Case No. 4D05-2606
LT No. CA 03-5045 AI

In the District Court of Appeal
Fourth District of Florida

MORGAN STANLEY & CO. INCORPORATED, APPELLANT,

v.

COLEMAN (PARENT) HOLDINGS INC., APPELLEE.

On Appeal from the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Honorable Elizabeth T. Maass

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 business and professional organizations of every size and in every sector and region of the country. One of the Chamber's key functions is filing *amicus curiae* briefs involving issues of national concern to American business.

Few issues are of greater concern to American business than the fair administration of punitive damages. Accordingly, the Chamber regularly files *amicus* briefs in significant punitive damages cases, and has done so in each of the cases in which the United States Supreme Court has addressed such issues during the past 15 years. The Chamber believes its familiarity with the law of punitive damages can be of assistance to the Court not only in resolving the substantive issues raised in Morgan Stanley's appeal, but also in addressing the requirements imposed by the United States Constitution on punitive damages-related jury instructions.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case highlights the irrationality that sometimes results when a jury is not adequately instructed on the proper purpose and function of punitive damages. The case arose from a 1998 merger in which Sunbeam, Inc. ("Sunbeam") acquired

The Coleman Company, Inc. ("Coleman"), paying in part with shares of Sunbeam stock. Morgan Stanley & Co., Inc. ("Morgan Stanley") served as Sunbeam's investment banker, receiving a $10 million fee and an additional $22 million for a related debenture offering. Shortly thereafter, Sunbeam's stock price dropped sharply when accounting irregularities were uncovered at Sunbeam. After reaching separate settlements with Sunbeam and its auditor, Arthur Anderson, plaintiff Coleman Parent Holdings ("CPH"), which owned most of Coleman's stock, sued Morgan Stanley, alleging that it was in on the fraud.

As a sanction for discovery conduct, the trial court barred Morgan Stanley from disputing the fraud and conspiracy allegations. The court directed the jury to deem true most of the allegations in the complaint. In addition, it permitted CPH to recover "benefit of the bargain" damages. The jury returned a compensatory award of $604 million. It then imposed $850 million in punitive damages — 17 times greater than the largest award ever upheld by a Florida appellate court — despite the already enormous compensatory award and the comparatively modest size of Morgan Stanley's gain (at most $32 million). That award must be reversed for two independent reasons.

I. First, it is grossly excessive when examined in light of the legitimate purposes of punitive awards. Punitive damages serve the dual purposes of punishment and deterrence, but the $850 million punitive award below cannot be involved unusually egregious and life-threatening conduct. Moreover, the $604 million compensatory award itself exceeds Morgan Stanley's gain from the Sunbeam transactions by $572 million — a hefty punishment and deterrent that makes any further damages wholly unjustified.

Although the enormous punitive award is "only" 1.4 times the compensatory award, that fact does not automatically save it. High ratios generally render an award constitutionally suspect, but the converse is not necessarily true. Here, the 1.4:1 ratio is illusory: the compensatory award is based on benefit-of-the-bargain damages that do not purport to reflect CPH's actual harm (if any) from the merger, and the compensatory award itself more than suffices to punish Morgan Stanley and deter future misconduct.

II. Even if the punitive award satisfied the requirements of due process, reversal would nonetheless be required because the trial court failed to instruct the jury properly. Specifically, the court failed to give proper instructions on the deterrent effect of compensatory damages, on whether punitive damages were needed to remove Morgan Stanley's profit, and on whether the jury would have violated the reasonableness and proportionality requirements had it returned no punitive damages or an amount smaller than the compensatory award. These errors, which violate Florida law as well as federal due process, independently require reversal.

