

TABLE OF CONTENTS

Page

1

2

3

4 I. THIS COURT SHOULD GRANT A NEW TRIAL ON PLAINTIFF’S CLAIM FOR PUNITIVE DAMAGES.....1

5 A. Introduction1

6 B. The Court Must Act as an Independent Trier of Fact in Scrutinizing the Punitive Damage Award4

7 C. The Three Billion Dollar Punitive Damage Award is Grossly Excessive5

8 1. The Punitive Damage Award Is Excessive In Relation to the Compensatory Damages6

9 2. The Punitive Damages Award Is Excessive in Relation to Philip Morris’ Financial Condition7

10 a. Plaintiff’s Use of Illusionary Economics to Value Philip Morris was Improper7

11 b. The Punitive Award Is Disproportionate to Philip Morris’ Net Worth11

12 3. The Punitive Damage Award Is Excessive in Relation to the Reprehensibility of Philip Morris’ Alleged Conduct11

13

14 D. The Three Billion Dollar Punitive Damage Award is Unnecessary to Deter Future Misconduct.....17

15 1. Philip Morris Has Stopped the Alleged Practices at Issue18

16 2. The Master Settlement Agreement Prevents Future Misconduct.....18

17 3. The Prospect of Additional Lawsuits Renders the Punitive Damages Award Here Superfluous and Excessive20

18

19 E. The Three Billion Dollar Punitive Damage Award is the Product of Passion and Prejudice21

20 1. The Misconduct of Plaintiff’s Counsel Inflamed the Jury Into Awarding Punitive Damages Based on Passion and Prejudice21

21 2. The Verdict Was So Tainted by Passion And Prejudice That a New Trial Is Necessary24

22

23

24 II. THIS COURT SHOULD GRANT A NEW TRIAL ON PLAINTIFF’S CAUSES OF ACTION.....26

25 A. Philip Morris is Entitled to a New Trial Because of the Court’s Failure to Instruct the Jury on the Scope of Preemption Under the FCLAA.....26

26 1. Scope Of Preemption Under The FCLAA26

27 2. Plaintiff’s “Fraud” Claims Were Preempted Because They Were Premised on Conduct Addressed by the FCLAA.....28

28 a. The Court Improperly Admitted Evidence of Post 1969 Fraudulent Concealment.....28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

b. The Court Improperly Admitted Evidence of Neutralization of the Federal Warning30

c. The Court Improperly Admitted Evidence of Post-1969 “Youth Marketing”30

3. The Admission of Evidence and Failure to Instruct the Jury On the Scope of Preemption Under the FCLAA Was Prejudicial Error.....31

B. Philip Morris is Entitled to a New Trial Because the Finding of Reliance is Against the Weight of the Evidence32

C. Philip Morris is Entitled to a New Trial Based Upon the Erroneous and Prejudicial Exclusion of Evidence of Plaintiff’s Felony Convictions.....35

D. Philip Morris is Entitled to a New Trial on the Claims of Strict Products Liability and Negligence37

1. Philip Morris is Entitled to a New Trial on the Design Claims.....37

a. A Verdict Based Upon the Consumer Expectation Test is Against the Weight of the Evidence37

b. The Jury Was Improperly Instructed That a Defect in Design Could Be Found Under the Risk/Benefit Test.....39

c. A Verdict Based on the Risk/Benefit Test Is Against the Weight of the Evidence42

2. The Evidence Is Insufficient To Support A Verdict Based Upon Failure To Disclose Prior To July 1, 196943

E. The Court Erred in Excusing Juror No. 5.....44

F. The Entire Verdict Should be Set Aside Because It Was the Product of Passion and Prejudice44

CONCLUSION45

1 **TABLE OF AUTHORITIES**

2 Page(s)

3 **STATE CASES**

4 *Ace v. Aetna Life Ins. Co.*
5 (D. Alaska. 1999) 40 F. Supp. 2d 1125 14

6 *Acosta v. Synthetic Indus., Inc.*
7 (2001) 88 Cal. App. 4th 944 33, 42

8 *Adams v. Murakami*
9 (1991) 54 Cal. 3d 105 2, 5, 7, 8, 11, 17

10 *Adams v. Thomas*
11 (Tex. Ct. App. 1982) 638 S.W.2d 933 17

12 *Allard v. Church of Scientology*
13 (1976) 58 Cal. App. 3d 439 6

14 *American Tobacco Co. v. Superior Court*
15 (1989) 208 Cal. App. 3d 480 12

16 *Anderson v. Owens-Corning Fiberglas Corp.*
17 (1991) 53 Cal. 3d 987 43

18 *Baione v. Owens-Illinois, Inc.*
19 (Fla. Dist. Ct. App. 1992) 599 So. 2d 1377 17

20 *Barker v. Brown & Williamson Tobacco Corp.*
21 (2001) 88 Cal. 4th 42 12

22 *Barker v. Lull Engineering Co.*
23 (1978) 20 Cal. 3d 413 37

24 *Blackmore v. Brennan*
25 (1941) 43 Cal. App. 2d 280 21

26 *Bresnahan v. Chrysler Corp.*
27 (1998) 65 Cal. App. 4th 1149 43

28 *Brown v. Farkas*
(Ill. App. Ct. 1986) 511 N.E.2d 1143 7

Burnett v. National Enquirer, Inc.
(1983) 144 Cal. App. 3d 991 11

Clemmer v. Hartford Ins. Co.
(1978) 22 Cal. 3d 865 4

Compare Stevens v. Owens-Corning Fiberglass Corp.
(1996) 49 Cal. App. 4th 1645 2

Cunningham v. Simpson
(1969) 1 Cal. 3d 301 21

1	<i>Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.</i>	
2	(1984) 155 Cal. App. 3d 381	8
3	<i>Dumas v. Stocker</i>	
4	(1989) 213 Cal. App. 3d 1262	4, 8
5	<i>Egan v. Mutual of Omaha Ins.</i>	
6	(1979) 24 Cal. 3d 809	6
7	<i>Fountain Valley Chateau Blanc Homeowner's Ass'n v. Dep't of Veterans Affairs</i>	
8	(1998) 67 Cal. App. 4th 743	32, 39
9	<i>Gawara v. U.S. Brass Corp.</i>	
10	(1998) 63 Cal. App. 4th 1341	33
11	<i>Gordon v. Strawther Enter.</i>	
12	(1969) 78 Cal. Rptr. 417	25
13	<i>Green v. Soule</i>	
14	(1904) 145 Cal. 96	32
15	<i>Hasson v. Ford Motor Co.</i>	
16	(1982) 32 Cal. 3d 388	24
17	<i>Holmes v. J.C. Penney Co.</i>	
18	(1982) 133 Cal. App. 3d 216	43
19	<i>Jones v. Citrus Motors Ontario, Inc.</i>	
20	(1973) 8 Cal. 3d 706	4
21	<i>Kenly v. Hiroshi Ukegawa</i>	
22	(1993) 16 Cal. App. 4th 49	8
23	<i>Lane v. Hughes Aircraft Co.</i>	
24	(2000) 22 Cal. 4th 405	3, 7
25	<i>Las Palmas Assoc. v. Las Palmas Ctr.</i>	
26	(1991) 235 Cal. App. 3d 1220	8
27	<i>Lemons v. Regents of Univ. of Cal.</i>	
28	(1978) 21 Cal. 3d 869	31, 42
29	<i>Little v. Stuyvesant Life Ins. Co.</i>	
30	(1977) 67 Cal. App. 3d 451	6, 8, 11, 25, 44
31	<i>Love v. Wolf</i>	
32	(1964) 226 Cal. App. 2d 378	25, 44
33	<i>Maiorino v. Schering-Plough Corp.</i>	
34	(N.J. Super. Ct. App. Div. 1997) 695 A.2d 353	7
35	<i>Malkasian v. Irwin</i>	
36	(1964) 61 Cal. 2d 738	25
37	<i>Merlo v. Standard Life & Acc. Ins.</i>	
38	(1976) 9 Cal. App. 3d 5	11

1	<i>Michelson v. Hamada</i>	
2	(1994) 29 Cal. App. 4th 1566	17
3	<i>Mirkin v. Wasserman</i>	
4	(1993) 5 Cal. 4th 1082.....	7, 19
5	<i>Neal v. Farmers Ins. Exchange</i>	
6	(1978) 21 Cal. 3d 910.....	1
7	<i>Nieves v. Vigolino</i>	
8	(1933) 135 Cal. App. 763.....	25
9	<i>Norden v. Hartman</i>	
10	(1952) 111 Cal. App. 2d 751	32
11	<i>Pease v. Pease</i>	
12	(1988) 201 Cal. App. 3d 29	18
13	<i>People v. Galloway</i>	
14	(1927) 202 Cal. 81	24
15	<i>Pietrone v. American Honda Motor Corps.</i>	
16	(1987) 189 Cal. App. 3d 1057	39
17	<i>Richards v. Owens-Illinois, Inc.</i>	
18	(1997) 14 Cal. 4th 985	12
19	<i>Robbins v. Wong</i>	
20	(1994) 27 Cal. App. 4th 261	36
21	<i>Robinson v. Cable</i>	
22	(1961) 55 Cal. 2d 425	42
23	<i>Rosener v. Sears Roebuck & Co.</i>	
24	(1980) 110 Cal. App. 3d 740	6
25	<i>Rudolph v. Gorman</i>	
26	(Cal. Dist. Ct. App. 1959) 338 P.2d 218	25
27	<i>Rufo v. Simpson</i>	
28	(2001) 86 Cal. App. 4th 573	5
	<i>Seaman's Direct Buying Serv. Co. v. Standard Oil, Inc.</i>	
	(1984) 36 Cal. 3d 752	42
	<i>Seeley v. Seymour</i>	
	(1987) 190 Cal. App. 3d 844	1
	<i>Seimon v. Southern Pac. Transp. Co.</i>	
	(1977) 67 Cal. App. 3d 600.....	25
	<i>Self v. General Motors Corp.</i>	
	(1974) 42 Cal. App. 3d 1	44
	<i>Sierra Club Found. v. Graham</i>	
	(1999) 72 Cal. App. 4th 1135	4

1	<i>Simmons v. Southern Pac. Transp. Co.</i>	
2	(1976) 62 Cal. App. 3d 341	25, 43
3	<i>Soule v. General Motors</i>	
4	(1994) 8 Cal. 4th 548.....	39, 41
5	<i>State of California v. Superior Court</i>	
6	(2000) 83 Cal. App. 4th 597	18
7	<i>Stevens v. Owens-Corning Fiberglass Corp.</i>	
8	(1996) 49 Cal. App. 4th 1645	2
9	<i>Stone v. Foster</i>	
10	(1980) 106 Cal. App. 3d 334	24, 25, 44
11	<i>Tice v. Kaiser Co.</i>	
12	(1951) 102 Cal. App. 2d 44	4, 32
13	<i>Wawanesa Mut. Ins. Co. v. Matlock</i>	
14	(1997) 60 Cal. App. 4th 583	38
15	<i>Weathers v. Kaiser Found. Hosp.</i>	
16	(1971) 5 Cal. 3d 98	24
17	<i>Widener v. Pacific Gas & Electric Co.</i>	
18	(1977) 75 Cal. App. 3d 415	4
19		
20	FEDERAL CASES	
21	<i>Allgood v. R. J. Reynolds</i>	
22	(5th Cir.), 80 F.3d 168 cert. denied (1996) 519 U.S. 930	12, 28, 29
23	<i>Atlas Food Systems & Serv., Inc. v. Crane Nat'l Vendors, Inc.</i>	
24	(4th Cir. 1996) 99 F.3d 587	5
25	<i>BMW of North America, Inc. v. Gore</i>	
26	(1996) 517 U.S. 559	1, 5, 6, 7, 14, 17
27	<i>Boyle v. Lorimar Prod., Inc.</i>	
28	(9th Cir. 1994) 13 F.3d 1357	8
29	<i>Cipollone v. Liggett Group, Inc.</i>	
30	(1992) 505 U.S. 504,	13, 26, 27, 28, 30
31	<i>Cooper Indus. Inc. v. Leatherman Tool Group, Inc.</i>	
32	(U.S. 2001) 121 S. Ct. 1678	5, 16, 18, 26
33	<i>Creative Demos, Inc. v. Wal-Mart Stores, Inc.</i>	
34	(S.D. Ind. 1997) 955 F. Supp. 1032	8
35	<i>Food & Drug Admin. v. Brown & Williamson Tobacco Corp.</i>	
36	(2000) 120 S. Ct. 1292	12, 13

1	<i>Geressy v. Digital Equip. Corp.</i> (E.D.N.Y. 1997) 950 F. Supp. 519	14
2	<i>Griesenbeck v. American Tobacco Co.</i> (D.N.J. 1995) 897 F. Supp. 815	28
3		
4	<i>Guilbeault v. R. J. Reynolds Tobacco Co.</i> (D.R.I. 2000) 84 F. Supp. 2d 263, 274.....	12
5	<i>Honda Motor Co. v. Oberg</i> (1994) 512 U.S. 415	5
6		
7	<i>Insolia v. Philip Morris, Inc.</i> (W.D. Wis. 1999) 53 F. Supp. 2d 1032.....	38
8		
9	<i>Johansen v. Combustion Eng'g Inc.</i> (11th Cir. 1999) 170 F.3d 1320	14
10	<i>Lacey v. Lorillard Tobacco Co., Inc.</i> (N.D. Ala. 1997) 956 F. Supp. 956	27
11		
12	<i>Lorillard v. Reilly</i> (2001) 1212 S. Ct. 2404, 2001 WL 721016	13, 26
13	<i>MMAR Group v. Dow Jones & Co.</i> (S.D. Texas 1997) 987 F. Supp. 535	9
14		
15	<i>Memphis Com'ty Sch. Dist. v. Stachura</i> (1986) 477 U.S. 299	7
16	<i>Pacific Mutual Life Ins. Co. v. Haslip</i> (1991) 499 U.S. 1	1, 3, 6, 11
17		
18	<i>Paugh v. R.J. Reynolds Tobacco Co.</i> (N.D. Ohio 1993) 834 F. Supp. 228	38
19	<i>Rosado v. Santiago</i> (1st Cir. 1977) 562 F.2d 114	7
20		
21	<i>Roysdon v. R.J. Reynolds Tobacco Co.</i> (6th Cir. 1988) 849 F.2d 230	12
22	<i>Sanchez v. Liggett & Myers, Inc.</i> (5th Cir. 1999) 187 F.3d 486	38
23		
24	<i>Sonnenreich v. Philip Morris, Inc.</i> (S.D. Fla. 1996) 929 F. Supp. 416	28
25	<i>TXO Prod. Corp. v. Alliance Resources Corp.</i> (1993) 509 U.S. 443	6, 7
26		
27	<i>Tillman v. Reynolds Tobacco Co.</i> (S.D. Ala. 2000) 89 F. Supp. 2d 1297	12
28	<i>Tompkins v. R.J. Reynolds Tobacco Co.</i> (N.D.N.Y. 2000) 92 F. Supp. 2d 70	38

1 *White v. R.J. Reynolds Tobacco Co.*
2 (D. Md. 2000) 109 F. Supp. 2d 424, 431-32 12

3 **DOCKETED CASES**

4 *Eastern States Heath & Welfare Fund v. Philip Morris, Inc.*
5 New York Superior Court Case No. 603869/97..... 39

6 *Henley v. Philip Morris Inc.,*
7 San Francisco County Superior Court Case No. 995172 2, 3, 20

8 *Whiteley v. Philip Morris Inc.,*
9 San Francisco County Superior Court Case No. 303184 3, 20

10 *Williams v. Philip Morris Inc.,*
11 Oregon Circuit Court Case No. 9705-03957 2

12 *Wolf v. Philip Morris, Inc.*
13 Massachusetts Superior Court Case No. 99-1260-B 38

14 **STATUTES AND RULES**

15 15 U.S.C. §§ 1331, *et seq.*, 13, 26

16 15 U.S.C. § 1334(a) 27

17 15 U.S.C. § 1334(b) 27

18 Cal. Civ. Proc. Code § 657 1, 4, 32

19 Cal. Civ. Proc. Code § 662.5 4, 16

20 Civil Code § 1714.45 12

21 Evidence Code § 352 35

22 Pub. L. 91-222, § 3, 84 Stat. 87 27

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1 Philip Morris seeks a new trial on (1) plaintiff's claim for punitive damages pursuant to
2 Code Civ. Pro. § 657(5), and (2) plaintiff's other claims pursuant to Code Civ. Pro. §§ 657(1), (2),
3 (6), and (7).

