No. 16-10430

In the United States Court of Appeals for the Fifth Circuit

STELLUTI KERR, L.L.C.; ANTHONY STELLUTI; PAMELA STELLUTI,
Plaintiffs-Appellants,

v.

MAPEI CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Texas, Lubbock Division

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS STELLUTI KERR, LLC, ANTHONY STELLUTI, AND PAMELA STELLUTI

Mark W. McBrayer
Robert L. Duncan, P.C.
CRENSHAW, DUPREE & MILAM, L.L.P.
P.O. Box 64479
Lubbock, TX 79464
Tel.: (806) 762-5281
Fax: (806) 762-3510
mmcbrayer@cdmlaw.com
opie@cdmlaw.com

Daniel L. Geyser
Lead Counsel
Douglas D. Geyser
Victor O'Connell
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
Tel.: (213) 995-6811
Fax: (213) 261-0299
daniel.geyser@strismaher.com
douglas.geyser@strismaher.com
victor.oconnell@strismaher.com

Counsel for Plaintiffs-Appellants

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Stelluti Kerr, LLC, Plaintiff-Appellant.
2. Anthony Stelluti, Plaintiff-Appellant.
3. Pamela Stelluti, Plaintiff-Appellant.
4. Daniel L. Geyser, appellate counsel for Plaintiffs-Appellants.
5. Douglas D. Geyser, appellate counsel for Plaintiffs-Appellants.
6. Victor O'Connell, appellate counsel for Plaintiffs-Appellants.

7. Stris & Maher LLP, appellate counsel for Plaintiffs-Appellants.

8. Mark W. McBrayer, trial counsel for Plaintiffs-Appellants.

9. Amber Miller, trial counsel for Plaintiffs-Appellants.

10. Robert L. Duncan, trial counsel for Plaintiffs-Appellants.

11. Eliott V. Nixon, trial counsel for Plaintiffs-Appellants.

12. Matt D. Matzner, trial counsel for Plaintiffs-Appellants.

13. Crenshaw, Dupree & Milam, LLP, trial counsel for Plaintiffs-Appellants.

14. MAPEI Corporation, Defendant-Appellee.

15. Lawrence T. Bowman, counsel for Defendant-Appellee MAPEI Corporation.

16. Bradley J. Rutledge, counsel for Defendant-Appellee MAPEI Corporation.

17. Kane Russell Coleman & Logan PC, counsel for Defendant-Appellee MAPEI Corporation.

18. Fernando M. Bustos, counsel for Defendant-Appellee MAPEI Corporation.

19. Aaron M. Pier, counsel for Defendant-Appellee MAPEI Corporation.

20. Bustos Law Firm, P.C., counsel for Defendant-Appellee MAPEI Corporation.

21. Tim D. Haggard, counsel for Defendant-Appellee MAPEI Corporation.

22. Cozen O'Connor, counsel for Defendant-Appellee MAPEI Corporation.

23. Arodo BVBA, Defendant.[1]

24. W. Ross Forbes, Jr., counsel for Defendant Arodo BVBA.

25. Matthew C. Acosta, counsel for Defendant Arodo BVBA.

26. Stephanie C. Sparks, counsel for Defendant Arodo BVBA.

27. Jackson Walker LLP, counsel for Defendant Arodo BVBA.

Respectfully submitted.

/s/ *Daniel L. Geyser*
Daniel L. Geyser
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
Tel.: (213) 995-6811
Fax: (213) 261-0299
daniel.geyser@strismaher.com

Counsel for Plaintiffs-Appellants Stelluti Kerr, LLC, Anthony Stelluti, and Pamela Stelluti

July 20, 2016

[1] In accordance with this Court's letter on June 3, 2016, Arodo BVBA has been terminated as a party to this appeal. (Arodo was a defendant below, but was dismissed earlier in the case by separate judgment under Fed. R. Civ. P. 54(b).) We have continued to include Arodo's conflicts information out of an abundance of caution.

STATEMENT REGARDING ORAL ARGUMENT

In accordance with Fed. R. App. P. 34(a) and 5 Cir. R. 28.2.3, Plaintiffs respectfully submit that this appeal warrants oral argument. This case involves a sophisticated commercial dispute in a billion-dollar industry. The district court tossed a jury verdict after a week-long trial, yet failed to provide any accompanying explanation—leaving the parties to brief scores of issues that theoretically supported the judgment.

In light of the importance and complexity of these issues, Plaintiffs believe that oral argument will assist the Court in its review.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

Other Authorities

JURISDICTIONAL STATEMENT

Plaintiffs, a Texas company and their Texas principals, filed suit in state court against Arodo BVBA, a Belgian entity, and Mapei Corporation, an Illinois corporation. ROA.1919. The case was removed under 28 U.S.C. 1441(a), and the district court had jurisdiction under 28 U.S.C. 1332. ROA.29, ROA.928-931. On February 11, 2015, the court entered final judgment in favor of Arodo under Fed. R. Civ. P. 54(b). ROA.2321. On March 25, 2016, the district court granted Mapei judgment as a matter of law, and entered final judgment dismissing the action. ROA.8806-8808. Plaintiffs filed a timely notice of appeal on April 11, 2016 (ROA.8954), and this Court now has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

At an extensive trial, the jury heard conflicting testimony from multiple witnesses on a variety of issues, and resolved those conflicts by *rejecting* Mapei's defenses. After the verdict was entered, the court first requested briefing on an issue that Mapei waived, and then it again requested more briefing on a second issue that Mapei also waived. It finally set aside a jury verdict after a week-long trial without one whit of concrete explanation.

The questions presented are:

1. Whether the district court, without explanation, was correct to find that there was somehow insufficient evidence to support the verdict.

2. Whether Mapei preserved its core post-verdict challenges, including whether those challenges were properly raised in its Rule 50 motions (despite only "preserving" those challenges by incorporating earlier filings, in a footnote, without any effort to single out particular issues in those filings); and if Mapei did preserve those challenges, whether the district court erred in (hypothetically) accepting them.

3. Whether there is any basis for reducing the jury's award based on issue preclusion, the one-satisfaction rule, or inadequate expert testimony, questions the district court squarely resolved as a matter of law against Mapei pre-trial—but theoretically resolved for Mapei (without explanation) post-trial.

STATEMENT OF THE CASE

This case involves a dispute between Plaintiffs and Mapei Corporation.[2] Plaintiffs' founders are the driving force behind a ground-breaking machine that transformed a billion-dollar industry. Before Plaintiffs' innovation, micrometric powders—think dry cement—were typically stored in paper sacks. If a sack broke or became wet, the powders were ruined and the resulting mess presented health and safety hazards (especially in large retail chains and warehouses). Plaintiffs dis-

[2] In light of the record-intensive nature of the case, Plaintiffs are providing only a brief overview of the relevant facts. In order to avoid repetition, the bulk of the core factual dispute (including record citations) is developed directly in the argument section.

covered a process for using high-tech machines to produce clean, water-tight plastic bags. These bags were the perfect solution to the problems plaguing stores (like Lowe's and Home Depot) that sold micrometric powders in mass quantities. Plaintiffs collaborated with Arodo, a Belgian company, to produce the machines, and obtained distribution rights from Arodo to market the machine in North America.

Mapei had a substantial need for Plaintiffs' technology. Mapei had just lost $70-million in annual revenue with Lowe's, and it was desperate to win back the business. It had lost out to a competitor who had secured its own exclusive arrangement with a different manufacturer; that manufacturer obtained rights to plastic-bag technology, but its bags were not airtight.

After extensive negotiations, the parties entered an agreement for purchasing these machines. According to Mapei, it agreed to buy a single machine (at $1 million); according to Plaintiffs, Mapei agreed to buy at least 14 machines (at $1 million per machine). After the first purchase, however, Mapei ultimately refused to purchase the remaining machines from Plaintiffs. It instead went directly to Arodo for additional machines, and ultimately forced Arodo to terminate its distribution agreement with Stelluti Kerr.

Plaintiffs filed suit, alleging claims of breach of contract, tortious interference, and fraud.[3]

After an extensive trial, a jury found that Mapei had breached its contract with Stelluti Kerr and tortiously interfered with the Stelluti Kerr-Arodo contractual relationship. It awarded approximately $7.75 million in damages and $2.7 million in punitive damages—a measured amount that reflected Mapei's significant misconduct but still fell far short of Stelluti Kerr's requested damages.

Once the jury returned its verdict, the district court requested post-verdict briefing on two issues (both of which Mapei had waived) and entertained hundreds of pages of additional briefing. The district court ultimately granted Mapei judgment as a matter of law, and alternatively granted Mapei's motion for a new trial. Despite the extensive post-verdict briefing, the district court failed to provide any concrete explanation for why it elected to set aside the jury's verdict. The order simply referenced Mapei's briefing (without any differentiation), even though Mapei raised scores of issues, including (i) issues the district court squarely resolved *against Mapei* earlier in the case; and (ii) issues that might reduce the dam-

[3] Plaintiffs also sued Arodo, but those claims were subject to international arbitration before the ICC; this case was stayed pending that arbitration. The arbitrator found that Arodo breached its agreement with Plaintiffs, and awarded damages, under Belgian law, for three machines (those which were already in production at the time of breach).

ages award, but would not justify setting aside the verdict or ordering a new trial. The district court, of course, did not confront the wealth of evidence supporting the verdict or explain why Stelluti Kerr's post-verdict theories lacked merit.

This appeal followed.

SUMMARY OF ARGUMENT

After a full week trial, the jury found Mapei liable on two independent counts (plus punitive damages), each involving separate issues and distinct bodies of evidence. The jury's findings were supported by overwhelming evidence. The judge threw out the verdict without a single line of explanation. The court rejected the jury's resolution of the very fact dispute the court identified at summary judgment, or rejected (without explanation) its own legal rulings earlier in the case. It twice called for briefing on issues Mapei had clearly waived, and never explained which of the scores of issues Mapei asserted post-verdict (all of which failed earlier) were suddenly convincing.

As the record easily shows, Mapei breached the unambiguous terms of its own contract, and then it tortiously interfered with Plaintiffs' contract with Arodo. It did this precisely to secure via coercion the business deal it failed to obtain through ordinary negotiation. The jury correctly found Mapei liable for its misconduct, and awarded limited punitive damages to underscore the egregious nature of Mapei's misconduct.

Mapei's attempts to escape liability are unavailing. Its sufficiency challenge is frivolous: as one might expect after a solid week of testimony, the record is more than adequate to sustain the jury's verdict. And Mapei's legal issues are both waived and meritless. Mapei failed to raise those arguments under Rule 50(a), thus eliminating its ability to raise them under Rule 50(b). And they each fail on the merits anyway: Mapei misunderstands the nature of Plaintiffs' arbitration with Arodo, and misinterprets the law of non-mutual issue preclusion in seeking to take advantage, as an outsider, of the arbitral findings. Mapei's arguments under the one-satisfaction rule are barred by circuit precedent, and otherwise are premised on a distortion of the factual record. And its attack on Plaintiffs' expert—for applying sound methodology to Mapei's own assessment of the facts—is utterly baseless.

