No. 18-403

In the Supreme Court of the United States

BRUCE SHEAR,

Petitioner,

v.

MAZ PARTNERS, LP, on behalf of itself and all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION FOR BEHAVIORAL HEALTHCARE IN SUPPORT OF PETITIONER

Philip S. Goldberg
Counsel of Record
Andrew J. Trask
SHOOK, HARDY & BACON L.L.P.
1155 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 783-8400

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INTEREST OF *AMICUS CURIAE*[1]

The National Association for Behavioral Healthcare (NABH) represents provider systems committed to the delivery of responsive, accountable, and clinically effective prevention and treatment of those with mental or substance use disorders. NABH has a substantial interest in ensuring that its members are subject to liability based on established law and legal principles. NABH is concerned that allowing a court to effectively disregard a jury's finding that plaintiffs have sustained no compensable harm will infringe on its members' rights to fair trials under the Seventh Amendment of the Constitution. The result could be unprincipled liability that is subjective and punitive in nature, and not in accordance with settled law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Court is once again needed to provide restraints on the authority of Federal Judges in the absence of statutes and rules. Last year, the Court provided boundaries on a District Court's inherent authority when issuing sanction awards; a federal judge had sanctioned a party for far more than harm caused by its misconduct. *See Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017). Here, the Court should grant the Petition because the same

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[1] The parties received timely notice of *amicus*'s intent to file the brief have consented to its filing. Petitioners consented without reservation, and Respondents stated, "We consent, without waiving any of our rights." Also, this brief was not authored in whole or in part by counsel for any party and no person or entity, other than *amicus*, its members, or their counsel made a monetary contribution to fund its preparation or submission.

guidance is needed to restrain Federal Judges who use their equitable powers to create awards unmoored by injury and causation. The equitable powers doctrine cannot be, as the First Circuit suggests, a free pass for untethered judicial activism.

Here, Plaintiffs alleged a violation of fiduciary duty and requested a jury trial to determine liability. The jury found Petitioner's alleged breach of fiduciary duty resulted in no harm to Plaintiffs. The District Court entered judgment on that verdict, but invoking its equitable powers, ordered Petitioner to nevertheless disgorge nearly $3 million from the transaction at issue and give it to the class. This award was more than double the damages Plaintiffs sought. Plaintiffs, though, had not requested equitable disgorgement in its complaint and, because they sustained no damages, had no basis for any such restitution. Thus, the disgorgement award was a windfall to which they were not due, in law or equity.

The Petition presents numerous issues requiring the Court's attention. First, individuals who are wholly uninjured should have no right to a windfall award merely because the judge determines there is a breach of a duty in equity. Second, a judge should not be allowed to affirm a jury's defense verdict, but still award Plaintiffs a substantial award on its own without running afoul of Petitioner's Seventh Amendment Rights. Third, the equitable powers doctrine cannot provide the type of unfettered authority usurped by the District Court. Judges should not be allowed to give Plaintiffs two bites at the same apple in the name of the equitable powers doctrine.

NABH respectfully urges the Court to grant the Petition. As in *Goodyear*, sound principles are clear-

ly needed to guard against District Courts from overstepping their authority.

ARGUMENT

I. The Court Should Grant Review to Curtail Awards to Uninjured Plaintiffs.

It is undisputed that, based on the jury's determinations, neither the named Plaintiff nor the class was injured by Petitioner's alleged misconduct. This Court has been clear that such individuals who have not sustained injury, and where no injury is imminent, have no right to recover. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). Without any injury-in-fact, they do not have Article III standing and cannot bring a class action on behalf of similarly situated individuals. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). Requiring measurable injury provides the necessary nexus between the gravamen of the lawsuit and liability, regardless of whether a claim sounds in law or equity.

A. This Case Demonstrates Legal and Practical Problems with Windfall Awards to Uninjured Plaintiffs.

The lower courts' rulings demonstrate that injury-in-fact provides the objective principles needed for establishing how much someone should be liable for and to whom. As a basis to justify disgorgement, the trial court asserted its belief that the payment to Petitioner for his Class B shares was "unfairly high." App. at 60a. "Unfairly high" is a subjective, relative statement. The payment Petitioner received must be "too high" compared to some objective standard.