ARGUMENT

I. The Punitive Award Is Grossly Excessive in Light of the Policies Underlying Punitive Damages.

Under both Florida law and the Fourteenth Amendment, punitive damages can serve the dual ends of punishment and deterrence. *BMW of N. Am.* v. *Gore*, 517 U.S. 559, 568 (1996) (punitive damages "further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); *Owens-Corning Fiberglas Corp.* v. *Ballard*, 749 So. 2d 483, 486 (Fla. 1999) (punitive damages "punish the defendant for its wrongful conduct" and "deter similar misconduct"). Here, however, the punitive award must be reversed because it cannot be justified on either ground.[1]

A. The punitive award does not reasonably serve the state's legitimate interest in punishing reprehensible conduct.

As to the first: it is black letter law that civil punitive damage awards may serve as appropriate punishment for *egregious* misconduct, and the Supreme Court has emphasized that "[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's

[1] Whether a punitive award is excessive is reviewed *de novo*. *State Farm Mut. Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003).

conduct." *State Farm*, 538 U.S. at 419. Judged by this measure, the massive punitive award here cannot be upheld.[2]

First, the Supreme Court has held that isolated economic torts involving sophisticated investors are far less worthy of punishment than torts involving "reckless disregard of the health or safety of others." *State Farm*, 538 U.S. at 419. Yet the punitive award here is 27 times larger than the award upheld in *Ballard*, where, describing the defendant's misconduct, the Florida Supreme Court observed that "it would be difficult to envision a more egregious set of circumstances" or "blatant disregard for human safety involving large numbers of people put at life-threatening risk." 749 So. 2d at 489. Similarly, the award below is 17 times larger than that upheld in *CSX*, which involved "borderline criminal" conduct that killed eight people. *CSX Transp., Inc.* v. *Palank*, 743 So. 2d 556, 562 (Fla. 4th DCA 1999). If cases involving grave physical harm produced punitive awards measuring only a tiny fraction of the award here, that award is plainly excessive.

Second, the $604 million compensatory award already has a substantial punitive component because it vastly exceeds the $32 million in fees that Morgan Stanley

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[2] Indeed, as a matter of sound policy, the punishment rationale for imposing punitive damages is of questionable validity as applied to corporations. The actual wrongdoers who engage in corporate misconduct do not suffer the punishment that the jury imposes on a corporation. And those who do suffer such punishment (the shareholders) are not themselves guilty of misconduct. See, *e.g.*, *Zazu Designs* v. *L'Oreal*, 979 F.2d 499, 508 (7th Cir. 1992); Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. Legal Stud. 415, 422 (1989).

gained. The compensatory award was based on CPH's expected gain from the deal. But, as the Tenth Circuit recently noted, an "award of profits" has a "punitive nature," especially where there are few or no actual damages: "Given the punitive nature of the remedy and the possible windfall to the plaintiff, the potential for inequity is necessarily heightened when a party seeks a profit award in the absence of actual damages." *Western Diversified Servs., Inc.* v. *Hyundai Motor Am., Inc.*, 427 F.3d 1269, 1272 (10th Cir. 2005). Without more, the compensatory award itself renders the punitive damages here unnecessary — and thus grossly excessive — for purposes of punishment.

Third, and perhaps most importantly, CPH made no showing to the jury that it suffered any actual harm — only that it missed out on a significant expected gain from the merger. Although punitive damages are not generally available for breaches of contract, CPH's proposed compensatory award was based on "benefit-of-the-bargain" damages: CPH recovered the difference between the value that the Sunbeam shares *would have had* if they had been as valuable as represented, and their actual value on the date of transaction. Thus, CPH never had to prove out-of-pocket losses — the difference between what it paid for the shares and their actual value — let alone the sort of extensive harm that would justify imposing further damages to punish Morgan Stanley. As the Court ruled in *State Farm*: "punitive damages should only be awarded if the defendant's culpability, *after* having paid compensatory damages, is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence." 538 U.S. at 419 (emphasis added).

In sum, whether or not an $850 million award would have been appropriate to punish Sunbeam, the company that fraudulently traded its inflated stock for ownership of Coleman, that award was not an appropriate punishment for Morgan Stanley, Sunbeam's investment banker, which made at most only $32 million in fees on the deal.

B. The punitive award does not reasonably serve the state's legitimate interest in deterrence.

Nor does that award reasonably serve the state's interest in deterrence. To be sure, deterrence of "future egregious conduct" is "a primary purpose" of the policy underlying the award of punitive damages. *Smith* v. *Wade*, 461 U.S. 30, 49 (1983). A reviewing court, however, may not uphold a punitive award on the ground that it would deter future misconduct "*without considering whether less drastic remedies could be expected to achieve that goal.*" *Gore*, 517 U.S. at 584 (emphasis added). In *State Farm*, for example, the Supreme Court held a punitive award excessive because "a more modest punishment for th[e] reprehensible conduct could have satisfied the State's legitimate objectives" — and thus "the Utah courts should have gone no further." 538 U.S. at 419-420.