The district court erred in overriding the jury, and its judgment should be reversed.

STANDARD OF REVIEW

This Court "review[s] a district court's decision to grant judgment as a matter of law de novo." *Serna* v. *City of San Antonio*, 244 F.3d 479, 481 (5th Cir. 2001).

Although the decision to "grant or deny a motion for a new trial is generally within the [trial court's] sound discretion," "where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise particu-

larly close scrutiny, to protect the litigants' right to a jury trial." *Shows* v. *Jamison Bedding, Inc.*, 671 F.2d 927, 930 (5th Cir. 1982); see also *id.* at 931 ("[t]he 'great weight of the evidence' standard is not easily met"; "our standard of review on appeal in cases of this type is also a strict one").

ARGUMENT

I. THE DISTRICT COURT PLAINLY ERRED IN OVERRIDING THE JURY'S VERDICT AFTER AN EXTENSIVE TRIAL—WITHOUT A SINGLE STITCH OF CONCRETE EXPLANATION

The court supplanted the jury's verdict without any explanation. It did not explain which of Mapei's kitchen-sink arguments carried the day; it refused to confirm that it applied the right standard, credited the right evidence, assumed the right credibility findings, or discarded points the jury presumptively rejected. See *Ellerbrook* v. *City of Lubbock*, 465 F. App'x 324, 331-332 (5th Cir. 2012) (reversing the district court for "making credibility determinations," failing to "disregard all evidence favorable to the moving party," and failing to "construe the facts and draw all reasonable inferences from the facts in [judgment-winner's] favor"). Mapei's core arguments were rejected on summary judgment; if the court reconsidered those legal points, it offered no reasoning for the abrupt switch.

With the court not articulating any basis for its ruling, Plaintiffs must now guess which grounds to attack on appeal. The court evidently ruled on sufficiency grounds (given its accompanying grant of a new trial on the "great weight" of the

evidence). But out of an abundance of caution, Plaintiffs will attack all grounds theoretically underpinning the judgment, even those weak points the court definitively rejected on summary judgment. In the end, Mapei's multiple challenges are meritless, and the jury verdict should be restored.

A. In Light Of The Exhaustive Record, Mapei's Sufficiency Challenges Were Baseless

Mapei's efforts to upset the verdict face an exceptional burden. Its JMOL motion "challenges the legal sufficiency of the evidence." *Hodges* v. *Mack Trucks, Inc.*, 474 F.3d 188, 195 (5th Cir. 2006). After an extensive trial, the jury heard conflicting testimony from multiple witnesses on a variety of issues, and resolved those conflicts by *rejecting* Mapei's defenses. That jury "verdict is afforded great deference," and Mapei must now show that "'the facts and inferences point so strongly in [its] favor * * * that a rational jury could not reach a contrary verdict." *Pineda* v. *UPS, Inc.*, 360 F.3d 483, 486 (5th Cir. 2004). In conducting this exacting analysis, "all reasonable inferences" are construed against Mapei and in favor of upholding the verdict. *Lane* v. *R.A. Sims, Jr., Inc.*, 241 F.3d 439, 445 (5th Cir. 2001); *Brennan's Inc.* v. *Dickie Brennan & Co.*, 376 F.3d 356, 362 (5th Cir. 2004). The Court may not "make credibility determinations or weigh the evidence," which are exclusively functions for the jury. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Unless Mapei's proof was sufficiently "strong[] and overwhelming[]" or "uncontradicted and unimpeached" (*Med. Care*

Am., Inc. v. *Nat'l Union Fire Ins.*, 341 F.3d 415, 420 (5th Cir. 2003)), the jury was free to disregard Mapei's theories and testimony in favor of Plaintiffs' competing submission (*Reeves*, 530 U.S. at 150-151). Disturbing the verdict on any lesser showing is reversible error. *Am. Home Assurance Co.* v. *United Space Alliance, LLC*, 378 F.3d 482, 487 (5th Cir. 2004).

Mapei cannot muster the necessary showing.

1. Mapei has not met its heavy burden to overturn the jury's contract award

a. The district court's *sua sponte* "authority" issue is unavailing

i. Mapei waived the "authority" argument by failing to assert it under Rule 50(a), and Mapei did not preserve the issue by vaguely incorporating the entirety of its earlier briefing in a single footnote

1. The Court requested post-verdict briefing on whether evidence proved Mapei's owner authorized the purchase of multiple machines, effectively calling for a Rule 50(b) motion for judgment as a matter of law. But Rule 50(b) is textually limited to "renewed" motions, and parties cannot *renew* issues that were not previously raised. *Mozingo* v. *Correct Mfg. Corp.*, 752 F.2d 168, 172 (5th Cir. 1985). This is why parties are strictly limited under Rule 50(b) to issues raised under Rule 50(a). Unless a ground was "advanced in the pre-verdict motion," it cannot provide relief post-trial.

This requirement promotes Rule 50's dual objectives. The Rule protects parties against baseless judgments, but also avoids inappropriate "sandbagg[ing]": parties cannot wait until after trial is over to point out errors that could have been easily addressed during trial. *Quinn* v. *Sw. Wood Prods., Inc.*, 597 F.2d 1018, 1024-1025 (5th Cir. 1979). The "earlier motion" under Rule 50(a) "informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available." Fed. R. Civ. P. 50 advisory committee's note to 2006 amendment. If a party fails to "clearly point[] out a claimed evidentiary deficiency" under Rule 50(a), it fails to preserve the issue under Rule 50(b).

Nor can courts excuse Rule 50 violations. The court is bound by the same preservation rules as the parties, and it cannot *sua sponte* grant JMOL on unpreserved issues. *Mozingo*, 752 F.2d at 172. A contrary rule would impose the same prejudice and create the same "post-verdict 'trap' that Rule 50(b) is designed to avoid." *Doe* v. *Celebrity Cruises, Inc.*, 394 F.3d 891, 904 (11th Cir. 2004).

2. Mapei failed to preserve the single, narrow issue the court flagged for post-verdict briefing. Throughout the entire litigation, Mapei never suggested corporate "authority" was contested, or that its representatives lacked authority to deal with Plaintiffs. This issue was not presented, legally or factually, in Mapei's answer, its counterclaims, its summary-judgment briefing, its pre-trial filings, its jury

arguments, or (critically) its Rule 50(a) motion. Rather, Defendants' entire case has always focused on the agreement's *terms*, not a purported lack of authority (for whatever reason) to *enter* the agreement in the first place. ROA.9010:17-23 ("This case boils down to whether Mapei agreed to buy one machine through a purchase order or whether it agreed to buy 14 machines."); ROA.7076-7078.

If Mapei wished to argue there was no binding contract without Dr. Squinzi's specific authorization, it was obligated to present that question squarely in its Rule 50(a) motion. Had it timely raised the issue, Plaintiffs could have addressed it, offered additional evidence, and cure any defects before the case was submitted to the jury. It is too late now to generate new factual issues after the jury's fact-finding is over, and the court's contrary invitation stands at odds with Rule 50's unambiguous command. The court erred in pressing a question no one asked, and it erred again in (apparently) resolving that question in Mapei's favor.

3. a. Without legal support, Mapei insists it preserved the "authority" issue by incorporating the undifferentiated mass of its earlier filings from summary judgment—where, incidentally, this issue was (likewise) not identified with any particularity. Mapei's footnote reference was inadequate to preserve this question. Mapei failed to identify the issue during its oral or written Rule 50(a) motions, and it cannot cite a single case suggesting that a generic footnote can preserve unidentified issues by reference—especially where a party enumerates *other* issues from its

summary-judgment filings. *Roman* v. *Western Mfg., Inc.*, 691 F.3d 686, 700 (5th Cir. 2012). Mapei provided no notice that "authority" was at issue, which is why the court never said a word about it in rejecting Mapei's Rule 50(a) motion.

Indeed, in an analogous case, the Tenth Circuit upheld a ruling that a party failed to preserve issues under Rule 50 by merely incorporating its earlier summary-judgment pleadings; it was limited to grounds specifically raised in the Rule 50(a) motion. *ICE Corp. v. Hamilton Sundstrand Corp.*, 432 Fed. Appx. 732, 734-736 (10th Cir. 2011); see also *Hodges* v. *Mack Trucks, Inc.*, 474 F.3d 188, 195 (5th Cir. 2006). That same rule is dispositive here: Mapei cannot seriously invoke 40+ pages of briefing in a single footnote and expect to put anyone on reasonable notice of what Mapei actually thinks is deficient. Fed. R. Civ. P. 50(a)(2) (the motion must "*specify*" relevant "law and facts"); *McCann* v. *Tex. City Refining, Inc.*, 984 F.2d 667, 672 (5th Cir. 1993) (Rule 50(a) requires stating "*specific grounds* for granting the motion").

Moreover, despite Mapei's bold assertion that the issue was "clearly preserved" and "raised repeatedly" throughout its earlier briefs, its own citations reveal Mapei's error. ROA.7957 (bullet list of six isolated snippets pulled from 48 pages of briefing). Mapei's lead bullet, for example, cites statements from *two separate footnotes* (read out of context), not even a single sentence (much less complete paragraph) in the actual text. It relies on other statements from the "Back-

ground" section of its brief, not the argument, and cites generic statements from negotiations *pre-dating* the quotation's submission in the CapEx process (to prove *earlier* discussions did not form an agreement, a point irrelevant here). Mapei never argued, specifically, that there was no "authority" binding Mapei to the terms in the quotation and Confirmation Order—it simply argued the only contract was the purchase order, a point the jury emphatically rejected.[4]

3. b. Mapei brushes aside its error by invoking Rule 50's "liberal spirit." But even a "liberal spirit" has its limits, and no case excuses parties from properly "specify[ing]" fact issues under Rule 50(a). Mapei's limited presentation at trial does not supply the "hint" missing from its actual motion. Mapei produced evidence regarding its internal "CapEx" procedures, but to suggest that pre-CapEx negotiations did not bind Mapei, or that the actual "contract" was the purchase order, not the quotation or Confirmation Order. Rule 50 does not ask parties to guess which evidentiary questions the opposing party might raise post-verdict. Fair notice requires specificity. That notice was lacking here, and Mapei cannot cite its general trial presentation to cure defects in its Rule 50(a) motion.

[4] Moreover, Mapei's weak examples miss the point. There is a clear difference between saying a contract for 14 machines lacked authority and saying that no contract for 14 machines ever existed. Mapei argued the latter, not the former, and that choice failed to preserve the "authority" issue.

ii. The record readily supports a finding of "authority"

Mapei did not challenge "authority" for a reason: the jury had abundant evidence to find Plaintiffs' contract was authorized.

