process. It's got to be an unconditional proposal. And it cannot qualify, and that's why the REIT continuously said, "We can't call it a superior proposal," but that news doesn't come out until later.

So I think the market is really misled to think you've got the identical unconditional deal that Ventas did. The market trades 30 million shares on that information alone, not [85] one day, and every contemporaneous report of what the press release said that HCP made an unconditional offer. You see that right in the analyst reports.

I think at a minimum the jury needs to see, not for the truth of the matter asserted, because obviously it was false. We are putting it in to show the falsity and the misleading effect of the press release, not the truth of the analyst reports. We will stipulate the analysts were wrong. It wasn't an unconditional offer. But for the state of mind of the analysts and what information was in the market, those analyst reports from the 15th of February show that the market believed it was a clean offer.

Apart from this punitive damage issue, I would encourage Your Honor to please reconsider that. You originally said we could put in those reports. I think they are the most direct evidence of what effect did this press release have on the market. We heard what Mr. Warren thought. I think it's highly relevant what did the analysts think with a clear instruction this is not for the truth. We will stipulate the analysts were wrong. But it really does show what did the analysts think that day. That is the most direct evidence we have that this press release was misleading, is how did the listener actually understand it.

As Your Honor said, these were sophisticated listeners. This isn't somebody who picked up a newspaper and they are [86] going to say, "I had this understanding." These are the people who are there, who know the playing field, who know what's going on. If they are misled by this and they think it's an unconditional offer, I think that's very relevant and reliable to what the market itself was thinking.

I would ask you to at least reserve judgment on this issue till we have had the chance to proffer those reports again and till you hear from Mr. Bigman and Mr. Smith and the other evidence that's going to come in in connection with their case.

There's also—this is also, I think, very important, Your Honor. Mr. Downey was the one analyst who we deposed because we understood this issue of, well, the analyst reports can't be cross examined. They still reflect what the market was thinking. We also went and deposed an analyst and said—he's the most sophisticated follower of the REIT. He's Mr. Downey. I think he's from—is it Royal Bank of—RBC, Royal Bank of Canada. He is a very sophisticated guy. What did you understand following Sunrise REIT—that's what he does. He specializes in following this process of Sunrise REIT. What did you understand on February the 15th? He testifies, "I was convinced by this press release that this was an unconditional offer." I don't know that there's any other way to understand it.

The jury should be allowed to hear that evidence. That [87] is, as we came to trial, our most compelling evidence of the falsity and misleading nature of the press release, and again, it's not for the truth of what this guy thought. We will stipulate he got it wrong. But this is what the state of mind of the market is. It's the most classic state of mind evidence. Your Honor hasn't heard that evidence. I don't think Your Honor has had a chance to consider it. The analyst reports I ask you—really, really urge you to let us put that into evidence. I think of every decision that's been made in this case, and with great respect, that that is the one decision we disagree with most strenuously.

THE COURT: Which is what?

MR. BRADFORD: We have been prejudiced the most by. Is the exclusion of the analyst reports, at least from that narrow point in time and of Mr. Downey's deposition testimony on what he thought and understood from the press release. I'm happy to tender that this weekend to Your Honor and let Your Honor review that and consider letting us put that in. Then I would ask that we have an opportunity to argue this motion in light of that evidence.

THE COURT: You can send it to me. I'll take it under advisement.

MR. BRADFORD: Thank you.

MR. HANSEN: May I respond?

THE COURT: Yes.

[88] MR. HANSEN: They have closed their case. We are at the close of their case. We are entitled to know what case we are defending. I think this shifting sands argument is not appropriate.

The analysts—we will get to the analysts in a minute. The shareholders weren't offended at all. The shareholders will testify they knew from the outset 15 was a bad deal. They did what they did. There's nothing there for reprehensibility or punitive damages, not one iota.

What we have here is a case of the most—hard to know how to characterize it other than a commercial dispute between sophisticated parties involving very sophisticated questions of business negotiation. This is not—we don't think it's a tort case. We will argue that when Your Honor is ready to hear it. We don't think it even crawls up to the threshold of what it has to crawl up to for a tort case.