4 **I. THIS COURT SHOULD GRANT A NEW TRIAL**
5 **ON PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES**

6 **A. Introduction**

7 Philip Morris moves for a new trial on the jury's award of \$3,000,000,000 in punitive
8 damages. It would be a monumental understatement to describe the award as "excessive" or "so
9 grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." *Neal*
10 *v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 928. No punitive damage award greater than \$25
11 million has ever survived appeal under California law in any published opinion. Nor in any
12 published opinion has any punitive award survived appeal when it was more than three times
13 compensatory damages in excess of \$1 million. Here, the ratio between punitive damages and
14 compensatory damages is a staggering **540 to 1**. This multiple is more than 100 times the ratio that
15 the United States Supreme Court deemed "close to the [constitutional] line" in an intentional fraud
16 case. *Pacific Mutual Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 23-24.¹ It is hundreds of times the
17 2:1 and 3:1 ratios found in the statutes that provide the common law roots for punitive damage
18 awards. *See BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 580-81 & n.33. Indeed, the
19 immensity of the award itself "creates the inevitable inference that it was the product of antipathy
20 toward the defendant." *Seeley v. Seymour* (1987) 190 Cal. App. 3d 844, 868.

21 As detailed below, the punitive award here is so excessive – and the presumption of passion
22 and prejudice by the jury so compelling – that this Court should order a new trial without remittitur.
23 If the Court denies such relief, it should at least enter a remittitur greatly scaling back the damages.
24 The punitive award overreaches by far "the level necessary to properly punish and deter." *Neal*, 21
25 Cal. 2d at 928 n.13. Furthermore, the damages are manifestly disproportionate to Philip Morris'
26 ability to pay, as they comprise more than 60% of its net worth (according to plaintiff's own

27 _____
28 ¹ Copies of non-California cases may be found in the Appendix of Non-California Authorities in
Support of Motion for a New Trial.

1 evidence). *See Adams v. Murakami* (1991) 54 Cal. 3d 105, 111 (“the award can be so
2 disproportionate to the defendant’s ability to pay that the award is excessive for that reason alone”).
3 Under California as well as federal constitutional law, this punitive award is grossly excessive.

4 Although no fixed formula dictates the proper level of punitive damages, a California court
5 in *Henley v. Philip Morris* considered the appropriate amount in a similar case also brought against
6 Philip Morris in the California courts. *See Henley v. Philip Morris Inc.*, No. 995172 Opinion and
7 Order (April 6, 1999) (“*Henley Order*”) (Ex. 3).² The jury there had awarded punitive damages of
8 \$50 million. Though that award pales before the \$3 billion imposed here, the *Henley* court held that
9 even \$50 million was “excessive.” The court therefore granted remittitur, finding that “\$25 million
10 is both sufficient and necessary to achieve the goals of punishment and deterrence.” *Id.* at 12. In so
11 holding, the court by no means acted upon a charitable view of Philip Morris’ alleged conduct. The
12 court concluded that the evidence supported the plaintiff’s allegations of fraud and deceit and
13 reflected “a high degree of reprehensibility in the conduct which the jury found to exist.” *Id.* at 9.
14 Nonetheless, the court found remittitur necessary, stating that “even a major company does not
15 absorb an award of [\$25 million] without substantial discomfort.” *Id.* at 12.³ Moreover, the court
16 specifically recognized the need to take into account *future* claims and awards:

17 [T]here is a further consideration which also points in the direction of
18 reduction. . . . The evidence in this case suggests the probability, if
19 not the certainty, that countless persons have been impacted by Philip
20 Morris’ conduct in ways identical or similar to plaintiff Patricia
21 Henley. . . . While the Court does not rely on such a prediction in
22 reaching its result, the potential serves to fortify the conclusion that
23 \$25 million is enough to punish and deter in the present context.
24 *Compare Stevens v. Owens-Corning Fiberglass Corp.* (1996) 49 Cal.
25 App. 4th 1645, 1661 (the likelihood of future punitive damage awards
26 may be considered in fixing the level of a punitive damages award).

27 *Id.* at 12-13.

28 With respect to punitive damages, this case involved the same evidence, the same factual
allegations, and the same legal claims as *Henley*. Philip Morris believes \$25 million is excessive

² All exhibits are attached to the accompanying Declaration of John L. Carlton.

³ Similarly, in a recent smoking and health case in Oregon, the trial court cited *Henley* in reducing a \$79.5 million punitive award to \$32 million, agreeing that “it doesn’t take multiples of millions of dollars necessarily to ensure that misconduct will not occur in the future.” *Williams v. Philip Morris Inc.*, (Or. Cir. Ct. May 13, 1999) No. 9705-03957, Transcript at 100-04 (Ex. ____).

1 (and is appealing the *Henley* order), but any remitted award at least should be no greater than the
2 \$25 million that the *Henley* court found “sufficient and necessary” to punish and deter.⁴ Although a
3 \$25 million award would be a substantial (indeed, inordinate) windfall for a single plaintiff, the
4 ratio to compensatory damages would at least be in the vicinity of 4 to 1 – the level the Supreme
5 Court deemed “close to the [constitutional] line.” *Haslip*, 499 U.S. at 23-24. And a \$25 million
6 award would still be significantly greater than the highest ratio ever affirmed in a published opinion
7 by the California appellate courts when compensatory damages exceeded \$1 million.

8 Furthermore, as the *Henley* court found, huge damage awards against Philip Morris, such as
9 the one here, will encourage virtually every Californian who smokes and develops a smoking-
10 related disease, such as lung cancer, to sue. *See Lane v. Hughes Aircraft Co.* (2000) 22 Cal. 4th
11 405, 427-28 (Brown, J., concurring) (noting the potential significance of “recurrent” awards).
12 Allowing multi-million dollar punitive awards in each case – let alone the punitive damage award at
13 issue here – would subject Philip Morris to crushing liability, far greater than its ability to pay. The
14 inevitable result of any sizeable punitive award in this case will be a race to the courthouse by
15 prospective plaintiffs. Allowing anything like the existing punitive damage award to stand would
16 leave later plaintiffs with little or no possibility of recovery. More immediately, it would also
17 contravene federal and state requirements that a punitive award reasonably relate to the actual harm
18 to the plaintiff. Here, the award – with a punitive to compensatory damages ratio of 540 to 1 –
19 bears no “reasonable relationship” to plaintiff’s compensatory damages at all and must be reduced.

20 The punitive damages awarded in this case are also unnecessary to deter future conduct
21 because the very conduct at issue in this case has already been addressed in a 1998 consent decree
22 and settlement agreement between Philip Morris and the California Attorney General (as well as the
23 attorneys general of the other 49 states). Under this agreement, the tobacco companies committed
24 not only to pay the states hundreds of billions of dollars, but also to make fundamental changes in
25

26 ⁴ In another California tobacco trial, a San Francisco court upheld a \$20 million punitive damages
27 award against Philip Morris and R.J. Reynolds. *See Whiteley v. Philip Morris Inc.*, No. 303184
28 (San Fran. Sup. Ct. May 24, 2000) (order denying motion for a new trial) (“*Whiteley Order*”) (Ex.
5). Although Philip Morris has also appealed that award as excessive, it – like *Henley* – argues in
favor of a drastic remittitur here.

1 the way they do business. The agreement empowers the California Attorney General to monitor
2 Philip Morris' compliance, and if necessary, to enforce the provisions in California state court.

3 In sum, the punitive damage award in this case cannot be justified based on "punishment" or
4 "deterrence." This Court should grant a new trial, or at least a drastic remittitur, on the ground that
5 the \$3 billion award is "excessive" and "so grossly disproportionate as to raise a presumption that it
6 is the result of passion or prejudice." *Neal*, 21 Cal. 3d at 928.

7 **B. The Court Must Act as an Independent Trier**
8 **of Fact in Scrutinizing the Punitive Damage Award**

9 California courts have recognized that "punitive damages constitute a windfall, create the
10 anomaly of excessive compensation, and are therefore not favored in the law." *Dumas v. Stocker*
11 (1989) 213 Cal. App. 3d 1262, 1266. Indeed, the "disfavored nature" of punitive damages,
12 "coupled with unfettered discretion granted to juries in making [such an] award, requires *heightened*
13 judicial vigilance in reviewing [the] propriety of punitive damage awards." *Id.* at 1266 n.11
14 (emphasis added). Thus, in evaluating whether punitive damages are excessive, this Court "sits not
15 in an appellate capacity but as an independent trier of fact." *Neal*, 21 Cal. 3d at 933. *See also* Cal.
16 Civ. Proc. Code § 662.5 (trial court evaluates excessiveness of award as an "independent
17 judgment"); *Sierra Club Found. v. Graham* (1999) 72 Cal. App. 4th 1135, 1160. In this capacity,
18 the Court may "reweigh [the] evidence" and even "draw reasonable inferences that are contrary to
19 those drawn by the jury." *Id.*⁵ If the "entire record, including reasonable inferences therefrom"
20 establishes that the award is excessive, Cal. Civ. Proc. Code § 657, it is the "duty of the trial judge
21 to grant a new trial." *Tice v. Kaiser Co.* (1951) 102 Cal. App. 2d 44, 46; *see also Dumas*, 213 Cal.
22 App. 3d at 1266.

23 In addition, the U.S. Constitution requires a searching, independent judicial review of the
24 amount of punitive damages to ensure that the award does not violate due process limitations on

25 ⁵ *See also Clemmer v. Hartford Ins. Co.* (1978) 22 Cal. 3d 865, 888 (in granting motion for new
26 trial, trial court was entitled to "reject" expert testimony as "absurd"); *Widener v. Pacific Gas &*
27 *Electric Co.* (1977) 75 Cal. App. 3d 415, 442-43 (in granting motion for new trial for excessive
28 damages, trial court was entitled to disregard evidence of personal humiliation and mental
suffering); *Jones v. Citrus Motors Ontario, Inc.* (1973) 8 Cal. 3d 706, 711 (in granting motion for
new trial in collision case, the court was entitled to reject "alternative explanations of the
collision").

1 excessive punitive damage awards. *See Honda Motor Co. v. Oberg* (1994) 512 U.S. 415, 432;
2 *BMW*, 517 U.S. at 568 (conducting “federal excessiveness inquiry” to determine whether state court
3 award violated due process); *Atlas Food Systems & Serv., Inc. v. Crane Nat’l Vendors, Inc.* (4th Cir.
4 1996) 99 F.3d 587, 593 (distinguishing between excessiveness review under state substantive law
5 and federal constitutional law). As with the review under California law, the federal excessiveness
6 inquiry requires a *de novo* evaluation of the punitive damages award. Indeed, only weeks ago, the
7 United States Supreme Court made clear that, to protect a defendant’s constitutional rights, even
8 appellate courts must make this determination *de novo* with “an independent examination of the
9 relevant criteria.” *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.* (U.S. 2001) 121 S. Ct. 1678,
10 1685.⁶ Such an independent, *de novo* inquiry here demonstrates that the punitive damages award
11 cannot stand.

12 **C. The Three Billion Dollar Punitive**
13 **Damage Award is Grossly Excessive**

14 The largest single punitive damage award previously upheld by a California appellate court
15 under California law in any published opinion – no matter how egregious the defendant’s acts, how
16 vicious its intent, or how terrible the plaintiff’s injury or death – is \$25 million. *See Rufo v.*
17 *Simpson* (2001) 86 Cal. App. 4th 573. The California Supreme Court has set forth three criteria for
18 determining whether punitive damages awards are excessive: (1) the relationship between the
19 compensatory and the punitive award; (2) the defendant’s financial condition; and (3) the
20 reprehensibility of the defendant’s conduct. *Neal*, 21 Cal.3d at 928; *Adams v. Murakami* (1991) 54
21 Cal. 3d 105, 110; BAJI 14.71. Every punitive damage award also must pass muster as a matter of
22 federal due process. *BMW*, 517 U.S. 559; *Honda Motor Co.*, 512 U.S. at 434-35. Here, whether
23

24 _____
25 ⁶ In conducting this inquiry, the court may be required to consider evidence not squarely presented
26 to the jury. For example, one of the guideposts in determining excessiveness under the Due Process
27 Clause is “the civil or criminal penalties that could be imposed for comparable misconduct.” *BMW*,
28 517 U.S. at 583. Such evidence is almost never before the jury and, indeed, does not even fall
within the criteria the jury must apply to determine punitive damages. *See, e.g., Neal*, 21 Cal. 3d at
928. As the U.S. Court of Appeals for the Fourth Circuit explained, the unique nature of punitive
damages awards mandates that the reviewing court undertake a “participatory decisionmaking role”
that is not necessarily confined to the record. *Atlas Food*, 99 F.3d at 594.

1 examined in light of the relevant factors under California law or according to the standards of
2 federal due process, the punitive award is so excessive that it must be set aside.

3 **1. The Punitive Damage Award Is Excessive**
4 **In Relation to the Compensatory Damages**

5 Both California law and federal due process require that punitive damages “bear a
6 reasonable relationship to compensatory damages,” as measured by the ratio of the punitive award
7 to the plaintiff’s actual injury. *BMW*, 517 U.S. at 580; *Rosener v. Sears Roebuck & Co.* (1980) 110
8 Cal. App. 3d 740, 749-54. ***No California appellate court in any published opinion has ever***
9 ***upheld a ratio of greater than 3:1 when the compensatory award was more than \$1 million.*** On
10 either the constitutional or state law standard, the 540:1 ratio here far exceeds a “reasonable
11 relationship.” The astronomical 540:1 ratio in this case “jars one’s constitutional sensibilities” and
12 confirms the Supreme Court’s concerns about punitive damages “run wild.” *Haslip*, 499 U.S. at 18.

13 Although no mathematical bright line illuminates the state or federal calculus, the U.S.
14 Supreme Court has cautioned that where, as here, “the ratio is a breathtaking 500:1, . . . the award
15 must surely ‘raise a suspicious judicial eyebrow.’” *BMW*, 517 U.S. at 583 (*quoting TXO Prod.*
16 *Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 (O’Connor, J., dissenting)). Indeed, far
17 lower multiples have engendered constitutional misgivings. In *Haslip*, for example, the Court
18 found a ratio of only 4:1 “close to the line” of “constitutional impropriety.” *Haslip*, 499 U.S. at 23-
19 24. This is consistent with the history of double, treble or quadruple damages in the early English
20 statutes that laid the foundation for today’s punitive damage awards. *See BMW*, 517 U.S. at 579-81
21 & n.33. The California courts have also objected to lopsided ratios. The courts have struck down
22 punitive damages that exceeded compensatory damages by 40 times, *Egan v. Mutual of Omaha Ins.*
23 (1979) 24 Cal. 3d 809, 824, 14 times, *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal. App. 3d 451,
24 469-70, and as little as 5 times, *Allard v. Church of Scientology* (1976) 58 Cal. App. 3d 439, 452-
25 53.

