IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1251

COLEMAN (PARENT) HOLDINGS INC.,

Petitioner,

vs.

MORGAN STANLEY & CO. INCORPORATED,

Respondent.

RESPONDENT'S ANSWER BRIEF IN OPPOSITION TO JURISDICTION

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SUMMARY OF THE ARGUMENT

There is no express and direct conflict with *Ault v. Lohr*, 538 So. 2d 454 (Fla. 1989) and *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Neither case holds that a party may recover punitive damages for fraud even though it failed to prove it suffered actual, compensable damages, an essential element of a cause of action for fraud. Rather, as the Fourth District correctly held, "[t]he punitive damages award cannot stand where, as here, no legally cognizable damage was shown as a result of the alleged fraud." Appendix A, p. 10.

Nor is there express and direct conflict with *Webb Furniture Co. v. Everett*, 105 Fla. 292, 141 So. 115 (1932). Contrary to Petitioner's contention, *Webb* does not require a new trial where, as here, the plaintiff failed to present legally sufficient evidence of an essential element of its claim. There also is no conflict with *Goldberg v. Florida Power & Light Co.*, 899 So. 2d 1105 (Fla. 2005) or *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992). Those cases do not address benefit-of-the-bargain damages. None of the other cases cited by Petitioner presents express and direct conflict, the prerequisite for this Court's jurisdiction.

ARGUMENT

I
THERE IS NO EXPRESS AND DIRECT CONFLICT WITH *AULT* OR *ENGLE*

There is no express and direct conflict with *Ault v. Lohr*, 538 So. 2d 454 (Fla. 1989). *Ault* held that an assault plaintiff could recover punitive damages without proving actual, compensable damages. *Id.* at 456. Actual damages are not an essential element of the tort of assault. Appendix A, p. 10. But this was a fraud case. "[D]amage" is the "very essence of an action [for] fraud," and without proof of damages, a fraud is not actionable. *Casey v. Welch*, 50 So. 2d 124, 125 (Fla. 1951).

Petitioner's assertion that it "prove[d] conclusively that it was injured in fact" (Jur. Br., p. 4) is incorrect. The Fourth District stated: "[N]o legally cognizable damage was shown as a result of the alleged fraud." Appendix A, p. 10. Because Petitioner did not prove a critical element of fraud – compensable injury – there could be no liability for fraud and no punitive damages. Indeed, "[h]ad the trial court properly directed a verdict for Morgan Stanley, the case would have ended at that point and the punitive damages phase never would have been reached." *Id.* There is no conflict with *Ault*, which was not a fraud case.

Nor is there an express and direct conflict with *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Petitioner incorrectly says that in *Engle* this Court "*held* that a fraud plaintiff seeking punitive damages need not prove a 'specific injury' or a specific amount of compensatory damages," and that "*Engle*'s *holding* [was] that a party found liable for fraud can be required to pay punitive damages even if the plaintiff 'did not suffer any compensable damage.'" Jur. Br., p. 4-5 and n.1 (emphasis supplied). This Court did not so "hold." It said this:

> More specifically, we *hold* as follows:
>
> * * *
>
> A majority of the Court (Anstead, Pariente, Lewis, and Quince) also concludes that the Third District misapplied *Ault v. Lohr*, 538 So. 2d 454, 456 (Fla. 1989), by holding that compensatory damages must be determined *before* a jury can determine *entitlement* to punitive damages.

945 So. 2d at 1254 (emphasis supplied).

As the Fourth District correctly recognized, that holding addressed the timing of proof, *i.e.*, whether a jury in a class action can, before individual compensatory damages are decided, find that the defendant's conduct was sufficiently wrongful to warrant a potential punitive damages award. *Engle* did not

hold that punitive damages may be awarded to an individual fraud plaintiff that ultimately fails to prove the essential element of compensable damages.