To get beyond that, for punitive damages you need shocking of the conscience. You need reprehensibility. Nobody was shocked here. The arbitrager, not one shareholder lawsuit, not one government investigation, not one irate person or complaint. Only Ventas trying to capitalize on its windfall as a result of negotiating for a confidentiality agreement was better than the one we got. Good for Ventas. They kept us away from this transaction. They got an $18 asset for $16.50. Big feather in Ms. Cafaro's cap.

[89] What bad conduct did we do? Lying to the market? We didn't lie to anybody. Mr. Shean wrote that press release. He wasn't lying to the market. Mr. Flaherty told anybody who wanted to hear it's a conditional offer. Anybody who read it knew it was a conditional offer. It had to be a conditional offer. You don't put something in the release that says we are confident we are going to make an agreement with somebody if you don't need to make the agreement. You only put it in there if you need to do it. It's not surplusage. Any literate and intelligent human reading that knows it's something you got to check off your list before you forward it and do the deal. That's what Mr. Warren said, Mr. Phillips said, Mr. MacLatchy said. Then they go to the market and issue their own press release the next morning to make even clearer this is conditional.

Now, where that all takes us. Your Honor, on the tort, I know we are going to address at the appropriate time. If nothing else, we should be through right here and now with this notion of punitive damages so we can appropriately confine our proof to what could possibly be the case. We are not aware of any case that would come even close to allowing this kind of equivocal proof on a tort that it doesn't even, frankly, meet to say this is reprehensible, shocking of the conscience conduct.

Your Honor asked just the right questions. Why does [90] Mr. Warren's speculation get to the rise to the level of evidence? With all respect, we don't think there's even evidence. Certainly it's completely inconsistent with his conduct because Mr. Warren and everybody else worked arm-in-arm with us to try to get this deal through. The fact that he's now angry and wants to say some speculation about something, that doesn't change the dynamic of what actually happened here, which is that everybody thought this was a legitimate deal.

You said it at one point yourself in one of the conferences. We had a whole bunch of sophisticated actors acting fairly reasonably under the circumstances in which they found themselves. The Canadian court came down where it did. This is not somebody who acted outrageously, reprehensibly, in some terrible way. It just isn't.

This issue should be out of the case today so as we go to the weekend, we can actually go back and focus on the case that we have got to defend. That's fair to us.

THE COURT: If there's one thing I want to do, it's make your weekend easier.

MR. HANSEN: It's going to be a hard weekend anyway no matter what. Even though I think it is fair—as you said in your preliminary rulings, this should be a grant. This is the point to grant it so we can actually focus on what we should focus on.

[91] THE COURT: I'm sure you'll focus on what you should be focusing on. I've the heard the arguments. I brought it up, and I'll decide it in due course.

MR. BRADFORD: Thank you, Your Honor.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CASE NO. 3:07CV-238-H

VENTAS, INC.,
Plaintiff,

vs.

HCP, INC.,
Defendant.

Volume 11A
Transcript of Jury Trial
Before Honorable John G. Heyburn II
United States District Judge

September 2, 2009
Louisville, Kentucky

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[175] THE COURT: * * * In the interim, I suggest we work on the instructions based on the assumptions—at least unless someone argues to the contrary, based on the assumptions implicit in the instructions, and that is that there would not be an instruction with regard to the malicious behavior prong and that there would be no punitive damage instruction based on my belief that there is insufficient evidence to establish oppression and the kind of fraud and malice required of punitive dam-

ages, which in my opinion is something more than what is required for the tort would be evident in the evidence.

The principal reason—the principal thing I was looking at from the beginning of the case till the end is whether or not there was evidence—clear and convincing evident which would be required for punitive damages, I believe, that the purpose—the real purpose of the July 14th bid—February 14th bid was not at all to purchase the company but, in fact, [176] some other destruction to the market or purely a vindictive or malicious act against Ventas. Obviously I don't think there was—I think there was very little evidence of that at all, certainly not enough to support the punitive damage claim, so at this point I would not have an instruction on that grounds.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

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[22] MR. SNYDER: If I could, Your Honor, there are two sentences in the Scandpower Case. "Therefore TEC argues it can recover if the false representations were a "substantial factor" in SMUD's decision-making process. The flaw in TEC's argument is that it fails to recognize that the tort alleged here requires the Plaintiff to prove that it would have obtained the economic advantage but for the Defendant's tortious interference." That's what—

MR. WEISS: And that's what—

THE COURT: Right. But that doesn't—I mean, there could have been other factors which could have led—could have contributed to it. But the factor which is the improper interference, you know, must be a factor which on its own did or could have caused.

