19-1569

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MONETTE E. SACCAMENO,

Plaintiff - Appellee,

v.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR C-BASS MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007 RP1, and OCWEN LOAN SERVICING, LLC,

Defendants - Appellants.

On appeal from the United States District Court for the Northern District of Illinois, No. 15 CV 1164
The Honorable Joan B. Gottschall

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS - APPELLANTS

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to file an *amicus curiae* brief in support of defendant - appellant Ocwen Loan Servicing, LLC.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional

organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Few issues are of more concern to U.S. business than those pertaining to the fair administration of punitive damages. The Chamber regularly files *amicus* briefs in significant punitive damages cases, including all of the Supreme Court's punitive damages cases in the past three decades.

The federal courts have endeavored over the past few decades to develop a framework for reviewing punitive awards to ensure that they are imposed in a reasonable, fair, and consistent way. The Supreme Court took great strides in that direction when it adopted three guideposts to assist courts in deciding whether a punitive award is excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive to compensatory damages; and (3) the civil

penalties applicable to comparable conduct. However, issues regarding the proper application of these guideposts persist.

The proposed *amicus* brief addresses errors that the district court made in applying each of these guideposts. The Chamber's interest in the proper application of the guideposts transcends that of Ocwen. The Chamber's members regularly find themselves embroiled in punitive damages litigation. What this Court says about the guideposts in this case will govern all future cases involving the Chamber's members in this Circuit and could influence litigation involving its members in other Circuits. Moreover, the proposed *amicus* brief contains legal analysis that is non-duplicative of points made in Ocwen's brief. In particular, the proposed *amicus* brief explains at length why the maximum permissible ratio of punitive to compensatory damages in this case should be 1:1. The brief also provides a more thorough analysis of two of the reprehensibility factors—whether the target of the conduct was financially vulnerable and whether the conduct involved repeated actions or was an isolated incident—than does Ocwen in its brief. Accordingly, the Chamber has a strong interest in presenting the Court with its analysis of these important, recurring issues.

Counsel for defendants consents to the filing of this *amicus* brief. Counsel for plaintiff indicated that plaintiff opposes the filing of the brief.

CONCLUSION

The Court should grant permission to file the proposed *amicus* brief.

Respectfully submitted,

s/Evan M. Tager

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 467 words. I further certify that this motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the motion was prepared in 14-point Century Schoolbook font using Microsoft Word.

Dated: June 24, 2019

s/ Evan M. Tager
Evan M. Tager

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 24, 2019

s/ Evan M. Tager
Evan M. Tager

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BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS - APPELLANTS

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1569

Short Caption: Saccameno v. U.S. Bank National Association et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Evan M. Tager Date: 06/24/2019

Attorney's Printed Name: Evan M. Tager

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Attorney's Printed Name: Daryl Joseffer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Michael B. Schon Date: 06/24/2019

Attorney's Printed Name: Michael B. Schon

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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INTEREST OF THE *AMICUS CURIAE*[1]

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Few issues are of more concern to U.S. business than those pertaining to the fair administration of punitive damages. The Chamber regularly files *amicus* briefs in significant punitive damages cases, including all of the Supreme Court's punitive damages cases in the past three decades.

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[1] No party or counsel for a party in the pending appeal authored the proposed *amicus* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal courts have endeavored over the past few decades to develop a framework for ensuring that punitive damages are imposed in a reasonable, fair, and consistent way. The Supreme Court took great strides in that direction when it adopted three guideposts to assist courts in deciding whether a punitive award is excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive to compensatory damages; and (3) the civil penalties applicable to comparable conduct. However, issues regarding the proper application of these guideposts persist. Here, the district court made critical errors when applying each of the guideposts.

First, the district court made a number of errors in applying the reprehensibility guidepost. Most fundamentally, it failed to compare the alleged conduct here—misconduct by a low-level employee in the processing of a mortgage—with other punishable acts such as discrimination or physical assault. The district court's analysis of the five reprehensibility factors identified by the Supreme Court also was mistaken. The court found the third factor to be satisfied simply because Saccameno was financially vulnerable, disregarding the

important limitation—recognized by many courts—that conduct is more than minimally reprehensible only when an individual is ***targeted*** because of that vulnerability. And it found the fourth factor—whether the conduct involved repeated actions or instead was an isolated incident—to be present by atomizing Ocwen's interactions with Saccameno rather than identifying a pattern of similar conduct involving other individuals. On both of these points, the district court's conclusion is contrary to the foundational Supreme Court decisions and lower court decisions interpreting them.

