John A. Anderson (4464)
john.anderson@stoel.com
Lauren E.H. DiFrancesco (14205)
lauren.difrancesco@stoel.com
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111
Office: (801) 578-6962
Facsimile: (801) 578-6999
Attorney for Proposed Amicus Curiae

IN THE UTAH SUPREME COURT

DOTERRA INTERNATIONAL, LLC, *Petitioner/Defendant* v. JESSICA KRUGER, *Respondent/Plaintiff*	Appeal No. 20191040-SC

INTEREST OF *AMICUS CURIAE*

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and nonculpable defendants are exonerated and can defend themselves without unreasonable cost.

The IADC maintains an abiding interest in the fair and efficient administration of tort actions, including the product liability claims at issue here. The IADC regularly publishes newsletters and journal articles, and presents education seminars both internally and to the legal community at large. The IADC has participated as *amici curiae* on punitive damages issues before Circuit and state Supreme Courts, including *Bixby v. KBR, Inc*, 603 F. App'x 605 (9th Cir. 2015), and *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007), as well as general product liability issues, including *Burningham v. Wright Medical Technology, Inc.,* 2019 UT 56, 448 P.3d 1283; *Kim v. Toyota Motor Corp.*, 197 Cal. Rptr. 3d 647 (Cal. Ct. App. 2016); and *Ramos v. Brenntag Specialties, Inc.*, 372 P.3d 200 (Cal. 2016).

STATEMENT OF THE ISSUE PRESENTED FOR APPELLATE REVIEW

Whether the district court erred in creating a *per se* prohibition on preinjury waivers of punitive damages under Utah law, irrespective of whether the contract containing the waiver is otherwise enforceable and without any statutory or constitutional support for the public policy it purported to be acting in support of.

STATEMENT OF THE CASE

This is a case from the Fourth District Court involving Plaintiff Kruger's use of ClaryCalm, a cream manufactured and sold by defendant doTERRA. Kruger voluntarily signed up to be a Wellness Advocate, an independent product consultant for doTERRA. As part of the onboarding process, Kruger signed two different agreements, both of which explicitly stated that doTERRA would not be liable to Wellness Advocates for punitive damages. Kruger voluntarily entered into these agreements in exchange for, among other terms, discounted products, doTERRA sales support, and doTERRA's bonus compensation plan.

On November 17, 2015, Kruger applied ClaryCalm to her back and abdomen shortly before entering a tanning bed, the combination of which allegedly caused her to severely burn. Medical expenses related to Kruger's burn were $5,370.16. Kruger initially sought punitive damages of $33,000,000 and has since demanded $5,000,000.[1] In July 2019, doTERRA

[1] IADC separately notes that Kruger's settlement demands grossly exceed the constitutional due process limitations on punitive damages awards articulated in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 424-25 (2003).

sought partial summary adjudication requesting that the district court determine Kruger waived any claim to punitive damages based on the contract she signed in becoming a Wellness Advocate. The district court, extending the holding in *Russ v. Woodside Homes, Inc.*, 905 P.2d 901 (Utah Ct. App. 1995), held that because Utah law prohibits waivers of claims of gross negligence, preinjury waivers of punitive damages for willful and malicious conduct must therefore be prohibited as well. There being no statutes or caselaw directly addressing the enforceability of preinjury waivers of punitive damages, this Court granted interlocutory review.

SUMMARY OF THE ARGUMENT

A deal is a deal. My word is my bond. A gentleman's handshake. Each of these colloquialisms represents the quintessential idea that when a deal is struck, it should mean something. This is true – even if you are a Wellness Advocate for a multilevel marketing health and wellness company. A deal is a deal.