MR. BRADFORD: It's got to be a substantial factor.

[23] THE COURT: But it's not on its own did. It's either did or could, because if it's a big enough factor, the existence of other factors wouldn't necessarily preclude a jury from checking off this element, right or not?

MR. BRADFORD: Right.

MR. SNYDER: I understand your point and that may be in terms difference between a hypothetical world and the but for world.

THE COURT: Okay. I'm sorry.

MR. BRADFORD: Your Honor, I think the right standard for causation is, in fact, the substantial factors or the language that you used here is absolutely correct. There's a separate issue that came up in Scandpower, because there was a contention that there was wholly unrelated conduct that might have caused this transaction to fail for reasons completely independent of the tortious conduct.

It's kind of like an intervening cause argument. And so they had to prove that, in fact, their expectation would have occurred but for a conduct. That, I think, we know here the expectation did not occur. I mean, the question—let me put it a different way. They would have got the deal there is what they had to prove but for—not but for, but absent the conduct they [24] would have got the deal. That's something we have to prove. You've said that in terms of reasonable expectation that we've got to prove. However, that's been articulated. That's not just speculation that we would have got the deal. That's an element of the proof. You can't just show up and say there's wrongful conduct and therefore I get the benefit of something. You have to prove it was more likely than not or whatever the right standard is, you get that benefit.

But when it comes to what was the role of the wrongful conduct in causing them not to get it, not that you would have proved you would have got it, it has to be a substantial factor. That's the test. There's nothing in Scandpower that's inconsistent with that. Scandpower is just saying that addition to proving it's a substantial factor, you have to prove that there was a reasonable likelihood you would have got it absent the various conduct. And it doesn't mean that you've got to break down all the conduct in the world and say, you know, this specifically is what caused it. And if you somehow extract the wrongful part of the conduct from the not wrongful part of the conduct, that you got to prove it's only that aspect of the conduct that was wrongful. They were talking about somebody else's conduct altogether.

[25] THE COURT: Well, what you're going to argue I'm not sure as a practical matter how it's going to affect the case, because the jury is either going to believe that a combination of conduct was significantly wrongful. And that is, the submitting of the bid, the use of the press release, and all the conduct surround it. The obfuscation of the true intent perhaps misleading statements made to various different people, and there could be some other things, I don't know. But those things combined and they can't be separated. I mean, the fact that—

MR. BRADFORD: Exactly. And that's the problem—

THE COURT: You know, the fact that making the $18 bid alone doesn't constitute significantly wrongful conduct. You know, you can't separate all these things. So I think—

MR. BRADFORD: And it's—

THE COURT: We're not going to have a situation—we may not have the Scandpower situation where there's sort of separate parts of conduct which need to be evaluated. So the result may end up being the same, but still it's important to get the standard right. Even if the result is a forgone conclusion after they conclude on number three. I mean, they're never going to [26] get to four unless they get past three, and it may be that once you get past one, you get past the other. But it's important to look at the standard and whether the standard is correct or not, because we don't know exactly what the jury is going to do. So I can't really say one way or the other, because I haven't read Scandpower, so I can't—

MR. SNYDER: Your Honor, it's a very short opinion. And rather than the two of us arguing what it says, I'm sure you can read it and decide for yourself what it says, but what Mr. Bradford just said, though, is wrong. And that is this: The whole purpose of the exercise we've spent a week going through between the two provisions of the REIT statement is wrongful means.

THE COURT: Yes.

MR. SNYDER: As a competitor we have a right to interfere using proper means. And the whole point of the but for test as opposed to the substantial factor test, is the jury does have to separate those two things out.