1. There is no absolute rule that a corporation's owner must personally authorize every contract. Corporations generally speak through their representatives. Tex. Bus. Org. Code 3.101, 21.401. Actual authority requires a corporation to intentionally delegate authority to its agents. See *Celtic Life Ins.* v. *Coats*, 885 S.W.2d 96, 98-99 (Tex. 1994). Authority can be expressly delegated or implied from a custom or habit of doing business. See, *e.g.*, *Templeton* v. *Nocona Hills Owners Ass'n, Inc.*, 555 S.W.2d 534, 537 (Tex. App.—Texarkana 1977, no pet.). Implied authority does not require written proof, but may be established via "course of business," the board's "knowledge," or evidence that "authority was vested through a chain of command." *Karam* v. *Travelers Ins. Co.*, 813 F.2d 751, 753-754 (5th Cir. 1987). If actual or apparent authority exists, the corporation "is bound by [the agent's] acts and declarations within the scope of the business entrusted to him." *Id.* at 754.

2. This record establishes a clear case for actual and apparent authority, even showing that Mapei's "owner" reviewed the contract's terms and approved the deal.

Plaintiffs negotiated directly with high-ranking Mapei officers with express authority to handle the transaction. ROA.7823-7824, ROA.7827, ROA.10669; ROA.10588. The deal's critical terms were included—at Mapei's insistence—in the operative quotation (ROA.10545; ROA.10436); that quotation was submitted in Mapei's "CapEx" process; the "owner" directly reviewed the Quotation (ROA.10561), and the CapEx was "fully approved" (ROA.10581-10582); Mapei subsequently issued a purchase order—which (according to Mapei itself) was predicated on a properly authorized "contract"; Plaintiffs responded immediately with an Order Confirmation with identical terms; and a revised purchase order was transmitted to Plaintiffs via e-mail (i) *referring (as the subject line) to the Order Confirmation*, and (ii) including Plaintiffs' affirmation that the Order Confirmation was the "*contract between the parties*." ROA.10640-10641; ROA.10596. Without anything more, this evidence eviscerates Mapei's position.

But there indeed *is* something more: *Mapei's silence*. There is not one whit of evidence showing that Mapei (or any of its employees) *rejected* the clear provisions of the quotation or Order Confirmation. Nothing in the record suggests that Mapei ever sought to set the record straight, or ever confirmed that it was somehow *not* bound by the negotiated terms in these critical legal documents. As Mapei itself admits, its corporate employees made clear that they could not proceed without corporate approval—and *yet they proceeded here after submitting the relevant*

contract terms for corporate approval. Nothing in the record suggests the usual process was not followed or Mapei's purchase order was issued prematurely. On the contrary, the record shows that Mapei demanded "contract specifics" before proceeding, and refused to issue the purchase order until a contract was approved via CapEx. ROA.10416. Against this backdrop, it is implausible that Mapei's understanding of the deal differed from Plaintiffs'—much less that Plaintiffs had reason to think the "contract between the parties" was not authorized by Mapei. At a minimum, the evidence is adequate for a rational juror to infer there was corporate "authority" to enter this binding contract. See, *e.g.*, ROA.9665:4-10 (Mapei's project manager admitting that "[n]obody at Mapei objected to the [Order Confirmation's] terms, provisions, or conditions," and further confirming that Mapei *relied* on those terms).

Mapei cannot sidestep this evidence merely because the purchase order was for a single machine. *The quotation itself contemplated the initial purchase of a single machine*. ROA.10771 (internal Mapei e-mail attaching the confirmation order and saying the purchase order was "based" on that "quote"). Mapei's response was thus exactly what the parties contemplated, and there is no reason for Plaintiffs to doubt the authority to enter a binding contract—especially after Mapei issued a revised purchase order effectively adopting the Confirmation Order (which Plain-

tiffs explicitly labeled the parties' "contract," ROA.10609). Mapei's contrary argument is borderline frivolous, and the jury had ample reason to reject it.

In response, Mapei continues to pluck and misread isolated snippets of evidence from the record, and suggests jurors *might* have read these snippets to doubt "authority." But Mapei ignores an important fact: *it just lost a jury trial*. At this stage, all inferences are construed to *support* the verdict, and any contrary evidence is rejected unless it was uncontradicted and unimpeached. The jury was specifically instructed to find "authority" for the contract, and it necessarily found "authority" in deciding there was a binding contract to purchase multiple machines. The court erred in setting aside the verdict despite this overwhelming evidence.

iii. The apparent-authority issue was properly preserved

After post-verdict briefing was complete, the court, again, *sua sponte*, flagged another issue Mapei failed to raise: "whether apparent authority must be specifically pleaded in order for it to be asserted at time of trial." ROA.8776. The answer is no.

1. Mapei itself waived this issue by failing to timely argue "waiver." *Waganfeald* v. *Gusman*, 674 F.3d 475, 481 & n.15, 484 (5th Cir. 2012). If Plaintiffs had the burden to plead "apparent authority," Mapei had every opportunity to object. It is too late to assert waiver *after* trial and post-verdict briefing. *Thompson & Wallace of Memphis, Inc.* v. *Falconwood Corp.*, 100 F.3d 429, 435 (5th Cir. 1996).

2. The Federal Rules provide a direct answer to the court's order: under Fed. R. Civ. P. 15(b)(2), "[w]hen an issue not raised by the pleadings is tried by the parties' express or implied consent, *it must be treated in all respects as if raised in the pleadings*" (emphasis added); see also *Ortiz* v. *Jordan*, 562 U.S. 180, 191 n.7 (2011). It accordingly was *not* necessary to "plead" apparent authority (specifically or otherwise) in order to assert it at trial: in "language that could not be clearer," Rule 15(b)(2) provides that if an unpleaded issue "was tried * * * without objection by either party, it doesn't matter that it wasn't mentioned in the complaint." *Torry* v. *Northrop Grumman Corp.*, 399 F.3d 876, 878 (7th Cir. 2005). Indeed, while the Rule permits parties to "amend the pleadings"—"at any time, *even after judgment*"—to conform to the evidence, it explicitly instructs that the "*failure to amend does not affect the result of the trial*." *Ibid.* (emphases added); see also 6A *Federal Practice* § 1493 ("Rule 15(b)(2) does not require that a conforming amendment be made and there is no penalty for failing to do so").

It accordingly is irrelevant whether "apparent authority" was pleaded. Once the issue arose at trial, it was tried by consent—and "it must be treated in all respects as if raised in the pleadings." Fed. R. Civ. P. 15(b)(2); see also, *e.g.*, *Morri-*

son v. *W. Builders of Amarillo, Inc. (In re Morrison)*, 555 F.3d 473, 480 (5th Cir. 2009); *Dominguez* v. *Hendley*, 545 F.3d 585, 590-591 (7th Cir. 2008).[5]

Nor is there any genuine dispute that "apparent authority" was tried by implied consent. *U.S.* v. *Shanbaum*, 10 F.3d 305, 312-313 (5th Cir. 1994) (outlining test); see also, *e.g.*, *Banks* v. *Thaler*, 583 F.3d 295, 307 (5th Cir. 2009). Indeed, Mapei effectively *concedes* as much. Mapei admitted that, as "trial strategy," it "raised the issue repeatedly and explicitly throughout the trial" (ROA.7955-7956). See 6A *Federal Practice* § 1493 ("A party who knowingly acquiesces in the introduction of evidence relating to issues that are beyond the pleadings is in no position to contest a motion to conform."). Mapei cannot plausibly suggest it lacked an adequate opportunity to present the issue. ROA.7958-7959, ROA.7963; see also *N.Y. State Elec. & Gas Corp.* v. *Sec'y of Labor*, 88 F.3d 98, 104-105 (2d Cir. 1996). The court could not trump "the result of the trial" by looking back to the pleadings. Fed. R. Civ. P. 15(b)(2).[6]

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[5] The fact that Mapei litigated the issue at trial does not mean it also *preserved* the issue for purposes of Rule 50(a). A primary function of Rule 50 is to put the other side on notice of evidentiary deficiencies. Litigation alone fails to achieve that function.

[6] This is a particularly modest use of Rule 15(b)(2). That Rule permits parties to add new *claims* to a case; here, by contrast, Plaintiffs are (at most) adding one theory supporting a single element of a preserved claim—all in response to an affirm-

[Footnote continued on next page]

3. In any event, the pleadings are not even relevant here. This is a sufficiency challenge; it is measured against the claim's *proper* legal elements—not the elements as pleaded (or as the jury was instructed). See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513-514 (1988) (asking whether "the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated defense," even if the "jury instructions * * * expressed the defense differently"). Courts compare the correct legal standard against the evidence (*ibid.*), asking whether rational jurors could have found for the judgment-winner. See *Ebker v. Tan Jay Int'l, Ltd.*, 739 F.2d 812, 825 n.17 (2d Cir. 1984) (Friendly, J.). Because rational jurors could easily find what this jury found, the verdict should have been upheld. *Pineda* v. *United Postal Serv., Inc.*, 360 F.3d 483, 486 (5th Cir. 2004).

b. There was a clear meeting of the minds to purchase multiple machines, and Mapei's contrary contention is baseless

1. The clear, consistent evidence shows that Mapei agreed to purchase 14 Arovac machines once the first performed as intended. "Contract formation is a question of fact under Texas law," and the jury found a meeting of the minds. *J.D.*

[Footnote continued from previous page]

ative defense that itself was not explicitly asserted until after trial. This situation fits comfortably within Rule 15(b)(2)'s broad ambit.

Fields & Co. v. *U.S. Steel Int'l, Inc.*, 426 F. App'x 271, 277 (5th Cir. 2011); see also *Crest Ridge Constr. Group, Inc.* v. *Newcourt Inc.*, 78 F.3d 146, 151 (5th Cir. 1996). The deal's terms were clearly communicated and "fully approved" by all parties. "[T]he parties' conduct illustrated that they thought they had a deal," and "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Tex. Bus. & Comm. Code 2.204(a). Respectfully, this case was not even close, and the court erred in disturbing the verdict.

The jury had overwhelming reason to conclude that the consistent terms of the quotation and the Confirmation Order reflected the parties' agreement. Plaintiffs "transmit[ted] the first form"—a price quotation—as the proposed contract; "[a] price quotation, if detailed enough, can constitute an offer capable of acceptance." *Delta Brands, Inc.* v. *Wysong & Miles Co.*, 3:97-CV-1935-BC, 1996 WL 641810, at *3 (N.D. Tex. Sept. 14, 1998) (citing *Crest Ridge*, 78 F.3d at 152). Plaintiffs testified that their quotations were offers that Mapei could accept or reject. ROA.9118:15-9119:10. A revised quotation was submitted through the CapEx process, and Mapei acted on that quotation in issuing a purchase order, providing a down payment, accepting the machine, and even *invoking the contract's warranties*—without uttering a single word that it was rejecting the contract's unambiguous terms. ROA.10599-10604; ROA.7915.

Contrary to Mapei's contention, there is no wooden rule (in law or business) holding that price quotations are never "offers" or that contracts are artificially limited to the terms found in purchase orders. Plaintiffs and Mapei extensively negotiated the terms of their agreement, and there was every indication that Mapei understood it was binding itself to purchase 14 machines in exchange for exclusivity. The jury weighed the evidence and determined whether Plaintiffs' terms (repeated throughout extensive negotiations) or Mapei's stripped-down purchase order reflected the true agreement. The jury's decision is final.