Second, the district court committed two separate errors in applying the ratio guidepost. It improperly included in the denominator of the ratio damages that Saccameno received for causes of action that do not support an award of punitive damages. Including those amounts in the denominator improperly punishes Ocwen for conduct that Congress and the Illinois legislature have not deemed worthy of punishment.

Having mistakenly expanded the denominator, the district court compounded its error by mistakenly assuming that any single-digit ratio of punitive to compensatory damages is presumptively

constitutional. Decisions of the Supreme Court, Courts of Appeals, and other courts make clear that a different presumption applies in a case like this: When a defendant's conduct is not on the high end of the reprehensibility spectrum and the compensatory damages are substantial, the punitive damages should generally be limited to no more than the amount of compensatory damages—*i.e.*, a ratio of 1:1.

Finally, the district court's application of the third guidepost is irreconcilable with Supreme Court precedent. Disregarding the Illinois legislature's determination that the appropriate punishment for this type of conduct is between $25,000 and $50,000, the district court justified the $3,000,000 exaction here by comparing it to the financial consequences of Ocwen losing its business license. But the Supreme Court has held that such rationalizations for high punitive awards are too speculative and distort the purposes behind the third guidepost.

ARGUMENT

The fundamental question underlying constitutional review of punitive awards for excessiveness is "whether [the] particular award is greater than reasonably necessary to punish and deter." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991). When "a more modest

punishment … could have satisfied the State's legitimate objectives," then a reviewing court should reduce the award to that amount and "go[] no further." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419-20 (2013); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 584 (1996) ("The sanction imposed … cannot be justified … without considering whether less drastic remedies could be expected to achieve [punishment and deterrence]."); *cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008) (recognizing "the need to protect against the possibility … of [punitive] awards that are unpredictable and unnecessary, either for deterrence or for measured retribution").

To aid courts in determining whether a punitive award exceeds the amount necessary to punish and deter, the Supreme Court has identified three "guideposts": (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *See, e.g.*, *BMW*, 517 U.S. at 574-85. "Exacting" judicial review employing these guideposts is necessary to "ensure[] that an award of

punitive damages is based upon an application of law, rather than a decisionmaker's caprice."[2] *State Farm*, 538 U.S. at 418 (internal quotation marks omitted).

Here, the district court made mistakes when applying each of the three guideposts.

I. The District Court Misapprehended And Misapplied The Reprehensibility Guidepost.

"The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (internal quotation marks and alterations omitted). Put succinctly, "punitive damages may not be grossly out of proportion to the severity of the offense." *BMW*, 517 U.S.

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[2] In applying the guideposts, this Court may not presume that the jury resolved all factual disputes and construed all inferences in favor of Saccameno. "Unlike the measure of actual damages suffered, … the level of punitive damages is not really a 'fact' 'tried by the jury." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001) (quotation and citation omitted). Thus, "a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive damages awards." *In re Exxon Valdez*, 270 F.3d 1215, 1239 (9th Cir. 2001); *see also*, *e.g.*, *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 72 (2005) ("[w]hile we defer to express jury findings supported by the evidence … , in the absence of an express finding on the question we must independently decide" factual issues bearing on the constitutionally permissible amount of punitive damages); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1063-65 (10th Cir. 2016).

at 576 (internal quotation marks omitted). This core constitutional requirement entails placing the conduct at issue on a spectrum of reprehensibility, comparing it with other conduct that may be sanctioned with punitive damages.

For example, the Ninth Circuit has concluded that "the reprehensibility of the fraudulent business practices [in *State Farm*]"—which involved an insurer systematically setting out to defraud its insureds—"is ***different in kind*** from the reprehensibility of intentional discrimination on the basis of race or ethnicity" and that the "***gulf*** between the reprehensibility" of these two types of misconduct "***is substantial***." *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1043-44 (9th Cir. 2003) (emphasis added).

The Supreme Court has identified five non-exclusive factors to assist courts in placing conduct on the reprehensibility spectrum: (i) whether "the harm caused was physical as opposed to economic"; (ii) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (iii) whether "the target of the conduct had financial vulnerability"; (iv) whether "the conduct involved repeated actions or was an isolated incident"; and (v) whether

"the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm*, 538 U.S. at 419. Importantly, the Court has added that "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id*.

Here, the district court engaged in a cursory analysis of the five reprehensibility factors (*Saccameno v. Ocwen Loan Servicing, LLC*, 372 F. Supp. 3d 609, 656-57 (N.D. Ill. 2019)), but failed to appreciate that merely checking the boxes is not a substitute for a more searching comparative inquiry. Accordingly, it failed to acknowledge that, in the scheme of things, the alleged economic misconduct here cannot credibly be deemed to be as reprehensible as many torts for which punitive damages may be imposed.

