

Nos. 06-11311-DD, 06-11312-DD

**United States Court of Appeals
For the Eleventh Circuit**

ACTION MARINE, INC. et al.,
Plaintiffs-Appellees,

v.

CONTINENTAL CARBON INC. et al.,
Defendants-Appellants.

Appeal from the United States District Court for the
Middle District of Alabama, Eastern Division, C.A. No. 3:01-CV-994-MEF
Hon. Mark E. Fuller, Chief United States District Judge

**BRIEF OF DEFENDANTS-APPELLANTS CONTINENTAL CARBON
COMPANY AND CHINA SYNTHETIC RUBBER CORPORATION**

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Set forth below is a list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of a party's stock, and other identifiable legal entities related to a party, to the best of my knowledge:

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15. The City of Columbus, Georgia
16. Continental Carbon Company
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Dated: May 30, 2006

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellants respectfully request that the Court hear oral argument in this matter. Argument is warranted for four reasons. First, the jury returned a general verdict, finding Defendants liable under several different causes of action, often involving different elements and mental states. The parties' familiarity with the record should aid the Court in resolving any questions it may have about those issues. Second, the validity of the compensatory awards turns on the resolution of various scientific issues, which the parties' familiarity with the underlying methodology and the record should facilitate. Third, the sheer magnitude of the judgment—over \$20,000,000, including \$17,500,000 in punitive damages—makes the case worthy of oral argument. Finally, the case presents an excellent opportunity to provide trial courts with guidance regarding such important recurring issues as the application of the Georgia punitive damages cap and the implementation of the constitutional limitations on punitive damages articulated by the Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003).

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1332. On January 31, 2005, it entered final judgment under FED. R. CIV. P. 54(b) on the claims submitted to the jury. Defendants timely filed a notice of appeal from this judgment on February 21, 2006—within 30 days of the district court’s January 23, 2006 order denying Defendants’ post-trial motions. This Court has jurisdiction under 28 U.S.C. § 1291. *See* Order of May 24, 2006.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs failed to adduce sufficient evidence to establish the risk-of-physical-harm element of their wantonness claim, the state-of-mind element of their wantonness and trespass claims, the causation element of all of their claims, and the “substantial damage” element of their trespass and nuisance claims.

2. Whether Plaintiff Action Marine’s damages must be reduced to eliminate recovery for ordinary business debts that were not caused by Defendants’ torts; Plaintiff Tharpe’s damages must be eliminated entirely because they are purely derivative of the damage to his company, Action Marine; Plaintiff City of Columbus’s damages must be reduced to eliminate recovery for properties that did not test positive for carbon black; and all Plaintiffs’ damages must be reduced to

eliminate recovery for damage caused by dark particulate matter not produced by Defendants.

3. Whether Plaintiffs failed to adduce clear and convincing evidence that Defendants demonstrated the quasi-criminal mental state necessary to support an award of punitive damages.

4. Whether Plaintiffs failed to adduce sufficient evidence that Defendants harbored the specific intent to cause harm to them, as necessary to support an award of punitive damages in excess of \$250,000 per Plaintiff.

5. Whether the \$17,500,000 punitive award is unconstitutionally excessive.

STATEMENT OF THE CASE

In this case, Plaintiffs alleged that carbon black escaped Defendants' manufacturing plant and was carried by wind currents onto their properties, causing discoloration to those properties. Plaintiffs sued Defendants solely for property damage; there are no claims of physical injury. The jury returned a general verdict finding Defendants liable for negligence, nuisance, trespass, and/or wantonness and awarded Plaintiffs \$1,915,000 in compensatory damages, \$17,500,000 in punitive damages, and \$1,294,000 in attorneys' fees.

A. Statement Of Facts

Plaintiffs are a boat dealership, Action Marine, Inc.; its owner John Tharpe; the City of Columbus, Georgia; and city resident Owen Ditchfield. Dkt. 34. Defendants are Continental Carbon Company (“CCC”), a Delaware corporation headquartered in Texas, and China Synthetic Rubber Corporation (“CSRC”), a Taiwanese corporation that owns part of the stock of CCC’s parent company. R207.

CCC owns a plant in Phenix City, Alabama that manufactures carbon black. R52, 534. Carbon black is a highly engineered product manufactured by heating feedstock oil to a high temperature in a low-oxygen reactor. R218-19. The resulting product is smoke that includes both carbon black and waste gases. R84. The carbon black is separated from the gases, processed, and formed into small pellets for ease of handling and shipment. R217, 226. CCC sells carbon black for use in making tires, rubber and plastic items, inks, and other useful products. Dkt. 38, at 3.

The plant has two production units: Unit 1 (the original plant) and Unit 2 (opened in 1999). R224. During the construction of Unit 2, CCC worked with the Alabama Department of Environmental Management to identify and install the best available pollution-control technology for both units. R221-22, 347, 563. For example, each unit has several “bagfilters”—large compartments containing

several hundred bags each that collect the carbon black after it is produced. R217, 221, 559-60. A thermal oxidizer incinerates any particulate matter not captured by the bagfilters (including carbon black) at 1700 degrees Fahrenheit. R221, 332, 343. The gas stream that comes out of the thermal oxidizer is then vented through a stack containing Triboguards, which are electronic probes that detect any solid particles in the stream and sound an alarm so that plant employees can investigate. R223, 345-46, 350.

Because some particles will escape from even the best available system, CCC has a permit to emit 120 tons per year of particulate matter, including carbon black. R327-28, 937-38. According to Plaintiffs, carbon black escaped the plant because Unit 1 had developed leaks and needed to be replaced (R167-68, 372, 425, 497, 1335, 1340), while Unit 2 had insufficient bagfilter capacity, causing premature bag failure (R71-75, 367-68).

Plaintiffs' properties are in Columbus, Georgia, across the Chattahoochee River from Defendants' plant. R1221. Plaintiffs periodically find black spots or black dust on their properties. R647, 656, 1049, 1051, 1177-78. John Tharpe testified that his corporation, Action Marine, lost potential customers because of black material and that he worried about losing his business. R1052-53, 1062-63. Representatives of the City testified that the spots blackened the roof of the Civic Center and caused black streaking at nearby city facilities. R1010-11, 1224, 1230-

32. Owen Ditchfield testified that the material dirtied the paint on his houses and the finish on his vehicles. R1188-90.

When experts analyzed samples taken from these properties, however, they found no carbon black on several of the City's properties. *See* p. 17 n.2, *infra*. Only tiny amounts of carbon black were present on Plaintiffs' other properties except one of Action Marine's boats, which contained a more substantial amount. R1786-89, 1802-03, 1817, 1825, 1863-64; DX162. Microscopic examination revealed that other dark particles such as mold spores and pollen—not carbon black—had discolored those properties. R1782, 1792.

B. Proceedings Below

Action Marine and Tharpe sued CCC, CSRC, and three other parties in the U.S. District Court for the Middle District of Alabama, pleading eight causes of action under Georgia law. Dkt. 1. The City and Ditchfield subsequently joined as additional plaintiffs. The court later granted Defendants partial summary judgment, dismissing some claims against CCC and CSRC and all claims against the three other parties. Dkt. 175.

In August 2004, Plaintiffs went to trial against CCC and CSRC on their claims for negligence, nuisance, trespass, and wantonness. Defendants moved for judgment as a matter of law (“JMOL”) at the close of Plaintiffs' case and at the close of the evidence. R1498, 1875. The district court denied the motions except

as to Ditchfield's claim of nuisance regarding his rental house, which Plaintiffs agreed should be dismissed. R1510, 1527-28, 1876.

The jury returned a general verdict finding both Defendants liable to all Plaintiffs. It awarded \$1,915,000 in compensatory damages—\$1,200,000 in lost business value to Action Marine; \$100,000 for emotional distress to Tharpe; \$45,000 in remediation costs to Ditchfield; and \$570,000 in remediation costs to the City. Finding that Defendants had acted in bad faith, the jury also awarded Plaintiffs \$1,294,000 in attorneys' fees. Finally, the jury found Defendants liable for punitive damages, found that they had acted with a specific intent to harm Plaintiffs (as required to lift Georgia's statutory punitive damages cap), and awarded Plaintiffs \$17,500,000 in punitive damages. Dkt. 216-17. The district court entered judgment for Plaintiffs on the verdict. Dkt. 241. On January 23, 2006, the court denied Defendants' timely-filed post-trial motions. Dkt. 323.

After the trial, the district court concluded that Plaintiffs were entitled to injunctive relief. Dkt. 239. It eventually entered an agreed permanent injunction that required Defendants to demolish and replace substantial parts of CCC's plant. Dkt. 295. That injunction is not at issue in this appeal.

Plaintiffs also filed a post-trial motion to supplement the record with documents that they alleged had been improperly withheld during discovery. Dkt. 293. The district court denied the motion. Dkt. 306. Plaintiffs also moved to

sanction Defendants for withholding the documents. Dkt. 308. In response, Defendants explained that Plaintiffs had not established that the documents were embraced within the scope of their discovery requests. Dkt. 314. The sanctions motion remains pending and likewise is not at issue in this appeal. The documents that are the subject of these motions accordingly are not part of the record on appeal. Dkt. 306, at 2.

C. Standard Of Review

This Court reviews the district court's denial of Defendants' motion for JMOL *de novo*, applying the same standard as the district court. *Montgomery v. Noga*, 168 F.3d 1282, 1289 (11th Cir. 1999). When "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the non-movant] on [a given] issue," JMOL should be granted. *Wood v. Green*, 323 F.3d 1309, 1312 (11th Cir. 2003). It will be denied only if "substantial evidence is presented opposed to the motion, and this evidence is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." *Walker v. NationsBank N.A.*, 53 F.3d 1548, 1555 (11th Cir. 1995).

In reviewing the district court's refusal to reduce the compensatory damages, this Court "must independently determine the maximum possible award that is reasonably supported by the evidence in the record" and either order remittitur of the excess or grant a new trial. *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277,

1283 (11th Cir. 2000) (internal quotation marks omitted). The Court may reduce an award unconditionally, however, when it concludes that certain quantifiable sums should not have been included in the verdict. *Holmes v. W. Palm Beach Hous. Auth.*, 309 F.3d 752, 758 (11th Cir. 2002).