2. In addition to ignoring Plaintiffs' controverting evidence, Mapei further ignores its own testimony regarding how Mapei's *actual* process operated. That testimony, discussed above, shows that all proposed terms, "details," and "contract specifics"—including machine specifications, warranties, a factory-acceptance test, and performance guarantees—had to be submitted for approval through "CapEx." ROA.7828-7829; ROA.10416. Mapei wanted all material terms merged into Plaintiffs' quotation—which included, of course, the provision for multiple machines and exclusivity. All of these terms and details were submitted via CapEx for approval and were coupled with the purchase order. If Mapei disagreed with those terms, it assuredly would have said something. Yet it said—*nothing*. It simply attached a revised purchase order to the same e-mail (with the same subject line) confirming the Order Confirmation as the "contract between the parties."

ROA.10609. The jury was free to credit Mapei's actions as a definitive statement that it had accepted Plaintiffs' terms.

Moreover, contrary to Mapei's contention, no one from Mapei ever told Plaintiffs that the purchase order was the contract. ROA.9409:21-9412:12. Stelluti directly confirmed that Mapei's agent represented that Mapei would make payment off the quotation or Order Confirmation. ROA.9427:14-22. The jury was entitled to believe Plaintiffs' testimony; it was not compelled to accept the implausible—that the unadorned purchase order contained the exclusive terms governing this complex transaction. Indeed, Mapei's own CEO refuted Mapei's theory. ROA.7829 (Q: "Would MAPEI buy a million-dollar machine without having those kind of specifics?" A: "No. Those specifics should and need to be defined.").

Mapei again protests that the purchase order was only for one machine. But Mapei's own witness admitted that an immediate order for multiple machines was neither expected nor would "make any sense" under the circumstances. ROA.9663:9-9664:3; see also ROA.9182:9-18, ROA.9183:16-9184:6. The contract language meant what it plainly said: Mapei was obligated to purchase additional machines *if the first one worked*. Against that backdrop, it made perfect sense for Mapei to accept the deal *and* submit a purchase order for one machine. That inference is not only rational, but the only plausible understanding of the facts.

3. Mapei argues that Plaintiffs' theory alters Mapei's "offer" by adding a $13-million expense to the purchase order. According to Mapei, this "addition" is automatically excluded (as a matter of law) under Tex. Bus. & Comm. Code 2.207(b)(2). Yet there was nothing "added" here: the jury correctly found that the parties' agreement *included* the purchase of 14 machines. The Order Confirmation (key word: *confirmation*) did not differ from the terms "offered or agreed upon." Tex. Bus. & Comm. Code 2.207(a). It reflected the precise deal the parties struck during negotiations. Compare ROA.11185 ("if the machine performs as specified in our proposal, Mapei will order subsequent machines as follows"; further stating that "the new quote * * * will become the contract"); ROA.10652. And those terms, again, were reflected in Plaintiffs' earlier "Quotation," which served as the essential component of the CapEx process. ROA.9148:24-9149:21, ROA.9160:10-9164:3, ROA.9164:6-9168:10, ROA.9173:23-9174:15, ROA.9178:19-9179:3, ROA.9183:9-15, ROA.9190:5-9192:22, ROA.9234:24-9236:9; ROA.9549:11-23, ROA.9551:22-9552:13, ROA.9546:6-11.

Had Mapei not agreed with those terms, it assuredly would have objected, and Mapei's contrary assertion is implausible. When a sophisticated entity confronts a party's attempt to add material terms to an agreement, the natural response is not to stand by silently while accepting the agreement's benefits. The jury had every reason to ask why Mapei said *nothing*, on multiple occasions, if it truly felt

that Plaintiffs' representations misstated critical elements of the deal. Because Mapei did not offer any objection (written or otherwise) to these documents, the jury had every reason to reject Mapei's self-serving declaration that it disagreed with Plaintiffs' understanding of the contract.

Finally, if Mapei truly felt that its simple purchase order reflected the entirety of the deal, it cannot explain why it later relied on terms *in the quotation and Order Confirmation*. Mapei, for example, initiated arrangements shortly after the deal closed to schedule delivery of machines 2-4, and Plaintiffs ordered those machines from Arodo. ROA.9199:13-9200:7. Mapei relied directly on terms in the Order Confirmation for things like warranties, the factory-acceptance test, and terms of payment (ROA.9662:1-11, ROA.9665:8-24, ROA.9667:2-4; ROA.7915), none of which were included in Mapei's bare-bones purchase order. ROA.7832. If *any* terms were part of the contract, then *all* terms were part of the contract. This further confirms why a rational jury could determine that Mapei agreed to purchase multiple machines.

4. Mapei argues that the parties' "exclusivity" clause is ambiguous, and any ambiguities must be construed in Mapei's favor. This contention is both waived and meritless.

This point is waived because Mapei wrongly raised the issue for the first time in its Rule 50(b) motion. Mapei addressed evidence of offer and acceptance

and material alteration in its Rule 50(a) motion but failed to argue that the exclusivity clause failed under its novel view of contract law. That forfeited the question. *Blessey Marine Services, Inc.* v. *Jeffboat, LLC*, 771 F.3d 894, 897 (5th Cir. 2014); accord *Ji* v. *Bose Corp.*, 626 F.3d 116, 128 (1st Cir. 2010); *Chesapeake Paper Prods. Co.* v. *Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1236-1237 (4th Cir. 1995). This case was presented to the jury to decide the parties' intent. Voluminous testimony and an extensive written record was presented at trial. This evidence was sufficient to create a fact issue for the jury (see *Charbonnages de France* v. *Smith*, 597 F.2d 406, 415 (4th Cir. 1979)); had Mapei highlighted the *contra proferentem* issue, Plaintiffs could have called witnesses to refute it.

In any event, the exclusivity provision itself is hardly ambiguous. Its language means what it plainly says, and it says exactly that Mapei is required to purchase multiple machines:

> **Exclusivity:**
>
> If the first machine operates as specified in this order, Mapei agrees and is committed to purchase the following subsequent machines:
>
> i) Subsequent three (3) AROVAC 800 FFS machines to be delivered in February 2008.
> ii) Subsequent to the above, ten (10) AROVAC 800 FFS machines to be delivered two (2) per quarter in 2008-2009.
>
> Delivery dates are flexible and subject to change upon Mapei's written notification of such changes. The above quantities are minimum quantities and are also subject to increase upon Mapei's written notification of such increases.

> SK agrees to grant Mapei exclusivity to the AROVAC bag for its industry, specifically cement based tile adhesives but **only for North American territories**. AROVAC FFS machines are purchased exclusively from SK.

ROA.10633. The contract could not have spoken any more plainly in setting out Mapei's commitment: "If the first machine operates as specified in this order, Mapei agrees and is committed to purchase the following subsequent machines." Even if the back-and-forth between the parties created *some* ambiguity, there is no ambiguity at all in the agreement's plain language.

Moreover, Mapei misunderstands the canons it has invoked. Contrary to Mapei's contention, *ejusdem generis* has nothing to do with this situation. It does not apply where there is a heading to a contract provision. It applies where "a drafter has tacked on a catchall phrase at the end of an enumeration of specifics, as in *dogs, cats, horses, cattle, and other animals*." Hon. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012). There is no such enumeration here; there is a straightforward declaration that "[i]f the first machine operates as specified in this order, *Mapei agrees and is committed* to purchase the following [13] subsequent machines" (emphasis added). The appropriate canon of construction, as the jury apparently found, is that plain text controls.

Mapei's reliance on *contra proferentem* is likewise misplaced. This rule of "last resort" (*Forest Oil Corp.* v. *Strata Energy*, 929 F.2d 1039, 1043–1044 (5th

Cir. 1991)) cannot override the agreement's plain terms—and it assuredly cannot dictate which document (a purchase order versus a Confirmation Order) reflected the parties' full agreement. This negotiation was not between parties with unequal power; indeed, if anything, Mapei's market dominance gave it the upper hand in negotiations. This rule cannot excuse Mapei from the jury's finding that it agreed to purchase 14 machines and refused to live up to its bargain.

The exclusivity clause—together with Mapei's commitment to purchase multiple machines—was hardly slipped into the agreement unnoticed. The record establishes that exclusivity was Mapei's requirement from its first discussions with Plaintiffs and the first meeting of Mapei's steering committee (ROA.9611:14-9614:3, ROA.9101:1-9102:9, ROA.9106:8-9107:2; ROA.10270, ROA.10282, ROA.10297), and that Mapei demanded a gentlemen's agreement for exclusivity from the start (ROA.9112:11-9113:9, ROA.7804). Exclusivity was part and parcel of every stage of the parties' negotiations (ROA.9116:13-9118:18, ROA.9143:12-9144:21, ROA.9145:11-9148:20, ROA.10303); it was not something Plaintiffs "snuck in" at the last minute (ROA.9546:25-9547:12). Plaintiffs made clear that, central to the deal, Mapei would receive exclusivity in return for Mapei's commitment to purchase 14 machines. ROA.9106:8-9107:20, ROA.9112:11-9113:10, ROA.9137:8-9148:20. That is exactly what it got.

Further, Mapei's understanding of "exclusivity" is untenable. According to Mapei, exclusivity would kick in *after* Mapei purchased 14 machines; it was thus an option, not a requirement. Yet Mapei surely did not contemplate that Plaintiffs could flood the market with Arovacs, arming its competitors with the same device at the critical juncture that Mapei was negotiating with Lowe's, simply because Mapei could obtain exclusivity years later by purchasing all 14 machines. Contract ambiguity is relevant when the non-drafting party posits a reasonable interpretation. Mapei's interpretation is wholly unreasonable, which is why the jury rejected it. It is out of step with a wealth of evidence that Mapei wanted immediate exclusivity; Mapei would not tolerate waiting years after the agreement began.

The evidence shows that Mapei agreed to the Order Confirmation as the "contract between the parties," and that "contract" means what it says: Mapei was "committed" to purchasing 13 machines after the first machine passed the test.

c. Mapei's argument that Plaintiffs "reserved" the right to reject the contract is frivolous

In district court, Mapei insisted that the contract was "illusory" because Plaintiffs' quotation and Order Confirmation had a "headquarters approval" clause, reserving "the unilateral right to reject the transaction." ROA.7165; ROA.10635 ("All quotations, orders and agreements made between Customer and STELLUTI KERR LLC's [sic] shall be subject to the acceptance and approval of STELLUTI KERR LCC's headquarters."). Mapei's argument is absurd.

This is a technicality at its worst, and it is irrelevant. Even if the Order Confirmation reserved approval, *Plaintiffs approved it*, thus satisfying the clause's own terms. Plaintiffs transmitted the Order Confirmation in an e-mail that itself affirmed the "contract between the parties." ROA.10609; *Nordyne* v. *Int'l Controls & Measurement Corp.*, 262 F.3d 843, 845, 847 (8th Cir. 2001) (holding that a supplier's quotation with a home-office approval clause was an offer because, before the buyer sent its purchase order, approval occurred in the home office's letter asking the buyer to "sign off"). If anyone needed to "approve" the transaction, it was indeed approved before it reached Mapei.

