No. 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,

Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division, No. 1:15-CV-01164
Honorable Joan B. Gottschall

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its more than 70-year history, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.

AAJ addresses this court with respect to Defendant-Appellant Ocwen Loan Servicing, LLC's ("Ocwen") excessiveness challenge to the jury's punitive damages verdict. In AAJ's view, Ocwen's proposed gloss on the Supreme Court's ratio guidepost is without basis in either precedent or policy.[1]

SUMMARY OF THE ARGUMENT

1. The district court's application of the Supreme Court's Second Due Process guidepost properly found that the jury's award of punitive damages was proportionate to the entire harm the Ocwen's misconduct inflicted on Plaintiff-

[1] All parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), amicus AAJ states that no party's counsel authored this brief in whole or in part and that no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

Appellee Monette Saccameno ("Ms. Saccameno"). The jury found, based on substantial evidence, that Ocwen harassed Ms. Saccameno for more than four years, threatening foreclosure on her home, all based on Ocwen's failure to maintain accurate borrower account and to correct errors.

The jury found that Ocwen's wrongful conduct was a breach of contract as well as a violation of the federal Fair Debt Collection Practices Act and Real Estate Settlement Procedures Act, and awarded a single amount in compensatory damages. The jury also found that Ocwen's misconduct violated the Illinois Consumer Fraud and Deceptive Business Act, warranting a separate award of actual damages and $3 million in punitive damages. The district court rejected Ocwen's contention that the punitive award was unconstitutionally excessive, noting that the ratio between the punitive award and the entire harm to the plaintiff, as reflected in the total of the compensatory and the actual damage awards, was less than 5 to 1. The court explained that the two awards were not for identical harms, but for causes of action that were sufficiently related. They could, therefore, be appropriately aggregated to constitute the denominator for purposes of the ratio guidepost.

On appeal, Ocwen contends that this Court must apply the ratio guidepost on a count-by-count basis and compare the punitive award only to the compensatory harm assessed under the same count. Ocwen cites no Supreme Court authority requiring such a restriction. Indeed, the Supreme Court has repeatedly emphasized

that the ratio guidepost does not impose a mathematical bright line. Instead, due process looks to whether the award of punitive damages is proportionate to the *harm* defendant has caused. Where the compensatory damage award does not fairly measure that harm, the Court has indicated that the reviewing court may look elsewhere. The Supreme Court has, for example, looked to the potential harm not reflected in a small compensatory award. The Supreme Court has also included in the denominator jury assessments that exceeded legislative caps on recoverable compensatory damages and the value of settlements that were not part of the jury's award on any count. The lower court's judgment in this case comports with that guidance.

2. Ocwen's restrictive count-by-count gloss on the ratio guidepost is not supported by decisions of other federal courts of appeals. None of the decisions relied upon by Ocwen expressly addresses this purported constitutional mandate. In fact, nearly all of those decision are applications of the very rule enunciated by the district court below: Those courts excluded compensatory damage awards that were for identical harms or where the causes of action were not sufficiently related or "intertwined."

In addition, although this Court has not squarely addressed this issue, the decisions cited by Ocwen do not support its interpretation of the ratio guidepost.

3. Nor do the policy considerations advanced by Ocwen offer persuasive support of Ocwen's position. First, Ocwen can scarcely argue that the decision below deprived it of fair notice that its misconduct could subject it to substantial punishment. The company had been ordered to improve its borrower account systems under multiple consent decrees. Moreover, advance notice of the exact amount of punitive damages a company might anticipate as a result of its misconduct would undermine the state interest in punishing and deterring wrongful conduct. Punitive damages would simply become a cost of doing business.

Assessing punitive damages in proportion to the entire harm defendant's misconduct has caused, regardless of whether that harm was compensated under different counts, is consistent with the long common-law history recognizing the jury's role in tailoring punitive damages to the severity of the harm in the particular case.