The district court's determination that the punitive damages are not excessive is reviewed *de novo*. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678 (2001). Because the jury made no specific findings bearing on the excessiveness guideposts, this Court "must independently decide" whether disputed facts relevant to those guideposts have been established. *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 72 (Cal. 2005), *pet. for cert. filed*, 74 U.S.L.W. 3629 (Apr. 24, 2006). Insofar as the district court made factual findings in its order denying the post-trial motions, those findings are reviewed for clear error. *Cooper Indus.*, 532 U.S. at 440 n.14, 121 S.Ct. at 1688 n.14.

SUMMARY OF THE ARGUMENT

This should have been a straightforward trial about whether Defendants acted negligently. Instead, Plaintiffs needlessly complicated the case and inflamed the jury by loading up their shotgun complaint and the jury charge with theories of liability and damages that simply do not fit these facts, including wantonness, trespass, and specific intent to harm. *See* Dkt. 1, 34; *Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 & n.9 (11th Cir.

2002) (noting this Circuit’s repeated condemnation of “shotgun” pleading). In addition, Plaintiffs sought damages for properties that did not even test positive for carbon black, as well as for properties that could not have been discolored by the tiny amount of carbon black present on them. The result was a runaway verdict, including a whopping \$17,500,000 punitive award even though Plaintiffs admittedly suffered no physical injury. This verdict cannot stand for several reasons.

1. To begin with, essential elements of Plaintiffs’ claims are unsupported by the evidence. For example, Plaintiffs’ wantonness claim requires proof that Defendants acted with an entire absence of care and created an unreasonable risk of substantial physical harm. Yet Plaintiffs did not offer evidence that the amount of carbon black on their properties posed such a risk. Moreover, undisputed evidence that Defendants did take measures to prevent carbon black emissions affirmatively precludes a finding that they acted with an entire want of care. Plaintiffs’ trespass claim also fails because they did not carry their burden to prove the requisite mental state—*i.e.*, that Defendants willfully damaged Plaintiffs’ personal property and intended to cause carbon black to trespass onto their real property.

In addition, all of Plaintiffs’ claims (except Action Marine’s claim for damage to one boat) are infirm because there is insufficient evidence that carbon

black caused the alleged property damage. No carbon black was found on many of the City's properties, and the minuscule amounts found on the rest of Plaintiffs' properties (other than the one boat) caused no discoloration. For the same reason, Plaintiffs failed to prove the substantial damage element of their nuisance and trespass claims.

2. Even if the liability findings were sustainable, the compensatory awards are not. Action Marine's \$1,200,000 award improperly includes \$795,243 to pay ordinary business debts not incurred as a result of any wrongdoing by Defendants. Tharpe's damages must be eliminated because any emotional injury he suffered was derivative of financial injury to Action Marine. In addition, the City cannot recover damages for properties that did not test positive for carbon black, and the damage awards for Plaintiffs' other properties must be drastically reduced because carbon black from Defendants' facility accounted for only a minuscule percentage of the dark particulate matter on Plaintiffs' properties.

3. The punitive award must be reversed because the record does not contain clear and convincing evidence of the quasi-criminal conduct necessary to impose punitive liability. At minimum, the Georgia punitive damage cap of \$250,000 per plaintiff applies because there is no evidence that Defendants specifically intended to cause harm to anyone. Indeed, Plaintiffs' theory was that Defendants' conduct was motivated simply by a desire to save money—*i.e.*, to benefit themselves, not

harm others. Finally, application of the Supreme Court’s three guideposts compels the conclusion that the \$17,500,000 punitive award is unconstitutionally excessive: Defendants’ conduct was not especially reprehensible; the 9:1 ratio of punitive to compensatory damages is unsustainably high in light of the Supreme Court’s pronouncement 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” (*Campbell*, 548 U.S. at 425, 123 S.Ct. at 1524); and the punitive damages are grossly disproportionate to the *maximum* civil fine that can be imposed for the most egregious environmental violations in Alabama—\$250,000. The Court should therefore reduce the punitive award to no more than the amount of compensatory damages (assuming that it has not already reduced the award pursuant to the cap statute).

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO JUDGMENT AND/OR A NEW TRIAL ON ALL OF PLAINTIFFS’ CLAIMS.

The district court submitted four of Plaintiffs’ causes of action to the jury—negligence, wantonness, trespass, and nuisance. Dkt. 215, at 5-8. As we discuss below, however, Plaintiffs failed to carry their burden to prove indispensable elements of each of those claims.

A. There Is Insufficient Evidence To Support The Wantonness Claim.

Plaintiffs' "wantonness" claim does not support the jury's general verdict against Defendants for two reasons.

1. To commit the tort of willful or wanton misconduct under Georgia law, a defendant must act with "intentional or reckless disregard *of human life.*" *Poole v. City of Louisville*, 130 S.E.2d 157, 160 (Ga. App. 1963) (emphasis added).¹ Georgia courts have used section 500 of the Restatement to define this tort. *Id.*; *Arrington v. Trammell*, 62 S.E.2d 451, 454-55 (Ga. App. 1950). That section similarly requires proof that a reasonable person would realize that the defendant's conduct created a "substantial[]" and "unreasonable risk of *physical harm* to another." RESTATEMENT (SECOND) OF TORTS § 500 (1965) (emphasis added).

In this case, however, Plaintiffs' only claims are for property damage, and they adduced no evidence that the amount of carbon black found on their properties presented any substantial risk of physical harm (*see* p. 42, *infra*), much less that a reasonable person would believe that it did. Thus, Plaintiffs cannot recover on a wantonness theory.

¹ *See also Ga. Power Co. v. Deese*, 51 S.E.2d 724, 728 (Ga. App. 1949) (defining tort in terms of "injury to a person"); *Lee v. Lott*, 177 S.E. 92, 96 (Ga. App. 1934) (defendant's conduct must be "so reckless or so charged with indifference to the consequences *where human life or limb was involved* as to justify the jury in finding a wantonness equivalent in spirit to actual intent") (internal quotation marks omitted; emphasis added).

2. Even if a wantonness claim could be based on property damage, Plaintiffs failed to provide sufficient evidence that Defendants had the required mental state. Under Georgia law, “wanton conduct is that which is so reckless or so charged with indifference to the consequences as to [be] . . . equivalent in spirit to actual intent.” *Culpepper v. Thompson*, 562 S.E.2d 837, 839 (Ga. App. 2002) (internal quotation marks omitted). This element of intent distinguishes wantonness from gross negligence. *Id.* It can be established only by proof of “that *entire* absence of care which would raise the presumption of conscious indifference.” *H.J. Russell & Co. v. Jones*, 550 S.E.2d 450, 453 (Ga. App. 2001) (emphasis added).

That standard cannot be satisfied here. Indeed, it was undisputed at trial that:

- Although CCC possessed a permit that authorized some releases of carbon black from its plant, it also installed the best available pollution-control technology. R221, 328, 347-48, 937.
- CCC took action to identify and remedy the causes of carbon black emissions. PX17.
- CCC repaired and replaced certain parts of Units 1 and 2 at its plant. R74, 385, 493, 571-72.
- Defendants later approved and built two additional bagfilter compartments for Unit 2 and began taking action to replace the Unit 1 bagfilters entirely, at a cost of several million dollars. R75, 171, 173, 182-83, 365, 475-76, 573, 1360-61.

Plaintiffs argued below that Defendants should have acted earlier and done more because they knew that Plaintiffs were being harmed. Dkt. 290, at 9. Yet

even if Defendants were negligent in delaying or forgoing certain repairs, that negligence does not negate the substantial, undisputed measures they did take to prevent carbon black emissions. In light of those measures, no reasonable jury could conclude that Defendants acted with the *entire* absence of care that characterizes wanton behavior. To the contrary, when viewed as a whole, the evidence unequivocally demonstrates that Defendants “had concern for the consequences of [carbon black emissions] and [thus were] not behaving wantonly.” *McNeal Loftis, Inc. v. Helmey*, 462 S.E.2d 789, 790 (Ga. App. 1995). As a matter of law, therefore, Plaintiffs’ wantonness claim cannot support a judgment against Defendants.

B. There Is Insufficient Evidence To Support The Trespass Claim.

The trespass claim also cannot support a judgment against Defendants because Plaintiffs failed to prove the intent element of that tort. To recover damages for a trespass to personal property (such as Action Marine’s boats), a plaintiff must prove that the defendant “*willfully* damage[d]” the property. O.C.G.A. § 51-10-6(a) (emphasis added); Dkt. 215, at 7 (jury charge). In addition, Georgia does not recognize liability for a trespass to either real or personal property unless the defendant “*intended* the immediate consequences of the act, causing the trespass or invasion.” *Lanier v. Burnette*, 538 S.E.2d 476, 480 (Ga. App. 2000) (emphasis added).

These standards have not been met here. To begin with, no reasonable jury could find that Defendants intended to emit carbon black into the environment instead of selling it to their customers. Indeed, the evidence was to the contrary. *See* R534 (testimony of former plant manager Nicks that CCC “want[s] to make and sell all the carbon black [it] can” and that it “is not our intent whatsoever” to “have carbon black blowing around” or “going up the stack”); R91 (testimony of CCC vice-president Rodriguez that “[t]he [carbon black manufacturing] process is designed to not leak. Now, we are not perfect, from time to time there may be an incident But that’s not the intent”).

Moreover, there is no evidence that Defendants desired to cause any emitted carbon black to trespass onto Plaintiffs’ property. *See Allstate Ins. Co. v. Justice*, 493 S.E.2d 532, 535 (Ga. App. 1997) (“‘Intent’ means having a desire to bring about particular consequences which are substantially certain to result from the act.”). Finally, in light of the undisputed steps taken by Defendants to reduce emissions (*see* p. 13, *supra*), no reasonable jury could find that Defendants deposited carbon black onto anyone’s personal property with “an actual intention to do harm or inflict injury.” *Chrysler Corp. v. Batten*, 450 S.E.2d 208, 212 (Ga. 1994) (defining willful conduct).

Plaintiffs argued below that Defendants had *knowledge* that carbon black emissions were impacting properties downwind of the plant. Dkt. 290, at 2.

