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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

9 Southern Union Company, a
10 Delaware corporation,

11 Plaintiff,

12 v.

13 Southwest Gas Corporation, a
14 California corporation, et al.,

15 Defendants.

CV-99-1294-PHX-ROS

Order

16 On December 18, 2002, after a jury trial of nearly two months, the jury returned a
17 verdict for Plaintiff Southern Union Company against Arizona Corporation Commissioner
18 James Irvin, the only remaining Defendant at the conclusion of trial, and assessed a punitive
19 damages award of \$60,000,000. Southern Union prevailed on two causes of action,
20 intentional interference with business expectancy and intentional interference with
21 contractual relations, both arising from Irvin's activities generally in 1999 which caused the
22 failure of an attempted merger between Southern Union and Southwest Gas Corporation. At
23 the time of both the attempted merger and the jury verdict, Irvin held elective office as a
24 Commissioner on the Arizona Corporation Commission. He has filed an Amended Motion
25 for JNOV or in the Alternative for New Trial or Remittitur [Doc. #2238], seeking a new trial
26 or remittitur on the punitive damage award of \$60,000,000.

27 Following the Supreme Court's decision in State Farm Mutual Auto. Ins. Co. v.
28 Campbell, 123 S.Ct. 1513 (2003) (Campbell), the parties submitted supplemental briefing

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1 on the issue of punitive damages: Commissioner Irvin's Supplemental Memorandum of Law
2 [Doc. #2244], Southern Union Company's Response [Doc. #2245], and Commissioner Irvin's
3 Reply [Doc. #2246]. Following a hearing on June 2, 2003, the Court ordered further
4 supplemental briefing, and both Southern Union [Doc. #2253] and Commissioner Irvin [Doc.
5 #2254] submitted additional memoranda. Having considered the briefing of the parties,
6 Commissioner Irvin's motion will be denied, and the punitive damages award of \$60,000,000
7 assessed by the jury will be upheld.

8 **Analysis**

9 **A. Punitive Damages under Arizona Law**

10 Commissioner Irvin's initial argument is that there is insufficient evidence to sustain
11 an award of punitive damages under Arizona law. "To recover punitive damages, the
12 plaintiff must ... introduce sufficient evidence to allow the trier-of-fact to calculate a punitive
13 damage award that is reasonable under the circumstances." Hawkins v. Allstate Ins. Co., 152
14 Ariz. 490, 497, 733 P.2d 1073, 1080 (Ariz. 1987). Hawkins specifies three non-exclusive
15 factors that the Court should consider in evaluating an award of punitive damages: the
16 financial position of the defendant, the nature of the defendant's conduct, and the profitability
17 of the defendant's conduct. Id. at 501-2. See also Hyatt Regency Phoenix Hotel Co. v.
18 Winston & Strawn, 184 Ariz 120, 134, 907 P.2d 506, 520 (Ariz. App. 1995) (outlining and
19 applying three Hawkins factors). "A plaintiff is not required to put on proof of every factor,
20 nor is any single factor a prerequisite to recovery of punitive damages. Rather, the plaintiff
21 must produce evidence so that the amount awarded may not be said to be so unreasonable in
22 regard to the circumstances as to show the influence of passion or prejudice." Hawkins, 152
23 Ariz. at 501 (quotations and citations omitted). The Court must show considerable deference
24 to the judgment of the jury:

25 We vest the trier-of-fact with discretion to award an amount of punitive
26 damages that, in its judgment, will punish the defendant and serve as an
27 example to deter similar future misconduct. Once exercised, this discretion
28 should not be disturbed unless the award is the result of passion or prejudice.
The appropriate test of passion or prejudice is whether the verdict is so
manifestly unfair, unreasonable, and outrageous as to shock the conscience of
the court. *The amount of the award alone is not sufficient evidence to prove*

1 *the jury acted with passion or prejudice.*

2 Hawkins, 152 Ariz. at 501 (quotations and citations omitted) (emphasis added).

3 The first consideration is the financial position of the defendant. Hawkins, 152 Ariz.
4 at 497. "It is axiomatic that the wealthier the wrongdoing defendant, the greater the award
5 of punitive damages necessary to punish him. We recognize, however, that the award must
6 not financially kill the defendant." Id. at 501.

7 Irvin argues that the punitive damages award in this case must be overturned because
8 it would "financially kill" him based on the evidence that Southern Union introduced at trial.
9 At trial, Southern Union produced evidence of one financial statement of Irvin's and his
10 wife's assets (Exhibit 435) which reflected that on an undisclosed date they had \$859,000 in
11 assets, excluding Irvin's interests in his family's business. Tr. at 4770-71. On cross-
12 examination, Irvin conceded that he had stock in the family business but claimed to have no
13 knowledge of how much the stock or the company was worth. Tr. at 4762. Later, Irvin
14 claimed, without any offer of proof or substantiation, that his individual net worth was
15 "considerably less" than that reflected on the joint financial statement. Tr. at 4821.

16 Southern Union, however, presents case law establishing that the burden is *on Irvin*
17 to show that the verdict would actually financially destroy him. In Arizona, "there is no
18 requirement that specific financial circumstances be presented. A defendant who has not
19 introduced evidence of his financial circumstances may not complain of its absence."
20 Asphalt Engineers, Inc. v. Galusha, 160 Ariz. 134, 138, 770 P.2d 1180, 1184 (Ariz. App.
21 1989). See also Neinstedt v. Wetzel, 133 Ariz. 348, 357, 651 P.2d 876, 885 (Ariz. App.
22 1982) (holding that "a defendant may not complain of the absence of evidence of his wealth
23 when he has made no effort to introduce such evidence"); Hawkins, 152 Ariz. at 501 ("A
24 plaintiff is not required to put on proof of every factor, nor is any single factor a prerequisite
25 to recovery of punitive damages. See Neinstedt v. Wetzel, 133 Ariz. at 357, 651 P.2d at 885
26 (evidence of defendant's wealth not required to recover punitive damages).") (citation in
27 original). Further, Arizona courts have held that "the sole fact that an award exceeds a
28 defendant's present assets" is not sufficient grounds for setting it aside. Puz v. McDonald,

1 140 Ariz. 77, 79, 680 P.2d 213, 215 (Ariz. App. 1984).

2 Irvin presented no evidence that the award would actually financially destroy him.
3 The only evidence of his net worth in the record was offered by Southern Union. Irvin
4 disputed the amount by merely testifying that the evidence was not accurate. Without
5 corroboration of this statement and other evidence, Irvin has waived his right to complain of
6 his absence of wealth.