The district court's approach in this case does not violate the separation of powers. No punitive damages were awarded under causes of action for which such damages are unavailable. The district court properly took account of the compensatory awards under those counts to arrive at the full measure of harm defendant inflicted on the plaintiff. Nor is this approach "inequitable." Rather, it fully comports with the Supreme Court's fundamental principle that the most

important indicium of the reasonableness of punitive damages is not a mathematical bright-line ratio, but the reprehensibility of the defendant's conduct.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THE JURY'S PUNITIVE DAMAGE AWARD WAS PROPORTIONATE TO THE ENTIRE HARM CAUSED BY OCWEN'S MISCONDUCT.

A. The Jury Found that Ocwen's Misconduct Rendered It Liable Under Several Causes of Action.

AAJ addresses this court with respect to the jury award for punitive damages in this case. Specifically, AAJ examines the radical gloss on the Supreme Court's ratio guidepost proposed by Defendant-Appellant Ocwen Loan Servicing, LLC ("Ocwen").

As set forth more fully in Plaintiff-Appellee Monette Saccameno's ("Ms. Saccameno") brief, this lawsuit was the endpoint in the saga of mistreatment of Ms. Saccameno by the company servicing the mortgage on her home. For over four years, Ocwen sent numerous letters and oral communications falsely stating that her mortgage was seriously in default, demanding payment in full or renegotiation of the loan, and threatening foreclosure. The company repeatedly failed to halt its harassment, despite Ms. Saccameno's best efforts to provide Ocwen with correct information for its records. *See* Response Brief of Monette E. Saccameno ("Plaintiff Br.") 2-16. She did not give in to the company's pressure, and ultimately filed suit,

pleading several causes of action based on this course of misconduct. *See Saccameno v. Ocwen Loan Servicing, LLC*, 372 F. Supp. 3d 609, 622 (N.D. Ill. 2019).

The jury found Ocwen liable on all counts, including breach of contract (Count I), violation of the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (Count II), and violation of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* (Count IV). *Saccameno*, 372 F. Supp. 3d at 622-23. The jury awarded compensatory damages in the amount of $500,000. In addition, the jury also found Ocwen's misconduct violated the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 810 ILCS 505/1 *et seq.* (Count III). On that count, the jury awarded $3 million in punitive damages and $82,000 in actual damages, including pecuniary and nonpecuniary harm. *Id.* at 623, 642.

B. The District Court Properly Found that the Punitive Damage Award Under One Count Was Not Unconstitutionally Disproportionate to the Harm Suffered by Plaintiff, As Reflected In the Total Compensatory Damage Awards Under Multiple Related Counts.

The district court denied Ocwen's Rule 59(e) motion to amend the judgment, concluding after careful analysis that the amount of punitive damages awarded was well within due process limits. *Saccameno*, 372 F. Supp. 3d at 662-63. The district court assessed the award using the three guideposts prescribed by the Supreme Court:

> (1) [T]he 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

Id. at 656 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003)). *See also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). With regard to the second guidepost, the district court noted that the jury made one award of compensatory damages under Counts I, II, and IV, and a separate award of actual damages under Count III. *Saccameno*, 372 F. Supp. 3d at 657-58.

To be clear, the problem faced by the district court does not occur in all, or even in most, punitive damage cases. A plaintiff may plead and prove the same wrongful conduct and the same harm under multiple counts. For example, in *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), motel guests who were bitten by bedbugs sued the motel chain for negligence. Judge Posner pointed out that the same course of conduct, failure either to warn guests or to eliminate the bedbugs, could have supported several causes of action, including "fraud and probably . . . battery as well." *Id*. at 675. Of course, plaintiffs could still recover only once for a single harm.[2] That was the case here for plaintiff's single compensatory damage award under Counts I, II, and IV.

[2] For that reason, this Court also declined to address the correctness of the dismissal of plaintiffs' additional count alleging violation of the consumer fraud statute: a verdict of liability on that count would not have resulted in additional damages. *Mathias*, 347 F.3d at 674.

Conversely, if a plaintiff seeks separate damages for two completely independent causes of action, the resulting compensatory and punitive damage awards for each count would be assessed separately. Such would be the case if the unhappy motel guests in *Mathias* had also complained to the manager and had been assaulted or falsely arrested for their trouble. A punitive award based on that unrelated misconduct would be appropriately compared to the compensatory damages awarded under that separate count.