Georgia courts have held, however, that “mere knowledge and appreciation of a risk . . . is not the equivalent of intent.” *Colonial Penn Ins. Co. v. Hart*, 291 S.E.2d 410, 413 (Ga. App. 1982). Similarly, the Restatement distinguishes between an intentional trespass and reckless disregard of a known and unreasonable risk of invading real property. *See* RESTATEMENT (SECOND) OF TORTS §§ 158, 165 & cmts. a-b, d, 500 cmt. a (1965). Plaintiffs’ evidence of knowledge is thus insufficient to prove an intentional—much less willful—trespass. Accordingly, Plaintiffs’ trespass claim does not support the jury’s general verdict against Defendants.

C. Plaintiffs Did Not Prove Causation.

To recover damages in a tort action, a plaintiff must prove that the defendant’s tortious conduct was the cause in fact of the injury. *Atlanta Obstetrics & Gynecology Group, P.A. v. Coleman*, 398 S.E.2d 16, 17 (Ga. 1990). The Georgia Supreme Court has expressly recognized that the cause-in-fact requirement forecloses “award[ing] damages for a de minimis exposure.” *John Crane, Inc. v. Jones*, 604 S.E.2d 822, 825 (Ga. 2004). This principle requires entry of judgment for Defendants on all of Plaintiffs’ claims (except Action Marine’s claim for damage to one boat).

It is undisputed that experts for both sides found no evidence of carbon black whatever on many of the City's properties.² Moreover, the undisputed evidence showed that carbon black accounted for a very small percentage—generally less than 1%—of the total dark particulate matter on the rest of Plaintiffs' properties, except one of Action Marine's boats. R1786, 1789, 1802-03, 1817, 1825, 1863-64; DX162. There is no proof that this de minimis amount of carbon black had any visible effect on those properties. R1817, 1863-64. The dark matter that Plaintiffs alleged had discolored the properties proved to be fungal spores, plant hairs, abraded tire rubber, pollen, and charred wood—none of which is produced by Defendants. R1782, 1792.

Plaintiffs tried to overcome the fact that many of the City's properties tested negative by pointing to: (1) lay testimony of "black specking" on the properties where neither expert had found carbon black (R1218); and (2) an air dispersion model showing that the wind blew any emissions from CCC's smokestacks toward those properties up to 6% of the time (R961-62), from which they argued that it was impossible for carbon black to be deposited on one property but not on another nearby. *See* Dkt. 290, at 10-12. Both Plaintiffs' and Defendants' experts agreed,

² The City properties on which no carbon black was found include Memorial Stadium (R1448, 1794), Whopper Field (R1447, 1476, 1613, 1795-96), the South Commons concession stand area (R1447-48, 1611-12; DX162, at 4), the Rigdon Park ball fields (R1451, 1453, 1476, 1616-17; DX162, at 5), the interior of the Civic Center (including carpeting) (R1445-46), and the Civic Center vehicles (R1464).

however, that carbon black cannot be positively identified with the naked eye. R862-64, 870-72, 1770, 1783, 1846-47. It also is undisputed that carbon black is not the only substance that can cause “black specking.” R1770, 1772, 1792. Furthermore, the air dispersion model did not address how much (if any) carbon black was being carried by the wind when it blew toward the City’s properties. Given that only minuscule amounts of carbon black were found on the City’s nearby properties, the air dispersion model provides no basis for Plaintiffs’ counterintuitive assertion that some amount of carbon black must have landed on the properties that tested negative.

As for the properties of the City and the other Plaintiffs on which only minuscule amounts of carbon black were found, Plaintiffs pointed to their expert’s testimony that: (1) small amounts of carbon black will produce a color change visible to the naked eye (R789-90, 824-25); and (2) it is impossible to quantify the amount of carbon black in a given sample using a transmission electron microscope (R784-86). *See* Dkt. 290, at 8-9.

Of course, Plaintiffs had the burden of proof. The fact that their expert elected to use an instrument that he admitted was inadequate for the job undermines their case rather than supports it.³

³ The expert conceded that he used a transmission electron microscope because he sought only to determine whether *any* molecules of carbon black were present, not whether enough were present to cause a color change. R738, 829-31.

In any event, Defendants' expert analyzed both sides' samples using the proper tool for quantifying carbon black—a light microscope (*see* R1780, 1823-24)—to determine what caused the samples to appear black to the naked eye. R1780, 1863. He provided uncontroverted testimony that carbon black does not produce a color change visible under a light microscope unless it constitutes 1% or more of the material in the sample. R1783, 1786. Because a light microscope revealed no carbon black discoloration in any of the samples, he concluded that carbon black was only a very small constituent (less than 1%) of these samples and that other dark substances—not carbon black—caused the samples to appear black. *Id.* Indeed, if the carbon black had been removed from these samples, they would have looked no different to the naked eye. R1817. In light of this uncontradicted evidence, the testimony of Plaintiffs' expert is manifestly insufficient to support a finding that carbon black caused discoloration to any of Plaintiffs' properties other than one of Action Marine's boats.

Accordingly, Defendants are entitled to a take-nothing judgment on all claims of the City, Tharpe, and Ditchfield, none of whom proved the presence of any material amount of carbon black on any of their properties. *See Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997). As for Action Marine, its damages must be limited to those sustained by the one boat that it proved had a

material amount of carbon black on it. Because those damages are not quantified in the record, however, a new trial is necessary to determine them.

D. Plaintiffs Did Not Prove The “Substantial” Damage Element Of Their Trespass And Nuisance Claims.

To recover for trespass or nuisance, a plaintiff must prove “substantial” damage to its property. *Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1567, 1572 (N.D. Ga. 1995); *Holman v. Athens Empire Laundry Co.*, 100 S.E. 207, 210 (Ga. 1919). Yet as discussed above, with the exception of one of Action Marine’s boats, carbon black had no visible—let alone substantial—effect on any of Plaintiffs’ properties. *See* pp. 17, 19, *supra*. Moreover, there is no evidence that a carbon black deposit on one boat caused substantial damage to Action Marine’s business (the only damage for which Action Marine sought to recover). Accordingly, for this reason as well, Defendants are entitled to judgment on the trespass and nuisance claims.

E. The Proper Remedy Is Rendition Or, At Minimum, A New Trial.

The Court should render judgment for Defendants on any claims of any Plaintiffs as to which it agrees that one or more elements were not supported by sufficient evidence. As to any remaining claims, a new trial is required because the verdict form in this case allowed the jury to answer “yes” to a liability question for each Plaintiff if it believed that Defendants had committed any one of the four

torts. Dkt. 216.⁴ The rule is clear in this Circuit that “[w]here . . . two or more claims are submitted . . . in a single interrogatory, a new trial may be required if either of the claims was erroneously submitted, as there is no way to be sure that the jury’s verdict was not predicated solely on the invalid claim.” *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1055 (11th Cir. 1994); *see also Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1099 (11th Cir. 1983) (“[U]nless appellees can support submission of *each* theory of liability submitted to the jury [under a general verdict], we must remand the case for a new trial.” (emphasis added)).

If the Court concludes that only some Plaintiffs failed to prove one or more of their claims, Defendants would be entitled to a new trial with respect to all claims of those Plaintiffs. But because the awards of punitive damages and attorneys’ fees do not distinguish among Plaintiffs, a new trial on those issues would be required as to all Plaintiffs.

If the Court grants a new trial, Defendants urge it to determine the proper standards for awarding punitive damages and lifting the Georgia punitive damages cap (*see* Parts III.A.-B., *infra*) because those issues are likely to recur on remand.

⁴ Because the jury’s answers regarding compensatory damages, punitive damages, and attorneys’ fees were all based on the general liability verdict (Dkt. 216), the entry of judgment for Defendants on any claim would require a new trial on these issues as well.

Westchester Specialty Ins. Servs., Inc. v. U.S. Fire Ins. Co., 119 F.3d 1505, 1514 (11th Cir. 1997).

II. SEVERAL OF THE COMPENSATORY AWARDS ARE LEGALLY FLAWED.

In Georgia, as elsewhere, “the purpose of damages is to place an injured party in the same position as it would have been in had there been no injury or breach of duty, that is, to compensate for the injury actually sustained.” *Home Ins. Co. v. N. River Ins. Co.*, 385 S.E.2d 736, 742 (Ga. App. 1989). It is the plaintiff’s burden to establish a causal connection between the damages sought and the defendant’s alleged wrongdoing. *Russaw v. Martin*, 472 S.E.2d 508, 511 (Ga. App. 1996). Under these principles, several of the damage awards are unsustainable even if the findings of liability are affirmed.

A. Action Marine Is Not Entitled To Payment Of Its Ordinary Debts.

Action Marine’s compensatory award of \$1,200,000 improperly includes nearly \$800,000 in debts that were not incurred as a result of any wrongdoing by Defendants. Plaintiffs’ expert, Edward Sauls, opined that \$1,200,000 would be necessary “in order to make [Action Marine] whole in this case.” R1117. Of this amount, \$795,243 was debt carried by Action Marine, consisting of notes payable, inventory debt, and a mortgage. R1111-12; PX79, Ex. 5. Sauls testified that the jury “would have to award [what the business should have been worth today] *plus* enough to take care of those outstanding debts.” R1116 (emphasis added). It did

just that, awarding the full \$1,200,000 for which Sauls had advocated. Dkt. 216, at 2.

This award is erroneous because Action Marine offered no proof connecting its debts with any releases of carbon black by Defendants. It is a matter of common knowledge that obligations such as notes payable, inventory debt, and mortgages are incurred in the ordinary course of any company's business. In nearly identical circumstances, other courts have steadfastly rejected plaintiffs' efforts to use a tort suit as a means of ridding themselves of ordinary business debt. *See, e.g., Lively v. Rufus*, 533 S.E.2d 662, 668 n.11, 669 (W.Va. 2000) (business debts not recoverable in addition to diminished value of business where debts were "in no way related to the claims asserted against the defendants"); *Brewhouse, Ltd. v. New Orleans Pub. Serv. Inc.*, 614 So. 2d 118, 122 (La. App. 1993) (reducing compensatory award to exclude interest on debt not incurred due to defendant's conduct); *Wagenheim v. Alexander Grant & Co.*, 482 N.E.2d 955, 967-68 (Ohio App. 1983) (reversing award of compensatory damages for business destruction measured by debts "which [business] was already responsible for, regardless of defendant's actions").