7 The second consideration in assessing the award of punitive damages is "the nature
8 of the defendant's conduct, including the reprehensibility of the conduct and the severity of
9 the harm likely to result, as well as the harm that has occurred, from the defendant's conduct."
10 Hawkins, 152 Ariz. at 497. More particularly, "[t]he more reprehensible the act and the more
11 severe the resulting harm, the greater the award of punitive damages that is reasonable under
12 the circumstances. The duration of the misconduct, the degree of defendant's awareness of
13 the harm or risk of harm, and any concealment of it are elements to consider in judging the
14 reprehensibility of the defendant's conduct." Id. at 497.

15 Irvin argues that his conduct was not reprehensible, because it took place over a short
16 period of time (two months) and resulted in only economic injuries. Further, Irvin argues
17 that any concealment of his activities should not be considered because the concealment itself
18 was not the proximate cause of the injury. Irvin's first objection is meritless, because
19 Southern Union presented evidence at trial of a determined effort, over a number of months,
20 to disrupt the Southern Union-Southwest Gas merger. The evidence also showed that during
21 this time, Irvin abused his privileges as a Corporation Commissioner to attempt to disrupt the
22 deal, while purposely concealing his activities from the Commission. Additionally, Irvin was
23 acutely aware of the risk of harm to Southern Union, a fact which the jury clearly found in
24 order to find him liable of an intentional tort and award an impressive amount of punitive
25 damages. Southern Union accurately argues that this type of conduct should be severely
26 deterred, which is a key purpose of an award of punitive damages. Finally, the concealment
27 is also an "element[]" to consider in judging the reprehensibility of [Irvin's] conduct."
28 Hawkins, 152 Ariz. at 497.

1 Irvin's concealment *is* relevant to determining the degree of reprehensibility. Irvin
2 relies on Saucedo v. Salvation Army, 200 Ariz. 179, 24 P.3d 1274 (Ariz. App. 2001), in
3 which the Court of Appeals overturned an award of punitive damages where the requisite evil
4 mind was inferred from a motorists' flight from the scene of an accident after he negligently
5 struck and killed a pedestrian. The Court held that the flight was not the proximate cause of
6 the injury, and therefore was not a basis for punitive damages. However, in Saucedo, the
7 flight had very little relevance to whether the motorist committed the tort with an evil mind
8 because it occurred after the tort was completed, and the flight did not proximately cause the
9 injury because the victim would have died whether or not the motorist had stopped. In this
10 case, the evidence of concealment clearly bears upon whether Irvin had the required mental
11 state of intent to commit the tortious acts. Further, it directly relates to Irvin's ability to
12 undercut the merger while avoiding any public scrutiny anticipated in his role as a public
13 official with significant authority to affect the decision of which company merged with
14 Southwest Gas. The concealment was part of Irvin's pattern of activities constituting the
15 legal "proximate cause" of the injury. The jury was instructed on proximate cause in
16 accordance with Arizona law. Instruction No. 28 [Doc. #2196] reads, "Before you can find
17 James Irvin at fault, you must find that his conduct was the cause of Southern Union's injury.
18 To find that James Irvin's conduct caused Southern Union's injury, Southern Union must
19 prove that Southwest Gas Corporation would not have breached its contract with Southern
20 Union, and/or terminated Southern Union's business expectancy in acquiring Southwest Gas,
21 but for the conduct of James Irvin." By virtue of the verdict, the jury found Irvin's conduct
22 was the proximate cause of both torts.

23 The final Hawkins factor, the profitability of Irvin's conduct to himself, is not relevant
24 here. There was evidence, however, that he would have been personally advantaged by a
25 merger with ONEOK. First, there was reliable evidence that the management of Southwest
26 Gas preferred ONEOK as a merger partner over Southern Union. Further, the evidence
27 supported the inference that Irvin perceived that his allegiance to the management of
28 Southwest Gas would enhance his political career. Apart from this, it is not necessary, to

1 support an award of punitive damages, that Southern Union prove that Irvin personally
2 profited from his tortious actions. Hawkins, 152 Ariz. at 501. Therefore, the award of
3 punitive damages is not in violation of or inconsistent with Arizona law.

4 **B. Due Process**

5 Following recent Supreme Court precedents, the Court must determine whether the
6 punitive damages award is constitutional as a matter of due process. In 1996, the Supreme
7 Court decided BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996) (Gore),
8 which established that punitive damage awards may be so "grossly excessive" as to "enter
9 the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."

10 In Campbell, 123 S.Ct. at 1520-21, the Supreme Court held unconstitutional a \$145 million
11 punitive damages award based on a compensatory damage award of \$1 million. In doing so
12 the Court reaffirmed that trial courts must consider the three central "guideposts" first
13 specified in Gore: the degree of reprehensibility of the defendant's misconduct, the disparity
14 between actual or potential harm suffered by the plaintiff and the punitive damages award,
15 and the difference between punitive damages and civil or criminal penalties authorized or
16 imposed in comparable cases. To determine whether the \$60 million award is
17 unconstitutionally excessive, the Court must examine each guidepost.

18 **(1) Degree of reprehensibility**

19 "[T]he most important indicium of the reasonableness of a punitive damages award
20 is the degree of reprehensibility of the defendant's conduct." Campbell, 123 S.Ct. at 1521
21 (quoting Gore, 517 U.S. at 575). The Court in Campbell listed five factors to consider in
22 determining the reprehensibility of a defendant's conduct: "the harm caused was physical
23 rather than economic, the tortious conduct evinced an indifference to or a reckless disregard
24 of the health or safety of others; the target of the conduct had financial vulnerability; the
25 conduct involved repeated actions or was an isolated incident; and the harm was the result
26 of intentional malice, trickery, or deceit, or mere accident." Campbell, 123 S.Ct. at 1521.
27 The Court clarified that "[t]he existence of any one of these factors weighing in favor of a
28 plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of

1 them renders any award suspect." Id. at 1521.