As shown below, the punitive award here violates the fundamental due process principle that the punishment cannot exceed the amount necessary to remove the incentive to engage in the allegedly unlawful activity. See *Gore*, 517 U.S. at 584 (courts must ask "whether a lesser deterrent would have adequately protected the interest of [deterrence]"); *Continental Trend Res., Inc.* v. *OXY USA Inc.*, 101 F.3d 634, 641 (10th Cir. 1996) ("[*Gore*] places in the constitutional calculus the question of the *minimum level* of penalty *necessary* to achieve the state's goal of deterrence" (emphasis added)). That is true both because the compensatory award is itself so large in absolute terms, and because the punitive damages so far exceed any gain that Morgan Stanley received, or could have received, as a result of the conduct for which the company was found liable.

1. To provide the appropriate level of deterrence, punitive awards must not exceed the amount necessary to remove the incentive to engage in the misconduct at issue.

To provide an appropriate level of deterrence, the total liability imposed on the defendant — *i.e.*, compensatory plus punitive damages (plus any attorneys' fees awarded) — should suffice to remove the defendant's gain from the act that injured the plaintiff. "Removal of any profits the defendant has earned by a wrongful act is a logical step toward deterring its repetition or imitation. 'A gain-based measure of this sort sends a clear signal to defendants that such misconduct does not pay and, thus, serves the deterrent function of punitive damages.'" *Johnson* v. *Ford Motor Co.*, 113 P.3d 82, 93 (Cal. 2005) (citation omitted).[3]

The leading commentators agree. As Professor Dobbs has expressed the point: "[t]he idea of deterrence" is that rational actors "tend to avoid conduct that could lead to tort liability. They might sometimes engage in the conduct in question, but only if they would get more out of it than the tort liability would cost." 1 Dan B. Dobbs, *The Law of Torts* § 11, at 19 (2001). Thus, "a tort committed in the hope of profit calls for deterrent measures that will tend to eliminate the profit." Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 874 (1989). But anything beyond nominal punitive damages cannot be justified as necessary for deterrence where the compensatory award has already removed the financial incentive to commit the tort. See Richard A. Posner, *Economic Analysis of Law* 227 (5th ed. 1998) (a "dollop" of punitive damages may suffice where compensatory damages sufficiently deter).

This is not to suggest that an amount of liability that produces disgorgement of any ill-gotten gains from the transaction between plaintiff and defendant is always sufficient to provide the needed level of deterrence. Sometimes the defendant acts

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[3] Although the court in *Johnson* recognized that removing a defendant's ill-gotten gain from a transaction with the plaintiff serves to deter, it correctly rejected an "aggregate disgorgement theory" under which the plaintiff there would have been entitled to predicate punitive damages on disgorgement of the defendant's profit from *other*, similar transactions, finding such an approach fraught with potential for unfairness and excessive punishment. *Id.* at 94-95.

in the expectation that it might escape liability for its misconduct, and in such instances added liability in the form of punitive damages can correct for that possibility. See, *e.g.*, *Gore*, 517 U.S. at 582 (punitive damages "may also be justified in cases in which the injury is hard to detect"); Abraham & Jeffries, 18 J. Legal Stud. at 417 ("[A] potentially liable defendant will compare the benefits it will derive from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs."); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 874 (1998) (similar analysis).

This case, however, differs in a critical respect from the typical fraud case, in which the defendant has received the proceeds of the fraud: Morgan Stanley was Sunbeam's *investment banker* and not a party to the underlying merger transaction. Thus, the proceeds of any fraud flowed principally to Sunbeam, not to Morgan Stanley. Nevertheless, Morgan Stanley was held liable for virtually the entire amount of CPH's "damages," thus creating a wide disparity between what Morgan Stanley gained through its efforts on Sunbeam's behalf and Sunbeam's illicit gains. As a consequence, the compensatory award alone made Morgan Stanley liable for $572 million more than the fees it received.