In this case, however, the damages under Counts I, II, and IV were identical, allowing a single compensatory award. That harm was not identical to actual damages under Count III, but it was not entirely separate either, being based on the same course of misconduct.

The district court concluded that the more persuasive authorities hold that "compensatory damages may be aggregated under such circumstances, provided that the underlying claims [of misconduct] are sufficiently related." *Saccameno*, 372 F. Supp. 3d at 659. The court relied on *Bains LLC v. Arco Prods. Co.*, 405 F.3d 764, 775-76 (9th Cir. 2005) (combining compensatory awards is appropriate where "[t]he conduct was intertwined"); *Pollard v. E.I. DuPont de Nemours, Inc.*, 412 F.3d 657, 666 (6th Cir. 2005) (combining compensatory damages from a Title VII award of back pay, a separate award after remand from the Supreme Court for front pay that had not been previously available, and an additional separate award of compensatory

damages for intentional infliction of emotional distress; the ratio of punitive damages to the aggregated compensatory damages was approximately 1 to 1); and *Fastenal Co. v. Crawford*, 609 F. Supp. 2d 650, 661 (E.D. Ky. 2009) ("[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.").

In this case, the district court calculated that the ratio between the $3 million punitive damage award and the $582,000 in total compensatory damages awarded for the harm suffered by plaintiff, a ratio of less than 5 to 1, was "not unconstitutionally excessive." *Saccameno*, 372 F. Supp. 3d at 661.

On appeal, Ocwen does not dispute either of the compensatory damage awards. Brief for Defendants-Appellants ("Ocwen Br.") 1 & 53. Significantly, after stating that its handling of Ms. Saccameno's mortgage was improper, Ocwen admits that each of Ms. Saccameno's "claims for breach of contract and violations of the FDCPA, RESPA, and the ICFA . . . was based on the loan-servicing conduct just described." Ocwen Br. 8-9. Thus, Ocwen concedes that its wrongful actions support all the underlying claims. They are, as the district court found, "related" or "intertwined."

Nevertheless, Ocwen boldly asserts that the district court committed a "most obvious" constitutional error in adding the compensatory damages award for Counts I, II, and IV to the actual damage award for Count III to arrive at the denominator

for the ratio guidepost. Ocwen Br. 33. Ocwen proposes instead that this Court examine the verdict form count by count, comparing the punitive damage award under Count III to only the actual damages awarded under Count III, yielding a ratio of about 37:1. Ocwen Br. 34.

Plaintiff suggests that for several reasons this Court need not reach these constitutional issues. Plaintiff Br. 35-38. If the Court does address the proper application of the ratio guidepost in this case, AAJ submits that the district court correctly applied the constitutional parameters drawn by the Supreme Court.

C. The District Court's Approach Follows the Supreme Court's Clear Guidance Regarding Due Process Review of Punitive Damage Awards.

Ocwen contends that the district court's analysis "conflicts with the approach used by the vast majority of courts." Ocwen Br. 15. It does not, as AAJ demonstrates in Part II below. But it is most significant that Ocwen finds no support in any of the Supreme Court's precedents addressing due process limits on punitive damages. The Court has never held that the only compensatory damages relevant to the comparison are those awarded under the same count as the punitive award. In fact, the Supreme Court's decisions strongly suggest that the ratio denominator is not so confined.

At the outset, the Court has repeatedly instructed lower courts not to make a fetish of numerical exactitude in applying the "ratio" guidepost:

> [W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages

> award . . . We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.

State Farm, 538 U.S. at 424-25. *See also BMW*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula."); *Pac. Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."). As this Court has noted, the judicial function here "is to police a range, not a point." *Mathias*, 347 F.3d at 678. Indeed, the Supreme Court has emphasized that that reprehensibility, not some arbitrary mathematical formula, remains the "most important indicium of the reasonableness of a punitive damages award." *State Farm*, 538 U.S. at 419 (citing *BMW*, 517 U.S. at 575).