2 In this case, the degree of reprehensibility of Irvin's conduct is marked by two factors:
3 repeated actions and harm caused by intentional trickery and deceit. As discussed in the
4 previous section, Irvin's tortious actions were planned and perpetrated over a number of
5 months, and were not singular or isolated attempts to disrupt the merger, even if the rejection
6 of the merger occurred at only one Board meeting. Also, the harm was the result of Irvin's
7 intentional conduct, which the jury determined was accomplished with an evil mind,
8 manifested by deception and trickery. Irvin was in a vital position to influence the Southwest
9 Gas Board of Directors on which company would merge with Southwest Gas. As established
10 at trial Irvin, as a Corporation Commissioner, had quasi-judicial responsibilities, requiring
11 scrupulous honesty and neutrality in his dealings with all merger candidates, and in his
12 serving the best interests of the public. "To be sure, infliction of economic injury, especially
13 when done intentionally through affirmative acts of misconduct . . . can warrant a substantial
14 penalty." Gore, 517 U.S. at 576. Though striking down a punitive damages award, the Court
15 in Gore was careful to distinguish the facts in Gore from cases such as this one. "[T]he
16 record in this case discloses no deliberate false statements, acts of affirmative misconduct,
17 or concealment of evidence of improper motive, such as were present in Haslip and TXO."
18 Id. at 579 (citing Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) and TXO
19 Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993)). In contrast, the record
20 in this case discloses all of these factors.

21 Most of the Supreme Court's analysis of reprehensibility in Campbell is simply
22 inapplicable to this case. Campbell and Gore were primarily concerned with a defendant
23 being punished for actions it took in other states, particularly when those actions may have
24 been lawful if they took place in other states. Campbell, 123 S.Ct. at 1521-23. While
25 Campbell does indicate that "[d]ue process does not permit courts, in the calculation of
26 punitive damages, to adjudicate the merits of other parties' hypothetical claims against a
27 defendant under the reprehensibility analysis," the Court's primary concern is that "[a]
28 defendant's dissimilar acts, independent of the acts upon which liability was premised, may

1 not serve as the basis of punitive damages." Id. at 1523. Apart from this, Irvin's liability is
2 premised on a series of events causing a single identifiable harm - disruption of the Southern
3 Union - Southwest Gas merger. Nor does this Campbell guidepost foreclose a consideration
4 of Commissioner Irvin's concomitant breach of the public trust by disrupting the merger.
5 Certainly, Irvin's ignoble neglect of the public trust, that was inextricably related to his
6 disruption of the merger may be considered by the Court on the issue of reprehensibility.

7 There is significant convincing evidence supporting the jury's decision to return a
8 verdict assessing punitive damages and awarding the amount chosen. Elaborating on what
9 was previously alluded to, Commissioner Irvin is vested with immense powers founded in
10 the Constitution of the State of Arizona, and the people who elected him to this public office
11 had faith that he would engage his authority fairly and in accordance with the law. The
12 evidence shows and the jury found that he abused those powers in favor of the private
13 interests of a specific utility company, ONEOK, and his personal interests, by intentionally
14 and deceptively participating in dissuading the Southwest Gas Board from adopting a plan
15 to merge with Southern Union. Apparently because of the wrongdoing, he concealed his
16 activities from his fellow Commissioners and the public during such activities, and
17 afterwards he covered up the wrongdoing to ensure the outcome of the scheme. Finally, he
18 persevered in hiding his wrongful acts throughout the trial and in particular while testifying
19 in Court before the jury.

20 A particularly egregious act of reprehensibility occurring during trial was the evidence
21 that Irvin was involved in the attempted proffer of fabricated evidence, again demonstrating
22 that he would persist in refusing to take responsibility for his behavior. On October 24, 2002,
23 the week before trial began in the late evening, Irvin's counsel informed the Court that new
24 evidence had been discovered and would be offered at trial. This evidence included two
25 pages of notes written by Carol Irvin dated "7-31-99." The notes described a telephone
26 conversation between Carol Irvin and Defendant Jack Rose allegedly occurring on July 31,
27 1999. Irvin's counsel represented that the notes were taken "contemporaneously" with the
28 1999 conversation. The content of the notes emphatically indicated that Rose, an assistant

1 to Irvin at the time of the failed merger, told Carol Irvin that he was principally involved in
2 working on the merger while "Jim [Irvin] not involved." The truncated notes continued, in
3 part, to further exculpate Irvin with allegations of Rose's remarks that "Jim [Irvin] did
4 nothing wrong - Jack working with others to bring Oneok to AZ. Jim not involved - trusted
5 Jack to do research.... Jack did a lot without Jim knowing cuz Jim busy at Commiss. Jack
6 working in AZ Best interest. When will Jim be home - Jack needs to tell Jim s-o-o much he
7 doesn't know! Call me anytime! I'm there for you! Don't worry - we did nothing wrong."
8 Further, and not appearing to be merely coincidental, the notes were written on the back of
9 unrelated documents dated March 30, 1998 and April 8, 1998.

10 Adding to the suspicion, Irvin's counsel said that Carol Irvin also gave counsel a
11 statement of her recollection of a meeting between Commissioner Kunasek and Irvin also
12 occurring in 1999. Significantly, the statement was represented to have been authored by her
13 one week before trial. Conspicuously, this statement was not drafted on paper with the
14 printed date of 1998. Further, the notes of her conversation with Rose were styled in short,
15 chopped phrases as if hurriedly written. In contrast, the statement of her recollection of the
16 1999 meeting was written in complete sentences which logically flowed from one topic to
17 the next and was not written with on paper with the printed 1998 on the back.

18 Irvin's counsel further represented that Carol Irvin had disclosed to him the existence
19 of the notes and the statement the day before, October 23, and had provided them to him on
20 October 24. After this revelation, the Court ordered Irvin's counsel to produce the notes and
21 the statement for inspection by Plaintiff's and Rose's counsel. On October 31, 2002, in open
22 Court and in the presence of Irvin and/or Irvin's counsel, Plaintiff's counsel requested an
23 opportunity for Plaintiff's forensic examiner to examine the notes and the Court granted the
24 request. The next day, on November 1, 2002, counsel for Irvin contacted the Court at
25 approximately noon and requested an emergency hearing that was held in the afternoon of
26 the same day. Irvin's counsel explained that a meeting with Carol Irvin and Commissioner
27 Irvin occurred in the morning of that day and new information came to light regarding
28 whether the notes had been prepared contemporaneously during Carol Irvin's 1999

1 conversation with Rose. Counsel first stated that "there was considerable confusion on the
2 communication on those notes." Tr. at 1286. He then retracted his position that the notes
3 had been made "contemporaneously" with the 1999 Rose phone call, concluding that he
4 learned the notes had actually been written the week before at the same time as the statement
5 was written. Irvin's counsel apologized for the misunderstanding he had with Carol Irvin
6 regarding whether the notes were "original" notes of the conversation with Rose. *Id.* at 1289.
7 A subsequent hearing was held to determine whether the initial representation of the timing
8 of the preparation of the notes by counsel for Irvin, and the retraction of such representation
9 after Plaintiff announced that a forensic examiner would evaluate the notes, constituted
10 sufficient evidence pursuant to Federal Rule of Evidence 104 for the jury to find that
11 Commissioner Irvin and his wife jointly proffered fabricated evidence to the Court. Carol
12 Irvin testified, in an attempt to explain the misunderstanding, that she did take
13 contemporaneous notes of the 1999 conversation with Rose, kept them in a file, recopied
14 them on October 23, 2002, but then destroyed the original. She did not offer a plausible
15 explanation for destroying the original notes, and Irvin's counsel withdrew his proffer for
16 admission of the notes in evidence.