For any amount of punitive damages to be justified on deterrence grounds, the court would have to conclude that there was an extremely high likelihood that the fraud would never come to light. But any such claim would be untenable here, given that Sunbeam's first quarter operating results (a significant aspect of the alleged misrepresentations) were to be disclosed shortly after the closing — when the inaccuracies in Sunbeam's financials would predictably come to light. This, in fact, is how the accounting problems at the heart of this case were uncovered.

To be sure, the validity of the *compensatory* award, standing alone, is a question of state law, not federal constitutional law. But the liability it embodies obviously must be taken into account in determining the constitutionality of any additional liability in the form of punitive damages. As the Court explained in *Gore*, a substantial punitive award is not "necessary to deter future misconduct" where "less drastic remedies could be expected to achieve that goal." 517 U.S. at 584. And if the liability imposed by virtue of a substantial compensatory award would suffice to "satisf[y] the State's legitimate objectives" of punishment and deterrence, the courts may "go[] no further." *State Farm*, 538 U.S. at 419-420.

2. The compensatory award here suffices to deter similar future misconduct and thus eliminates the justification for any substantial punitive damages.

These principles require that the punitive award here be entirely vacated or at least greatly remitted. To begin with, as noted, the compensatory award itself fully served the purpose of deterring any future misconduct, making the punitive award entirely unnecessary. As the Supreme Court has observed, "[p]unitive damages aside, . . . [d]eterrence also operates through the mechanism of damages that are compensatory." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986). Indeed, "large compensatory damage awards not based on a defendant's ill-gotten gains have a strong deterrent and punitive effect in themselves." *Lane v. Hughes Aircraft Co.*, 993 P.2d 388, 400-01 (Cal. 2000) (Brown, J., concurring). As Judge Posner recently noted: awards of "very substantial compensatory damages . . . greatly reduce[] the need for giving [the plaintiffs] a huge award of punitive damages . . . as well in order to provide an effective remedy." *Mathias* v. *Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003). Accordingly, courts reviewing punitive awards for excessiveness "should be guided by considering whether actual damages would not suffice to deter a defendant's wrongdoing." *Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114, 121 (1st Cir. 1977).[4]

The district court's decision in *United States* v. *Bailey*, 288 F. Supp. 2d 1261, 1281 (M.D. Fla. 2003), *aff'd*, 419 F.3d 1208 (11th Cir. 2005), is instructive. The jury there imposed a $3 million punitive award on top of $2 million in

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[4] See also *Maiorino* v. *Schering-Plough Corp.*, 695 A.2d 353, 370 (N.J. Super. App. Div. 1997) (vacating punitive award where "the large compensatory damage award . . . by itself provided significant deterrence" and the punitive award "was not necessary to punish [the defendant] or to deter it"); *Quick Air Freight, Inc.* v. *Teamsters Local Union No. 413*, 575 N.E.2d 1204, 1217 (Ohio Ct. App. 1989) (affirming trial court's ruling that "punitive damages were unnecessary" because "the [compensatory] award was sufficient to punish defendants and deter them"); *Koufakis* v. *Carvel*, 425 F.2d 892, 907 (2d Cir. 1970); *In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001).

compensatory damages for conversion. In analyzing the award for constitutionality, the court acknowledged that the punitive award "represents a multiplier of 1.5, which is not per se unconstitutional," and that a comparison with civil penalties authorized by law for comparable cases did not warrant disturbing the award. *Id.* at 1280. Nonetheless, the court went on to vacate the punitive award "in its entirety." *Id.* at 1281. The court reasoned that the harm at issue "was economic, not physical," and "the target of [the defendant's] conduct — the Federal Government — was not financially vulnerable." *Ibid.* In addition, however, in light of the defendant's "liabil[ity] for the entire $2,000,000 even though he . . . received only $777,545.71," the defendant's conduct "d[id] not warrant the imposition of further sanctions to achieve punishment or deterrence." *Ibid.* Compensatory damages more than removed the defendant's gain, making punitive damages unjustified.

This case is on all fours with *Bailey*. As noted above (at 4-7), Morgan Stanley's conduct is low on the scale of reprehensibility: it involved only isolated economic harm to a sophisticated billionaire investor who, like the federal government, "was not financially vulnerable." Moreover, reference to other Florida awards confirms that far more egregious wrongs have been subjected to penalties of no more than $50 million.