The IADC believes this Court should enforce the validity of preinjury punitive damages waivers for the following three reasons: First, the district court's belief that it was constrained by obiter dicta contained in *Russ*, 905 P.2d 901, was flawed, as was its analysis in expanding that dicta from a waiver of all liability for gross negligence to a waiver of the possibility of recovering punitive damages—damages in excess of the actual damages caused by a tortfeasor. Second, this Court's longstanding policy in favor of and adherence to freedom to contract principles mandates such a result; parties should be free to contract to limit or define available damages to get the benefit of the bargain they desire. Absent a showing that leaves the court "free from doubt" that public policy mandates invalidation of a contractual

provision, Utah courts should uphold parties' agreements. And finally, although the majority of state courts around the country have not addressed the validity of preinjury waivers of punitive damages, the majority of those that have addressed the issue have done so on a case-by-case basis. IADC agrees that the case-by-case analysis – as opposed to the wholesale rejection adopted by the district court – is the appropriate approach to considering the enforceability of a punitive damages waiver in a given case. Parties should be free to contract and limit damages. Preinjury waivers of punitive damages contained in otherwise enforceable agreements should be upheld unless an injured party can establish the provision is otherwise unenforceable.

ARGUMENT

I. The District Court Inappropriately Conflated Liability and Damages and Misconstrued the Holding in *Russ*.

The district court, having determined it was "bound by Utah precedent" set forth in *Russ*, held that if "pre-injury waivers of 'harm willfully inflicted or caused by gross or wanton negligence' are 'always invalid,'" then it must follow that "a pre-injury waiver of liability for harm inflicted through 'willful and malicious . . . conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others" is likewise invalid. (R. 1918.) This reasoning suffers at least two fundamental flaws. First, it ignores the plain language from *Russ* upon which it relies, and second, it conflates the distinct concepts of liability, damages, harm, and remedies.

In *Russ*, the Utah Court of Appeals held:

> Generally, parties "not engaged in public service may properly bargain against ***liability for harm caused*** by their ordinary negligence in performance of

> contractual duty; but such an exemption is always invalid if it applies to ***harm wilfully inflicted or caused*** by gross or wanton negligence."

Russ, 905 P.2d at 904 (citation omitted) (emphases added). As an initial matter, the language the district court felt constrained to follow was nonbinding obiter dicta – a judicial statement "unnecessary to the resolution of the case" that "'refers to a remark or expression of opinion that a court uttered as an aside.'"[2] *Ortega v. Ridgewood Estates LLC*, 2016 UT App 131, ¶ 14 n.4, 379 P.3d 18 (citation omitted). *Russ* involved a waiver of ordinary negligence, not gross negligence; the language quoted above formed the basis of the Court's determination that a waiver of ordinary negligence (between parties not engaged in public service) does *not* violate public policy of the State of Utah. The *Russ* court never determined that any waiver at issue in the case did violate public policy. As obiter dicta, the district court was not obliged to follow this language from *Russ* in the first instance.

But even if the lower court were obliged to follow the dicta from *Russ*, the district court did not simply follow *Russ* to its logical next step as it believed it had; rather it misconstrued and significantly expanded the scope of the dicta in *Russ*. The language relied upon by the district court was limited to waivers of liability for "***harm caused***" by ordinary or gross negligence or "***harm wilfully inflicted***," not whether a party should be able to limit liability to only the harm caused by the allegedly tortious conduct. In other words, *Russ* never addressed the question – in dicta or otherwise – of whether public policy demands that a tortfeasor

[2] Obiter dicta here is distinguished from judicial dicta – "a statement 'deliberately made for the guidance of the bench and bar upon ***a point of statutory construction*** not theretofore considered by the Supreme Court.'" *Ortega v. Ridgewood Estates LLC*, 2016 UT App 131, ¶ 14 n.4, 379 P.3d 18 (citation omitted) (emphasis added). The language from *Russ* cannot be judicial dicta as it does not relate to a point of statutory construction.

remain liable for all available remedies – even those remedies that exceed the actual harm allegedly inflicted, but rather only whether a party should be liable for the actual harm caused. This contention is further supported by the language in *Russ* regarding contractual "provisions [that] relieve one party from the ***risk of loss or injury***" and "deprive the other party of the right to recover damages ***for loss or injury***." 905 P.2d at 905 (emphases added). Simply put, the public policy articulated in *Russ* relates solely to requiring a tortfeasor to compensate an injured party for the actual harm caused by egregious tortious conduct, not to ensure an injured party has access to every conceivable possible remedy against a tortfeasor – even the possibility of recovering damages in excess of an injured party's actual damages.