The different opinions in *Engle* confirm that the Court did not create a free-standing claim for punitive damages in the absence of proof of a prima facie case. A majority (Lewis, C.J., Quince, J., Wells, J., and Bell, J.) recognized that an award of punitive damages to the individual plaintiffs in *Engle* must be predicated on proof of actual injury. *See* 945 So. 2d at 1280 (Lewis, C.J., concurring in part and dissenting in part, joined by Quince, J.) ("[N]o plaintiff in the Engle Class may ultimately receive an award of punitive damages without proving that he or she suffered actual damages in Phase III . . . ."); *id.* at 1284-85 (Wells, J., concurring in part and dissenting in part, joined by Bell, J.) ("The [United States] Supreme Court has made it clear that punitive damages must be in ratio to compensatory damages. . . . It necessarily follows, then, that there must be compensatory damages in order for punitive damages to be in ratio to compensatory damages.").[1]

[1] *Engle*, moreover, was addressing the order of proof for a variety of tort claims – there were also product liability claims and claims for intentional infliction of emotional distress, *id*. at 1257 & n.4 – and the Court not only decertified the class but set aside findings of fraud on various grounds, *id*. at 1255, 1267-69, 1276-77. Given that, *Engle* cannot reasonably be read as singling out the tort of fraud to hold that a plaintiff can recover punitive damages for fraud without

In addition, *Engle* recognized that "the amount of compensatory damages must be determined in advance of a determination of the amount of punitive damages awardable, if any, so that the relationship between the two may be reviewed for reasonableness." 945 So. 2d at 1265. Moreover, section 768.73, Fla. Stat., imposes a cap of three times compensatory damages. Here, "no legally cognizable damage was shown." Appendix A, p. 10. Thus, not only is there no conflict with *Engle* and *Ault*, there is no practical need to exercise discretionary jurisdiction in this case.**II**

THERE IS NO EXPRESS AND DIRECT CONFLICT WITH THIS COURT'S 1932 DECISION IN *WEBB FURNITURE* OR WITH OTHER DECISIONS

The Fourth District's decision does not expressly and directly conflict with *Webb Furniture Co. v. Everett*, 105 Fla. 292, 141 So. 115 (1932), a case which Petitioner did not even cite below. Nothing in *Webb* establishes a rule that a remand for entry of judgment cannot follow a reversal based on insufficient evidence of a claim. *Webb* pre-dates the 1950 rule changes allowing trial courts to enter judgment in accordance with a motion for directed verdict. Moreover, *Webb* did not require a new trial on a previously tried claim that failed for insufficient proof. It remanded for a trial *only on claims that had not yet been tried*, claims that the plaintiff had sought to add after a prior appeal. *Webb*, 105 Fla. at 293-97, 141 So. at 115-16. That is entirely different from the relief Petitioner seeks, a remand to retry the same claim it failed to prove at trial.

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proving the actual damages necessary to establish liability. For that reason too, there is no conflict with *Engle*.

Petitioner offers *Webb*'s statement that, after a reversal, parties on remand should be "restored to the position they found themselves [in] at the time the error was committed" and that, "when error occurs in the trial, . . . the cause must be tried again." 141 So. at 116. The Fourth District did not hold otherwise. It recognized that the trial court's error occurred when that court failed to "grant[] Morgan Stanley's motion for directed verdict" *after* the close of Petitioner's evidence. Appendix A, p. 9. At that point, Respondent should have been granted judgment as a matter of law. The remand for the entry of judgment "restored [the parties] to the position they found themselves [in] at the time the error was committed." 141 So. at 116. That poses no conflict with *Webb*.

Petitioner asserts that it relied on the trial court's rulings in presenting its damages evidence at trial and thus should receive a new trial. However, the decision below is not about evidentiary rulings; it is based on Petitioner's failure to present legally sufficient evidence to prove its claimed benefit-of-the-bargain damages. Petitioner, not the trial court, instructed its expert to "[d]epart[] from his practice in other securities cases" and "simply assume[] CPH could not have recovered any value." Appendix A, p. 4. Having made that strategic decision before the trial court's rulings, Petitioner cannot blame its failure of proof on the trial court.

Petitioner's failure at trial to present legally sufficient evidence to prove the benefit-of-the-bargain damages it elected to pursue required the directed verdict Respondent had sought. In *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corporation*, 537 So. 2d 561, 563 (Fla. 1989), the Court required entry of judgment, not a new trial, when the plaintiff chose to proceed over the other party's overruled objection. The similar outcome here created no conflict with *Webb*.

There also is no express and direct conflict with Petitioner's other cited cases. Those decisions either (1) do not involve failure to prove an element of the tort, *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006); *Wolfe v. Gencorp, Inc.*, 529 So. 2d 1154 (Fla. 1st DCA 1988); (2) predate the 1950 rule changes, *Jones v. Tampa Elec. Co.*, 143 Fla. 693, 197 So. 385 (1940); (3) have no analysis demonstrating conflict, *Srybnik v. Ice Tower, Inc.*, 162 So. 2d 294, 296 (Fla. 3d DCA 1964); or (4) involve unique and utterly dissimilar facts, such as a trial premised on an unconstitutional statute, *see Florida E. Coast Ry. Co. v. Edwards*, 197 So. 2d 293 (Fla. 1967). None holds that a plaintiff gets a new trial if it fails to prove an essential element of its claim at trial.