Most importantly, however, the compensatory award — which is 18 times larger than the $32 million Morgan Stanley gained in fees — is more than sufficient to deter any future misconduct. The fact that the ratio of punitive to compensatory damages here is only 1.4:1 is constitutionally irrelevant — as was the 1.5 :1 ratio at issue in *Bailey* — because the entire punitive award far exceeds the constitutional minimum reasonably necessary to serve the goal of deterrence.

In sum, where a compensatory award itself satisfies the state's interest in punishment and deterrence, the punitive award must be vacated or reduced to a nominal amount *regardless* of the ratio of punitive to compensatory damages. That alone requires vacatur of the punitive award in this case.[5]

II. The Court Below Erred in Refusing to Give Adequate Jury Instructions on Punitive Damages.

The trial court independently erred in refusing to instruct the jury properly on the principles outlined above. These instructional errors are important, not just for the proper resolution of this case, but for other, similar cases in this State.[6]

[5] Even disregarding the deterrent effect of the compensatory award, the punitive award here bears no reasonable relationship to deterrence. As noted above (at 6), CPH's recovered "benefit-of-the-bargain" damages; it adduced no evidence before the jury showing the extent of its out-of-pocket losses. Thus, the punitive award was calculated without regard to *either* the harm CPH suffered *or* the amount that Morgan Stanley gained.

[6] Jury instructions are reviewed for abuse of discretion, but must accurately state the applicable law. *Barton Protective Servs., Inc.* v. *Faber*, 745 So. 2d 968, 974 (Fla. 4th DCA 1999).

A. Due process requires adequate jury instructions on punitive damages.

It is difficult to exaggerate the importance of ensuring that juries are properly instructed before imposing punitive awards. As the Supreme Court has observed, "proper jury instruction[] is a well-established and, of course, important check against excessive [punitive damage] awards." *Honda Motor Co., Ltd.* v. *Oberg,* 512 U.S. 415, 433 (1994). "Vague instructions . . . do little to aid the [jury] in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *State Farm,* 538 U.S. at 418. And when instructions give juries "wide discretion in choosing amounts," there is a grave risk "that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Oberg,* 512 U.S. at 432.

Recent studies confirm that, absent adequate instruction, jurors award punitive damages arbitrarily. See Cass R. Sunstein et al., *Punitive Damages: How Juries Decide* (2002). That is true, moreover, even when they face identical scenarios involving identical harm and identical defendants, and even when they assess, in a consistent manner, the outrageousness of the misconduct. See Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law),* 107 Yale L.J. 2071, 2100-2103, 2146 (1998); see also Reid Hastie et al., *Juror Judgments in Civil Cases: Hindsight Effects on Judgments of Liability for Punitive Damages,* 23 Law & Human Behav. 597, 605-607, 609 (1999). As Judge force that distorts judgment." *Carroll* v. *Otis Elevator Co.,* 896 F.2d 210, 215-216 (7th Cir. 1990) (Easterbrook, J., concurring).

For these reasons, and because punitive damages are akin to criminal penalties,[7] due process "demands that [courts] articulate objective standards for the imposition of punitive damages that can be communicated to the jury in the form of instructions and against which the imposition of the punitive award can be weighed in the process of judicial review." *Farmers Ins. Exch.* v. *Shirley,* 958 P.2d 1040, 1045 (Wyo. 1998).

Improper instructions, moreover, cannot be harmless error. Although de novo review of punitive awards is critical, see *Cooper Indus.,* 532 U.S. at 437; *Oberg,* 512 U.S. at 430, even the most rigorous appellate review cannot "cure" a decision made by a jury lacking adequate instruction on punitive damages. Post hoc review is typically limited to reducing a punitive award to the constitutionally permissible [illegible] jury has not been properly instructed, the court may no

[7] See *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.,* 532 U.S. 424, 432 (2001) (punitive damages are "quasi-criminal" and "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing"). Just as imposing criminal penalties on the basis of unbounded discretion rather than controlling law is barred by due process, so too is assessing punitive damages on that basis. *State Farm,* 538 U.S. at 417-418 (criminal penalties and punitive awards serve similar ends and should be subject to similar procedural protections).

longer fairly assume that a properly instructed jury would have awarded that maximum amount, as opposed to some lower amount within its discretion.