17 Thereafter, Plaintiff sought to present the circumstances of the attempt by counsel on
18 behalf of the Irvins to gain permission from the Court for admission of the notes into
19 evidence. Southern Union argued that this conduct was relevant to proving that Irvin
20 intentionally interfered with Southern Union's prospective business advantage and
21 intentionally interfered with Southern Union's contractual relations. The Court delayed
22 ruling on the request, but over the course of trial sufficient evidence was admitted to allow
23 the admission of the notes and the attendant circumstances regarding them. The Court
24 granted Southern Union's motion. Central to the Court's decision were two factors: Carol
25 Irvin testified that Irvin knew about the notes before she disclosed them to his counsel, and
26 that the day after Southern Union announced in open court that a forensic examiner would
27 evaluate the notes, on November 1, Irvin attended the meeting when a decision was made to
28 withdraw the notes. Irvin testified that his wife "made mention" of her notes from 1999 on

1 the night of October 23, and that he directed her to call his counsel that night to discuss
2 various issues concerning the trial. *Id.* at 6084; Tr. 12/6/02 at 4789-90. On the morning of
3 October 24, Commissioner Irvin transported the notes in an envelope from Carol Irvin's
4 possession to the office of his counsel. Carol Irvin testified that she told her husband that the
5 notes were of her conversation with Rose, though Commissioner Irvin testified that he could
6 not recall if his wife told him what was in the package. Tr. 12/13/02, at 6070-1, 6073.

7 The Court again finds that the evidence was sufficient for the jury to find intentional
8 fabrication of evidence and that it was admissible to show Irvin's consciousness of
9 wrongdoing and was relevant regarding the intent of Irvin when engaging in activities related
10 to the claims. The jury instructions clarified that "[e]vidence that defendant Irvin offered
11 fabricated evidence to the Court that he believed would be favorable to his defense, are
12 circumstances that, if proven, may be considered by the jury as showing consciousness of
13 wrongdoing on the part of defendant Irvin." Instruction No. 20 [Doc. #2196].

14 Both causes of action are intentional torts and both involve an element of "improper
15 motive." The Complaint alleged significant deceit and concealment by Irvin. The attempted
16 fabrication of evidence clearly shows the reprehensibility of Irvin's conduct. In short, he
17 participated in a scheme to impede the jury's search for truth at trial. Because this conduct
18 occurred three years after Irvin's wrongful conduct regarding the merger and because it
19 constitutes a willful obstruction of justice, the jury could readily find that Irvin would
20 continue to engage in improper conduct as a Commissioner. All of which strengthens the
21 jury's concern that if Irvin was not deterred by an appropriate award of punitive damages, he
22 would continue to engage in further reprehensible acts as an Arizona Corporation
23 Commissioner.

24 Finally, Irvin's abuse of power included disregarding the interests of the rate-payers
25 of Arizona, which is a centerpiece of his public duties as an Arizona Corporation
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1 Commissioner.¹ The jury's \$60 million punitive damages award clearly evinces a
2 condemnation of Irvin's conduct, a desire to punish him for the harm and potential harm
3 suffered by both Southern Union and the citizens of Arizona, and to deter Arizona public
4 officials from further abuses such as meddling with multi-million dollar corporate
5 transactions in derogation of their duties of affording fairness to all parties participating in
6 Commission matters.

7 **(2) Ratio**

8 In Campbell, the Supreme Court "decline[d] again to impose a bright-line ratio
9 [between compensatory and punitive damages] which a punitive damages award cannot
10 exceed." Campbell, 123 S.Ct. at 1524. Apart from this, the Court remarked, "[o]ur
11 jurisprudence and the principles it has now established demonstrate, however, that, in
12 practice, few awards exceeding a single-digit ratio between punitive and compensatory
13 damages, to a significant degree, will satisfy due process." Campbell, 123 S.Ct. at 1524. In
14 this case, the compensatory award against Irvin was \$390,072.58, meaning that the ratio of
15 punitive to compensatory damages is about 153 to 1. Commissioner Irvin argues that the
16 punitive damages award should be overturned solely because this ratio is excessive.

17 The Supreme Court's holding on ratios, however, is not categorical. The opinion
18 acknowledges that a "few awards" exceeding a single-digit ratio "to a significant degree" will
19 meet the constitutional mark. The Court does not explore the circumstances under which
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21 ¹Gregory Patterson, who represented Arizona consumers as Director of the Residential
22 Utility Consumer Office (RUCO) during the time of the merger, testified at trial. Mr.
23 Patterson confirmed that RUCO represents Arizona residential consumers as a party in
24 proceedings before the Commission, and had a clear stake in any change in ownership of
25 Southwest Gas and how it affects "the quality of service, the viability of the company, the
26 intention to raise rates." Tr. 5764, 5893. RUCO, representing consumers, may present its
27 opinions and offer evidence, though it may not vote. Tr. 5890-94. Thus, the interests of
28 Arizona consumers are clearly affected by the Commission's decisions and influence.
Further, although Mr. Patterson advocated against the Southern Union merger before the
Southwest Gas Board, he testified at trial that if he had known that he was basing his opinion
on false information about Southern Union's debt-to-equity ratio, he would have given a
different presentation to the Southwest Gas Board.