That conclusion is confirmed by application of *State Farm*'s five reprehensibility factors. The district court correctly found that the first two factors are not present here because the conduct occurred entirely in the economic realm. But it misinterpreted the law that applies to two of the remaining three factors on which it relied in support of its conclusion that Ocwen's conduct merited a $3 million exaction.

First, the district court was mistaken in concluding that the third factor "weigh[s] in Saccameno's favor" "given that she was emerging from bankruptcy," and therefore "was highly vulnerable financially." *Saccameno*, 372 F. Supp. 3d at 656. Both the Supreme Court and other courts have recognized that this factor requires evidence that the defendant intentionally ***targeted*** the plaintiff due to her vulnerability. *See, e.g.*, *BMW*, 517 U.S. at 576 (conduct is more reprehensible if "***the target*** is financially vulnerable") (emphasis added); *In re Exxon Valdez*, 490 F.3d 1066, 1087 (9th Cir. 2003) ("there must be some kind of ***intentional aiming or targeting of the vulnerable***" to satisfy this factor) (emphasis added), *vacated on other grounds by Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *Lompe*, 818 F.3d at 1066 (this factor applies when there is "a reprehensible ***exploitation of financial vulnerability*** through fraud or other financial misconduct") (emphasis added); *Eisenhour v. Stafford*, 2013 WL 6212725, at *5 (E.D. Tex. Nov. 26, 2013) (finding low reprehensibility in part because "the Defendant ***did not target*** the Plaintiff because of his financial vulnerability") (emphasis added).

That interpretation of this factor makes sense because often the defendant has no awareness of the financial circumstances of the plaintiff. What makes conduct more reprehensible is when the defendant knows that the plaintiff is vulnerable and deliberately attempts to exploit that vulnerability. *Cf. Life Ins. Co. of Georgia v. Johnson*, 701 So. 2d 524, 526-29 (Ala. 1997) (reducing punitive award from $15 million to $3 million in case involving a pattern of fraud targeted at "elderly, uneducated, single black women").

In this case, the district court did not find—and it may not be presumed that the jury found—that Ocwen intentionally targeted Saccameno due to her vulnerability. To the contrary, in discussing the fifth reprehensibility factor, the court acknowledged that Ocwen's conduct was "not malicious." *Saccameno*, 372 F. Supp. 3d at 657.

Second, the court was mistaken in concluding that this case implicates the fourth factor because "Ocwen's conduct involved repeated actions (*e.g.*, repeatedly failing to correct Saccameno's account; repeatedly seeking payment of funds it was not entitled to; repeatedly returning Saccameno's payments)." *Saccameno*, 372 F. Supp. 3d at 656. As numerous courts have observed, this factor is about recidivism, not

whether a single course of conduct can be atomized into multiple acts. *See, e.g.*, *State Farm*, 538 U.S. at 423 (when determining whether this factor applies, "courts must ensure the conduct in question ***replicates the prior transgressions***") (emphasis added); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 487 (6th Cir. 2007) ("[t]he repeated conduct factor requires that the similar reprehensible conduct be committed against various different parties rather than repeated reprehensible acts within the single transaction with the plaintiff") (internal quotation marks omitted); *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 1000 (6th Cir. 2007) (same); *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 356 (6th Cir. 2005) (same); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 232 (3d Cir. 2005) ("The 'repeated misconduct' cited in *Gore* involved not merely a pattern of contemptible conduct within one extended transaction …, but rather specific instances of similar conduct by the defendant in relation to other parties."); *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 717 (2009) (factor not met where supervisor harassed plaintiff on daily basis, but there was no evidence of recidivism by employer); *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005) (because "no evidence

indicated [that the defendant] had acted similarly toward other[s]" it "cannot be characterized as a repeat offender"); *Amerigraphics, Inc. v. Mercury Cas. Co.*, 182 Cal. App. 4th 1583, 1563 (2010) (conduct involved "several discrete acts of misconduct," but "ultimately involved only one insured and one claim. … Thus, on the evidence before us we cannot conclude that Mercury was a 'repeat offender.'"); *Park v. Mobil Oil Guam, Inc.*, 2004 WL 2595897, at *13 (Guam Nov. 16, 2004) (repeated misconduct factor was not satisfied "[a]lthough the wrongful acts … spanned several years" and inflicted harm on plaintiff on several separate occasions because "the Supreme Court cases refer to the frequency of *past* similar conduct of the defendant in question, similar to a repeat offender status in a criminal case").