Plaintiffs argued below that Sauls properly calculated Action Marine's damages under the asset-based approach. Dkt. 290, at 20. As Sauls himself admitted, however, the asset-based approach values a business by calculating the

fair market value of assets *minus* the fair market value of liabilities. PX79, at 10; *see* SHANNON PRATT ET AL., VALUING A BUSINESS 307 (4th ed. 2000) (calling “assets minus liabilities” the “axiomatic . . . formula” for valuing a business under the asset-based approach). Sauls’ conclusion that Action Marine was entitled to recover its lost business value “[i]n *addition* to . . . [an] amount that would enable the Plaintiffs to settle *all* outstanding obligations” (PX79, at 11 (emphasis added)) bears no resemblance to this approach.

For these reasons, Action Marine failed to carry its burden to prove that erasing its debts of \$795,243 was required to compensate it for the injury caused by Defendants. To the contrary, the inclusion of Action Marine’s debts in its compensatory award is a windfall that does more than merely restore Action Marine’s pre-tort economic status. Accordingly, this Court should unconditionally reduce the award to \$404,757. *Holmes*, 309 F.3d at 758.

B. Tharpe Cannot Recover For Injuries That Are Derivative Of Action Marine’s.

John Tharpe’s \$100,000 recovery for the emotional distress he suffered when his closely-held corporation—Action Marine—was “going down the tubes” (R1945 (argument of counsel)) must be eliminated. It is well settled that “a stockholder of a corporation has no personal or individual right of action against third persons for damages that result indirectly to the stockholder because of an injury to the corporation.” *Kush v. Am. States Ins. Co.*, 853 F.2d 1380, 1383 (7th

Cir. 1988). Thus, in *Maryland Staffing Services, Inc. v. Manpower, Inc.*, 936 F. Supp. 1494, 1499 (E.D. Wis. 1996), the court dismissed the plaintiffs' claims for "personal pain, suffering, humiliation, emotional distress and mental anguish" arising from a business dispute between their closely held corporation and defendants, holding that plaintiffs' mental injuries were "not separate and distinct from" the corporation's financial injuries but instead were "derivative of" those injuries.

That is exactly the situation here: any emotional injury to Tharpe is purely derivative of Action Marine's financial injury. Tharpe testified about his emotional distress only briefly, and the only source of distress he identified was "[his] worry about [his] *business*." R1063 (emphasis added); *see also* R1062 ("I was losing money in my business, it was going downhill"). He made no effort to show that Defendants had caused him any separate and distinct injury that gave rise to distress. For example, Tharpe presented no evidence that he—as opposed to Action Marine—owned any of the real or personal property that Plaintiffs complain was damaged by carbon black. *E.g.*, PX79, Ex. 5-6 (itemizing Action Marine's personal and real property); R1065-66, 1520-25.

Plaintiffs argued below that Tharpe was entitled to emotional distress damages because his reputation had been harmed and because Action Marine's lenders had attempted to collect its debts from him as guarantor. These injuries are

not separate from those suffered by Action Marine, however. The testimony about harm to reputation concerned Tharpe's "boat business" (R1042) and had "nothing to do with John [Tharpe]." R1044. As to Action Marine's debts, even if there were proof that Defendants injured Action Marine by emitting carbon black and that this injury resulted in its inability to pay its debts, any emotional distress Tharpe suffered from attempts to collect those debts would be derivative of Action Marine's injury. Moreover, there is no evidence that particular concerns Tharpe had about his own reputation and debt, rather than broader concerns about his failing business, caused him emotional distress.

In sum, any distress suffered by Tharpe was "'an indirect result of the damage done'" to Action Marine. *Maryland Staffing*, 936 F. Supp. at 1499 (quoting *Flynn v. Merrick*, 881 F.2d 446, 449 (7th Cir. 1989)). Accordingly, Tharpe cannot recover individually under any of his causes of action. This Court should reverse and render judgment that Tharpe take nothing. Moreover, given that the jury's finding of specific intent to harm and its awards of punitive damages and attorneys' fees do not distinguish among Plaintiffs, Defendants are entitled to a new trial on those issues with respect to Action Marine, the City, and Ditchfield. *See* p. 21, *supra*.

C. The Compensatory Awards Must Be Reduced Because Georgia Law Limits Defendants' Liability To The Portion Of The Property Damage Attributable To Their Torts.

As discussed above (at p. 17), the City failed to provide evidence that any carbon black was present on many of its properties. Under Georgia law, Defendants are entitled to judgment as to those properties. *See Satterfield*, 888 F. Supp. at 1570-71 (granting defendants summary judgment on plaintiffs' claims for property damage because "[b]eyond sheer lay speculation, there is no evidence whatsoever that emissions from defendant's plant caused damage to plaintiffs' property"). The City offered evidence of only \$237,070 in damage to properties that tested positive for carbon black.⁵ At minimum, therefore, the Court should reduce the City's damages from \$570,000 to \$237,070 as a matter of law. *Holmes*, 309 F.3d at 758.

In addition, the damages awarded to all Plaintiffs were solely to compensate them for losses resulting from the discoloration of their properties. It is undisputed, however, that a high percentage of the dark particulate matter on those properties was not attributable to Defendants, but instead included fungal spores, plant hairs, abraded tire rubber, pollen, and charred wood. *See* pp. 17, 19, *supra*. Under Georgia law, "where two or more persons, each acting independently, create or maintain a situation which is a tortious invasion of a landowner's interest

⁵ *See* PX113, at 19-20 (subtracting from total remediation costs of \$369,420 the costs relating to City properties on which no carbon black was found (as listed in p. 17 n.2, *supra*), which total \$132,350, leaving \$237,070).

... by interfering with his ... air ... , each is liable only for such proportion of the harm caused to the land ... as his contribution to the harm bears to the total harm.’” *Vaughn v. Burnette*, 84 S.E.2d 568, 569 (Ga. 1954). Because it was undisputed that carbon black accounted for less than 1% of the total dark particulate matter on all of the properties at issue other than one of Action Marine’s boats (R1786, 1789, 1802-03, 1817, 1825, 1863-64; DX162), the Court should either order a remittitur of the compensatory awards by 99% or grant a new trial. *Frederick*, 205 F.3d at 1283.

III. THE PUNITIVE AWARD CANNOT STAND.

A. Defendants’ Conduct Is Not Punishable Under Georgia Law.

Under Georgia law, punitive damages may be awarded only when “it is proven by clear and convincing evidence that the defendant’s actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.” O.C.G.A. § 51-12-5.1(b). The various enumerated grounds refer to “the defendant’s mental state” (*Macon-Bibb County Water & Sewerage Auth. v. Tuttle/White Constructors, Inc.*, 530 F. Supp. 1048, 1057 (M.D. Ga. 1981)) and reach only conduct that is so egregious as to be “of a criminal or quasi-criminal nature” (*Muller v. English*, 472 S.E.2d 448, 453 (Ga. App. 1996)). “Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage [M]ere negligence is

not enough, even though it is so extreme in degree as to be characterized as ‘gross’” *Colonial Pipeline Co. v. Brown*, 365 S.E.2d 827, 832 (Ga. 1988) (plurality op.).⁶

The requirement that a plaintiff prove entitlement to punitive damages by clear and convincing evidence is “an extremely high evidentiary burden” (*Perrin v. Stansell*, 533 S.E.2d 458, 477 (Ga. App. 2000)) that “is a more stringent standard than ‘preponderating’ and requires a greater quantum and a high quality of proof in plaintiff’s favor” (*In re Estate of Burton*, 453 S.E.2d 16, 16 (Ga. 1995)). Specifically, evidence is clear and convincing only if it “positively, unequivocally, and clearly” establishes the fact at issue. *Sheley v. Singletary*, 955 F.2d 1434, 1438 (11th Cir. 1992).

Georgia’s high standard for punitive liability was not satisfied here. Plaintiffs founded their case for punitive damages entirely upon Defendants’ allegedly insufficient efforts to prevent carbon black emissions—that is, on a “failure to do *more*.” Dkt. 290, at 23 (emphasis added).⁷ Such a failure is far from sufficient to establish the sort of “criminal or quasi-criminal” conduct that is

⁶ See also *Smith v. Wade*, 461 U.S. 30, 60 n.3, 103 S.Ct. 1625, 1643 n.3 (1983) (Rehnquist, J., dissenting) (“[i]n deciding whether to impose the ‘quasi-criminal’ punishment of punitive damages,” “courts using the phrase [wanton]” at common law generally “meant ‘that the act done is of a wilful, wicked purpose’”) (citation omitted).

⁷ Plaintiffs claimed that this failure constituted “conscious indifference to the consequences” and a “willful repetition of a trespass.” *Id.*

punishable under Georgia law, however. Instead, Georgia courts limit punitive liability for inaction to situations in which a defendant consciously refuses to do **anything** to stop the problem.⁸ *E.g.*, *Tyler v. Lincoln*, 527 S.E.2d 180, 183 (Ga. 2000) (summary judgment on punitive liability was improper because plaintiffs presented evidence that “they repeatedly asked the subdivision developers to correct the problems, but failed to get them to take **any** action to remedy the situation and the ongoing damage”) (emphasis added); *CSX Transp., Inc. v. West*, 523 S.E.2d 63, 66 (Ga. App. 1999) (affirming jury verdict on conscious indifference where defendant knew of flooding and “consciously refus[ed] to take **any** action to alleviate the damage being caused to [plaintiff’s] property”) (emphasis added); *Tri-County Inv. Group v. S. States, Inc.*, 500 S.E.2d 22, 28 (Ga. App. 1998) (suggesting that punitive damages are warranted in an environmental

⁸ Plaintiffs’ reliance on *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), for the contrary proposition is misplaced. In *Johansen*, the finding of punitive liability was upheld in a prior summary disposition that said only: “Affirmed. FN**. Local Rule 36 case.” 67 F.3d 314 (11th Cir. 1995). The Supreme Court later granted, vacated, and remanded in light of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996). *See Johansen*, 517 U.S. 1217, 116 S.Ct. 1843 (1996). The remand, however, was limited to the question whether the amount of punitive damages was unconstitutionally excessive; the rest of the decision remained intact. *See* 1997 WL 423108, at *1-2 (S.D. Ga. June 7, 1997). Although both the district court and this Court discussed on remand the defendant’s “failure to do more to prevent the acidic water problem,” they did so in the context of explaining that the defendant’s behavior “was not highly reprehensible” under *Gore*. 170 F.3d at 1336; 1997 WL 423108, at *2-3. Neither this Court nor the district court purported to address the standards for punishment under Georgia law because punitive liability was not at issue in the remand.

case only when the defendant “deliberately ignored any requests to abate the nuisance”).