Yet that is precisely what the district court did when it conflated the notions of harm and remedy, liability and damage, and the "harmed caused" by gross negligence versus the "harm caused" by conduct satisfying the standard necessary to impose punitive damages. In *Houtz v. Union Pacific Railroad Co.*, 93 P. 439 (Utah 1908), the Utah Supreme Court noted that "there is a well-recognized distinction between a substantive right or liability, and [the] remedy, though at times [that distinction is] difficult [to] exact[ly] defin[e]." *Id.* at 445. Harm means "[i]njury, loss, damage," or a "material or tangible detriment." *Harm*, *Black's Law Dictionary* (11th ed. 2019). Remedy is broader and includes "anything a court can do for a litigant who has been wronged or is about to be wronged." *Remedy*, *Black's Law Dictionary*. Remedy includes redressing the actual harm inflicted, but may also go beyond actual damages and include punitive or exemplary damages.

The conflation of the terms harm and remedy seems to have been at least in part based on the district court's erroneous belief that there is no distinction between liability and

damages. Liability has two distinct meanings: (1) fault – the "quality, state, or condition of being legally obligated or accountable" or (2) debt – a "financial or pecuniary obligation in a specified amount," depending on the context. *Liability*, *Black's Law Dictionary*. The latter definition of liability overlaps with the definition of damages – "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." *Damages*, *Black's Law Dictionary*. Punitive damages go beyond the traditional definition of damages inasmuch as they are "[d]amages awarded in addition to actual damages . . . to penaliz[e] the wrongdoer or mak[e] an example to others." *Id.* But the overlap in the latter definition of liability and damages does not mean there is no distinction between the terms.

And yet with little explanation, the district court erroneously expanded the notion of liability for harm caused by allegedly tortious conduct with liability for all potentially available remedies, and erroneously determined there is no distinction between "damages" and "liability" because "if any damages are waived, then the liability for those damages is necessarily waived too." (R. 1916.) This logical leap ignores the simple truth that a waiver of liability to some damages is not a waiver of liability to all damages, and that a waiver of liability as to punitive damages in no way impairs an injured party's right to recover all damages for the "harm caused" by a tortfeasor.

But where the flawed reasoning of the district court is most evident is where the district court impliedly correlated a waiver of liability for punitive damages with a waiver of liability for "harm inflicted through 'willful or malicious . . . conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.'" (R. 1918.) There is no independent cause of action for punitive damages under Utah law. *See*

Waddoups v. Amalgamated Sugar Co., 2002 UT 69, ¶ 8 n.1, 54 P.3d 1054. Therefore, a waiver of liability for punitive damages simply does not waive any liability for any "harm inflicted" through any means; the sole purpose of punitive damages is to punish, never to compensate. The only way a party could waive liability for harm inflicted through willful or malicious conduct is by waiving their right to bring a cause of action based on the underlying tort. Such a waiver would also act to waive any punitive damages, but a waiver of punitive damages does not act to waive liability for the actual harm resulting from the underlying tort. This distinction matters. Both the language of *Russ* and the Restatement (Second) of Contracts relate only to the waiver of liability for "***harm caused***" intentionally or recklessly (or by gross or wanton negligence) that is unenforceable; neither makes any reference to a waiver of liability for damages that exceed the harm caused. Moreover, unlike compensatory damages for personal injuries – those "[d]amages sufficient in amount to indemnify the injured person for the loss suffered," *Compensatory Damages, Black's Law Dictionary* – punitive damages are purely discretionary. In other words, while the law recognizes a right to receive compensatory damages if an injured party establishes each of the elements of their claim, there is no "right" to receive punitive damages even where the statutory prerequisites are met. *See White v. Randall*, 2007 UT App 45, ¶ 23, 156 P.3d 849 ("Even when malicious action has been established, a trial court has discretion in deciding whether to award punitive damages."); Utah Code § 78B-8-201(1)(a) ("punitive damages ***may be*** awarded only if" (emphasis added)).