Secondly, the Supreme Court has instructed that the due process objective of the ratio guideline is not to achieve mechanical precision, but rather to ensure there is reasonable proportionality "between the actual or potential *harm* suffered by the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 418 (emphasis added). This Court has observed that the Supreme Court's standard requires courts to "ensure that the measure of punishment is both reasonable and proportionate to the *amount of harm to the plaintiff and to the general damages recovered*." *E.E.O.C. v. AutoZone, Inc.*, 707 F.3d 824, 839 (7th Cir. 2013) (emphasis added) (citing *State Farm*, 538 U.S. at 426).

The jury's award of compensatory damages is often a fair measure of the harm plaintiff has suffered. But where it is not, a reviewing court may look elsewhere to satisfy itself that the punitive damage award is not disproportional. For example, as the district court below aptly noted, in *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443 (1993), where the plaintiff successfully resisted defendant's fraudulent scheme and so did not suffer a large monetary loss that could be recovered as compensatory damages, the Court looked beyond the compensatory award and took account of the potential harm to the plaintiff, which sharply reduced the ratio. *TXO Prod. Corp.*, 509 U.S. at 460-62 (plurality).

Also instructive is the Court's holding in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), where the Court upheld an award of punitive damages of $79.5 million to the family of a smoker who died of lung cancer. The Court compared the punitive award to the $821,000 in compensatory damages awarded by the jury, not the $500,000 that the court actually entered in judgment, pursuant to Oregon's statutory cap on non-economic damages in wrongful death cases. *Philip Morris*, 549 U.S. at 351. *See also Williams v. Philip Morris Inc.*, 92 P.3d 126, 130 (Or. Ct. App. 2004) (noting that the trial court reduced the amount of noneconomic damages to $500,000 when it entered judgment). Thus, the Supreme Court found no obstacle to increasing the denominator of the ratio to more accurately reflect the plaintiff's

entire harm, even where the legislature has limited the compensatory damages a plaintiff could receive for that harm.

As well, in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) the Court used as the denominator "the District Court's calculation of the *total* relevant compensatory damages at $507.5 million," applying a 1:1 ratio as a matter of general maritime law. *Id.* at 514-15. (emphasis added). As a result, the Court included in that denominator not only the jury award of $287 million in compensatory damages, but also $220 million in claims that had been settled, and for which punitive damages were no longer available. *See In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1059-60 (D. Alaska 2002).

In short, although the Supreme Court has not squarely addressed the appropriate construction of the ratio where there have been compensatory awards under several related counts, its precedents give reviewing courts clear guidance to increase the denominator by looking outside the particular amount that a plaintiff has received in compensation on a particular count.

Despite this, Ocwen asserts that the district court's approach "conflicts with the approach used by the vast majority of courts, and . . . violates principles of fair notice, historical tradition, the separation of powers, and equity." Ocwen Br. 15. In fact, as AAJ discusses in Parts II and III, none of these assertions are even remotely convincing.

II. THE WEIGHT OF AUTHORITY DOES NOT SUPPORT OCWEN'S PROPOSAL TO COMPARE THE PUNITIVE AWARD TO ONLY PART OF THE HARM OCWEN'S MISCONDUCT INFLICTED ON PLAINTIFF.

A. Federal Appeals Court Decisions from Other Circuit Courts Do Not Require Application of the Ratio Guidepost on a Count-By-Count Basis.

As the district court observed, this Court has not squarely addressed the issue presented in this case. *Saccameno*, 372 F. Supp. 3d at 658. Nevertheless, Ocwen contends that "[a]s nearly every court to confront this issue has recognized, the proper approach in these circumstances is to formulate the punitive damages ratio claim by claim, rather than by aggregating compensatory damages across all claims." Ocwen Br. 35. Actually, as the district court also pointed out, almost none of the decisions cited by Ocwen discuss this issue at all. *Saccameno*, 372 F. Supp. 3d at 658-59. Certainly, there is little support for this proposition among the decisions by "multiple" federal courts of appeals. *See* Ocwen Br. 35. In fact, the decisions Ocwen cites are consistent with the district court's view that compensatory damages awarded under separate counts that are sufficiently "related" or "intertwined" is appropriate to best reflect the harm done to the plaintiff.