Here, without the guidance of actual harm, the District Court used its own subjective calculation for

determining its disgorgement award. It cited Plaintiffs' expert's testimony that a premium of $1.82 million might have been defensible. *See* App. at 62a. It then subtracted that "defensible" premium from the total premium of $5 million, yielding a disgorgement award of $3.18 million of which Petitioner's share was $2.96 million. This award was more than double the $1.4 million in monetary damages Plaintiff could have been awarded. *See* Pet. Br. at 2-3. In other words, the trial court's disgorgement order, which was based on its intuition that the premium Petitioner received was "unfairly high," bore no rational relation to any harm he allegedly caused. *See Comcast v. Behrend*, 133 S. Ct. 1426, 1433 (2013) ("[I]f [Plaintiffs] prevail on their claims, they would be entitled only to damages resulting from . . . [the theory] accepted for class-action treatment"). The irony here is inescapable. Plaintiffs likely benefited from the defense verdict; had Plaintiffs won at trial, the court may not have felt the need to order disgorgement.

This huge discrepancy between the disgorgement award and jury's finding of no damages should have been a caution flag. The First Circuit, though, defended the award, asserting that because the remedy sounds in equity there were no limits on awarding damages to uninjured parties. But, the cases the First Circuit cited to support this argument did not include uninjured claimants. In *Hendry v. Pelland*, 73 F.3d 397 (D.C. Cir. 1996), although the plaintiffs did not receive an award for their harms, the award was based on "the decreased value" of the defendants' legal services for which they paid in full. In *Sagalyn v. Meekins Packard and Wheat Co.*, 195 N.E. 769 (Mass. 1935), the court required defendants to refund excess salary to the corporation that paid

them. *See also Chelsea Indus. Inc. v. Gaffney*, 449 N.E.2d 320 (Mass. 1983) (similar restoration of compensation to the company who paid them).

In none of these cases did a court issue an award to uninjured third parties. They used their equitable powers to award restitution to the entities who suffered actual injury. Here, the District Court and First Circuit concede this award was a "windfall" to Plaintiffs. *See* App. at 34a, 62a. They merely suggested that in equity, it was irrelevant whether Plaintiffs have been harmed. As this case clearly demonstrates, when a plaintiff has suffered no harm, there is no objective standard for measuring liability. Indeed, such lack of objective standards for who can receive how much in liability frequently confounds courts when faced with no-injury cases.

B. The Court Should Provide Guidance to Lower Courts Acting in Equity to Ground Liability in Sound Legal Principles.

The Court has regularly looked to causation to create the proper nexus between the alleged misconduct and any judicial award. *See Goodyear,* 137 S. Ct. at 1186 ("Compensation for a wrong, after all, tracks the loss resulting from that wrong."). Last year in *Goodyear*, the Court reinforced that a judge's inherent authority to sanction a recalcitrant litigant is similarly cabined by causation. It should grant the Petition to provide the same guidance here. When a court is acting under its equitable powers, just as with inherent authority, liability must be restrained by a causal connection to a plaintiff's loss.

Causation has proven to be the bedrock element for determining the availability and size of a liability

award. There must be a "reasonable connection between the act or omission of the defendant and the" award to the plaintiff(s). W. Page Keeton *et al.*, *Prosser & Keeton on Torts* § 41, 263 (5th ed. 1984); Fowler V. Harper *et al.*, *The Law of Torts* § 20.2 (1986) (The "common thread" for proximate cause is that "defendant's wrongful conduct must be a cause in fact of plaintiff's injury."). Accordingly, the Court has applied causation principles for establishing liability across a wide-range of substantive areas of law. *See*, *e.g.*, *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 807 (2011) ("[I]nvestors must demonstrate that the defendant's deceptive conduct caused their claimed economic loss."); *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 443-44 (1997) (declining to recognize claim for medical monitoring under Federal Employers' Liability Act where employer did not cause a physical injury); *Heck v. Humphrey*, 512 U.S. 477, 487 n.7 (1994) ("plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury").