Rowland v. Whitehead, 375 So. 2d 607 (Fla. 2d DCA 1979), also is inapposite. That court allowed a new trial because it was "not a case in which the

plaintiff . . . is seeking to introduce additional evidence which she should have put on in the first place." *Id.* at 609. Here, Petitioner could have introduced the required damages evidence at trial, and having chosen not to do so, now seeks a new trial to introduce the evidence it should have presented in the first place. *See, e.g., St. Petersburg Hous. Auth. v. J.R. Dev.*, 706 So. 2d 1377, 1377 (Fla. 2d DCA 1998) (reversing order granting rehearing on damages because such a hearing "improperly allows appellee a 'second bite at the apple' at proving damages, an element of proof that should have been proven at trial"). None of Petitioner's cases poses express and direct conflict with the decision below.

III
THERE IS NO EXPRESS AND DIRECT CONFLICT WITH *GOLDBERG* OR *MCCAIN*

The decision below likewise does not conflict with *McCain* or *Goldberg*, neither of which was cited by Petitioner below. Those personal injury cases, involving issues of foreseeability and intervening cause, have nothing to do with the proper test for proving benefit-of-the-bargain damages in a commercial fraud case. Benefit-of-the-bargain damages are the difference between what the plaintiff was promised and what it actually received. Petitioner failed to prove the value of what it received, and thus failed to prove that difference. That is a damages issue, and presents no express and direct conflict with *Goldberg* or *McCain*.

Petitioner claims the Fourth District created a "new fraud damages rule" by holding that a plaintiff "must conduct an 'event study' to prove the amount of its damages." Jur. Br., p. 8. Not so. The Fourth District merely observed that securities fraud plaintiffs "[u]sually" employ an event study to prove damages, and that other jurisdictions had "often" required such studies. Appendix A, p. 7. But the court ultimately held only that Petitioner had to prove, by any proper means, "the actual 'fraud-free' value of the stock at the time of purchase." *Id.* at 9.

Petitioner was not entitled to assume the stock's value was zero and thereby recover three years of unrelated stock-price declines. Sunbeam did not go bankrupt for nearly three years after the transaction at issue. Appendix A, p. 3. Furthermore, well after the alleged fraud was disclosed and Sunbeam restated its 1997 financials, "Sunbeam still showed a profit for 1997, even after the restatement, and still had assets of $3.5 billion." *Id.* at 2. Whatever may have motivated Petitioner to avoid proving the fraud-free value of the stock at the time of its purchase, one thing is clear: the failure to do so, and its consequences, present no conflict with decisions of this Court or any other District Court of Appeal.

Petitioner claims that it suffered losses during the three years it held the Sunbeam stock (when its own officers ran Sunbeam, Appendix A, p. 2) because the

alleged fraud prevented it from selling the stock earlier. But Petitioner's bargain with Sunbeam included a "lockup" that prevented it from selling during that period. Appendix A, p. 2. Petitioner cannot claim benefit-of-the-bargain damages while ignoring the part of its bargain that required it to assume the risk of stock price declines from ordinary market events. Petitioner did not seek consequential damages, *id.* at 5 n.1, and a "plaintiff who seeks a benefit-of-the-bargain measure of damages is not entitled to a better bargain than the one it made." *Id.* at 6. On this issue too Petitioner has demonstrated no express and direct conflict with any decisions.

Finally, we note that Petitioner's assertion that Respondent had a "proven role" (Jur. Br., p. 1) in Sunbeam's fraud is misleading. A discovery sanction precluded Respondent from contesting its alleged involvement, an issue the Fourth District did not need to reach because Petitioner "fail[ed] to prove compensatory damages by not establishing the fraud-free value of the Sunbeam stock on the date of the merger transaction." Appendix A, pp. 1-2.

CONCLUSION

For the foregoing reasons, the Court should decline to exercise its express and direct conflict jurisdiction in this case because there is no express and direct conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following parties by U.S. Mail this 24th day of July, 2007:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

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