1 larger awards will be upheld, though it provides some direction. In Campbell, the Court
2 stated, "because there are no rigid benchmarks that a punitive damages award may not
3 surpass, ratios greater than those we have previously upheld may comport with due process
4 where a particularly egregious act has resulted in only a small amount of economic
5 damages." Id. at 1524 (quoting Gore, 517 U.S. at 582). In Gore, the Court, "reject[ing] the
6 notion that the constitutional line is marked by a simple mathematical formula," surmised that
7 "[a] higher ratio may also be justified in cases in which the injury is hard to detect or the
8 monetary value of noneconomic harm might have been difficult to determine." Id. at 582.²
9 Considering the Supreme Court has only recently begun sketching these due process limits
10 in a few cases, it is not surprising that the Court has not considered how to quantify the
11 damage caused by a breach of the public trust by a public official.

12 But the case law does not preclude but supports a significant award resting on the
13 particularly reprehensible actions by a public official in violation of the public trust. Because
14 the injury caused by a public official's violation of the public trust is uniquely dependent on
15 the variables of each public office, significant consideration in each case must be given to
16 the nature of the public trust embodied in the position held by the official, e.g., the President
17 of the United States in comparison to a precinct committee chairman. Consequently,
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19 ²The Supreme Court's recent pronouncements reflect a historical understanding that
20 punitive damages serve to punish defendants where the harm is non-economic or difficult to
21 quantify, such as in this case. In an early case upholding the recognition of the common law
22 propriety of punitive damages, the Court noted, "[i]n many civil actions, such as libel,
23 slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a
24 money standard; and the damages assessed depend on the circumstances, showing the degree
25 of moral turpitude or atrocity of the defendant's conduct, and may properly be termed
26 exemplary or vindictive rather than compensatory." Day v. Woodworth, 54 U.S. 363, 371,
27 13 How. 363 (1851). The Court was compelled to deny Southern Union's demand for
28 damages incurred as a consequence of the failed merger because they were legally incapable
of measurement. This ruling is not to be interpreted as a finding that Southern Union did not
sustain such damages. It meant only that the damages were "incapable of being measured
by a money standard, and the [amount] assessed depend[ed] on the circumstances" that
necessarily involved an elusive prediction of the degree of monetary success that would have
followed a Southern Union - Southwest Gas merger.

1 application of the numerical ratio is most often unfit for the imprecise and limitless
2 characterizations of the public trust. Further, punitive damages against public officials
3 occupy a unique role in the jurisprudence of punitive damages, and have been assessed
4 against public officials for oppressive conduct regardless of actual or compensatory damages.
5 Concomitantly, the law allows punitive damage awards in § 1981 and § 1983 cases against
6 public officials, even when a jury awards only nominal damages. Finally, the Supreme Court
7 allows consideration of unquantifiable potential harm in assessing the ratio in these cases.

8 Initially, punitive damages against public officials for violations of the public trust are
9 firmly grounded in the law, and the evidence suggest that punitive damages, as a historical
10 matter, were developed *specifically* as a method to punish public corruption. According to
11 the Restatement (Second) of Torts § 908, comment c, "[i]n the earliest cases in which
12 punitive damages were allowed, the plaintiffs suffered no substantial harm, or at least no
13 physical or financial harm appeared. These were the cases in which public officials were
14 guilty of outrageously oppressive conduct." As some commentators have documented, early
15 English "[c]ourts imposed these first exemplary damage awards against public officials who
16 abused power in their official capacity, but the remedy soon took on a wider role." Michael
17 L. Rustad & Thomas H. Koenig, Taming the Tort Monster: The American Civil Justice
18 System as a Battleground of Social Theory, 68 Brook. L. Rev. 1, 57 (2002).³ See also Lane
19 County v. Wood, 298 Or. 191, 200, 691 P.2d 473, 477 (Or. 1984) ("Historically, oppressive
20 conduct by public officers was the situation where early judges were most prone to sanction
21 exemplary damages, and by which they justified and rationalized the doctrine.") (quoting
22 McCormick, Damages 288, § 81 (1935)).

24 ³Professors Rustad and Koenig explore the history of English and early American
25 punitive damages in some detail, noting, for example, that "[j]ust as Roman Senators were
26 assessed multiple damages when they oppressed the weak, the English courts punished high-
27 handed aristocrats by imposing large fines paid directly to the victim." *Id.* at 55. Notably,
28 the Court has often relied on this history in discerning Constitutional limits on punitive
damages. See Gore, 517 U.S. at 580-581 (analyzing early English statutes on exemplary
damages).

1 Because of this history, and the unique harm inflicted by a breach of the public trust,
2 punitive damage awards assessed against public officials have in some cases required less
3 of a proportional connection to actual monetary damages to be upheld. In Lane County v.
4 Wood, 298 Or. 191, 691 P.2d 473 (Or. 1984), the Supreme Court of Oregon thoroughly
5 explored the history of punitive damages as related to public officials, and concluded that an
6 award of *nominal* damages could support an award of punitive damages against a public
7 official where the public official committed a breach of the public trust. Subsequent Oregon
8 cases have clarified that this principle is limited to awards against public officials; in almost
9 all cases, some amount of compensatory damages is necessary for an award of punitive
10 damages. See Klinicki v. Lundgren, 298 Or. 662, 686, 695 P.2d 906, 922 (Or. 1985)
11 ("[A]bsent breach of public trust or cases in which damages are presumed, punitive damages
12 cannot be awarded merely to punish. . . . In other words, a proven discrete, discernable harm
13 must underlie any punitive damages award.").

14 In Lane County, the plaintiff county sued a former county commissioner for fraud,
15 breach of fiduciary duty, and breach of statutory duty for actions taken when the
16 commissioner was still in office. In striking similarity to this case, a commissioner rigged
17 a land deal to benefit two of his friends by manipulating his position as commissioner. The
18 jury returned a verdict of \$1.00 in nominal damages but \$5000 in punitives against the
19 commissioner. The Oregon Court, after extensively reviewing the history, the Restatement,
20 and leading authorities, concluded that the commissioner's actions, in breach of his fiduciary
21 duty to the public, were "so egregiously culpable that an award of nominal damages is
22 sufficient to support the award[] of punitive damages against [him]." 691 P.2d at 479.⁴

24 ⁴An analogous case which the Oregon court appears not have considered is Wilson
25 v. Vaughn, 23 F. 229 (C.C. D. Kan. 1885). In that case, the Court held that exemplary
26 damages could be awarded against public officials even where only nominal damages were
27 found. The plaintiff sued county commissioners to recover damages for their wilful refusal
28 to levy a tax on property pursuant to a valid judgment and writ of mandamus. The plaintiff
suffered only delay of collecting the judgment, and thus only nominal damages. However,
the Court upheld an award of exemplary damages, noting, "the plaintiff is deprived of a clear