THE COURT: There's really not going to be that much separation, is there? I mean, granted the jury could decide that whatever you all did was not wrongful. But if—it's very difficult to see how they're going to say that some of it was okay and some of it wasn't. I [27] think they're going to group the conduct and then decide it's either okay, it's not significantly wrongful as a group aggregated or it is. One way or another. So you're not going to have—and what—after they get finished making their other arguments, what I may do is, I mean, I see it is a little bit of a short opinion. I'm somewhat familiar with the area of law. I might go back and read it for fifteen minutes and come back and just have the discussion right now, so I can get—can ask the kind of questions I normally would. Right now I really—I'm just guessing.

MR. SNYDER: I would just suggest when you read it that you keep in mind Professor Fischel's testimony today, which clearly will be the closing argument in terms of what did and didn't cause this between wrongful means and proper competition.

THE COURT: But what would be proper competition?

MR. SNYDER: Announcing an $18 bid.

THE COURT: Well, no, but that's indistinguishable from—I mean, I don't think you can separate because the—you know, what—it goes back to the breach of contract. Clearly announcing at 18, my understanding is, that that alone would not be significantly wrongful conduct. But that alone is not [28] what happened.

And so you can't separate the significantly wrongful conduct certainly, and a jury's not going to disaggregate it. It is announcing at 18, making it public in the way they did, making other misrepresentations. They're going to be able to consider all those things. We're not asking them to separate those things. I mean, and it is possible that the jury could say, okay, the bad thing, the wrongful thing, was the press release and anything else they did, the announcing at 18. We don't even consider part of wrongful conduct; and therefore, they get the this. And they say, really, the 18 is what caused the interference. Than wasn't wrongful. You know, Ventas loses.

I mean, I think that's almost unimaginable they would do that to that level of disaggregation, but it certainly would be permissible, perhaps, under the instructions. I just don't think it's going to happen.

MR. SNYDER: Well, I'm not going to debate jury behavior with you.

THE COURT: Probably—we're all on thin ice doing that.

MR. SNYDER: But what I would focus on is the purpose of the instructions are to guide the jury behavior. And the Scandpower case very clearly holds [29] that you do have to disaggregate the conduct. That's the whole purpose—

THE COURT: But you don't have to, because it is clear it's permissible for the jury—I mean, I think—I guess I would state it more affirmatively. The only way the jury is going to find for Ventas is to aggregate the conduct and that it is all part of significantly wrongful conduct. I think anything—any disaggregation is inevitably going to lead to a finding against Ventas on one of these elements or the other. I'm not suggesting what they're going to do one way or the other, I'm just saying for Ventas to win, I feel quite confident the jury is going to have to look at all the conduct aggregated together as related to a common purpose. And I believe that it is fair for the jury to do that. And whether they will or not, I have no idea. It's possible they'll do what you suggest, but I think that's fair for them to do that. But I need to read Scandpower.

MR. BRADFORD: I think it would be helpful for Your Honor to take a look at the Restatement again, 766, in terms of legal causation, because that's defined very clearly here that the act or omission must be a substantial factor in bringing about the harm.

THE COURT: Yeah, that's—but that's number five. That's not number four. They're possibly two [30] different things. They're different things. And I'm generally, vaguely, aware of this. It usually doesn't come up.

MR. BRADFORD: I think one is just, you know, factual causation of damages. That's number five. But number four is the interference causing the loss of the transaction. That's where it's got to be a substantial factor. So I think you properly defined it—

THE COURT: Well, that's not exactly what the Restatement says though and Kentucky law—Kentucky law supplements, you know, the way I look at it and the way you'll see it described in my memorandum, Kentucky law is Kentucky courts have not dealt on this specific question. There are some Kentucky cases that give us hints about what they would decide and why, how they would deal with this Restatement. And, of course, Kentucky law fills in the blanks on the things which they have held over the years many, many times and that's questions of causation, whether damages or otherwise.