26 Courts have recognized that higher compensatory damage awards generally require ***lower***
27 ratios. When compensatory damages are large, they already serve part or all the goals of deterrence
28 and punishment. By contrast, as the Supreme Court has stated, “low awards of compensatory
damages may properly support a higher ratio than high compensatory awards.” *BMW*, 517 U.S. at

1 582. The California Supreme Court has recognized this principle, noting that the “overall size of
2 compensatory damages alone may constitute a significant deterrent,” such that no award of punitive
3 damages is either necessary or justified. *Mirkin v. Wasserman* (1993) 5 Cal. 4th 1082, 1106.⁷ The
4 substantial compensatory award of about \$5.5 million in this case, itself excessive, satisfies the
5 State’s interest in punishment and deterrence.

6 **2. The Punitive Damages Award Is Excessive in**
7 **Relation to Philip Morris’ Financial Condition**

8 **a. Plaintiff’s Use of Illusionary Economics**
9 **to Value Philip Morris was Improper**

10 The California Supreme Court has held that evidence of a defendant’s financial condition is
11 a prerequisite to an award of punitive damages. *Adams*, 54 Cal. 3d at 114-16. But that Court, as
12 well as the U.S. Supreme Court, has also recognized the care that must be exercised with regard to
13 this factor. In *TXO Production Corp.*, for example, the Supreme Court worried that “emphasis on
14 the wealth of the wrongdoer increased the risk that the award may have been influenced by
15 prejudice against large corporations, a risk that is of special concern when the defendant is a
16 nonresident.” 509 U.S. at 464; *see also id.* at 468 (Kennedy, J., concurring) (noting the danger of a
17 jury’s “raw redistributionist impulses stemming from antipathy to a wealthy out-of-state corporate
18 defendant”); *BMW*, 517 U.S. at 591 (Breyer, J., concurring) (punitive damages should not serve as
19 “an open-ended basis for inflating awards when the defendant is wealthy.”). Here, the punitive
20 damage award is manifestly excessive in relation to Philip Morris’ net worth. Furthermore,
21 plaintiff’s counsel misled the jury with exponential overstatements of Philip Morris’ value not
22
23

24 ⁷ *See also, e.g., Memphis Com’ty Sch. Dist. v. Stachura* (1986) 477 U.S. 299, 307 (“Deterrence . . .
25 operates through the mechanism of damages that are compensatory”); *Lane*, 22 Cal. 4th at 424
26 (Brown, J. concurring) (acknowledging that large compensatory damages awards “have a strong
27 deterrent and punitive effect in themselves”); *Rosado v. Santiago* (1st Cir. 1977) 562 F.2d 114, 121
28 (reversing punitive damages award because award of actual damages coupled with reinstatement
was sufficient deterrent); *Brown v. Farkas* (Ill. App. Ct. 1986) 511 N.E.2d 1143, 1147-48 (reducing
punitive damage award on the basis of large compensatory award); *Maiorino v. Schering-Plough
Corp.* (N.J. Super. Ct. App. Div. 1997) 695 A.2d 353, 370 (compensatory award of \$435,000 by
itself provided sufficient deterrence to a company as large as Schering).

1 relevant to its net worth or ability to pay. For these reasons alone, defendant is entitled to a new
2 trial on the punitive damage claim.⁸

3 Scrutiny of this criterion for assessing the excessiveness of the punitive damage award
4 should begin with the reason why the courts consider this type of evidence – to calibrate the award
5 and its deterrent effect to the defendant’s ability to pay. As the California Supreme Court has
6 recognized, even if punitive damages are reasonable in light of other factors, they “can be so
7 disproportionate to the defendant’s *ability to pay* that the award is excessive for that reason alone.”
8 *Adams*, 54 Cal. 3d at 111 (emphasis supplied). The importance of the defendant’s ability to pay has
9 led the California courts to make evidence of a company’s *net worth* the focus in assessing financial
10 condition. *See Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal. App. 3d 381, 391
11 (net worth “considered the best measure of a defendant’s ‘wealth’”); *Kenly v. Hiroshi Ukegawa*
12 (1993) 16 Cal. App. 4th 49, 57 (“We are convinced that in most cases there must be evidence of the
13 defendant’s net worth in order to support the punitive damage award.”); *Las Palmas Assoc. v. Las*
14 *Palmas Ctr.* (1991) 235 Cal. App. 3d 1220, 1258 (court must consider the “relationship between the
15 punitive damages and defendant’s net worth”); *Dumas*, (1989) 213 Cal. App. 3d 1262 (absence of
16 evidence on net worth renders award baseless). Net worth is what is left of a company’s assets after
17 liabilities are subtracted – that is, what is available from which to pay a judgment. As the Court of
18 Appeals for the Ninth Circuit held in rejecting reliance on gross revenues in setting punitive
19 damages, “[a] comparison of the award to gross revenues does not answer this question because it
20 does not indicate *ability to pay*.” *Boyle v. Lorimar Prod., Inc.* (9th Cir. 1994) 13 F.3d 1357, 1361
21 (emphasis supplied) (applying California law); *see also Little*, 67 Cal. App. 3d at 469 n.5 (“gross
22 income might be very large, but if expenses are even larger, the company would be incurring a
23 loss”).

24 _____
25 ⁸ The United States Supreme Court has never reached the issue of whether consideration of a
26 defendant’s ability to pay in assessing punitive damages is appropriate constitutionally. Although
27 we recognize that this Court is bound by contrary California precedent, we hereby assert and
28 preserve the argument that consideration of a defendant’s financial condition (other than in
mitigation) is never an appropriate factor in determining an award of punitive damages. *See, e.g.,*
Creative Demos, Inc. v. Wal-Mart Stores, Inc. (S.D. Ind. 1997) 955 F. Supp. 1032, 1044 (wealth of
defendant “cannot serve to justify an otherwise excessive punitive damages award”), *vacated on*
other grounds, (7th Cir. 1998) 142 F.3d 367.

1 The punitive award here should be reversed because, instead of focusing on net worth, the
2 plaintiff, as in *Boyle*, relied on economic methodologies yielding enormous values that did not
3 reflect Philip Morris' ability to pay and thus had no relation to deterrence. This Court, in re-
4 weighing the evidence, should disregard those inflated approaches and reverse the punitive damage
5 award.

6 Specifically, plaintiff called an economist, Robert Johnson, to testify regarding the financial
7 condition of Philip Morris. Although Johnson testified in passing that Philip Morris had a net
8 worth of approximately \$5 billion (RT 3617 (Johnson))⁹, he relied on two very different and
9 misleading theories of valuation.

10 **Market Capitalization.** Johnson first testified that Philip Morris could be valued by
11 looking at the market price of its parent company, Philip Morris Companies, Inc. ("PMC"). This
12 calculation multiplies the share price of PMC by the number of its outstanding shares, resulting in a
13 market capitalization of \$105 billion. (RT 3605). Then, to determine Philip Morris' market value,
14 Johnson multiplied that number by either Philip Morris' percent of PMC sales or its share of PMC
15 operating income. (RT 3607; 3608). Thus, his final value for Philip Morris based on market
16 capitalization came to \$30-35 billion.

17 Market capitalization, however, is *not* the equivalent of net worth. Johnson himself testified
18 that Philip Morris' net worth is around \$5 billion, yet market capitalization is \$30-35 billion. Net
19 worth reflects a company's assets that are available from which to satisfy a judgment; market
20 capitalization does not. It is a snapshot of how the stock of the company is valued at a particular
21 moment. The fundamental fallacy in using market capitalization as the measure of Philip Morris'
22 ability to pay is that *Philip Morris does not own its stock or that of its parent*. It therefore cannot
23 sell that stock to satisfy a judgment. Philip Morris' market capitalization thus has no bearing on its
24 ability to pay a punitive damage award. Indeed, plaintiff's expert himself conceded that market
25 value did not equate with "money in the pocket" or "cash in the bank." (RT 3629; 3630). *See*
26 *MMAR Group v. Dow Jones & Co.* (S.D. Texas 1997) 987 F. Supp. 535, 550 (ordering new trial or
27

28 ⁹ All citations to the trial transcript are included in Exhibit 1.

1 remittitur where jury “must have been overwhelmingly influenced by Dow Jones’s \$2 billion in
2 annual revenues and \$4.2 billion in market capitalization”).

3 **Trademark Acquisition.** Johnson’s “favorite” method for valuing Philip Morris produced,
4 not surprisingly, an even bigger number. (RT 3614). Using the so-called “trademark acquisition”
5 method, Johnson extrapolated a “floor value” for Philip Morris of \$75 billion. His “logic” worked
6 like this: In 1998, Philip Morris purchased the trademark rights to three minor brands of cigarettes
7 (Lark, L&M and Chesterfield) for \$300 million. These three brands totaled 0.2% or 1/500th of the
8 cigarette market. Johnson therefore inferred that the value of the entire industry was \$300 million
9 times 500, or \$150 billion. Then, because Philip Morris’ market share was 49.6%, he concluded
10 that the value of the company must be at least \$75 billion. (RT 3612-14). Moreover, according to
11 Johnson, this number is only a “floor” because it fails to consider the true worth of Philip Morris’
12 dominant brands like Marlboro. (RT 3615-16).

13 As far as we can tell, no appellate court, anywhere, has approved of this methodology to
14 determine the appropriate level of punitive damages. And for good reason – the methodology has
15 absolutely nothing to do with the defendant’s ability to pay a judgment. Even if one were to accept
16 Johnson’s far-fetched extrapolation, the value of Philip Morris’ trademarks still could conceivably
17 be relevant only if the company could sell them – that is, if it could cash them in for money to pay a
18 punitive damage award. There was no evidence – *none at all* – that anyone would buy the
19 trademarks at any price. Absent such evidence, \$75 billion is nothing more than a hyper-inflated
20 number unrelated to ability to pay, unrelated to deterrence, unrelated to the constitutional requisites
21 for a valid punitive damage award.

22 Nonetheless, plaintiff explicitly urged the jury to use this number in his closing argument:

23 Philip Morris’s share, U.S.A., 75 billion dollars. And [Johnson] said,
24 in his view, that was the financial condition, that was the proper
25 financial condition to take that into account for what I am going to ask
26 you to punish and deter, 75 billion dollars.

26 (RT 6029). This reckless plea ignored the purpose of punitive damage awards, pandered to
27 ingrained prejudices against corporate wealth, and yielded an award so excessive as to taint these
28 entire proceedings.

1 **b. The Punitive Award Is Disproportionate**
2 **to Philip Morris' Net Worth**

3 The purpose of punitive damages is to deter, not destroy. *Adams*, 54 Cal.3d at 112. On
4 plaintiff's own calculations, the punitive award here comprises more than 60% of Philip Morris' net
5 worth. No California court has ever sustained such an award against a corporate business in a
6 published opinion. *See Burnett v. National Enquirer, Inc.* (1983) 144 Cal. App. 3d 991, 994 (35%
7 of net worth excessive); *Merlo v. Standard Life & Acc. Ins.* (1976) 9 Cal. App. 3d 5, 18 (33% of net
8 worth "so greatly disproportionate to [the defendant's] net worth that it is presumptively based upon
9 passion or prejudice"); *Little*, 67 Cal. App. 3d at 469-70 (15% of net worth "grossly
10 disproportionate to the wealth of defendant"). Indeed, the trial judge in *Henley* reduced the punitive
11 award there to an amount equal to ¾ of 1 percent of Philip Morris' then-reported net worth. *Henley*
12 Order at 12.

13 In sum, plaintiff should "not enjoy a windfall because [he has] the good fortune to have a
14 defendant with a deep pocket." *Haslip*, 499 U.S. at 22. Indeed, Philip Morris' pocket is not nearly
15 as deep as plaintiff claimed. The \$3 billion punitive damage award is manifestly excessive
16 compared to Philip Morris' net worth. Furthermore, it is apparent from the punitive award that
17 plaintiff's improper and overblown claims regarding Philip Morris' alleged wealth played a
18 substantial role in the jury's calculation.

19 **3. The Punitive Damage Award Is Excessive in Relation**
20 **to the Reprehensibility of Philip Morris' Alleged Conduct**

21 Philip Morris demonstrates elsewhere in this brief and in connection with its Motion for
22 Judgment Notwithstanding the Verdict that plaintiff did not prove fraud. *See pp. 32-33, infra;*
23 Memorandum in Support of Defendant's Motion for Judgment Notwithstanding the Verdict
24 ("JNOV Memorandum") at 4-17. Given the overlap between plaintiff's fraud claims and his
25 punitive damage allegations, the same deficiencies bar punitive damages, and Philip Morris will not
26 reprise the evidentiary arguments here. However, even if the Court finds that plaintiff met his
27 burden of proving fraud, several factors regarding Philip Morris' conduct show the
28 inappropriateness of the unprecedented punitive damage award in this case.

First, this is simply not a case where the defendants are alleged to possess crucial, secret
information that smoking can cause serious disease and kill, which was not known to the scientific

1 community or the public at large. Courts in California and across the country have recognized that
2 the risks of cigarettes have been common knowledge for decades. *See, e.g., Barker v. Brown &*
3 *Williamson Tobacco Corp.* (2001) 88 Cal. 4th 42, 50 (“it has been a matter of common knowledge
4 since at least 1965 that cigarette smoking is not healthy”).¹⁰ For that reason, comment i to Section
5 402A of the Second Restatement of Torts (“comment i”), published in 1965, expressly identified
6 tobacco as an inherently unsafe substance whose risks are commonly known in the community. *See*
7 *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal. 4th 985, 1000 (discussing comment i). *See*
8 *generally* JNOV Memorandum at 12-16.

9 In 1987 the California legislature enacted Civil Code § 1714.45, which codified comment i.
10 The legislature expressly applied the statute to tobacco, deeming it to be “a product known to be
11 unsafe by the ordinary consumer . . . with the ordinary knowledge common to the community.”
12 Original Civ. Code § 1714.45. Almost immediately after its enactment, a Court of Appeal
13 interpreted the section as granting “automatic immunity” to manufacturers of cigarettes. *See*
14 *American Tobacco Co. v. Superior Court* (1989) 208 Cal. App. 3d 480, 485-87. The question of
15 whether or not the subsequent repeal of Section 1714.45 is retroactive is addressed at length in
16 Philip Morris’ JNOV Memorandum at 23-30, incorporated here. But whether or not the original
17 statute continues to immunize the conduct at issue, it plainly reflected a reasonable policy judgment
18 that the deadly dangers of cigarettes were “within the ordinary knowledge common to the
19 community” and that the marketing of cigarettes was not “reprehensible.” Indeed, far from

20
21 ¹⁰ *See also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.* (2000) 120 S. Ct. 1295,
22 1303, 1306-07 (since at least January 1964 the health consequences of cigarette smoking have been
23 “well known” and “documented . . . in great detail” in reports issued to the general public); *Allgood*
24 *v. R. J. Reynolds* (5th Cir.) 80 F.3d 168, 172, *cert. denied* (1996) 519 U.S. 930 (“the dangers of
25 cigarette smoking have long been known to be community Therefore, defendants had no duty
26 to warn Allgood [who began smoking by 1957] of the dangers of smoking”); *Roysdon v. R.J.*
27 *Reynolds Tobacco Co.* (6th Cir. 1988) 849 F.2d 230, 236 (“Knowledge that cigarette smoking is
28 harmful to health is widespread and can be considered part of the common knowledge of the
community”); *White v. R.J. Reynolds Tobacco Co.* (D. Md. 2000) 109 F. Supp. 2d 424, 431-32 (the
health risks of smoking have been common knowledge at least since the early 1950s); *Tillman v.*
Reynolds Tobacco Co. (S.D. Ala. 2000) 89 F. Supp. 2d 1297, 1303 (“the risks of smoking have
been recognized in a line of well reasoned cases as commonly known since at least the time that the
federal warnings were mandated” in 1966); *Guilbeault v. R. J. Reynolds Tobacco Co.* (D.R.I. 2000)
84 F. Supp. 2d 263, 274 (as a matter of law, by 1964, “all reasonable consumers should be charged
with . . . knowledge” that smoking causes cancer).