1 Lane County indicates that a violation of the public trust is itself a considerable,
2 cognizable harm, though one without a definitive monetary value. Here, Irvin abused the
3 public trust by misappropriating his elected authority to undermine fair consideration of
4 Southern Union's offer. Southern Union suffered from Irvin's failure to afford it a fair and
5 unbiased investigation and consideration of its proposal for a merger. Apart from this injury,
6 the public suffered by virtue of Irvin's bold defiance of the law that defined his duties and
7 responsibilities. Accordingly, Irvin's argument that he, as a public official, should not be
8 subject to different potential punitive damage standards as other defendants verges on being
9 frivolous. The ratio of compensatory to punitive damages is not justified merely because
10 Irvin is a public official, but because his conduct caused a harm to the public trust that is not
11 discernable merely by an award of compensatory damages. Cf. Davis v. McLaughlin, 1989
12 WL 47699, *2 (E.D.N.Y. Apr. 28, 1999) ("While it is true that a comparison of the two
13 numbers might be a provident exercise in many cases, their ratio is of dubious value where,
14 as here, intangible rights have been vindicated by plaintiff's successful claim.").

15 The decisions which allow the assessment of punitive damages in § 1983 suits filed
16 against public officials, even when damages are only nominal (which almost always produces
17 a ratio far in excess of 10:1), demonstrate a recognition in the law of the vital importance of
18 preserving the public's trust in those who are chosen to govern, and to exercise their precious
19 and sometimes almost limitless powers to effect changes and alter consequences effecting
20 the lives of the very people who empowered the official. Following Gore, the Second Circuit
21 has upheld an award of punitive damages in a case where only nominal damages were
22 awarded against a public officer. In Lee v. Edwards, 101 F.3d 805 (2d Cir. 1996), the Court

23 _____
24 legal right through the wrongful and wilful conduct of the defendants. They alone have the
25 power to levy the tax, and it is their duty, under the law and the command of the court, to
26 levy it.... [P]laintiff's compensatory damages are but nominal . . . but it is in the power of
27 these defendants and their successors in office, by defying the law, to delay him indefinitely
28 in its collection." Id. at 231-2. Thus, the Oregon court had at least one century-old pedigree
to support its holding. See also EEOC v. Wal-Mart Stores, Inc., 11 F.Supp.2d 1313, 1326
(D. N.M. 1998) (relying on Wilson for the proposition that "exemplary damages may be
awarded where only nominal damages are established").

1 upheld a punitive damages award of \$200,000 in a case where plaintiff prevailed on a
2 malicious prosecution claim. The Court noted, "the jury was obviously unimpressed by Lee's
3 claim to have suffered harm by reason of being prosecuted maliciously," however, "[a]s a
4 police officer, Edwards exercised an authority backed by the weight and force of state
5 power," which could allow the jury to find the officer's conduct "egregious and
6 reprehensible." *Id.* at 810. The Court noted that *Gore's* disapproval of a 500:1 compensatory
7 to punitives ratio "does not necessarily control the fair ratios in a § 1983 case. We have said
8 that punitive damages may be awarded in a § 1983 case, even if the compensatory damages
9 are only nominal." *Id.* at 811 (citing *King v. Macri*, 993 F.2d 294, 297-98 (2d Cir. 1993)).
10 In short, "in a § 1983 case in which the compensatory damages are nominal, a much higher
11 ratio can be contemplated while retaining normal respiration." *Id.*

12 Indeed, a number of courts have held that an award of nominal damages (or sufficient
13 proof of injury) can support an award of punitive damages under § 1981 and § 1983,
14 situations which *in particular* involve wrongdoing by a *public officer*. See *Gill v. Manuel*,
15 488 F.2d 799, 802 (9th Cir. 1973) (in case where plaintiff sued police officers under § 1983,
16 noting that "an award of punitive damages is not a necessary prerequisite to an award of
17 punitive damages."); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1352 (7th
18 Cir. 1995) (holding that award of compensatory damages is not necessary to support award
19 of punitive damages under § 1981); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008,
20 1010 (7th Cir. 1998) (holding, post-*Gore*, no requirement of compensatory damages to
21 support punitive damage award in Title VII sex discrimination suit) (citing *Erwin v.*
22 *Manitowoc County*, 872 F.2d 1292, 1299 (7th Cir. 1989) (holding no requirement of
23 compensatory damages to award punitive damages for constitutional damages under §
24 1983)); *King v. Macri*, 993 F.2d 294, 297-8 (2d Cir. 1993) (punitive damage award need not
25 be based on compensatory award in § 1983 actions) (citing *Press Pub. Co. v. Monroe*, 73 F.
26 196, 201 (2d Cir. 1896) (holding, in action for violation of copyright, "exemplary damages
27 are awarded in the federal courts, namely, as something additional to, and in no wise
28 dependent upon, the actual pecuniary loss of the plaintiff, being frequently given in actions

1 'where the wrong done to the plaintiff is incapable of being measured by a money standard.'")
2 (quoting Day, 54 U.S. at 371)). See also Deters v. Equifax Credit Information Serv., 202
3 F.3d 1262 (10th Cir. 2000) (upholding 59:1 punitive to compensatory ratio in Title VII case
4 with small compensatory damage award where injury was primarily non-economic).

5 Further, although the Supreme Court has not addressed this issue in its recent punitive
6 damages decisions, it has emphasized the importance of punitive damages assessments
7 against public officials. In the context of § 1983 suits against public officials for violations
8 of constitutional rights, the Supreme Court has noted:

9 By allowing juries and courts to assess punitive damages in appropriate
10 circumstances against the offending official, based on his personal financial
11 resources, the statute directly advances the public's interest in repeated
12 constitutional deprivations. In our view, this provides sufficient protection
13 against the prospect that a public official may commit recurrent constitutional
14 violations by reason of his office. The Court previously has found, with
15 respect to such violations, that a damages remedy recoverable against
16 individuals is more effective as a deterrent than the threat of damages against
17 a government employer.

18 City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269 (1981) (citing Carlson v. Green,
19 446 U.S. 12, 21 (1980)). Public official punitive damage awards advance the public interest.
20 by deterring a reappearance of official misconduct. If awards were restricted to adhere to a
21 formula for calculating the punitive harm, the goal of deterrence, in some case, will be lost.