In sum, the district court erred in holding it was constrained to follow the obiter dicta set forth in *Russ* regarding waivers of liability for harm caused by gross negligence, and

compounded that error when it expanded the holding in *Russ* to preclude waivers of liability for damages in excess of the harm caused by any alleged gross negligence. Under Utah law, in contrast to the right to receive compensatory damages, there is no "right" to receive punitive damages. The district court erred in extending *Russ* to apply to a waiver by a party of the option to seek damages in excess of their actual damages.

II. Parties Should Be Free to Contract as They See Fit; Public Policy Is Not Offended by a Party's Waiver of the Option to Seek Damages in Excess of Their Actual Damages.

Utah courts have long recognized that it is a basic principle of contract law that parties are generally "free to contract according to their desires in whatever terms they can agree upon." *Russell v. Park City Utah Corp.*, 548 P.2d 889, 891 (Utah 1976). Indeed, "[t]he basic purpose in construing or interpreting a contract . . . is to determine the intentions of the parties, which are controlling." *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54, ¶ 14, 28 P.3d 669. Even the issue of damages "'will always hinge upon the nature and language of the contract and the reasonable expectations of the parties,'" *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033 (Utah 1989) (citation omitted), for "judicial interference of contract terms is also fraught with peril, as its misuse threatens 'commercial certainty and breeds costly litigation,'" *Young Living Essential Oils, LC v. Marin*, 2011 UT 64, ¶ 8, 266 P.3d 814 (citation and brackets omitted). Consequently, courts are rightfully "'loath to interfere with parties' ability to contract freely.'" *Utah Dep't of Transp. v. Kmart Corp.*, 2018 UT 54, ¶ 21, 428 P.3d 1118 (citation omitted).

This freedom to contract principle includes parties' abilities to negotiate benefits, allocate risks, and limit potentially available remedies, even when those bargains appear to

significantly favor one side over the other. *See, e.g., Vander Veur v. Groove Entm't Techs.,* 2019 UT 64, ¶ 10, 452 P.3d 1173 (court noting it cannot create a contract right "'to achieve an outcome in harmony with the court's sense of justice but inconsistent with the express terms of the applicable contract'" (citation omitted)); *Consol. Wagon & Mach. Co. v. Barben*, 150 P. 949, 952 (Utah 1915) (finding "it has uniformly been ruled that, when the parties to the contract have agreed upon the warranties and the remedies that accrue upon a breach of them, these remedies constitute the only relief in this particular that the purchaser has, and he must look to his contract and be governed by its stipulations"). A contract, taken as a whole, is a reflection of the parties' expectations, negotiations, and benefits of their bargain and, as such, should not be disturbed absent well-recognized exceptions such as fraud, duress, or unconscionability.

To this end, courts have routinely upheld contract damages limitations, including preinjury waivers. *See, e.g., Penunuri v. Sundance Partners, Ltd.*, 2013 UT 22, ¶ 25, 301 P.3d 984 (noting that "[i]t is well settled that preinjury releases of claims for ordinary negligence can be valid and enforceable"). Preinjury releases, however, are "'not unlimited in power and can be invalidated in certain circumstances,'" including for public policy considerations. *Id.* (citation omitted). In determining whether a contract offends public policy, courts "first determine whether an established public policy has been expressed in either constitutional or statutory provisions or the common law." *Id.* at ¶ 26. "'[F]or a [provision of a] contract to be void on the basis of public policy, there must be a showing free from doubt that the contract is against public policy.'" *Id.* (citation omitted); *see Retherford v. AT & T Commc'ns of Mtn. States, Inc.*, 844 P.2d 949, 967 n.11 (Utah 1992) ("Before we can interfere with the

enforcement of this private agreement, we must find that the private agreement offends the public policy embodied in the statute, offends it so severely that it requires striking the term or clause as unenforceable."). Whether a provision is against public policy should be viewed in light of the "provision's context, subject, and overall purpose."[3] *Russ*, 905 P.2d at 907. Courts look to whether the legislature has deemed a damages limitation unequivocally unenforceable on its face – such as the limitation on waiving compensatory damages for personal injuries set forth in the Utah Uniform Commercial Code, *see* Utah Code § 70A-2-719(3) – or whether the public policy is expressed in the common law or suggested by statutory text. *See Penunuri*, 2013 UT 22, ¶ 26. When interpreting statutory text, courts look to "'the plain language of the statute itself,'" as well as seeking "'to give effect to omissions in statutory language by presuming all omissions to be purposeful.'" *Id.* at ¶ 15 (citations omitted).