1 deeming the marketing and sale of cigarettes reprehensible, the legislature immunized defendant
2 from liability and punishment for its conduct. The legislature’s later repeal of section 1714.45, even
3 if retroactive, does not change the fact that this State’s policy for ten years was to protect the type of
4 conduct subject to punitive damages in this case. Any assessment of the “reprehensibility” of
5 defendant’s conduct must take into account the fact that the legislature saw fit to protect that
6 conduct with immunity from liability for a decade. Beyond that, to impose punitive damages for
7 conduct that was protected by legislative immunity *when the conduct occurred* would violate basic
8 principles of due process.

9 *Second*, the Public Health Cigarette Smoking Act of 1969 (the “1969 Act”) and other federal
10 legislation reflect Congress’ policy judgment that it is not reprehensible – indeed, that it is fully
11 lawful – to market and advertise cigarettes with the warning prescribed in that statute. *See* 15
12 U.S.C. §§ 1331 *et seq.* That policy controls here. *See, e.g., Food & Drug Admin. v. Brown &*
13 *Williamson Tobacco Corp.* (2000) 120 S. Ct. 1292, 1295, 1303, 1306-07 (“Congress, however, has
14 foreclosed the removal of tobacco products from the market.”); *Lorillard v. Reilly* (2001) 1212 S.
15 Ct. 2404, 2001 WL 721016, *11 (one purpose of the Act was “to protect the national economy” in
16 cigarettes); *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 511 n.5 (same). Post-trial
17 statements of at least one juror suggest that the jury ignored the binding effect of federal preemption
18 and, by their huge punitive damage award, sought to compel Philip Morris to promulgate a different
19 warning than the one mandated by federal law. M. Levin & D. Moultrie, *L.A. Jury Awards \$3*
20 *Billion to Smoker*, Los Angeles Times, June 7, 2001, at A1 (quoting juror Denise Key: “We want
21 them to put on their product: It kills.”) (Ex. 6). It is therefore imperative that this Court exercise its
22 authority as an independent trier of fact in assessing the excessiveness of the jury’s award in light of
23 federal policy to protect cigarette commerce, lest the judgment in this case impermissibly infringe
24 on federal law.

25 *Third*, in assessing the punitive damage award, this Court must disregard any evidence of
26 conduct or harm outside of California. Imposing a punitive damage award based on conduct or
27 harm not within this State would violate principles of interstate comity and exceed the constitutional
28 limits of this State’s power. A state may impose punitive damages only to protect its own

1 consumers and economy. It may not impose sanctions to punish or deter a defendant’s conduct in
2 other states. *See BMW*, 517 U.S. at 572 (“We think it follows from these principles of state
3 sovereignty and comity that a State may not impose economic sanctions on violators of its laws
4 with the intent of changing the tortfeasors’ lawful conduct in other States. . . . [An award of punitive
5 damages] must be supported by the State’s interest in protecting its own consumers and its own
6 economy.”). As the U.S. Court of Appeals for the Eleventh Circuit stated in *Johansen v.*
7 *Combustion Eng’g Inc.* (11th Cir. 1999) 170 F.3d 1320, 1333, “[p]unitive damages must be based
8 upon conduct in a single state – the state where the tortious conduct occurred – and reflect a
9 legitimate state interest in punishing and deterring that conduct.”¹¹

10 Yet, there is little question that plaintiff asked the jury to consider conduct and alleged
11 injuries that occurred far beyond the boundaries of this State – and that is precisely what the jury
12 did in assessing its \$3 billion award. During all parts of the trial, plaintiff’s counsel exhorted the
13 jury to award punitive damages based on alleged conduct, and resulting harm, that occurred in the
14 entire country. For example, he repeatedly asserted that 400,000 people died each year for many
15 decades from smoking-related illnesses *throughout the country*. During opening statements,
16 plaintiff’s counsel said:

17 The evidence in this case will show that 400,000 people die of
18 cigarette related illness *in the United States* each year. And so the
19 timeframe we are going to be concentrating on here is roughly 1950
20 to roughly 2000. So that’s 50 years. During that time, in round
numbers, 20 million Americans have died from smoking related
illness.

21 (RT 1181; 1182) (emphasis added). And he repeated similar assertions over and over again in
22 questioning witnesses:

- 23 • 13 to 15 million deaths from tobacco-related illnesses since 1964 (RT 3952 (Hoffman));
- 24 • “How about this for part of the answer: 400,000 people a year stopped [smoking] when
25 they got nailed into a coffin?” (RT 3953 (Hoffman));

26 ¹¹ Other courts have reached the same conclusion. *See Geressy v. Digital Equip. Corp.* (E.D.N.Y.
27 1997) 950 F. Supp. 519, 521 (“punitive damages cannot be awarded to punish or deter acts in other
28 states which do not affect the forum state”); *Ace v. Aetna Life Ins. Co.* (D. Alaska. 1999) 40 F.
Supp. 2d 1125, 1133 (under *BMW*, “Alaska must leave some room within which the other states can
exercise their own interests in defining the precise extent of and in deterring wrongful conduct.”).

- 1 • “It is true that the tobacco industry lost 13 to 15 million customers in that period [since
2 1964] just because they all died?” (RT 3953 (Hoffman));
- 3 • 15 million deaths from tobacco-related illnesses since 1950 (RT 4035 (Hoffman));
- 4 • 17.2 million people dead of smoking-related illnesses over 43 year time period (RT
5 4092; 4094; 4095 (Hoffman));
- 6 • 6,000 deaths per day attributed to Philip Morris “every single day, for every single week,
7 every single month, every single year . . .” (RT 4661 (Carchman)); and
- 8 • “What’s 37 times 400,000?” (RT 4687 (Carchman)).

9 Finally, during his closing statement, plaintiff’s counsel argued:

10 Just remember, as you look at this document here, every, single year
11 on this document is 400,000 lives that end premature from smoking *in*
12 *this one country*. Just remember that of those 400,000, Philip Morris
13 has half the market share. 200,000 every succeeding year.

14 And also, please remember that for each and every single year you see
15 here, roughly up to 75,000, in round numbers, *people die in the*
16 *United States* of lung cancer caused by smoking and tobacco and
17 Philip Morris has 50 percent of that share.

18 * * *

19 And so I am saying to the jury that 600,000 people in the last hundred
20 years have died in American wars, 600,000 Americans, and I am
21 saying to the jury that since 1965, or in round numbers, 17 million
22 people have died prematurely from tobacco *in this country*.

23 (RT 5929; 6025).

24 Nothing in the Court’s instructions told the jury that it was barred from considering conduct
25 or injury outside California. Nothing in the instructions told the jury not to attempt to vindicate the
26 interests of smokers other than Mr. Boeken. Having anticipated this problem, defendant asked the
27 Court to instruct the jurors:

28 You should only consider the defendant’s actions as they relate to
plaintiff and his claims. The defendant’s actions that may have
affected persons other than the plaintiff are not relevant.

Defendant’s Proposed Jury Instructions, BAJI 1.23 (Modified). The Court did not give this
instruction or otherwise direct the jury to consider only conduct affecting Mr. Boeken in the
instructions on punitive damages. *See* BAJI 14.71. The failure to give these instructions,
combined with counsel’s encouragement to consider the “17 million people who died prematurely”

1 and “all the people who have been victimized over the years,” left the jury with the
2 misunderstanding that they were free to punish Philip Morris for conduct outside California.¹²

3 The constitutional requirement that any punitive damage award be based solely on conduct
4 within or affecting the forum state is particularly compelling here, given that every other state has
5 specifically addressed Philip Morris’ conduct in some way. The governments of all fifty states have
6 entered into a settlement with Philip Morris dealing with the company’s past and future conduct.
7 *See* p. 18-20, *infra*. Moreover, juries in many states – including, for example, Indiana, Mississippi,
8 New Jersey, New York, Ohio, and Tennessee – have considered essentially the same evidence
9 presented in this case and found that Philip Morris is not liable for punitive damages. To be sure,
10 other juries in other states have come to the opposite conclusion. However, that is exactly the point:
11 Each state – its courts, executive agencies, and legislatures – has addressed and is continuing to
12 address Philip Morris’ conduct based on its own policies and laws. For a California jury to replicate
13 or supplant their efforts usurps their authority and exceeds its own.¹³

14 In short, the jury was improperly urged to punish and deter conduct outside the State and
15 plainly did so in awarding \$3 billion in punitive damages. This fact, by itself, requires this Court to
16 grant a new trial on punitive damages without remittitur. In the alternative, in independently
17
18
19

20 ¹² Although defendant sought a jury instruction limiting the basis of punitive damages to plaintiff,
21 seeking a jury instruction is not a prerequisite to this Court’s *de novo* review of the punitive damage
22 award. In engaging in a *de novo* review, this Court must follow federal and California law placing
23 restraints on the imposition of punitive damages, especially *constitutional* limitations of the
24 California judiciary in imposing punitive damage awards, irrespective of whether the jury was
25 instructed on the subject. *See generally* Cal. Civ. Proc. Code § 662.5 (trial court evaluates
excessiveness of award as an “independent judgment”); *see also Cooper Indus. Inc.*, 121 S. Ct. at
1685 (“a review of [the] amount of a punitive damages award should involve comparison of the
court’s independent judgment on the appropriate amount with the jury’s award”). In re-weighing
the evidence, this Court has power and responsibility to disregard evidence that is constitutionally
infirm.

26 ¹³ Moreover, awarding punitive damages to punish or deter conduct outside California exacerbates
27 the problem, discussed below, of multiple punishment. *See* p. 20-21, *infra*. If, as plaintiff claims,
28 Philip Morris’ conduct nationwide is worthy of punishment, then Philip Morris will be subject to
punishment in other cases, in other states, for the very same actions that form the basis for liability
in California. Having no control over judicial proceedings in other states, the California courts are
powerless to protect Philip Morris against the threat of repetitive sanctions.

1 reviewing the evidence, the Court should order remittitur that reflects, in addition to the other
2 considerations set forth below, only conduct in or affecting this State.¹⁴

3 **D. The Three Billion Dollar Punitive Damage Award is**
4 **Unnecessary to Deter Future Misconduct**

5 In the final analysis, the three factors analyzed above – ratio to compensatory damages,
6 financial condition, and reprehensibility – all are “grounded in the purpose and function of punitive
7 damages,” which is to “punish wrongdoers and thereby deter the commission of wrongful acts.”
8 *Neal*, 21 Cal. 3d at 928 & n.13. “Because the quintessence of punitive damages is to deter future
9 misconduct by the defendant,” the California Supreme Court has explained that the “key question”
10 before the court is whether the award “exceeds the level necessary to properly punish and deter.”
11 *Adams*, 54 Cal. 3d at 110. The award “should be no larger than the amount necessary to accomplish
12 this purpose.” *Michelson v. Hamada* (1994) 29 Cal. App. 4th 1566, 1593. In *BMW*, the Supreme
13 Court similarly held that “the federal excessiveness inquiry appropriately begins with an
14 identification of the state interests that a punitive award is designed to serve.” 517 U.S. at 568.
15 Accordingly, independently of the three factors analyzed above, this Court must determine whether
16 the State’s legitimate interest in punishment and deterrence justifies the staggering \$3 billion award
17 in this case. It clearly does not. The undisputed evidence in this case, as well as the Master
18 Settlement Agreement between the states and Philip Morris, establish that there is little, if anything,
19 left to deter. Hence, no punitive damages are appropriate, let alone an award anywhere close to \$3
20 billion.

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23 ¹⁴ In assessing reprehensibility, the Court must also take into account the remoteness in time of
24 most of the events at issue. This Court instructed the jury that it could not consider fraudulent
25 concealment that occurred after 1969 – over 30 years ago. *See* BAJI 12.35. Moreover, as plaintiff
26 argued in his closing statement, plaintiff’s injury was certain by 1989 – 12 years ago – and no
27 conduct by Philip Morris could have affected his health after that. (RT 5852). Both law and
28 common sense dictate that the more distant in time the allegedly reprehensible conduct, the less it
bears on any current need to deter the defendant. *See Baione v. Owens-Illinois, Inc.* (Fla. Dist. Ct.
App. 1992) 599 So. 2d 1377, 1380 (Altenbernd, J., concurring)(“ Punitive damages serve a valid
purpose when they punish persons for their recent, inappropriate decisions.”). *See also Adams v.*
Thomas (Tex. Ct. App. 1982) 638 S.W.2d 933, 937 (evidence of prior assaults by defendant not
admissible to prove entitlement to punitive damages if prior assaults are remote in time).

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1. **Philip Morris Has Stopped the Alleged Practices at Issue**

Plaintiff's lawsuit rested largely on allegations that Philip Morris had fraudulently denied the health risks and addictive nature of smoking and that it targeted youth in advertising and marketing. For several years, however, Philip Morris has expressly admitted that smoking causes disease and is addictive. (RT 4178-4181 (Merlo)). Philip Morris also has established freely accessible, state-of-the-art websites that include comprehensive links to sites maintained by, among other organizations, the American Cancer Society and the FTC. *See, e.g.*, <http://www.philipmorrisusa.com>.

Moreover, as Ms. Merlo testified, Philip Morris has launched a multi-million dollar effort to prevent youth smoking that, among other things:

- establishes an entire department devoted exclusively to youth smoking prevention with an annual budget of over a hundred million dollars (RT 4213-16);
- sponsors millions of dollars in television advertisements for both parents and children designed to convince children not to smoke (RT 4216-25);
- funds the Life Skills Training Program for school curricula (RT 4229-31);
- funds programs by the 4-H club and the Boys and Girls Club (RT 4233-35); and
- denies promotional benefits to retailers who are convicted of selling cigarettes to minors (RT 4242-43).

There is neither any need nor any basis to impose punitive damages to induce Philip Morris to take these steps.

2. **The Master Settlement Agreement Prevents Future Misconduct**

These voluntary actions by Philip Morris, however, are only the beginning. In the 1990s, state attorneys general from all over the country sued Philip Morris based upon precisely the same conduct alleged in this case. As part of a landmark agreement – the “Master Settlement Agreement” (“MSA”) (Ex. 7) between the tobacco industry and the State of California (and 46 other states)¹⁵ – Philip Morris agreed to take unprecedented steps to ensure that conduct such as that alleged here would not recur.¹⁶ The MSA requires the tobacco companies to pay hundreds of

¹⁵ The four states not party to the MSA – Minnesota, Mississippi, Florida, and Texas – had entered into their own settlement agreements with the tobacco companies before the creation of the MSA.

¹⁶ Although the MSA and its impact on Philip Morris' future conduct was the subject of testimony in this trial, *see, e.g.*, (RT at 4444-45 (Merlo)), not all its provisions came into evidence.

