THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

PATRICIA WILLIAMS,

Plaintiff,

vs.

WYNDHAM VACATION OWNERSHIP, INC., WYNDHAM VACATION RESORTS, INC.,

Defendants.

Case No. CGC-12-526187

RULINGS ON DEFENDANTS' POST-TRIAL MOTIONS

Defendants move for a new trial and judgment notwithstanding the verdict ("JNOV"). Save for a reduction in the amount of punitive damages, the motions are DENIED.

Summary of Trial Evidence

With a net worth of $3.7 billion, Wyndham Vacation Ownership, Inc. is one of the world's largest timeshare companies. In 2010, Wyndham's[1] San Francisco site was defrauding many customers, mainly the elderly. Wyndham's salespeople called the fraudulent practices "pitching heat." The fraud took many forms. "Buy back fraud" was to make a sale by falsely telling a prospect that Wyndham guaranteed to buy back timeshares. Wyndham's salespeople also financed timeshares by opening credit cards in customers' names without their knowledge. They falsely stated that monthly maintenance fees could not be raised, and sold the elderly more

[1] Wyndham Vacation Ownership, Inc. and Wyndham Vacation Resorts, Inc. are affiliated. At trial, its counsel called the two "Wyndham" and rarely distinguished between them. I follow Wyndham's convention in this order.

time than they could reasonably use before death. When timeshare sales were off, Wyndham had "TAFT Days" – "Tell Them Any Frigging Thing."

Led by site manager Tara Dow, Wyndham incentivized the fraud in its fast-talking high-pressure commission-sales environment with "The Wheel." Using it, Dow assigned salespeople who sold timeshares by "pitching heat" on one day to prey on prime prospects the next day. Conversely, Dow assigned salespeople who refused to commit fraud to "one-leggers" – a wife or husband whose spouse was not present to enable a sale.

The most egregious fraudster, Anita Howell, bragged to co-workers that she "sold my soul to the Devil." Wyndham received 39 customer complaints against Howell.

Patricia Williams, a Wyndham salesperson in Virginia, was recruited to join Wyndham-San Francisco and moved herself cross-country. Confronted with the rampant fraud, Williams refused to join in and blew the whistle, reporting the fraud internally at Wyndham and then to the National Labor Relations Board. Wyndham fired Williams in retaliation. The Wyndham human resources officer who investigated her case and questioned the propriety of Williams' pretextual firing was then himself fired.

Meanwhile, as Howell continued to amass customer complaints, Wyndham lavished her with steak dinners, lobsters delivered to her home and tropical vacations.

Back in Virginia, Williams sought solace in alcohol, drinking herself to sleep most nights. At middle age, she was reduced to a restaurant greeter job and moved in with her mother.

New Trial Motion

Whitney Testimony. Wyndham's lead argument regards Marty Whitney, a Williams co-worker. Formerly a co-plaintiff with Williams in this case, Whitney became unhappy when Williams did not settle along with her, believing that cost Whitney more money. Whitney thus

delivered on a written threat to turn coat and testify against Williams at trial. Among Whitney's testimony were details of what Williams would seek in mediation and settlement.

Wyndham claims Williams' counsel violated my orders on mediation and settlement. I ruled that, if former co-plaintiff witnesses (*e.g.*, Whitney) showed animus toward Williams in their testimony, they could be asked "whether they're unhappy that Ms. Williams would not settle thus costing them more money, but without saying settlement amounts." Whitney was thus asked in cross-examination: "Didn't you communicate if you had to settle for that [unstated] small amount, you were going to be a witness for Wyndham against Trish [Williams]?" This did not violate my orders.

Nor was it error. Wyndham opened the door to mediation-related matters with Whitney's testimony about her pre-mediation discussions with Williams. To not allow impeachment of Whitney with her post-mediation threat could only have misled the jury and violated due process. The Legislature's intent in enacting mediation laws was not to promote gamesmanship or perjury. (*See Rojas v. Sup. Ct.* (2004) 33 Cal.4th 407, 416-18.)[2]

Moreover, had any error occurred, it would have been harmless. Questioning about Whitney's threat took roughly one minute of a three-week trial. The rest of Whitney's spiteful testimony was self-contradictory, hyper-partisan, lacking in credibility and just plain bizarre.[3] Wyndham deems Whitney's testimony "devastating" to Williams, but it actually hurt Wyndham's case far more than it helped.

Amount of Noneconomic Damages. Williams sought noneconomic damages for "past physical pain, mental suffering, loss of enjoyment of life, physical impairment, inconvenience,

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[2] Wyndham says it wanted Whitney to make "a forceful and complete denial" of her threat against Williams; that would have been a falsehood.

[3] Early on, for example, Whitney announced to the jury that she was "a domestic goddess."

grief, anxiety, humiliation, and emotional distress." The testimony of Williams and her former fiancé (set out on pages 5 and 6 of her opposition) was detailed and convincing.