II. The District Court Committed Two Critical Conceptual Errors In Applying The Ratio Guidepost.

The district court committed two errors in applying the ratio guidepost. First, it included in the denominator of the ratio compensatory damages awarded for claims as to which the jury could not and did not award punitive damages. Second, it failed to heed the Supreme Court's admonition that when the compensatory damages are substantial—as they undeniably are here—a punitive award equal to

the amount of compensatory damages may be the maximum permissible under the Constitution.

A. The Denominator Of The Ratio Should Include Only Compensatory Damages Awarded For Claims As To Which The Jury Imposed Punitive Damages.

In *BMW*, the Supreme Court observed that the "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." 517 U.S. at 580. It directed reviewing courts to ask "whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred." *Id.* at 581 (internal quotation marks omitted). When all of the conduct at issue in a case can support an award of punitive damages, then all of the compensatory damages awarded are relevant to this comparison between the harm caused by the conduct and the punishment imposed for that conduct.

When, however, a lawsuit involves some claims that support a punitive award and some claims for which the legislature has not allowed punitive damages or the jury has elected not to impose them, then the reasonableness of the punitive award should be measured

against only the harm caused by the punishable conduct. Aggregating other compensatory damages within the denominator of the ratio guidepost would impermissibly result in punishment for conduct that the legislature (or jury) has determined does not warrant punishment.

Numerous courts have recognized that the appropriate comparison under the ratio guidepost in this situation is between the punitive damages award and the compensatory damages for the conduct that justified the award of punitive damages. *See, e.g.*, *Quigley v. Winter*, 598 F.3d 938, 945, 955 (8th Cir. 2010) (using only compensatory damages for housing-act violation, not damages for breach of contract, in denominator of ratio guidepost); *In re Wright Med. Tech. Inc., Conserve Hip Implant Prods. Liab. Litig.*, 178 F. Supp. 3d 1321, 1367 n.32 (N.D. Ga. 2016) ("Because the jury concluded the award of punitive damages was based on Defendant's misrepresentations—for which it awarded $450,000 in compensatory damages—the $550,000 in compensatory damages awarded solely on the design defect claim is not relevant."); *Tomao v. Abbott Labs., Inc.*, 2007 WL 2225905, at *22 n.6 (N.D. Ill. July 31, 2007) ("The court rejects Tomao's attempt to aggregate the awards among all of her claims in an effort to make the

ratio appear smaller."); *Major v. Western Home Ins. Co.*, 169 Cal. App. 4th 1197, 1224 (2009) ("because punitive damages are not authorized in contract actions under California law … only the tort damages are considered in measuring the proportionality of a punitive damages award").

As the present case illustrates, this issue can have a very significant effect on the outcome of the constitutional analysis. Only $82,000 of the compensatory damages awarded to Saccameno arose out of conduct that can support an award of punitive damages. *Saccameno*, 372 F. Supp. 3d 657. The other $500,000 that she received was compensation for harm caused by conduct that Congress and the Illinois legislature have determined does ***not*** justify punishment. *Id.* Assuming for present purposes that a ratio of 5:1 were justified in this case (*but see* pages 18-29, *infra*), limiting the denominator to the harm caused by Ocwen's punishable conduct would result in a punitive award of $410,000. Adding to the denominator the damages that Saccameno obtained on other claims, arising out of conduct that Congress and the Illinois legislature have determined do not justify any punishment, would inflate the permissible punitive award in this case—for the very

same punishable conduct—to $2,910,000. As this example demonstrates, it would introduce unacceptable arbitrariness into the second guidepost if the presence of non-punishable causes of action in a case could so radically alter the constitutionally permissible punitive award.

The district court rejected this conclusion based largely on the reasoning in *Fastenal Co. v. Crawford*, 609 F. Supp. 2d 650 (E.D. Ky. 2009). *See Saccameno*, 372 F. Supp. 3d at 659. In *Fastenal*, the district court noted that "potential harm" to the plaintiff is sometimes considered in the ratio guidepost when the defendant's conduct would have caused greater injury if it had been successful. *Fastenal*, 609 F. Supp. at 661. From this, the court concluded that, if the inquiry "is not limited to compensatory damages that actually occurred in calculating the ratio, it follows that a court is not confined only to the compensatory damages under particular claims and instead can look at damages found by a jury on related claims." *Id.*

That, however, is a non-sequitur. "Potential harm" is sometimes included in the denominator because it represents harm that the defendant's punishable conduct would have caused if that conduct had

been successful. It is thus a measure of the intended, but unrealized, harm resulting from the conduct being punished. Compensatory damages awarded on other claims, however, do not measure the harm caused by the conduct being punished, but the harm caused by other non-punishable acts. Including such damages in the denominator does not more accurately tailor the ratio guidepost to the effects of the conduct being punished—it arbitrarily inflates the permissible punitive damages for that conduct simply because the plaintiff also obtained compensation for other, non-punishable, conduct.