22 The Court realizes, of course, that the this case was not brought as a civil rights action.
23 However, the same reasoning supports a punitive award to punish and deter the abuse of
24 power by public officials in these cases. First, the conduct here bears the hallmarks of a civil
25 rights action, including an official acting under color of state law, intentional misconduct,
26 and biased and differential treatment of parties before the Commission in ways that
27 undermine due process and equal protection of the laws. Although Southern Union, as a
28 corporation, may not be able to bring a § 1983 suit, such due process violations affect the
public as a whole. Corporation commissioners possess wide powers to "inspect and
investigate the property, books, papers, business, methods, and affairs of any corporation
whose stock shall be offered for sale to the public and of any public service corporation
doing business within the state, and for the purpose of the commission, and of the several

1 members thereof, shall have the *power of a court of general jurisdiction* to enforce the
2 attendance of witness and production of evidence by subpoena, attachment, and punishment,
3 which said power shall extend throughout the state." Jury Instruction No. 15 [Doc. #2196]
4 (emphasis added). As the Arizona Supreme Court has noted,

5 When an Arizona administrative agency unreasonably infringes on the liberties
6 of a corporation, its officers, and its shareholders, it is the Arizona courts who
7 must be able to curb the abuse of power. The Corporation Commission has
8 been treated as a fourth branch of government in Arizona. . . . [I]f an
9 administrative agency's investigation becomes a tool of harassment and
10 intimidation rather than a means to gather appropriate information, the
11 appropriate court may intrude and stop the incursion into the constitutional
liberties of the parties under investigation. . . . The Commission is empowered
to investigate for purposes of enforcing the securities laws; the Commission
has no authority to determine on a basis other than compliance with the
securities laws those persons or corporations who may conduct business in
Arizona. The Commission may not constitutionally use its investigatory
powers to harass, intimidate, and defame a business into leaving the state.

12 Polaris International Metals Corp. v. Arizona Corporation Commission, 133 Ariz. 500, 506-
13 7, 652 P.2d 1023, 1029-30 (Ariz. 1982). The record is replete with evidence of bias and a
14 failure to provide due process and impartial consideration of Southern Union's offer.

15 Second, the civil rights cases reflect a broader goal of deterring abuses of the public
16 trust by public officials that is not limited to individual constitutional rights violations. As
17 the Second Circuit noted in Zarcone v. Perry, 572 F.2d 56-7 (2d Cir. 1978), in a decision
18 upholding punitive damages against public officials for constitutional violations, "it is clear
19 that substantial exemplary damage verdicts are appropriate in intentional tort actions not
20 involving constitutional deprivations." See also Lane County, 691 P.2d at 479 ("It may be
21 that the property involved appreciated in value so that no actual loss was sustained by the
22 county, but that fortuitous result does not diminish the severity of the wrongful acts. . . . The
23 misconduct by [the defendants] was intentional, not just careless. The scheme was
24 premeditated, not reckless. The two defendant, motivated by greed, were found by the jury
25 to have acted together knowingly to violate an official trust place on Wood by the public.").

26 Moreover, the Supreme Court has not limited the ratio calculation to actual
27 compensatory damages, and has suggested that comparisons to *potential* harm are
28 appropriate. In TXO, the Court upheld a punitive damages award where the ratio of punitive

1 to compensatory damages was about 526:1, relying in part on the potential for damages
2 caused by the defendant's conduct. The plurality noted that "this Court [has] eschewed an
3 approach that concentrates entirely on the relationship between punitive and actual damages.
4 It is appropriate to consider the magnitude of the *potential harm* that the defendant would
5 have caused to its intended victim if the wrongful plan had succeeded. . . ." TXO, 509 U.S.
6 at 459 (plurality opinion) (italics in original). The use of potential harm in assessing the ratio
7 continues throughout the Court's most recent decisions, but neither Gore nor Campbell
8 involved an issue of potential harm because the issue was not relevant in those cases. See
9 Gore, 517 U.S. at 575 (describing second guidepost as "the disparity between the harm or
10 potential harm . . . and [the] punitive damages award"); id. at 581 (relying on the plurality's
11 "potential harm" holding in TXO to discern lower ratio in that case); Campbell, 123 S.Ct. at
12 1520 (describing second guidepost in terms of "actual or potential harm").⁵

13 Again, though the Court held that Southern Union was not entitled to recover damages
14 for speculative lost profits, the potential for such damage could be factored into the jury's
15 decision to punish Irvin. For example, another district court in the Ninth Circuit recently
16 upheld a punitive damages award of \$5,000,000 in a § 1981 racial discrimination case against
17 a private corporation even though the jury found only nominal damages. See Bains LLC v.
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19 ⁵Notably, in this case, the ratio is dramatic primarily because the Court previously
20 found Southern Union's lost profit calculations to be too speculative to support recovery for
21 lost profits, and limited Southern Union to recovery of only out-of-pocket reliance damages.
22 See Southern Union Co. v. Southwest Gas Corp., 180 F.Supp.2d 1021, 1051 (D. Ariz. 2002)
23 ("The indeterminacy concerning this basic merger term illustrates that Southern Union's
24 claim for lost profit damages is too speculative to support recovery."). To the extent that due
25 process limits the size of a punitive damage award because the defendant is not on notice of
26 his potential liability, Irvin's undisputed experience and knowledge made him aware of the
27 potential enormous risks of his conduct would have in disrupting a multi-million dollar
28 transaction. See Campbell, 123 S.Ct. at 1525 (quoting Gore, 517 U.S. at 585 (Breyer, J.,
concurring)) (discussing fair notice requirements); Gore, 517 U.S. at 574 ("Elementary
notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive
fair notice . . . of the severity of a penalty that a State may impose."). See also the discussion
of Southern Union's damages supra at 9, n.2.

1 Arco Products Co., 220 F.Supp.2d 1193, 1201 (W.D. Wash. 2002). As the Court noted,
2 "[t]he jury's award of nominal damages and high punitive damages is reflective of its findings
3 that while compensatory damages were difficult to calculate, the egregiousness of
4 Defendant's conduct was obvious to everyone in the courtroom." Id. at 1201. See also
5 Swinton v. Potomac Corp., 270 F.3d 794, 819 (9th Cir. 2001) (in upholding a 28:1 punitive
6 to compensatory damage ratio in private racial harassment claim, noting "[t]he fact that the
7 harm from unchecked racial harassment occurring day after day cannot be calculated with
8 any precision does not deflate its magnitude").