Here, it is undisputed that Defendants exercised *some care* in trying to prevent carbon black emissions. In particular, they installed the best available pollution-control technology, identified and fixed leaks as they occurred, and undertook multimillion-dollar construction, replacement, and repair projects to reduce emissions. *See* p. 13, *supra*. To be sure, they did not undertake every possible improvement project, and their efforts at controlling the releases were not entirely successful. But that is not enough to demonstrate “positively, unequivocally, and clearly” (*Sheley*, 955 F.2d at 1438) that Defendants harbored the necessary quasi-criminal mental state to justify punishment. *See Hutcherson v. Progressive Corp.*, 984 F.2d 1152, 1155-56 (11th Cir. 1993) (ruling as a matter of law that trucking company was not “consciously indifferent” in entrusting a vehicle to employee who caused a drunk-driving accident—even though company was aware of employee’s prior DUI and alcohol-related license suspension—because company made some efforts to investigate employee’s background before hiring him). Thus, even if this Court finds sufficient evidence to support the

underlying wantonness and trespass claims, Plaintiffs did not satisfy the materially higher standard for punitive liability.⁹

B. Georgia’s Punitive Damages Cap Applies.

Under Georgia law, \$250,000 is the maximum amount of money that may be awarded to a plaintiff as punitive damages in a non-products liability case unless “it is found that the defendant acted, or failed to act, with the *specific intent to cause harm.*” O.C.G.A. § 51-12-5.1(f)-(g) (emphasis added); *Bagley v. Shortt*, 410 S.E.2d 738 (Ga. 1991). There is, of course, no evidence that Defendants failed to prevent the escape of carbon black because they harbored a nefarious intent to hurt Plaintiffs. Accordingly, the plain language of the statute requires that the punitive damages be reduced to \$250,000 per plaintiff.

The district court nevertheless refused to disturb the jury’s verdict, stating conclusorily that it “does not agree that Plaintiffs failed to adduce sufficient evidence that Defendants acted with specific intent to harm Plaintiffs.” Op. 10 (Dkt. 323). The court either misunderstood the law or misunderstood the facts. Either way, its conclusion is indefensible.

⁹ This conclusion does not change because attorneys’ fees were awarded. “[A]lthough conduct may constitute an intentional tort and therefore authorize imposition of attorney fees, it may not be so egregious as to present the aggravating circumstances necessary for punitive damages.” *Ross v. Hagler*, 433 S.E.2d 124, 127 (Ga. App. 1993).

In interpreting the cap statute, Georgia courts have made clear that the “specific intent to cause harm” standard is much more exacting than Georgia’s already stringent standard for punitive liability. *E.g.*, *J.B. Hunt Transp., Inc. v. Bentley*, 427 S.E.2d 499, 504 (Ga. App. 1992). It is not enough to prove that the defendant intentionally committed a tort (*Sims v. Heath*, 577 S.E.2d 789, 795 (Ga. App. 2002)) or that it willfully performed an action that foreseeably would result in harm (*Bentley*, 427 S.E.2d at 504). Nor, as the Georgia Court of Appeals noted in the drunk-driving context, is proof of “conscious indifference to the consequences” sufficient to lift the cap. As the court explained:

[The defendant] intended to drink, he intended to drive after he had done so and, while driving, he intended to exceed the speed limit. This would certainly be evidence of his *general* conscious indifference to the consequences of driving while intoxicated and would certainly authorize a finding that he was liable for punitive damages. However, it would not be evidence of his *specific* intent that driving in his intoxicated condition cause harm.

Viau v. Fred Dean, Inc., 418 S.E.2d 604, 608 (Ga. App. 1992); *cf. Montford v. State*, 564 S.E.2d 216, 217 (Ga. App. 2002) (“no matter the degree, a wanton or reckless state of mind cannot be considered the equivalent of [a] specific intent to injure”).¹⁰

¹⁰ In *Johansen*, this Court stated that “[s]pecific intent to cause harm may properly be inferred from deliberate indifference.” 170 F.3d at 1336. That statement, made without citation to any Georgia case construing the cap statute, was dictum because the only issue before the Court in that appeal was whether the punitive award was unconstitutionally excessive. *See* p. 30 n.8, *supra*. Especially

Wal-Mart Stores v. Johnson, 547 S.E.2d 320 (Ga. App. 2001), is particularly instructive. In *Johnson*, the defendant’s employees roughed up and falsely imprisoned the plaintiff, an undeniably innocent 54-year-old African-American woman, whom they had erroneously confused with some suspected shoplifters. At trial, the court instructed the jury that “if an individual does an act which has clearly foreseeable consequences and as a proximate result of that act, those consequences occur, then under the law, he is presumed to have intended those consequences.” *Id.* at 325. The appellate court held that “[t]his charge was erroneous. A finding of specific intent to cause harm may *not* be based on the rebuttable presumption that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts” *Id.* Accordingly, the court ordered a new trial unless the plaintiff agreed to \$250,000 in punitive damages. *Id.*

Under the foregoing cases, the cap applies here. The record contains no evidence that CCC’s failure to do more to prevent the escape of carbon black dust was motivated by a specific intent to injure Plaintiffs or anyone else. *See* p. 15, *supra*. Indeed, Plaintiffs’ theory of the case was that Defendants refrained from

because several intervening Georgia decisions have made clear that “deliberate indifference” is not equivalent to a “specific intent to cause harm,” this Court is not bound by the one sentence of dictum in *Johansen*. *See, e.g., Roboserve, Ltd. v. Tom’s Foods, Inc.*, 940 F.2d 1441, 1451 (11th Cir. 1991) (declining to follow prior panel’s decision because intervening state intermediate appellate decision explicitly contradicted it).

making certain repairs *in order to make more money*—*i.e.*, to benefit themselves, not to injure someone else.¹¹ That motive is affirmatively inconsistent with the mental state necessary for lifting the cap. See *Whelan v. CareerCom Corp.*, 711 F. Supp. 198, 203 (M.D. Pa. 1989) (“averments that defendant intended to benefit itself financially by terminating plaintiff” are insufficient to prove “specific intent to harm” as a matter of law).

Plaintiffs argued below that forgoing repairs to save money could be evidence of a “specific intent to cause harm” if the jury found that harm was “substantially certain” to result from that choice. R1510-11. This argument confuses general and specific intent. Evidence that the defendant recognizes that harm is substantially certain to result may prove the *general* intent element of an intentional tort,¹² but it does not, by itself, prove a *specific* intent to cause harm. *Johnson*, 547 S.E.2d at 325; BLACK’S LAW DICTIONARY 1527 (8th ed. 1999) (defining “intentional tort” as “[a] tort committed by someone acting with general

¹¹ *E.g.*, Dkt. 290, at 27 (“Simply put, the defendants made a conscious decision to refuse capital expenditures to correct environmental problems because they could invest money elsewhere and earn a greater return on their investment.”); R2024 (“The testimony is this, they had five million dollars that they were asked to give in 1999 and they didn’t give it because they could make more money somewhere else.”).

¹² See *Viau*, 418 S.E.2d at 608 (proof that harm was “substantially certain to result” may be used to prove “intent” under the RESTATEMENT (SECOND) OF TORTS § 8A (1965)); RESTATEMENT § 8A cmt. a & illus. 1 (stating that this section defines “[i]ntent, as it is used throughout the Restatement of Torts” for “an intentional tort”).

or specific intent”) (emphasis added); *cf. Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 917-18 (11th Cir. 2004) (sexual battery is an “intentional tort” even though it “does not require that a defendant act with specific intent”).

As *Johnson* makes clear, proving specific intent is much more difficult than proving general intent. Unlike general intent, specific intent may not be presumed from the possible consequences of an act, even if those consequences are “clearly foreseeable.” *Johnson*, 547 S.E.2d at 325; *see Smith v. Wade*, 461 U.S. 30, 37 n.6, 103 S.Ct. 1625, 1630 n.6 (1983) (“intent to cause injury” and “subjective consciousness of risk of injury” are “distinct concepts”: “[c]onsciousness of consequences or of wrongdoing . . . does not require injurious intent”). Rather, to lift the cap, the defendant must specifically seek to cause harm. *Johnson*, 547 S.E.2d at 325; BLACK’S, *supra*, at 826 (“specific intent” is the “intent to accomplish the precise [charged act]”); *see also In re Taka C.*, 626 A.2d 366, 369 (Md. 1993) (to establish a specific intent to injure property, “it is not sufficient that the defendant merely intended to do the act which led to the damage to property; it is necessary that the defendant actually intended to cause the harm to the property”).

Cases decided in the environmental context have confirmed this distinction, capping punitive awards despite the defendant’s failure to take steps that would have been substantially certain to limit or prevent the plaintiff’s injury. For

instance, in *Sumitomo Corp. v. Deal*, 569 S.E.2d 608, 614 (Ga. App. 2002), the trial court held that the cap applied even though the defendant had been aware for five years that surface water runoff from his detention pond was damaging the land of downstream property owners but did nothing to solve the problem. Similarly, in *Bowen & Bowen Construction Co. v. Fowler*, 593 S.E.2d 668, 671-72 (Ga. App. 2004), the trial court reduced a \$500,000 punitive award to \$250,000 pursuant to the statutory cap even though the plaintiff had “produced evidence that numerous other homeowners had complained about standing water and water drainage problems” and the homebuilder “consistently refused to acknowledge the problem” and do anything about it. In both cases, the Georgia Court of Appeals concluded that the awards should not be further reduced on federal constitutional grounds, but left the cap holding (which the plaintiffs had not appealed) undisturbed. *Deal*, 569 S.E.2d at 615-16; *Fowler*, 593 S.E.2d at 672. In short, there is no Georgia precedent supporting Plaintiffs’ invitation to depart from the plain meaning of the statute.¹³

Moreover, if accepted, Plaintiffs’ interpretation of the statute would eviscerate the distinction between the conduct necessary for punitive liability and the conduct necessary to breach the cap in a wide range of cases, undermining the

¹³ Should the Court have any doubts as to whether O.C.G.A. § 51-12-5.1(g) means what it says, we urge it to certify the question to the Georgia Supreme Court. *See Simmons v. Sonyika*, 394 F.3d 1335 (11th Cir. 2004).