The disgorgement order at bar should be treated no differently. In equity, disgorgement is "a remedy only for restitution" and, accordingly, is "limited to restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant." *Tull v. United States,* 481 U.S. 412, 424 (1987) (quoting *Porter v. Warner Holding Co.,* 328 U.S. 395, 402 (1946)); *see also Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002) (finding equitable restitution is limited to "the return of identifiable funds (or property) belonging to the plaintiff and held by the defendant"). As the cases above demonstrate, with restitution, the defendants are alleged to have wrongfully caused the plaintiffs

to spend money for products or services not properly received. Thus, causation provides a clear, fair, and predictable standard for tailoring liability to the impact of the alleged misconduct, including in equity.

By contrast, removing causation from liability creates an anchorless ship. Here, the jury found Petitioner did not receive any money at the expense of the class, meaning Petitioner did not *cause* Plaintiffs any loss—in law or equity. There was nothing for him to return to them. Without this barometer there is no clear means for determining whether the judge's award crosses the line into improper punishment. "To level that kind of separate penalty, a court would need to provide procedural guarantees applicable in criminal cases, such as a 'beyond a reasonable doubt' standard of proof." *Goodyear*, 137 S. Ct. at 1186; *see also Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (explaining that awards inflated by punishment raise the "acute danger of arbitrary deprivation of property").

That concern is not merely abstract. Here, the First Circuit invoked societal punishment as a primary reason for upholding the disgorgement award. It stated that disgorgement "serves a valid societal purpose regardless of whether the innocent shareholders have been injured by his misconduct." App. at 30a. Thus, this disgorgement order looks more like a modern civil penalty than traditional restitution remedies this Court has approved in the past.

Allegations related to fiduciary duties, merely because they sound in equity, must not be immune from constitutional and judicial restraints. If such safeguards are afforded to parties found to have litigated in bad faith or engaged in such egregious mis-

conduct as to warrant punitive damages, they should apply those defending allegations in equity.

C. Allowing This Award Will Fuel Other Attempts at "No-injury" Class Actions.

Litigation disconnected from causation and injury focuses solely on duty and breach, which is not sufficient to generate liability. The approval of such truncated causes of actions will encourage entrepreneurial lawyers to chase large payouts without the constraints of injured clients. *See* John Coffee, *Entrepreneurial Litigation: Its Rise, Fall, and Future* 15 (Harvard Univ. Press 2015) (calling "each step" of development of entrepreneurial class action litigation "controversial and scandal plagued"); *see also Eubank v. Pella Corp.,* 753 F.3d 718 (7th Cir. 2014) (reversing class settlement for unmanifested defect because of various improprieties by plaintiffs' counsel); *In re Mentor Corp. Obtape Transobturator Sling Prods.,* MDL Docket No. 2004, 2016 U.S. Dist. LEXIS 121608, *7-8 (M.D. Ga. Sep. 7, 2016) (noting incentives for lawyers to file cases "of marginal merit in federal court").

Lawyers bringing these lawsuits, particularly under Rule 23, may suggest they are acting to advance societal goals to hold wrongdoers accountable. However, they are not law enforcement officers, but private attorneys seeking cases based on ease of litigation and potential payout. *See, e.g.,* John Beisner, *et al.*, *Class Action Cops: Public Servants or Private Entrepreneurs?,* 57 STAN. L. REV. 1441, 1443 (2005); Coffee, *supra*, at 15 (noting private attorneys "seldom constrained by the same principles of prosecutorial discretion that guide public enforcers"). Also, as indicated, punishment alone is not a viable rationale

for private litigation, in law or equity. These claims typically involve attempts to leverage a violation of federal or state statute or regulation, or a recall or other trigger event, for liability. *See generally* Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation: Where Should Tort Law Draw the Line?*, 80 BROOK. L. REV. 599 (2015). By focusing on the alleged misconduct, they hope to skew the fact that the class was not harmed by the alleged violation and leverage media to drive liability awards.