9 In short, in consideration of the unquantifiable breach of the public trust by Irvin and
10 the significant potential damages faced by Southern Union, reliance upon the ratio of
11 punitive to compensatory damages is unwarranted. In a case of such egregiousness, the
12 benchmark of a simple numerical ratio, where the Supreme Court has repeatedly clarified that
13 it has not established a bright-line categorical rule, does not defeat the award because it
14 violates due process. Cf. Swinton, 270 F.3d at 819 ("We find little comfort in trying to
15 discern [ratio] parameters from other cases because the circumstances vary so widely. Such
16 an exercise simply results in a scatter graph that pushes the decision toward a mathematical
17 bright-line, a path that we eschew in accord with the Supreme Court guidelines."). Under
18 the second Campbell guidepost, the award is not constitutionally excessive.

19 (3) Penalties imposed in comparable cases

20 The third guidepost is a comparison of the punitive damages award with civil or
21 criminal penalties for comparable misconduct. Campbell, 123 S.Ct. at 1526. The exact
22 method of application of this criterion is unclear in Gore or Campbell. In Campbell, the
23 Court rejected comparable civil and criminal penalties as a justification for the size of the
24 award, noting that "[t]he existence of a criminal penalty does have bearing on the seriousness
25 with which the State views a wrongful action. When used to determine the dollar amount
26 of the award, however, the criminal penalty has less utility." Id. at 1526. Further, the Court
27 noted that the most relevant civil sanction involved a maximum fine of \$10,000. Id. In Gore,
28 517 U.S. at 583-5, the Court also noted that the defendant's actions were subject to a much

1 smaller civil fine than the award of punitive damages.

2 Irvin argues that this punitive damages award should be struck down because it far
3 exceeds any comparable or civil penalty, and also exceeds any punitive damages award
4 upheld in Arizona. Irvin relies on Ace v. Aetna Life Ins. Co., 139 F.3d 1241, 1248-9 (9th Cir.
5 1998), in which the Ninth Circuit, without extensive comment, invalidated a \$16.5 million
6 punitive damages award with a 130-to-1 punitive-to-compensatory damages ration where
7 "the ratio . . . is far beyond any approved by Alaska courts. . . [and] the amount of punitive
8 damages far exceeds the potential civil and criminal penalties." Southern Union argues that
9 the award does not exceed awards upheld in a few other (out-of-state) cases, and thus Irvin
10 was on notice of the prospect of sufficiently large penalties. See, e.g., TXO, 509 U.S. at 459
11 (1993) (upholding 526 to 1 punitive to compensatory damage ratio); In re Exxon Valdez, 236
12 F.Supp.2d 1043 (D. Alaska 2002) (upholding \$4 billion of punitive damages award in case
13 involving economic (not environmental) damage of oil spill). As for state civil penalties,
14 Southern Union essentially concedes that none would mandate any comparable monetary
15 award unless Irvin was ordered to pay restitution for lost profits. However, under Arizona
16 law, even if Irvin were required to pay restitution as part of a criminal conviction, the sum
17 would not include compensatory damages such as lost profits. A.R.S. § 13-105(14); 13-
18 804(A). On the other hand, Irvin's conduct almost certainly could be framed as mail and wire
19 fraud under federal law, and, if proven, he would be subject to a fine "not more than the
20 greater of . . . twice the gross [pecuniary] loss" to Southern Union. 18 U.S.C. § 3571(d).

21 Unfortunately, the cases cited by the parties do not involve circumstances analogous
22 to Irvin's misconduct in this case. Such comparisons provide no meaningful guidance for the
23 Court to determine whether the award is unconstitutionally excessive. As the Supreme Court
24 has noted, "the most important indicium of the reasonableness of a punitive damages award
25 is the degree of reprehensibility of the defendant's conduct." Campbell, 123 S.Ct. at 1521
26 (quoting Gore, 517 U.S. at 575). Here, the degree of reprehensibility is established by the
27 breach of the public trust, and the parties provide no case law concerning punitive damage
28 awards against Arizona public officials. As previously discussed, awards against public

1 officials for breach of the public trust occupy a unique status in the imposition of punitive
2 damages. See Lane County, 691 P.2d at 479. Again, it is difficult "to discern parameters
3 from other cases because the circumstances vary so widely." Swinton, 270 F.3d at 819.
4 Finding some concrete numerical limit to this award grounded in the Constitution is "not an
5 enviable task" and not amenable to ready application of a formula. Leatherman Tool Group,
6 Inc. v. Cooper Industries, Inc., 285 F.3d 1146, 1152 (9th Cir. 2002) (quoting Inter Medical
7 Supplies v. EBI Medical Systems, 181 F.3d 446, 468 (3rd Cir. 1999)). Under the Campbell
8 and Gore guideposts, in consideration of Irvin's egregious conduct flaunting the public trust,
9 the award is not constitutionally excessive, and the Court need not hypothesize some outer
10 limit to the punitive damages allowable in this case.

11 **C. Additional findings**

12 The Court notes that Commissioner Irvin should be personally liable for payment of
13 the punitive damages award. For example, under the Bankruptcy Code, 11 U.S.C. §
14 523(a)(6), a debt is not dischargeable in bankruptcy proceedings when it is incurred "for
15 willful and malicious injury by the debtor to another entity or to the property of another
16 entity." Commissioner Irvin, as clearly shown by the jury's verdict, engaged in fraudulent
17 activity constituting tortious conduct resulting in a willful and malicious injury to Southern
18 Union. See In re Jercich, 238 F.3d 1202, 1205-6 (9th Cir. 2001) (tortious conduct causing
19 willful and malicious injury is not dischargeable under § 523(a)(6)); In re Riso, 978 F.2d
20 1151, 1154 (9th Cir. 1992) (same). Further, a public employee is only immune from liability
21 for punitive damage awards if acting within the scope of his employment. A.R.S. §12-
22 820.04. Though that issue was never presented to the jury for resolution, the record in this
23 case strongly suggests that he was not.

24 In conclusion, the reasoned judgment of the jury that Commissioner Irvin should be
25 punished in an amount of \$60 million will stand.

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Accordingly,

IT IS ORDERED that Defendant Irvin's Amended Motion for JNOV or in the Alternative for New Trial or Remittitur [Doc. #2238] is **DENIED**.

DATED this 3 day of July, 2003.



Roslyn O. Silver
United States District Judge