Applying these principles to punitive damages limitations, the legislature has definitively identified where limits should exist as to the imposition of punitive damages, and in doing so, it has expressed a policy that punitive damages are only one vehicle to guide the reasonableness of parties' conduct, but are not essential in all instances to compel parties to act with appropriate consideration for the rights of others. To be sure, punitive damages are not available in every instance where a party acts willfully and maliciously or with reckless disregard of the rights of others. *See* Utah Code § 78B-8-201(1)(a). For example, punitive

[3] Ironically, despite the fact that *Russ* mandates a case-by-case analysis before striking a contract provision as against public policy, the district court's *per se* rule negates this required analysis in its entirety. *See Russ*, 905 P.2d at 907.

damages are only available in tort actions; they are not available in any breach of contract actions, unless the breach constitutes an independent tort. *See, e.g., Norman v. Arnold*, 2002 UT 81, ¶ 35, 57 P.3d 997; Utah Code § 78B-8-201 ("punitive damages may only be awarded if . . . the acts or omissions of the ***tortfeasor*** . . . ."). Punitive damages are also entirely prohibited in actions against any governmental entity, including the state, as well as all of its political subdivisions[4] and law enforcement. *See* Utah Code § 63G-7-603(1)(a). Punitive damages are also limited to circumstances where a party has actually been injured – no matter how egregious a party's conduct, if it does not cause compensable injury to a person, punitive damages are not recoverable under Utah law. *See id.* § 78B-8-201(1)(a). And finally, by statute, punitive damages are entirely discretionary – "punitive damages ***may be awarded only if***" specified elements are established, but are not required to be awarded even if those elements are established. *Id.* In short, the Utah legislature – by limiting the availability of punitive damages to only a limited set of tort claims against certain persons or entities – has expressed a policy that the threat of punitive damages is not necessary in all instances to prevent parties from appropriately considering – and acting in consideration of – the rights of others.

Looking to statutory pronouncements on the enforceability of damages waivers and damages limitations, the Utah legislature has limited recovery of actual damages in

[4] Political subdivisions includes "any county, city, town, school district, community reinvestment agency, special improvement or taxing district, local district, special service district, an entity created by an interlocal agreement adopted under Title 11, Chapter 13, Interlocal Cooperation Act, or other governmental subdivision or public corporation." Utah Code § 63G-7-102(8).

circumstances and such limitations have received the imprimatur of this Court. For example, the Utah Health Care Malpractice Act limits the amount of noneconomic damages recoverable in malpractice actions. This Court upheld that limitation of damages because the cap was narrowly tailored and capping damages was a discrete way to offset the mounting prices of medical malpractice insurance. *See Judd v. Drezga*, 2004 UT 91, ¶¶ 16-17, 103 P.3d 135. "Rather than cap all damages, like the cap struck down in *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989), the limitation on recoverable damages in this case is narrowly tailored, by limiting quality of life damages alone." *Id.* at ¶ 17. The Workers' Compensation Act is another example of the legislature capping damages in certain types of cases that have received the approval of this Court. The Workers' Compensation Act eliminates an employee's right to sue their employer for on-the-job injuries, except in very limited circumstances, and sets (and by extension caps) the available remedies for the employee by type and permanency of injury. *See* Utah Code § 34A-2-101, *et seq.* Where the legislature has found that in certain circumstances public policy favors limitations of actual damages, there is no reason to believe the public policy of the State of Utah does not permit private contracting parties to negotiate away – in exchange for valuable consideration – the possibility they may be the exceptional case where punitive damages may be awarded.