Moreover, contract formation is a fact question (*Crest Ridge*, 78 F.3d at 151); the jury readily concluded that both parties performed under the contract and treated it as final. ROA.10771 (Mapei internally referring to the Order Confirmation as the contract). "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract[,] * * * even though the moment of its making is undetermined." Tex. Bus. & Comm. Code 2.204(a)-(b); *Axelson*, 7 F.3d at 1233 ("Both parties understood that they had a contract; they celebrated, and they commenced performance. Conduct by both parties recognized the existence of a contract."). No one thought this snippet of language, tucked away in a laundry list of boilerplate

terms, rendered the quotation or confirmation non-committal. If Mapei wants to avoid its contract with a technicality, it has to do better than this.

2. Mapei has not met its heavy burden to overturn the jury's finding of tortious interference

Mapei tortiously interfered with Plaintiffs' contractual rights, and the district court had no basis for throwing out the jury's verdict. "Interference can include conduct that prevents performance of a contract or makes performance of a contract impossible, more burdensome, or more difficult or of less value to the one entitled to performance." ROA.7100. "[I]ntentional interference does not require intent to injure, only that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Sw. Bell Tel. Co.* v. *John Carlo Tex., Inc.*, 843 S.W.2d 470, 472 (Tex. 1992). While an "actual breach" is not necessary, "the defendant must have intended to induce a breach (even if unsuccessful), thereby making performance more difficult in some way that injured the plaintiff." *Cuba* v. *Pylant*, 814 F.3d 701, 717 (5th Cir. 2016).

There was robust evidence supporting the jury's finding of tortious interference. Mapei engaged in an escalating pattern of willful and intentional interference designed to bully Arodo into terminating its agreement with Plaintiffs, all so Mapei could escape its obligations under its own contract. Before Mapei's meddling, Plaintiffs had two critical rights with Arodo: an exclusive right to sell Arovacs to Mapei's industry, and general distribution rights in North America. ROA.10851.

Mapei was unhappy with its own deal, so it looked to cut Plaintiffs out. It knew that, with Plaintiffs involved, Mapei would be forced to purchase 14 machines, and it would also obtain limited exclusivity. But without Plaintiffs, Mapei could force Arodo to provide expanded exclusivity with a smaller commitment.

So despite its exclusive arrangement with Plaintiffs (and Plaintiffs' contractual rights with Arodo), Mapei began a campaign of contacting Arodo directly behind Plaintiffs' back. As early as March 2008, Mapei bypassed Plaintiffs and approached Arodo to delay down payments on machines 2-4, which were already in production. ROA.9246:9-9248:1, ROA.10720. Mapei consistently pressured Arodo to establish a direct business relationship and supply contract for future machines. ROA.10722, ROA.9250:12-22, ROA.9590:14-9591:24. It met with Arodo and sought greater exclusivity than its contract with Plaintiffs and Plaintiffs' contract with Arodo.

When Arodo initially resisted—reminding Mapei of Arodo's duties to Plaintiffs—Mapei became more aggressive. ROA.9741:19-9743:8, ROA.10720. It threatened to pull back orders for the three machines, leaving Arodo with a substantial unpaid investment. ROA.9255:24-9258:24. Yet at the same time, it sought to placate Plaintiffs—insisting that "the interests of Mapei, Arodo and Stelluti-Kerr are aligned"— knowing that it had to maintain that relationship until it could establish a better deal with Arodo. ROA.9262:10-9265:31, ROA.10741.

In May 2008, however, Mapei increased its pressure. At a meeting to address Mapei's tardy payments and delays, Mapei demanded that Plaintiffs give up their rights under the deal, accepting fewer machines purchased over a longer period, all while expanding Mapei's exclusivity (in terms of time and product lines). ROA.10942. When Plaintiffs refused, Mapei's CEO became angry and threatened Plaintiffs. He said Mapei could simply buy Arodo outright and fire Plaintiffs, and he said Mapei could drive Plaintiffs into bankruptcy, saying it would take Plaintiffs a decade before they got their money from the deal. ROA.9265:22-9272:8, ROA.9974:9-9980:6.[7]

In an attempt to salvage the relationship, Plaintiffs were willing to compromise. At Mapei's request (ROA.10836), Plaintiffs hired a lawyer to draft a proposal for an amended agreement. ROA.10806-10809. While giving up certain rights, Plaintiffs also included a final request for Mapei to pay the deposit that was long overdue on the three machines in production. Plaintiffs closed the letter by saying they "look[] forward to a continued business relationship." ROA.10809.

[7] While Mapei refused to admit this "bankruptcy" threat, Mapei's general counsel admitted the meeting was "explosive," "adversarial," or "volatile." ROA.7869. Arodo's CEO testified he did not hear the threat, but he also (implausibly) could not remember the meeting. ROA.9747:7-24, 9749:20-23. The jury was entitled to resolve inconsistencies in testimony by accepting Plaintiffs' statements and rejecting Mapei's.

Mapei never responded to Plaintiffs' proposal. It simply used the letter as a pretext to cut out Plaintiffs, claiming the letter was a direct threat to sue Mapei. At that point forward, it refused to deal with Plaintiffs. Mapei and Arodo scheduled a July 2008 meeting to discuss the relationship. Arodo went in concerned that Mapei would tell Arodo to "fuck off" and refuse to honor its commitment, which would be a "catastrophe" for Arodo. ROA.9750:10-25. After the meeting, Arodo met with Plaintiffs. Arodo's CEO appeared sheepish and "down." His advisor told Plaintiffs that Mapei was cutting out Plaintiffs and they would remain "out of the picture from this day forward" unless they agreed to a new financial arrangement. Otherwise, Mapei would reject future machines and Arodo would lose the entire order. ROA.9755:12-25, ROA.9284:11-324:24.

Days later, Arodo instructed Plaintiffs by e-mail that Mapei and Arodo had entered into an exclusive agreement for the Arovac. Plaintiffs' rights with Mapei were gone, and Plaintiffs' distribution rights were significantly curtailed. Plaintiffs were restricted to a reduced commission basis, and their market was drastically limited due to the new Arodo-Mapei "Exclusivity Agreement." Critically, Arodo conditioned even this limited role on Plaintiffs forfeiting their legal rights to Mapei's contract: unless Plaintiffs drafted a letter promising not to sue Mapei and disclaiming their rights, Plaintiffs would receive nothing and be cut off as a distributor. ROA.9756:10-9760:19, ROA.10750.

Plaintiffs withheld their consent. Arodo again advised Plaintiffs in August that their rights would be cut off on September 1, 2008, unless Plaintiffs "promise[d] not to sue" Mapei. ROA.10754.

Plaintiffs still withheld their consent. As Mapei and Arodo continued negotiating their separate deal, Mapei's CEO continued to press Arodo to push aside Plaintiffs: "[t]he key point which sounds very legalistic is that you need to ensure that Stelluti-Kerr and you arrive at an agreements [sic] which keeps them away from Mapei." ROA.10811. Arodo admitted that he ended Arodo's relationship with Plaintiffs because Plaintiffs refused to agree not to sue Mapei. ROA.9763:6-14.

These events readily show that Mapei willfully and intentionally interfered with Plaintiffs' contract, causing Arodo to break off its relationship with Plaintiffs. The jury was not required to credit Arodo's self-interested testimony to the contrary. After all, Arodo has a continuing relationship with Mapei. The facts show Mapei's clear reluctance to honor its agreement, followed by a blatant attempt to abuse its market power to coerce weaker parties to give up their contractual rights. When Plaintiffs refused to give in, Mapei concocted an excuse (suggesting Plaintiffs threatened litigation) to give it cover to disavow its contact with Plaintiffs and finalize its deal with Arodo. ROA.10965-10966.

Moreover, Mapei had every incentive to knock Plaintiffs out of the picture. It was deeply concerned about retaining exclusivity, and it knew that, once it breached its contract, Plaintiffs would be free to market Arovac machines to Mapei's competitors. So Mapei elected to push Plaintiffs out of the market entirely. It cornered Arodo without Plaintiffs, and convinced Arodo to stop "deal[ing] with SK" and instead deal with Mapei as Arodo's "client." It forced Arodo to dishonor its distributorship relationship with Plaintiffs, eliminating Plaintiffs' ability to sell Arovac machines to anyone. And all these events happened before Plaintiffs' lawsuit against Arodo could have conceivably justified the withdrawal of Plaintiffs' corporate agreements.

Tortious interference does not require the complete obliteration of a contract (although that happened here); it exists even where a tortfeasor makes "performance of a contract * * * more burdensome, or more difficult or of less value to the one entitled to performance." ROA.7100. As shown above, Mapei's interference deliberately escalated once Mapei decided to sweep aside Plaintiffs' contract to get a better deal that it failed to obtain via legitimate negotiation. ROA.10905, ROA.10965. The jury had more than sufficient evidence to find that Mapei intentionally destroyed Plaintiffs' contractual relationship with Arodo.

And the jury was not alone. Mapei's interference was also clearly evident to the arbitrator, who found that Arodo had "severely breached" the relationship by a

"wrongful and abusive termination." ROA.9774:16-9778:13. In making that finding, the arbitrator rejected Arodo's denunciation of Plaintiffs' business manner as a reason for refusing to work with Plaintiffs, stating that Arodo's refusal was explained "by the business relations created directly between ARODO and Mapei." ROA.11060. Mapei purposefully destroyed Plaintiffs' rights, and the jury correctly held Mapei responsible for its actions. There is no basis for brushing aside the jury's fact-finding on this issue.

3. Mapei has not met its heavy burden to overturn the jury's award of punitive damages

The jury correctly awarded punitive damages, and Mapei failed to offer any legitimate basis for disturbing the jury's award.

While tortious interference only requires proof of an intent to interfere, punitive damages requires proof of "malice" *or* "reckless indifference," *i.e.*, proof of an intent to cause harm or knowledge that such harm would likely result from a tortfeasor's misconduct. ROA.7105. Contrary to Mapei's contention, the jury had clear and convincing evidence for awarding punitive damages.

a. "Malice" is "a specific intent by the defendant to cause substantial injury or harm to the claimant." Tex. Civ. Prac. & Rem. Code 41.001(7). Specific intent is not just the desire to cause the consequences of one's act, but it can also include acts taken believing the consequences are substantially certain to result. *Reed Tool Co.* v. *Copelin*, 689 S.W.2d 404, 406 (Tex. 1985). Plaintiffs did not have to prove

that Mapei acted out of personal spite. *Missouri Pac. R. Co.* v. *Lemon*, 861 S.W.2d 501, 517 (Tex. App.—Houston [14th Dist.] 1993, pet. dism'd by agrmt). To establish malice, Plaintiffs had to prove that Mapei "committed wrongful acts in reckless disregard of [Plaintiffs' rights] and with indifference as to whether [Plaintiffs] would be injured." *Tranum* v. *Broadway*, 283 S.W.3d 403, 417 (Tex. App.—Waco 2008, pet. denied).