Again, this case is a good example. Although the district court asserted that the conduct on each of the claims was "interrelated" when attempting to rationalize its aggregation of the damages in the denominator (*Saccameno*, 372 F. Supp. 3d at 660), it took a different view when describing those claims elsewhere in the opinion. In particular, the court found that Saccameno's various claims "are based on different conduct by Ocwen: Saccameno's breach-of-contract claim is based on Ocwen's rejection of her mortgage payments; her FDCPA claim is based on the collection letters that Ocwen sent to her; and her RESPA claim is based on Ocwen's responses to her inquiries requesting

correction of her account. These facts, while obviously related, are not 'indivisible.' In addition, the claims provide redress for different kinds of injury." *Saccameno*, 372 F. Supp. 3d at 625. Including the damages awarded on those other claims in the denominator would thus result in punishment that is measured against the injury caused by, for example, Ocwen's rejection of Saccameno's mortgage payments even though neither Congress nor the Illinois legislature has authorized punishment for that type of contractual breach.

B. The Ratio Of Compensatory To Punitive Damages Should Not Exceed 1:1 When, As Here, The Compensatory Damages Are Substantial.

In *State Farm*, the Supreme Court "addressed [the ratio] guidepost with markedly greater emphasis and more constraining language" than it had in previous cases, "tighten[ing] the noose" that it previously had thrown around the problem of excessive punitive awards. *Simon*, 113 P.3d at 76. Specifically, the Court reiterated its statement in *BMW* that a punitive award of four times compensatory damages is generally "close to the line of constitutional impropriety" and indicated that, though "not binding," the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to

3:1) is "instructive." *State Farm*, 538 U.S. at 425. Most important, *State Farm* "emphasizes and supplements" *BMW* "by holding that '[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Bains LLC v. ARCO Prods. Co.*, 405 F.3d 764, 776 (9th Cir. 2005) (quoting *State Farm*, 538 U.S. at 425). Five years later, the Supreme Court echoed that holding in *Exxon Shipping*. 554 U.S. at 501; *see also id.* 514 & n.28 (quoting the same language again and stating that "[i]n this case, then, the constitutional outer limit may well be 1:1").[3]

To be sure, these principles do not establish a rigid mathematical formula for calculating punitive damages, but instead create a rough

[3] Although the Supreme Court reviewed the punitive award in *Exxon Shipping* under federal maritime law rather than the Due Process Clause, the Court's discussion of the due process standard must be given significant weight by lower courts. *See, e.g.*, *Nicholl v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) ("This Court should respect considered Supreme Court dicta"); *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292, 297 n.3 (4th Cir. 2004) ("carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative") (quoting *Sierra Club v. E.P.A.*, 322 F.3d 718, 724 (D.C. Cir. 2003)). Indeed, the Supreme Court's concern in *Exxon Shipping*—that the current punitive damages system is not producing "consistent results in cases with similar facts" (554 U.S. at 500)—applies with even greater force in the context of due process.

framework under which the maximum permissible ratio depends principally on two variables: the degree of reprehensibility of the conduct and the magnitude of the harm caused by the conduct (here, as in most cases, the amount of the compensatory damages). The maximum permissible ratio is directly related to the degree of reprehensibility and inversely related to the harm caused. In other words, for any particular degree of reprehensibility, as the compensatory damages increase, the maximum permissible ratio decreases. And for any particular amount of compensatory damages, the lower on the reprehensibility spectrum the conduct falls, the lower the constitutionally permissible ratio. Illuminating this principle, the Second Circuit has explained that a 10:1 ratio might be permissible had the conduct before it caused only $10,000 in compensable harm, while a 1:1 ratio would be "very high" if the compensatory damages had been $300,000. *Payne v. Jones*, 711 F.3d 85, 103 (2d Cir. 2013). The court concluded that, "given the substantial amount of the compensatory award"—$60,000 in that case—a 5:1 ratio "appears high" (*id.*); ultimately, it ordered a remittitur to $100,000, representing a ratio of 1.67:1 (*id.* at 106).

Thus, when the Supreme Court stated in *State Farm* and *Exxon Shipping* that a ratio of 1:1 may be the constitutional limit when compensatory damages are substantial, it was describing an outer bound for ***all*** such punitive awards. It follows that an even lower ratio may be required when compensatory damages are substantial and reprehensibility is ***not*** high. That is the only way to maintain proportionality between reprehensibility and ratio within the category of cases involving substantial compensatory damages—ensuring that more egregious conduct is punished more severely. Here, for example, where the compensatory damages are very substantial—more than four times the value of Saccameno's mortgage—and the conduct is far from the high end of the spectrum of punishable conduct, a ratio below 1:1 may be required.