With respect to any constitutional expressions of public policy for or against waivers of punitive damages, the protections set forth in the Utah Constitution are tied to compensation for injuries, there is no established right to (or even reference to) punitive damages or damages in excess of a party's injury. *See* Utah Const. art. I, § 11 ("All courts shall be open, and every person, ***for an injury done to him*** in his person, property or reputation, shall have remedy by

due course of law . . . ." (emphasis added)); Utah Const. art. XVI, § 5 ("The right of action ***to recover damages for injuries*** resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law." (emphasis added)). To the contrary, not only is there no constitutional right to punitive damages, the constitution imposes limits on the imposition of punitive damages. *See State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416-17 (2003) ("While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. The reason is that 'elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'" (brackets and citations omitted)).

While the common law recognizes there is a "general policy of permitting punitive damages to punish a wrongdoer and to deter particularly culpable, dangerous conduct," there is equal recognition that the threat of punitive damages is not the only means of deterring outrageous and malicious conduct. *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1185 (Utah 1983). "'[P]unitive damages should be awarded only when they will clearly accomplish a public objective not accomplished by the award of compensatory damages. The intended deterrent effect must be clear and in proportion to the nature of the wrong and the possibility of recurrence.'" *Gleave v. Denver & Rio Grande W. R.R. Co.*, 749 P.2d 660, 671 (Utah 1988)

(citation and ellipsis omitted). Indeed, "the general rule is that only compensatory damages are appropriate and that punitive damages may be awarded only in exceptional cases." *Behrens*, 675 P.2d at 1186. Unfortunately, *Russ* is bereft of any articulation of a public policy supporting its language that waivers of intentional harm or gross negligence are invalid. In sum, from the common law, there is some articulation of a public policy in favor of punitive damages in instances where they will actually accomplish the intended effect of deterring outrageous and malicious conduct.

The public policy of the State of Utah – as informed by statutory, constitutional, and common law considerations – does not support a finding "free from doubt" that Utah law demands a *per se* prohibition on preinjury punitive damages waivers. There is no constitutional right to punitive damages. and neither the legislature nor this Court has unequivocally circumscribed the ability to waive punitive damages preinjury. Had the legislature spoken, or had there been controlling precedent by which to bind the district court, the instant case would be facilely discharged. But where the legislature has only made the remedy of punitive damages available on a discretionary basis in a narrow subset of tort actions brought only against nongovernmental entity defendants, it simply cannot be said there is such a strong public policy in favor of punitive damages that parties cannot waive the option of seeking to recover punitive damages in exchange for valuable consideration. To the contrary, upholding the enforceability of a preinjury waiver of punitive damages achieves the exact same result as the restriction of punitive damages against governmental entities: a party who agrees to a preinjury waiver is not thereafter precluded from recovering their actual damages – rather, that party is merely precluded from the possibility of recovering damages in

excess of their actual injury, and the tortfeasor is still held liable for the entirety of the actual damages their misdeeds may have caused. In other words, the threat of actual damages is a sufficient deterrent. The waiver here should be upheld in particular where Kruger was not required to sign the contracts containing the waiver and instead was given the option of purchasing doTERRA's product either at a discount (which required a waiver of punitive damages) or without a discount (which did not require a waiver of punitive damages). Simply stated, the constitutional, statutory, and common law considerations of public policy surrounding the necessity of the threat of punitive damages to deter certain tortious conduct do not leave a court "free from doubt" that an otherwise enforceable contract limiting the availability of punitive damages is against the public policy.

III. Most Jurisdictions That Have Addressed the Enforceability of Punitive Damages Waivers Analyze the Issue on a Case-by-Case Basis; Multiple Jurisdictions Have Upheld Preinjury Waiver of Punitive Damages.

Finally, less than half of the state courts around the country have even considered the enforceability of preinjury waivers of punitive damages.[5] But the majority of those states that have addressed the issue analyzed the question on a case-by-case basis; only three states have outright rejected all punitive damages waivers as a matter of public policy;[6] and two states

[5] It appears the following 35 state courts have not addressed the enforceability of waivers of punitive damages: Arkansas, Arizona, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, and Wyoming.