(Footnote Cont'd on Following Page)

1 billions of dollars in payments to the states (12.76% of which is allocated to California) over 25
2 years. MSA § IX & Exhibit A. In California, Philip Morris is expected to pay approximately \$20.5
3 billion through the year 2025. MSA, § IX and Exhibit A (pp. 54-83, A-1). These payments alone
4 constitute sufficient punishment and deterrence, *see Mirkin*, 5 Cal. 4th at 1106 (ruling that because
5 “the overkill size of compensatory damages alone may constitute a significant deterrent” punitive
6 damages were not needed in securities fraud cases), but they represent only a small portion of the
7 MSA’s provisions. Among other things, the MSA:

- 8 • dissolves the Tobacco Institute and the Council for Tobacco Research
9 [§ III(o)];
- 10 • prohibits the targeting of youths in cigarette advertising, promotion, or
11 marketing [§ III(a)];
- 12 • bans virtually all outdoor and transit advertising of tobacco products
13 (including billboards) [§ III(d)];
- 14 • bans the production, distribution, or sale of tobacco brand-name products
15 such as caps, jackets, and bags [§ III(f)];
- 16 • prohibits any agreement to limit or suppress research on the health effects
17 of tobacco [§ III(q)];
- 18 • prohibits the making of any material misrepresentation of fact regarding
19 the health consequences of using any tobacco product [§ III(r)]; and
- 20 • provides for publication on the Internet of a vast number of documents produced in
21 discovery in past and future cases against the tobacco industry [§ IV].

22 The MSA expressly empowers the California Attorney General to monitor Philip Morris’
23 compliance with its terms and to enforce the agreement in court. MSA § VII. In the event of a
24 continuing violation of the MSA, the Attorney General may seek monetary fines, civil contempt, or
25 even criminal sanctions. MSA § VII(c)(4). In short, punitive damages are not necessary to deter

26 (Footnote Cont’d From Previous Page)

27 Nonetheless, as courts have recognized, the MSA is the proper subject of judicial notice. *See State*
28 *of California v. Superior Court* (2000) 83 Cal. App. 4th 597, 604 n.6 (taking judicial notice of the
MSA). Furthermore, the MSA was incorporated into a consent decree and judgment, which is also
subject to judicial notice. *Pease v. Pease* (1988) 201 Cal. App. 3d 29, 32 (“A trial court may take
judicial notice of a prior judgment.”). Consideration of it is both permitted in and essential to the
Court’s independent examination of the excessiveness of the punitive damages award, which need
not be confined to the evidence before the jury. *See Leatherman*, 121 S. Ct. at 1685 (identifying
due process issues for the court to consider, rather than the jury, in assessing the proper level of
punitive damages).

1 alleged future misconduct because the MSA and its enforcement mechanisms already accomplish
2 that goal.

3 **3. The Prospect of Additional Lawsuits Renders the**
4 **Punitive Damages Award Here Superfluous and Excessive**

5 As noted earlier, this Court is not the first in California to confront a massive punitive
6 damages award against Philip Morris. In *Whiteley v. Philip Morris, Inc.*, the trial court upheld a
7 \$20 million punitive award. *Whiteley* Order at 1 (Ex. 5). The court in *Henley* – faced with the same
8 allegations of misconduct at issue here and on essentially the same record – reduced a punitive
9 damages award from \$50 million to \$25 million on the grounds that the original award exceeded the
10 level necessary to punish and deter. *Henley* Order at 12 (“[T]he sum of \$25 million is large by any
11 standard, and even a major company does not absorb an award of that magnitude without
12 substantial discomfort.”) (Ex. 3). Although a \$25 million punitive damage award here would still
13 be excessive, the award should certainly be *no greater* than the \$25 million award that the *Henley*
14 court found was “sufficient and necessary to achieve the goals of punishment and deterrence.” *Id.*
15 The *Henley* court explained that such a reduction made sense in light of the potential for future
16 punitive damages awards against Philip Morris. *Id.* at 12-13 (“[T]he jury’s award likely has given
17 to past and present smokers . . . the encouragement to sue Philip Morris. . . . Punitive damages
18 undoubtedly will be requested and may well be awarded in many such suits.”).

19 The potential for future punitive awards recognized by the *Henley* court similarly calls for a
20 wholesale remittitur here. If the titanic three billion-dollar verdict in this case and the recent multi-
21 million dollar punitive awards in *Henley* and other cases establish anything, it is that injured
22 smokers in California have sufficient incentives to sue. Under plaintiff’s theory, Philip Morris faces
23 a potential claim from every person who smokes its cigarettes and becomes ill. Even a cursory
24 review of the evidence in this case shows that the number of potential claimants is overwhelming.
25 Plaintiff asserted that approximately 400,000 Americans die from smoking-related illnesses each
26 year. (RT 2276 (Dr. Feingold)). If only 5% of that number live in California and half of them have
27 smoked Philip Morris’ products then, according to plaintiff, 10,000 Californians each year could in
28 theory make claims based on precisely the same misconduct. And even if only a small fraction of
those smokers sue, the amount of compensatory damages alone would be staggering and have an

1 undeniable deterrent effect. Beyond that, multi-million dollar awards – let alone anything like the
2 punitive damage award in this case – would subject Philip Morris to billions of dollars of exposure
3 annually in California alone, far beyond Philip Morris’ ability to pay. Punishments even remotely
4 approaching this magnitude simply are not necessary or proper to deter future misconduct.

5 **E. The Three Billion Dollar Punitive Damage**
6 **Award is the Product of Passion and Prejudice**

7 **1. The Misconduct of Plaintiff’s Counsel Inflamed the Jury**
8 **Into Awarding Punitive Damages Based on Passion and Prejudice**

9 The California Supreme Court has consistently held that damages awards resulting from
10 passion and prejudice must be set aside. *See e.g., Blackmore v. Brennan* (1941) 43 Cal. App. 2d
11 280, 289. The sheer enormity of this punitive award alone creates a presumption that it was the
12 product of passion and prejudice. *See Cunningham v. Simpson* (1969) 1 Cal. 3d 301, 308-09
13 (“grossly disproportionate” damages award “raise[s] a presumption that it is the result of passion or
14 prejudice” so that “the duty is then imposed upon a reviewing court to act”); *Neal*, 21 Cal. 3d at
15 927-28 (court may reverse punitive award “where the recovery is so grossly disproportionate as to
16 raise a presumption that it is the result of passion or prejudice”).¹⁷ Review of the trial record leaves
17 no doubt that this presumption is correct. Plaintiff’s counsel so inflamed the passions and
18 prejudices of the jury that it returned a patently unreasonable punitive damages award.

19 Throughout the trial and most vividly in his closing, plaintiff’s counsel used slurs, name-
20 calling and inflammatory analogies to infect the jury with emotion and prejudice. Counsel painted
21 Philip Morris executives as “alligators . . . smoking in the room laughing diabolically,” (RT 5942),
22 while “spoon-feed[ing] misinformation, disinformation, counter-information and lies to people to
23 keep them smoking, to keep money rolling in” and “the undertaker busy.” (RT 5926-5927; 5944).
24 Plaintiff also attempted to inflame the passions of jurors by comparing the conduct of Philip Morris
25 to the beating of Rodney King by L.A.P.D. officers. (RT 6217-18).

26 But that was just a small example of his incendiary rhetoric. Others include:

27 ¹⁷ California is by no means alone in this regard. Throughout the history of the common law in the
28 United States, “[j]udges [have] infer[red] passion, prejudice, or partiality from the size” of damages
awards. *Honda Motor Co., Ltd. v. Oberg*, (1994) 512 U.S. 415, 425-26 & n.4 (collecting cases).

- 1 • Holocaust. Counsel cross-examined Philip Morris' historian Hoffman
2 by comparing deaths from tobacco to the number of deaths during the
3 Holocaust and wars. (RT 4035 (15 million have died from tobacco
4 and only 600,000 in foreign wars in a whole century); 4093-95 (Hitler
5 gassed 7 million)). He repeated this comparison in closing. (RT 5846-
6 5847).
- 7 • Drug Dealers. Counsel asked both Merlo and Hoffman whether Philip
8 Morris was "the largest drug dealer in the world." (RT 4064
9 (Hoffman); 4336 (Merlo)). During Hoffman's cross he compared
10 tobacco executives to Noriega. (RT 4066-67). In closing, counsel
11 claimed that Philip Morris "puts the Colombian Cartel to shame." (RT
12 5849).
- 13 • Devil. Counsel ran through a lengthy analogy that featured Philip
14 Morris as the "devil" creating an addictive product to make people
15 "very, very, very sick, slowly and painfully and kill them." He added
16 that the devil "would take pleasure in insulting people by charging
17 them money for the product." (RT 6224-6226).
- 18 • Murderers. Counsel analogized Philip Morris to a crook or murderer
19 who had been caught "dead to rights." (RT 5860-5861).

20 Counsel improperly told the jury that he did not trust the defense witnesses. (RT 6222
21 (regarding Ms. Merlo, "I won't trust her any further than I could throw her.")). He repeatedly called
22 Philip Morris and Philip Morris executives "disgusting." (RT 6243). These tactics were designed
23 to rouse – and did rouse – the passions of the jurors so they would ignore the confines of California
24 law and "throw a carton of . . . books" at Philip Morris. (RT 5823).¹⁸

25 In addition, counsel missed no opportunity to highlight (inaccurately) Philip Morris'
26 financial condition and to argue that Philip Morris values its stock price over the lives of its
27 customers. The effect of this rhetoric was to incite the jury to award huge damages solely because
28 Philip Morris is a big, "filthy rich," company. (RT 6239). For example, as discussed previously,
counsel elicited improper and grossly exaggerated testimony from its economist about Philip
Morris' financial condition. By using market capitalization and a baseless theory regarding the
value of trademarks, counsel told the jury that Philip Morris was worth from \$30-75 billion. He

¹⁸ There seems little doubt that at least some of the jurors did act out of passion and prejudice. One juror, Peter Brosnan, expressed his view following the verdict that "I hope a lot more \$-Billion judgments follow. And I hope that Philip Morris soon follows Johns-Manville and spittoons on the road to extinction." (Ex. 8). In a letter to the L.A. Times, Mr. Brosnan stated: "These guys are criminals and should be treated like any other pushers targeting the schoolyard." He also opined, "[I]awsuits have the power to bring 'death by a thousand cuts' to the tobacco companies, eventually forcing them into bankruptcy courts." Letter, L.A. Times, June 26, 2001 (Ex. 9).

1 then featured these figures repeatedly in his closing statement.¹⁹ Those numbers, irrelevant to
2 Philip Morris' ability to absorb a punitive damage award, are orders of magnitude more than Philip
3 Morris' net worth, which was closer to \$5 billion. (RT 3617 (Johnson)).

4 Counsel also repeatedly described Philip Morris as a mammoth corporation that cares only
5 about making money. He told the jury that Philip Morris was "the acknowledged big, big, big
6 khahuna here." (RT 5874). He claimed Philip Morris "[d]isrespect[ed] their customers,
7 disrespected Mr. Boeken, disrespected the public, disrespected the scientific community,
8 disrespected, B.S.'d and lied to the government, and it was done because they are afraid of their
9 position in the stock market and sales of their product." (RT 5874). This refrain was repeated again
10 and again. *See, e.g.*, (RT 6210; 6229; 6252-53; 3951).²⁰

11 Counsel used erroneous statements of Philip Morris' wealth to emphasize to the jury that
12 only a gargantuan number would have any impact on Philip Morris. He told the jury that a "small"
13 award of \$100 million dollars would be a "slap on the wrist," like "taking my kid's allowance away
14 for a week." (RT 6259). He told them "a slap on the wrist is a joke. It's a laugh. It's an insult.
15 It's an insult to all of the people who have been victimized over the years." (RT 6258); (RT 6231)
16 ("would not even be a gnat landing on Philip Morris' arm").

17 Finally, plaintiff's counsel tried to convince the jury that they were the only human beings
18 on the planet who could protect the smokers of America against Philip Morris. Counsel claimed:

19 I think that out of all the tens of thousands or however many juries
20 there have been in the United States that have ever looked at anything
21 in a civil case, ever, any kind of civil case, ever, that you are one of
the extreme few jurors to ever lay eyes on stuff like this in hundreds
of years.

23 ¹⁹ *See* (RT 6027 (operating revenues have skyrocketed); 6027 (profits have gone through roof);
24 6028 (\$16 billion in overall profits); 6028 (PMC has market value of \$105 billion; 6029 (company's
25 financial condition is \$75 billion); 6030 (cost of cup of coffee to Philip Morris is \$100,000); 6032
(Philip Morris makes \$600,000 per hour, \$14 million per day, \$100 million per week); 6259
(\$100 million dollars would be a "slap on the wrist"); 6033 (largest consumer product organization
in the world).

26 ²⁰ Counsel referred to Philip Morris Companies Inc. (the parent company) as "the biggest marketing
27 company in the world." (RT 3917; 4303-04). On cross-examination, he asked Ms. Merlo to list all
28 the other companies PMC had ever purchased. (RT 4485-86 (listing General Foods, Kraft Foods,
Miller Brewing Company, Nabisco, among others)). Such testimony had no purpose other than to
show that Philip Morris and its parent company have a great deal of money.

1 (RT 5896). Although Philip Morris objected to this comment (and others), and the Court often
2 sustained the objections, the damage was irremediable. The jury was left with the distinct
3 impression that it was its job to teach Philip Morris a lesson for all of society, for the “Joe Smith[s]”
4 and the “Josephine Jones[es].” (RT 6260). This impression distorted the jury’s deliberations,
5 exceeded the jurisdiction of a California court, and procured a crushing award that could only be
6 explained by the jury’s misconception of its “historic” mission.²¹

7 **2. The Verdict Was So Tainted by Passion**
8 **And Prejudice That a New Trial Is Necessary**

9 Where, as here, a jury’s verdict is infected with passion and prejudice, it deprives the
10 defendant of the constitutional right to a trial by 12 impartial peers. *See, e.g. Hasson v. Ford Motor*
11 *Co.* (1982) 32 Cal. 3d 388, 416 (“[C]ivil litigants, like criminal defendants, have a constitutionally
12 protected right to the complete consideration of their case by an impartial panel of jurors.”);
13 *Weathers v. Kaiser Found. Hosp.* (1971) 5 Cal. 3d 98, 110 (“The right to unbiased and unprejudiced
14 jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the
15 Constitution.”) (quoting *People v. Galloway* (1927) 202 Cal. 81, 92). Given the extent to which
16 passion and prejudice pervaded these proceedings and the resulting verdict, the Court cannot cure
17 this deprivation merely by reducing the damage award. Passion and prejudice so manifestly tainted
18 the jury’s deliberations that its entire decisional process is rendered constitutionally suspect. The
19 Court must invalidate the verdict in its entirety.

20 For a jury to yield to passion and prejudice is to permit improper factors to influence its
21 deliberations. Thus, for example, in *Stone v. Foster* (1980) 106 Cal. App. 3d 334, the court reversed
22 a judgment in favor of the plaintiff because it found that plaintiff’s counsel had impermissibly
23 appealed to the “prejudice, passions [and] sympathy of the jury.” *Id.* at 355. The court found that
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27 ²¹ Juror Peter Brosnan echoed this view in a post-verdict letter to the L.A. Times: “As Atty. Gen.
28 John Ashcroft’s recent decision to seek a settlement with Big Tobacco makes obscenely clear, we
cannot expect government officials to take any real action against Big Tobacco. There is just too
much Big Tobacco money stuffed into their pockets.” (Ex. 9).