A good example is Ocwen's lead decision, *JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862 (8th Cir. 2008). *See* Ocwen Br. 35. JCB, a manufacturer of heavy machinery, sold 23 pieces of equipment to Machinery, Inc., on credit, holding a purchase money security interest. Defendant bank also extended a line of credit to

Machinery with a security interest in the equipment. When Machinery went out of business, the bank entered the property without authorization, took possession of the 23 items, and sold them at auction. The jury awarded JCB $1,446,500 in compensatory damages on its claim for conversion, based on the fair market value of the equipment, along with $1,150,000 in punitive damages. On JCB's claim for trespass, the jury awarded only $1 in compensatory damages, because the value of the land had not been diminished, but $1,087,500 in punitive damages. *JCB, Inc.*, 539 F.3d at 869. The Eighth Circuit affirmed that JCB had the senior security interest in the collateral. *Id.* at 871. Addressing the excessiveness of the punitive damage award, the court stated, "[t]respass and conversion protect distinct legal rights," and are "based on separate actions." *Id.* at 874. Moreover, the jury considered punitive damages "separately" for each claim. *Id.* It was therefore "appropriate to consider the individual punitive damage awards separately . . . on appeal." *Id.* at 875.

The Eighth Circuit clearly did not adopt a rule that punitive damages must always be compared only with the compensatory damages awarded on that cause of action. Rather, the decision stands for the proposition that the reviewing court may aggregate the compensatory damages awarded on other causes of action only when those claims are sufficiently related, as JCB's claims were not.

Ocwen next looks to *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70 (1st Cir. 2001). *See* Ocwen 36. Celia Zimmerman, a former credit union employee,

alleged that her supervisor interfered with her employment relationship and that she was fired in retaliation for filing a discrimination complaint based on the supervisor's conduct. The jury awarded $130,000 in compensatory damages on her tortious interference claim and $200,000 compensatory and $400,000 in punitive damages on her retaliation claim. *Zimmerman*, 262 F.3d at 75. Ocwen focuses on a footnote in which the court, in comparing the punitive award to compensatory damages, states that it was "appropriate to construct the ratio by looking only to the count on which punitive damages were awarded (here, the retaliation count)." *Id.* at 82 n.9. The court concluded that the ratio was not excessive regardless of whether the court took into account the compensatory damages awarded under the tortious interference count. *Id.*

The court did not explain the reasoning behind this aspect of its ruling. However, the court did point out that the two "compensatory damage awards may be duplicative," a defect not raised by the parties. *Id.* at 72 n.1. The case appears to be one where the plaintiff was entitled to a single recovery, which would serve as the proper denominator. At the very least, a reviewing court's limitation on the ratio, without explanation and possibly in response to a defect in the verdict form, provides little support for Ocwen's contention that the court's calculation was constitutionally mandated. That the First Circuit has not adopted Ocwen's count-by-count approach is suggested by *Casillas-Díaz v. Palau*, 463 F.3d 77 (1st Cir. 2006), where the jury

found several police officers liable to an arrestee for use of excessive force under § 1983. In applying the ratio guidepost, the court added the compensatory and punitive damages awarded against all defendants, noting that courts in the First Circuit "have *compared the aggregate figures to be received by the plaintiff* rather than the per capita figures to be paid by each defendant." *Palau*, 463 F.3d at 86 n.5 (emphasis added).

Thirdly, Ocwen cites *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140 (2d Cir. 2014), where plaintiff sued his employer and several coworkers, alleging that he was subjected to a hostile work environment and intentional infliction of emotional distress. *See* Ocwen Br. 36. It is true that the court broke down in detail the amounts of compensatory and punitive damages awarded under the two causes of action following plaintiff's agreement to a remittitur. *Turley*, 774 F.3d at 152. However, in applying the ratio guidepost, the court looked to the aggregated damage awards, finding the ratio of 4:1 excessive as a matter of the court's supervisory power, and not addressing the question whether the award was constitutionally permissible. The court ordered a further remittitur to an award with a ratio of 2:1, using the aggregated damages figures. *Id.* at 164-66. Again, the court's analysis matches that of the district court in this case.