Since *State Farm*, many courts have concluded that, when compensatory damages are substantial, a ratio of 1:1 or lower marks the outer limit of due process. Perhaps the best example is *Bach v. First Union National Bank*, 486 F.3d 150 (6th Cir. 2007). There, as here, a large financial institution allegedly committed statutory violations in its dealings with a financially vulnerable customer—in that case a 77-

year-old widowed senior citizen. There, as here, the plaintiff was awarded a substantial amount of compensatory damages—$400,000—plus a multi-million-dollar punitive award ($2,628,600). The Sixth Circuit agreed that the bank "engaged in blameworthy conduct" that "merits strong disapproval," including "continu[ing] to report unfavorable credit information regarding Bach even after receiving notification from Bach, an elderly widow, that the information was inaccurate." *Id.* at 155. Nevertheless, the court concluded that the bank's conduct was "comparatively less egregious" than the conduct in other cases in which punitive damages are warranted and that the existing "ratio of approximately 6.6:1 was 'alarming.'" *Id.* at 154. It held that "the facts before us simply do not justify a departure from the general principle that a plaintiff who receives a considerable compensatory damages award ought not also receive a sizeable punitive damages award absent special circumstances." *Id.* at 156. Accordingly, the court ordered the district court to reduce the punitive award to no more than $400,000, the same amount as the compensatory damages. *Id.* at 157.[4]

[4] Other decisions of federal courts of appeals holding that a 1:1 ratio

was the constitutional maximum include *Lompe*, 818 F.3d at 1068 (reducing $22.5 million punitive award against one defendant to amount of compensatory damages attributable to that defendant—$1,950,000); *Burton v. Zwicker & Assocs.*, 577 F. App'x 555, 565 (6th Cir. 2014) (affirming reduction of $600,000 punitive award to $350,000, the amount of compensatory damages); *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1206-08 (10th Cir. 2012) (reducing $2,000,000 punitive award to amount equal to the $630,307 compensatory award); *Morgan v. New York Life Ins. Co.*, 559 F.3d 425, 441-43 (6th Cir. 2009) (vacating $10,000,000 punitive award that was 1.67 times the compensatory award and remanding with instructions to enter remittitur in an amount not more than compensatory damages); *Méndez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 56 (1st Cir. 2009) (reducing $350,000 punitive award to $35,000, which equaled the compensatory damages); *Zakre v. Norddeutsche Landesbank Girozentrale*, 344 F. App'x 628, 631 (2d Cir. 2009) (affirming reduction of punitive award from $2.5 million to $600,000 where compensatory damages were approximately $1.5 million); *Jurinko v. Medical Protective Co.*, 305 F. App'x 13, 27-32 (3d Cir. 2008) (reducing 3.13:1 ratio to 1:1 where compensatory damages and attorneys' fees totaled approximately $2 million); *Bridgeport Music*, 507 F.3d at 487 (reversing punitive award that was 9.5 times the compensatory damages and holding that "[i]n this case where only one of the reprehensibility factors is present, a ratio in the range of 1:1 to 2:1 is all that due process will allow"); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (ordering reduction to 1:1 ratio where plaintiff was victim of egregious pattern of racial harassment, but received "$600,000 to compensate him for his harassment," which "is a lot of money"); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (reducing $15 million punitive award to $5 million where compensatory damages were $4,025,000 and explaining that although the defendant's deceptive marketing of cigarettes "was highly reprehensible," "a ratio of approximately 1:1 would comport with the requirements of due process" because "[f]actors that justify a higher ratio, such as the presence of an 'injury that is hard to detect' or a 'particularly egregious act [that] has resulted in only a small amount of economic damages,' are absent here") (quoting *BMW*, 517 U.S. at 582)

(second alteration in original); *DiSorbo v. Hoy*, 343 F.3d 172, 176-77, 189 (2d Cir. 2003) (ordering remittitur of compensatory award to $250,000 and remittitur of punitive damages from $1,275,000 to $75,000).