MR. BRADFORD: I think there's causation and fact and then there's the legal causation and both of those are addressed here that the legal causation, I believe, is the substantial factor in that the causation and fact is that we got to prove that absent the conduct, we would have achieved the $15. I don't think there's a [31] third requirement here that we somehow got to get over that requires some kind of disaggregation. And I think—

THE COURT: No, I'm not—I don't think the disaggregation is—I doubt if I'll get into that. I think the jury can decide for itself—you know, the jury will decide whatever it believes to be the significantly wrongful conduct and they don't have to describe that to us. That might be asking too much.

MR. BRADFORD: If we might address other—

THE COURT: Yeah, absolutely.

MR. BRADFORD: —aspects of this. We understand, obviously, respectfully disagree with Your Honor's finding with respect to prong one; i.e., that this was not at least in part to advance the interests. But we would say if the case is proceeding as it will, solely on the basis of significantly wrongful means, that there's no reason to get into the other prong and advise the jury that it hasn't been satisfied here; that the jury should simply be instructed that for us to prevail, we have to prove that HCP employed significantly wrongful means and interfering.

You can instruct them, in other words, on prong two and take out the reference to prong one and the explanation of prong one hasn't been met. I think it's [32] prejudicial to us to have the jury here that the Court's determined that the conduct was not malicious. We're not going to argue it's malicious. You made that finding. So the jury is not confused by this and just focuses on the theory of the case as it's being presented. And I think this is consistent with how we presented it; that the only question before them on this particular question or element, is there significantly wrongful means and interfering and we take out all the rest of it is kind ever surplusage that may confuse the jury.

THE COURT: I'll take a look at that, but, again, the instructions are not given in a vacuum. The instructions are given in the context of the entire case. And unfortunately or fortunately, as the case may be, this was an argument which was made in opening argument and it was an argument which I instructed the jury about, you know, preliminarily and I told them it might change.

And so I think the fairness aspect of it, I try to be fair in suggesting that testimony of motive is not—it still plays a role, which it could, but that it doesn't amount to the standard to get here. And I think it is—it is—sure, it is prejudicial somewhat to your side of the case, but not unfairly so because it adequately describes to the jury the circumstance and under the—and how we got there. So, I think, it is [33]—it is unfortunately true that fair statements sometimes prejudice one side or another.

MR. BRADFORD: Your Honor, I don't believe we've ever argued the sole means at the time of opening. We believed that we were going to have the benefit of 766, and we did argue that part of the purpose was to do so. We were not arguing this kind of standard, because we didn't think it would apply. I would note in opening, the jury had the benefit of a rules of the game instruction, which we do think should be referenced here.

The thrust of our opening was, this was a violation of the rules of the game; that this was—we did say it was fraudulent conduct. We focused on how wrongful it was. We never said ever that they didn't want to buy the assets or that their sole intent was just to injure Ventas. That's not been a thing we argued in this case. We didn't think they were sincere about $18, but we never went the route of saying they didn't want to buy this altogether.

The question has been, have they been dishonest with the marketplace, dishonest with the REIT. And we did argue the rules of the game, which, I think, in a competitive situation, there does need to be some reference to the rules of the game as a relevant consideration in determining whether there is [34] significantly wrongful conduct. And it may not suffice understand Your Honor's instructions to gets there, but it's a relevant consideration. And particularly if you're going to tell them they're competitors, I think it's only fair for the jury to consider, among other factors, did the competitors comply with the rules of the game, because the whole notion that they get a competitors privilege presumes in part that they've competed in a way that's appropriate. And it's part of what the jury needs to decide here. I don't think—

THE COURT: I think the way I would read it is that you are, you know, number one, if you are competitors but you have no real interest in advancing a competitive interest, then you could win under instruction number one. It doesn't alleviate the need for the instruction. But if, in fact, that's true, you win under number one. You all pretty much—certainly your witnesses said that this was a sham bid, a frivolous bid. What they were really trying to do was to make us pay more. The implication is they had no real interest in purchasing the company. All those things influenced my saying this, so I think the—

MR. BRADFORD: I don't think we've argued that. I think we have said that the idea was they were going to try to knock us out and come back and buy this [35] at a different price, and if they didn't succeed the consequence was we would have to pay more for the assets. And that wasn't a bad outcome, but nobody's ever suggested that this was not in any way intended to serve competitive purposes of some sort. We've said they didn't have a right to do what they did, but I don't think we've ever argued this was malicious.