1 this “misconduct” by plaintiff’s counsel was sufficient evidence from which to infer that the jury
2 was improperly motivated, requiring a new trial. *See id.*²²

3 The resemblance between *Stone* and the instant case is striking. In *Stone*, a fraud case, the
4 court found that plaintiff’s counsel committed misconduct during his closing arguments by leveling
5 attacks on the defendant, stating on several occasions that defendant was “disgraceful.” *See Stone*,
6 106 Cal. App. 3d at 355. Similarly, during his closing argument in this fraud case, plaintiff’s
7 counsel repeatedly referred to Philip Morris as “disgusting.” *See* (RT 5850; 5854; 5855; 6243–44).
8 Counsel’s incendiary rhetoric did not stop at what *Stone* found improper, however. As detailed
9 *supra*, he went on to characterize the defendant at various times as diabolical (RT 5936), a bully
10 (RT 6252), a murderer (RT 5860-61), an alligator (RT 5942) a snake (RT 5909), a scorpion (RT
11 5976), a drug dealer (RT 5849), even the devil (RT 6224-26) – and he capped it off by perversely
12 analogizing defendants’ conduct to that of Adolf Hitler (RT 5847).²³

13 Remittitur will not cure the damage done by this misconduct. The Court should order a new
14 trial.

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19 ²² Similarly, in both *Gordon v. Strawther Enter.* (1969) 78 Cal. Rptr. 417, and *Rudolph v. Gorman*
20 (Cal. Dist. Ct. App. 1959) 338 P.2d 218, the appellate court upheld an order of unconditional new
21 trial on the grounds that the damages were so excessive that they could only have resulted from
22 passion and prejudice.

23 ²³ The Court has the authority to order a new trial in cases of attorney misconduct, even in the
24 absence of objections by the party claiming misconduct. *See Seimon v. Southern Pac. Transp. Co.*,
25 (1977) 67 Cal. App. 3d 600, 605 (quoting *Nieves v. Vigolino* (1933) 135 Cal. App. 763, 765); *see*
26 *also Malkasian v. Irwin* (1964) 61 Cal. 2d 738, 747. Although appellate courts generally require
27 that the party claiming misconduct lodge objections on the record and request that the jury be
28 admonished, “even in the absence of an objection and request for admonition, where there are
flagrant and repeated instances of misconduct, an appellate court cannot refuse to recognize the
misconduct.” *Simmons v. Southern Pac. Transp. Co.* (1976) 62 Cal. App. 3d 341, 355. And a party
cannot necessarily be expected to object to each act of misconduct. *See Love v. Wolf* (1964) 226
Cal. App. 2d 378, 393; *see also Simmons*, 62 Cal. App. 3d at 355 (“It is clear from the record that
objecting would have overemphasized the objectionable material and would have alienated the jury
who, because of plaintiffs’ counsel’s conduct, was unfavorably disposed against the defendants.”).
In many instances, Philip Morris objected to the misconduct by Plaintiff’s counsel. Sometimes the
Court sustained the objections, other times they were overruled. But in any event, the damage was
done, and Philip Morris was incurably prejudiced.

1 **II. THIS COURT SHOULD GRANT**
2 **A NEW TRIAL ON PLAINTIFF’S CAUSES OF ACTION**

3 **A. Philip Morris is Entitled to a New Trial**
4 **Because of the Court’s Failure to Instruct**
5 **the Jury on the Scope of Preemption Under the FCLAA**

6 Throughout the trial, over Philip Morris’ objection, plaintiff repeatedly presented evidence
7 and argument to the jury on issues preempted by the Federal Cigarette Labeling and Advertising
8 Act (“FCLAA”), 15 U.S.C. §§ 1331, *et seq.*²⁴ Philip Morris requested that the Court instruct the
9 jury during trial on the scope of preemption. *See* (RT 1999; 2002.)²⁵ The Court refused this
10 request, stating that it felt “confident that it can handle this by way of a jury instruction, an
11 appropriately written jury instruction.” *See* (RT 2630). At the end of the case, Philip Morris
12 proposed such an instruction. Its proposed instruction J would have explained to the jury the scope
13 of preemption under the FCLAA and provided necessary guidance as to what claims federal law
14 preempts. Refusing to give this instruction, the Court merely limited the ambit of certain claims to
15 the period before July 1, 1969, the effective date of preemption under the FCLAA, without
16 explanation to the jury.

17 The Court’s admission of plaintiff’s evidence and its failure to give the requested
18 preemption instruction allowed plaintiff to base his fraud claims and his claims for punitive
19 damages on conduct – such as concealment and supposed attempts to neutralize the federal
20 warnings – that is protected by federal preemption.

21 **1. Scope Of Preemption Under The FCLAA**

22 When this Court rendered its rulings in this case regarding preemption, it did not have the
23 benefit of *Lorillard Tobacco Co. v. Reilly* (U.S. June 28, 2001) 1212 S. Ct. 2404, 2001 WL 721016,
24 wherein the Supreme Court clarified and reaffirmed the preemptive effect of the FCLAA. The

25 ²⁴ Before trial, the Court largely denied Philip Morris’ motion in limine to exclude evidence and
26 argument to the jury on issues preempted by the FCLAA. The Court prohibited only evidence
27 offered to show, and argument contending, that particular post-1969 product advertising or
28 promotions constituted failure to warn.

²⁵ *See also* colloquy at (RT 2629-30) (“What we are obviously concerned about is that whatever
arguments the Plaintiff may make and whatever evidence the jury may see, the jury could use this
evidence in its deliberations to find liability against Philip Morris on a ground that would be
prohibited by *Cipollone*. We believe that it would be appropriate either now or at a time down the
road, for the jury to be instructed on the proper and improper use of this kind of testimony to the
extent it has been allowed in over our objection.”).

1 Court struck down Massachusetts legislation attempting to regulate the sale and promotion of
2 cigarettes to minors. In so doing, the Court removed any doubt as to the preemptive reach of the
3 statute.

4 The *Reilly* Court found that “Congress has crafted a *comprehensive* federal scheme
5 governing the advertising and promotion of cigarettes.” *Reilly*, 2001 WL 721016 at *10 (emphasis
6 added). The Court held that “[t]he purpose of the FCLAA was twofold: to inform the public
7 adequately about the hazards of cigarette smoking, and to protect the national economy from
8 interference due to diverse, nonuniform, and confusing cigarette labeling and advertising
9 regulations with respect to the relationship between smoking and health.” *Id.* at *11.

10 To achieve these purposes, the FCLAA provides that the congressional warnings are the
11 *only* statements concerning the relationship between smoking and health that cigarette
12 manufacturers can be required to display on their packs and advertising. *See* 15 U.S.C. § 1334(a).
13 Additionally, as of 1969, the FCLAA broadly preempts state law in this area:

14 No requirement or prohibition based on smoking and health shall be
15 imposed under State law with respect to the advertising or promotion
16 of any cigarettes the packages of which are labeled in conformity with
the provisions of this [Act]. (15 U.S.C. § 1334(b).)

17 This provision became effective July 1, 1969. Pub. L. 91-222, § 3, 84 Stat. 87.

18 The *Reilly* Court further reaffirmed *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504,
19 where the Supreme Court held that the 1969 FCLAA preempts all common law causes of action to
20 the extent they are premised on a claim that a cigarette manufacturer failed to disclose sufficient
21 information regarding smoking and health in advertising or promotion after July 1, 1969. In short,
22 as a matter of federal law, the statutory warning “inform[s] the public adequately about the hazards
23 of cigarette smoking.” *Reilly*, 2001 WL 721016 at *11. In defining the boundaries of preemption,
24 *Cipollone* rejected the notion that the descriptive label a plaintiff attaches to a particular claim
25 determines whether it is preempted. Rather, the question whether or not plaintiff’s claims are
26 preempted turns on “whether the legal duty that is the predicate of the common law damages action
27 constitutes a ‘requirement or prohibition based on smoking and health . . . imposed under State law
28 with respect to . . . advertising or promotion.’” *Lacey v. Lorillard Tobacco Co., Inc.* (N.D. Ala.
1997) 956 F. Supp. 956, 961 (quoting *Cipollone*).

1 Thus, the preemptive effect of the FCLAA precludes not only post-1969 failure to warn
2 claims, but also precludes post-1969 “fraud” claims to the extent they are predicated on a failure to
3 provide additional information. *See Allgood v. R.J. Reynolds Tobacco Co.* (5th Cir. 1996) 80 F.3d
4 168, 171 (“To the extent that plaintiffs’ claims are based on fraudulent concealment or a failure to
5 warn after 1969, they are preempted by the Federal Cigarette Labeling and Advertising Act . . .”).
6 The FCLAA also preempts “fraud” claims that are predicated on allegations that cigarette
7 advertising or promotion “neutralized” or undermined the federal warnings. *See Cipollone*, 505
8 U.S. at 527.²⁶

9 **2. Plaintiff’s “Fraud” Claims Were Preempted Because**
10 **They Were Premised on Conduct Addressed by the FCLAA**

11 Notwithstanding the broad preemptive reach of the FCLAA, the Court admitted extensive
12 evidence relating to conduct protected by Congress. The Court then compounded this error by
13 failing to instruct the jury that any finding of liability could not be predicated on such evidence.
14 The resulting prejudice to defendant requires a new trial as a matter of federal law.

15 **a. The Court Improperly Admitted Evidence of Post 1969**
16 **Fraudulent Concealment**

17 In support of his “fraud” claim, plaintiff presented evidence and argued extensively that
18 Philip Morris wrongfully failed to disclose information about the health risks of smoking even after
19 July 1, 1969. *See, e.g.*, (RT 1221 (Plaintiff’s Opening) (“Philip Morris specifically stayed away
20 from doing any types of tests to see what would happen if these substances were tested on human
21 beings.”); 1221 (“If the tests were harmful to Philip Morris, they would not come to light.”); 1221
22 (“They were going to bury the evidence.”); 1222– 23 (“If they found anything that was—could be

23 ²⁶ Preemption under the FCLAA extends to informational communications to the public as well as
24 straightforward advertising. *See Griesenbeck v. American Tobacco Co.* (D.N.J. 1995) 897 F. Supp.
25 815, 823. “A company’s attempt to notify its mass market of anything, whether a danger warning
26 or a marketing effort, is considered ‘advertising or promotion’ under the general usage of those
27 terms, and a state cannot impose requirements on such activities without running afoul of the clear
28 language of *Cipollone*.” *Id.*; *see also Sonnenreich v. Philip Morris, Inc.* (S.D. Fla. 1996) 929 F.
Supp. 416, 419 (“Any attempt by [Philip Morris] to notify its [sic] customers of the dangers of
smoking would employ the same techniques as a traditional advertising or promotional campaign,
save with the goal of discouraging smoking. Lobbying, seminars, and public service
announcements are all undertaken with the effect of promoting and fostering a product or an
ideology.”).

1 used to show tobacco harmed people, they are going to deep six it, bury it, burn it, and not make it
2 available.”); 1826–31 (Uydess) (Philip Morris concealed or destroyed its scientific research on
3 smoking and health); 1516–25 (Feingold) (scientific studies on smoking and health concealed from
4 the public)).

5 Plaintiff’s expert witness, Dr. Neil Benowitz, testified without time limitations that smokers
6 were not warned of the dangers of compensation (RT 1974; 1992-93; 2312-13) and that Philip
7 Morris should have told smokers “how to avoid compensation” (RT 2040). Plaintiff’s expert
8 witness, Dr. Alan Feingold, testified that Philip Morris never told smokers not to compensate when
9 smoking low tar cigarettes despite the fact that it knew of the health risks of compensation since at
10 least the 1970’s. (RT 2337–38). Dr. Feingold also testified that Philip Morris knew, and should
11 have disclosed after July 1, 1969, that low tar cigarettes were easily misused by smokers and that
12 Philip Morris should have provided safety instructions in its cigarette packages (RT 1570–72).

13 Indeed, Dr. Benowitz further testified that the federally mandated health warnings failed to
14 adequately warn smokers of the risks of smoking. *See* (RT 1994 (Benowitz)) (health warnings fail
15 to give smokers a “feel for how risky smoking is”). Plaintiff was even allowed to argue that Philip
16 Morris opposed giving stronger warnings to the public on the health risks of smoking. *See* (RT
17 5870 (Philip Morris opposed stronger warnings); RT 2270-72 (Philip Morris wanted to keep
18 existing warnings intact for litigation purposes)).

19 In *Allgood*, 80 F.3d 168, the plaintiff asserted claims strikingly similar to those in this case,
20 *e.g.*, that Philip Morris fraudulently failed to disclose information about smoking and health and
21 concealed the results of industry research on the health effects of tobacco. *Id.* at 170-72. The Fifth
22 Circuit held that the FCLAA preempted those claims to the extent they were based on alleged
23 fraudulent concealment or non-disclosures that took place after the effective date of the Act. *Id.* at
24 171. The same result should obtain here. Because the jury was allowed – and urged by plaintiff –
25 to take into account preempted conduct in deciding the fraud claim, this Court should order a new
26 trial.

1 (discussing ordinance prohibiting cigarette advertisements within 1,000 feet of schools); 5898 (“We
2 know that the tobacco industry strategically places their products next to products that appeal to
3 children, particularly in stores near schools.”); 5898 (“Cigarette makers have increased advertising
4 in magazines with large teen audiences since 1998.”)). Under *Reilly*, such a “concern about youth
5 exposure to cigarette advertising is intertwined with the concern about cigarette smoking and
6 health.” *Id.* at 16. Accordingly, plaintiff’s claim that Philip Morris improperly engaged in “youth
7 advertising” and “youth marketing” after 1969 is an attack on its advertising and promotion and
8 therefore preempted.

9 **3. The Admission of Evidence and Failure to Instruct the Jury**
10 **On the Scope of Preemption Under the FCLAA Was Prejudicial Error**

11 The Court’s decision to allow the jury to consider evidence of and arguments based on
12 defendant’s post-July 1, 1969 alleged concealment and advertising and promotional practices
13 improperly permitted the jury to predicate liability on conduct protected by federal preemption.
14 Evidence of such conduct should have been excluded. At the very least, the jury should have been
15 instructed that, as a matter of controlling federal law, the statutory warning was adequate as a matter
16 of law – that is, defendant could not be held liable on the basis of any evidence relating to post-July
17 1, 1969 failure to warn, concealment, or advertising or promotional activities.²⁷ It is clear that the
18 admission of the “preempted” evidence, and the failure to cure the admission of such evidence by
19 an instruction, requires a new trial. First, plaintiff’s reliance on preempted conduct was an
20 important part of his proofs and jury arguments. Second, the error was not cured by any other
21 instruction. Finally, in light of the bare minimum 9-to-3 majority in this case, it “seems probable
22 that the jury’s verdict may have been based on” the failure to give defendant’s proposed preemption
23 instruction. *Lemons v. Regents of Univ. of Cal.* (1978) 21 Cal. 3d 869, 875.

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27 ²⁷ The Court’s instruction that plaintiff had to show concealment before July 1969 did not prevent
28 the jury from considering evidence of concealment after that date in connection with the other fraud
claims.

1 **B. Philip Morris is Entitled to a New Trial Because the**
2 **Finding of Reliance is Against the Weight of the Evidence**

3 A trial court may grant a new trial on the ground of “insufficiency of the evidence to justify
4 the verdict.” Cal. Civ. Proc. Code § 657(6). In considering a new trial motion on this ground, the
5 Court must weigh the evidence to determine whether the jury “clearly should have reached a
6 different verdict.” *Id.* It is the Court’s duty to grant a new trial if it concludes that the weight of the
7 evidence is contrary to the jury’s findings. *Tice v. Kaiser Co.* (1951) 102 Cal. App. 2d 44, 46.

8 On a new trial motion, the Court must independently assess the evidence. The Court is
9 entitled to “disbelieve witnesses, reweigh evidence and draw reasonable inferences contrary to that
10 of the jury.” *Fountain Valley Chateau Blanc Homeowner’s Ass’n v. Dep’t of Veterans Affairs*,
11 (1998) 67 Cal. App. 4th 743, 751. In effect, the Court acts as a “thirteenth juror” entitled to cast the
12 decisive vote. *Norden v. Hartman* (1952) 111 Cal. App. 2d 751, 758. *See also Green v. Soule*
13 (1904) 145 Cal. 96, 103 (“The parties are entitled to the judgment of the jury in rendering a verdict,
14 in the first instance; but upon a motion for a new trial they are equally entitled to the independent
15 judgment of the judge as to whether such verdict is supported by the evidence.”).