Legislature's intent to allow high punitive damages only in the most egregious of cases and exposing all manner of companies that do business in Georgia to unbounded punitive awards. Indeed, in this case at least, the problem is of constitutional dimension. Because there is nothing ambiguous about the term "specific intent to cause harm," Defendants had no notice at the time of the releases that they could be subjected to uncapped punitive damages under Georgia law. The Supreme Court has held in analogous circumstances that it violates due process to retroactively interpret a penal statute with a clear and precise meaning to encompass conduct that no reasonable person could have thought was included within its scope. *See Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697 (1964).

In *Bouie*, two students were arrested for trespassing after refusing to leave a restaurant during a sit-in. *Id.* at 348, 84 S.Ct. at 1700. They were charged under a South Carolina statute defining trespass as "entry [onto another's property] after notice from the owner . . . prohibiting such entry." *Id.* at 349, 84 S.Ct. at 1700. The South Carolina Supreme Court upheld the conviction on the ground that staying in a restaurant after being told to leave was equivalent to entering the restaurant after being told not to. *Id.* at 350, 84 S.Ct. at 1700-01. The U.S. Supreme Court held that construing the statute in this way violated the defendants' due process rights because the trespass statute had a "narrow and precise" statutory

meaning that did not include their conduct. Therefore, the defendants lacked fair notice that the conduct was punishable. *Id.* at 350-53, 84 S.Ct. at 1700-02.

The Supreme Court has cited *Bouie* in the punitive damages context, explaining that the “fair notice” requirement applies “not only [to] the conduct that will subject [a defendant] to punishment, but also [to] the severity of the penalty that a State may impose.” *Gore*, 517 U.S. at 574 & n.22, 116 S.Ct. at 1598 & n.22. Accordingly, even if the Court adopts Plaintiffs’ interpretation of the statute, due process precludes applying that interpretation to Defendants.

C. The Punitive Damages Are Unconstitutionally Excessive.

Although a \$17,500,000 punitive award might not seem shocking in a world of nine-digit lottery prizes and eight-digit athletic salaries, it is important to remember that punitive damages are punishment. Even a \$2,000,000 punitive award is “tantamount to a severe criminal penalty” that is warranted only for “egregiously improper conduct.” *Gore*, 517 U.S. at 580, 585, 116 S.Ct. at 1601, 1604.

The Supreme Court has instructed lower courts to consider three “guideposts” for determining whether a punitive award is unconstitutionally excessive: (1) the degree of reprehensibility of the misconduct; (2) the ratio of punitive to compensatory damages; and (3) the civil penalties applicable to comparable conduct. *Campbell*, 538 U.S. at 417-18, 123 S.Ct. at 1520. “Exacting

appellate review” employing these guideposts is necessary to ensure that punitive damages are “based upon an ‘application of law, rather than a decisionmaker’s caprice.’” *Id.* The required exacting review compels the conclusion that \$17,500,000 in punishment is unconstitutionally excessive.

1. This case does not involve significant reprehensibility.

“‘[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.’” *Id.* at 419, 123 S.Ct. at 1521 (citation omitted). Put succinctly, “punitive damages may not be ‘grossly out of proportion to the severity of the offense.’” *Gore*, 517 U.S. at 576, 116 S.Ct. at 1599 (citation omitted).

Among other factors bearing on the degree of reprehensibility, reviewing courts must consider whether: (i) “the harm caused was physical as opposed to economic”; (ii) “the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others”; (iii) “the target of the conduct had financial vulnerability”; (iv) “the conduct involved repeated actions or was an isolated incident”; and (v) “the harm was the result of intentional malice, trickery, or deceit, or mere accident.” *Campbell*, 538 U.S. at 419, 123 S.Ct. at 1521. None of these factors supports a finding of significant reprehensibility here.

First, it is undisputed that “the harm inflicted in this case [property damage] was economic rather than physical.” Op. 13; Dkt. 290, at 26 (“plaintiffs did not suffer physical harm”).

Second, although the district court stated that Defendants “evinced an indifference to or a reckless disregard of the health or safety of others” because “emissions of carbon black can pose serious health risks” (Op. 13), that finding is clearly erroneous. In urging the district court to make this finding, Plaintiffs relied principally on Defendants’ Material Safety Data Sheets (“MSDSs”), which they asserted prove that the atmospheric release of carbon black is a “possible human carcinogen.” Dkt. 290, at 26. To the contrary, the MSDSs say that the U.S. National Toxicology Program, the U.S. Occupational Safety and Health Administration, and the European Union have *not* designated carbon black as a carcinogen. PX32-17. While one agency (IARC) has concluded that carbon black has possible carcinogenic effects based on rat inhalation studies, even it acknowledged that “[t]here is *inadequate evidence in humans for the carcinogenicity of carbon black.*” *Id.* (emphasis added). Moreover, there is no evidence that Defendants thought that carbon black was a carcinogen yet recklessly disregarded that risk.

Although overexposure to carbon black may have several potential health effects (PX32-9), “[e]ven the most innocuous of substances, when taken into the

body in sufficient amounts, may lead to undesirable, if not distinctly harmful, effects.” TED LOOMIS, ESSENTIALS OF TOXICOLOGY 1 (3d ed. 1978); *accord* CURTIS KLAASSEN ET AL., CASARETT & DOULL’S TOXICOLOGY 12 (3d ed. 1986) (“[V]irtually every known chemical has the potential to produce injury or death if present in a sufficient amount.”). Plaintiffs adduced no evidence that either humans or animals could suffer serious health effects based on at-large, atmospheric exposure to the amount of carbon black allegedly released here, much less evidence that Defendants were aware of that risk yet recklessly disregarded it.¹⁴

Third, Plaintiffs have never claimed that they are financially vulnerable—*i.e.*, that they are among “‘the weakest of the herd’—‘the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most

¹⁴ Plaintiffs noted below that carbon black is listed as a “chronic health hazard” under Section 311/312 of the Superfund Amendments and Reauthorization Act. PX32-20. But this does not establish that carbon black is especially dangerous when released atmospherically. Approximately 500,000 products are on this list, *which is for the benefit of emergency providers responding to accidents at a facility*. See 42 U.S.C. § 11021(a) (requiring safety information for chemicals listed under Section 311/312 to be submitted to various emergency providers); EPCRA Fact Sheet, *available at* <http://tinyurl.com/kkpaf>. Notably, carbon black is *not* listed under Section 313 of the Act, which includes the especially toxic substances that are of concern to the public at large. See 42 U.S.C. § 11023(d) (EPA may add chemical to Section 313 list if it is “known to cause or can reasonably be anticipated to cause significant adverse acute human health effects,” “cancer . . . or other chronic health effects,” or “a significant adverse effect on the environment”). Nor is it on the Section 302 list of “extremely hazardous” substances. 40 C.F.R. pt. 355, app. A, B.

vulnerable to trickery or deceit.’” *Campbell*, 538 U.S. at 433, 123 S.Ct. at 1529 (Ginsburg, J., dissenting) (citation omitted). Nor have they ever alleged that Defendants “target[ed]” them for this reason. *Cf. Kemp v. AT&T*, 393 F.3d 1354, 1363 (11th Cir. 2004) (“the trial court was also justified in finding that AT&T ***intended to target*** financially vulnerable individuals”) (emphasis added). While Plaintiffs have claimed to be burdened by continuous cleanup costs, that does not establish financial vulnerability. *See, e.g., Turner v. Firststar Bank, N.A.*, 845 N.E.2d 816, 828 (Ill. App. 2006) (vulnerability subfactor not satisfied because “no evidence was presented that the defendant was aware of this particular plaintiff’s financial vulnerability at the time the conversions occurred, nor . . . was evidence presented that she was any more financially vulnerable than any other consumer seeking redress from a major corporation”).

Fourth, although Defendants’ conduct could be construed as involving “repeated actions,” insofar as a failure to prevent the escape of a pollutant constitutes an “action[],” that could be said of virtually every business tort and therefore cannot itself be a basis for finding heightened reprehensibility. Indeed, courts have held that this factor is not satisfied when, as here, the defendant has essentially engaged in a single course of conduct that may “span[] several weeks.” *Simon*, 113 P.3d at 76; *see also Park v. Mobil Oil Guam, Inc.*, 2004 WL 2595897, at *13 (Guam Nov. 16, 2004) (repeated misconduct subfactor was not satisfied

even though defendant's wrongful acts "spanned several years" and injured plaintiff on several separate occasions because those acts comprised a single course of conduct).

Fifth, although the district court found that Defendants took a "less than honest approach to their dealings with Plaintiffs" (Op. 13), that is not equivalent to a finding that "the harm was the result of intentional malice, trickery, or deceit" (*Campbell*, 538 U.S. at 419, 123 S.Ct. at 1521). To the contrary, even accepting the court's finding that Defendants were "less than honest" in their dealings with Plaintiffs, there is no evidentiary basis for a further finding of a causal relation between that lack of candor and Plaintiffs' injuries. Specifically, Plaintiffs asserted at trial that Defendants misrepresented to Tharpe and Ditchfield that their properties tested negative for carbon black. Not only did Defendants have a valid scientific basis for so representing (*see* PX80-2 (independent lab's conclusion that "black particles" in sample from Tharpe's property were not carbon black)), but there is no evidence that either plaintiff's injuries would have been mitigated had Defendants stated that, in fact, there were minuscule amounts of carbon black on their properties.