THE COURT: Well, you said their motives were to hurt—was to hurt Ventas.

MR. BRADFORD: Yeah, in part, but I didn't say that was their sole motive. I never argued that that was the only reason that they did this. And I think we've been consistent. In fact, I said to the jury at the outset, we'll never know why they did that. I made a real point of not arguing motive to that extreme because I thought, frankly, it would be a credibility issue to argue to the jury that this was their sole motive. And so I did start the whole motive discussion by saying, we'll never know why, in fact, they did this. Among other things, you have to look at their motive in determining whether this is wrongful conduct or not.

And I do think to tell the jury that you've specifically found this, it's as if we lost half the case that we never tried here. And I did say we tried a case pursuant to this rules of the game concept, which was the [36] preliminary instruction, which is not in here. And I think we're really being put to a finding that we lost under a standard that we never tried to meet. It really wasn't something that was brought out, emphasized, or argued by any of the witnesses here or in my opening statement. I was very careful to stay away from that. I was very careful to stay away from the punitive damage issue, which would have required me to argue malice or motive. I never said a word about punitives in opening. I never said a word about their sole intent being to injure Ventas. Never said a word about they don't have any interest in these assets. I don't think anybody would come in here and say they didn't have any interest in these assets. That's not something we tried to advance in this case. Did they have an interest in paying $18? I think that's a wholly different question, and that's why I would say something like a sham bid or fraudulent bid, but that's not to suggest—

THE COURT: I mean, there was really, I would say, and the reason—I mean, I understand exactly your argument. I guess it would be my opinion from the evidence that there is no evidence to suggest that they had no interest in paying and would not pay 18. All we have, if my memory is correct, is certainly that's what your people believed. But that's not evidence. And that [37] came in, you know, as their belief because their beliefs can be important. But there is no evidence from which one could reasonably infer, a jury could reasonably infer, that that is the case. I just don't see it. That would have to come from a lack of preparation, a sham nature of the bid, a complete inability to actually afford the bid at that price. I mean, there could be lots of—there could be lots of actually different kinds of evidence which could tend to show that. I just don't see that any of those things have ever been introduced.

MR. BRADFORD: I think I should be more precise. 18 on what terms? So, in other words, they've never said they would pay 18 unconditionally. They've said, if we would get a deal we like with SSL, we would pay 18. But we see them holding back on getting a deal done with SSL. We heard that those are valuable development rights that they're trying to negotiate. They're preserving the ability to come back and say, you know, that SSL deal cost us more than we thought it would cost us, and so I think more precisely the question is—

THE COURT: Well, I mean, there's no evidence of that. The evidence is, as I understand it is, the SSL people saying, yes, we had, you know, some disputes, but that ultimately we could have reached a deal. Now, [38] they're not saying on what terms and maybe it was tough negotiation. And, of course, truthful or untruthful, the testimony of the HCP folks that they said were going to cave. Now, a jury could certainly disbelieve that. It's obviously somewhat self-serving after the fact, but it's still, you know, it doesn't lead to any other conclusion about—

MR. BRADFORD: I think it's more than a reasonable inference. The whole course of conduct is consistent with that game plan here. And beginning with the whole desire to get exclusivity in the auction process that the whole game plan has been, let's get a one-on-one negotiation and let's see what kind of price we can get to.

THE COURT: I guess, I don't see that—I know that's been emphasized. I don't see that as significant evidence, myself, but you're a better lawyer and you might make something out of it. But it seems to me that is a request—I mean, obviously to their advantage. If they could have gotten Sunrise to agree to it. Sunrise didn't. They could have. They thought it was to their advantage not to. So it's something that happened prior to all these bids. It happened. You know, no one said it was improper and it was a good gambit by HCP and it failed.

[39] You know, for, I think, obvious reasons why Sunrise at that particular time didn't want to do it when, you know, the space between the two existing bidders was sort of a pick-em situation, and that's something, based on my knowledge of the evidence, that HCP probably didn't realize. They never thought they were in a much better position and the statement to their own people thought they were in a better position. They thought they were $2 ahead, when really the way Sunrise was looking at it, it was sort of a pick-em situation. It was not so one-sided.