Here, the large award to Plaintiffs (and their attorneys) *despite* a dispositive jury finding of no injury creates the conditions that encourage entrepreneurial lawsuits. Compounding the matter is that here, there are no statutes or regulations to guide the courts. The arbitrariness of this disgorgement award to uninjured claimants undermines the public's trust in the courts. The First Circuit's attempt to distinguish these cases from the one at bar based on the fiduciary nature of the claims—claim in equity, not law—warrant this Court's attention. This distinction should not drive these results.

II. The Lower Courts' Findings Justifying the Post-Trial "No-Injury" Award Raise Serious Seventh Amendment Concerns.

Granting the Petition can also ensure that a District Court cannot, under the guise of its equitable powers, effectively overturn the decisions of a jury. Plaintiffs are entitled to bring legal and equitable claims in the same action, but a court cannot ignore the prohibitions of the Seventh Amendment against revisiting jury findings. *See In re Evangelist*, 760 F.2d 27 (1st Cir. 1985) (Breyer, J.) (stating the jury can "decide common issues of fact" between the two

sets of claims). "[N]o fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law." U.S. Const. amend. VII.

Here, the District Court premised its disgorgement order on two grounds: it found that the payment to Petitioner in the merger was (a) "to the *detriment* of the disinterested shareholders," and (b) "unfairly high." App. at 60a (emphasis added). Each assessment indicates the trial court re-examined facts the jury had conclusively decided. With respect to the first finding, "detriment" is an "injury, damage," or "a cause of injury or damage." "Detriment," Merriam-Webster.com.[2] The trial court's determination that the premium paid to Respondent was a "detriment" to shareholders, therefore, improperly encroaches on the jury's specific finding of no harm.

Second, in order to find that a payment to one class of shareholders (Petitioner) was "unfairly high" to another class (Plaintiffs), the trial court would have to find that the payment to the complaining class was unfairly low such that it was deprived of money it should have received. Again, the jury determined that Plaintiffs were not deprived any economic gain and that funds Petitioner received did not come at the Plaintiffs' expense. This finding, therefore, violates the Seventh Amendment.

Further, if the judge issued the post-trial disgorgement order under the belief the jury award of no damages was too low, the disgorgement order violates the Court's longstanding jurisprudence against

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[2] https://www.merriam-webster.com/dictionary/detriment

additur. *See Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("[W]here the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict."). "Where the verdict returned by a jury is palpably and grossly inadequate or excessive," courts can require a retrial of both liability and damages. *Id*. As the Court recognized in *Dimick*, "As a matter of constitutional law, a party must not be compelled to forego its "right to the verdict of a jury and accept an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess." *Id*. at 487. Court must not be allowed to circumvent this jurisprudence merely by ordering a post-trial award in equity.

The Seventh Amendment was specifically enacted to provide a check on such judicial intrusions on jury findings. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment,* 57 MINN. L. REV. 639, 659 (1973) (explaining that using juries were suggested during the Constitutional Convention in order to restrain the power of judges). The founders appreciated that judicial power, particularly the court's equitable power, requires constraint. A critic of the Constitution's inclusion of equity foresaw this predicament, arguing it was "a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate." Federal Farmer No. 3 (10 October 1787) in Herbert J. Storing (ed.), The Complete Anti-Federalist vol. 2 at 234 (1981).

Allowing this equitable award to stand would condone ignoring and, as a practical matter, reversing a properly-empaneled jury's findings of fact. A court's ruling in equity cannot violate the integrity of jury determinations. The Court should grant the Petition to establish clear guidelines for judges who assert equitable powers after a jury verdict.

III. Lower Courts Require Defined Boundaries for Equitable Powers.

Finally, the Court should grant the Petition to provide boundaries for judicial authority under the equitable powers doctrine. Here, the First Circuit asserted that a District Court has "wide" and "protean" equitable powers. App. at 28a. Neither the Constitution nor this Court has conveyed such unbounded authority to the courts.