Reckless indifference requires proof "that the defendant had decided to ignore the rights of others even in light of probable and threatened injury to them." *THI of Tex. at Lubbock I, LLC* v. *Perea*, 329 S.W.3d 548, 580 (Tex. App.—Amarillo 2010, pet. denied). Furthermore, malice and reckless indifference may be established by direct or circumstantial evidence. *Tranum*, 283 S.W.3d at 417; see also *Wellogix, Inc.* v. *Accenture, L.L.P.*, 716 F.3d 867, 883 (5th Cir. 2013). The jury's verdict will be set aside only if, "view[ing] all of the evidence in the light most favorable to the verdict," "the evidence points so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at any contrary conclusion." *Bagby Elevator Co.* v. *Schindler Elevator Corp.*, 609 F.3d 768, 771-773 (5th Cir. 2010); see also, *e.g.*, *Coffel* v. *Stryker Corp.*, 284 F.3d 625, 630, 639-640 (5th Cir. 2002) (applying this standard to reverse the district court's grant of a Rule 50(b) motion on punitive damages).

b. According to the clear evidence at trial, Mapei acted with malice and reckless indifference to Plaintiffs' rights. It deliberately set out to destroy Plaintiffs' ability to hold Mapei to its deal, or its alternative right to market Arovac machines to Mapei's competitors. Mapei was well aware of the consequences of its actions—indeed, it attempted to use those consequences (risk of bankruptcy and years of litigation) as a threat to force Plaintiffs to give in rather than stand by while their rights were flouted. Mapei's conduct was deliberate and reprehensible, and the jury had every reason to punish Mapei: Without an added incentive to check its egregious behavior, Mapei could simply abuse parties and breach agreements at will, knowing that most parties will not persist in litigation and those that do will otherwise simply be put back in the same position where they started. This is precisely the kind of situation that punitive damages was designed to address.

More specifically:

- Mapei knew it had economic leverage over Arodo and Plaintiffs, and it acted deliberately to exploit that leverage (ROA.11210, ROA.11220, ROA.10838).
- It demanded concessions and contract modifications without any justification, and withheld contract payments to weaken Plaintiffs' contract position. ROA.9265:22-9272:8, ROA.9974:9-9980:6.

- After failing to get its way, Mapei flouted its own contract and attempted to force Arodo to cut off Plaintiffs, so Mapei could negotiate a separate exclusivity agreement (ROA.10965-10966).
- Mapei threatened Plaintiffs with "bankruptcy" and years of unjustified delay—insisting that it could simply "buy Arodo" and "fire" Plaintiffs—all in the hope of coercing Plaintiffs to relinquish their contract rights under their separate agreements with Mapei and Arodo. ROA.9265:22-9272:8, ROA.9974:9-9980:6.
- Having violated Plaintiffs' contract rights, Mapei forced Arodo to push Plaintiffs to give up their legal remedies, all in the hope of securing rights it lacked under Plaintiffs' agreements. ROA.10750.
- Realizing Plaintiffs could still supply machines to its competitors, Mapei decided to cut Plaintiffs out of the market entirely, obliterating all their rights in order to protect Mapei's self-interest. ROA.10905.
- And Mapei knew that crippling Plaintiffs' contractual rights with Arodo would make it even more difficult for Plaintiffs to invest the time and resources to vindicate their rights in court: "SK [would] not have any distribution agreement with Arodo [and] Arodo [would] support the US-market by itself, no compensation for SK on machines sold or to be sold etc." ROA.10754.

This pattern of misconduct and bullying is egregious and obvious. Mapei felt that it could pressure its way out of its contract, and decided it was better to destroy the rights of another party than to honor its original contractual agreement—or simply pay for the rights it wished to obtain through coercion. And it was determined to shield itself from the consequences of its misconduct, attempting to force Plaintiffs to forfeit their rights to hold Mapei accountable for its actions.

This is a quintessential example of an appropriate situation for punitive damages. This heightened remedy counteracts Mapei's incentives to continue its bad practices. Otherwise, its risk of compensatory damages—assuming its victims sue at all—will merely be absorbed as the cost of doing business.

The jury, in short, was presented with clear evidence of a pattern of destructive, self-interested behavior. Mapei understood exactly the costs and the harm it was imposing on Plaintiffs—including possible "bankruptcy"—but it acted anyway out of its own economic self-interest. Its extreme conduct is worthy of sanction, and Mapei identifies nothing in the record to undermine the jury's careful judgment on this issue.

c. Finally, Mapei argues that this Court should remit the punitive damages as disproportionate to the alleged harm. This is baseless. The jury's award was a measured response to Mapei's egregious conduct. Mapei's interference satisfies the core "reprehensibility" factors (*Wellogix*, 716 F.3d at 885)—it was taken with

knowledge that Plaintiffs would be financially vulnerable and possibly bankrupted as a result; it was not an isolated event but the culmination of a series of escalating acts and threats; and its conduct was not accidental at all, but an intentional scheme to lull Plaintiffs through deception (to protect Mapei's exclusivity) until it could obtain what it wanted from Arodo directly. The jury assessed this conduct first-hand, and there is no basis for discarding its decision.

Nor was the award disproportionate. Mapei argues that the award was excessive, but it used the wrong comparator. The analysis does not turn on what the arbitrator awarded Plaintiffs in a suit against Arodo, but what this jury awarded Plaintiffs in a suit against Mapei. Using the proper reference point, the award for tortious interference *exceeded* the award for punitive damages. "[A]n award is excessive only when it clearly exceeds that amount that any reasonable man could feel the claimant is entitled to." *Shows*, 671 F.2d at 934. And, as this Court recently confirmed, there is not a single case "in which an appellate court vacated or reduced a punitive award that was less than the compensatory award." *Wellogix*, 716 F.3d at 886. In sum, there was sufficient evidence and testimony to support the jury's punitive-damages verdict, and Mapei has provided no reasonable basis for overturning or reducing that award through remittitur or otherwise. The jury's verdict should stand.

B. Mapei's Other Legal Challenges Were Squarely Rejected At Summary Judgment, Waived At Trial, And Otherwise Meritless

Mapei challenged the jury's verdict on tortious interference on multiple grounds, but none has any merit. Mapei's core arguments—on issue preclusion, the one-satisfaction rule, and Plaintiffs' expert witness—were already rejected before trial, and there is no reason to think the court inexplicably reversed itself. Mapei's remaining arguments were squarely refuted at trial and rejected by the jury. Mapei's post-judgment filings continued to mischaracterize the findings from the international arbitration, and to distort the source of damages Plaintiffs sought and obtained at trial. Mapei tortiously interfered with Plaintiffs' contractual rights, and its efforts to disturb the verdict are unavailing. The judgment should be reversed.

1. Each of these challenges was waived

In its Rule 50(a) motion, Mapei argued there was no evidence that it tortiously interfered with Plaintiffs' contract with Arodo, despite ample evidence that Mapei forced Arodo to terminate its contract with Plaintiffs. Mapei made no reference at all, however, to its affirmative defenses of issue preclusion or the one-satisfaction rule, and it failed to renew any challenge to Plaintiffs' expert. Mapei therefore forfeited those issues. If it wishes to overturn the jury's verdict, it must identify an issue it actually preserved at trial.

Mapei is wrong that its footnote reference was adequate to preserve these questions, despite Mapei's failure to "specify" these issues during its oral or writ-

ten Rule 50(a) motions. And it is irrelevant that these issues have legal elements: even for "purely legal issues," parties must make "a Rule 50 motion for judgment as a matter of law" to preserve points raised at summary judgment. *Blessey*, 771 F.3d at 897-898. While Mapei errs on the merits, its forfeiture is sufficient to dispose of these issues.

2. Mapei's attempt to avoid liability via issue preclusion is groundless

a. Mapei insists that Plaintiffs' tortious-interference claim is barred by issue preclusion, but Mapei is wrong. Issue preclusion requires "'identical issue[s]'" in each proceeding (*Bradberry* v. *Jefferson Cnty.*, 732 F.3d 540, 549 (5th Cir. 2013)), and "both the facts and the legal standard used to assess them [must be] the same" (*Copeland* v. *Merrill Lynch & Co.*, 47 F.3d 1415, 1422 (5th Cir. 1995)); see also, *e.g.*, *Barnes* v. *United Parcel Serv., Inc.*, 395 S.W.3d 165, 176-177 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). According to Mapei, Plaintiffs' tortious-interference claim against Mapei turns on the same issues decided in Plaintiffs' contract claim against Arodo. ROA.7180-7187, ROA.8764-8765. As Mapei sees it, the international arbitration established the precise scope and value of Plaintiffs' contractual rights with Arodo; if Mapei interfered with any rights at all, it interfered with *those* rights—it could not, however, have interfered with a *broader* set of rights, at least not without ignoring the arbitrator's decision.

As the district court held below, Mapei is mistaken. ROA.6355-6356. The arbitrator identified *two* legal agreements between Plaintiffs and Arodo, but its award was limited to a single agreement. The arbitrator first identified a general, non-exclusive distributorship agreement encompassing North America. ROA.1080, ROA.1085. This was *not* the subject of the arbitrator's damages award. The second agreement was a narrower, exclusive distributorship agreement granted specifically by an exclusivity clause in Plaintiffs' purchase order "5279.4." This purchase order only covered Plaintiffs' purchase of machines ordered specifically for Mapei. The arbitrator concluded that Arodo's separate deal to sell machines directly to Mapei did not violate the *general* distributorship agreement (precisely because it was *non-exclusive*). But the arbitrator found that Arodo's sale of machines to Mapei violated the *exclusive* agreement under purchase order 5279.4. ROA.11058, ROA.11065. Consequently, the arbitrator awarded Plaintiffs damages for lost profits from the three machines Arodo sold to Mapei in violation of Plaintiffs' exclusive distributorship rights for those three machines. ROA.1113, ROA.11071.

This dooms Mapei's argument. The arbitrator did not purport to resolve all questions regarding Plaintiffs' rights under the non-exclusive distribution agreement. It simply held that Arodo breached the exclusive agreement concerning three machines. That leaves entirely open whether Mapei wrongly interfered with Plain-

tiffs' non-exclusive agreement, pressuring Arodo to terminate an agreement Arodo otherwise would have left in place. That termination injured Plaintiffs' ability to market machines to Mapei and all other North American customers. The fact that Arodo, under Belgian law, did not owe contract damages for those sales says nothing about Mapei's tort liability for intentionally extinguishing Plaintiffs' rights under its core distribution agreement.

Mapei further ignores *why* the award was limited to three machines. This was not an account of the full value of the Mapei contract; it was an application of Belgium's strict damages law. ROA.6355 (order on summary judgment rejecting estoppel in part because "the European arbitrator applied *Belgian law*"). While the arbitrator found the "severe" breach affected all 13 machines, it was limited to awarding "concrete" damages for the three machines then-in production. Mapei's attempt to cast the arbitrator's award as covering the full value of a 14-machine contract is both false and wishful thinking.