There are many additional decisions of federal district courts and state appellate courts reducing punitive awards to the amount of the compensatory damages or below. The following is only a representative sample of state-court decisions following this rule: *Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.*, 277 P.3d 789, 806-10 (Ariz. Ct. App. 2012) (reducing to a 1:1 ratio a punitive award that the lower court had already reduced from roughly 355:1 to 4:1, since the conduct was at most in "the middle range of the reprehensibility scale" and the harm was only economic); *Hudgins v. Sw. Airlines Co.*, 212 P. 3d 810, 830 (Ariz. Ct. App. 2009) (reducing $4 million punitive award to $500,000 for each plaintiff, the amount of compensatory damages); *Sec. Title Agency, Inc. v. Pope*, 200 P. 3d 977, 1000-01 (Ariz. Ct. App. 2008) (reducing $35 million punitive award to $6 million, the amount of compensatory damages); *Roby*, 219 P.3d at 770 (holding that 1:1 was constitutional maximum in light of the "relatively low degree of reprehensibility and the substantial award of noneconomic damages"); *Torres v. B/E Aerospace, Inc.*, 2018 WL 2228643, at *18 (Cal. Ct. App. May 16, 2018) (affirming reduction of punitive damages from $7 million to $1 million, where compensatory damages of $1.516 million "contained a large component of emotional distress damages" that itself served deterrent purposes); *Walker v. Farmers Ins. Exch.*, 153 Cal. App. 4th 965, 973-74 (2007) (reducing $8.3 million punitive award to $1.5 million, the amount of compensatory damages); *Jet Source Charter, Inc. v. Doherty*, 148 Cal. App. 4th 1 (Cal. Ct. App. 2007) (remanding $26 million punitive award to trial court with instructions to limit the award to an amount not exceeding the total compensatory damages awarded, $6.5 million); *Czarnik v. Illumina, Inc.*, 2004 WL 2757571, at *11 (Cal. App. 4th Dec. 3, 2004); *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 233 P.3d 1221, 1262 (Idaho 2010) (reducing $6 million punitive award to $1.89 million, the amount of compensatory damages); *Thistlethwaite v. Gonzalez*, 106 So. 3d 238, 267-68 (La. Ct. App. 2012) (reducing punitive award to a 1:1 ratio, citing the high level of

It is hard to see how this case can be distinguished from *Bach*. Because "[c]ourts of law are concerned with fairness as consistency," and "a penalty should be reasonably predictable in its severity" (*Exxon Shipping*, 554 U.S. at 499, 502), an analogy to *Bach* would be an appropriate basis for this Court to hold that the maximum permissible constitutional ratio here is no more than 1:1.

Moreover, the Supreme Court repeatedly has held that the deterrent and retributive effects of compensatory damages must be taken into account in determining both whether and in what amount punitive damages are appropriate. As the Court explained in *State Farm*:

> It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, ***after***

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compensatory damages); *Guest v. Allstate Ins. Co.*, 2006 WL 6620226, at *1 (N.M. Ct. App. Oct. 27, 2006) (reducing $9 million punitive award to $1,842,900, the amount of compensatory damages), *rev'd in part on other grounds*, 205 P.3d 844 (N.M. Ct. App. 2009); *Burns v. Prudential Sec., Inc.*, 857 N.E.2d 621, 659 (Ohio Ct. App. 2006) (reducing punitive award from $250 million to $6.8 million where compensatory damages on tort claim were approximately $6 million); *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 562 S.W.3d 451, 495 (Tex. App. 2016) (reducing ratio from 7.5:1 to 0.04:1 where compensatory damages were $15.3 million), *rule 53.7(f) motion subsequently granted and judgment set aside, opinion not vacated*, 562 S.W.3d at 500, *rev'd on other grounds*, 2019 WL 847845 (Tex. Feb. 22, 2019).

> ***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); *see also, e.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("Deterrence … operates through the mechanism of damages that are *compensatory*."). Following this principle, courts have held that "when the compensatory damages are substantial ***or already contain a punitive element***, lesser ratios 'can reach the outermost limit of the due process guarantee.'" *Simon*, 113 P.3d at 77 (emphasis added) (quoting *State Farm*, 538 U.S. at 425).

In particular, courts have recognized that "compensatory damages … awarded solely for [the plaintiff's] physical and emotional distress … may have reflected the jury's indignation at [the defendant's] conduct, thus including a punitive component." *Roby*, 219 P.3d at 769-70 (ordering reduction of punitive damages to 1:1 ratio); *see also, e.g.*, *Bach*, 149 F. App'x at 365 (deeming a 6.6:1 ratio to be "alarming" "considering the fact that much of the compensatory damage award must be attributable to Bach's [emotional distress]," which "compels the conclusion that the punitive award is duplicative"); *Tomao*, 2007 WL 2225905, at *22 (reducing punitive award to 2:1 ratio, in part because

"Tamao has also received significant compensatory damages for her emotional distress; *i.e.*, nearly $10,000 for two months of distress" and "[s]uch damages contain a punitive element") (internal quotation marks omitted); *Walker*, 153 Cal. App. 4th at 974 (affirming reduction of punitive damages to 1:1 ratio because award of emotional-distress damages added "a punitive element to respondents' recovery of compensatory damages"); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003) (punitive award was excessive, in part, because "there was a substantial compensatory damage award containing a punitive element which fully compensated Roth for the harm caused").