Finally, Ocwen seeks support from the Ninth Circuit's decision in *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003). *See* Ocwen Br. 36. Zhang

sued his former employer for employment discrimination based on his Chinese ethnicity under 42 U.S.C. § 1981, and for breach of contract for lost wages wrongfully withheld. In affirming judgment for plaintiff, the court examined "the ratio of the $2.6 million punitive damage award to the $360,000 compensatory damage award." *Zhang*, 339 F.3d at 1044. The court did not explain why its ratio analysis was limited to the discrimination claim. However, the court noted that jury's award for breach of contract consisted of lost wages that were wrongfully withheld, for which plaintiff was entitled to double damages under Washington law and which the jury awarded. *Id.* at 1027. Clearly the court viewed the two claims as completely separate. Indeed, the doubling of wage loss may be viewed as akin to a separate punitive award confirming that the counts are not sufficiently related or intertwined to allow aggregation of the compensatory damages for purposes of the ratio guidepost – precisely the position enunciated by the district court below.

Ocwen also relies on an intermediate state appellate court decision that is similarly inapposite, *Dubey v. Pub. Storage, Inc.*, 918 N.E.2d 265 (Ill. Ct. App. 2009). *See* Ocwen Br 36. The state court jury found defendant storage unit operator liable for wrongfully seizing and disposing of plaintiff's property. The appellate court held that the jury award of $745,000 in punitive damages on her cause of action for conversion was excessive in relation to the $5,000 in compensatory damages on that count, a 149:1 ratio. However, the court upheld an award of $69,145 in

compensatory damages and $207,435 in punitive damages, a 3:1 ratio, on plaintiff's ICFA claim, which was based on defendant's failure to timely notify her of the auction of her property. *Dubey*, 918 N.E.2d at 278, 282-83. The decision lends no support to Ocwen's argument that most courts apply the ratio on a count-by-count basis when there is more than one compensatory award. Although the state court does not undertake an explanation of its ratio analysis, this is clearly an instance where plaintiff's causes of action were not sufficiently "intertwined," but were entirely separate, resulting in separate compensatory and punitive damage awards.

In sum, none of the decisions Ocwen presents as exemplars of its constitutional requirement expressly state the gloss Ocwen would place on the ratio guidepost, and all are distinguishable from this case.

B. This Court's Decisions Do Not Support Ocwen's Count-By-Count Ratio Approach.

Ocwen also suggests that this Court should adopt its count-by-count gloss on the ratio guidepost, based on its decision in *United States ex rel. Pileco, Inc. v. Slurry Systems, Inc.*, 804 F.3d 889 (7th Cir. 2015). *See* Ocwen Br. 37. In that case, the jury awarded $3.4 million in compensatory damages on a breach of contract claim, $1 million in compensatory damages on express and implied warranty claims, and $0 in compensatory damages plus $20 million in punitive damages on an ICFA claim. *Slurry Systems*, 804 F.3d at 891. This Court, focusing on the ICFA count, declared that the "ratio of $20 million to zero" exceeded constitutional limits. *Id.* at 892. But

the gist of this Court's decision is not, as Ocwen argues, that a separate ratio must be constructed for each separate count. Nor did this Court suggest that due process precludes aggregating the compensatory awards. Instead, this Court's analysis reflects its effort to sort out a verdict that was "perplexing" in its inconsistent compensatory awards for breach of a single contract and "absurd[]" in its large award of punitive damages and zero compensatory damages on the consumer fraud claim. *Id.* at 891. The court surmised that the "likeliest reason for the bollixed verdict" was the over-long and too-technical jury instructions devised by the rival lawyers. *Id* at 892. This case is yet another instance where Ocwen seizes upon a reviewing court's careful resolution of a defective verdict form as an implied endorsement of Ocwen's proposed constitutional requirement.