[6] Alabama, *Ex parte Thicklin*, 824 So. 2d 723, 732 (Ala. 2002), *overruled on other grounds by Patriot Mfg., Inc. v. Jackson*, 929 So. 2d 997 (Ala. 2005); Alaska, *McKeown v. Kinney Shoe Corp.*, 820 P.2d 1068 (Alaska 1991); Wisconsin, *Cook v. Pub. Storage, Inc.*, 761 N.W.2d 645, 668 (Ct. App. Wis. 2008).

have rejected punitive damages waivers only to the extent they are contained in contracts of adhesion.[7] Of the nine states analyzing the enforceability of the waiver of punitive damages on a case-by-case basis, three states rejected the specific waiver at issue based on the totality of circumstances,[8] Florida struck all punitive damages waivers contained in assisted living and nursing home contracts based on specific statutory language applicable to such contracts,[9] New York invalidated a punitive damages waiver as inconsistent with the arbitration rules adopted by the contract containing the waiver,[10] and four states upheld the enforceability of the punitive damages waiver finding the waiver not unconscionable.

The South Carolina Supreme Court upheld a contract precluding a party from seeking "consequential damages, indirect damages, special damages, or punitive damages" because the party was still entitled to recover actual damages, noting that "[w]hile clauses limiting liability are to be strictly construed, we find no reason to ignore the plain language of the clause based on either public policy or unconscionability grounds." *Maybank v. BB&T Corp.*, 787 S.E.2d 498, 516 (S.C. 2016); *see Arrendondo v. SNH SE Ashley River Tenant, LLC*, No. 2017-001298, 2019 WL 3814725, at *4 (S.C. Ct. App. 2019) (unpublished) (enforcing a

---

[7] Hawai'i, *Narayan v. Ritz-Carlton Dev. Co.,* 350 P.3d 995 (Hawai'i 2015), *vacated on other grounds by Ritz-Carlton Dev. Co. v. Narayan*, 136 S. Ct. 800 (2016) (table); West Virginia, *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 279-80 (2002).

[8] California, *Pardee Constr. Co. v. Superior Court*, 100 Cal. App. 4th 1081, 1085 (2002); Mississippi, *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 523-24 (Miss. 2005), *overruled on other grounds by Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009); Washington, *Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 767 (Wash. 2004).

[9] Florida, *Gessa v. Manor Care of Fla., Inc.*, 86 So. 3d 484, 492-93 (Fla. 2011) (waiver of punitive damages under Nursing Home Resident Act and Assisted Living Resident Act violated public policy as inconsistent with the statute).

[10] *Lian v. First Asset Mgmt.,* 710 N.Y.S.2d 52 (N.Y. App. Div. 2000).

punitive damages waiver where equitable relief and economic and non-economic damages were not waived). The Texas Supreme Court likewise upheld a waiver of punitive damages by "balancing the competing interests between protecting parties from 'unintentionally waiving a claim for fraud' and 'the ability of parties to fully and finally resolve disputes between them,'" and noting that in waiving the ability to recover punitive damages for fraud, the parties did not waive a claim for fraud. *Bombardier Aerospace Corp. v. SPEP Aircraft Holding, LLC,* 572 S.W.3d 213, 232 (Tex. 2019) (citation omitted) (holding the court must "respect and enforce terms of a contract that parties have freely and voluntarily entered," for the plaintiffs "'cannot both have the contract and defeat it too'" (citation and brackets omitted)). The Superior Court of Delaware upheld a waiver of "punitive, exemplary, lost profits, consequential or similar damages." *O'Neill v. AFS Holdings, LLC,* No. N13C-02-JTV, 2014 WL 626031, at *5 n.13 (Del. 2014) (unpublished) (upholding waiver of exemplary damages contained in an earnout agreement). And the Ohio Supreme Court upheld a punitive damages waiver in connection with a contract for services for a nursing home resident. *Hayes v. Oakridge Home*, 908 N.E.2d 408 (Ohio 2009).[11] The Ohio Supreme Court upheld the agreement in large part because the plaintiff had the option not to sign the arbitration agreement that contained the waiver, but where both parties gave up legal rights in exchange for entering into the arbitration agreement, the contract—including the punitive damages waiver—was enforceable. *See id.* at 415.