The jury was instructed: "No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your commonsense." (California Civil Jury Instructions (CACI) 3905A.) This was, in fact, a commonsense jury. Jurors posed many intelligent written questions to witnesses and made cogent queries while deliberating. (*See* CACI 5009, 5019.)

Wyndham claims the jury's noneconomic damages verdict was "excessive" and based on "inflammatory evidence, misleading jury instructions, improper argument by counsel, or other misconduct." But Wyndham points to nothing persuasive. Its lead is again the minute of Whitney testimony – a weak reed. Wyndham next says the evidence of its sales fraud was "misconduct" by Williams' counsel. However, that evidence tracked my rulings and was relevant to the reasons for Williams' whistleblowing, to the motive for Wyndham's retaliation and to Wyndham's disparate treatment of Howell and Williams.

Wyndham also argues that awards in other cases mandate reversal of our jury's verdict. The California Supreme Court teaches otherwise: "The vast variety and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries award to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of fact finding." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 n.12.)

No cause for a new trial on noneconomic damages exists.

Jury Question. During Phase I deliberations in this bifurcated punitive damages trial, the jury sent out a written question: "Regarding [CACI] 3946, punitive damages may apply if Wyndham engaged in malice [,] oppression or fraud. Must we consider only malice, oppression or fraud conduct towards Ms. Williams, or malice, oppression or fraud in general (i.e., defrauding the elderly)." (emphasis in original).

CACI 3946 is a lengthy instruction, but its first sentence answered the jury's query: "If you decide that Wyndham's conduct caused Patricia Williams harm, you must decide whether that conduct justifies an award of punitive damages" – *i.e.,* the jury must consider only conduct toward Williams, as the sentence mentioned no one else. I thus answered the jury question: "Please see first sentence of CACI 3946."[4]

Wyndham advocated that I instead clip a sentence from CACI 3949 – an instruction not to be given until Phase II of a bifurcated punitive damages trial. In any event, the two sentences' import is the same. This was no error.

Amount of Punitive Damages. In Phase II, the jury was instructed: "The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future." (CACI 3949.) As to "the amount of punitive damages," the jury was instructed to consider "[h]ow reprehensible" Wyndham's conduct was and, "[i]n view of" the "defendant's financial condition, what amount is necessary to punish it and discourage future wrongful conduct?" (*Id.*)

Wyndham's conduct was highly reprehensible; Wyndham fleeced elderly people rampantly. When Williams blew the whistle on the fraud, Wyndham retaliated against the "financially weak" and "vulnerable" single woman, who arrived in San Francisco with too little money to pay first month's rent. (*See* CACI 3949.) When Wyndham's own human resources

[4] This is unlike Wyndham's cited cases, in which instructions did not already state the requisite legal standards.

officer questioned Wyndham's conduct, it fired him too, showing "a pattern or practice" of retaliation. (*See id.*)[5]

The question for the jury thus became how much money, in view of Wyndham's "financial condition," was "necessary to punish" its highly reprehensible past misconduct and to "discourage future wrongful conduct." (*See* CACI 3949.) Wyndham is a $3.7-billion concern. The $130,000 in punitive damages it now proposes to pay would be a rounding error to Wyndham, not punishment.

Wyndham finds "passion and prejudice" in the jury's verdict based on no more than its amount. However, given the evidence and the CACI instructions the jury followed, the verdict is dispassionately sound. Wyndham's conduct was highly reprehensible; $18.6 million might well be necessary to actually punish, and deter future misconduct by, a company worth $3.7 billion.

Wyndham again cherry-picks awards from other cases. However, our Supreme Court's teaching is again wise: comparison to other awards in other cases to other plaintiffs based on other facts and other law seldom proves fruitful. (*See Bertero*, 13 Cal.3d at 65.) The evidence and instructions in *this* case are primary; they warranted the jury's punitive damages award.

That said, the U.S. Supreme Court has set "due process" limits on punitive damages. As stated in *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 410, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy

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[5] Other Wyndham employees also testified to its retaliatory practices and fraud:

(1) Salesperson: After she complained of the fraud, "The managers wouldn't even look at me. They would skip me on the rotation. They did...everything they could so I wouldn't get sales."
(2) Salesperson: When she complained to Wyndham about the fraud, site manager Dow told her to "keep my mouth shut or I'd be fired."
(3) Manager: After he protested the fraud in a letter, Wyndham vice president Jim White told him he had to transfer out of San Francisco or be fired.
(4) Salesperson: She was afraid to report fraud "because I would be fired"; Wyndham "was like the Mafia."
(5) Quality control officer: She was shunned by fraudster salespeople after arriving in San Francisco because they could not "get away with as much"; after she reported a pattern of fraud, Wyndham did not take responsive steps.

due process." The punitive damages award is therefore reduced to $12.8 million – a less than 9:1 ratio between punitive and compensatory damages. (*See Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 375) ("appropriate order is for an absolute reduction," not remittitur).)[6]

JNOV

Labor Code §1102.5 Claim. Williams had to prove that Wyndham discharged her in retaliation for (1) disclosure of information to a government agency or (2) refusal to participate in unlawful acts. The disclosure or refusal need have been only one "motivating reason" for the discharge decision. (11/14 Tr. 53.) There was substantial evidence on both grounds.