The use of equitable powers in American law is constrained to those powers available in courts of chancery at the time the United States courts split from British courts—commonly understood to be 1791. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 318 (1999). The reason for this historical test is that the American legal system has recognized that equitable remedies are extraordinary. *See* Samuel Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1037 (2015) ("American courts and commentators have also frequently characterized equitable remedies as extraordinary or exceptional."). "Exceptional" in this usage, though, does not mean statistically rare or that the powers are unbounded. They still must be constrained by traditional legal concepts. *See Grupo Mexicano*, 527 U.S. at 318 (rejecting an

"expansive view of equity"). A judge cannot craft, as here, the equivalent of a "nuclear weapon." *Id.*

For example, it has long been black letter law that equitable remedies are not permitted to be punitive. *See Livingston v. Woodworth,* 56 U.S. (15 How.) 546, 559 (1853) ("We are aware of no rule which converts a court of equity into an instrument for the punishment of simple torts …"). As a result, ordering "disgorgement" for deterrent purposes is an exercise of a court's legal—not *equitable*—powers. *See Tull*, 481 U.S. at 422-23 (punitive monetary relief only enforceable by court of law as opposed to equity). As discussed above, the First Circuit defended disgorgement here as a deterrent and to achieve societal law enforcement goals. Such an explanation demonstrates why the disgorgement order here was not a proper use of equitable powers.

This constraint on the equitable discretion of a single judge is a vital component of the rule of law in the American legal system. As the Court observed in *Grupo Mexicano*, allowing unbounded equity powers would place the rights of the community under the "arbitrary will" of a single judge. 527 U.S. at 332 (quoting Joseph Story, 1 Commentaries on Equity Jurisprudence § 19, at 21 (1836)). While federal judges are rigorously evaluated and conscientiously trained, they remain human beings, subject to the same cognitive limitations as we all are. *See* Chris Guthrie, et al., *Blinking on the Bench: How Judges Decide Cases,* 93 CORNELL L. REV. 101, 117 (2007) (noting, after survey testing judges' problem-solving approaches, that "these results suggest that judges tended to favor intuitive rather than deliberative faculties"). That the judge might have a well-

developed conscience would not reduce the despotic power he or she would hold.

The Court's justices have expressed similar concerns with unbounded inherent authority power to sanction recalcitrant litigants. *See Mine Workers v. Bagwell*, 512 U.S. 821, 840 (1994) (Scalia, J., concurring) ("That one and the same person would be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers."); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 70 (1991) (Kennedy, J., dissenting) (similarly cautioning against giving judges authority "without specific definitional or procedural limits"). The Court has appreciated that such unbounded authority in a single judge could be subject to party gamesmanship. Litigants know that "[c]ontumacy often strikes at the most vulnerable and human qualities of a judge's temperament." *Bagwell*, 512 U.S. at 831. "[E]ven the best-tempered judges can lose their impartiality." Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 765 (2001). Whether judicial discretion is derived from inherent authority or equitable powers, safeguards are need to ensure that liability is not decided by a judge's subjective view of a case or litigant.

Windfall awards, whether through inherent authority sanctions or equitable powers of the court, should not overtake longstanding principles of liability to create funds for attorneys and their clients. Liability must remain principled, and federal courts must not foster standardless legal environments. Requiring plaintiffs to have sustained concrete injuries and that any disgorgement award be tied causal-

ly to economic losses may not prevent all avenues for abuse of a court's equitable powers, but they provide important checks on a judge's authority and can reduce the incentives for litigants to provoke the ire of the judge against their opponents. Given the results here, it is clear that further guidance on the limits of a court's equity powers is needed.

CONCLUSION

For the reasons stated above, NABH respectfully urges the Court to grant the Petition.

Respectfully submitted,

Philip S. Goldberg
Counsel of Record
Andrew J. Trask
SHOOK, HARDY & BACON L.L.P.
1155 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 783-8400

Counsel for Amicus Curiae

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