Nor is there any doubt that Belgian and Texas law are distinct. Texas requires that lost profits "be ascertained with a reasonable degree of certainty and exactness" and "need not be susceptible to exact calculation." *Homoki* v. *Conversion Servs., Inc.*, 717 F.3d 388, 399 (5th Cir. 2013). Although "[u]ncertainty as to the fact of legal damages is fatal to recovery * * * uncertainty as to the amount will not defeat recovery." *Ibid.* Applying Belgian law, by contrast, the arbitrator re-

quired a "*concrete* element which would demonstrate the *commitment* of potential customers," and enforced the "known added value" standard from Article 3 of the Belgian Law of 27 July 1961. ROA.1111-1113 (emphases added). There is no indication that these legal standards are the same, and Mapei has no basis whatsoever for casting this as "a pure fact question that did not turn on any unique, idiosyncratic Belgium-specific legal standard." ROA.7186.

In any event, it is Mapei's burden—as the party seeking to assert the defense—to establish that the arbitration unambiguously resolved the identical issues presented here, especially "where the record is ambiguous or confusing." *In re Braniff Airways, Inc.*, 783 F.2d 1283, 1289 (5th Cir. 1986). Mapei cannot overcome that high threshold. The arbitration award is expansive and sprawling, and Mapei has misread its terms. Even if Mapei's reading were minimally plausible, courts still "err on the side of construing prior ambiguous findings or holdings narrowly." *U.S.* v. *United Techs. Corp.*, 782 F.3d 718, 729 (6th Cir. 2015). Nothing in the arbitration award provides the degree of clarity required for Mapei to satisfy its burden.

Because Plaintiffs' agreements with Arodo were distinct, the issues resolved in arbitration were distinct. "The elements of collateral estoppel are not satisfied." ROA.6356.

b. In any event, Mapei is incorrect that *non-mutual* issue preclusion is even available for arbitration findings. Arbitration is a matter of contract, and there was no agreement to resolve *this* dispute under that separate contract. Even though "arbitral proceedings *can* have preclusive effect" between the arbitrating parties (*Grimes* v. *BNSF Ry. Co.*, 746 F.3d 184, 188 (5th Cir. 2014)), there is no basis for extending the arbitration's results (with its limited procedures and highly cabined judicial review) to strangers, absent the original parties' consent. This issue has split courts nationwide, and it remains open in this Circuit. Compare, *e.g.*, *Buckner* v. *Kennard*, 99 P.3d 842, 850 (Utah 2004) ("[T]hird parties will only be permitted to invoke collateral estoppel in subsequent litigation if provided for by the parties to the original arbitration proceeding."), and *Vandenberg* v. *Superior Ct.*, 982 P.2d 229, 242-243 (Cal. 1999) ("[A] private arbitration award cannot have nonmutual collateral estoppel effect unless the arbitral parties so agree."), with, *e.g.*, *Cities Serv. Co.* v. *Gulf Oil Co.*, 980 P.2d 116, 125-126 (Okla. 1999) (applying issue preclusion to an arbitration award), and *Aufderhar* v. *Data Dispatch, Inc.*, 452 N.W.2d 648, 651-652 (Minn. 1990) (same). Even if its elements were satisfied, the Court should hold that Mapei, a third party, cannot avail itself of arbitral findings unless the arbitral parties so agree, which they did not.

The Supreme Court has repeatedly emphasized the contractual, consensual nature of arbitration. Parties may "'structure their arbitration agreements as they

see fit.'" *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). "[I]t is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration" (*First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995)), and, critically here, "*with whom* they choose to arbitrate their disputes" (*Stolt-Nielsen*, 559 U.S. at 684).

Such principles are fundamentally incompatible with non-mutual issue preclusion. Just because two parties agree to be bound in their own disputes hardly indicates they agree for arbitration to bind themselves with third parties as a one-way ratchet: "In selecting arbitration, a party has demonstrated only that the current dispute is better resolved by avoiding traditional adjudication, not that it is willing to apply the arbitrator's decision to future disputes with other parties." *Buckner*, 99 P.3d at 850. To the contrary, "common sense weighs against the assumption that parties contemplate such remote and collateral ramifications when they agree to arbitrate controversies between themselves." *Vandenberg*, 982 P.2d at 239. "[T]he informal nature of arbitration, the usual reasons for its use, the potentially disproportionate consequences of nonmutual collateral estoppel, and the fact that such consequences may not be immediately apparent to the arbitral parties, all suggest that their silence on the subject does not imply consent." *Id.* at 242. Permitting non-mutual preclusion here would effectively overrule the parties' agreement about who would participate in the arbitration, violating "the foundational [] prin-

ciple that arbitration is a matter of consent." *Stolt-Nielsen*, 559 U.S. at 684; *Vandenberg*, 982 P.2d at 240 (allowing non-mutual estoppel "would thus violate the fundamental premise that private arbitration is a contractual proceeding *whose scope and effect are defined and limited by the parties' consent*").

Moreover, there is nothing unfair about denying preclusion here. Mapei is not seeking protection from *re*litigating an issue, but rather hopes "to gain vicarious advantage from a litigation victory *won by another*." *Vandenberg*, 982 P.2d at 240. In full knowledge of the arbitration, Mapei sat on the sidelines and now wants to selectively use arbitration findings to its advantage. The arbitration clause says nothing of preclusion. ROA.973. To the extent the award contains any indication of the parties' intent, it runs directly against Mapei's position: the arbitrator stressed that the "proceedings are completely independent from" this lawsuit. ROA.1091. Mapei is wrong to wait out the arbitration, and then attempt to use those findings against Plaintiffs.

c. Everything else aside, "nonmutual issue preclusion is not available as a matter of right" (18A Charles Alan Wright et al., Federal Practice & Procedure § 4465 (2d. ed. 2016)), and it is wholly inequitable under the circumstances. *Fin. Acquisition Partners L.P.* v. *Blackwell*, 440 F.3d 278, 284 (5th Cir. 2006); *Charles J. Arndt, Inc.*, v. *City of Birmingham*, 748 F.2d 1486, 1494-1195 (11th Cir. 1984). Mapei violated the Supreme Court's chief admonishment against preclusion: al-

lowing litigants "to adopt a 'wait and see' attitude, in the hope that the first action by another [party] will result in a favorable judgment." *Parklane*, 439 U.S. at 330. Such tactics "increase rather than decrease the total amount of litigation" (*ibid.*), and it creates the perversity where litigants like Mapei embrace certain findings while resisting others. See, *e.g.*, ROA.5341 n.3 ("While the doctrine of collateral estoppel may bar the positions in Stelluti's Motion, it does not preclude MAPEI from arguing that there was no contract for the additional Arovacs because MAPEI was not involved in the Paris Arbitration.").

As the jury correctly found, Mapei is a tortfeasor and bad actor. Its conduct should not be sheltered by one-way findings in Plaintiffs' arbitration.

d. On a related point, Mapei baldly asserts that the jury's damages award included exactly the same damages awarded in the international arbitration. Yet in supporting this point, Mapei offers exactly *zero* evidence. The jury did not award the full amount requested by Plaintiffs, and its award is readily construed to represent only those damages that had nothing to do with the arbitration. The jury was specifically asked to determine whether Mapei's tortious interference was the proximate cause of Plaintiffs' damages, including past and future lost profits. ROA.7113, ROA.7115. Indeed, Plaintiffs sought $10.84 million in damages as make-whole relief for Mapei's deliberate interference with Plaintiffs' general distributorship agreement, not simply the exclusive agreement for sales to Mapei.

ROA.9879:18-9881:14. The jury's award of a subset of the requested relief shows a measured decision; it does not support a raw assumption of double-counting pockets of damages.

3. Mapei's attempt to avoid liability via the one-satisfaction rule is groundless

According to Mapei, the jury's award violates the one-satisfaction rule, because Plaintiffs are supposedly collecting twice for the same injury (once from Arodo and again from Mapei). ROA.7178-7180, 7187-7190. This argument invites a direct conflict with controlling circuit law. According to this Court, the one-satisfaction rule is specifically limited to settlement credits due a non-settling party in the limited context of tort claims involving joint tortfeasors. *GE Capital Commercial, Inc.* v. *Worthington Nat. Bank*, 754 F.3d 297, 305-309 (5th Cir. 2014). Mapei ignores that it is not a non-settling defendant seeking a credit for a joint tortfeasor's settlement. And Mapei again ignores that it is not subject to "joint liability," an essential predicate to the rule. Mapei may disagree with this Court's reading of Texas law, but its proper audience is the en banc Court—which is partly why the district court *rejected* the identical argument at summary judgment. ROA.6356-6358.

In any event, the one-satisfaction rule is irrelevant on these facts. Mapei simply ignores that Plaintiffs are *not* seeking the same damages for the same harm. The damages awarded in Belgium are not the same damages sought here. The for-

mer relates specifically to a targeted agreement to provide machines to Mapei; the latter relates to the right to generally distribute machines throughout all of North America. There is no indication that the jury's award covers any damages already satisfied in the international arbitration. Indeed, Mapei introduced evidence of the arbitrator's award at trial, and Mapei's counsel specifically argued that Plaintiffs had already received almost $1-million in damages from Arodo and was seeking a double recovery from Mapei. ROA.9780:4-18, ROA.9924:18-9925:19. Mapei thus made its case to the jury, and the jury awarded damages far less than the total Plaintiffs sought. There is no basis, in law or logic, for presuming that the jury's award double-counted any damages. Even were Mapei right on the law, verdicts are generally construed to *avoid* invalidity; it is easy to construe this verdict as awarding damages for harms left unremedied by the Arodo arbitration.

Nor should a new trial be ordered based on any purported ambiguity in the jury's award of future-lost profits. Initially, Mapei has forfeited this challenge by failing to object while the jury was still empaneled. If Mapei had any doubt that the jury meant what it said, it should have raised the issue in time for the Court to seek clarification. It cannot properly wait for the jury to be discharged, then belatedly raise a claim that the jury itself could have answered—without the heavy burden of a full retrial. Mapei's delay tactics impose unnecessary costs on the Court and the parties, and, if allowed, it would impermissibly wipe out the result of an extended

trial based on *possible* error. Mapei asserts this challenge too late to obtain any relief.

In any event, Mapei is wrong to presume any error. The Seventh Amendment protects the right to trial by jury, and that right cannot be eroded by sweeping aside the jury's fact-finding function. Especially given the constitutional interests at stake, courts are required to reconcile any apparent inconsistencies in a manner that validates the jury's verdict. *White* v. *Grinfas*, 809 F.2d 1157, 1161 (5th Cir. 1987); see also *Atl. & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962). If the jury's "answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted," then the verdict will be upheld. *White*, 809 F.2d at 1161; *Crossland* v. *Canteen Corp.*, 711 F.2d 714, 725 (5th Cir. 1983). Plaintiffs' expert broke down the damages analysis into three periods, estimating $3.24-million for past damages, $950,000 for current damages, and $6.65-million for future. ROA.9879:23-9881:14, ROA.9591:20-9597:8, ROA.10920. The evidence is sufficient to support the jury's award of $3,427,809 for future-lost profits. Mapei has failed to identify any sound basis for upsetting the jury's findings.