First, it was not seriously disputed that Williams informed the National Labor Relations Board that Wyndham committed sales fraud and told Wyndham of that disclosure before it fired her. Wyndham maintained Williams' statement in a business record that it concedes was admissible. That record established Williams' disclosure and Wyndham's knowledge of it.[7]

Second, after arriving at Wyndham-San Francisco, Williams soon learned the site was rife with fraud. She refused to participate in the unlawful acts and blew the whistle on them. This put Williams firmly on the wrong side of site manager Dow, who profited from the fraud.

Wyndham argues that Williams was not directly ordered to commit fraud, but it cites no authority holding that a direct order is required, and Wyndham management's actions spoke louder than words. For example, as detailed above, Dow rewarded fraudster salespeople with the prime spots on Wyndham's "Wheel." Those, such as Williams, who refused to participate in

[6] To the extent other opinions are relevant, three regarding punitive damages in employment cases have been published since *State Farm.* (1) *Gober v. Ralph's Grocery* (2006) 137 Cal.App.4th 204, 223 reduced a ratio to 6:1 given – unlike here – "only a modest degree of reprehensibility." (2) *Wysinger v. Automobile Club of Southern Calif.* (2007) 157 Cal.App.4th 413, 429 upheld a 3.6:1 ratio. (3) *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 719, reduced a ratio to 1:1 given – unlike here – a "relatively low degree of reprehensibility." *See also Nickerson,* 63 Cal.4th at 370 (10:1 ratio); *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1189 (10:1 ratio).

[7] Because the fact of Williams' disclosure to the board was not seriously disputed, the board's handling of the disclosure was excluded from trial as unduly time-consuming and likely to confuse issues. (*See* Evid. Code §352.) Likewise excluded, at Wyndham's request, was the later firing of Tara Dow for drug-abuse allegations, including snorting cocaine off another woman's breast. (*See id.*)

unlawful acts, had their compensation slashed by "one-legger" assignments and the like. Wyndham's clear directive: commit fraud.

Wyndham also isolates Williams' refusal to commit the fraud from her whistleblowing about the fraud. But the two were of a piece, and Wyndham cites no authority for such parsing.

Wrongful Termination Claim. Wyndham now argues that it is not a violation of public policy to discharge an individual because she disclosed information to her employer. However, Wyndham itself proposed a jury instruction stating: "It is a violation of public policy to discharge an individual because she disclosed information to her employer." The instruction Wyndham advocated – and the instruction given to the jury – correctly stated the law. (*See, e.g., Green v. Ralee Eng'g Co.* (1998) 19 Cal.4th 66, 80; *Gould v. Maryland Sound* (1995) 31 Cal.App.4th 1137, 1150; *Collier v. Sup. Ct.* (1991) 228 Cal.App.3d 1117, 1123-24.)

Wyndham's Managing Agents. Wyndham claims its executives who wronged Williams were not "managing agents" for punitive damages purposes. Jim White was vice president of Wyndham's western region, responsible for $275-300 million in annual sales and for sales practices of Wyndham employees in at least 16 sites. Kimberly Barber was Wyndham's Director of Human Resources for all of California, Nevada and Colorado. Karen Case was Area Vice President for Human Resources. Wyndham concedes Tara Dow "was the most senior person in the San Francisco operation," and, as detailed above, Wyndham gave Dow substantial independent authority.

People with authority equal to or less than these Wyndham executives are routinely held to be managing agents for punitive damages purposes. (*See, e.g., White v. Ultramar, Inc.* (1999) 21 Cal.4th. 563, 577-78 (zone manager); *Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 373 (equal opportunities officer); *Powerhouse Motorsports Ground, Inc. v. Yamaha Motor*

Corp. (2013) 221 Cal.App.4th 867, 886 (regional sales manager); *Major v. Western Home* (2009) 169 Cal.App.4th 1197, 1220-21 (regional claims manager); *Wysinger*, 157 Cal.App.4th at 428-29 (vice president of district office); *Gober*, 137 Cal.App.4th at 221 (district manager); *Hobbs v. Bateman, Eichler, Hill Richards* (1985) 164 Cal. App.3d (1985) 174, 193 (office manager).)

Wyndham says in a single-sentence argument that Williams "was not wronged" by its managing agents. The treatment is abbreviated for a reason: the clear and convincing evidence established that the four Wyndham executives all participated in Williams' retaliatory firing and thus (1) "committed" the misconduct themselves, (2) "authorized" it and/or (3) knew of the misconduct "and adopted or approved that conduct after it occurred." (*See* CACI 3946.)

Amount of Noneconomic Damages. Wyndham seeks a "partial JNOV" on noneconomic damages. This is denied for the reasons already stated above.

Amount of Punitive Damages. Wyndham's arguments on the amount of punitive damages – incorporated into its new trial motion – are also addressed above.

Dated: March 10, 2017

Richard B. Ulmer Jr.
Judge of the Superior Court