In any event, not all deceptions are of equal reprehensibility. Even if Defendants weren't candid with Plaintiffs, that lack of candor pales in comparison with the frauds in other cases in which courts have found multimillion dollar

punitive awards excessive. *See, e.g., Kemp*, 393 F.3d at 1363 (reducing \$1,000,000 punitive award to \$250,000 despite “large-scale corporate” effort “to exploit customers who were unsophisticated and economically vulnerable” by misleadingly presenting gambling debts as “legitimate” long-distance phone charges); *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 828-29 (8th Cir. 2004) (affirming reduction of \$17,875,000 punitive award to \$10,000,000 even though district court “[could] hardly think of a more reprehensible case of business fraud”); *Life Ins. Co. of Ga. v. Johnson*, 701 So. 2d 524, 526-29 (Ala. 1997) (reducing \$15,000,000 punishment to \$3,000,000 where defendant engaged in a pattern of selling worthless Medicare supplement policies to “elderly, uneducated, single black women”).

The reprehensibility factors identified in *Campbell* thus place Defendants’ conduct on the lower end of the reprehensibility spectrum. Moreover, other factors not discussed in *Campbell* reduce the degree of reprehensibility still further. First, the emissions at issue here occurred as part of the process of producing materials for tires, rubber and plastic products, and printing inks and coatings. As the Ninth Circuit has explained, conduct occurring in connection with the performance of “a socially valuable task” such as the transportation of oil by tanker is less reprehensible than conduct serving no legitimate purpose, such as “intentional, repeated ethnic harassment.” *Bains LLC v. ARCO Prods. Co.*, 405 F.3d 764, 775

(9th Cir. 2005). Defendants' conduct should therefore be treated as less reprehensible than the intentional fraud in *Kemp* and the racially discriminatory job actions in *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003).

Second, although Plaintiffs say that Defendants should have done more to prevent carbon black emissions, there can be no question that Defendants did undertake substantial voluntary, pre-judgment remedial measures. See p. 13, *supra*.¹⁵ Several courts, including this one, have recognized that reprehensibility is mitigated when the defendant has undertaken remedial measures. See, e.g., *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1336 (11th Cir. 1999) (because defendant had made "significant efforts" to prevent releases of acidic water from its property, its reprehensibility "was not great"); *Pollard v. E.I. DuPont de Nemours, Inc.*, 2003 WL 23849733, at *5 & n.5 (W.D. Tenn. Oct. 22, 2003) (defendants' efforts to eliminate harassment were a mitigating factor even though "such efforts were not projected directly towards Plaintiff"), *aff'd*, 412 F.3d 657 (6th Cir. 2005); *Indep. Life & Accident Ins. Co. v. Harrington*, 658 So. 2d 892,

¹⁵ The district court stated that Defendants failed to make the multi-million dollar repairs demanded by Plaintiffs because it sought to "bolster profits." Op. 13. Defendants dispute this contention. But even if it were true, that does not mean that Defendants' conduct was especially reprehensible. The defendant in *Johansen* also opted not to undertake every expenditure that the plaintiffs believed was necessary to prevent acidic water from escaping its property, yet this Court agreed with the district court that the misconduct was "not very reprehensible, with no aggravating factors present." 170 F.3d at 1338.

904 (Ala. 1994) (even post-verdict remedial actions mitigate the degree of reprehensibility of the conduct).

For all of these reasons, Defendants’ conduct was not especially reprehensible. Accordingly, even a punitive award of \$2,000,000—which the Supreme Court analogized to a “severe criminal penalty” in *Gore* (517 U.S. at 585, 116 S.Ct. at 1604)—would be excessive. *See, e.g., Konvitz v. Midland Walwyn Capital, Inc.*, 129 Fed. Appx. 344, 347 (9th Cir. 2005) (unpublished) (affirming reduction of punitive award from \$4,784,331.33 to \$1,078,343.55 for fraud as “the maximum amount that is constitutionally permissible,” where the misconduct “was not particularly reprehensible: the harm caused was primarily economic as opposed to physical; it did not involve any acts taken in reckless disregard for the health and safety of others; and the target of the conduct [] was not vulnerable financially or otherwise”); *Park*, 2004 WL 2595897, at *13-16 (reducing \$2,800,000 punitive award to \$150,000, because “an application of the above five factors shows that [the defendant] engaged in reprehensible conduct sufficient to support an award of punitive damages to *some* extent” but ““more modest punishment for this reprehensible conduct’” was justified).

2. The 9:1 ratio of punitive to compensatory damages is indicative of a grossly excessive punishment.

In *Campbell*, the Supreme Court placed “markedly greater emphasis” on the ratio guidepost, providing more detail and using “more constraining language”

than in prior cases. *Simon*, 113 P.3d at 76; *see also* Andrew Lund, *The Road From Nowhere? Punitive Damage Ratios After BMW v. Gore and State Farm Mutual Automobile Insurance Co. v. Campbell*, 20 *TOURO L. REV.* 943, 973-84 (2005) (discussing this change). Specifically, the Court stated that “few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process”; reiterated that a punitive award of four times compensatory damages was likely to “be close to the line of constitutional impropriety”; indicated that, although “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”; and, most notably for present purposes, explained 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.” *Campbell*, 538 U.S. at 425, 123 S.Ct. at 1524 (emphasis added). Applying these guidelines, the Court observed that even though State Farm’s conduct was “reprehensible” and “merit[ed] no praise” (*id.* at 419-20, 123 S.Ct. at 1521), “a punitive damages award at or near the amount of compensatory damages” was likely the constitutional maximum (*id.* at 429, 123 S.Ct. at 1526).

There can be no doubt that compensatory damages totaling \$1,915,000 are “substantial.” In view of the substantiality of those damages, and the modest

reprehensibility of the conduct, no punitive award in excess of the amount of compensatory damages is sustainable here.

The Eighth Circuit reached precisely that conclusion in a case involving significantly more egregious conduct—racial harassment. In *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004), that court held that a \$6,063,750 punitive award—over ten times the \$600,000 compensatory award—was unconstitutionally excessive and that a 1:1 ratio should apply, explaining:

[The] large compensatory award . . . militates against departing from the heartland of permissible exemplary damages. . . . Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on [the] harassment claim be remitted to \$600,000.

Id. at 799 (citation omitted); *see also Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (“a ratio of approximately 1:1” was constitutional maximum where compensatory damages were “substantial” and misconduct was “highly reprehensible”); *Kent v. United of Omaha Life Ins. Co.*, 2006 WL 114922, at *11-12 (D.S.D. Apr. 28, 2006) (reducing \$7,500,000 punitive award for “deceitful conduct [spanning] several months” to \$2,400,000, the amount of compensatory damages, because “[i]t is an understatement to say that \$2,400,000 is a great deal of money”); *Czarnik v. Illumina, Inc.*, 2004 WL 2757571, at *11 (Cal. App. Dec. 3, 2004) (unpublished) (“1:1 ratio of punitive to compensatory damages [was] the [constitutional] maximum” where compensatory

damages were \$2,196,935 and misconduct “was not highly reprehensible”); *cf. Clark v. Chrysler Corp.*, 436 F.3d 594, 607 (6th Cir. 2006) (following *Williams* and *Boerner* and reducing punitive award from \$3,000,000 to \$471,258.26, the amount of compensatory damages).¹⁶

Even though the compensatory damages here are more than three times the damages in *Williams*, and thus are certainly “a lot of money,” the district court nevertheless concluded that the ratio could have been “even higher” than 9:1 because *Johansen* permitted a larger ratio (100:1) in order to promote deterrence. Op. 15 n.6. This reliance on *Johansen* was misplaced for several reasons.

First, the compensatory damages in *Johansen* were “quite small”—\$47,000. 170 F.3d at 1339. Here, the compensatory damages are over 40 times larger. As *Campbell* makes clear, “[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.” 538 U.S. at 425, 123 S.Ct. at 1524; *cf.*

¹⁶ True, in *Bogle* this Court permitted a 3.8:1 ratio notwithstanding that the seven plaintiffs collectively received \$3,500,000 in compensatory damages. There, however, the conduct (race discrimination) was highly reprehensible. 332 F.3d at 1361; *cf. S. Union Co. v. Sw. Gas Corp.*, 415 F.3d 1001, 1011 (9th Cir. 2005) (“The redress of racial, religious, or gender discrimination has been treated as a special area of public concern where affront to human rights may require high punitives.”). Thus, although the court recognized that each librarian “received substantial compensatory damages” and that, generally in that circumstance, “‘a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost due process guarantee,’” the particular “facts of [the] case” justified a 3.8:1 ratio. *Bogle*, 332 F.3d at 1362 (citation omitted).

Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) (“As the Court emphasized in *Campbell*, the . . . very substantial compensatory damages [of \$1 million] . . . greatly reduced the need for giving [plaintiffs] a huge award of punitive damages (\$145 million) as well in order to provide an effective remedy.”).

Second, the *Johansen* Court stated that a higher multiple of the “quite small” compensatory damages was necessary because the defendant was an “extremely wealthy international corporation” and a smaller award might not “attract [its] attention” and adequately deter it. 170 F.3d at 1338. Here, however, the record contains no evidence of Defendants’ wealth, much less evidence that Defendants are “extremely wealthy.”

Moreover, in a subsequent case involving telecommunications giant AT&T, this Court held that a \$1,000,000 punitive award was unconstitutionally excessive and that \$250,000 is a sufficiently “meaningful deterrent to a corporation like AT&T.” *Kemp*, 393 F.3d at 1365; *see also Simon*, 113 P.3d at 82 (reducing \$1,700,000 punitive award to \$50,000 and explaining that “even a prosperous company would ordinarily take reasonable measures to prevent the recurrence of a \$50,000 net loss”).

If a \$1,000,000 punishment was unnecessary to provide adequate deterrence in *Kemp*, then surely a \$17,500,000 punitive award far exceeds the amount needed to deter here. That is especially true because the \$1,915,000 in compensatory

damages, \$1,294,000 in attorneys' fees, and millions that Defendants will have to pay to comply with the injunction all have a significant deterrent effect in their own right. See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307, 106 S.Ct. 2537, 2543 (1986) (compensatory damages deter even in the absence of punitive damages); *Smith*, 461 U.S. at 94, 103 S.Ct. at 1659 (O'Connor, J., dissenting) (awards of attorneys' fees "provide significant deterrence"); *Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003) (substantial attorneys' fees include "a certain punitive element" and "favor[] a lesser rather than greater award of punitive damages"); *In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) (various costs incurred by defendant as a result of its conduct "should be considered as part of the deterrent already imposed").