So I don't personally see that as being very influential in the jury, but, again, you may make something of it, but it certainly doesn't prove it's not evidence from which somebody could infer that they were—had a bad motive. They were trying to gain a legitimate advantage, which nobody would disagree is a legitimate advantage. No harm in asking, as they say.

MR. BRADFORD: To the point of digression.

THE COURT: Anyway, maybe nowadays there is a harm in asking.

MR. BRADFORD: If Your Honor wants to instruct the jury that—

THE COURT: As long as you obey the answer.

MR. BRADFORD: There's no contention that HCP [40] was acting exclusively to injure Ventas or some such thing that takes off limits for purposes of argument. I understand that. But I think this gives such undue emphasis to this in the context of these instructions.

THE COURT: I'll look at that. I think that's a valid point. I tried to do it in a way that didn't overplay it. And I'll—

MR. BRADFORD: I really appreciate that, Your Honor, because, obviously, anything that the Court finds has extraordinary weight with the jury. And to have a judicial finding that this was not malicious, I think it really tells the jury that the Court doesn't think much of the motive parts of the case. I think it's very fair to take out the issue and make it clear that there's no contention here that HCP was acting exclusively to injure Ventas. And that that's not something we're permitted to argue. I didn't argue it at opening, and let's get it out of the case. That's fair, but whenever the Court says, you found, I think Your Honor knows that really has extraordinary consequences—

THE COURT: I'll take a look at this. I don't think it's error either way to include it or not to include it.

MR. HANSEN: Our position, Your Honor, is you [41] instructed on the beginning case, got past summary judgment on two theories: Motives and this unlawful means. So, you know, we disagree about what was said in the opening. So I think it would be wrong to say to the jury it wasn't argued. I think this is just neutral and doesn't call undue attention to it. It's just an issue like the Canadian issue is out of the case for us. We had to live on that.

MR. BRADFORD: We did argue that on summary judgment because we argued 767. It's not anything we've ever argued in this case. It's not anything I could think to argue in this case. And I think to make a finding on that, particularly when we came in and tried a case with the understanding that 767 was applicable. And now the jury is being told that there's a finding under a different legal standard adverse to us, it really is highly prejudicial. I would say in the ordinary course Your Honor may be right about your ability to make this kind of finding. But I think in a case where we didn't know what legal standard we were going to wind up before the jury on, it's not anything we ever would have wanted to argue because we thought there was a lower bar that would satisfy liability here. It's very unfair to make a finding on that when it really was never in the case in the first place.

[42] THE COURT: That's a good point. I'll take a look at it.

APPENDIX E
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOS. 09-6385/6413

VENTAS, INC.,
Plaintiff-Appellee/Cross-Appellant,

v.

HCP, INC., FORMERLY KNOWN AS HEALTH CARE PROPERTY INVESTORS, INC.,
Defendant-Appellant/Cross-Appellee.

Appeal from the United States District Court for the Western District of Kentucky at Louisville.
No. 07-00238—John G. Heyburn II, District Judge.

JUNE 27, 2011

Before MERRITT, CLAY, and GRIFFIN, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc,

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* Judge Kethledge recused himself from participation in this ruling.

the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX F

CONSTITUTIONAL PROVISION AND RULES

1. Federal Rule of Civil Procedure 50 provides as follows:

(a) JUDGMENT AS A MATTER OF LAW.

(1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) RENEWING THE MOTION AFTER TRIAL; ALTERNATIVE MOTION FOR A NEW TRIAL. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) GRANTING THE RENEWED MOTION; CONDITIONAL RULING ON A MOTION FOR A NEW TRIAL.

(1) *In General.* If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) *Effect of a Conditional Ruling.* Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) TIME FOR A LOSING PARTY'S NEW-TRIAL MOTION. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) DENYING THE MOTION FOR JUDGMENT AS A MATTER OF LAW; REVERSAL ON APPEAL. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

* * * * *

2. Federal Rule of Civil Procedure 54(b) provides in relevant part as follows:

(b) JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. * * *

* * * * *

3. The Seventh Amendment to the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.