[11] While the district court found the Ohio Supreme Court's analysis inapposite because doTERRA's contract was "a contract of adhesion," the IADC respectfully disagrees. Just as the *Hayes* plaintiff could have found residence at another nursing home, Kruger could have not purchased the products at a discount or could have found other products to distribute. The district court's *sua sponte* pronouncement that doTERRA's contract is one of adhesion is procedurally and substantively improper.

Additionally, both federal circuit and district courts have also upheld punitive damages waivers. *See*, e.g., *Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.,* 298 F.3d 314, 318 n.1 (5th Cir. 2002) ("Provisions in arbitration agreements that prohibit punitive damages are generally enforceable."); *Dunkin' Donuts Franchised Rests. LLC v. Manassas Donut, Inc.,* No. 1:07cv446, 2008 WL 110474 (E.D. Va. Jan. 8, 2008) (finding that where the waiver of punitive damages in franchise agreement was found in two different places, in a conspicuous manner, the defendants had knowingly and voluntarily waived any claim for punitive damages); *New S. Fed. Sav. Bank v. Anding*, 414 F. Supp. 2d 636 (S.D. Miss. 2005) (court finding that the exclusion of punitive damages in an arbitration agreement was enforceable). Indeed, the Fifth Circuit has interpreted the 1995 U.S. Supreme Court case of *Mastrobuono v. Shearson Lehman Hutton, Inc.*, as standing for the proposition that "[p]rovisions in arbitration agreements that prohibit punitive damages are generally enforceable." *Inv. Partners*, 298 F.3d at 318 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56-57 (1995)).

The same rationale applied by the Ohio Supreme Court applies to the case before this Court. Plaintiff Kruger voluntarily entered into contracts with doTERRA wherein she waived her right to punitive damages in exchange for a benefit she thought was worthy of that exchange, namely, discounted products, sales support, and a competitive bonus plan, to name a few. Plaintiff was not required to sign the contracts and indeed could have obtained doTERRA's products without signing the Wellness Advocate agreements, albeit not at discounted prices. Weighing the benefits, Kruger chose to accept the contracts and by so doing, submitted herself to all of the provisions of the agreements, including the waiver of punitive damages. As the Ohio Supreme Court found in *Hayes* – similar to courts across the

country – this Court should find that punitive damages waivers should be analyzed on a case-by-case basis and find a party's decision to waive preinjury punitive damage claims in an otherwise enforceable contract is likewise enforceable.

CONCLUSION

For the reasons stated above, the IADC respectfully asks this Court to reject the district court's adoption of a *per se* prohibition on punitive damages waivers and hold that preinjury punitive damage contract waivers are enforceable under Utah law, absent an established exception to the enforceability of the contract.

Dated this 17th day of June, 2020.

/s/ Lauren DiFrancesco
John A. Anderson
Lauren E.H. DiFrancesco
STOEL RIVES LLP
Attorneys for Proposed Amicus Curiae International Association of Defense Counsel

Certificate of Service

I certify that on the 17th day of June, 2020, I caused the foregoing to be served on the following via email:

Black W. Johnson
JOHNSON LIVINGSTON, PLLC
blake@johnsonlivingston.com

Attorney for Respondent/Plaintiff
Jessica Kruger

Steven C. Smith
Kipp S. Muir
SMITH LC
ssmith@smith-lc.com
kmuir@smith-lc.com

Aaron R. Harris
DURHAM JONES & PINEGAR, P.C.
aharris@djplaw.com

Daniel S. Wittenberg
Katherine R. Nichols
dwittenberg@swlaw.com
knichols@swlaw.com

Attorneys for Defendant/Petitioner
dōTERRA International, LLC

/s/ *Lauren DiFrancesco*