Ocwen also points to *Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729 (7th Cir. 1998), where the jury awarded the plaintiff $1,207.50 in compensatory damages and $9,100 in punitive damages on her Fair Labor Standards Act claims, as well as $1 in compensatory damages and $2,500 in punitive damages on her Title VII claim. *Id.* at 732. Ocwen states that this Court analyzed the plaintiff's claims separately, noting the 2,500:1 ratio on the plaintiff's Title VII claim. Ocwen Br. 37-38. In fact, that was the argument made to the court by the defendant. *Shea*, 152 F.3d at 732. The court's resolution and holding, however, found it appropriate to aggregate the separate compensatory awards. The "jury . . . found the company's

conduct reprehensible to the tune of $2,500. Viewing that amount *as a component of the overall verdict*, [this Court could not] say that it is grossly out of line." *Id.* at 736 (emphasis added).

Indeed, this Court's decision in *Mathias* leans away from Ocwen's count-by-count approach. Applying the third due process guidepost, this Court indicated that "deliberate exposure of hotel guests to the health risks created by insect infestations exposes the hotel's owner to sanctions under Illinois and Chicago law that *in the aggregate* are comparable in severity to the punitive damage award in this case. 347 F.3d at 678.

Clearly, and contrary to Ocwen's primary argument, the district court's application of the ratio guidepost was not in conflict with the "vast majority" of courts.

III. PUBLIC POLICY DOES NOT SUPPORT OCWEN'S COUNT-BY-COUNT APPROACH.

As well, the decision below does not "violate[] principles of fair notice, historical tradition, the separation of powers, and equity." *See* Ocwen Br. 15.

A. The Comparison of Punitive Damages to the Total Harm Suffered by Plaintiff Does Not Violate Principles of Fair Notice.

Ocwen complains that the district court's holding did not give the company fair notice of the severity of the penalty it could face for its mortgage servicing misconduct. *See* Ocwen Br. 38.

At the outset, it is difficult to credit Ocwen's claims that it could not have anticipated a large award of punitive damages for its extensive mistreatment of Ms. Saccameno. As the district court observed, "the many investigations, reports, consent decrees and judgments against Ocwen for related misconduct could not have left it surprised that the jury found a substantial punitive award appropriate." *Saccameno*, 372 F. Supp. 3d at 661. One consent order, for example, was the result of a lawsuit by the federal Consumer Financial Protection Bureau, together with forty-nine states and the District of Columbia, following investigation of Ocwen's mortgage servicing practices. The consent order required Ocwen to "maintain procedures to ensure accuracy and timely updating of borrower's account information," and to "take appropriate action to promptly remediate any inaccuracies." *See Id.* at 643-44.

Ocwen was also subject to a similar consent order imposed by the State of New York, based on failure to maintain accurate borrower account records in violation of state banking law. After repeated violations of that consent order, Ocwen agreed to pay a $100 million civil penalty and $50 million in restitution to New York borrowers. *Id.* at 644.

Indeed, the State of Illinois placed Ocwen's license to do business in the state on probation for its mortgage servicing practices, noting complaints by Illinois residents "that Ocwen's servicing records contain incorrect information and

payment discrepancies." *In the Matter of: Ocwen Loan Servicing, LLC*, No. 2017-MBR-CD-01, 2017 WL 2258261, at ¶19 (Ill. Dept. Fin. & Prof. Reg. April 20, 2017). Ocwen was clearly on notice that its procedures systematically failed to maintain accurate borrower records and resisted efforts to correct errors, subjecting the company to substantial penalties.[3]

Ocwen's insistence upon notice of the precise amount of punitive damages it could face would undermine the very state interests that such awards serve. A company that can predict the cost of reprehensible (but potentially profitable) misconduct can simply build that cost into the price of its goods or services. Punitive damages would cease to be either a punishment for misconduct or a deterrent. It would become instead a license "to commit the offensive act with impunity provided that he was willing to pay." *Mathias*, 347 F.3d at 677.