Similarly, courts have observed that any award of attorneys' fees "includes a certain punitive element." *Parrish v. Sollecito*, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003); *accord Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383, 389 (2d Cir. 1985) ("an award of fees under the bad faith exception … has a punitive and deterrent flavor"); *Walker*, 153 Cal. App. 4th at 974 (similar). Indeed, courts have held that this punitive effect means that a plaintiff who receives an award of attorneys' fees should receive "a lesser rather than greater award of

punitive damages." *Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003).

Here, the majority of Saccameno's "compensatory" damages already serve a punitive function. As noted above, the compensatory damages alone are four times larger than the value of Saccameno's mortgage. Further, the great majority of those damages—$570,000—was for Saccameno's emotional distress. Such non-economic damages have a strong punitive effect on the defendant, and likely reflect a punitive intent by the jury. *See State Farm*, 538 U.S. at 426 (observing that the compensatory damages for emotional distress "likely were based on a component which was duplicated in the punitive award"). Furthermore, Ocwen already has been ordered to pay $750,000 (and counting) in attorneys' fees (Doc. # 347), another part of the judgment that serves to punish and deter before a single penny in "punitive damages" is imposed. The largely punitive nature of the "compensatory" damages awarded in this case and the sizeable award of attorneys' fees provide further reasons to conclude that the highest constitutionally permissible award of punitive damages is equal to or less than the amount of compensatory damages.

The Supreme Court has made clear that a punitive award that is greater than necessary to accomplish a state's interest in punishment and deterrence "furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm*, 538 U.S. at 417. Because the large amount of compensatory damages and attorneys' fees awarded to Saccameno—more than $1.3 million in toto—far exceeds any possible ill-gotten gain to Ocwen, a "more modest punishment" would more than adequately serve Illinois's interest in "punishing and deterring future misconduct," and the Due Process Clause therefore requires that the punitive award "go no further." *Lompe*, 818 F.3d at 1065 (internal quotation marks omitted).

III. The Proper Comparison Under The Third Guidepost Is With Realistic Civil Fines For Similar Conduct, Not The Speculative Loss Of A License To Do Business.

The third *BMW* guidepost requires a comparison between "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583; *see also State Farm*, 538 U.S. at 428 (award was excessive, in part because "[t]he most relevant civil sanction … [was] dwarfed by the … punitive damages award"). By tethering punitive awards to legislatively adopted

punishments, this guidepost both (i) incorporates deference to the state legislature's determination of the amount necessary to carry out the state's interest in punishment and deterrence and (ii) guarantees that defendants have notice of the punishment that can be imposed for their conduct. As the Supreme Court observed in *BMW*, "a reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." 517 U.S. at 583 (internal quotation marks omitted). And when the legislatively established fines for similar conduct are in the low thousands of dollars, the defendant is denied "fair notice" that its conduct "might subject an offender to a multimillion dollar penalty." *Id.* at 584.

Here, the district court acknowledged that the Illinois legislature has decided that fines in the range of $25,000 to $50,000 are sufficient to carry out the state's interest in punishing and deterring similar conduct. *Saccameno*, 372 F. Supp. 3d at 661. And it recognized that comparison with those amounts suggests that the jury's award of $3,000,000 is far too large. *Id.* Discarding that comparison, however, the district court concluded that the jury's award fared better when

compared to the financial consequences of Ocwen losing its license to do business, a remedy that is theoretically available, but exceptionally unlikely. *Id.* at 662.

That same rationalization of a high punitive award was rejected by the Supreme Court in *State Farm*. There, the Court noted that "[t]he Supreme Court of Utah speculated about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment," but held that "[t]his analysis was insufficient to justify the award." *State Farm*, 538 U.S. at 428. Instead, the Court held that "[t]he most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud … an amount dwarfed by the $145 million punitive damages award." *Id.*; *see also, e.g.*, *Clark v. Chrysler Corp.*, 436 F.3d 594, 608 (6th Cir. 2006) (relevant comparison was to civil fine of "$1,000 per vehicle, up to a maximum of $800,000 for a related series of violations," not speculative loss of corporate license, which means that third guidepost "may indicate that $3 million [punitive award] is excessive").

Here too, the most relevant fine under Illinois law for the conduct that harmed Saccameno is $25,000 to $50,000, amounts that are dwarfed by the $3,000,000 punitive damages award.

CONCLUSION

The punitive damages should be reduced to an amount equal to or less than the compensatory damages for the Illinois Consumer Fraud claim.

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Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Circuit Rule 32(c) because it contains 6655 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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I hereby certify that on June 24, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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