16 The jury found Philip Morris liable on four fraud claims: intentional misrepresentation,
17 fraud by concealment, false promise, and fraud by negligent misrepresentation. Defendant’s JNOV
18 Memorandum at 4-11 demonstrates that Philip Morris is entitled to judgment on each of those
19 claims because plaintiff failed to prove “indirect reliance” by Mr. Boeken. Indeed, plaintiff did not
20 show that he even heard, much less relied on, any promise by Philip Morris. Plaintiff also did not
21 prove that, had “omitted” information been disclosed, he would have been aware of it and acted
22 differently. Finally, plaintiff failed to show that any reliance was justifiable. However, in the event
23 that the Court does not grant defendant’s JNOV motion, those arguments – incorporated herein by
24 reference – at a minimum demonstrate that the jury’s verdict on the fraud claims was against the
25 weight of the evidence, and defendant is entitled to a new trial.

26 To summarize the points made in the JNOV Memorandum, to prove “indirect reliance,”
27 plaintiff must show that (1) the defendant made specific misrepresentations or omissions to a
28 person, (2) that person then repeated the specific misrepresentations to plaintiff, who was thus an
indirect recipient of the defendant’s communications, and (3) plaintiff actually and justifiably relied

1 on the representations and suffered resultant damages. *See Gawara v. U.S. Brass Corp.* (1998) 63
2 Cal. App. 4th 1341, 1355; *Acosta v. Synthetic Indus., Inc.* (2001) 88 Cal. App. 4th 944, 964. The
3 *only* evidence that Mr. Boeken actually relied on anything said by Philip Morris (or any other
4 tobacco entity) comes from the deposition testimony of Mr. Boeken that was admitted at trial. That
5 testimony does not begin to prove reliance, either direct or indirect.

6 *First*, plaintiff never even claimed that he started smoking in 1957 because he relied on
7 anything Philip Morris said or did. He claimed only that he started smoking because his friends
8 and family smoked, “everyone” smoked, and he viewed smoking as sophisticated, mature and cool.
9 (Boeken Depo at 36 (12/18/00)). He did not point to any statement or promise by Philip Morris as
10 causing him to smoke.²⁸ Nor is there credible evidence that plaintiff would not have begun to
11 smoke had Philip Morris made additional statements about smoking and health. For forty years
12 plaintiff ignored information about health risks of smoking that was readily available to him; he
13 continued to smoke even after 1994, when he said he concluded that smoking was dangerous.

14 *Second*, although plaintiff claims he continued to smoke because he relied on tobacco
15 industry statements, there is no proof of what it is he heard, much less what he relied on. Plaintiff
16 never identified a single specific statement between 1957 (when he began to smoke) and 1994
17 (when he claims to have discovered that smoking is dangerous) upon which he relied in continuing
18 to smoke. At trial, the bulk of the statements that the jury was shown were from internal Philip
19 Morris company documents, not disseminated to the public. The jury was shown about thirteen
20 “public” statements before 1994. The earliest, the Frank Statement, was published on one day in
21 1954, and Mr. Boeken admits he never saw it, read it, or heard of it. (Boeken Depo at 298
22 (12/28/00)). The jury was shown approximately eight press releases from the Tobacco Institute or
23 the Tobacco Industry Research Committee, dated between 1957 and 1967, but plaintiff offered no
24 evidence that they were published or reported on by any television or radio news broadcast. The
25 jury also was shown a document created by the Tobacco Institute in approximately 1984 that on its
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27 ²⁸ A plaintiff’s expert, Dr. Marvin Goldberg, opined that Philip Morris’ advertising campaign in the
28 1950’s targeted underage boys, but plaintiff did not offer a single document from Philip Morris
supporting this opinion.

1 face indicates that it was “presented to United States congressional committees.” Again, there is no
2 evidence that this document was ever released to the public or reported on in the media. And
3 plaintiff repeatedly played for the jury excerpts of 1976 videotaped interviews of Philip Morris
4 executives James Bolling and Helmet Wakeham, but there was no evidence that those interviews
5 were ever broadcast or reported on by the media.

6 Plaintiff’s reliance case fails at this juncture – there is no evidence that Mr. Boeken ever
7 heard or saw *any* of the misrepresentations that the jury saw in this trial, either directly or indirectly.
8 Only a leap of faith, not evidence, connects any of the tobacco company statements shown to the
9 jury to Mr. Boeken. Plaintiff has not satisfied his burden of showing either direct or indirect
10 reliance.

11 *Third*, even if one were to assume that the media disseminated to the public some of the
12 statements admitted into evidence, substantial evidence contradicts Mr. Boeken’s claim that he
13 actually relied on those statements. For example, to accept Mr. Boeken’s claimed reliance, one must
14 also accept the following propositions:

- 15 • Mr. Boeken, who admitted he regularly kept up with the news, somehow missed the
16 avalanche of information in the media about the health risks of smoking. (Boeken Depo
17 at 81 (12/18/00)).
- 18 • Although he was aware that they existed, Mr. Boeken never read the health warnings on
19 cigarette packages until Christmas, 2000. (Boeken Depo at 199; 201 (12/27/00)).
- 20 • Mr. Boeken tried to quit smoking several times over three decades, but not because he
21 thought smoking was dangerous. Rather, he tried to quit because he wanted to be a
22 better jogger. (Boeken Depo at 195 (12/19/00)).
- 23 • Mr. Boeken attended Smokenders and Smokers Anonymous, but has no recollection of
24 anyone discussing the health risks of smoking. (Boeken Depo at 201 (12/19/00); 114;
25 121 (12/21/00)).
- 26 • Mr. Boeken and his sister went to a hypnotist for assistance in quitting smoking, but Mr.
27 Boeken and his sister never discussed the health risks of smoking. (Boeken Depo at 199
28 (12/19/00); 102 (12/21/00)).
- Mrs. Boeken stopped smoking when she was pregnant in 1990, because she knew
smoking could harm the fetus. After the baby was born, she prohibited smoking near the
baby. Mr. Boeken was aware of these facts but did not believe at the time smoking had
serious health risks. (Boeken Depo at 299; 300 (12/28/00)).
- Dr. Trabulus advised Mr. Boeken to quit smoking, but Mr. Boeken did not conclude
from that that smoking had serious health risks. (Boeken Depo at 208 (12/27/00)).

- 1 • Although both Mr. Boeken and his wife repeatedly tried to quit smoking over the years,
2 they never discussed the health risks of smoking. (Boeken Depo at 299-302
3 (12/28/00)).²⁹

4 In short, this was not a case solely about the conduct of Philip Morris. Plaintiff had to prove
5 that misrepresentations by Philip Morris caused his injuries. He failed. In the absence of a showing
6 of actual reliance – the key element linking Philip Morris’ conduct to Mr. Boeken’s injuries – the
7 fraud verdicts cannot be upheld.

8 **C. Philip Morris is Entitled to a New Trial Based
9 Upon the Erroneous and Prejudicial Exclusion
10 of Evidence of Plaintiff’s Felony Convictions**

11 Plaintiff has three felony convictions: (1) a 1993 federal conviction for aiding and abetting
12 wire fraud, (2) a 1976 state conviction for possession of heroin, and (3) a 1972 state conviction for
13 possession of stolen property.³⁰ Mr. Boeken testified falsely about those convictions in his
14 depositions. The Court granted Plaintiff’s Motion to Preclude Evidence of Prior Felony
15 Convictions,³¹ and no evidence relating to these convictions was ever admitted into evidence.
16 Although the Court granted the motion without prejudice as to the 1993 conviction for wire fraud,³²
17 the Court denied later requests by Philip Morris during trial to present evidence relating to this
18 conviction. (RT 2368-71; 2494-96).

19 As shown above, the only evidence of plaintiff’s actual reliance on the alleged fraud was his
20 own self-serving, uncorroborated testimony. Mr. Boeken’s credibility was therefore a critical issue
21 in this case. Indeed, insofar as plaintiff’s 1993 federal conviction was for aiding and abetting *wire*
22 *fraud*, that conviction was particularly probative of Mr. Boeken’s credibility. The jury should have
23 been permitted to consider this evidence in evaluating plaintiff’s credibility. Philip Morris

24 ²⁹ For these reasons, the jury’s implicit finding that any “reliance” by Mr. Boeken was “reasonable”
25 is also against the weight of the evidence.

26 ³⁰ For a complete discussion of Plaintiff’s prior felony convictions, see Defendant’s Memorandum
27 in Opposition to Plaintiff’s Motion In Limine re Exclusion of Evidence of Plaintiff’s Prior Felony
28 Convictions (Motion No. 8); Declaration of John L. Carlton (“Opposition to Motion to Exclude
Evidence of Felony Convictions”). Philip Morris incorporates the arguments in that memorandum
by reference.

³¹ See Statement of Decision Re Motions in Limine dated March 9, 2001, at 2.

³² The Court stated that “Defendant may seek leave to raise the subject on cross examination, when
the court will be in a better position to assess Evidence Code § 352 factors relating to this particular
conviction.” Statement of Decision Re Motions in Limine dated March 9, 2001, at 2.

1 respectfully submits that the exclusion of this evidence was prejudicial error, justifying retrial. *See*
2 *generally Robbins v. Wong* (1994) 27 Cal. App. 4th 261, 274 (trial court is bound to admit evidence
3 of prior felony conviction when probative value with regard to credibility outweighs prejudicial
4 effect).

5 Plaintiff's 1993 wire fraud conviction was also relevant to other issues, such as
6 compensatory damages. Plaintiff testified at his deposition that, after his federal conviction, he was
7 able to continue being a securities salesperson.³³ In fact, plaintiff testified at trial that he made at
8 least \$250,000 per year since 1993 selling securities.³⁴ Yet, a condition of plaintiff's five-year
9 probation in the federal case was that he was not to sell securities: "regardless of what the [National
10 Association of Securities Dealers] does[,] you are not to engage in the sale or offering for sale of
11 securities for the term of probation."³⁵ Notably, plaintiff attempted unsuccessfully to have this
12 condition removed in 1993, at which time he informed the court that he was unable to make a living
13 under that restriction.³⁶ In short, the terms of his probation were starkly at odds with his testimony
14 about his income and claimed economic damages. Defendant was entitled to present to the jury this
15 discrepancy, as relevant to both Mr. Boeken's overall credibility and the proper amount of
16 compensatory damages in this case. Again, the exclusion of this evidence was error, justifying a
17 new trial.

18 Nor can it be said, given the importance of plaintiff's prior felony convictions to Philip
19 Morris' defense, that the probative value of his convictions was outweighed by unfair prejudice.
20 Although plaintiff was allowed to present extensive evidence to support his claims of misconduct,
21 Philip Morris was precluded from presenting an important piece of evidence necessary to refute his
22 fraud claims. This was highly prejudicial to Philip Morris, and a new trial is warranted on this
23 ground alone.

24
25 _____
26 ³³ Opposition to Motion to Exclude Evidence of Felony Convictions, Exhibit S.

27 ³⁴ Opposition to Motion to Exclude Evidence of Felony Convictions, Exhibit N.

28 ³⁵ Opposition to Motion to Exclude Evidence of Felony Convictions, Exhibit F.

³⁶ Opposition to Motion to Exclude Evidence of Felony Convictions, Exhibits G and H.

1 **D. Philip Morris is Entitled to a New Trial on the**
2 **Claims of Strict Products Liability and Negligence**

3 As demonstrated in the JNOV Memorandum, Philip Morris is entitled to judgment on
4 plaintiff’s claims for strict product liability and negligence as a matter of law. In that
5 Memorandum, we demonstrate that the “risk/benefit test” does not apply to inherently dangerous
6 products, such as cigarettes. JNOV Memorandum at 18-21. We further demonstrate that the
7 unrebutted evidence here establishes that the ordinary consumer at all relevant times was aware of
8 the dangers of cigarettes, precluding liability under the consumer expectation test. *Id.*, at 12-16.
9 The evidence and arguments in support of the JNOV motion are incorporated herein. In the event
10 that this Court determines that Philip Morris is not entitled to judgment on these claims as a matter
11 of law, it is at least entitled to a new trial on those claims.

12 **1. Philip Morris is Entitled to a**
13 **New Trial on the Design Claims**

14 In order to prevail on a design defect claim, a plaintiff must ordinarily establish that a
15 product is defective in design under one of two tests:

16 First, a product may be found defective in design if the plaintiff
17 establishes that the product failed to perform as safely as an ordinary
18 consumer would expect when used in an intended or reasonably
19 foreseeable manner. Second, a product may alternatively be found
20 defective in design if the plaintiff demonstrates that the product’s
21 design proximately caused his injury and the defendant fails to
22 establish, in light of relevant factors, that, on balance, the benefits of
23 the challenged design outweigh the risk of danger inherent in such
24 design.

25 *Barker v. Lull Engineering Co.* (1978) 20 Cal. 3d 413, 432. The jury’s verdict that plaintiff
26 satisfied his burden is the result of improper jury instructions and is overwhelmingly against the
27 weight of the evidence. Consequently, Philip Morris at a minimum is entitled to a new trial on the
28 design defect claims.

29 **a. A Verdict Based Upon the Consumer**
30 **Expectation Test is Against the Weight of the Evidence**

31 As demonstrated in the JNOV motion, Philip Morris presented overwhelming – and
32 unrebutted – evidence that the inherent risks of smoking cigarettes have long been commonly
33 known to the public. JNOV Memorandum at 12-16. By the time Plaintiff began smoking in the
34 late 1950s, the public knew that cigarettes are addictive, hazardous to one’s health, and capable of

1 leading to lung cancer. During that decade, the *Los Angeles Times*, *Reader's Digest*, *Time*, *Life*, and
2 many other newspapers and magazines sold in California published hundreds of articles on the
3 health risks of smoking, many of which featured headlines specifically identifying the relationship
4 between smoking and lung cancer. (RT 3831; 3832 (Hoffman)). Likewise, the American Cancer
5 Society implemented nationally acclaimed programs in Los Angeles High Schools during the
6 1950's when Mr. Boeken attended those schools as a student. (RT 3843; 3844 (Hoffman)). Indeed,
7 by 1954, 90% of all respondents to a nationwide Gallup poll indicated that they had recently heard
8 or read "that cigarette smoking may be a cause of Cancer of the Lung." (RT 5051 (Viscusi)); *see*
9 *also White*, 109 F. Supp. 2d at 432. And a 1959 poll of junior and senior high school students found
10 that 97.4% of them had heard of the connection between smoking and cancer. (RT 4023; 4147
11 (Hoffman)); *see also Insolia v. Philip Morris, Inc.* (W.D. Wis. 1999) 53 F. Supp. 2d 1032, 1037
12 *aff'd in rel. pt.* (7th Cir. 2000) 216 F.3d 596. The Director of the National Cancer Institute, Dr.
13 John Heller, echoed the Surgeon General's sentiments when he testified that: "Newspapers, radio,
14 TV, and other media have done an excellent job covering this problem, and a very objective job.
15 This is an exceedingly valuable way of informing the public." *See* (RT 5065 (Viscusi)).