In any event, *Johansen* is of questionable precedential value after *Campbell*. The Supreme Court made clear in *Campbell* that the defendant's wealth "cannot be the sole basis for a large punitive award in the absence of any of the 'guideposts' . . . , such as the reprehensibility of a defendant's conduct." *Kemp*, 393 F.3d at 1365 n.9. It also "addressed th[e ratio] guidepost with markedly greater emphasis and more constraining language" than *Gore. Simon*, 113 P.3d at 76. And it stated that "any [punitive] award [is] suspect" when a case involves none of the enumerated reprehensibility factors (538 U.S. at 419, 123 S.Ct. at 1521)—a description that fits *Johansen*. See 170 F.3d at 1338 ("no aggravating factors

[were] present”). Accordingly, the fact that *Johansen* upheld a punitive award that was close to 100 times the \$47,000 compensatory award provides no support for deviating from *Campbell*’s clear guidance that a 1:1 ratio is the constitutional maximum when the compensatory damages are substantial and the conduct, even if “merit[ing] no praise” (538 U.S. at 419, 123 S.Ct. at 1521), is not on the high end of the reprehensibility spectrum.

3. The punitive damages are grossly excessive in relation to the fines for comparable conduct.

Because CCC’s plant is regulated by the Alabama Department of Environmental Management (“ADEM”), the most comparable civil penalties are those for air pollution under Alabama Code §§ 22-22A-4 and 22-22A-5. Those statutes impose a \$250,000 cap on the “total penalty [that is] assessed in an order issued by the department.” *Id.* § 22-22A-5(18)c. Accordingly, the third guidepost confirms that CCC lacked “fair notice” that it could be subjected to a \$17,500,000 exaction.

The district court held that under *Johansen*, in which this Court upheld a \$4,350,000 punitive award even though the defendant had been fined only \$10,000 by the relevant state agency, “the possible civil penalty under Alabama law of \$250,000 provided Defendants with adequate notice that their conduct could result in a substantial penalty for pollution.” Op. 16. That conclusion is erroneous for three reasons.

First, the district court’s reasoning would apparently justify *any* amount of punitive damages. The Supreme Court has held directly to the contrary, stating in *Campbell* that the fact that the defendant could have been fined at most \$10,000 “was insufficient to justify the [\$145,000,000 punitive] award.” 538 U.S. at 428, 123 S.Ct. at 1526. Since *Campbell*, several courts have stated that a large disparity between the punitive damages and the applicable civil penalty constitutes strong evidence that the punitive award is unconstitutionally excessive. *E.g.*, *Clark*, 436 F.3d at 608 (“wide gap” between \$3,000,000 punitive award and maximum civil penalty of \$800,000 indicates that punitive award is excessive); *Bains*, 405 F.3d at 777 (comparison of \$10,000,000 punitive award to \$300,000 Title VII cap indicated that punitive award was excessive); *Williams*, 378 F.3d at 798 (comparable penalties analysis indicates that \$6,063,750 punitive award is excessive because “discrepancy [between it and the \$300,000 cap in Title VII cases] . . . is telling and hard to ignore”); *Blust v. Lamar Adver. Co.*, 813 N.E.2d 902, 916 (Ohio. App. 2004) (reducing punitive damages from \$2,245,000 to \$550,316.80 in part because punitive award “dwarf[ed] th[e] roughly analogous statutory penalty [of \$96,000]”).

Second, the *Johansen* Court expressly rejected relying on the maximum fine in environmental cases because “it cannot be presumed that the defendant had notice that the state’s interest in the *specific* conduct at issue in the case is

represented by the maximum fine provided by the statute.” 170 F.3d at 1337. Indeed, often the actual fine will be far less.¹⁷

Finally, the third guidepost is not concerned solely with notice. It also ensures that ““substantial deference”” is accorded to ““legislative judgments concerning appropriate sanctions for the conduct at issue.”” *Gore*, 517 U.S. at 583, 116 S.Ct. at 1603. The district court’s reasoning, which essentially reads the third guidepost out of the law, gives no deference to the legislative judgment that the *most egregious* of environmental violations warrant *at most* only a \$250,000 fine. *See, e.g., Lincoln v. Case*, 340 F.3d 283, 294 (5th Cir. 2003) (reducing punitive award from \$100,000 to \$55,000, the “statutory maximum civil penalty”).

4. The punitive award cannot be justified as disgorgement.

At trial, Plaintiffs claimed that a \$22,500,000 punitive award was necessary to remove the incentive for the misconduct because that was the amount of money Defendants expected to make if, instead of replacing the Unit 1 bagfilters for \$4,700,000, they spent that money elsewhere. R2025. They based this argument on four pieces of evidence: a 1999 document shown to CCC President Kim Pan during his deposition (but not introduced into evidence) that estimated that

¹⁷ The court below erroneously stated that the punitive award in *Johansen* was “100 times greater than the maximum penalty that could have been imposed.” Op. 16. In fact, because Georgia law permitted a *daily* fine of up to \$100,000 (170 F.3d at 1337), and the releases spanned several years, the theoretical maximum penalty in *Johansen* was much higher than the punitive award.

investing \$4,700,000 to replace the Unit 1 bagfilters would yield a “return” of 582% by 2009; Pan’s response that it was logical to assume that, if Defendants did not make this investment, they expected to earn a greater return elsewhere (Pan Depo. 375-77);¹⁸ and two exhibits (PX12 and PX13) confirming that the 1999 calculation was made. Dkt. 290, at 29.

Plaintiffs’ argument fails on several levels. First, it rests on bad math. Although Defendants might have forgone the \$22,500,000 projected return on investment because they expected to earn more elsewhere, \$22,500,000 is not the measure of their “profit” from investing elsewhere. That figure can be derived only by subtracting \$22,500,000 from the projected return on the alternative investment. Because that figure is not in the record, there is no basis for assuming that it comes anywhere near the amount of punitive damages imposed by the jury.¹⁹

But even if there were evidence of the “gain” to Defendants from forgoing the replacement of the Unit 1 bagfilters, allowing a single set of plaintiffs to disgorge that gain in the form of punitive damages raises a number of problems

¹⁸ Several excerpts from Pan’s video deposition—including the one cited in text—were played to the jury. Because the court reporter did not transcribe those excerpts, the district court made the deposition transcript part of the record. Dkt. 264, at 2.

¹⁹ Putting aside this mathematical flaw in Plaintiffs’ theory, the evidence is that Defendants began taking actions to replace the Unit 1 bagfilters before trial. R171, 365. Hence, no amount of punitive damages was necessary to “disgorge” Defendants of the supposed return from an alternative use of the \$4,700,000 cost of replacing the bagfilters.

“which may be of constitutional dimension [under *Campbell*].” *Johnson v. Ford Motor Co.*, 113 P.3d 82, 93-94 (Cal. 2005). Most important, given that this is not a class action, there is a risk of multiple punishment for the same conduct because other property owners could sue Defendants seeking punitive damages under the same “aggregate disgorgement” theory. *Id.* at 94-95; *see Campbell*, 538 U.S. at 423, 123 S.Ct. at 1523 (holding that it is unconstitutional to use a punitive damages award in an individual case to punish for harms to non-parties because doing so “creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains”).

In addition, allowing a large punitive award on the basis of a disgorgement rationale would likely violate the ratio guidepost because “gains made over some period of time” are “likely to be disproportionate to the individual plaintiff’s compensatory award.” *Johnson*, 113 P.3d at 95. That is the case here because the amount sought as disgorgement (\$22,500,000) was based on projected gains over a ten-year period (about half of which post-dates the judgment) and far exceeds Plaintiffs’ harm (\$1,915,000). *See pp. 47-50, supra* (discussing ratio guidepost).

Finally, Plaintiffs’ disgorgement rationale turns common sense on its head. Under the age-old Learned Hand test for negligence, a defendant is liable only if the expense of taking a precaution is *less* than the expected harm from forgoing it.

See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). Yet according to Plaintiffs' theory, the **greater** the expense of a precaution, the more the defendant should be punished for failing to undertake that precaution. Hence, if accepted, Plaintiffs' theory would have the perverse result of authorizing the highest amounts of punitive damages in the cases in which the defendant's conduct is most justifiable as a matter of economics and negligence law.

Indeed, using punitive damages to force companies to make economically irrational investments in pollution-containment technology is the essence of "overdeterrence." *See In re Exxon Valdez*, 270 F.3d at 1244; A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 919 (1998) (punitive damages should not be set at the amount of the defendant's gain when it exceeds plaintiff's harm "because overdeterrence may result"); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 287, 324-25 (1998) (concluding that there are no "systemic differences in the safety and environmental performance between states with punitive damages and states without them" and explaining that "punitive damages promote counterproductive spending and wasteful precautions that may lead to increased risk") (capitalization altered). *Gore* makes clear that "a multimillion dollar penalty" may not be upheld

on deterrence grounds when “a lesser deterrent” would suffice. 517 U.S. at 584, 116 S.Ct. at 1603. That is precisely the situation here.

5. The proper remedy is a substantial reduction of the punitive damages.

In sum, because of the substantial compensatory award, the modest reprehensibility of the alleged misconduct, and the large attorneys’ fees and injunctive costs, the maximum permissible amount of punitive damages is no more than the amount of compensatory damages. Accordingly, the Court should reduce the punitive award to this amount (assuming that it has not already reduced the punitive damages pursuant to the cap statute). *Kemp*, 393 F.3d at 1365 (court can unconditionally reduce award to constitutional maximum); *Johansen*, 170 F.3d at 1328-33 (same).

CONCLUSION

The Court should reverse the judgment of the district court and render judgment that Plaintiffs take nothing. Alternatively, the Court should grant Defendants a new trial. At minimum, the Court should drastically reduce the compensatory and punitive damages.

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Dated: May 30, 2006

**CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7) AND
ELEVENTH CIRCUIT RULE 28-1**

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7) and Eleventh Circuit Rule 28-1 for a brief produced with a proportionally spaced font. This brief was prepared using Microsoft Word 2002 in Times New Roman 14 point font. The length of this brief is 13,989 words.

/s/ Evan M. Tager
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Dated: May 30, 2006

CERTIFICATE OF SERVICE

I hereby certify that, on May 30, 2006, I served one copy of the foregoing Brief Of Defendants-Appellants Continental Carbon Company And China Synthetic Rubber Corporation by First Class Mail, postage prepaid, on each of the following:

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