B. The Comparison of Punitive Damages to the Total Harm Suffered by Plaintiff Does Not Violate Historical Tradition.

Ocwen cites the Supreme Court's observation in *BMW* that criminal statutes imposing fines measured in low multiples of the harm inflicted by the statutory violation have a "long pedigree." Ocwen Br. 39 (quoting *BMW*, 517 U.S. at 580).

[3] Among the punitive awards against Ocwen for similar misconduct is *Daugherty v. Ocwen Loan Servicing, LLC*, 701 F. App'x 246 (4th Cir. 2017), in which the court held that $600,000 in punitive damages was not constitutionally excessive for repeatedly failing to correct false information regarding plaintiff's mortgage account, where the violation was not willful and compensatory damages were only $ 6,128, allowing a 98:1 ratio. *Id.* at 259-62.

However, punitive damage awards are not prospective fines for specified misconduct; they are tailored to fit the reprehensibility of the harmful misconduct. The notion that the jury has broad discretion in arriving at the appropriate award also has deep historical roots. The Supreme Court has noted that "[t]he modern Anglo–American doctrine of punitive damages dates back at least to 1763. *Exxon Shipping Co. v. Baker*, 554 U.S. at 490 (citing *Wilkes v. Wood*, Lofft 1, 18, 98 Eng. Rep. 489, 498 (1763), and *Huckle v. Money*, 2 Wils. 205, 206–207, 95 Eng. Rep. 768, 768–769 (K.B.1763)). As the Court also noted, these "punitive damages were a common law innovation *untethered to strict numerical multipliers*. *Id.* at 491 (emphasis added).

Ocwen's insistence that punitive damages be limited to a rigid, mechanical application of the ratio guidepost directly conflicts with the Supreme Court's instruction that "[t]he precise [punitive damage] award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425.

C. The Comparison of Punitive Damages to the Total Harm Suffered by Plaintiff Does Not Violate Separation of Powers.

Ocwen complains that to include in the denominator compensatory damages awarded under counts that do not permit punitive damages would counter the intent of Congress or of state lawmakers that punitive damages should not be awarded for those causes of action. Ocwen Br. 39-40.

The short and complete answer is that the court in applying the ratio guidepost is not awarding punitive damages, nor increasing the jury's award. The district court in this case examined the amount of the jury's punitive award for violation of the ICFA, for which the legislature has authorized such damages, to ensure the award was proportionate to the harm that violation caused to the plaintiff. The fact that the harm can be measured by the compensatory award under other counts does not offend separation of powers.[4]

D. The Comparison of Punitive Damages to the Total Harm Suffered by Plaintiff Does Not Violate Principles of "Equity."

Ocwen complains that the district court's approach is "inequitable" because the court applied it "in a one-sided, anti-defendant fashion." Ocwen Br. 40.

There can be no inequity in eschewing a rigid mathematical limit on punitive damages in favor of a comparison of the punitive award with the full amount of harm that defendant's wrongdoing inflicted on the plaintiff. The fundamental precept guiding excessiveness review is that that "[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the

[4] Although Justice Scalia in *BMW* disagreed that the Due Process Clause limits punitive awards, he was clear on this point: "[I]f a person has been held subject to punishment because he committed an *un*lawful act, the *degree* of his punishment assuredly *can* be increased on the basis of any other conduct of his that displays his wickedness, unlawful or not." 517 U.S. at 603 (Scalia, J., dissenting) (emphasis in original).

defendant's conduct." *State Farm*, 538 U.S. at 419 (quoting *BMW*, 517 U.S. at 575). The reprehensibility of Ocwen's misconduct in this case, detailed in Plaintiff Ms. Saccameno's brief, fully supports the jury's award of punitive damages and the district court's finding that the award falls within the Supreme Court's due process guidelines.

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to affirm the judgment of the district court.

Respectfully submitted,

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Date: July 24, 2019

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,186 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type style.

Date: July 24, 2019

/s/ Jeffrey R. White
JEFFREY R. WHITE

CERTIFICATE OF SERVICE

I, Jeffrey R. White, counsel for amicus curiae, certify that on July 24, 2019, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

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