16 Numerous courts have held as a matter of law that the health risks of smoking were common
17 knowledge as of the 1950's or earlier. *See, e.g., Wawanesa Mut. Ins. Co. v. Matlock* (1997) 60 Cal.
18 App. 4th 583, 587 n.3 ("The noxiousness of tobacco was known long before 1891."); *Sanchez v.*
19 *Liggett & Myers, Inc.* (5th Cir. 1999) 187 F.3d 486, 492 (the health risks of smoking have been
20 common knowledge since 1957); *White*, 109 F. Supp. 2d at 431-32 (finding that the health risks of
21 smoking have been common knowledge at least since the early 1950s, including 1952 when the
22 plaintiff began smoking); *Tompkins v. R.J. Reynolds Tobacco Co.* (N.D.N.Y. 2000) 92 F. Supp. 2d
23 70, 89 (finding no duty to warn consumers because the health risks of smoking were commonly
24 known in 1938); *Paugh v. R.J. Reynolds Tobacco Co.* (N.D. Ohio 1993) 834 F. Supp. 228, 230-31
25 (stating that where the decedent began smoking in 1940, the court found that the common
26 knowledge of the dangers of smoking precluded plaintiff's design defect claims based upon
27 common knowledge of risks); *Wolf v. Philip Morris, Inc.* (Mass. Super. Ct. June 21, 2000) No. 99-
28 1260-B, slip op. at 8 (taking judicial notice of the public's common knowledge of the health risks of

1 cigarette smoking dating back to the 1930s); *Eastern States Heath & Welfare Fund v. Philip Morris,*
2 *Inc.* (N.Y. Sup. Ct. Mar. 3, 2000) No. 603869/97, slip op. (“[t]he alleged dangers of smoking have
3 been publicized and known to the general public for more than one century.”).

4 Plaintiff did not even attempt to dispute that the ordinary consumer knows (and has known
5 for many decades, going back before the 1950s) that cigarettes are “inherently unsafe.” There was
6 simply no evidence that the cigarettes smoked by plaintiff failed to perform as safely as the ordinary
7 consumer would expect. Accordingly, to the extent that the verdict on the design defect claims was
8 predicated in any way on the consumer expectation test, it was overwhelmingly against the weight
9 of the evidence. At a minimum, defendant is entitled to a new trial.

10 **b. The Jury Was Improperly Instructed That a**
11 **Defect in Design Could Be Found Under the Risk/Benefit Test**

12 As demonstrated in the JNOV Memorandum, unless plaintiff comes forward with evidence
13 that his injuries were caused by a *preventable* design feature in cigarettes, the risk/benefit test is
14 inapplicable. JNOV Memorandum at 18-21. Before trial, Philip Morris brought a motion in limine
15 to exclude the risk/benefit test for design defect on the ground that it is inappropriate for use with
16 inherently dangerous tobacco products. In response to that motion, the Court stated:

17 [I]t appears the evidence in this case will include information relating
18 to potential alternative cigarette designs supporting a BAJI 9.00.5
19 instruction on a design defect theory requiring risk/benefit analysis.
20 The court does not, at this time, anticipate a circumstance where it
21 would be asked to instruct the jury on a straightforward risk/benefit
22 theory involving cigarettes generically apart from alleged defective
23 design.

24 *See* Statement of Decision Re Motions in Limine, March 9, 2001.

25 The Court’s ruling was based upon recognition that, under the risk/benefit test, a plaintiff is
26 required to make a prima facie showing that a preventable defect existed in the design of the
27 product that caused his injury. *See Soule v. General Motors* (1994) 8 Cal. 4th 548, 572; *Lambert v.*
28 *General Motors* (1998) 67 Cal. App. 4th 1179, 1186. It is not enough that a plaintiff proves that
smoking per se caused the injury. Rather, the plaintiff must identify some specific design feature in
cigarettes that could have been corrected and that caused the injury. *See Soule*, 8 Cal 4th at 572
(finding abstract defect cannot be considered substantial factor in causing injury); *Pietrone v.*
American Honda Motor Corps. (1987) 189 Cal. App. 3d 1057, 1061.

1 At the close of evidence, Philip Morris raised the issue in a motion for directed verdict. The
2 Court ruled as follows:

3 As to the motion for directed verdict as to negligence and strict
4 liability, that motion will be granted in part, denied in part. It is
5 granted as to any claim that cigarettes are so inherently dangerous that
6 they cannot be marketed in the United States today. But it would be
7 denied as to design defect based on claims that Philip Morris could
8 have chosen to reduce tar and Nicotine more quickly than they did,
9 and they had available designs that they chose, for whatever reason,
10 not to implement.

11 (TR 5809-10).

12 Ultimately, the Court instructed the jury on plaintiff's claims for design defect using a
13 modified version of BAJI 9.00.5.³⁷ The portion regarding the risk/benefit test read as follows:

14 A product is defective in design:

15 * * *

16 B. if there is a risk of danger inherent in the design, which
17 outweighs the benefits of that design, defendant's burden of proof is
18 to prove by a preponderance of the evidence that the benefits of the
19 product as a whole outweigh the danger inherent in such design.

20 In determining whether the benefits of the design outweigh such risks
21 you may consider, among other things, the gravity of the danger
22 posed by the design, the likelihood that such danger would cause
23 damage, the mechanical feasibility of a safer alternative design at the
24 time of manufacture, the existence or non-existence of warnings, the
25 financial cost of an improved design, and the adverse consequences to
26 the product and the consumer that would result from an alternative
27 design.

28 BAJI 9.00.5.

29 In providing these instructions, the Court erred in failing to charge the jury that defendants
30 cannot be held liable simply for the sale of cigarettes, as the Court recognized in its May 16, 2001
31 ruling. According to that ruling, a finding of a design defect cannot be predicated on a claim "that
32 cigarettes are so inherently dangerous that they cannot be marketed in the United States today."
33 (RT 5810). Rather, a design defect claim must be predicated on an avoidable design flaw. The
34 Court identified as such a defect a failure "to reduce tar and Nicotine more quickly than they did,"

35 _____
36 ³⁷ At the jury instruction conference, counsel for Philip Morris argued that the risk/benefit test does
37 not apply to cigarettes as a product and, on the evidence in this case, should not be included in the
38 instructions to the jury. Carlton Declaration, Paragraph 12.

1 that caused the injury. (RT 5809-10). Although in its pretrial ruling the Court itself distinguished
2 between inherent risks and avoidable defects, *the Court never instructed the jury that liability*
3 *could not be based on the inherent risks of cigarettes, as defendant suggested.*³⁸ The jury was
4 merely instructed that it needed to determine “if there is a risk of danger inherent in the design
5 which outweighs the benefits of that design.” BAJI 9.00.5. Thus, it is highly probable that the jury
6 interpreted the “risk of danger inherent in the design” to be that “cigarettes are so inherently
7 dangerous that they cannot be marketed in the United States today.” In short, the jury should have
8 been instructed that the test should be applied to a correctable aspect of the design of Philip Morris’
9 products – not on the inherent danger of cigarettes themselves – that caused the injury.

10 Where, as here, the court’s instructions on design defect were erroneous and there is a
11 reasonable probability that the error affected the outcome, a new trial is appropriate. *See Soule*, 8
12 Cal. 4th at 580-81. In light of the factors set forth in *Soule*, it is clear that this instruction error led
13 to the verdict on the strict liability and negligence claims and requires a new trial:

14 (1) The error was not cured by any other instruction. In fact, the Court’s other instructions
15 regarding strict liability and negligent design *reinforced* the error by inviting a finding of defective
16 and negligent design based on the inherent risks of smoking. For instance, the Court instructed the
17 jury that, “the manufacturer of a product that is reasonably certain to be dangerous if negligently
18 made, has a duty to exercise reasonable care in the design and testing of the product. A failure to
19 fulfill that duty is negligence.”³⁹ BAJI 9.21. The instructions taken as a whole improperly
20 suggested that Philip Morris was under a duty to design a cigarette that would not be dangerous,
21 notwithstanding any inherent danger.⁴⁰

22
23
24 ³⁸ Defendant’s Proposed No. P. (Ex. 10).

25 ³⁹ Philip Morris requested a modified version of this instruction, including the substance of BAJI
26 9.00.6. The modification was not given.

27 ⁴⁰ The Court also instructed the jury that if a person of “ordinary prudence” would have
28 “foreseen . . . that someone might have been injured” by a certain action and the action “reasonably
could have been avoided,” then the action is negligent. *Id.* at 3.11. In the absence of BAJI 9.00.6,
this instruction permitted the jury to decide whether the continued manufacture of cigarettes is
unreasonable and therefore negligent, regardless of the inherent risks associated with smoking.

1 (2) There was no evidence in the record of a safer, feasible design for a cigarette that would
2 have avoided plaintiff's injuries. See JNOV Memorandum at 21-23. In fact, the evidence was
3 overwhelming that cigarettes are inherently unsafe and known to be unsafe by the ordinary
4 consumer. *Id.* at 11-16. The evidence relied upon by plaintiff to establish negligence and strict
5 liability improperly related to the inherent dangers of cigarettes, not an avoidable design feature.
6 Plaintiff's jury arguments in fact reinforced the prejudice to defendant from the court's instructional
7 error. *Seaman's Direct Buying Serv. Co. v. Standard Oil, Inc.* (1984) 36 Cal. 3d 752, 771-72;
8 (reversing judgment where the arguments to jury reinforced misleading instruction); *Lemons*, 21
9 Cal. 3d at 876-87 (reversing judgment where closing argument "increased the harmful potential of
10 the improper instruction" because "at least some jurors" may have been misled).

11 (3) Because the trial court failed to provide a proper instruction on design defect, when it
12 came time for the jury to answer questions on the negligence claim, there was no way for the jury to
13 reject plaintiff's claim on the ground that liability cannot be based on the inherent risks of
14 cigarettes.

15 (4) The closeness of the jury's 9-3 verdict and the overwhelming evidence supporting
16 consumer knowledge of the dangers of smoking make the prejudice inescapable. See *Robinson v.*
17 *Cable* (1961) 55 Cal. 2d 425, 428 (finding instructional error prejudicial where the "bare number"
18 of jurors supported verdict).

19 In short, "[p]arties have the right to have the jury instructed as to the law applicable to all
20 their theories of the case which were supported by the pleadings and the evidence, whether or not
21 that evidence was considered persuasive by the trial court." *Galvez v. Frields* (2001) 88 Cal. App.
22 4th 1410, 1420 (internal quotes omitted). Because any finding of design defect was against the
23 weight of the evidence, the instructional error was prejudicial and requires a new trial.

24 **c. A Verdict Based on the Risk/Benefit**
25 **Test Is Against the Weight of the Evidence**

26 Even assuming the risk/benefit test applies – and that the jury relied on that test in rendering
27 its decision – the verdict is against the weight of the evidence. As described in defendant's JNOV
28 Memorandum, the evidence was insufficient to support a verdict that cigarettes could have been

1 made safer or that a preventable design in the cigarettes caused Mr. Boeken's lung cancer. *See*
2 JNOV Memorandum at 21-23. Consequently, defendant at a minimum is entitled to a new trial.

3 **2. The Evidence Is Insufficient To Support A Verdict**
4 **Based Upon Failure To Disclose Prior To July 1, 1969**

5 In order to prevail on a failure-to-warn claim under strict liability or negligence, plaintiff
6 must show that the dangers of the product are not well known to the public. *See Anderson v.*
7 *Owens-Corning Fiberglas Corp.* (1991) 53 Cal. 3d 987, 996; *Bresnahan v. Chrysler Corp.* (1998)
8 65 Cal. App. 4th 1149, 1154. Indeed, the applicable BAJI confirms this rule. *See* BAJI 9.00.7
9 (2000 Revision) (imposing a duty to warn under a products liability claim only where a foreseeable
10 use of the product involves a "substantial danger that would not be readily recognized by the
11 ordinary user of the product"); BAJI 9.20 (a duty to warn under a negligence claim is only required
12 where the supplier or manufacturer "has reason to believe that [the consumer] will not realize its
13 dangerous condition"). Where the dangers of the product are well known, the manufacturer is
14 generally not required to disclose information about those warnings. *See Holmes v. J.C. Penney Co.*
15 (1982) 133 Cal. App. 3d 216, 219-20 (finding that no warning was required where the harm incident
16 to firing of pellet gun was obvious); *Bojorquez v. House of Toys, Inc.* (1976) 62 Cal. App. 3d 930,
17 933 (finding no duty to warn where dangers of slingshot are common knowledge).

18 As demonstrated above and in the JNOV Memorandum at 11-16, the evidence in this case
19 overwhelmingly established that the health risks of smoking were common knowledge long before
20 plaintiff began to smoke in the late 1950s. In light of the overwhelming evidence that the dangers
21 of smoking were common knowledge at all relevant times, the verdict on plaintiff's warning claims
22 was clearly against the weight of the evidence.

23 In addition, plaintiff's claims that Philip Morris should have disclosed additional
24 information before 1969 – whether sounding in negligence, strict liability, or fraudulent
25 concealment – faces another insurmountable problem: there was no meaningful evidence
26 establishing causation, *i.e.*, that he would have changed his smoking behavior if a pre-1969 warning
27 had been given. The undisputed fact is that plaintiff continued to smoke through the year 2000,
28 notwithstanding that the federally required warnings had appeared on all packs of cigarettes for over
30 years and that he had personally become convinced by 1994 that smoking caused lung cancer.

1 There is simply no basis for concluding that additional pre-1969 warnings by Philip Morris would
2 have caused Mr. Boeken to attempt – successfully – to quit smoking.

3 For all these reasons, the verdict is against the weight of the evidence, and this Court should
4 order a new trial.

5 **E. The Court Erred in Excusing Juror No. 5**

6 See Memorandum of Points And Authorities In Support of Motion For New Trial Re:
7 Excusing of Juror No. 5, filed under seal concurrently herewith.

8 **F. The Entire Verdict Should be Set Aside**
9 **Because It Was the Product of Passion and Prejudice**

10 When counsel for a party appeals to the prejudice, passions, or sympathy of the jury, the
11 resulting verdict may be properly set aside. *See, e.g., Stone v. Foster* (1980) 106 Cal. App. 3d 334,
12 355; *Seimon v. Southern Pac. Transp. Co.* (1977) 67 Cal. App. 3d 600, 605-06; *Self v. General*
13 *Motors Corp.* (1974) 42 Cal. App. 3d 1, 12-14. As noted above, plaintiff’s counsel engaged in
14 repeated and gross misconduct designed to stir up the passions and prejudice of the jury. That
15 plaintiff’s counsel was effective cannot be doubted – the jury verdict in this case includes an
16 immense compensatory damage award and the largest amount of punitive damages ever awarded to
17 an individual in American jurisprudence. Under these circumstances, plaintiff is not entitled to the
18 benefit of the doubt:

19 [I]t cannot be stated with certainty that all of this would have changed
20 the result of the case. But, as said by the Supreme Court, a litigant
21 who has engaged in misconduct is not entitled to the benefit of
22 calculation, which can be little better than speculation, as to the extent
23 of the wrong inflicted upon his opponent.

24 *Love*, 226 Cal. App. 2d at 394 (quoting *Seaboldt v. Penn. R.R. Co.* (3d Cir. 1961) 290 F.2d 296,
25 300). Here, as detailed above, the improper nature of counsel’s conduct was manifest and its
26 prejudicial impact on the entire verdict, including both compensatory and punitive damage awards,
27 is far more than “speculation.” Defendant is entitled to a new trial.
28

CONCLUSION

For all of the foregoing reasons:

1. The Court should order a new trial on plaintiff’s claim for punitive damages.

Alternatively, at a minimum, the Court should grant a drastic remittitur, resulting in a remitted award in no event greater than \$25 million – the amount that the *Henley* court found to be “sufficient and necessary to achieve the goals of punishment and deterrence.” *Henley*, slip op. at 2.

2. The Court should order a new trial on plaintiff’s claims for intentional misrepresentation, fraud by concealment, false promise, fraud by negligent misrepresentation, defective product, and negligence.

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