Mapei also asserts that any damages from its tortious interference with the Arodo contract exactly replicate the damages from Mapei's breach of its own contract. This is false. By deliberately working to eviscerate Plaintiffs' North Ameri-

can distributorship agreement, Mapei cost Plaintiffs far more than Plaintiffs' rights under the Mapei contract; it also cost Plaintiffs their ability to sell machines to countless other companies throughout North America. Plaintiffs were entitled to seek compensation for that intentional tort, and the jury had ample basis for awarding separate damages.

4. Mapei's attempt to avoid future-lost profits is groundless

Mapei argued that the testimony of Plaintiffs' economic expert, Dr. Brad Ewing, is inadmissible and cannot support the jury's verdict on future-lost profits. ROA.7190-7195. Despite challenging Ewing's testimony as "inherently unreliable," Mapei does not take issue with any part of Ewing's core methodology. Indeed, Mapei's own expert apparently accepted Ewing's methodology as unobjectionable. ROA.10125:2-8; ROA.10134:17-20. Ewing performed an incremental lost-profits analysis, projecting Plaintiffs' past, current, and future profits absent Mapei's interference; Ewing then subjected those annual incremental profits to net-present-value methodology with an associated discount rate, and summed to arrive at the lost-profits estimate. As part of those calculations, Ewing selected a reasonable number of machines that Plaintiffs would have sold but-for Mapei's tortious conduct.

Mapei is left weakly challenging a single data point in Ewing's lost-profits calculations: it says Ewing selected the wrong number of machines. According to

Mapei, Ewing based this number solely on Plaintiffs' supplied figures, without any independent analysis to confirm the projection. ROA.7192. Mapei is wrong.

Ewing did not pluck this number out of thin air. It was a conservative estimate *based on Mapei's own agreement to purchase seven machines each year*. ROA.9888:19-9889:15, ROA.9905:6-17, ROA.9929:12-9930:11, ROA.11186. Without an exclusivity agreement, Plaintiffs could have sold even more machines on the open market, as Mapei well knew (thus the demand for *exclusivity*). This number was not "arbitrarily inserted" (as Mapei contends), but the result of extended negotiations between the parties. Far from a hypothetical guess or mere aspiration, the Order Confirmation offered real-world, tangible evidence of sales actually contemplated by real parties in a market exchange. Even Mapei's own expert, Kurt Harms, admitted that he too often extrapolates from a baseline provided by actual documents when projecting lost profits. ROA.10124:10-17. If Mapei felt its own contract was unreasonable, it was free to argue that point factually to the jury, as Mapei did. *Wellogix*, 716 F.3d at 881. The jury simply rejected Mapei's argument.

Moreover, this number was fully consistent with additional factual evidence presented during trial. For example, Mapei's CEO e-mailed Arodo that the market for Arovac machines outside Mapei's exclusivity clause would demand sales of "dozens" of machines. ROA.9931:15-9932:22; ROA.10137:7-10138:7;

ROA.10845. Ewing also relied on evidence that Arodo told Mapei that it expected to sell at least 20 machines in "the near future." ROA.10135:10-10137:6. Ewing's baseline was more conservative than the eight or more annual sales that the record evidence (from industry leaders at Mapei and Arodo) would have supported. ROA.9932:23-9833:14. It is odd for Mapei to challenge Ewing's deliberate choice of a *lower* number.

In any event, although Harms challenged Ewing's selection of seven sales, Harms unequivocally admitted that Ewing used a *generally accepted methodology* to "do what economists do." ROA.10134:11-25. While Harms unsurprisingly preferred an even lower baseline (based on Mapei's actual purchases), ROA.9831:2-6; ROA.10139:17-21, this represents an unremarkable battle of the experts over a minor point. Expert analysis is not thrown out based on such disagreements. Indeed, even where expert opinion on lost profits depends on a "fundamental degree of speculation" and "a number of assumptions," the opinion still stands if it is grounded in "objective facts, figures, or data from which the amount of lost profits can be ascertained." *KMG Kanal-Muller-Gruppe Deutschland GmbH & Co. KG* v. *Davis*, 175 S.W.3d 379, 390-391 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Ewing's opinion easily surpasses this threshold.

Mapei also argues in passing that the specific company risk factor (14%) that Ewing adopted to arrive at his total discount factor (40%) is purely subjective.

Harms, however, testified that this objection was "not substantial." ROA.10125:10-16. Expert disagreement over the appropriate measure of risk is hardly a basis for excluding expert testimony. And Mapei's competing witness is not even an economist, but an accountant. Mapei has provided no basis for challenging Ewing's testimony as unreliable or inadmissible.

Ewing was indisputably qualified to offer expert opinion on lost profits. His methodology was directly relevant and useful in explaining to the jury how to calculate the present value of future damages based on projected figures. As Mapei's own expert admitted during cross-examination, Ewing's opinion was based on generally accepted practices and procedures within the field of economics, easily satisfying the reliability prong of Fed. R. Evid. 702. Ewing's testimony is indisputably admissible, and there was no basis for tossing the jury's verdict on future lost profits.

II. THE DISTRICT COURT ERRED IN CONDITIONALLY GRANTING A NEW TRIAL

A. The court alternatively granted Mapei a new trial. The court said the verdict was against "the great weight" of evidence, but it never explained why. ROA.8807. This Court already minimizes its deference to judicial decisions tossing jury verdicts (*Shows*, 671 F.2d at 930-931), and there is especially little reason to defer to the court's exercise of discretion when it is entirely unclear what discre-

tion the court exercised. It provided no rationale for its decision, or, indeed, any indication that its decision was even based on proper considerations.

Plaintiffs have outlined the exhaustive evidence supporting the jury's verdict. This, again, is not a close call. The district court plainly erred, and its judgment should be reversed.

B. If the Court reverses the JMOL decision but affirms the grant of a new trial, Plaintiffs conditionally seek a new trial on their fraud claim. The court granted Mapei's Rule 50(a) motion on the fraud count (ROA.10109-10110) despite the existence of clear record evidence supporting Plaintiffs' allegations. ROA.10108-10109.

As established below, if Mapei never intended to honor its agreement, it fraudulently induced Plaintiffs to grant Mapei exclusivity—and refrain from pursuing Mapei's competitors—despite Mapei having no intention of fulfilling its end of the bargain. ROA.11187; ROA.10708; ROA.10324. Mapei repeatedly testified at trial that it was in "no position" to uphold the 14-machine deal without a firm commitment from Lowe's. Yet Mapei never inserted that condition in the contract; it instead agreed to purchase two machines per quarter, because it knew anything less was a deal-breaker for Plaintiffs. ROA.11186-11187 ("you can put down 2/quarter, assuming again that the equipment will perform as planned").

And Plaintiffs were unequivocal in their understanding of the deal: it obligated Mapei to purchase all 14 machines if the first machine worked, and Plaintiffs believed (correctly) that they had no right to market the machine to anyone in Mapei's industry in light of the contract. If Mapei truly never intended to honor its end of the agreement—as Mapei's witnesses insisted was the case—then Mapei deliberately misled Plaintiffs to confer exclusivity on false premises. Mapei never once told Plaintiffs that their understanding of the deal was wrong. Mapei never said it had no intention of honoring the deal—until it was too late. Mapei instead led Plaintiffs along, promising their interests were "aligned," all while trying to use Arodo to cut them out. ROA.10741.

Mapei lied about its understanding of the contract, or Mapei lied to Plaintiffs so they would not pursue other business. ROA.10406. The facts were easily sufficient to prove fraud, and the district court erred in refusing to submit the question to the jury.

III. THIS COURT SHOULD ORDER THE DISTRICT COURT TO AWARD APPROPRIATE RELIEF ON REMAND

If the Court reverses the judgment and reinstates the verdict, the Court should instruct the district court to award appropriate relief on remand.

Under Fed. R. App. P. 37(b), the Court's "mandate must contain instructions about the allowance of interest." Fed. R. App. P. 37(b). The Court should instruct the district court to award both pre- and post-judgment interest. Post-judgment in-

terest is a matter of federal law, and it "is awarded as a matter of course." *Meaux Surface Protection, Inc.* v. *Fogleman,* 607 F.3d 161, 173 (5th Cir. 2010). Pre-judgment interest is governed by Texas law, *e.g.*, *id.* at 172, and also conferred "as a matter of course." *Executone Information Sys., Inc.* v. *Davis,* 26 F.3d 1314, 1329 (5th Cir. 1994). Contrary to Mapei's misleading argument below (ROA.8063), Texas makes reducing or eliminating such an award "*impermissible*" "[i]n all but [] *exceptional* circumstances." *Concorde Limousines, Inc.* v. *Moloney Coachbuilders, Inc.*, 835 F.2d 541, 549 (5th Cir. 1987). Nothing here remotely justifies a departure from this rule.

The mandate should also specify the date on which post-judgment interest starts accruing. In light of the equities, and the "essential purpose of * * * compensat[ing] a wronged plaintiff" (*Affiliated Capital Corp.* v. *City of Houston,* 793 F.2d 706, 710-11 (5th Cir. 1986) (en banc)), the Court should pin the dividing line on the date judgment is entered on remand, which "more fully compensates [Plaintiffs as] the prevailing party." *AT&T Co.* v. *United Computer Sys., Inc.*, 98 F.3d 1206, 1211 (9th Cir. 1996).

The Court should also instruct the court to calculate and award Plaintiffs attorney's fees (under the contract, ROA.10638), and award Plaintiffs costs as the prevailing party.

CONCLUSION

The judgment should be reversed, the jury verdict should be reinstated in its entirety, and the Court should instruct the district court to award pre-judgment interest, post-judgment interest, attorney's fees, and costs; alternatively, if the Court remands for a new trial, it should reverse the district court's ruling on Plaintiff's fraud claim.

Respectfully submitted.

/s/ *Daniel L. Geyser*

Daniel L. Geyser
Lead Counsel
Douglas D. Geyser
Victor O'Connell
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
Tel.: (213) 995-6811
Fax: (213) 261-0299
daniel.geyser@strismaher.com
douglas.geyser@strismaher.com
victor.oconnell@strismaher.com

Mark W. McBrayer
Robert L. Duncan, P.C.
CRENSHAW, DUPREE & MILAM, L.L.P.
P.O. Box 64479
Lubbock, TX 79464
Tel.: (806) 762-5281
Fax: (806) 762-3510
mmcbrayer@cdmlaw.com
opie@cdmlaw.com

Counsel for Plaintiffs-Appellants Stelluti Kerr, LLC, Anthony Stelluti, and Pamela Stelluti

July 20, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,946 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ *Daniel L. Geyser*
Daniel L. Geyser
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
Tel.: (213) 995-6811
Fax: (213) 261-0299
daniel.geyser@strismaher.com

July 20, 2016

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I hereby certify that on July 20, 2016, an electronic copy of the foregoing Opening Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Fifth Circuit, using the appellate CM/ECF system. I further certify that all parties in the case are represented by lead counsel who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Daniel L. Geyser*
Daniel L. Geyser
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
Tel.: (213) 995-6811
Fax: (213) 261-0299
daniel.geyser@strismaher.com

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