The constitutional importance of proper jury instructions on punitive damages is acknowledged by the institutional plaintiffs' bar. Indeed, the Association of Trial Lawyers of America ("ATLA") has argued that the "root cause" of excessive punitive damages awards is "woefully unguided juries." *Amicus Curiae* Brief of the Ass'n of Trial Lawyers in America, at 20, in *State Farm Mut. Auto. Ins. Co.* v. *Campbell,* No. 01-1289 (Oct. 17, 2002). ATLA thus believes — and the Chamber concurs — that "proper jury instructions are crucial to ensure that jury verdicts are consistent with constitutional limits on state authority." *Id.* at 21.

For all these reasons, juries considering punitive damages must be carefully instructed on how to apply the governing constitutional limitations contained in *State Farm* and *Gore*. See *State Farm*, 538 U.S. at 416. Indeed, a punitive award returned by a jury operating without such guidance violates procedural due process even if it otherwise comports with the substantive requirements of those decisions. A jury must be given sufficient guidance to permit a principled application of the law. *Pacific Mut. Life Ins. Co.* v. *Haslip,* 499 U.S. 1, 19-20 (1991). And a trial court's failure to do so is necessarily "reversible error." *Wransky* v. *Dalfo*, 801 So. 2d 239, 243 (Fla. 4th DCA 2001) (failure to give requested instruction is reversible when "instruction accurately states the applicable law, the facts in the case support giving the instruction, and the instruction was necessary to allow the jury to properly resolve all issues").

B. The trial court's jury instructions violated the requirements of procedural due process.

Here, the jury instructions violated due process for two independent reasons. *First*, the trial court improperly refused to instruct that compensatory damages can themselves serve a deterrent function. As explained above (at 12), it is black letter law that compensatory damages deter. *Stachura*, 477 U.S. at 307. Moreover, the court's failure to inform the jury that compensatory damages deter is inconsistent with the principle that punitive awards may not unreasonably exceed the minimum needed to achieve the state's interest in deterrence. *Gore*, 517 U.S. at 584; *State Farm*, 538 U.S. at 419-420. A properly instructed jury might well have determined that a substantial punitive award served no further purpose, given the $604 million compensatory award.

The trial court's error in refusing to give this instruction was exacerbated by its erroneous refusal to instruct the jury to consider whether punitive damages were necessary to remove Morgan Stanley's profit from the disputed transaction. As the Florida Supreme Court has recognized, trial courts should instruct juries "to consider . . . the profitability to [the defendant] of the wrongful conduct and the desirability of removing that profit and of having [the defendant] also sustain a loss." *Ballard*, 749 So. 2d at 485, 487. Without being told to consider the relationship of the liability here to Morgan Stanley's prospective profit from the alleged fraud, and without being told that compensatory damages themselves serve a deterrent function, the jury was far more likely to think further damages were needed to deter future misdeeds. See also *Haslip*, 499 U.S. at 22 ("the profitability to the defendant of the wrongful conduct" is a factor "in determining whether a particular award is greater than reasonably necessary to punish and deter").

Second, the trial court improperly failed to instruct the jury that reasonableness and proportionality principles allowed it to award *no* punitive damages or an amount *smaller than* the compensatory award. As noted above (at 12-14), whether a punitive award is "reasonable" and "proportional" depends on the size of the compensatory award and the extent to which it has already served the state's interests in retribution and deterrence. *State Farm*, 538 U.S. at 419. Because the compensatory award more than served those interests here, the entire punitive award was unjustified. But the court's failure to inform the jury that an award smaller than $604 million could satisfy the reasonableness and proportionality requirements greatly increased the risk that the jury would impose a punitive award comparable in size to the compensatory award. That too requires reversal.

* * * * *

In summary, punitive awards may not exceed the amount reasonably necessary to accomplish the state's legitimate interests, and a punitive award is not necessary for punishment or deterrence where the compensatory award, standing alone, extinguishes the defendant's gain 18 times over. But even if the punitive award here were not grossly excessive, the inadequate jury instructions on punitive damages independently require vacating the entire punitive award.

CONCLUSION

For the foregoing reasons, the punitive damages award should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rules 9.210 and 9.370 of the Florida Rules of Appellate Procedure.

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